THE HIGH COURT

[2017 No. 861 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

JOANNA SLOAN

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 12th day of March, 2019

1. The within motion for summary judgment is brought by the plaintiff ("the Bank") on foot of a loan agreement in writing dated the 28th June, 2007.

2. Some relevant background facts include that the defendant Ms. Sloan, is married to Simon Kelly, a son of Paddy Kelly who is described as a well known developer. It would appear that in 2006, the Bank advanced some €8 million to Paddy Kelly and others for the purchase of ten commercial units at the Apex Centre in Sandyford, County Dublin. Messrs. Kelly together with other parties were shareholders in a company called Daleridge Ltd which owned the Apex Centre.

3. That company was liquidated and it seems that the shareholders acquired some of the individual units in the Apex Centre subsequently. The personal purchasers of those units were financed by the Bank and Ms. Sloan suggests that these loans were ultimately transferred to NAMA and a compromise of the relevant parties' indebtedness occurred thereafter. Ms. Sloan is unaware of the terms of this compromise.

4. Subsequent to the liquidation of Daleridge Ltd, the Bank's deponent, Madeline Murray, avers that Ms. Sloan purchased two of the units from Paddy Kelly. Ms. Sloan herself avers that she purchased the units from her husband, Simon Kelly. Nothing turns on this difference.

5. The Bank originally sanctioned a loan in favour of Ms. Sloan in July 2006 in the sum of €1.863 million for the purchase of the two units in the Apex Centre, Unit A, Floor 3 and Unit C, Floor 2. That transaction did not proceed and about a year later, the transaction the subject matter of these proceedings was entered into. The loan agreement relates to two facilities for three different amounts. The first facility is for €2.617 million. This is made up of the original €1.863 million for the purchase of the two units together with €0.754 million described as an equity release to be used for personal investment into other businesses.

6. The second facility was in the sum of €805,000 and is described as being for the purpose of an equity release from the two office units. The security provisions of the loan agreement are threefold. The first and second require the provision of a legal charge by Ms. Sloan over the two units. The third is a letter of guarantee in the amount of €3.422 million by Simon Kelly for the obligations of Ms. Sloan. The total amount of the loans sanctioned by the facility letter is €3.422 million, which equates to the amount of the guarantee.

7. There is no dispute but that the monies were drawn down by Ms. Sloan as provided in the loan agreement. Legal mortgages were executed by Ms. Sloan over both of the units as provided by the security provisions in the letter of sanction. It is also not in dispute that there was default in the repayment of the loans, demands for such repayment were made and not met.

8. A number of putative defences have been raised by Ms. Sloan in response to the Bank's application herein both on affidavit and by way of submission. The first is that the loan agreement exhibited in the Bank's first grounding affidavit is not signed by her. That is so. Of course that without more cannot give rise of itself to a defence. The fact that a loan agreement is not executed does not mean that there is no agreement. It may mean that there is an additional evidential burden on the Bank to prove the terms of the agreement whereby the loans were advanced. A loan agreement that is purely oral is of course perfectly valid. Where the terms are set out in an unexecuted document, the Bank may be able to establish such terms by proving that the document was given to the plaintiff and the monies were subsequently drawn down, thus amounting to implicit acceptance of those terms. It is a question of proof in each case.

9. In a subsequent affidavit, the Bank has now exhibited a copy of the loan agreement which is in fact signed and the Bank says was signed by Ms. Sloan. She denies that it is her signature. In fact Ms. Sloan goes considerably further than this. In her first affidavit at para. 8, she avers "I wish to further state that I have no knowledge of this loan. It appears to be the case that this loan is for the full benefit of my husband rather than me."

10. However the latter averment appears to be directly contradicted by Ms. Sloan in her second affidavit where she says at para. 15 "I say and believe that and I am advised that I did not receive independent legal advice at the point at which *I executed the liabilities in question"*(my emphasis).

11. Ms. Sloan is non specific as to what she means by this averment but one would in the normal way assume that the words "liabilities in question" can only refer to the liabilities which are in issue in these proceedings on foot of the loan agreement.

12. Her counsel however sought to argue that the "liabilities" referred to in fact relate to the mortgages admittedly signed by Ms. Sloan. There is no evidential basis for this contention and of course the mortgages are not "in question" in these proceedings. On this latter point, it is not clear to me how Ms. Sloan can credibly aver that she has no knowledge of a loan in respect of which she admits executing two mortgages.

13. Ms. Sloan stops short of alleging that the signature on the loan agreement exhibited by the Bank is a forgery but it seems to me no other inference is open. A similar issue arose in *AIB v. Stack* [2018] IECA 128. In that case the defendants were husband and wife who were sued on foot of guarantees allegedly signed by them for the indebtedness of a company. The wife swore an affidavit in which she asserted that her signature on the guarantee was a forgery. This was held by the High Court to be a mere assertion not giving rise to a *bona fide* defence.

14. The Court of Appeal came to the same conclusion and conducted a very useful analyse of the legal principles to be applied in applications for a summary judgement. I subsequently referred to these in my judgment in *AIB v. Gormley* [2018] IEHC 744 where I considered Stack and also the judgment of Clarke J. (as he then was) in *Chadwicks v. P. Byrne Roofing Ltd* [2005] IEHC 47. Having done so, I noted (at para. 37):

> "Although of course it is correct to say that the court cannot in general form a view on the credibility of the evidence, that is far from saying that the court must accept at face value any assertion by a defendant, no matter how unlikely or improbable it may be. As the Court of Appeal pointed out in *AIB v. Stack* , the court has to form a view of the evidence as a whole to determine if the defence being advanced by the defendants is of substance and credible…
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> 39. *Chadwicks* again demonstrates that although the court is in general not concerned with credibility issues arising from affidavits which may be contradictory on either side of the case, the defence advanced as a whole must be substantial and credible. The court has to decide whether looking at the entire matter in the round, such a defence has been raised. If it is not credible, then by definition it cannot raise a fair or reasonable probability of being *bona fide* ."

15. Applying these principles to the first issue herein, it seems to me that the assertion that Ms. Sloan knew nothing about the loan in question is simply not credible in the light of the documentary evidence which in my view is all to the contrary. Apart from the obvious conflict in her own affidavits, no explanation whatsoever has been forthcoming of how Ms. Sloan came to admittedly execute mortgages in respect of a loan about which she says she knows nothing.

16. Furthermore, the allegation that the signature on the loan agreement is not hers is an entirely bare assertion of the kind that was found in *AIB v. Stack* not to give rise to an arguable defence. There is also the significant fact that what Ms. Sloan now claims for the first time in her replying affidavits regarding her signature and knowledge of the loan was not previously raised despite demands for repayment which were received by her at the address which she admits is her home address. If what is now alleged is true, one would have expected a significant and robust response to demands for payment.

17. The second ground of defence raised is that Ms. Sloan received no legal advice before entering into the agreement, an agreement it must be remembered of which she allegedly has no knowledge. This purported defence is simply unstatable. Counsel for the defendant was unable to point to any authority which supported this proposition for the obvious reason that there is none.

18. The third defence raised is on the basis of the Statute of Limitation and it is argued on behalf of Ms. Sloan that as the proceedings commenced more than six years after the cause of action accrued, the claim is statute barred.

19. Counsel for the Bank counters this by relying on s.36(1)(a) of the Statute of Limitations 1957 which provides as follows:

> "No action shall be brought to recover any principal sum of money secured by a mortgage or charge on land or personal property (other than a ship) after the expiration of twelve years from the date when the right to receive the money accrued."

20. The section was considered by this court in *AIB v. Norton* [2018] IEHC 628 where a similar argument was made. In the course of her judgment, Faherty J. said (at para. 45):

> "To return now to the question of whether the within proceedings come under the ambit of s. 36 (1) (a) of the Statute. It is undoubtedly the case that each of the three facilities in issue in the within proceedings were secured on property. To my mind, this factor is sufficient to place the plaintiff's claim within s. 36 (1) (a). I accept the plaintiff's argument that the defendants have not put to the Court any authority for the proposition that the plaintiff was obliged to sue on the covenant to repay as set out in the mortgage deeds. The proposition is not sustainable in law, in my view, having regard to the dictum of Laffoy J. in *A.C.C. Bank v. Malocco* that s. 36 (1) (a) 'applies to an action on the covenant or on the agreement to repay' (emphasis added)
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> Furthermore, I am satisfied that s. 36 (1) (a) does not require a party to sue on the mortgage; what s. 36 (1) (a) states is that the monies claimed must be secured by a mortgage. Accordingly, a plain reading of the provision does not require the plaintiff to sue on foot of the mortgage deed."

21. In the present case, the mortgaged properties being the units in the Apex Centre were in fact sold by a receiver duly appointed and the proceeds credited for the benefit of the defendant in these proceedings. In *Norton*, the court held that this fact did not alter the limitation period and approved the judgment of the House of Lords in the UK in that respect in *West Bromwich Building Society v. Wilkinson* [2005] UK HL44.

22. I am therefore satisfied that in the present case the twelve year limitation period applies and the claim is not statute barred.

23. Finally, Ms. Sloan argues that because some compromise of the loan agreement relating to the €8 million advanced to other parties for the acquisition of the Apex Centre was compromised, she is entitled pursuant to s.35(1)(h) of the Civil Liability Act, 1961 to the benefit of that settlement in that the Bank, is for the purposes of the Act, identified with the settling debtors. For that to arise, the defendant would have to be a concurrent wrongdoer within the meaning of the Act with those who settled the claim but it is clear on the defendant's own evidence that she was not in fact party to the original loan arrangement of €8 million given that she acquired the units from one of those parties, either Paddy Kelly or Simon Kelly.

24. Counsel for the defendant sought to argue that this transcended mere assertion on the basis that the documents themselves showed that there was a larger transaction involved here. This was said to arise first because the guarantee referred to in the loan agreement is for a larger amount than the loan. As I have already noted, that is patently incorrect.

25. Counsel secondly relied upon the bank statements issued in respect of the loan of €1.863 million which initially appeared to show at the top of the page a larger amount being "Eur. 11.863m facility". Counsel sought to extrapolate from this that a larger facility was involved and that was the subject matter of the compromise with NAMA. In a subsequent affidavit, the bank exhibited the full suite of statements which commence with a statement of the 1st April, 2010 which has the heading Eur. 1.863m loan followed by an account number. The subsequent statements exhibited clearly refer to the same loan amount and the same loan account number but the headline figure has changed by the addition of the extra digit "1". I think I am entitled to infer that all the surrounding documents point to the fact that this is simply a typographical error which does not in any sense bear upon issues that Ms. Sloan seeks to canvass.

26. I am therefore satisfied that the Civil Liability Act argument is entirely misconceived and is not merely a bare assertion but one that is contradicted by all of the documentary evidence that is available.

27. For these reasons therefore, I am satisfied that the defendant has not demonstrated that she has a fair or reasonable probability of having a *bona fide* defence and I must give judgment for the amount claimed.