THE HIGH COURT

[2015 1665 S]

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

V.

GERARD BUTTERLY

AND

EMMA BUTTERLY

DEFENDANTS

JUDGMENT of Ms. Justice Creedon delivered on the 30th day of January, 2018

BACKGROUND

1. This concerns an application for summary judgment in the sum of €117,918.59 being taken by Bank of Ireland Mortgage Bank, the plaintiff, against Gerard Butterly and Emma Butterly, the defendants.

2. By letter dated the 11th September, 2007, (hereinafter the "letter of offer"), the plaintiff offered, and the defendants accepted, a loan in the total amount of €300,000, together with interest thereon, for a term of 25 years (hereinafter called "the loan").

3. The loan was accepted on or about the 24th November, 2007 and the full amount of the loan was drawn down by the defendants on the 20th December, 2007.

4. For the first seven years, until 2014, the defendants were to make interest only repayments. Thereafter, capital and interest repayments would become due and owing.

5. It was a term of the loan that in the event of any repayment not being paid, the loan was to be repayable immediately, on demand.

6. A default occurred, and the plaintiff called in the amount outstanding (€302,185.89), by letter of demand dated 28th January, 2015. Said sum is inclusive of arrears of €951.43 outstanding as of the 28th January, 2015.

7. By letter dated the 14th August, 2015, the plaintiff's solicitors wrote to the defendants informing them that the sum outstanding on the loan as at the 7th August, 2015 was €304,245.23, which sum was inclusive of arrears of €11,856.87.

8. Proceedings were issued by summary summons on the 27th August 2015.

9. It is not disputed between the parties that payments of interest only were to be made by the defendants for the first seven years of the loan. Interest only payments were made as agreed until November 2011, when one payment was missed. In December 2011, payments recommenced. The missed payments from November 2011 remained on the defendants' loan account. In December 2014, the loan account went into further arrears and thereafter the arrears continued to accrue.

10. The plaintiff bank did appoint a receiver over the property at 51 Manydown Close, Dundalk Co. Louth on the 13th May 2015. The property was rented by the receiver. The property achieved a rental income of €700 per month. The rent for the months of May 2015 and June 2015 were paid by the tenant directly to the defendants. The receiver's office received the rent of €700 per month for the months of July 2015, August 2015, September 2015 and October 2015 and the tenant then vacated the property in November 2015 and no rent was received thereafter. The total rent collected by the receiver for the months from July 2015 to October 2015 inclusive was €2,800. The receiver's costs of €1,005.92 were deducted from the rent received and a balance of €1,794.08 was applied was applied against Loan Account 37045739 on the 16th February 2016.

11. The property was sold by the receiver in June 2016 and the proceeds of sale of €190,167.31 were applied against the loan account on the 27th and 28th of June, 2016. Prior to selling the property, two independent valuations were carried out by the plaintiff bank. The property was first inspected by REA Gunn on the 16th June 2015, which advised that the market value of the property was between €180,000 and €190,000. The property was then inspected by DNG Duffy on the 19th June, 2015, which advised that the market value of the property was between €185,000 and €195,000.

12. The first named defendant contends that in June 2015, he was invited to a meeting by an employee of the plaintiff bank, named Mr. Gerry Gill. He attended the meeting with his financial adviser, Mr. John Higgins. The defendant states that the meeting was organised ostensibly to discuss his and his wife's indebtedness in respect of his family home at Lordship, Dundalk Co. Louth. However, when he attended the meeting, the defendant contends that Mr. Gill was instead keen to discuss the property at 51 Manydown Close. The first named defendant contends that Mr. Gill indicated that if the defendants were agreeable to an extension of the interest only payments for twelve months, then the bank would remove the receiver, and the loan would be consolidated to allow for a further twelve month period of interest only payments. The defendant avers that he indicated his agreement to this and, relying on the representation made, instructed his financial adviser to write to Mr. Gill outlining the substance of what had been agreed. He exhibited a letter dated the 24th July, 2015, sent to Mr. Gerry Gill, Bank of Ireland, by Mr. John Higgins. The defendant contends that in agreeing to extend the interest period and instructing his financial adviser to crystallise that agreement in writing, he took steps on foot of the agreement, which he contends was subsequently reneged upon, by the bank. In the original pleadings the defendants put forward four grounds which he argued constituted a legitimate defence. At hearing, these grounds were reduced to two:

> (1) That the receiver has failed to act appropriately in advertising the secured property, causing it to be sold at a gross undervalue and therefore, the amount of credit that has been afforded to the first and second named defendants is considerably less than it should be. In this regard, the defendants rely on the fact that the valuations exhibited in the affidavit were obtained within a very short time frame (both in June 2015) and that no updated evaluation was ever received, before the property was sold in June 2016. The defendants also state that an updated valuation sought by

them on the 7th March, 2016, from Anthony McArdle, valued the property at €220,000.

(2) That at the aforementioned meeting, dated 10th June, 2015, an agreement arose to vary the terms of the defendants' loan and the plaintiff should now be estopped from seeking to recover judgment in the sums claimed. It is also noted by the defendants that Mr. Gill was no longer available to give evidence and that the bank cannot locate any notes on file of the meeting. An issue of fact therefore arises as to what arose at that meeting.

13. With regard to the defendants' contention that the receiver acted improperly, the plaintiff put forward the following arguments: -

(1) The receiver is not a party to these proceedings.

(2) No application was ever made by the defendants to remove the receiver.

(3) The counter claim is against the receiver and not the bank and a new counter claim against the receiver on foot of these proceedings is not good in law.

14. With regard to the alleged meeting on the 10th June, 2015, the plaintiff contends as follows: -

(1) That all of the affidavits before the court confirm that the bank never followed through with this agreement.

(2) Mr. Higgins commented in his letter to Mr. Gerry Gill dated the 24th July, 2015, that "*we were of the* **understanding** *that* **you were going to seek approval** *for the removal of the Receiver and that Mr. Butterly would recommence paying monthly interest only from January 2015 for a 12 month period.*" (Emphasis added). It is argued that the terminology used by Mr. Higgins here, to characterise the meeting, indicates that it did not give rise to a binding agreement, varying the terms of the loan.

LAW

15. The authoritative case in respect of summary judgment is the case of *Aer Rianta v. Ryanair* [2001] 4 IR 607. At p. 615 of her judgment, McGuinness J held that the that the task for the court in such case was: "*to decide whether… the defence set out in the affidavits…is credible, or in order words, whether there is a fair or reasonable probability of the defendant having a real or bona fide defence*". She clarified that it was not for the court to discern which of the parties' versions of events was most plausible, but rather "*whether the proposed defence is so far fetched or so self contradictory as not to be credible*". Hardiman J concurred and further stated "*that the defendant's hurdle on a motion such as this is a low one and the jurisdiction is one to be used with great care*". He cited with approval the judgment of Lord Esher in *Sheppards and Co. v. Wilkinson and Jarvis* (1889) 6 TLR 13 which stated that "*a defendant ought not to be shut out from defending unless it was very clear indeed that he had no case".*

16. The case of *Harrisrange Ltd v. Duncan* [2003] 4 IR 1 was referred to, wherein McKechnie J at p. 7 gives the following guidelines as to the way in which the court should wield its power to grant summary judgment:

"(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?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;*

(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."

17. *Governor and Company of the Bank of Ireland v. John Flanagan* [2015] IECA 55 was opened and quoted from by the plaintiff. In this case, the defendant set out a number of defences including the fact that there had been an alleged agreement in place that varied the terms between parties; a term that provided repayment of a sum due and owing on the defendant's current account, "*was*

replaced by the discussions and agreements in or around October/November 2009 on the consolidation of all connected commercial facilities". It was also claimed that discussions surrounding such a consolidation agreement had not been finalised. The Court of Appeal noted that on the contrary, a letter from the plaintiff dated 14th of October, 2010, stated that the bank was unwilling to consolidate the defendant's accounts and that no agreement arose. It was held that there was an absence of a reasonable probability that the defendant had a real or bona fide defence and that the defendant did not clear the threshold to warrant the referral to a plenary hearing. The Court of Appeal quoted Murphy J in *First National Commercial Bank plc v. Anglin* [1996] 1 IR 75 where the threshold was summarised:

> *"For the court to grant summary judgment to a plaintiff and to refuse leave to defend, it is not sufficient that the court should have reason to doubt the bona fides of the defendant nor to doubt whether the defendant has a genuine cause of action… in my view the test to be applied is that laid down in Banque de Paris v. de Naray [1984] 1 Lloyds Law Report 21…: 'The mere assertion in an affidavit of a given situation which was to be the basis of the defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of the defendants having a real or bona fide defence."*

18. The plaintiffs opened the case of Ennis Property Finance DAC v. Raymond Murphy [2017] IEHC 573, where it was posited by the defendant that the receiver did not comply with his duties in common law or statute with regards to getting the best sales price for his property. Barrett J held at p. 4:

> *"Mr Murphy points to deficiencies in the appointment and actions of the receiver, whom he avers did not account to him for sales proceeds and, in truth, acted as the agent of Ennis Property and not as his agent. There is nothing in the evidence, beyond Mr Murphy's bare averment, to suggest that the receiver acted as the agent of the plaintiff. As to the validity of the receiver's appointment, it is striking that Mr Murphy did not seek to challenge the appointment of the receiver while the receivership was extant. The court does not see that such a challenge would now serve much practical purpose given that the receivership has concluded and the funds raised by the receiver through the disposal of secured assets have been applied against Mr Murphy's liabilities to Ennis Property. But such a challenge, even if it were to proceed, could not amount to a defence to Ennis Property's present claim for judgment in respect of loan facilities which Mr Murphy has expressly accepted in his affidavit evidence that he obtained."*

He continued:

> *"As to Mr Murphy's mooted claim against the receiver for allegedly not obtaining the best price for the secured properties, that is a line of potential action that exists between Mr Murphy and the receiver; it is not a defence to the within summary application that Mr Murphy might be entitled to an indemnity from a non-party were that non-party to be joined to the within proceedings if the within application was to be referred to plenary hearing."*

19. The defendants note that there is a statutory obligation on a receiver to achieve the best price reasonably possible for a security property in commercial cases, pursuant to the Companies Acts 2014. On this point, *Ruby Property Company Ltd, John McNally and Catherine McNally v. Raymond Kilty and Superquinn* [1999] IEHC 50 was opened to the court. In his judgment, McCracken J quoted Section 316A of the previous Companies Acts, 1963 as providing:

"A Receiver, in selling property of a company, shall exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of sale". McCracken J stated that this provision amounted to a statutory acknowledgement of the position at common law. As a result, in the instant case, the defendants argue the existence of an analogy between the common law duty owed by receivers in commercial circumstances to obtain the best price possible for a secured property, and a similar duty owed by receivers appointed over residential property.

20. The case of *Ennis Property Finance Ltd v. Alan Hynes and Noreen Hynes* [2016] IEHC 387 was opened to the court by the defendants. A number of defences were raised in this case, including that the sale price achieved by the receiver was at a significant undervalue. Costello J noted that the defendant "*led no valuation evidence which related to the date of the receivership, March, 2009, or for the dates of the realisations of the various properties between February, 2010 and June, 2012. Thus, she did not establish the factual basis upon which to advance this claim*". Ultimately, she held that "*the receiver carried out his duties in a proper fashion and that the sums realised, net of all relevant expenses and costs, have been duly remitted to the Bank and credited to the respective accounts of the defendants as set out in the evidence of Mr. Hepburn. The conduct of the sales of the properties and the realisation of the proceeds of sale has been properly accounted for. It does not establish a defence by the second named defendant to the plaintiff's claim*." It is argued by the defendants in the instant case that Costello J, although ultimately critical of the defendant in *Ennis Property Finance Ltd* for not putting valuation evidence before the court, she had no difficulty in accepting the possibility of a claim that the receiver had sold the property at an undervalue.

CONCLUSION

21. It seems to this court that the defendants defence rests on two grounds and it will turn to both individually.

22. Firstly, with regards to the defence that the receiver has failed to act appropriately in advertising the property in question, leading to its being sold at a gross undervalue: it is posited that the property would be more capable of achieving a sale value of €220,000 on the basis of a recent valuation and a comparison with other properties. However, the court is cognisant of the judgment of Barrett J in *Ennis Property Finance DAC*, and mirrors his sentiments. The court is of the view that the defendants qualm here is with the receiver and not the bank. It is aware that the receiver is not a party to these proceedings. It notes that it is not a defence to the within summary application that the defendants might be entitled to an indemnity from a non-party were that non-party to be joined to the within proceedings if the within application was to be referred to plenary hearing. Therefore, the court holds that is very unlikely that, in the words of McGuinness J in *Aer Rianta*, "*there is a fair or reasonable probability*" of the defendant having a real or bona fide defence, with regards to this point.

23. Next, the court turns to the defence of estoppel: that the bank should be estopped from seeking to recover judgment in the sums claimed, due to a mutual and binding agreement, which arose out of the a meeting between the defendants and Mr. Gerry Gill on the 10th June, 2015, and which varied the terms of the defendant's loan. The defendants aver that they relied on this agreement to their detriment and acted on the assurances given.

24. It is noted by the defendants that Mr. Gill was no longer available to give evidence and that the bank cannot locate any notes on file of the meeting. As a result, it was argued that an issue of fact arises with regards to what transpired at that meeting.

25. One of the so-called 'steps' taken on foot of the 'agreement', was an instruction given to Mr. Higgins by the defendants to

contact Mr. Gerry Gill and "*crystallise that agreement in writing*". In said letter, dated 24th of July, 2015, Mr. Higgins states that "*we were of the* **understanding** *that* **you were going to seek approval** *for the removal of the Receiver and that Mr. Butterly would recommence paying monthly interest only from January 2015 for a 12 month period."* (Emphasis added).

26. The court considers the language used in Mr. Higgins' letter dated 24th of July, 2015, characterising the supposed 'agreement' reached on the 10th of June, 2015, to be weak and tentative in nature. The purpose of this letter was to crystallise the outcome of the meeting; record what was agreed. In this way, even if there is a dispute as to what exactly arose at the 2015 meeting, this letter indicates that any 'agreement' was aspirational at best.

27. Taking the Court of Appeal's judgment in Governor *and Company of the Bank of Ireland v. John Flanagan* [2015] IECA 55, it is clear that the mere assertion in an affidavit of a given situation does not of itself provide leave to defend. It is the opinion of this court that although Mr. Butterly's affidavit avers that an agreement was reached, Mr. Higgins' letter to the bank, which according to the aforementioned affidavit, had the effect of "*outlining the substance of what had been agreed*", provides a truer picture as to what transpired. This supposition is further bolstered if one turns to Mr. Higgins' affidavit which states at para 7 that "*Mr. Gill indicated that he would seek to have the Receiver removed*"; the word 'seek' here, being an indefinite one. Hence, it is "*very clear*" to the court, to quote *Harrisrange Ltd*, that the defendant has no defence on this point.

28. As such, this court is minded to grant a summary judgment in the sum of €117,918.59 in favour of Bank of Ireland Mortgage Bank.