

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

MICHAEL TIMMONS

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 20th day of May, 2019**Background**

1. This is the plaintiff's motion seeking liberty to enter final judgment in the sum of £248,520.75 (Sterling) or the euro equivalent thereof. The sum being claimed arises from two loan accounts, having account numbers 300733774 and 300734044.

2. Initially the defendant was not legally represented but solicitors came on record on 30 June 2017. Prior to this date, the defendant filed a number of affidavits himself. For the purposes of this application, the defendant relies upon an affidavit, sworn 3 March 2017, wherein he seeks to raise a number of defences so as to have this matter remitted to plenary hearing.

Affidavit of the defendant

3. The affidavits set out the history of the defendant's dealings with the plaintiff. This history is sadly similar to that of many others who, with little or no experience, became involved with commercial property and incurred financial liabilities as a result. These persons, such as the defendant herein, were particularly vulnerable when the economic crash occurred.

4. The defendant deposes in his affidavit that he was approached to become part of a company (Investrade Limited) that was set up to purchase the upper floor of a property known as Halifax House, Fenwick Street, Liverpool. This company then approached an official of the plaintiff with a view to obtaining finance to develop Halifax House into 26 apartments. The company borrowed some £3million from the plaintiff. A number of serious problems developed with Halifax House, including a water leak and an ensuing insurance claim. There were also a number of claims concerning maintenance which affected the rest of the building. In any event, following the initial sale and rental of a number of apartments in the building, there remained four vacant units.

5. The defendant maintains that he was contacted by Mr. Pat Flynn, an official of the plaintiff, concerning the purchase of these four apartments.

6. In his affidavit, Mr. Flynn states that a number of meetings with the defendant and other investors took place in or around October 2006. Arising from these meetings the plaintiff issued a letter of offer in the sum of £125,000 to the defendant on or about 19 December 2007 to finance his purchase of the apartments. Mr. Flynn states that the defendant and his co-investors decided not to draw down the funds offered and requested the plaintiff to issue individual facilities in respect of each property, which the plaintiff agreed to do. These individual facilities were drawn down by the defendant in May 2008. Confirmation of the draw down is evidenced by documentation exhibited in this affidavit.

7. The defendant maintains that, in the course of these meetings, the plaintiff bank did not act in good faith and that he relied upon the advice of the plaintiff to purchase the apartments. This advice, on the submission of the defendant, amounted to negligent misstatement.

8. The defendant maintains, in his affidavit, that the monies referred to in the affidavit of Mr. Flynn were not, in fact, drawdown.

Affidavits of the plaintiff

9. A number of affidavits had been filed on behalf of the plaintiff. The affidavit of Ms. Hazel Fitzpatrick exhibits the various bank statements and loan offers made to the defendant. It is clear from these affidavits, in particular the exhibits thereto, that the amounts being claimed by the plaintiff are in respect of monies advanced by the plaintiff to the defendant which were drawn down.

10. I refer again to the affidavit of Mr. Flynn wherein he states that it was the defendant and his co-investors who proposed that the apartments be purchased in their own names and that this proposal was not instigated by him. Mr. Flynn further states that neither he nor the plaintiff applied any pressure to the defendant or his co-investors and that all requests in relation to the restructuring of their financial obligations to the plaintiff were at the their instigation and behest. Mr. Flynn maintains that he did not offer any advice in relation to the financial affairs of the defendant.

Principles to be applied

11. The principles to be applied by a court in an application for summary judgment are well established. I refer to the often cited passage of Hardiman J. in *Aer Rianta v. Ryanair Limited* [2001] 4 I.R. 607, at p. 623: -

"In my view, the fundamental questions to be posed on an application such as this remain: it is "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simply and easily determined? Do the defendants' affidavits fail to disclose even an arguable defence?"

12. In his replying affidavit and submissions to the Court, the defendant maintained that the plaintiff was not only acting as a banker but was also giving commercial advice. The defendant maintains that this advice was given negligently and that he acted on it to his detriment. On this issue I refer to the following passage from the judgment of Ní Raifeartaigh J. in *Allied Irish Banks Plc. v. Marino Motor Works Limited* [2017] IEHC 522: -

"35. There is no doubt that there was a long set of interactions between the parties involving considerable correspondence and meetings, only some of which have been put before the court. It is true that no evidence was put before the court to suggest that the bank went beyond the normal banking/customer relationship and somehow took on the mantle of offering general business advice; however, the defendant's case, in terms of its proposed counterclaim, is primarily one not of fiduciary duty but of simple negligence in the course of the ordinary bank-customer relationship. I do

not underestimate the difficulties facing any defendant in bringing such a claim home successfully; however, it is probably fair to say that the nature of the defendant's business was such that the banking facilities available to the business were integral to the day-to-day running of the business. It is possible that, upon a close examination of the evidence, a conclusion might be reached that there was some negligence on the part of the bank at particular moments in time which may have negatively impacted on the defendant's business and, in turn, its ability to repay the bank. I am sceptical, on the basis of the evidence I have seen, that this is so but, in view of the substantial conflict of evidence concerning various factual matters as between Mrs. Barry's affidavits and that of Ms. Lombard, I am not in a position to conclude that the proposed counterclaim is inevitably doomed to fail and that the defendant simply has no case in this regard. Accordingly, on this ground also, I will remit the matter to plenary hearing."

Application of principles

13. Insofar as the defendant alleges that the monies were not drawn down and questions the basis for the two loan accounts referred to by the plaintiff, I am satisfied that the defendant has failed to establish any *bona fide* grounds for defence. I am satisfied, on the basis of the documentation exhibited, that these are the relevant loan accounts and that the monies have not been repaid.

14. In respect of the defendant's claim for negligent misrepresentation, I adopt the passages cited above from Ní Raifeartaigh J. in *Marino Motors*. Though I have misgivings on this point, there is nonetheless a conflict between the affidavits of the defendant and that of Mr. Flynn which I cannot resolve in the course of a hearing for summary judgment. I am satisfied that the defendant's claim of negligent misrepresentation goes beyond a "mere assertion", as per McKechnie J. in *Harrisgrange Ltd. v. Durcan* [2003] 4 I.R. 8.

Conclusion

15. The plaintiff is entitled to judgment in an amount but I will hear counsel as to precisely what this amount is.

16. I will permit the defendant to maintain his action for negligent misrepresentation by way of a counterclaim. Depending on the determination of the counterclaim, the defendant may be entitled to set off such amount, if any, as may be awarded in the counterclaim as against the sum due and owing to the plaintiff.

17. I will hear counsel on directions as to pleadings.