Neutral Citation [2015] IEHC 371

THE HIGH COURT

[2013 No. 3696 S]

BETWEEN

DANSKE BANK A/S TRADING AS DANSKE BANK

PLAINTIFF

AND

MICHAEL HIGGINS AND MAUREEN HIGGINS

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 5th day of June, 2015

1. The plaintiff seeks summary judgment in the amount of €253,959.68 pursuant to the terms and conditions of a loan facility made available to the defendants in accordance with the terms of a letter of the 14th November 2012 which was duly accepted by the defendants on the 25th November 2012 and drawn down to their account and which they have failed to repay despite a demand to do so.

2. An initial letter of demand issued on the 2nd October 2013 followed by a further letter from the plaintiff's solicitors dated the 29th October.

3. A summary summons issued on the 8th November, 2013 and an appearance was entered on the 16th December. A motion for judgment was issued on the 23rd January 2014 grounded on the affidavit of Ms. Niamh Fitzmaurice.

4. The defendants contend that they have a bone fide defence to the plaintiff's claim and that the matter should be sent for trial by way of plenary hearing.

The Legal Test

5. The principles applicable to this application are well established. The court must consider whether it is satisfied that the defendants have established that there is a fair and reasonable probability that they have a real and bone fide defence. This does not mean that the defendants must establish that the defence will probably succeed; rather that it is probable that they have a *bone fide* defence (see *Aer Rianta v. Ryanair* [2001] 4 I.R. 607). These principles were summarised by McKechnie J. in *Harrisrange Limited v. Michael Duncan* [2003] 4 I.R. 1 as follows:-

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
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> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
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> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
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> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
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> *(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
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> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues;*
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> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant said credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;*
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> *(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
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> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*
>
> *(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result, whether that be liberty to enter judgment or leave to defend, as the case may be."*

(See also *Allied Irish Banks Plc. v. Farrell* [2014] IEHC 395 per Ryan J.)

The Proposed Defence
6. The defendants raise three issues by way of an intended defence:-

a) The defendants state that they were not ad idem with the plaintiff in respect of the terms of the loan facility letter. The plaintiff maintains that the loan agreement was for a period of six months only and that the plaintiff was entitled to payment of the full amount at the end of that period or upon any default of payment within it. The defendants contend that the agreement was to provide a vehicle for a moratorium on payments pursuant to their previous agreements and give a breathing space within which payments of a lesser amount might be maintained subject to review after six months but that they would retain the full benefit of the long term home loan secured on their family home and 80 acres of farmland.

b) The defendants contend that the plaintiff was in breach of an implied term to deal with them fairly and in particular in accordance with the Code of Conduct on Mortgage Arrears (CCMA) (Central Bank of Ireland 2013).

c) The defendants claim that the provisions of s. 30 and 54 of the Consumer Credit Act 1995 ought to have applied to the loan facility and that these proceedings issued in breach of the protections provided by the Act.

Chronology of Events
7. The defendants obtained a fixed rate home loan from National Irish Bank (now the plaintiff) pursuant to a letter of offer dated 6th June, 1997. The primary purpose of the loan was the purchase of the family home at 6 Woodhaven, Merlin Park, Galway and it was secured on that property and 80 acres at Kilkerrin, Mount Bellew, Ballinasloe, Co. Galway. This loan was for a period of 20 years from the drawdown of funds. The amount advanced was £290,000.

8. Mr. Higgins was running a farm business from the lands at Kilkerrin and Mrs. Higgins having taken redundancy from the Bank of Ireland in or about 1997 commenced to run a bed and breakfast business in the family home from about that time.

9. Additional loan facilities were granted by the bank from time to time. On the 2nd April 2007 an amount of €265,000 was advanced primarily for the purpose of obtaining an advance of €20,000 to assist in the construction of a new slatted shed but also to restructure all existing term borrowings. The letter of offer stated that it superseded and cancelled the bank's facility letters dated the 6th June 1997, 24th April 2003, 7th October 2005 and 26th June 2006. This loan covered 118 months of instalments of capital and interest commencing on the date of drawdown of the loan.

10. A further restructuring of loan accounts was secured by the provision of additional loan facilities again by letter of loan offer dated 25th June 2008 in the amount of €281,000. Once again a provision of new funds in the sum of €25,000 was advanced to assist in the construction of a farm building. This letter of loan also stated that it superseded and cancelled the bank's letter dated 2nd April 2007. It was repayable by interest only repayments for the first 24 months followed by 156 consecutive monthly payments of interest and capital. It continued to be secured on the property and lands at Kilkerrin, Ballinasloe.

11. The defendants acknowledge that they had financial difficulties during 2011 and early 2012 which were caused by poor weather and the reduced profitability of the farm. They maintained communication with the bank concerning these difficulties and sought restructuring of the loan to overcome them. They claim that they sought a restructuring by way of six monthly repayments to cover interest and partial capital in the sum of €2,000 per month by way of a temporary moratorium.

The Agreed Terms
12. The defendants accept that the terms of the restructured loan facility are contained in the letter of loan offer dated the 14th November 2012. However, it is not accepted that the terms as set out properly represent the agreement reached between the parties. The letter states that the loan must be fully repaid six months following the drawdown date. In her affidavit Mrs. Higgins on behalf of the defendants states that it was not their intention to delimit the term of their long term loan facility by making this agreement. She notes that the letter did not state that it superseded and cancelled the previous letter dated the 25th June 2008. The defendants claim that both sides envisaged that the long term home loan facility was to continue during the period of this short term six month agreement. She further states that the defendants signed this letter to secure the short term moratorium that was required. She maintains that they were not advised by the bank that the loan was to be repaid within six months and it was her understanding that the structure of the loan was to be reviewed after six months from the date of drawdown. The purpose of seeking restructuring was to provide "some short term affordability and allow us work our way out of difficulties".

13. The defendants submit that the terms included in the loan facility letter and the interpretation by the bank of its entitlements are contrary to the express agreement reached with the bank concerning a moratorium subject to a review after six months. In particular, they submit that the loan term now contended for by the bank had the opposite effect to a moratorium in that by stipulating repayment by June 2013, it increased the defendants exposure to the bank which was contrary to the recommendation in the bank's own file which stated that as of 29th July 2010 "exposure not to be increased". Furthermore, they contend that documentation held by the bank indicates that a moratorium was agreed on the loan on the 8th November 2012. Mrs. Higgins wrote to the bank on the 28th November 2012 agreeing payments of €2,000 per month for the next six months "with a further review of proposals for the future".

14. The agreement is evidenced in writing by the letter of loan facility of 14th November 2012 signed by the defendants. The defendants interpretation of the agreement is contrary to the clear terms set out in the letter. It is clear from the loan letter that the plaintiff agreed to grant a loan facility to the defendants repayable within six months and containing an express condition that repayments of €2,000 per month be made. The full amount was payable at the end of the six months period. The defendants in seeking to raise the defence of *non est facum* must demonstrate that there is a fair or reasonable probability based on credible cogent evidence beyond a mere assertion that:-

a) there was a radical or fundamental difference between what they signed and what they thought they were signing:

b) that the mistake was as to the general character of the document as opposed to the legal effect; and

c) that there was a lack of negligence *i.e.* that they took all reasonable precautions in the circumstances to find out what the document was.

The defence is not available to those who sign a document without inquiring at least as to its general effect. The defendants must

put forward some credible cogent evidence to support the contention that the document signed had a character and effect which was quite different to that which they believed it to be. Their belief that it had a contrary effect may be established if the defendants were given information which gave them some grounds for that belief. However, an absence of care on the defendants' part when signing the document which they now seek to disown is insufficient. The burden of proving *non est factum* is on the party disowning the agreement. (*Saunders v. Anglia Building Society* [1971] AC 1004).

15. In applying the *Saunders* decision in this jurisdiction, Morris J. (as he then was) in *Tedcastle, McCormack and Co. Ltd. v. McCrystals* (unreported High Court 15th March 1999), stated that the defendant must take "all reasonable precautions to find out what the document was". (See also *Allied Irish Banks Plc. v. Higgins and others* [2010] IEHC 219). There is no credible evidence that the defendants did not understand the clear meaning of the words set out in the document which they signed. I am not satisfied that there is any credible evidence of a difference between what the defendants signed and what they thought they were signing or that there could be any mistake as to the general character of the document signed or its legal effect. I am not satisfied that the defendants were given any information by the bank which could have misled them as to the true effect of the document.

16. The defendants also claim that the plaintiff agreed to grant a moratorium, accept payments of €2,000 per month and review their case after the six month period. However, even if that is correct, that review and the maintenance of the moratorium was conditional on the monthly payment of €2,000 in accordance with the new facility.

17. The defendants acknowledge that they missed three payments on the facility but claim that they also made a number of payments which brought the facility almost back into line with one payment outstanding by August 2013. It is clear that the defendants did not and could not pay the entire amount outstanding within the period of six months. Even on the defendants own interpretation of the terms, the bank was not obliged to carry out a review after a period of six months if payments had not been met. Thus whether the agreement is to be interpreted in accordance with the bank's submissions or the defendant's submissions, the bank was entitled to demand the full amount of the loan as it did in October 2013. The six months had expired and there had been default.

18. It should be noted also that, in the meantime, in June 2013 the defendants accept that they made further proposals for the payment of €2,000 per month on an ongoing basis by way of an alternative payment agreement which was refused by the bank on the 27th August 2013 following a consideration of the cash flow of the business which was not proven to be sustainable. This was the subject of an appeal process internally which was again refused on the 1st October 2013 for the same reason. It suggests that there was indeed a review process carried out by the bank after the six month period notwithstanding the default by the defendants in making payments under the terms of the loan facility.

19. I am satisfied, in the circumstances that the evidence adduced does not give rise to an arguable defence of *non est factum* or that the interpretation of the loan facility letter could possibly be that contended for by the defendants. However, even if the defendants' interpretation is correct, it is clear not only that the bank waited for the six month period to expire before taking any action against the defendants, but also engaged with them when they proposed a restructuring of the loan which was refused following a review by the bank of the defendants' financial circumstances. The letters of demand only issued following a negative risk review. I am not satisfied that the defendants have any arguable defence on these grounds.

Code of Conduct for Mortgage Arrears

20. The defendants also submit that their account should have been dealt with under the Code of Conduct for Mortgage Arrears (CCMA). They claim that the primary purpose of the loan advanced by the plaintiff was to finance a home loan. The CCMA issued by the Central Bank of Ireland (2013) provides that "Lenders are reminded that they are required to comply with this Code as a matter of law and stipulates that "this Code applies to the mortgage loan of a borrower which is secured by his/her primary residence". Under s. 117(1) of the Central Bank Act 1989, a regulated financial institution, in this case the plaintiff, is as a matter of law obliged to obey the code.

21. A primary residence is defined in the Code as:-

> "Primary Residence: means a property which is:
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> a) the residential property which the borrower occupies as his/her primary residence in this State, or
>
> b) a residential property which is the only residential property in this State owned by the borrower."

22. The security provided in respect of the loan facility includes the 80 acres near Ballinasloe and the family residence at Moypark, Galway. The defendants acknowledge that the loan facility was also in part to finance their farming business but insist that only a small proportion of it was directed towards the construction of farm buildings. It is accepted that a bed and breakfast business was operated from the family home from 1997. It is clear that the residence at Moypark is a family home.

23. The defendants claim that it was an implied term of the contract that the plaintiff would deal with them in a fair manner in accordance with the CCMA. It is submitted that before issuing proceedings seeking judgment in the amount of the loan that remained outstanding, the plaintiff was obliged to act in accordance with the protections provided to the defendants as "borrowers in arrears" pursuant to the CCMA.

24. The defendants understood that the loan would be dealt with under the CCMA because it was secured on the family home but this was refused by letter dated the 17th April which stated that the property was a commercial premises and did not fall within the scope of the code. In addition, the plaintiff claims that the CCMA is primarily directed towards court proceedings seeking possession of residential properties. In response, the defendants claim that the Code is of wider application and that had it been applied when they requested the loan facility of the 14th November 2012, the summary summons would not have issued as this would have been in breach of clauses 37-39 of the Code.

25. It is clear that the cases to date which consider the legal effect of the CCMA concern applications for possession of residential properties. The legal standing of the Code was considered by the Supreme Court in *Irish Life and Permanent PLC v. Dunne and Dunphy* [2015] IESC 46. The court held that the Code contained no express provision indicating that it affected the private legal rights and obligations of lenders and borrowers. However, the court considered whether a financial institution must be regarded as being legally debarred from seeking to exercise a right to possession, which it would otherwise enjoy, by reason of a breach of the Code. Clarke J. delivering the judgment of the court stated that the statutory aim of the Code and its enabling legislation was to seek to regulate the way in which "*financial institutions seek to repossess properties in cases of mortgage arrears"*.

26. The court considered that the purpose of the Code was to provide a window of opportunity in which to explore other solutions to the mortgage problem of the borrower and to take action to put those solutions in place:-

> *"5.18… A financial institution which, entirely ignoring the provisions of the Code in that regard, simply went ahead and sought possession as soon as it was legally entitled so to do would be doing the very thing which the Code is designed to prevent. For a court to entertain an application for possession which was brought in circumstances of clear breach of the moratorium would be for a court to act in aid of the actions of a financial institution which were clearly unlawful (by being in breach of the Code) and in circumstances where the very act of the financial institution concerned in seeking possession was contrary to the intention or purpose behind the Code itself."*

27. The court emphasised that the judgment concerned a situation where an application for possession was brought at a time when the Code precluded such action. However, Clarke J. noted that:-

> *"5.20… in respect of the other provisions of the Code, different considerations apply. There is nothing in the legislation to suggest that it is the policy of the legislation that the courts should be given a role in determining whether particular proposals should be accepted or in deciding whether a financial institution, in formulating its detailed policies in respect of mortgage arrears and applying those policies to the facts of individual cases, can be said to be acting reasonably. Neither can it be said that the policy of the legislation requires that courts assess in detail the compliance or otherwise by a regulated financial institution with the Code. If the Oireachtas had intended to give the courts such a role then it would surely have required detailed and express legislation which would have established the criteria by reference to which the Court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law."*

28. Clarke J. noted that the law governing the circumstances in which financial institutions may be entitled to possession is a matter for the Oireachtas which had not recalibrated the law because it was deemed to be "*too heavily weighted in favour of…financial institutions*". He noted that courts do not at present have the necessary resources to engage in detailed analysis of the merits or otherwise of debt resolution procedures and proposals in every possession case. The present function of the court was described by Clarke J. in the following terms:-

> *"5.22 It should be emphasised that the current function of a court in considering a case in which a lender seeks possession against a borrower is to determine whether, as a matter of law and on the evidence, the conditions which entitle the relevant lender to possession have been shown to exist. A court is not, on the law as it currently stands, given any general jurisdiction to consider whether the actions of a lender might be considered, by reference to whatever criteria one might like to apply, to be reasonable or fair. The problematic legal issue which arises in this case stems from the very fact that the Oireachtas did not choose, in the context of empowering the Central Bank to make binding codes, to specify whether the courts were to have any particular role in applying the provisions of such a code to affect what would otherwise be the ordinary legal rights and obligations arising between a lender and a borrower. It is the silence of the legislation that gives rise to the issue with which this Court is now concerned. If it is considered desirable, as a matter of policy, to give to the courts a wider jurisdiction in the context of repossession cases which would allow the Court to have a role in deciding the reasonableness or otherwise of the conduct of a lender, then it seems to me that clear legislation would be needed which conferred that role on the courts and which specified the criteria to be applied by the courts, in exercising any jurisdiction thus conferred…*
>
> *5.23… In the absence of there being some legal basis on which it can be said that the right to possession has not been established or does not arise, then the only role which the Court may have is, occasionally, to adjourn a case to afford an opportunity for some accommodation to be reached."*

29. The court emphasised that the statutory policy of the Central Bank Act 1989 and the code making powers were not intended to create a whole new jurisdiction for the courts in which they would be required to assess in some detail the type of engagement entered into between a financial institution and a borrower who is in sufficient arrears to enable that financial institution, as a matter of law, to seek possession. The court was not satisfied that there was any jurisdiction to decline possession in cases other than where a breach of the code alleged amounts to a failure to abide by a moratorium as envisaged by the Code. The courts would not entertain an application for possession in breach of a moratorium because that would be to facilitate an act which was illegal. The very act of seeking possession before the court in breach of the moratorium provision, constituted the illegality "*rather than any other question of compliance with the Code*". The court was clear at para. 5.27 that in the absence of appropriate legislation the court would only decline to make an order of possession "*in the limited cases of a breach of the moratorium, but in no other cases*".

30. Clarke J. summarised the court's conclusion:-

> *"7.2… where a breach of the Code involves a failure by a lender to abide by the moratorium referred to in the Code, but in no other circumstances, non-compliance with the Code affects, as a matter of law, a relevant lender's entitlement to obtain an order for possession. I would further clarify that it is a matter for the relevant lender to establish by appropriate evidence in any application before the Court that compliance with that aspect of the Code has occurred."*

31. The defendants face the difficulty that this is not an application for possession of the family residence. It is an application for summary judgment for monies due on foot of a loan facility. The defendants submit that the definition of "mortgage loan" must extend to such a facility when it is backed by the mortgage granted to the bank in respect of the family home. Otherwise, it is submitted that the purpose and intention of the protection set out in the Code could be circumvented by recourse to summary judgment for the amount outstanding and/or the appointment of a receiver.

32. It is clear from the letter of 4th March 2013 from the plaintiff to the defendants that the bank initially considered that the family residence could properly be dealt with under the Code and that it was appropriate to deal with the arrears issue under the Mortgage Arrears Resolution Process (MARP) set out in the code. This includes clauses 37-39 which concerns the steps to be followed in dealing with borrowers in arrears and assessing an alternative repayment arrangement that may provide a resolution for their difficulties. It was not accepted that the 80 acres of farmland was subject to the Code. The plaintiff changed its view on the 17th April 2013 when the bank wrote indicating its conclusion that the family residence was a commercial premises and did not fall within the provisions of the CCMA. The arrears issue was therefore dealt with under the SME Business Lending Code. Notwithstanding this decision, the MARP advisor within the bank was consulted. The advisor's view was that it would not be "unreasonable" to extend the loan term for 12 months on the basis that the loan was converted to a home loan and that €2,000 per month be paid by the defendants. This was not accepted by the bank. It viewed the proposal as unsustainable having regard to the finances of the defendants.

33. The defendants submit that their loan arrangements and the security obtained by the bank by way of mortgage on their family residence are so intertwined as to constitute a "mortgage loan account" pursuant to the CCMA. Even if that is correct, the restrictions on a lender in respect of the commencement of legal proceedings relate to claims for "repossession of a borrowers primary residence". This is not such an application. The Code does not contain any restriction on the bank seeking judgment for any amount due in respect of a loan facility by reason of default in payments or breach of contract or otherwise in accordance with the terms of the agreement. Clause 56 of the Code is clearly restricted to proceedings seeking "repossession". Even if the loan on the family residence was incorrectly designated as "commercial" rather than relating to a home loan or "mortgage loan account" in respect of the family residence, the Code, as interpreted in Dunne and Dunphy, does not prevent the bank from seeking judgment in the amount due or because it was said to have breached other clauses of the Code apart from clause 56, which is not engaged.

34. In the circumstances, I am not satisfied that the defendants have established that the initiation of proceedings for the recovery of the monies constitutes proceedings "for repossession" or is tainted by illegality because they were issued without proper adherence to the Code. It appears from the Supreme Court judgment in *Irish Life and Permanent PLC v. Dunne and Dunphy* that the Code is of limited application. The submissions in relation to the Code do not provide an arguable ground of defence in this case.

The Consumer Credit Act 1995

35. The Consumer Credit Act 1995 does not apply to a "housing loan" as defined by the Act. Furthermore, page 10 of the loan facility letter is an acknowledgement by the defendants that they were acting solely and exclusively within their trade, business or profession and that the purpose of the facility was wholly and entirely business related; consequently, they were not consumers within the meaning of the 1995 Act. Though the defendants contest this assertion and submit that it is wholly at variance with the course of dealing between the parties over the years, nevertheless, the bed and breakfast business was operated from the family home since 1997 and the loan facility was advanced to part finance the farm. In any event, whether one regards the loan as a "home loan" under the act or the defendants were indeed engaged in their trade and business when obtaining the loan, the provisions of s. 30 and 54 of the Act do not apply to the loan facility. I am not satisfied that there is any arguable defence to the plaintiffs claim on the basis of any of the protections said to arise under the Act.

36. I am therefore satisfied that the plaintiffs are entitled, on the evidence adduced, to judgment in the amount claimed.