THE HIGH COURT

[2017 No. 416 S]

BETWEEN

LAUNCESTON PROPERTY FINANCE DAC

PLAINTIFF

AND

JOHN WALLS

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 2nd day of November, 2018

1. The plaintiff brings the within motion for summary judgment as the successor in title of Anglo Irish Bank Corporation Plc which advanced two loans totalling just over €1 million to the defendant in 2008. The advances were made on foot of a loan facility letter of the 22nd September, 2008 in the amounts of €941,000 and €119,000 respectively, being in total €1,060,000.

2. Certain loans held by Anglo's successor Irish Bank Resolution Corporation Ltd, were sold in 2014 by IBRC to the plaintiff. The loan portfolio sale included the defendant's loans which are the subject matter of these proceedings.

3. Default occurred on the loan facilities and a demand for payment was made by the plaintiff on the 8th November, 2016 at which time the amount due on foot of the facilities was €1,326,819.78. Interest has since then continued to accrue. The plaintiff issued a summary summons on the 9th March, 2017 and a motion for summary judgment on the 26th May, 2017.

4. There is no dispute between the parties that the monies were advanced and not repaid nor is there any dispute as to the amount claimed. Although in the replying affidavits delivered by the defendant, a number of issues are canvassed, at the hearing of the motion before me, these essentially resolve down to three points advanced by the defendant which are said to give rise to an arguable defence sufficient to have the matter remitted for plenary hearing. I propose to deal with each of these in turn.

5. The first and principle ground relied upon by the defendant is that the plaintiff's claim has been the subject matter of a binding compromise entered into between the parties in 2016. It is alleged that this compromise was negotiated between the defendant's solicitor, James Flynn, who has sworn two affidavits, and Robert Dowling, an asset manager employed by Pepper Finance Corporation as agents for the plaintiff. The defendant's case in this regard is set out at para. 8 of Mr. Flynn's first affidavit sworn on the 27th July, 2017:

> "8. I say that in September 2016 discussions took place between Mr. Robert Dowling of Pepper Finance and your deponent. I say that I understood these discussions to result in a concluded agreement wherein a valuation of the lands contained in the aforementioned Folio 4173 of County Dublin would be procured from an agent nominated by Mr. Robert Dowling, and when same were to hand this would be determinative of a compromise figure. I say that this agreement was reached in early November 2016 and the defendant's obligations thereunder were complied with insofar as a report was procured from Pepper Finance's nominee and the appropriate valuation amount was offered in full and final settlement…"

6. This version of events is strongly contested by the plaintiff. Mr. Dowling has sworn an affidavit in which he accepts that it was agreed that a valuation report would be obtained but he vehemently disputes the proposition that any binding compromise was arrived at. In that regard, Mr. Dowling exhibits a chain of emails passing between himself and Mr. Flynn which culminated in the following exchange on the 2nd November, 2016, the date upon which Mr. Flynn alleges that a binding agreement was made:

> "12.07
>
> Robert,
>
> I attach copy of valuation which I have only received this day. I understand from Mr. Farley that you have already been furnished with a copy. I await hearing from you.
>
> Regards,
>
> James Flynn.
>
> 12.14
>
> Without prejudice
>
> Subject to contract/contract denied
>
> James,
>
> What is your client's proposal in respect of his outstanding liabilities?
>
> Regards
>
> Robert
>
> 12.23
>
> Robert,
>
> The independent valuation of the lands which are landlocked is circa €108,000. What will your clients accept? Please treat as a matter of extreme urgency.

Regards

James Flynn

12.43

Without prejudice

Subject to contract/contract denied

James,

Our client would accept full repayment of the loan.

If you (*sic*) client is not in a position to make a full repayment, can you please ask him to send to me his proposal in respect of outstanding liability.

Kind Regards,

Robert

13.47

Robert,

Our client's circumstances as well as his health has deteriorated. The offer is the value of the lands at €180,000.

Regards,

James Flynn."

7. In his second affidavit, Mr. Flynn refers to the fact that agreement was reached to compromise the plaintiff's intended proceedings on the basis that the defendant would pay the plaintiff the market value of the securitised land in full and final settlement of the intended claim against him. He does not identify when this alleged agreement was reached, save it was apparently in September 2016 although para. 8 of Mr. Flynn's first affidavit is ambiguous in that regard suggesting the agreement had been reached in September and then on the 2nd November. How the agreement was reached is not stated and certainly the email chain which includes emails from September exhibited by Mr. Dowling goes no further than showing that it was agreed between the parties that a valuation would be obtained. The valuation report exhibited by Mr. Flynn shows that the value of the land as it stood was €108,000 with a prospective value of €256,500 in the event of access being obtained to it. Apparently as the land then stood, it was landlocked.

8. Mr. Flynn avers that he contacted Mr. Dowling by telephone indicating his client's willingness to pay the sum of €108,000. This is however contradicted by the email above by which Mr. Flynn conveyed an offer of €180,000 and whether this is a typographical error or not is not canvassed by Mr. Flynn in his affidavits.

9. The email exchange referred to above seems to me to be entirely inconsistent with the suggestion that a binding compromise was entered into on the same date. If such a compromise had been arrived at, it is surprising that six days later, on the 8th November, 2016 the plaintiff demanded repayment of the full amount outstanding and on the 13th November, 2016, appointed receivers over the lands in question.

10. Arising out of the alleged compromise referred to above, Mr. Walls commenced plenary proceedings against Launceston in which he sought an interlocutory injunction to restrain the sale of the property on the same basis i.e. that a binding compromise was made. That application came on for hearing before McDonald J. in June of this year and he delivered an ex tempore judgment on the 14th June, 2018 having heard two days of argument. Of particular note in relation to those proceedings, the affidavits relied upon by Mr. Walls are the same affidavits that are before the court in this summary judgment application. McDonald J. considered the content of these affidavits in considerable detail and I gratefully adopt his analysis of them. In dealing with the emails to which I have referred above, McDonald J. noted (at p. 17):

> "What is I think of great significance is that Mr. Flynn does not, in fact, deal with the detail of the emails, although as we will see in a moment, those emails appear *on their face*, and I emphasise those words 'on their face' to be inconsistent with the agreement for which he contends."

The court went on to refer to para. 6 of Mr. Flynn's affidavit where he said:

> " 'I beg to refer to para. 8 of your deponent's affidavit sworn in these proceedings on the 27th July, 2017. I say that your deponent had a number of telephone conversations with Mr. Robert Dowling wherein agreement was reached to compromise the plaintiff's intended proceedings on the basis that the defendants would pay the plaintiff the market value of the securitised land in full and final settlement of the intended settlement against him.'
>
> If I may pause there. Clearly that sentence is reiterating the terms of the agreement but all it says about how the agreement came to be formed is that there were a number of telephone conversations with Mr. Robert Dowling. There is no material placed before the court either by way of evidence from Mr. Flynn or by reference to any supporting material, such as the solicitor's memorandum of a telephone conversation or a letter to a client recording what was said in a telephone conversation or anything of that kind, as to how the agreement came to be formed and that is a crucial issue in the proceedings in light of the evidence that has been given by Mr. Prendiville and, more particularly, by Mr. Dowling."

11. McDonald J. went on to consider the email exchange to which I have referred above which he notes occurred in the context of Mr. Flynn at that stage being aware of the contents of the valuation report dated the 27th October, 2016. McDonald J. observed (at p. 21):

> "Having regard to the agreement that Mr. Flynn contends for, one would expect that there would be a simple email from Mr. Flynn to Mr. Dowling saying something to the effect; in light of the report that has been provided by McPeake

> Auctioneers, it is clear that the amount that is due to your client to discharge my client's indebtedness to your client is €108,000 and that is what my client will pay. But that is not what Mr. Flynn says. In fact, the language that Mr. Flynn uses is inconsistent with the existence of an agreement."

Commenting further on the emails of the 2nd November, 2016 and in particular, the one in which Mr. Flynn asks Mr. Dowling what the plaintiff would accept, McDonald J. says:

> "Now I find it very difficult to understand, Mr. Flynn may have an explanation for this, as to why if there was already an agreement to pay €108,000 because that is what Mr. Flynn says the agreement was, why would he be asking Mr. Dowling at that stage: '*what will your clients accept*?'
>
> Yet that is the question which is asked."

12. The judge went on to consider the use of the word "offer" in the context of an offer of €180,000, and says (at p. 23):

> "I think there is a typo there, he says '180,000'. I think he meant to say, looking at his affidavit, '108,000'. But, again, the use of the words 'the offer' certainly on the face of it is inconsistent with the agreement for which Mr. Flynn contends and, in my view, Mr. Flynn, having this material that was put before the court, had an obligation to explain himself, if the court was to be persuaded that there is a fair question to be tried on this issue."

13. Having considered all the evidence, the court's conclusion on the application for the interlocutory injunction was as follows (at p. 24):

> "…in my view the plaintiff failed to meet the very low threshold which exists in this case which is to establish a fair question to be tried. I fully accept it is a low threshold but it does seem to me that that threshold is not met in the present case in circumstances where fairly basic questions were raised about the evidence placed before the court by Mr. Flynn in his first affidavit and were not addressed by Mr. Flynn in his second affidavit and as a consequence of which the court has no information at all as to how this, or certainly no detail at all, as to how this contract or compromise was alleged to have been arrived at."

14. Of course I accept that I am not in any way bound by the determination of McDonald J. in relation to the entirely different form of application with which he was dealing. However, it seems to me that in coming to a conclusion as to whether the defendant in these proceedings has raised a fair or reasonable probability of having a bona fide defence, I cannot ignore the fact that on exactly the same evidence, this court concluded that Mr. Walls had not even established a fair question to be tried. Although the test to be applied in interlocutory injunction proceedings is not the same as that to be applied in determining whether a sufficiently arguable defence has been raised to warrant the matter being remitted to plenary hearing, it seems to me that the tests are not a million miles apart and it would be a somewhat surprising outcome for the court to conclude, on the one hand that the defendant had not even raised a fair question to be tried while on the other having an arguable defence on precisely the same question.

15. The appropriate test to be applied in a case of this nature was considered by the Supreme Court in *IBRC v. McCaughey* [2014] IESC 44 where Clarke J. (as he then was) said the following (at para. 5.5):

> "Insofar as facts are put forward, then, subject to a very narrow limitation, the Court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta*. It needs to be emphasised again that it is no function of the Court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

16. In my view, all that is advanced by way of defence on the compromise point are mere assertions. Not only are these assertions not supported by any evidence but the uncontroverted evidence that does exist is in my view entirely contradictory of those assertions for the reasons identified by McDonald J. Nor do I believe that there is any realistic suggestion that evidence might be available to support assertions which are inherently contradictory to the documentary evidence.

17. In that regard it is suggested that recordings of the phone calls between Mr. Flynn and Mr. Dowling may assist the defendant's case. I note however that the defendant sought to bring a motion for discovery of the recordings of those phone calls which it withdrew. There is some dispute as to the basis upon which the motion was withdrawn. The plaintiff says that it was withdrawn because it advised the defendant that there were no such phone calls. On the other hand, the defendant says that it was withdrawn because the case was compromised.

18. Either way, it seems to me that the defendant has not advanced any realistic basis upon which the court could come to the conclusion that an arguable defence had been raised on the purely speculative basis that discovery might throw up something which would contradict the evidence that is actually before the court. The suggestion that such evidence might be forthcoming is not in my view realistic and if it were, the defendant should have proceeded with his motion for discovery once it became clear that the application for summary judgment was proceeding.

19. I turn now to the second matter argued by way of defence to his application arising from para. 14 of the defendant's affidavit where he says:

> "Further, and without prejudice to the foregoing, I say that it is my belief that Anglo Irish Bank advanced the sum of circa €1 million to your deponent in a personal capacity without conducting any, or any adequate investigations or inquiry into my capacity to repay the amount loaned. Such investigations and/or inquiries should have been carried out as a matter of course in order to protect the bank and its shareholders. I am of the view that the manner in which the bank conducted its business with respect to your deponent amounted to a want of care on the part of the bank, its servants and/or agents, and as a result Anglo Irish Bank are accountable for some, if not all, of the loss which they, their successors and/or assigns claimed to have suffered thereby. I say and am advised that in the circumstances, the defence of contributory negligence arises in respect of the within proceedings."

20. It is common case between the parties that our law does not recognises a tort of negligent or reckless lending. That has been held in many cases. However, counsel for the defendant argued that this did not exclude a defence of contributory negligence under s. 34 of the Civil Liability Act, 1961. In effect it was suggested that the negligence of a lender in advancing money to a borrower can be used as a shield rather than as a sword. Section 34 of the 1961 Act provides:

> "34.—(1) Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant…"

21. In my view, this argument is entirely misconceived. Counsel argued that a breach of contract had occurred in this case and thus the claim was in respect of a "wrong" within the meaning of the 1961 Act. Whether a claim for money due on foot of a contract of loan were to be regarded as an action in breach of contract, on which I express no view, s. 34 clearly applies to an action in which it is alleged that damage has been suffered by the plaintiff. The word "damage" is defined in s. 2 of the Act as including "loss of property, loss of life and personal injury".

22. It seems to me that a claim for money due and owing cannot be regarded as a claim for "damage" and accordingly one that is covered by s. 34. It would be quite anomalous if a claim for damages for negligent lending could not be maintained under our law but the same claim could be advanced by way of a defence at common law. Reliance was placed by the defendant on the judgment of Fennelly J. in *KBC Bank Ireland Plc v. BCM Hanby Wallace* [2013] 3 I.R. 759. In that case, the plaintiff bank sued its former solicitors for failing to perfect certain securities pledged by way of security for the borrowings of two borrowers. The bank suffered loss as a result and sued the solicitors for negligence. The solicitors pleaded contributory negligence on the basis that they alleged that the bank had failed to conduct any or any adequate inquiries into the creditworthiness of the borrowers. In his judgment, Fennelly J. considered that contributory negligence on the part of the bank could indeed arise as a cause of the loss suffered by it.

23. That decision has no applicability to the facts of the present case. That was a negligence action for loss which clearly fell squarely within the ambit of the Civil Liability Act and thus the defence of contributory negligence was open.

24. Counsel also relied upon the dicta of McDermott J. in *AIB v. Fahey* [2016] IEHC 192 where, at p. 12, he said:

> "19. Mr. Fahey maintains that he 'may be entitled to rely on the defence of contributory negligence on the part of the plaintiff and discovery is necessary to establish his defence more fully'. Though a defence of contributory negligence may be raised against a lender, as set out in *KBC Bank Ireland Plc. v BCM Hanby Wallace* [2013] IESC 32, in very limited circumstances, no evidence has been advanced to support any such defence beyond the speculative assertion set out in Mr. Fahey's affidavit. This does not provide the defendant with an arguable or credible defence."

25. I do not think that the foregoing passage from the judgment can be taken as authority for the proposition that the defence of contributory negligence is available to a borrower when sued by a lender for money due. Although McDermott J.'s comment was clearly obiter as he had determined that there was no evidence which could sustain an arguable defence of contributory negligence, I think his reference to *KBC* and "very limited circumstances" has to be seen in the light of the observations I have made above. Contributory negligence may of course be raised against a bank in circumstances where it sues a third party for damages for negligence typically such as a solicitor, surveyor or valuer. That is of no materiality to a claim by a lender for money due.

26. The third and final issue raised by way of defence was that the plaintiff's proofs are not in order because the loan transfer deed evidencing the transfer of the defendant's loan, inter alia, from IBRC to the plaintiff although exhibited in the plaintiff's affidavits is heavily redacted. The defendant suggests that the court and the defendant is entitled to see the deed in its entire unredacted form to determine whether it does in fact establish what the plaintiff alleges and that it is not entitled to put a redacted document before the court.

27. I reject that submission. It is by now well settled that in claims of this nature involving loan portfolio sales, it is established and accepted that plaintiffs are entitled to redact documents for reasons of commercial sensitivity and privacy rights of third parties. As Hedigan J. noted in *IBRC v. Halpin* (High Court Unreported 3rd November, 2015):

> "6. It is well established that documents may be redacted on the grounds of confidentiality, privilege or relevance, see *G.E. Capital Corporate Finance Group Limited v. Bankers Trust Co.* [1995] 1 WLR 172. In particular, I note the comments of Dillon L.J. at p. 177 of the judgment:-
>
> The history over the last 100 years of the practice of sealing up or covering over parts of documents which are disclosed on discovery on the ground that those parts are irrelevant is strongly against the other party having any automatic right to see the whole of the document in order to determine for himself whether the parts covered up are indeed irrelevant to the issues in the action. Indeed, the established practice of sealing up or covering over parts of documents would hardly have developed if the other party could immediately break the seal or tearaway the cover to see the contents for himself.'
>
> 7. Thus, it is simply not enough for a party to say that he wishes to see the document redacted since that would negative the right to redact. He must present some concrete argument that can lead the court to order the unredaction. In his argument today, the defendant can only say that he does not know what is contained in the redaction but would like to see so as to consider whether it might be relevant or helpful. This, in my view, is not sufficient. In the context of discovery, it would classically be considered a 'fishing expedition'. In discovery procedures, this is never allowed. In these proceedings, it cannot be allowed either."

28. I am satisfied therefore that the plaintiff was entitled to exhibit the redacted loan sale agreement here and that such parts as remain unredacted establish the transfer of the defendant's loans to the plaintiff. It must also be said that the defendant has not identified any particular reason why the unredacted document should be made available to him but it can only be for the purpose of determining whether or not he might be in a position to mount some form of challenge to the transfer of his loan to the plaintiff. That is however quite inconsistent with the first ground of defence advanced by the defendant, namely that he entered into a binding compromise of his indebtedness to the plaintiff.

29. For these reasons therefore, I am satisfied that the defendant has failed to establish that he has a fair or reasonable probability of having a bona fide defence as that expression is used in the leading case of *Aer Rianta v. Ryanair* [2001] IESC 94. To apply the

phrase used by Hardiman J. in the same case, it is clear to me that he has no defence.

30. Accordingly, the plaintiff is entitled to judgment for the sum claimed.