THE HIGH COURT

[2016 1199 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND
PETER McGRATH AND MARK McGRATH

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 30th day of July, 2018

1. By a credit agreement in writing made on the 17th October, 2007 between the plaintiff (the bank) and the defendants, the bank agreed to advance to the defendants the sum of €788,000 for a term of two years. The agreement provided for interest only payments to be made on a monthly basis with the entire capital sum being repayable at the end of the term. It is not in dispute that the money was drawn down and not repaid within the period stipulated in the credit agreement and ultimately, the balance due of €376,323 was demanded by the bank's solicitors on the 17th June, 2016.

2. As I have said, there is no dispute about the fact that the moneys were advanced and not repaid. Initially in their replying affidavits, the defendants made a number of contentions including in particular that a guarantor of the loan, Thomas Gahan, was not being pursued for the debt to which the defendants took objection. However, this turned out to be misconceived in circumstances where it subsequently emerged that judgment had in fact been obtained against Mr. Gahan.

3. I think as the case evolved, it is fair to say that it boils down to essentially two issues raised by the defendants by way of possible defence. Both of these issues rely on the terms of the Consumer Credit Act, 1995. Although here was some debate about whether or not the defendants ought to be regarded as consumers, I am prepared to assume for the purposes of this application only that they are without determining that issue in any final sense at this stage.

4. The first point raised by the defendants is that they did not receive a copy of the fully signed loan offer within the ten day period stipulated in s. 30 of the 1995 Act and they consequently argue that the loan is unenforceable. However, the loan document itself provides at the foot thereof:

"Confirmation (for bank use only)

> I confirm that the customer has been handed/sent (delete as appropriate) a signed copy of this agreement on 6/11/22.
>
> Signed:
>
> Ken Noonan"

5. Mr. Noonan has sworn an affidavit in which he avers he signed the document and caused a copy to be sent to the defendants. He also avers that the requirements of the Consumer Credit Act, 1995 were complied with.

6. There is therefore *prima facia* evidence that the bank sent the document to the defendants within the relevant period in compliance with the 1995 Act. As against that, there is a mere assertion by the defendant that they did not receive the document. I think that assertion by the defendant has to viewed in the light of the fact that very substantial payments were made on foot of this agreement by the defendant over a period of time and in particular, the security property referred to in the agreement being a farm of lands was sold by the defendants in April 2013 and the entire proceeds remitted to the bank. This conduct is on its face incompatible with the suggestion that the agreement does not bind the defendants because they did not receive a copy of it. It seems to me therefore that such conduct estops the defendants from denying the validity of the agreement based on an assertion that they did not receive a copy made for the first time more than a decade after the event. I am therefore satisfied that this issue does not give rise to any arguable defence.

7. The second issue raised by way of defence by the defendants is that they invested in a product called the Fifth Belfry Bond which was promoted by the bank and which the defendants allege was represented to them as being "risk free". Unfortunately, it would appear that the defendants lost money on this investment and for this they say the bank is responsible as a result of negligent misrepresentation. In essence therefore, the defendants are contending that they have a counter claim against the bank for unliquidated damages which they rely on by way of counterclaim to the bank's claim herein.

8. The law in this regard was summarised by Clarke J. (as he then was) in *Moohan v. S & R Motors (Donegal) Ltd* [2007] IEHC 435 where he said (at para. 4.6):

"On that basis the overall approach to a case such as this (involving, as it does, a cross-claim) seems to me to be the following: -

> (a) it is firstly necessary to determine whether the defendant has established a defence as such to the plaintiff's claim. In order for the asserted cross-claim to amount to a defence as such, it must arguably give rise to a set off in equity and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendant's case, it would not be inequitable to allow the asserted set off;
>
> (b) if and to the extent that a *prima facie* case for such a set off arises, the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);
>
> (c) if the cross-claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in *Prendergast v. Biddle*"

9. Applying these principles to the facts of this case, it seems clear that the counterclaim asserted by the defendants does not arise from the same set of facts as the bank's claim. It is a separate and free standing cause of action unrelated to the credit agreement

the subject matter of these proceedings. It seems to me therefore that it does not give rise to a potential defence by way of set off and therefore judgment should be entered as suggested by Clarke J. in *Moohan* which was followed and applied by the Court of Appeal in *National Assets Loan Management v. Kelleher* [2016] 3 I.R. 568.

10. The only issue then becomes whether or not execution of the judgment should be stayed pending determination of the counterclaim herein. It seems to me that the facts articulated in the defendants' affidavits are at best vague and give no information of any kind as to what the basis or quantum of such counterclaim would be save a bare assertion that they were told that the investment would be "risk free". It is notable that the Belfry Bonds are referred to as security for the 2007 agreement the subject matter of these proceedings. Thus it would appear that the representations of which the defendants made complaint must have been made prior to that date which in turn begs the question as to whether such a claim, were it now to be agitated, would be statute barred even making allowance for the fact that the loss may have accrued at a later date. In any event, and without expressing any view as to the merits of such potential counterclaim, I think it can fairly be said at this stage that it must at the very least be somewhat speculative.

11. In those circumstances, I do not see any basis upon which the court would be justified in staying the execution of the judgment pending the agitation of this counterclaim which of course the defendants remain free to pursue should they wish to do so.

12. Although counsel for the defendant argued that his clients' status as putative consumers should condition the court's view as to whether judgment should be granted pending the determination of the counterclaim, I find nothing in the authorities to which I have referred which justifies such contention.

13. For completeness, I do not overlook the other point raised by way of replying affidavits in particular the suggestion that there was a new loan agreement entered into by way of refinancing on the 28th August, 2012. Although this is referred to in the affidavits, it is not in any sense made clear how this gives rise to a defence in the absence of any dispute that the money was advanced on foot of the original agreement and not repaid.

14. In all the circumstances therefore, I am satisfied that the defendants have not established that they have a fair or reasonable probability of having a bona fide defence to the claim, being the test articulated by the Supreme Courts in Aer Rianta v. Ryanair.

15. Accordingly, the bank is entitled to judgment in the sum claimed.