

## THE HIGH COURT

[2014 No. 1455 S.]

BETWEEN

AIB MORTGAGE BANK

PLAINTIFF

AND

ALAN LYNKEY

DEFENDANT

**JUDGMENT of Mr. Justice Eagar delivered on the 28th day of March, 2017**

1. The plaintiff issued proceedings by way of summary summons dated the 5th June, 2014. The plaintiff is seeking judgment in the sum of €1,241,762.62 in accordance with three facilities provided by the plaintiff to the defendant in March 2006 and twice in July 2006. By letter of demand dated 10th September, 2013 the plaintiff demanded repayment of all monies due and owing. The defendant entered an appearance as a litigant and represented himself.

2. On the 9th December, 2014 a notice of motion for liberty to enter final judgment issued against the defendant for the sum of €1,149,808.72 returnable before the Master on the 15th January, 2014. On the 17th December, 2015 the proceedings were transferred from the Master's court to the common law motions list and from there to the nonjury list. On the 10th November, 2016 the matter was listed for hearing in the nonjury list. The matter was not reached on that date and was adjourned to the 24th January, 2017. On the 24th January, 2017 the matter was adjourned to the 31st March, 2017 in circumstances where the plaintiff required the filing of a change of solicitor which was issued on the 10th February, 2017.

3. The defendant issued a notice to cross-examine in accordance with O. 6 of the Rules of the Superior Courts on the 25th October, 2016 and the 16th January, 2017.

4. On the 27th February, 2017 the plaintiff following the notice of change of solicitors issued a notice of motion pursuant to O. 37, r. 2 to grant the plaintiff special leave to use as evidence the affidavits listed in the schedule, without producing the deponents for cross examination. The application was grounded on the application of Barbara Tanzler of AC Forde & Co. solicitors sworn on the 21st January, 2017.

5. The defendant has sworn a replying affidavit in opposition to the said notice of motion dated 15th March, 2017.

6. The substantive proceedings are listed before the nonjury list on the 31st March, 2017 for the purpose of hearing the substantive matter in respect of an application for liberty to enter final judgment.

7. Order 37 of the Rules of the Superior Court provides under rule 2:-

"Save in so far as the court shall otherwise order, a motion for liberty to enter judgment under this order shall be heard on affidavit: provided that any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination, and unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of the Master or the court, as the case may be. In cases in which the Master has jurisdiction, he shall have the same power as the court to hear oral evidence."

8. Order 40, rule 1 of the Rules of the Superior Court states that:

"Upon any petition, motion, or other application, evidence may be given by affidavit, but the court may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit."

9. Order 37, rule 2 makes it clear that where proceedings relate to summary summons matters, no such leave is required.

10. Order 40 provides instructions which must be complied with in matters in which affidavits are relied upon for the purpose of a hearing.

11. Order 40, rule 31 states:

"When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the leave of the court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production."

12. The defendant issued a notice to cross-examine Peter Glynn and Lynne Allen who swore affidavits on behalf of the plaintiff in relation to these proceedings. The notice to cross-examine were dated initially the 23rd October, 2016 and subsequently further notice on the 16th January, 2017.

13. The affidavit of Barbara Tanzler grounds the application on behalf of the plaintiff for an order pursuant to O. 37, r. 2 of the Rules of the Superior Courts granting the plaintiff special leave to use as evidence the affidavits listed without producing the deponents Lynne Allen and Peter Glynn for cross-examination. Lynne Allen swore affidavits on the 19th November, 2014, the 19th May, 2015, the 8th July, 2015, the 21st July, 2015, the 16th December, 2015 and Peter Glynn swore an affidavit on the 15th March, 2016.

14. Barbara Tanzler described the procedural history and said that it was not appropriate that Lynne Allen and Peter Glynn be subject to cross-examination in respect of their affidavits. These affidavits simply set out the plaintiff's position by reference to documents

and correspondence. The defendant has advanced the nature of his defence by way of replying affidavits throughout the exchange of affidavits.

15. Barbara Tanzler says that the plaintiff has advanced the circumstances of the loan, demand and repayment while the defendant has advanced the circumstances in which he states he is not required to repay the money and/or circumstances in which the court should transfer the matter for plenary hearing and/or dismiss the matter in accordance with O. 37 of the Rules. Barbara Tanzler also says the issue of a notice to cross-examine if allowed, will have no affect save as to delay the hearing of the application and the time and resources required for the hearing of the application.

16. Barbara Tanzler says that the matters averred to by Lynne Allen are matters of fact such as the sums due and owing, the nature of the documentation relied on by the plaintiff, the loan agreement and/or letters of demand.

17. Issues have been raised by the defendant in respect of procedural matters in that there is an allegation that an averment required in respect of the defendant having no defence to the claim was not contained in the grounding affidavit of Ms. Allen grounding the notice of motion. Ms. Tanzler says that Ms. Allen has subsequently sworn an affidavit averring to the fact that the defendant has no defence to the claim.

18. She also says that Ms. Allen has been on sick leave from the plaintiff bank since around October, 2016. In respect of the affidavit of Peter Glynn she says that Mr. Glynn has provided on affidavit evidence of his interactions with the defendant. She says that in the circumstances it is appropriate for the court to consider whether the assertions of the defendant amount to mere assertions, or a defence to the within proceedings. If the averments of Mr. Glynn amount to a defence, it will be appropriate for the court to send this matter to plenary hearing and at which time oral evidence and cross-examination will be required.

19. The first affidavit of the defendant in particular deals with issues of a procedural matter and circumstances pertaining to various court appearances and also the decision to serve a new notice for cross-examination on the 17th January, 2017. He says that the plaintiff's behaviour during the course of these proceedings had been dishonest and both Ms. Allen and Mr. Glynn made averments in their respective affidavits, in circumstances where they knew those averments to be untrue.

20. In particular, in relation to Mr. Glynn the defendant says that he exhibited a copy of handwritten notes produced by Mr. Glynn in 2005 when he was advising the defendant not to keep his money on deposit and directing that he should invest the money. He further says that Mr. Glynn did not deny that these documents were produced by him. Mr. Glynn rejected the suggestion that he gave any advice to the defendant in relation to what types of property he should purchase or that he should chose investment products for him. The defendant said that when he made a data access request to AIB in May, 2005 he did not receive a copy of the letter dated the 25th May, 2005 allegedly sent from Mr. O'Donnell at AIB to him. The plaintiff does not deny this fact.

21. In relation to Ms. Allen he says that AIB had exercised the power of sale over the three properties before Ms. Allen swore her affidavit on the 21st July, 2015. He finally says that he believes that the plaintiff's notice for special leave to use the affidavits sworn by both Peter Glynn and Ms. Allen without producing either deponent for cross-examination is being brought so as both Mr. Glynn and Ms. Allen can avoid cross-examination in relation to the averments they have made in these proceedings.

22. A motion for liberty to enter summary judgment is heard on affidavit unless the court otherwise orders and it is rare for the motion to be heard on oral evidence because if that course is appropriate, the case is one which should be adjourned to plenary hearing. In the *Criminal Assets Bureau v. Kelly* [2001] ILRM 271 O'Higgins J. rejected the submission of counsel for the defendant that the very presence of a factual dispute precludes summary disposal of a matter.

23. It is evident from O. 37, r. 7 that upon the hearing of a motion for summary judgment, the court has three main options:

- (1) to dismiss the action,
- (2) to grant judgment to the plaintiff for such relief as to which he appears to be entitled; or
- (3) to grant leave to defend with or without an order adjourning the proceedings to plenary hearing.

24. Mr. Justice McKechnie emphasised in *Harrisrange Ltd. v. Duncan* [2002] IEHC 14 that in deciding what is the most appropriate course to take, the court is obliged under rule 7 to "do what which best meets the justice of the situation" and that "is the result that must be achieved".

25. The tests for deciding whether liberty to grant judgment or whether leave to defend should be granted are essentially the same, because if judgment is not granted upon the motion, leave to defend is impliedly given to the defendant.

26. In the *First Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75 Murphy J. held in the Supreme Court that for the court to grant summary judgment and refuse leave to defend it, it is not sufficient that the court should have reason to doubt the bona fides of the defendant or doubt whether the defendant has a genuine defence. He adopted the test led down in *Banque de Paris v. de Naray* (reported 1984 1 Lloyds Reports at 21) namely that in deciding whether to grant summary judgment to a plaintiff and to refuse leave to defend, the court has to look at the whole situation to see whether the defendant has satisfied the court that there is a fair and reasonable probability of the defendant having a real or *bona fide* defence or whether what the plaintiff has said in the defence was credible. The mere assertion in an affidavit of a given situation which was to form the basis of the defence did not of itself constitute a ground for granting leave to defend.

27. These principles were endorsed by the Supreme Court in *Aer Rianta cpt. v. Ryanair Ltd.* [2001] 4 I.R. 607. The principles set out in *First National Commercial Bank plc. v. Anglin* [1996] IESC 1 were endorsed by McGuinness J., however she stated that the task of the court is "to decide" whether the defence set out on the affidavits is credible, or in otherwise whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. She went on to state that the question for the court was not whether the defendant's or plaintiff's version of events was the more probable but rather whether the proposed defence is so far-fetched or so self-contradictory as not to be credible.

28. Hardiman J. delivered a concurrent judgment in which he reviewed the authorities relating to the jurisdiction to grant summary judgment and quoted *Shepherds and Co. v. Wilkinson and Garvis* [1889] 60 LR 13 where Lord Easher had emphasised that the jurisdiction to enter summary judgment "must be used with great care" and that "a defendant ought not to be shut out from the defending unless it was very clear indeed that he had no case".

29. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. McKechnie J. set out principles to be applied by a court in deciding whether to grant summary judgment. As follows:-

*"(i) The power to grant summary judgment should be exercised with discernible caution.*

*(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.*

*(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.*

*(iv) Where truly, there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use.*

*(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".*

*(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.*

*(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 says credible'.*

*(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.*

*(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."*

30. In considering this application by the plaintiff, for special leave under O. 37, r. 2 the court does consider that the defendant has raised issues which this Court deems suitable to identify as an arguable defence.

31. The matter is listed for summary judgment on the 31st March, 2017 and this judgment will not bind whatever judge is assigned to hear the application but no doubt the parties will bring this Court's view to the attention to the judge assigned to hear the application for summary judgment. In all the circumstances, the court will grant an order in the terms of the notice of motion granting the plaintiff special leave to use in evidence the affidavits listed in the schedule without producing the deponents Lynne Allen and Peter Glynn for cross-examination at this application. However, the court has indicated it appears to be appropriate to send the proceedings to plenary hearing.