Neutral Citation [2015] IEHC 378

THE HIGH COURT

[2011/2142S]

BETWEEN

IRISH LIFE & PERMANENT TSB T/A PERMANENT TSB

PLAINTIFF

AND

PATRICK MCMAHON & ANGELA MCMAHON

DEFENDANTS

INTERIM JUDGMENT of Mr. Justice Haughton dated 12th day of May 2015

1. This judgment reflects reasons given *ex tempore* in the course of and at the close of the hearing of this matter before me on 28 April, 2015 for rejecting certain aspects of the putative defences raised by the defendants in their affidavits and in argument on that day. This is an Interim Judgment only as the matter stands adjourned to 15 June, 2015 for further affidavits/arguments in relation to one aspect of the case.

2. In these proceedings brought by summary summons the plaintiff claims against the defendants the sum of €976,360.96 together with continuing interest from 15th March, 2011 making in total as at 12th March, 2015 the sum of €1,250,215.64, claimed to be due and owing on foot of a loan Account 990695-90528470. The plaintiff's assistant manager Ms. Niamh McGee in her grounding affidavit sworn on 18th July, 2013 avers that the monies are due pursuant to a Letter of Offer dated on the 27th June, 2008, duly accepted by the defendants, under which they were lent the sum of €960,000 repayable over a 17 year period. The purpose of the loan was the financing of an investment property at 17 Shackleton House, Archers Wood, Dublin 15 and to redeem existing borrowings with the Bank of Scotland (Ireland) Ltd. It is averred that the loan went into default on or about 15th March, 2011, and despite a number of letters notifying of the default and requesting payment the defendants failed to discharge their endeavourers.

3. The defendants made an initial objection that this court did not have jurisdiction to hear this matter.

4. Firstly they suggested that, because they were not served with the originating summary summons, the court did not have jurisdiction. The plaintiff was initially unable to effect service of the originating summary summons, and by order of Mr. Justice Peart dated 27th June, 2011 it was ordered that service of the summons be affected by serving a copy, together with a copy of the order, by ordinary pre-paid post. A further order was made by the Master on 20th January, 2012 granting liberty to the plaintiff to amend the summons by amending the address of the defendants from "1 Park Lodge, Castleknock, Dublin 15" to "1A Park Lodge, Castleknock, Dublin 15", and also extending the time for endorsing the particulars of service on the summons by 4 weeks on the date of that order. The affidavit of service of Selina Lacey sworn on the 20th September, 2011 proves service by ordinary pre-paid post of a true copy of the originating summary summons, and a copy of the order of Mr. Justice Peart dated 27th June, 2011 on both defendants at 1A Park Lodge, Castleknock, Dublin 15 on 30th June, 2011, and I did not take the defendants to be denying that such substituted service had in fact taken place.

5. It appears that the defendants in fact entered an appearance on 28th January, 2013. This was entered unconditionally. Accordingly, if (and this is not accepted by the plaintiff) there was any defect in relation to the service of the summary summons, I find that that was corrected by the Appearance that the defendants entered, and that they were properly served. The defendants say that they entered the Appearance under "duress". However, while it was made known to the court that the defendants were under great pressure because of the most tragic of family bereavements, there was no evidence put forward to the court from which it could be concluded that there was any duress from any source that could undermine the validity of the Appearance. Moreover both Defendants were present in court before me. I was satisfied therefore that the court had jurisdiction and should hear the plaintiff's motion for summary judgment.

6. The defendants also raised other arguments which they claimed went to jurisdiction, but in the view of the court were more properly considered as grounds upon which they maintained that they had a *bona fide* defence and that the matter should be remitted to plenary hearing.

7. The defendants argued that the use of the summary summons procedure breached their rights under the European Convention Human Rights, and in particular the right to a fair hearing under Article 6, and under the Constitution (although no provision of the Constitution was identified). They complained that unless they were entitled to defend the proceedings fully at a plenary hearing they would be deprived of their right to fair procedures. The court did not accept this argument. It is clear that if there is no *bona fide* defence – and the threshold for identifying a *bona fide* defence is a low one – then the plaintiffs are entitled to proceed by way of a motion for a summary judgment. That procedure in itself allows ample opportunity for defendants to set out facts and arguments to persuade a court that there should be a full hearing. No authority was cited to the court to suggest that the summary summons procedure, or a motion seeking a summary judgment in an appropriate case, is not a fair procedure. It should also be noted that in the course of these proceedings 4 affidavits have been sworn by the defendants, and a further affidavit by the first named defendant, so they have in fact had every opportunity to set out the basis of any defence. These affidavits were fully opened by counsel for the plaintiff before this court on the 28 April, 2015. Also, it was never suggested that the High Court did not constitute "an independent and impartial tribunal established by law" under Article 6 for the purposes of hearing the motion.

8. The defendants also argued that in adopting this procedure the plaintiff was taking unfair advantage of the defendants as persons 'ignorant of the law'. They were not represented by solicitors or counsel, and I accept that this was by economic circumstance rather than by choice. Nonetheless they demonstrated in argument that they had researched and prepared their responses and that they had acquired some knowledge of the law and practice. More importantly, both in argument and on affidavit, they were well able to raise and communicate their arguments by way of defence, and it certainly could not be said that they were acting under any disadvantage. This in itself therefore cannot give any ground for defence, or prompt the court to defer the matter to plenary hearing on any precautionary basis.

9. The defendants argued that the plaintiff's evidence was not before the court because there was no proof/evidence that the deponents, Ms. Niamh McGee, Ms. Miriam Waldron and Ms. Jacqueline O'Brien were officers of the plaintiff. This is simply not the case as Ms. McGee states in her affidavits that she is an assistant manager in the collection department of the plaintiff bank and duly authorised to make the affidavit on behalf of the plaintiff and does so from an examination of the books, accounts and records of the plaintiff in relation to the defendants and from facts within her own knowledge, and similar averments appear in the affidavits of Ms. Waldron (Head of Securitisation of the plaintiff bank), and Ms. O'Brien (Manager in the Collection Department of the plaintiff bank whose affidavit was sworn in order to update the figures).

10. The defendants also suggested that there was no evidence before the court that Mr. O'Kelly of Donal O'Kelly & Co. Solicitors for the plaintiff, was duly authorised to bring and prosecute these proceedings on behalf of the bank. In support of this they also pointed to the fact that there was no representative (in the sense of an employee or officer) of the bank present in court during the hearing. Mr. O'Kelly was in fact in court attending counsel throughout the hearing. There was no evidence before the court to suggest that he was not properly appointed, authorised and acting on behalf of the plaintiff throughout these proceedings, and it seems to me that this cannot give rise to any defence, or even a procedural objection in the absence of any such evidence. Indeed the presence of Mr. O'Kelly in court, and the name of his firm on the special summons and other documentation created on behalf of the plaintiff in these proceeding is evidence from which the court is entitled to presume that Donal O'Kelly & Co. are properly acting on behalf of the plaintiff in these proceedings.

11. With regard to the suggestion by the defendants that the plaintiff could not proceed because they did not have a representative of the plaintiff in court, this point was entirely misconceived. As the matter proceeded on affidavit evidence, and no question had arisen as to cross-examination of any of the deponents on their affidavits, it was not necessary for any representative of the plaintiff or any of the deponents of affidavits on behalf the plaintiff to be present in court.

12. The defendants then argued that it was not appropriate for Ms. McGee, a bank employee, to state in para. 11 of her principal and grounding affidavit that "I say and believe that the Defendants have no *bona fide* defence to these proceedings and the appearance has been entered solely for the purpose of delay". They say that the deponent fails to state the source of her belief. While that is so, this is a standard averment in an affidavit grounding motion for summary judgment, and it would seem to be no more than a statement of the deponent's belief as to the legal position. This is really a matter for the court whose task is to determine whether any defendant has a good defence or ought to be permitted to defend the action. I am certainly not satisfied that a failure to state the source of the deponent's belief in itself gives rise to any ground of defence in this instance.

13. Next, the defendants raised a technical issue arising out of the fact that the affidavit of Ms. Waldron sworn on behalf of the plaintiff on 28th February, 2014 at para. 5 says that "[i]n relation to paragraphs 8-15 of the Defendants' Affidavit I say that these appear to deal with queries relating to the securitization process involving Fastnet Securities 7 Limited. I will deal with these issues, whereas my colleague Niamh McGee ***has sworn*** an Affidavit which deals with the remaining issues raised by the Defendants in their Affidavit of the 9th of December, 2012. I make the following points in regard to the securitization process…." (emphasis added).

14. In fact the affidavit of Niamh McGee dealing with "the remaining issues raised by the Defendants in their Affidavit of the 9th of December, 2012" was only sworn by her on 25th March, 2014, so that technically Ms. Waldron's reference to her having "sworn an affidavit" at the time she swore hers was incorrect. I note that the affidavit sworn by Niamh McGee on 25th March, 2014 does in fact deal with the other issues raised by the defendants in their affidavit of 9th December, 2012. I also note that the affidavit was prepared in print with the date for swearing of blank day of February, 2014, but was not sworn till the 25th March, 2014. It is therefore possible to speculate that Ms. Waldron saw the affidavit to be sworn by Ms. McGee in draft. However, even if this averment was technically inaccurate it was not of any materiality, and does not in itself invalidate her affidavit or any of the material averments sworn on 28th February, 2014, and accordingly this objection also does not give rise to any *bona fide* defence.

15. The defendants also argued that and the plaintiff had failed to exhibit the original loan agreement, alleged default of which forms the basis of their action. However, Ms. McGee in her first grounding affidavit exhibits what she avers to be "a true copy of the said Letter of Offer [dated 27th June, 2008] and the Special Conditions and the Permanent TSB Terms and Conditions referred to therein" as exhibit A. She is a bank official and makes her affidavit "from an examination of the books, accounts and records of the Plaintiff". Accordingly the plaintiff is entitled to rely on Bankers' Books Evidence Acts for proving the loan agreement by reference to copy entries and copy documents because on their face these documents are books of the bank and the entries in them have been made in the usual and ordinary course of business of the bank, and clearly these are documents that are within the custody or control of the bank.

16. The defendants then refer to alleged breaches by the plaintiff of the "Central Bank of Ireland Code of Practice on the Transfer of Mortgages", and the document headed "Central Bank of Ireland Asset Securitisation" which contains "Conditions to be satisfied for transferred assets to be exempted from the calculation of a credit institution's capital adequacy position."

This was raised in the context of the defendants' assertion that the plaintiff had sold/securitised the defendants' loan to Fastnet Securities 7 Ltd. They claim that as the loan has been settled on a third party the plaintiff has no privity of contract with the defendants, and no basis upon which it could sue them for the alleged default either in respect of principal or interest. They further asserted that the security in respect of the borrowing had also been sold to Fastnet Securities 7 Ltd. They said therefore that the plaintiff is not entitled to maintain these proceedings.

17. The court dealt with one aspect of this at the hearing on 28th April, 2015 namely the alleged breach of the Central Bank of Ireland Code of Practice. In *Freeman & Anor v Bank of Scotland plc & Anor* [2014] IEHC 284, McGovern J at p. 9 referred to the fact that these are voluntary codes and stated that "[i]t is clear, therefore, that non-compliance with a statuary code does not relieve a borrower from his obligations under a loan to repay the lender, nor does it deprive the lender of its rights and powers under the loan agreement."

I accept that as correct, and accordingly even if the defendants where able to show breaches of the Codes that would not afford them any *bona fide* defence.

18. The defendants also expressed on affidavit "grave doubts as to the actual validity of the bank['s] licence and the status of their solvency/insolvency". They were thus suggesting a defence that the lending to them was not a legal contract. The suggestion of a defence of this nature has been considered in a number of cases, and most recently by Kearns P in *Harrold v Nua Mortgages Ltd* [2015] IEHC 15 where he cited with approval the decision of Birmingham J in *Kearney v KBC Bank Ireland plc and others* [2014] IEHC 260 in the following terms:-

> "The contention that the bank is or was insolvent or has failed to prove its solvency, again, assuming in favour of the

> plaintiff for the purpose of this exercise that this is or was the situation, something which is of course firmly denied by the bank, this does not have any impact or effect on the validity or enforceability of the loan arrangements and mortgages entered into between the plaintiff and the bank and certainly would not provide the plaintiff with a cause of action. The obligation to repay remains in full force and effect whether the bank is solvent or insolvent."

I respectfully follow these authorities.

19. Securitisation

It is common case that the defendant's loan was "securitised", and it appears that this happened on 20th March, 2009. The process by which this was undertaken appears to involve a Mortgage Sale Agreement and the Mortgage Management Agreement. The plaintiff contends that as only the beneficial interest is transferred the legal title to the mortgage loans remains with the plaintiff, and hence no notice of the sale to the borrowers is required and the plaintiff, as legal owner of the loan, is entitled to maintain these proceedings. The plaintiff also says that as it is appointed as the Mortgage Manager under the mortgage management agreement, as agent for the transferee of the beneficial interest, it is entitled to maintain these proceedings. The court directed that copies of this securitisation documentation should be put on affidavit, and that the defendants should have an opportunity to consider that affidavit and respond. Accordingly, the question of whether there may be any *bona fida* defence or not under this heading has been adjourned for the further consideration of this court to 15th June, 2015. However, the court has made it clear that, apart from any possible defence under this heading, the defendants have failed to show that they have any *bona fida* defence to the plaintiff's claim.