THE HIGH COURT

[2014 No. 1512S]

BETWEEN:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

-AND-

GERARD MACKEN AND HELEN MACKEN

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on 22nd day of June, 2016.

1. This is an application by the plaintiff (the "Bank") for summary judgment against a husband and wife (the "Mackens"), being the principal sum of €600,052.62 against the first named defendant, Mr. Macken arising under the terms of a loan agreement between Mr. Macken and the Bank, and the sum of €281,151.37 against his wife, Mrs. Macken, as guarantor of that principal sum.

2. It is common case that the law in this area is settled and that the principles set out in *Aer Rianta Cpt. v. Ryanair Ltd* [2001] 4 I.R. 607; *First National Commercial Bank plc v. Anglin* [1996] 1 I.R. 75; and *Harrisrange Ltd v. Michael Duncan* [2003] 4. I.R. 1, are the principles to be applied by this Court in considering whether to grant summary judgment. 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?"

3. There remains the fact that the Mackens have not denied borrowing the money or deny the fact that the money is owed to the Bank. It is perhaps no coincidence that counsel for Mr. Macken only argued points 5 and 11 of their defence (as set out in the Bank's legal submissions), in making his oral submissions, since it is this Court's view that based on the evidence before it, the other defences lack credibility. Point 5 deals with the fact that no bank statements or records are exhibited in the affidavits proving the debt and Point 11 deals with the fact that the March 2014 Facility Letter is not being relied upon in these proceedings by the Bank.

4. Counsel for Mrs. Macken adopted the points of defence made by counsel for Mr. Macken and also made his own arguments in relation to Points 5 and 11. He also challenged the validity of the guarantee on a number of grounds. Based on the evidence before it, this Court does not find the defences raised by counsel for Mrs. Macken regarding the guarantee as credible or arguable.

5. As regards the defences 5 and 11, these are technical defences. They do not challenge the fact that the money is owed or that the Bank is entitled to be repaid, but that the Bank's proofs are not in order, in the sense that the proceedings are based on the wrong Facility Letter and that the debt due to the Bank should be proved by something other than a bald averment of a bank official, such as copies of bank records or bank statements.

6. In this sense, there may not be a huge amount to be gained by the Mackens having this matter sent forward for plenary hearing. There may be a personal and financial cost to them, in terms of the delay in having this matter resolved and the legal costs of a full High Court plenary hearing, including the cost of discovery, in having these matters resolved, rather than having them resolved today in summary proceedings. However, that is a matter for them.

7. All this Court has to decide is, not whether Mr. Macken owes the Bank the monies which were borrowed (which is not denied by him), but whether because of the issues which have been raised on the proofs, that this is a case where the amount owed should be determined at a plenary hearing, rather than in these summary proceedings.

8. The first issue which this Court will consider is the claim that the Bank should have relied on the Facility Letter of 11th March, 2014, in these proceedings, rather than the Facility Letter of 8th November, 2010. The purpose of the November 2010 Facility Letter was to renew two previous existing facilities at that time which had been provided to Mr. Macken to purchase and develop property in Carrick-on-Suir. Then on the 11th March, 2014, a new Facility Letter was issued by the Bank which was designed to restate and amend the previous Facility Letter. The Facility Letter of 11th March, 2014, states:-

> "The purpose of the Loan is to assist with the restructuring and renewal of existing loan facility referenced in previous offer letter (the "Existing Offer Letter") and issued by the bank to the borrower relating to account number 41301272.
>
> The Borrower acknowledges that one of the purposes of this Offer Letter is to restate and amend the Existing Offer Letter in relation to a Loan that has already been drawn down. […]
>
> The Loan will continue to be governed by the Existing Offer Letter until the Conditions Precedent set out herein have been satisfied. Any restatement and amendment in the terms described will not be effective until this Offer Letter is accepted and all the Conditions Precedent have been met to the satisfaction of the Bank.
>
> […]
>
> SECURITY HELD
>
> […]
>
> First Legal Mortgage/Charge over the property at Kilmaine, Co. Mayo (Folio No: 32204F and part 5A 32695 County: Mayo) registered in the names of Mr Gerard Macken and Mrs Helen Macken.
>
> "In addition to the Conditions Precedent to drawdown, contained in the Appendix, the Bank shall not be obliged to allow any drawdown of the above facilities unless at the time of so doing, it is satisfied that:
>
> Security as outlined above to be in place in a manner acceptable to the Bank and its Legal Advisors prior to drawdown of the facility.

> […]
>
> Review Date
>
> […] Unless circumstances change warranting an earlier review, the above facilities will be formally reviewed again by 31st August 2014. However if I can be of any assistance at any stage in the intervening period, please do not hesitate to contact me.
>
> […]
>
> Acceptance
>
> This offer will remain valid for 14 days from the date of this letter, after which date this offer shall lapse without any liability or commitment on our part. In order to signify your acceptance of the foregoing facilities on the terms and conditions outlined above and in the attached appendix, the duplicate letter should be accepted on behalf of Mr Gerard Macken and returned to this office."
>
> It seems clear that the Existing Offer Letter to which this March 2014 Facility Letter refers is the November 2010 Facility Letter. It is thus arguable that the purpose of the March 2014 Facility Letter was to replace the November 2010 Facility Letter.

9. Mr. Macken signed the March 2014 Facility Letter on the 1st April, 2014, which was a few days outside the 14 day time limit contained in that letter. He purported to amend its terms regarding security in his covering note, as this note stated:-

> "Security held for Carrick-on- Suir does not contain Folio No 32204F and part 5A 32695".

10. Mr. Kilgallon of AIB replied to this Note by letter dated 9th April, 2014. It is relevant that Mr. Kilgallon did not say that the Offer Letter had lapsed, as Mr. Macken had not complied with the 14 day time frame. Rather he gave him 10 days to effectively agree, by his silence, that the security held for Carrick-on-Suir did in fact include the two folios. His letter stated:-

> "Dear Mr Macken,
>
> Thank you for returning our Letter of Offer dated 11/03/2014.
>
> Please note that Folio 32204F & part 5A of Folio 32695 county Mayo are held for loan re Carrick on Suir development. Previous accepted Letters of Offer also refer. Please note facility now reviewed on this basis. If you have any issue in this matter kindly advise me in writing within the next 10 days.
>
> I trust this clarifies the position for you.
>
> Yours sincerely"

11. There is no evidence that Mr. Macken contacted the Bank within the ten day time-frame, which would have ended on 19th April, 2014. For this reason, this Court concludes that it is at least arguable that on the 20th April, 2014, the March 2014 Facility Letter amended, restated and may have even replaced the November 2010 Facility Letter in full. Indeed, this also appears to have been the view of the Bank, since on the 23rd April, 2014, Mr. Kilgallon wrote to Mr. Macken to state:-

> "Dear Mr Macken,
>
> I refer to the above-mentioned loan and to our letter of offer dated 11th March last.
>
> I wish to advise that unless the covenants outlined in this letter of offer are complied with by 6th May next the bank will instruct our solicitors to recommence legal action to recover the outstanding debt.
>
> Please give this matter your urgent attention.
>
> Yours sincerely".

This Court is of the view that the only reason the Bank was in this letter requiring Mr. Macken to comply with the covenants contained in the March 2014 Facility Letter, was because it believed that this Facility Letter was binding and thereby amended, restated and arguably replaced the November 2010 Facility Letter.

12. In its written legal submissions, the Bank states:-

> "While the first named Defendant did sign the form of acceptance of a facility letter dated 11 March 2014 he also included a handwritten note stating that certain securities were not held by the Plaintiff. In effect he had sent a counter offer to the Plaintiff which the Plaintiff did not accept. The proposed alterations to the terms were rejected by the Plaintiff and the Plaintiff further advised that unless the covenants contained in the facility letter were complied with that the Plaintiff would recommence legal proceedings."

No evidence was provided by the Bank to support its apparent contention, in this legal submission, that the March 2014 Facility Letter was not binding.

13. For these reasons, this Court concludes that it is at the very least arguable that the March 2014 Facility Letter replaced the November 2010 Facility Letter. On this basis it is also arguable that the failure to repay the sums due under the March 2014 Facility Letter by 31st August, 2014, (or a breach of the other terms of that Facility Letter) should have been the basis for the institution of these proceedings.

14. What actually happened was that the demand letter was dated 13th January, 2014, and was a demand under the November 2010 Facility Letter and the Summary Summons was issued on the 12th June, 2014. The Special Endorsement of Claim of the Summary Summons states that the sums were due under the November 2010 Facility Letter.

15. While in the long run, this procedural point may not assist Mr. Macken, since there has been no denial that he owes the money. Nonetheless, this Court finds that because of this failure of the Bank to rely on the terms of the March 2014 Facility Letter, which is arguably the basis for the sums being due, it means that it is not a matter that is suitable for summary judgment.

16. Although it does not need to decide on the issue, to the extent that the Bank is relying upon Order 37, rule 1 of the Rules of the Superior Court to be able to swear positively regarding the debt due, this Court is also of the view that both counsel for the defendants have made an arguable case that the Bank has failed to establish a *prima facie* case regarding the amount due.

17. Both counsel assert, in reliance on, *inter alia, Bank of Ireland v. Paul Keehan* [2013] IEHC 631 and *Ulster Bank v. O'Brien* [2015] IESC 96, that for a bank official to satisfy the Court that there is a *prima facie* case that a certain sum is due, it is not enough that he simply makes a bald averment of the amount of the debt due (as has been done in this case).

18. Rather to make a *prima facie* case, they argue that the averment of the bank official should be supported by some bank statements/bank records to provide some documentary support for the amount of the debt due (which has not been done in this case). The logic presumably is to give the Court some comfort that the figure has not simply been picked out of the sky and sight of a bank statement (unless it is claimed to be a forgery or otherwise incorrect) should achieve this aim. As Laffoy J. stated in the Supreme Court case of *Ulster Bank v. O'Brien* at para. 29, in quoting Clarke J. in *Moorview Developments v. First Active plc* [2010] IEHC 275 at para 6.3:

> "A witness from a bank is entitled to give evidence of the bank's records showing the amount due by a customer of the bank. That evidence and those records provide prima facie evidence of the liability (emphasis added)."

19. Without deciding this point, this Court would simply observe that it is certainly arguable that something more than a bald averment is needed, even if that something more is simply the exhibiting of one bank statement showing the amount due at a relevant date.

20. For the reasons set out earlier in this judgment, the summary judgment is refused.