Neutral Citation: [2015] IEHC 14

THE HIGH COURT

[2011 No. 740 S]

BETWEEN

CAVE PROJECTS LIMITED

PLAINTIFF

AND

PETER GILHOOLEY, JOHN KELLY, JOHN MORONEY, ROY O'BRIEN AND JOSEPH O'HARA

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered the 16th day of January, 2015

Background

1. This matter comes before the court by way of motion for summary judgment on foot of the summary summons herein against the 2nd and 5th named defendants (respectively "Mr. Kelly" and "Mr. O'Hara"), the plaintiff's claim having been compromised as against the 1st, 3rd and 4th named defendants. The claim is for the sum of €11,485,543.14 being the balance allegedly due and owing by Mr. Kelly and Mr. O'Hara to the plaintiff in respect of various loans advanced by the Governor and Company of the Bank of Ireland ("the bank") to the defendants, which loans were allegedly ultimately assigned to the plaintiff in the circumstances hereinafter appearing. The matter was heard on affidavit.

Facts

2. On the 27th November, 2003, the defendants entered into a partnership agreement essentially for the purpose of purchasing and developing land. On various dates between December, 2005 and January, 2007, the bank entered into loan agreements with the defendants on foot of which monies were advanced to the defendants for this purpose. These proceedings were originally commenced by the bank on the 24th November, 2011 grounded on the affidavit of Kevin O'Donovan, a senior manager with the bank's Specialist Property Group. In his affidavit, Mr. O'Donovan exhibits the various facility letters relied upon which were executed by the defendants. He avers that the funds were drawn down and were payable on demand on or after the 31st January, 2008. The loans were called in on the 5th January, 2011, no repayments having been made. He gives the amount due as of the swearing of the affidavit. He exhibits a statement of account showing how the balance due was calculated. He makes the usual averment that the defendants have no bona fide defence and the appearances entered on their behalf were solely for the purposes of delay.

3. A replying affidavit was sworn by Mr. O'Hara, a solicitor, on the 9th March, 2012, in which he disputes the bank's right to recover the sum claimed from him on a number of grounds. First, he claims that the bank had a fiduciary duty and a duty of care towards him. This appears to be based on an allegation that a sum of €750,000 was advanced by the bank for the purpose of investing in one of its own products which constituted the bank an investment intermediary and rendered it in breach of its own guidelines for lending. He alleges that the bank was in breach of these duties and this precludes it from recovery.

4. Secondly, Mr. O'Hara says that the contracts of loan were subject to conditions precedent to which the bank failed to adhere and in particular, he puts the bank on full proof of adherence to the condition requiring a valuation of the lands to be undertaken by a valuer appointed from the bank's own panel. Thirdly, he says that some or all of the money loaned was paid to the first to fourth defendants only and consequently there was no valuable consideration flowing from the bank to him supporting the contracts. Fourthly, he claims that the money loaned was drawn down by parties other than him for purposes not sanctioned by the contracts of loan. Fifthly and finally, Mr. O'Hara says that the bank was guilty of a failure to mitigate its loss by refusing to sanction a sale of the lands at a time when they were considerably more valuable than now.

5. Mr. Kelly swore a replying affidavit in or around the 15th May, 2012, in which he details the history of the matter and is very critical of the bank's lending policy and the manner in which the loans were managed. Although it has to be said that it is not entirely clear from this affidavit what defence is being advanced by Mr. Kelly, it seems to be based on an allegation of reckless lending by the bank which gave rise to the loss of the loan funds.

6. It would appear that sometime prior to the 22nd January, 2013, the loans, the subject matter of these proceedings, were acquired by National Asset Loan Management Limited ("NALM") pursuant to its powers under the National Asset Management Agency ("NAMA") Act 2009 ("the Act") and on the 22nd January, 2013 the loans were sold on to the plaintiff pursuant to a Loan Asset Deed Sale. By order of the Master of the High Court made on the 6th February, 2013, the plaintiff was substituted for the bank as plaintiff in the within proceedings.

7. On the 5th March, 2013, two affidavits were sworn by Mr. Thomas Kelly on behalf of the plaintiff in reply to the affidavits of Mr. O'Hara and Mr. Kelly respectively. Mr. Thomas Kelly swore the affidavits in his capacity as solicitor for the plaintiff. In the first affidavit, he exhibits a letter from NALM dated the 5th March, 2013 confirming that it acquired the loans pursuant to s. 90 of the Act, had power to sell them on pursuant to s. 139 and did so to the plaintiff on the 22nd January, 2013. He exhibits the partnership agreement and two deeds of charge signed by Mr. O'Hara in relation to the partnership lands acquired with the loan monies. He then goes on to in effect make submissions in response to the allegations in Mr. O'Hara's affidavit.

8. In his second affidavit, Mr. Thomas Kelly exhibits the order substituting the plaintiff and its certificate of incorporation and memorandum and articles of association. In para. 6 of the affidavit, Mr. Thomas Kelly refers to the instrument transferring the loans to NALM as exhibit "TK3". However, that exhibit is the deed of assignment of the loans from NALM to the plaintiff. He also exhibits correspondence dated the 22nd January, 2013 from NALM to each of the defendants notifying them of the sale of the loans to the plaintiff. Finally, he exhibits what is stated to be a certificate from NALM setting out the balance outstanding on foot of the loans.

9. A further affidavit was sworn on behalf of the plaintiff by Mr. Brendan Delaney, a director of the plaintiff company on the 23rd May, 2013. He avers that the letter of offer of the 5th September, 2007 was transferred to the plaintiff on foot of a loan asset deed sale dated the 22nd January, 2013. He avers that the loan asset deed sale is subject to a confidentiality clause and he is precluded from

exhibiting it in his affidavit. He says that each of the borrowers was informed of the transfer and that no payments had been made under the letter of offer dated the 5th September, 2007, so that the amount originally certified in the grounding affidavit of Kevin O'Donovan remains due.

10. In an affidavit sworn on the 30th May, 2013 by Michael Broderick, he says that he is a portfolio manager with NALM. He says that assets including the letter of offer of the 5th September, 2007 were acquired by NALM pursuant to s. 90 of the Act. He avers that NALM held these assets as of the 22nd January, 2013 and he exhibits a document as "NALM2" certifying this fact which he refers to as a "certificate". This document purports to emanate from NALM and certify that the loans were transferred to NALM on the 7th December, 2011 and were held by it until assigned to the plaintiff on the 22nd January, 2013. He avers that NALM transferred absolutely all its rights, title and interest in the loans to the plaintiff pursuant to s. 139 of the Act and he refers to the letter of the 5th March, 2013, previously seen, confirming these facts. He avers that each of the defendants was notified of the transfer by letters of the 22nd January, 2013 which he again exhibits as "NALM4".

11. Mr. Kelly responded to these affidavits in a second affidavit. In this affidavit, he appears to adopt much of what is stated by Mr. O'Hara in his affidavit. He says that he did not sign the final letter of loan offer dated the 26th November, 2009 although it emerged during the course of the hearing that this was not being relied upon by the plaintiff. He says that the bank dealt with the third defendant at all times and allowed him to draw down funds for purposes other than those set out in the facility letters. Like Mr. O'Hara, he claims that the bank placed itself in a fiduciary capacity *vis a vis* himself and calls for proof of adherence to the conditions precedent regarding valuation. He also complains of a failure to mitigate the bank's losses. He refers to the same transaction regarding the €750,000 as Mr. O'Hara and says that this constituted the bank a fiduciary and advisor to him and that this sum was advanced contrary to the bank's own guidelines.

12. He says that no information has been provided regarding the value at which the loans were transferred to the plaintiff and he goes on to suggest that there is strong circumstantial evidence of an improper relationship between the plaintiff and the 1st, 3rd and 4th defendants which would invalidate the transfer from NALM to the plaintiff. Beyond making this allegation, Mr. Kelly provides no detail or evidence to substantiate it. He disputes that Mr. Thomas Kelly is in a position to aver to alleged facts in respect of which he has no knowledge. He says that there is no evidence before the court of the correct balance outstanding on foot of the loans having regard to the settlement entered into between the plaintiff and the first, third and fourth defendants.

13. The final affidavit is a third affidavit of Mr. Thomas Kelly sworn on the 29th November, 2013 in reply to the last affidavit of Mr. Kelly. Few new facts are disclosed in this affidavit which is largely argumentative. He exhibits the settlement agreements with the other defendants.

Submissions

14. Mr. Delaney SC, counsel on behalf of the plaintiff, dealt with the issues raised in the affidavits of Mr. O'Hara and Mr. Kelly. He said that insofar as reckless or negligent lending was concerned, no such tort was known to the law and he relied on the dicta of Kelly J. in *McConnon v. President of Ireland* [2012] 1 I.R. 449 at p. 466 approving the earlier judgment of Charleton J. in *ICS Building Society v. Grant* [2010] IEHC 17, (Unreported, High Court, Charleton J., 26th January, 2010). On the issue that the bank had a fiduciary duty towards the defendants arising out of the purchase of an investment product from Bank of Ireland Private Banking for €750,000, he submitted that even if that were true, there was no evidence before the court of any loss having been suffered by the defendants arising out of any alleged breach of such duty. Further, there was nothing that supported the proposition that such duty, even if it existed, extended beyond that single issue.

15. On the claim advanced by Mr. Kelly that he had no independent legal advice before entering into the transaction, he submitted that this was not a defence particularly as there was no evidence that Mr. Kelly was in some way a vulnerable person. The alleged defence of failure to mitigate the bank's loss could not avail the defendants as this could only be appropriate to a claim for damages, not for a debt due. On the question of failing to comply with a condition precedent, Mr. Delaney said that this condition was inserted in the contract solely for the benefit of the bank who were entitled to waive it and could not be relied on by the defendants. As regards the suggestion that Mr. O'Hara and Mr. Kelly had not in fact actively participated in the loan arrangements which were exclusively dealt with by the third defendant, he relied on *Irish Bank Resolution Corporation Limited v. Quinn* [2011] IEHC 470 and the approval by Kelly J. (at p. 12) of the earlier dicta of Clarke J. in *ACC Bank v. Kelly* [2011] IEHC 7, where he said (at para. 7.5) that borrowers entering into commercial banking arrangements had to accept the consequences of signing such agreements whether they read or understood them or not.

16. In the same case, Kelly J. also dealt with the argument that there was a total failure of consideration as Mrs. Quinn, the second defendant, had not benefited in any way from the loans in question. He held that when the monies were drawn down, it was no concern of the bank as to what happened them thereafter - see p. 16.

17. Mr. Delaney referred to the Act and submitted that insofar as s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 required notice of an assignment of a chose in action to be given to the party affected thereby before it could be enforced, s. 90(6)(b) of the Act relieved NALM and the plaintiff of the obligation to comply with the notice requirement. He said that by virtue of s. 108 of the Act, the certificate NALM2 was conclusive evidence of what was stated therein.

18. Mr. O'Floinn BL, counsel on behalf of Mr. Flynn submitted that the plaintiff fell short in its proofs. He said that the plaintiff had to establish that NALM had acquired the assets, had held them, had assigned them and had notified his client of the assignment. He said that the plaintiff had failed to establish these facts and Mr. Broderick's affidavit was not shown to be made from the deponent's own knowledge as required by O. 40, r. 4 of the Rules of the Superior Courts. He said that para. 4 of the affidavit contained no more than a bald assertion that s. 90 had been complied with but the court had no way of knowing that or how it had been complied with. He took issue with the validity of the so called certificate NALM2 and drew attention to the fact that what may be certified under s. 108 is that NALM "holds" a bank asset whereas the certificate purported to certify that NALM "held" such asset.

19. He further submitted that there was a requirement that the certificate be under seal and there was no evidence of this. He referred to *National Asset Loan Management Limited v. Cullen* [2013] IEHC 121, where Kelly J. called in similar circumstances for the original certificate to be produced to determine if it had been properly sealed which in the event it had. The plaintiff had failed to exhibit the Loan Asset Sale Deed and could not invite the court to make an order without it. However, this document was made available to the court on the second day of the hearing when I allowed it to be admitted having regard to the submissions of the parties. Mr. O'Floinn said that the documents at NALM4 in Mr. Broderick's affidavit were all hearsay as he was not their author.

20. With regard to the admissibility of these documents, he relied on *Ulster Bank Ireland Limited v. Dermody* [2014] IEHC 140. He also relied on *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 and *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1 in relation to the appropriate criteria to be applied by the court in motions for summary judgment.

21. Mr. McEntegart SC, counsel on behalf of Mr. O'Hara submitted that the plaintiff could not seek judgment as it had failed to amend its indorsement of claim to take account of the fact that the bank was no longer the plaintiff. Accordingly, having regard to the transmission of interest in the chose in action the subject matter of the proceedings, the plaintiff could not proceed unless and until it sought and made the appropriate amendments. He relied on *Bank of Ireland v. Connell* [1942] I.R. 1, where the plaintiff bank sued on foot of a guarantee but pleaded an incorrect date of demand in the indorsement on the summary summons and leave to amend was refused. He also submitted that the plaintiff's affidavits contained significant hearsay and could not be relied on citing *Ulster Bank v. Dermody*.

22. He further argued that although in the normal course reckless or negligent lending could not afford a cause of action of itself, the situation was different where it was established that there was a fiduciary relationship between the parties and such a relationship existed here. In relation to the plaintiff's failure to establish compliance with the condition precedent relating to valuation, he relied on the judgment of Charleton J. in *Irish Bank Resolution Corporation Limited v. Cambourne Investments* [2012] IEHC 262. He submitted that non-compliance with the condition precedent rendered the loan contracts unenforceable.

23. Mr. Delaney SC in reply said that there was nothing in Mr. Broderick's affidavit to indicate that it was hearsay and that the court was entitled to infer from it that ss. 90 and 139 were complied with. He could be assumed to have the authority to swear the affidavit and to have done so from facts within his own knowledge. He said that a purposive approach should be adopted to the interpretation of the certificate NALM2 and it should be regarded as admissible evidence of the acquisition of the assets as of a certain date. On the issue of the seal, he argued that s. 108(2) of the Act provides that a document purporting to be a certificate shall be taken as such and to have been sealed unless the contrary is proved.

24. He said that there was no need to amend the pleadings where there was a change of party by transmission of interest under O. 17, r. 4 of the Rules of the Superior Courts. All that was required was the order which had been made by the Master and he referred to the judgment of Laffoy J. in *Bank of Ireland Finance Limited v. Browne and Others* (High Court, Unreported, Laffoy J., 24th June, 1996). On the issue of hearsay, he referred to *Moorview Developments and Others v. First Active plc and Ors* [2010] IEHC 275, *Bank of Scotland plc v. Fergus* [2012] IEHC 131 and *Bank of Ireland v. Keehan* [2013] IEHC 631. He submitted that these authorities were in conflict with *Ulster Bank Ireland v. Dermody* but as they post-dated the decision of the Supreme Court in *Criminal Assets Bureau v. Hunt & Ors* [2003] 2 I.R. 168 on which the decision in *Ulster Bank* was based, I ought to follow the former rather than the latter judgments of the High Court.

25. On the fiduciary relationship argument, Mr. Delaney said it was not clear that any advice had in fact been given but even if it was, there was nothing to suggest that the bank had assumed a duty of care in relation to anything beyond the investment of €750,000 and there was no authority to support such a proposition. Finally, on the issue of valuation, he submitted that there was no evidence of any failure to comply with the condition precedent and the fact that the money was drawn down ought to be taken as *prima facie* evidence of compliance. Furthermore, it appears from para. 7 of Mr. Kelly's first affidavit that the bank had in fact obtained valuations.

The Law

26. The test to be applied in applications for summary judgment is well settled since *Aer Rianta*. As stated by McGuinness J. (at p. 615):

> "Thus it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr. O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence."

27. Hardiman J. analysed the development of the summary judgment procedure, saying (at p. 620):

> "In *Prendergast v. Biddle* (Unreported, Supreme Court, 31st July, 1957) Lavery J. surveying the history of the summary judgment procedure said:-
>
> 'The procedure by summary summons was provided in order to enable speedy justice to be done in particular cases where there is either no issue to be tried or the issues involved are simple and capable of being easily determined."
>
> This observation is perfectly consistent with that in *Sheppards and Co. v. Wilkinson and Jarvis* (1889) 6 T.L.R. 13. In an Irish case almost contemporaneous with *Sheppards, Crawford v. Gillmor* (1891) L.R. Ir. 238, Sir Peter O'Brien C.J. said at p. 245:-
>
> 'I think, however, that final judgment should not be given on a motion for final judgment in any case where any serious conflict as to matter of fact or any real difficulty as to matter of law arises.'
>
> In the same case, two of the judges in the Irish Court of Appeal made observations which have often been the subject of approving comment. O'Brien C.J. said at p. 243:-
>
> 'I think the fact that this case has been so long at argument - and I do not think that it has been argued at unnecessary length - shows that it is not a case for final judgment upon an interlocutory motion of this sort.'
>
> Barry L.J. said at pp. 245 and 246:-
>
> 'I am of the opinion that ... the mere length of time which has been occupied by the argument of this case - and I do not think one moment of our time was occupied unnecessarily - shows that it does not come within the rule which allows final judgment to be marked on motion.'
>
> This is an aspect of the test to which further reference will be made when considering the facts of the present case, below.
>
> More recent Irish authority, in my view, supports the impression gleaned from authorities from the early days of the summary judgment jurisdiction, that the defendant's hurdle on a motion such as this is a low one and that the jurisdiction is one to be used with great care. In *Bank of Ireland v. Educational Building Society* [1999] 1 I.R. 220, Keane J. (as he then was) said (at p. 225):
>
> 'The issue before the High Court, and which has arisen again in this court, is as to whether the affidavits disclose a good

defence to the plaintiff's claim which necessitates the case being sent for plenary hearing at this stage. The issues of law and fact which arise, cannot be conclusively resolved in favour of either party, unless, as is submitted on behalf of the plaintiff, the affidavits do not disclose even an arguable defence to its claim."

28. Hardiman J. went on to consider various formulations of the relevant criteria before concluding (at p. 623):

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

29. Both parties referred to *Harrisrange*, which contains a helpful review of *Aer Rianta* and other relevant authorities.

Analysis

30. From the summary of the parties' arguments above, it is evident that there is a potential multiplicity of issues arising for determination in these proceedings. There is little dispute on the facts and most of the debate has centred on questions of law. In that regard, the following comments of Kelly J. in *McGrath v. O'Driscoll* [2006] IEHC 195 at para 3.4-3.5 are apposite:

> "3.4 So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved.
>
> 3.5 So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

31. This approach is echoed by McKechnie J. in *Harrisrange* where he said (at p. 7):

> "(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;"

32. It follows from the foregoing that if one or more of the issues raised cannot be readily determined within the four corners of this motion, it is unnecessary to consider them all in order to conclude that liberty to enter final judgment cannot be granted.

33. To my mind, there are at least three issues that cannot be clearly resolved at this stage. First, Mr. Flynn and Mr. O'Hara say that at least some part of the monies advanced by the bank was used to invest in products which the bank itself was selling. Whilst there may be absolutely nothing wrong with this, it does seem to me that it must at the very least raise some questions about what duties were owed by the bank to the defendants. It might for example be suggested that an obvious conflict arose for the bank which imposed different duties on it as against those that arise in a simple lender/borrower scenario. The defendants allege, and it has not really been contradicted, that this breached the bank's own lending guidelines and whether or not that in itself could give rise to a cause of action, it does appear to potentially take the relationship into a different sphere from that obtaining where the bank were merely lending money to a group of property developers for that purpose. The defendants' contention in this respect could not be classed as entirely fanciful, particularly where apparently compensation has already been paid to the settling defendants arising out of the same transaction. To what extent this affected the entire relationship does not seem to be a matter capable of resolution at this stage.

34. Secondly, the defendants have raised the issue of the condition precedent regarding valuation not having been complied with and the plaintiff has for whatever reason chosen not to confront it directly. Rather, the plaintiff has advanced the argument that it is entitled to waive the condition as it is exclusively for its benefit. However, it is clear from the judgment of Charleton J. in *IBRC v. Cambourne* that such a condition can and will in an appropriate case be regarded as being for the benefit of both parties. In that case, it was held that two conditions precedent relating to loan to value ratios and valuation respectively were not complied with by the plaintiff bank, that the bank could not waive them unilaterally and that accordingly, the guarantees within the facility letters failed, although the bank succeeded on other grounds. Therefore, it seems to me in the present case that it cannot be said that this point is not at least arguable.

35. Thirdly, the defendants say that much of what is contained in the plaintiff's affidavits is hearsay and cannot be relied upon in an application of this nature. They argue that this proposition is supported by the judgment of O'Malley J. in *Ulster Bank v. Dermody*. In that case, the court held that a witness could not give evidence based on a perusal of the books of a bank unless the exceptions to the rule against hearsay contained in the Bankers' Books Evidence Act, 1897 (as amended) could be availed of. O'Malley J. held that as the witness in question was not a partner or officer of the bank as defined in the Act, his evidence was hearsay and inadmissible. She considered that she was obliged to follow the judgment of the Supreme Court in *Criminal Assets Bureau v. Hunt*, where Keane C.J. giving the judgment of the court said:

> "It is clear that in accordance with the rules of evidence normally applicable in civil proceedings, the documents in question could be proved only by their authors giving sworn evidence and being subject to cross-examination, unless advantage was taken of the provisions of the Bankers' Books Evidence Act, 1879-1959. The documents in question, accordingly, should not have been admitted in evidence in the High Court, unless as the Bureau contend, they were admissible under [the provisions of the Criminal Assets Bureau Act, 1996]."

41. The High Court, in the three decisions already mentioned, appears to have reached a different conclusion with Clarke J., Finlay Geoghegan J. and Ryan J. considering that business records of this nature are admissible as *prima facie* evidence of the truth of their contents, without reference to statute. O'Malley J. found herself unable to agree with these decisions and a somewhat similar line appears to have been taken by Peart J. in *Bank of Scotland v. Stapleton* (Unreported, High Court, Peart J., 29th November, 2012). The defendants invite me to follow *Dermody* whereas the plaintiff says I should follow the *Moorview* line of authority. Because of the findings I have already made herein, it is not necessary for me to decide this issue other than to say that it provides a perfect

illustration of why the summary procedure is not suitable in this case.

42. To answer therefore the question posed by Hardiman J. in *Aer Rianta*, I cannot say that it is very clear that the defendants have no case.

Conclusion
43. Having regard to the foregoing, in my view it is clear that it would be entirely inappropriate to grant liberty to the plaintiff to enter judgment at this stage and I will accordingly remit the matter for plenary hearing.