Neutral Citation No. [2016] IEHC 346

THE HIGH COURT

COMMERCIAL

[2016 No. 119S]

BETWEEN:

ALLIED IRISH BANKS PLC

PLAINTIFF

-AND-

BILL MOLONEY

AND

EAMONN MCCARTHY

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 20th day of June, 2016

Introduction

1. This case involves the defendants resisting the summary judgment sought by the plaintiff (the "Bank") for an unpaid loan in the sum of €10,872,303 . Their defence is based on the grounds of an alleged oral agreement reached with the Bank whereby it is alleged by the defendants that it was agreed between the parties that the defendants would sell the properties charged to the Bank and the outstanding loan would be written off. A key issue in this case therefore is whether this Court views the defendants' claim that a binding oral agreement was reached between the parties as a credible claim, so as to deny the Bank its summary judgment.

Background

2. The defendants in this case owe the sum of €10,872,303 to the plaintiff (the "Bank"). The fact that they have borrowed the funds and owe this amount is not disputed by the defendants. The funds were borrowed in connection with the development by the defendants, who are building developers, of a housing estate known as Cnoc an Cairn at Chapel Lane in Dingle, Co. Kerry. The defendants granted the Bank a legal charge over the housing estate as security for these borrowings. The plaintiff is seeking summary judgment against the defendants in the sum of €10,872,303.

3. As well as resisting the summary judgment and seeking a plenary hearing, the defendants seek an injunction to prevent the Bank from appointing a receiver and a mandatory injunction obliging the plaintiff to consent to the sale of the secured properties to a named purchaser who has agreed, subject to contract, to purchase them from the defendants.

Chronology of events

4. The Bank sent a Letter of Sanction to the defendants on 24th September, 2008, which document was executed by the defendants on 13th October, 2008. Facility 2 under that letter was designated Account No. 935433 03463795 and pursuant to the terms of that facility, the sum of €9,380,200 was advanced to the defendants. This borrowing was stated in that Letter of Sanction to be on a several recourse basis.

5. This facility was replaced by agreement between the parties by a Letter of Sanction dated 10th May, 2012, which was executed by the defendants on 14th May, 2012. This letter states that "*this Letter of Sanction is in substitution of and not in addition to any previous Letters of Sanction issued by the Bank*" relating to these facilities. This Letter of Sanction also states that a copy of the letter is "*being forwarded to Billy Moloney and Eamon McCarthy as joint parties to these facilities*" and that the facilities in this Letter of Sanction are subject to the Bank's General Terms and Conditions dated February 2012. These Terms and Conditions provide at Clause 7.5 that:-

> "Each party to a facility on a joint account is jointly and severally liable to the Bank for repayment of the facility and is subject to all of the applicable terms and conditions".

6. This Loan Sanction letter dated the 10th May, 2012, expired on 1st May, 2013, and thus the Bank was entitled to call in the loan after that date in the absence of agreement being reached on a restructuring of the loan. The loan was called in by the Bank on the 9th June, 2015.

7. The defendants assert an oral agreement was reached between them and the plaintiff at a meeting between the parties held on the 21st June, 2013, whereby the terms of the foregoing loan between the parties were varied. Under the terms of the alleged oral agreement, the defendants assert that they were to work to achieve the sale of houses and sites on the secured property in return for which outstanding monies owed to the plaintiff would be written off. The plaintiff denies that any such agreement exists, since it alleges that it was at all times understood that there was no such agreement, and the defendants' actions are consistent with that being the position, and that this is an attempt by the defendants to avoid summary judgment.

8. As a result of the existence of the alleged oral agreement, the defendants allege that the plaintiff is not entitled to summary judgment and they allege, inter alia, that the dispute between the parties about the existence of the oral agreement is a sufficient reason for this matter to be sent for plenary hearing.

9. The defendants have negotiated the sale of the last nine charged properties on lands and they complain that the plaintiff has unreasonably refused to consent to the sale of properties known as Nos. 52 and 53 Cnoc an Cairn and sites no. 54, 68, 69, 70, 71, 74 and 75. Therefore they are seeking a mandatory injunction directing the plaintiff to provide such consent. In addition, the defendants seek an injunction restraining the plaintiff from appointing a receiver to enforce its charge over the Cnoc an Cairn site pending the

determination of these proceedings at a plenary hearing, which they are seeking.

10. These proceedings were admitted to the Commercial List by McGovern J. on the 14th March, 2016.

Analysis
11. The first issue to be considered in this case is whether the plaintiff should be granted summary judgment or whether the defendants should be given liberty to defend the plaintiff's application for judgment at a plenary hearing.

12. There is no dispute between the parties that the law in this area is settled and that the principles set out in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607; *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75; and *Harrisrange Ltd v. Duncan* [2003] 4. I.R. 1, are the principles to be applied by this Court in considering whether to grant summary judgment.

13. It is clear from those cases that the threshold is low for denying summary judgment, whether one characterises the test as: "is what the defendants allege credible?" or "is it clear that the defendants do not have an arguable defence?"

14. In light of these settled legal principles, this Court must consider the evidence before it to determine whether it is arguable or credible that there was a binding agreement between the parties in the terms alleged by the defendants which resulted from the meeting of the 21st June, 2013, so as to deny the plaintiff summary judgment.

The meeting of the 21st June, 2013 and its aftermath

15. The background to this meeting was that negotiations had begun between the Bank and the defendants in January of 2013 regarding a possible restructuring of their loans. A Non-Disclosure Agreement was sent by the Bank, by email on 22nd January, 2013, to Mr. Moloney, and by letter on the 22nd January, 2013, to Mr. McCarthy. The relevant terms of this document, which is called a 'Pre-Negotiation Non-Disclosure Undertaking' are as follows:-

> "In consideration of your willingness to enter into negotiations in connection with a possible restructuring of our facilities, we hereby irrevocably undertake and agree as follows […]
>
> 5. We accept that you will not be committed to us in any way, or obliged to enter into any transaction, unless and until a formal agreement is duly executed and delivered and that you are not obliged in any way to enter into any such agreement.
>
> 6. It is agreed that the negotiations between us shall be without prejudice (i.e. not to be disclosed by either party in any court of law or other dispute resolution forum) unless and until final agreement is entered into between us."

16. A copy of the Pre-Negotiation Non Disclosure Undertaking signed by Mr. Moloney was produced in evidence, but a copy of the terms of the Pre-Negotiation Non Disclosure Undertaking allegedly signed by Mr. McCarthy was not produced in evidence, although a copy of the letter sending him the Undertaking for signing was so produced. Mr. Carney on behalf of AIB swears that he believes that Mr. McCarthy did sign such an Undertaking and Mr. McCarthy has not sought to contradict this averment. Mr. Moloney in his affidavit dated the 4th April, 2016 swears that Mr. Carney indicated to all present at that the meeting of the 21st June, 2013, (which included Mr. McCarthy) that it was to be private and confidential and that all present would be expected to sign confidentiality agreements (which this Court infers was a reference to these Non Disclosure Undertakings). At a minimum, this Court is of the view that on the balance of probabilities Mr. McCarthy would have been aware of, and did not object to, the negotiations taking place with AIB on the basis of the foregoing extracts from the Non Disclosure Undertaking.

17. Against this backdrop, the meeting of the 21st June, 2013 was held and it was attended by Mr. Tommy Allen of AIB who was there with his colleague, Mr. Aonghus Carney. Also at the meeting was Mr. Con Slattery, another developer who was an AIB borrower (but who is unconnected with these proceedings), along with the two defendants. It is not in dispute between the parties that this was a meeting to discuss the restructuring of the defendants' borrowings, which involved their selling certain properties with the proceeds being used to pay off the loan, their making a contribution from their own assets of a sum to the loan account, with the balance being written off. What is disputed is whether agreement was reached between the parties on this date or whether these discussions amounted to mere negotiations.

18. Yet what the defendants say is that the existence of a binding oral agreement is not in doubt, but that there is a dispute about two terms of that binding oral agreement. The first term relates to the number of years which would have to elapse for the loan to be written off, although the term that is used in the exchange between the parties is of a 'review' as distinct from 'write-off'. What the defendants say is disputed is whether the 'review' was two years (as distinct from five years) in the alleged oral agreement. In his affidavit of the 4th April, 2016, Mr. Moloney avers that Mr. Carney had put forward three components to the restructuring, namely (i) the sale by the defendants of all the charged properties at prices to be sanctioned by the Bank (some 70 charged properties, being 16 houses and 54 sites), (ii) the payment by the defendants of a sum out of their personal funds to the loan account (in Mr. Moloney's case, a sum of €50,000) and (iii) the Bank would write off the balance. Since that meeting, 61 of the charged properties were sold, yielding proceeds of €1.3 million. If the final nine properties are sold for €240,000, this would lead to a final yield for the Bank of €1,540,000 out of a debt due to it of €10,872,303. Mr. Moloney avers that towards the conclusion of the meeting, Mr. Carney mentioned the possibility of a five year review facility being incorporated into the agreement, but Mr. Moloney states that he made it clear that he would not agree to same and that Mr. Carney indicated that a two year review period was acceptable. This is denied by Mr. Carney in his affidavit of the 27th April, 2016.

19. The second term of this allegedly binding oral agreement, about which the defendants say there is a dispute, is whether there was a financial covenant to the effect that the defendants were not to borrow in excess of €20,000 for a period of time. Mr. Moloney avers that when he received the Letter of Sanction dated 21st October, 2014, (which is referred to below in further detail) with the written terms which he expected to reflect the alleged oral agreement, that this financial covenant was included, even though it had not been discussed at the meeting of the 21st June, 2013.

20. For its part, the Bank denies there is any dispute about the status of these two alleged terms, quite simply they say they relate to an agreement that was never reached.

21. In support of their claim that they have a binding oral agreement, the defendants allege that after the meeting of the 21st June they engaged in selling the charged properties in part performance of the alleged oral agreement reached by them, with the Bank using the proceeds to reduce the debt, since by that stage the facilities under the Loan Sanction dated 10th May, 2012, had expired as of the 1st May, 2013 (two months prior to the date of the meeting). This led to a reduction of the debt from €11 million approx to

€10 million approx.

Heads of Terms in June 2014

22. After the meeting of the 21st June, 2013, the next significant step in the dealings between the defendants and the Bank was the approval by the Bank's Credit Committee of Heads of Terms which were issued to the defendants by the Bank by letter dated the 17th June, 2014. This Heads of Terms document is called a "*Fundamental Restructuring for Corporate Non-Binding Term Sheet*". The Heads of Terms themselves provided for the sale of the charged properties with the proceeds being used to pay off the loan, a contribution of €20,000 from each of the defendants out of their own personal funds to reduce the loan and the writing-off of the balance. These terms also provided for a five year review period.

23. The covering letters dated the 17th June, 2014, sending the Heads of Terms to both defendants are in similar terms and are headed:-

> "SUBJECT TO CONTRACT/CONTRACT DENIED"

The body of the letter, insofar as relevant, states:-

> "I would be grateful if you could review the attached Heads of Terms document(s) and revert to me with confirmation of your acceptance in principle within 20 business days of the date of this letter. Following receipt of this confirmation, we will proceed to issue a formal contract.
>
> The terms and conditions outlined in the attached Heads of Terms documents are indicative only and reflect market conditions as of 17th June 2014. They do not constitute an offer (or an undertaking to offer) to arrange or finance loan facilities. No legal obligation will be deemed to exist until, amongst other matters, the undertaking of legal due diligence and the issuance of a formal offer letter/loan agreement, including the bank's standard terms and conditions, for acceptance by you as the Borrower.
>
> These terms are intended to serve as the basis for elaboration in a definitive loan agreement/offer letter and are not intended to create any legally binding obligations between AIB and you.
>
> These terms are confidential and, per the terms of the Non-Disclosure Agreement completed by you, are not to be disclosed to any third party other than your professional advisers without our prior written consent."

24. As regards, Mr. McCarthy, he confirms in his affidavit dated 4th April, 2016, that he did not have an issue with the five year review outlined in the Heads of Terms and he agreed to those terms. Mr. Moloney wrote to the Bank on the 8th July, 2014, regarding the Heads of Terms which had been sent to him and Con Slattery. He states in this letter:-

> "With reference to the head of terms relating to Con Slattery and myself we have gone through the documents in detail and for the most part it is agreeable. However we are concerned about the 5 year stipulation […] Effectively we just want to confirm that if notes a & b are fulfilled in a shorter time frame that this will allow the full and final settlement before the 5 year period […] Personally, I think that 5 years will not work as I am now 49 years old and I need to return to construction as quickly as possible so that I can make the payments required of me re the b note. I simply cannot remain dormant for the next 5 years. I would be grateful if you would let me know the situation as soon as possible".

25. While this letter from Mr. Moloney to AIB refers to Heads of Terms which were proposed for Mr. Slattery and himself, it is certainly arguable that it could be construed as referring also to the Heads of Terms for Mr. McCarthy and himself, since the point he makes regarding the five years is equally applicable to the Heads of Terms between the Bank and Mr. McCarthy and himself. However, despite sending this letter to the Bank regarding the Heads of Terms Mr. Moloney, just six days letter, signed and sent a letter to the Bank (which was also signed by Mr. McCarthy) dated the 14th July, 2014, in which they agreed in principle to the Heads of Terms and without any reservation regarding the five year term. This letter states:-

> "Further to your Restructure of AIB Facilities letter of June 17th please accept this letter as confirmation that we agree in principle to the Heads of Terms detailed in your letter of June 17th subject to advice from our Solicitor once he has examined the formal agreement when it arrives".

26. At this stage, therefore both defendants are in agreement, albeit only '*in principle*' to the five year review period, since it is subject to legal advice on the final form of the agreement. The formal agreement to which the defendants' letter appears to refer and which was to be reviewed by their solicitor, was the Letter of Sanction which was sent to them on the 21st October, 2014.

Letter of Sanction in October 2014

27. This Letter of Sanction dated 17th October, 2014, is addressed to both defendants and is signed by the Bank. This document contains a reference to a financial covenant whereby the defendants would not borrow any sums in excess of €20,000 during the period of the facility. Shortly after receiving this Letter of Sanction, the defendants invoked the Bank's internal appeals procedure through their solicitors' firm, *Philip O'Sullivan & Co* , which wrote to the Bank on the 11th December, 2014. This letter is headed '*Notice of Appeal: Decision of AIB Bank Not to Reduce 5 Year Review Period – 18 November 2014*'. In this letter, Mr. O'Sullivan states, insofar as relevant:-

> "The proposed agreements are all dated in October 2014. […] As per the proposed agreements structured by AIB Bank which I am advised by Mr. Tommy Allen were bespoke to the borrowers circumstances there is a 5 year review in all agreements, meaning that the agreement will not come to and end until the end of the 5 year term and then the balance of the bad debt is written off.
>
> All agreements also contain a financial covenant restricting the borrowers from obtaining loans of more than €20,000[…]
>
> It is simply impossible for a Solicitor/Accountant or Insolvency Expert to advise a Client to sign up to the proposed agreements as currently drafted as they are harsher/less certain than bankruptcy in either the U.K. or in Ireland, which as you are aware the bankruptcy period in Ireland is merely three years as opposed to this proposed five year bankruptcy term.

> It has been pointed out by the bank representatives that the five-year review was never raised as an issue during negotiations but this is flatly contradicted by my Clients in the attached documents:
>
> 1. Memo of meetings dated the 24th of November 2014.
>
> 2. Copy letter to the bank dated the 8th of July from Billy Moloney.
>
> 3. Copy letters dated the 14th of July to the Bank from Billy Moloney and Eamon McCarthy.
>
> As there is a dispute of what was stated/not stated in these meetings leading up to the proposed agreement I request that the appeal is preceded by way of oral evidence so that Mr. Aongus Carney, Mr. Tommy Allen and Ms. Paula Marley can be called to give evidence and be cross examined."

28. This Court has already referred to the letters of 8th July, 2014, and 14th July, 2014, referred to in that solicitor's letter. The Memorandum of a Meeting dated 24th November, 2014, referenced in this letter is a memorandum which appears to have been prepared by the defendants (and Con Slattery) as a record of the meeting on the 21st June, 2013, although it appears to incorrectly refer to the meeting taking place on the 13th June, 2013. This Memorandum states, insofar as relevant:-

> "We, Billy Moloney, Eamon McCarthy, and Con Slattery had a meeting at the AIB bank, Denny Street, Tralee with Aonghus Carney & Tommy Allen from AIB on June 15th, 2013. […] Aonghus Carney let it be known that his main objective was that we should be free to get back working as soon as possible thereby creating employment. At one point he also said that he would look at having the 5 year term reduced. […] At the end of the meeting we were told that the heads of terms would be sent out to us. These did not arrive for another year. We agreed in principle to the heads of terms with a view to have the 5 year term reduced on the final agreement as we honestly did not feel that they were legally binding and for this reasons we sent three letters to AIB, dated July 8th and July 14th, 2014 (copies attached) in which we made it clear that we agreed in principle with the heads of terms subject to legal advice to ensure that what we agreed to was not legally binding."

The Bank's internal appeal did not lead to a successful resolution of the issues of dispute between the parties and so the next step in this dispute was the involvement of financial advisers on behalf of the defendants.

The involvement of financial advisers

29. Mr. Barry Donohue of the accountancy firm of *O'Connor Pyne* met with representatives of the Bank on the 22nd January, 2015. According to Mr Donohue's affidavit of 7th April, 2016, this meeting focused on the reduction in the five-year review period and the removal of the financial covenant. However, no agreement was reached between the Bank and the defendants' financial advisers regarding either of these terms.

Demand for repayment

30. By mid 2015, the loan facilities had expired over two years previously, on 1st May, 2013. Accordingly, on the 9th June, 2015, the Bank's solicitors wrote to the defendants demanding repayment of the facilities. It was at this stage that the defendants claimed that they reached a legally binding oral agreement with the Bank on the 21st June, 2013. It appears in the reply to the Bank's demand of the 9th June, 2015, when the defendants' solicitors states, in his replying email of the 10th June, 2015, that: -

> "Please also note the seeking of any monies is completely at variance in relation to specific assurances given by your Clients employees Mr Aongus Kearney and Mr Tommy Allen and my clients reliance on same and the seeking of same as a breach of the agreement reached between our respective clients. This will form the subject matter of any future court proceedings…"

As predicted in this solicitor's letter, this matter is now the subject of the current court proceedings.

Contracting for the sale of the remaining houses and sites

31. To complete the chronology of events, it is also relevant to note that defendants have agreed, subject to contract, to sell sites no. 54, 68, 69, 70, 71, 74 and 75 as well as partially completed houses no. 52 and 53 at Cnoc an Cairn to a nephew of Mr. Moloney. Once these final nine properties are sold, all the charged properties will have been sold. The total agreed price for all these nine properties is €240,000 and the defendants have provided valuations of the properties to show that this reflects market value. Due to the imminent expiry of planning permission relating to these sites and partially completed houses, and due to it being the defendants' view that no further planning permission will be granted in relation to these properties, the Defendants believe that if the properties are not sold now, they will be unsaleable. The Bank has refused to consent to the sale of these properties on the basis initially of the family connection between the purchaser and Mr. Moloney, but now on the basis of their own valuation of the properties which puts a greater value on those properties than that proposed. However, the defendants say that the Bank's valuation is seriously flawed due to its failure to take account of the planning issues and its use of inappropriate comparators.

32. Having outlined the factual background, it is now proposed to consider the defendants' arguments in support of their application to this Court for it to reject the application for summary judgment sought by the plaintiff.

Conflict of evidence as a reason for a plenary hearing

33. The defendants have highlighted the conflict of evidence that exists between the parties regarding the meeting of the 21st June, 2013, and they rely on this conflict of evidence to support their claim that this dispute should be dealt with by means of a plenary hearing. They point in particular to the fact that the only contemporaneous note of the meeting of the 21st June, 2013, was prepared by Mr. Allen of AIB. In this note, he states that the defendants *'confirmed that they do not have an issue with disposing of all assets at the 'Cnoc an Cairn' site within a 1-2 year timeframe*', which is significant since it refers to two years, rather than five years. Counsel for the defendants emphasised the conflict, as they see it, between this reference, in the contemporaneous note, to what they say is a reference to a two year review/write-off period, yet the Heads of Terms issued in June 2014 provided that at the end of five years and compliance with the terms of the Letter of Sanction, the outstanding loan would be written off.

34. Counsel for the defendants also emphasised that in support of their argument that there is a conflict of evidence which is suitable to be tested at a plenary hearing, this attendance note made no reference to financial covenants, yet the reference to financial covenants appeared in the Letter of Sanction issued in October 2014.

35. The first point that can be made about this reference in the attendance note to a '*1-2 year timeframe*' is that it appears to be simply a confirmation that at the meeting the defendants believed that they could sell the charged properties within one or two years. It is in this sense a reference to the market conditions for the sale of properties in Dingle. It is not evidence of an agreement between the Bank and the defendants on how quickly the Bank would write off the outstanding loan.

36. The second point to make is that the defendants, in seeking to have a plenary hearing to resolve the matters in dispute, have put particular emphasis on the fact that there is a conflict of evidence between the parties regarding these two issues, namely the length of time before the write-off would be effective and the existence of the financial covenant terms. Their case is that this reference in the attendance note to '1-2 years' supports their version of events, namely that agreement was reached on a two year review (or certainly that no agreement was reached on the five year time-period that appeared in the Heads of Terms) and the absence of reference to a financial covenant in the attendance note supports their view that this term was not agreed at the meeting of the 21st June, 2013, despite its appearance in the Letter of Sanction.

37. The defendants say that this conflict of evidence between the two parties supports their position that this matter should be dealt with by way of plenary hearing, since such a plenary hearing would enable the Court to get to the truth of the conflicting positions regarding these two disputed terms.

38. It is, of course, true to say that where there is a conflict of evidence, the most appropriate way in which to resolve the conflict is by means of cross examination at a plenary hearing. However, the conflict of the evidence in this case primarily relates to whether a five or two year time frame for write-off of the loan was mentioned, at the meeting on the 21st June, 2013. The defendants also alleged in their oral submissions that there is a conflict of evidence regarding whether the financial covenant was a term of the alleged oral agreement. It is not alleged by the Bank that the financial covenant was discussed at the meeting on the 21st June, 2013, and since the Bank claims that there was no binding agreement reached between the parties on this date or subsequently, there is not a dispute between the parties that the financial covenant is part of the alleged oral agreement allegedly reached on the 21st June, 2013.

39. Thus, the conflict between the parties for present purposes relates to whether agreement was reached on a five year term or a two year term on the 21st June, 2013. It is therefore a conflict of evidence as to the terms of the alleged binding oral agreement. As such, the fact that the defendants are emphasising that there is a conflict about what terms might have been in the alleged agreement support the view that no binding agreement was reached, since to have a binding agreement, one needs to point to 'agreement' on its terms. Therefore, while it is true that there is a conflict of evidence in this case, it is not a conflict of evidence that supports the defendants' case that there was a binding oral agreement between the parties reached on the 21st June, 2013. This conflict of evidence supports the contrary contention, namely that there was no agreement and that these discussions were simply negotiations. Therefore, in this Court's view, this conflict of evidence between the parties is not supportive of the defendants' claim that these proceedings should be the subject of a plenary hearing.

40. To put this matter another way, this case is not about whether a *binding oral agreement* between the parties contained a two year time-frame clause or a five year time-frame clause – if it were then the defendants would have a good case for a plenary hearing. Rather, this is a case about whether there is a binding oral agreement in the first place so as to deny the plaintiff its summary judgment. For this reason, the defendants' reliance on there being a conflict of evidence between the parties about which purported terms applied to the alleged agreement simply strengthens the plaintiff's case that no concluded agreement was reached between the parties. It is not a conflict of evidence which *per se* provides a basis for a plenary hearing. For this reason this particular conflict of evidence, does not support the claim that this matter should be dealt at a plenary hearing and therefore this conflict of evidence is not fatal to the plaintiff's case that it should be entitled to summary judgment.

A credible or even an arguable defence?

41. This is not the end of the matter as regards the granting of summary judgment in this case. The threshold for permitting summary judgment is high, since this Court needs to make a finding that it is not credible that there is a binding oral agreement between the Bank and the defendants. In this case, the following factors are relevant to the Court's consideration of this matter:-

> A. It is clear when one examines all the circumstances and all of the documentation that the defendants were made aware that in going into negotiations to try and arrive at a restructuring plan it was being done on a non-binding, subject to contract and without prejudice basis. The terms of the Pre-Negotiation Non-Disclosure Undertaking could not be clearer in its denial of any suggestion that there could be an agreement binding on the Bank, until a document is signed by the Bank. Yet the defendants' defence to the summary judgment flies completely in the face of the plain meaning of the words of the Non-Disclosure Undertaking. If this Court were to ignore the words of the Non-Disclosure Undertaking, business men would legitimately wonder what other words could be put into a document to ensure that negotiations are not binding, if these words don't work to achieve that purpose. The Undertaking either means what it says or it does not and it is stretching credibility for the defendants, and Mr. Moloney in particular (since a copy of his signed Undertaking has been produced in evidence), to sign this Non-Disclosure Undertaking saying the negotiations were without prejudice and that the Bank would not be bound until a document is executed, to now say that despite all of this, there was in fact a binding oral agreement reached on the 21st June, 2013, in direct contravention of the terms of the Undertaking.
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> B. It is also relevant that the only contemporaneous note that exists from the meeting of the 21st June, 2013, does not give any support to the contention there was a concluded agreement between the parties. Indeed, the reliance which is placed upon this document by the defendants simply highlights the conflict that exists between the defendants' claim, on the one hand, that a write-off of their loan over a two year period was allegedly discussed in sufficient terms to be agreed with the Bank at that meeting and the Bank's claim, on the other hand, that no such agreement was reached at that meeting on the length of the write-off period or on any other term. The absence of sufficient clarity regarding the terms of the alleged oral agreement, as highlighted by this conflict of evidence, support a finding by this Court that there was not a sufficient meeting of minds at this meeting for it to be credible for the defendants to say that a binding oral agreement was reached on the 21st June, 2013.
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> C. It is relevant that on the 17th June, 2014, when the Bank sent their Heads of Terms to the defendants, it is explicitly stated on the front of the Head of Terms that they are a 'Non-Binding Term Sheet' and the covering letters make clear that no legally binding obligations are created with the Bank but they are simply the basis for elaboration in a definitive loan agreement. If there was any credibility to the defendants' claim that there was a binding agreement from 21st June, 2013, then upon receipt of this letter in June 2014, they would have made it clear to the Bank that all these references to not having a binding agreement were incorrect. Instead of doing so, the engagement of the defendants with the Bank on the 14th July, 2014, was to the effect that subject to getting legal advice on the final agreements (namely the Letter of Sanction which issued subsequently in October), they agreed in principle with the Heads of Terms. Thus, in July 2014

both defendants agreed in principle with the terms set out in the Heads of Terms (including a five year write-off period), yet in the proceedings before this Court they are now saying that they had one year earlier, concluded a binding oral agreement, which included a write-off period of two years. In these circumstances, this Court is of the view that it is not credible for the defendants to now assert that a binding oral agreement was reached on the 21st June, 2013.

D. It is also relevant that separately, by letter dated 8th July, 2014, Mr. Moloney had (in the context of his Heads of Terms with Con Slattery and the Bank) sought to persuade the Bank to confirm that the five year write-off period did not in fact mean a five year write-off period or, in the alternative, to persuade the Bank to change the period to a shorter period and to '*let [him] know the situation as soon as possible*'. However, as previously noted, this approach by Mr. Moloney supports the contention that the negotiations in June of 2013 were just that, negotiations, rather than a binding agreement. This is because if there had been a binding agreement there would have been no reason for him to seek clarification in July 2014 in relation to the five year term if he already had a binding oral agreement with Mr. Carney, on behalf of the Bank, from the 21st June, 2013, that the review period was for two years.

E. The next relevant piece of evidence is the internal Memorandum dated 24th November, 2014, prepared by the two defendants and Mr. Slattery. This memorandum does not make any reference to there being a binding oral agreement concluded in June 2013. In fact, it is consistent with there not being a binding agreement since this document makes clear in the most explicit terms that the defendants did not believe that they were legally bound to the Bank. This Memoradum records that the reason their letter of 14th July, 2014, states to the Bank that they agreed in principle, subject to legal advice, to the Heads of Terms with the five year write-off period, was because they wanted to make sure that they were not legally bound. It is not credible for the defendants to now say in this Court that there was a binding oral agreement concluded on the 21st June, 2013, when this directly contradicts their own internal memorandum. They are in effect asking this Court to conclude in May 2016 (when this Court heard the evidence) that the discussions in June 2013 constituted a legally binding agreement, even though in the defendants' own views, expressed in November 2014, these discussions were not legally binding. This is not a credible position for the defendants to hold.

F. There is also the letter dated 11th December, 2014, from Philip O'Sullivan, the solicitor acting for the defendants, to be considered. This is a comprehensive and carefully worded letter to the appeals committee of the Bank. Not only is there no reference to a binding oral agreement from June 2013, but on the contrary there is a reference to the status of discussions between the parties as amounting to '*proposed agreements*' and an explicit reference to the absence of agreement between the parties, since he refers to the '*dispute of what was stated/not stated in these meetings leading up to the proposed agreement*'. This is a letter from the defendants' solicitor, who would have been acutely aware of the legal significance of the term '*proposed agreements*'. For this reason, it is not credible for the defendants to effectively deny the effect of this letter and allege that all the time there was in fact a binding oral agreement in place governing the terms of, what their solicitor refers to as a 'proposed agreement'. The solicitor uses this term because of his reference to the dispute (i.e. absence of agreement) between the parties as to what happened at the meeting on the 21st June, 2013.

G. There is also the meeting with the financial advisors in January of 2015. This is relevant because once again there is no suggestion there that the financial advisers were engaged to discuss the terms of a concluded agreement, but rather to engage in negotiations about the key terms in which there was no agreement between the parties, namely the write-off period and the financial covenants.

H. Finally, the timing of when the claim of the existence of the binding oral agreement is first made by the defendants is also pertinent. Even though this oral agreement was allegedly concluded in June 2013, it was raised by the defendants (despite the numerous opportunities in 2014 and 2015 referred to above) for the first time in June 2015 when the Bank called in the loan. In this Court's view this is telling. This Court is of the view that the defendants were looking to see if there was any way in which they could prevent AIB calling in the loan. It seems to this Court that their only hope was to allege, despite all the evidence to the contrary, that the discussions in June 2013 amounted to a binding oral agreement. It is this Court's view that the imminent calling in of their loan was the motivation for them to seek to rely on this untenable claim, since it is likely they could see no other way to prevent the calling in of their loan. If there was any truth to their claim that they had concluded a binding oral agreement in June 2013, it is this Court's view they would have made that claim much sooner and not as a last resort to put off the day of reckoning on their loan. Thus, the timing and circumstance of their making of this claim of an binding oral agreement is also relevant in the Court's conclusion. It is this Court's view that this claim was never credible and that it was only made by the defendants as a final attempt to prevent the calling in of their loan and thereby force the Bank into one last attempt to agree the terms of a restructuring/write-off agreement with them, despite the failure of the parties over the previous two years to reach such an agreement.

Joint and several liability

42. The defendants also claimed that there is uncertainty about the nature of their liability under their loan agreement with the plaintiff, on the grounds that the first Letter of Sanction dated 24th September, 2008, was several and the renewal of the underlying loan in the second Letter of Sanction dated 10th May, 2012, was on the basis of joint and several liability. They claim that this alleged uncertainty regarding the extent of the liability of the defendants is a basis for this matter being sent to a plenary hearing. Their argument appears to be that because this was simply a renewal of an existing loan, this change on the renewal of the loan from several liability to joint and several liability was ineffective. However, no authorities were opened to the Court to support this proposition. Furthermore, the second Letter of Sanction expressly states that it is in substitution for the previous Letter of Sanction and expressly states that the loan obligations are a joint and several liability (by express incorporation of the Bank's general terms and conditions). Accordingly, this Court can see no reason to conclude that the current Letter of Sanction, the subject of this summary judgment application, is not a joint and several liability of the defendants. It sees no basis for the claim that the extent of the liability of the defendants is uncertain and that the matter should be sent to a plenary hearing for this reason.

Conclusion

43. For the foregoing reasons, this Court concludes that the defendants' assertion that they have a binding oral agreement with the Bank is not credible. This conclusion also deals with the claim of part performance by the defendants. This is because it is clear from the decision of Barron J. in *Mackie v. Wilde and Longin* [1998] 2 I.R. 578 that '*in the absence of a concluded agreement there is no point in seeking to finds acts of part performance*'. This Court has found that there was no concluded agreement and therefore the alleged acts of part performance do not assist the defendants in preventing the summary judgment application in this case, which is granted to the plaintiff in the sum claimed.

44. As the plaintiff is being granted summary judgment, this Court can see no basis for granting the defendants an injunction to prevent the plaintiff from appointing a receiver.

45. As regards the mandatory injunction sought by the defendants forcing the plaintiff to consent to the sale of the houses, no authorities were opened to the Court to support the granting of an application by a mortgagor to force the mortgagee of a property to consent to the sale of that property, where the mortgagor is in default. In any case, the defendants have clearly stated in

monetary terms the amount they have agreed to sell the properties for, some €240,000, and therefore it seems to this Court that if the plaintiff fails to sell the properties for this amount, the loss to the defendants will be readily ascertainable. This is because if the said properties end up unsaleable then the outstanding loan of some €10 million could be reduced by the 'loss' suffered by the defendants of €240,000. It seems to this Court that damages are therefore an adequate remedy for the complaint of the defendants and therefore there would be no basis for such an injunction. Although not a determining factor for this Court, it is to be noted that the Bank has indicated, and this has not been denied by the defendants, that there is no prospect of the defendants paying back the €10 million they owe. In those circumstances it is unlikely the defendants will suffer any loss, in reality, by virtue of the fact that they fail to pay €10 million back to the Bank, rather than failing to pay €9.76 million back to the Bank, if the Bank had done what they wanted and sold the properties to Mr. Moloney's nephew. For these reasons, this relief of a mandatory injunction is also refused.