

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

BRIAN KANE

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 24th day of May, 2019**Introduction**

1. Before the Court is the plaintiff's motion seeking summary judgment in the sum of 1,746,613.95 together with further interest. The said sum comprises three principle sums of €908,064.55, €590,106.54 and €189,452.09. The defendant describes himself as being a "pensioner" and makes reference to his ill health in his replying affidavit. When the plaintiff advanced the said loans to the defendant in May 2007 he was, however, in business as an auctioneer and property developer and had an extensive property portfolio from which his income was derived.

Background to the Loans

2. In May 2007 the defendant wished to refinance certain facilities held by him with EBS Building Society, Irish Nationwide Building Society and Permanent TSB and to release the equity held in certain properties owned by the defendant.

3. The plaintiff issued two offer letters to the defendant on 24 May 2007. The first loan offer letter offered to provide the defendant with a facility in the sum of €1,230,000 repayable over fifteen years ("number one loan account"). The second loan offer letter of 24 May 2007 offered to provide the defendant with a further facility in the sum of €680,000 repayable again over fifteen years ("number two loan account"). Subsequently, on 3 April 2008, the plaintiff issued a third loan offer letter offering to provide the defendant a further facility in the sum of €250,000 repayable over fifteen years ("number three loan account").

4. All three loans referred to were secured by way of mortgage over some sixteen properties owned by the defendant. It should be noted that none of these properties comprise the family home of the defendant.

5. The defendant made payments in respect of each of the loan accounts in the period up until 1 February 2019 and the position as of 26 February 2019 is as follows:-

- (i) For balance principle on the number one loan account €908,064.55;
- (ii) For balance principle on the number two loan account €590,106.54;
- (iii) For balance principle on the number three loan account €189,452.09.

Details concerning these repayments were set out in affidavits, sworn on behalf of the plaintiff, by Mr. Sean Buckley and Mr. Emmet Pullan,

6. A receiver has been appointed by the plaintiff over three of the sixteen properties securing the said loans. In his affidavit, Mr. Buckley refers to the receiver reporting ongoing interference with the receivership. This interference concerns non-payment of rent and unauthorised tenancies. It should be noted that any issues in relation to the receivership do not form part of these proceedings.

Defences raised by the defendant

7. The defendant, in his replying affidavit, does not contest that the monies were advanced and have not been repaid in full. As noted, there have been a number of repayments over the years. In his defence, the defendant further seeks to rely upon: -

- (i) Council Directive 85/577/EEC and the European Communities (Cancellation of Contracts Negotiated Away From Business Premises) Regulations 1989 (SI No. 224/1989) ("the Doorstep Selling Directive")
- (ii) Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts and the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI NO. 227/1995).

Principles to be Applied

8. There is no dispute, as noted earlier in this judgment, by the defendant that the monies were advance and were not repaid. Indeed, a number of repayments have been made over the years. The defendant instead seeks to rely upon the legal points set out in the previous paragraph. As to the jurisdiction of the Court in such circumstances, I refer to the following passage from Clarke J. (as he was then), at p. 210, in *McGrath v O'Driscoll & Others* [2007] 1 ILRM 203: -

"Insofar as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion of summary judgment"

I am satisfied that this is a case that can be dealt with in an application for summary judgment in that the issues raised by the defendant are relatively straightforward and the Court has available to it a number of authorities on the points raised and thus I do not see that there will be any injustice to the defendant.

"Doorstep Selling Regulations"

9. I refer to the European Communities (Cancellation of Contracts Negotiated away from Business Premises) Regulations 1989 (SI No.

224/1989) wherein consumer was defined in Art. 2(1) as:-

"a natural person who, in transactions covered by these regulations, is acting for purposes which can be regarded as outside his trade or profession"

Article 3 provides: -

"(1) These regulations apply –

- (a) to contracts under which a trader supplies goods or services to a consumer and which are concluded –
 - (i) during an excursion organised by the trader away from his business premises, or
 - (ii) during a visit by a trader –

(I) to the consumer's home or to that of another consumer, or

(II) to the consumer's place of work,

where the visit does not take place at the express request of the consumer.

(b) To contracts for the supply of goods or services, other than those referred to in paragraph (a) of this Regulation, concerning which the consumer requested the visit of the trader; provided that when he requested the visit the consumer did not know, or could not reasonably have known, that the supply of those other goods or services formed part of the trader's commercial or professional activities.

(c) to contracts in respect of which an offer was made by the consumer under conditions similar to those described subparagraphs (a) or (b) of this paragraph although the consumer was not bound by that offer before its acceptance by the trader, and

(d) to offers made contractually by the consumer under conditions similar to those described in subparagraphs (a) or (b) of this paragraph where the consumer is bound by his offer."

Article 3(2) states that these Regulations do not apply to, *inter alia*: -

"(b) any contract for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property; provided, however, these Regulations shall apply to contracts for the supply of goods and for their incorporation in immovable property or contracts for repairing immovable property."

10. Mr. Buckley, on behalf of the plaintiff, in his affidavit of 15 March 2018, sets out the circumstances under which the three loan agreements were entered into. Mr. Buckley states that the defendant approached the plaintiff with a view to refinancing certain facilities held by him with other institutions.

11. The second loan agreement was to enable the defendant to release equity which had accumulated in a number of his properties for the purpose of constructing a bungalow and two self-catering units.

12. The third loan offer was also to enable the release of equity but was to assist the defendant in the purchase and refurbishment of a property at Kilashee Street, County Longford.

13. As referred to previously, the three loans were secured over sixteen properties owned by defendant none of which comprised the family home.

14. Mr. Buckley further disposes in his affidavit of 15 March 2018 that the defendant was introduced to the plaintiff through "Mortgages Home and Abroad Limited", a mortgage intermediary of Railway Street, Portlaoise, County Laois. Further, the defendant engaged a firm of solicitors for the purposes of the loan transactions and correspondence was exhibited verifying this.

15. The defendant filed a further affidavit on 10 May 2018 in reply to the affidavit of Mr. Buckley. In the course of this affidavit, the defendant takes issue with the description of him being a part-time auctioneer and property developer. He denies that he made a living from such. However, though he makes reference to the Regulations, the defendant does not deny the circumstances under which he took out the various loans nor does he deny having the advice of a solicitor. The defendant has further failed to establish facts required by Art. 3(1), as set out above, in order for the said Regulations to apply. I refer to *Leeds Building Society v. Brady* [2017] IECA 271 where Peart J., giving the judgment of the court stated:-

"23. Even on Mr Brady's own affidavit it is clear that the circumstances in which he requested the loan for which he and his wife later provided security in the form of the mortgage/charge on foot of which Leeds now seek possession of the property do not come within Regulation 3(1) (a) or (b). It is clear that at a time when Mr Brady was under great financial pressure he met a mortgage broker as he was walking along Fitzwilliam Square, Dublin 2. The broker appears to have indicated that he would arrange a loan for him. A loan offer letter issued very shortly thereafter in the amount of €760,000 which was accepted by Mr Brady, and some eight days later in the presence of their solicitor Mr and Mrs Brady executed the mortgage/charge documentation in the normal way and drew down the loan."

Further, in *Governor and Company of Bank of Ireland v. McMahon* [2017] IEHC 600 Noonan J. stated: -

"22. Even a cursory reading of these regulations shows clearly that they have no application to the facts of this case...

No realistic suggestion has been made by the McMahons in this case, nor could there be, that they entered into this mortgage with the lender in some form of doorstep selling arrangement. Patently therefore, the Regulations have no application"

16. In summary, I am satisfied that the defendant has fallen well short of establishing any sort of defence under the said Regulations as would permit me to direct a plenary hearing on the issue.

"Unfair Contract Terms Regulations"

17. The defendant seeks to rely upon Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts and the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27/1995).

18. These Regulations, as with the Regulations concerning doorstep selling, apply to a "consumer" as "a natural person who is acting for purposes which are outside his business". Though it is clear from the affidavits that the purpose of the loans related to commercial property I do have regard to the statement by the defendant that he was not acting as a property developer but rather dealing in and acquiring commercial property in order to make provision for his family. Thus I am not making any finding as to whether or not the defendant was a "consumer".

19. While the defendant seeks to rely upon the Regulations he has not however identified any particular term(s) of the loan agreements which he considers to be "unfair". I assume that the terms the plaintiff considers to be unfair relate to: -

- (i) The monies advanced;
- (ii) The interest rate applicable;
- (iii) The requirement that the monies be repaid by monthly payments; and
- (iv) The consequences of failing to make the payments.

20. Article 4 of the 1995 Regulations provides: -

"A term shall not of itself be considered to be unfair by relation to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, as against the goods and services supplied, in so far as these terms are in plain, intelligible language."

21. In *Allied Irish Banks Plc. v. Miriam O'Donohoe and Peter O'Donohoe* [2018] IEHC 599 this Court considered the application of the Regulations of 1995 to agreements as the Court is considering in this case. At para. 16 of the judgment the Court stated: -

"16. Having considered the authorities and having regard to the provisions of the Regulations, I am of the view that the provisions in the 'general terms and conditions of offer of mortgage loan' (clause 3.5) and the 'mortgage conditions' (clause 4.1) that relate to the payment of interest are not in breach of the Regulations. I reach this conclusion for the following reasons:-

(i) Article 4 of the Regulations provides that a term will not be 'considered to be unfair by relation to the definition of the main subject matter of the contract'. The main subject matter of the contract in question is that monies were advanced to the defendants to refinance the purchase of an apartment. This was of clear benefit to the defendants. The monies advanced had to be repaid to the plaintiff over the term of the loan. Having the benefit of these monies, which the defendants would not otherwise have had, came at a price – interest was payable. The interest rate may vary over the term of the loan. Thus, in my view, the amount advanced, the term of the loan and the interest that is payable are the 'main subject matters of the contract'. Therefore, applying Article 4 of the Regulations, the clauses in question that relate to the payment of interest do not fall within the scope of the Regulations.

(iii) It seems to me that interest rate clauses, such as the ones in the instant case, do not fall within the scope of the Regulations. I refer to what is called the 'grey list' in Schedule 3 subparagraph (I) of the Regulations. Subparagraph (I) covers situations where a supplier of services increases prices, in this case, increasing interest rates. Such may be an 'unfair term' and it would appear to support the defendants' case. However, Schedule 3 goes on to specifically provide that subparagraph (I) does not apply to '... financial instruments and other products or services where the price is linked to fluctuations in ... a financial market rate that the seller or supplier does not control.'

I would suggest that this provision is consistent with the view that interest rate clauses, such as those in question before this Court, are the 'main subject matter', as per Article 4, of a mortgage or loan agreement and thus not covered by the Regulations."

22. In *Aziz v. Caixa d'Estalvis de Catalunya* (Case C-415/11, Judgment of 14 March 2013) the ECJ stated that: -

"41. ... the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task ..."

23. I have held that the question before this Court does not fall within the scope of the Regulations of 1995. I have nonetheless examined the terms of the various agreements and have failed to identify any term that may be considered to be "unfair."

24. By reason of the foregoing, I am satisfied that the defendant has no defence under the Regulations of 1995.

Preliminary reference

25. The defendant issued a motion seeking a referral from this Court to the Court of Justice of the European Union for a preliminary ruling as to "the applicability or otherwise of the Council Directive of the 20th December, 1985 to protect the consumer in respect of contracts negotiated away from business premises 85/577/EC), on these instant matters, and the agreement/s the subject matter of the hearing proceedings."

26. I am perfectly satisfied that no such referral is necessary. The Directive referred to has been transposed into Irish Law and has been considered in several decisions of the High Court and the Court of Appeal. In the course of this judgment, I have referred to a number of these decisions. No referral therefore is necessary to enable me to reach the decisions which I have made.

Conclusion

27. By reason of the foregoing, I am satisfied that the plaintiff is entitled to judgment for the sums sought. In the course of the hearing, I noted that the loans in question were secured over sixteen properties, none of them comprised the family home. I would

have thought that it ought to have been possible for matters to have been resolved without the necessity for court proceedings. For whatever reason however this was not the case.