THE HIGH COURT

[2015 183 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND
PATRICK GORMLEY AND JAMES GORMLEY

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 20th day of December, 2018

1. This matter comes before the court by way of application for summary judgment by the plaintiff ("the Bank") against the defendants. The first defendant ("Mr. Gormley junior") is the son of the second defendant ("Mr. Gormley senior").

Relevant Facts

2. Mr. Gormley junior, who now describes himself as an engineer, was in 2005 a building contractor. Mr. Gormley senior was in 2005 a very experienced bricklayer who then employed seven block layers in his own right.

3. The loan which is the subject matter of these proceedings was granted on foot of a facility letter dated the 3rd November, 2010, but prior to then, there was a significant course of dealing between the parties. It is relevant to refer to that course of dealing in the context of the issues that arise on this application.

4. In or about September, 2005, the defendants applied for two loans to the Bank which were sanctioned on foot of a facility letter dated the 27th September, 2005. The first loan was in the amount of €230,000 and was for the purpose of purchasing property. The second loan was in the amount of €140,000 and its purpose is described in the letter of facility as "working capital". Mr. Gormley junior describes the first loan of €230,000 as being for the purpose of acquiring a one-acre site in Coolaney, County Sligo upon which he intended to build six houses for which planning permission had already been obtained.

5. The second loan, which in the same affidavit sworn on the 13th January, 2017, is described incorrectly by Mr. Gormley junior as being in the sum of €170,000, was, according to him, for the purpose of carrying out the development works on the site. The facility letter of the 27th September, 2005 is headed "Joint application from Patrick Gormley Esq. and Mr. James Gormley" and the body of the letter states that the Bank has sanctioned facilities to both Messrs. Gormley. There is no dispute about this.

6. Mr. Gormley junior in his affidavit states that the funds were used to purchase a single property, although it is evident from the documents exhibited in an affidavit sworn by John Rynne on behalf of the Bank that in fact two properties were purchased, both in Coolaney being the properties comprised respectively in Folios 21052F and 19722F County Sligo. It may of course be the case that a single property was purchased which was comprised in two folios, but nothing turns on this.

7. Of importance, the folios demonstrate that both Messrs. Gormley junior and senior were registered as owners of these folios respectively on the 26th and 27th June, 2006.

8. The terms of the facility letter in respect of this loan (Loan 1) provided that it should be repaid by one single payment to be made approximately a year later on the 23rd September, 2006. It may well have been envisaged that by the latter date, the development would have been completed and the houses sold.

9. Loan 1 was not repaid in accordance with its terms and a second loan facility letter dated the 4th December, 2006 was issued by the Bank in respect of a further loan (Loan 2), this time in the sum of €242,000. Presumably this represented the original €230,000 with accrued interest. The purpose of Loan 2 was stated to be "Restructure". The loan facility letter in respect of Loan 2 was signed in three places by each defendant. This again is not in dispute. In contrast to Loan 1, Loan 2 was a long term loan for a period of approximately ten years with the loan to be repaid in 120 monthly instalments commencing on the 1st January, 2007.

10. The defendants defaulted on the monthly repayments and this appears to have given rise to a further loan facility being entered into (Loan 3) on the 22nd May, 2009. Loan 3 was in the sum of €193,500, possibly representing the then outstanding balance of the previous loan, and its purpose is described as being "Restructure – Customer Initiated". The Loan 3 facility provided that it was to be repaid within a year by eight instalments of €12,019.58 and a final payment of €194,719.58. The loan facility letter is again signed by each defendant in three different places.

11. Default again occurred in relation to the repayment terms of Loan 3 and this resulted in a further facility letter of the 1st October, 2010 (Loan 4) in the sum of €190,600. This again was a relatively short term loan for a period of some eight months with nine monthly payments in the same sum as before, €12,019.58 and the final payment on the 13th June, 2011 in the sum of €187,245.97. The loan facility letter is executed by both defendants.

12. It is important to pause at this juncture in order to note that the facility letters in respect of each of these loans are exhibited in an affidavit sworn on behalf of the Bank by Rosie McDonnell on the 4th April, 2017 in which, in addition to exhibiting the facility letters, she avers that they were signed by both defendants. Two subsequent affidavits were sworn by Mr. Gormley senior respectively on the 20th July, 2017 and the 30th November, 2018 and in neither of these does he take any issue with the foregoing averments by Ms. McDonnell.

13. As appears above, the first repayment due in respect of Loan 4 was to be made on the 13th October, 2010. The defendants defaulted. The purpose of Loan 4 is identified in the facility letter of the 1st October, 2010 as "Renewal of existing facilities".

14. At para. 18 of her affidavit, Ms. McDonnell says that this default led to a further letter of sanction dated the 3rd November, 2010 being issued in respect of the loan, the subject matter of these proceedings (Loan 5). This was in the sum of €190,600 and was in very similar terms to the facility letter of some five weeks earlier also providing for nine monthly repayments of €12,019.58 commencing on the 23rd November, 2010 with a final payment of €187,166.06 on the 25th July, 2011. Ms. McDonnell says at para. 22 of her affidavit that at the time Loan 5 was entered into, there was no subsisting loan agreement between the Bank and the defendants having regard to the default that had occurred on Loan 4.

15. The facility letter the subject matter of these proceedings dated 3rd November, 2010 ostensibly appears to be signed by both defendants. Mr. Gormley junior admits that he signed it but Mr. Gormley senior says that he did not.

16. As matters evolved during the course of the hearing, the defences advanced by both defendants emerged as being first, that there was no consideration supporting the agreement in respect of Loan 5 and second there was a failure on the part of the Bank to comply with the requirements of the Consumer Credit Act, 1995 as amended. In the case of Mr. Gormley senior, he raises the additional defence that he never signed the facility letter or had any knowledge whatsoever of Loan 5 until he received a letter of demand dated the 12th November, 2014 from the Bank. It is with this last proposition that I propose to deal first.

17. Mr. Gormley senior has sworn three affidavits in this matter, the first on the 27th April, 2016. At para. 6, he avers as follows:

> "I say and believe that I have had no dealings or correspondence with the plaintiff bank relevant to the restructured loan, the subject matter of these proceedings. I say that the first and only occasion on which the existence of the restructured loan was brought to my attention was by way of letter dated the 12th day of November, 2014, whereby the plaintiff bank sought to demand repayment of the restructured loan in the sum of €231,246.91."

18. He elaborates on this averment in paras. 7 and 8 of his first affidavit where he says:

> "7. I say that I have not had sight of the terms of said letters of offer dated 3rd November, 2010. I say that I have not signed any such letters of offer whether on the 6th November, 2010 or at all. I further say that I have not authorised the signing of said letters of offer by any other persons nor have I been present whilst any other persons have endeavoured to sign said letters of offer on my behalf.
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> 8. I say and believe that all dealings and correspondence, relevant to the restructured loan, were distinctly between the plaintiff bank and the first named defendant. I say that the letters of offer, the subject matter of these proceedings, were signed by the first named defendant on his own behalf and on my behalf. I say that I did not agree to or authorise the signing of my name in the manner aforesaid or at all. I say that I did not provide the first named defendant with authority to apply to restructure the said original loan. I say that I was unaware of the restructuring of the said original loan, in the manner alleged or at all."

19. The meaning and intent of these averments could hardly be clearer. Mr. Gormley senior in his affidavit swears in clear terms that his son forged his signature twice on the loan documents. If that is true, not only is it a very serious fraud on Mr. Gormley senior by his son but it is also a serious criminal offence. It should be noted that two copies of the loan sanction letter of the 3rd November, 2010 were separately issued to each defendant. One was sent to Mr. Gormley junior at his address of 5 Forthaven, Coolaney, County Sligo. The second was sent to Mr. Gormley senior at his address at Gortnadrass, Lavagh, Ballymote, County Sligo.

20. Both versions of the document are signed with what appears to be the signature of both defendants. As between both documents, the signatures are clearly different so that they were evidently signed separately. It is also clearly evident that the signature of Mr. Gormley junior on each document is in different handwriting to that of Mr. Gormley senior. It is important to note the evidence of Mr. Gormley senior that his son signed the document "on my behalf". While he says that this was done without his knowledge or consent, he does not explain how he knows that his son as opposed to any other party signed it or when he became aware of that fact.

21. The next affidavit in sequence sworn by the defendants is an affidavit of Mr. Gormley junior sworn on the 13th January, 2017, some nine months after his father's affidavit which he had no doubt by then seen and considered. Rather surprisingly, having regard to the seriousness of the criminal allegation made against him by his father, Mr. Gormley's affidavit does not deny it but instead ignores it entirely. It merits no mention whatever. Moreover, nowhere in his affidavit does Mr. Gormley junior purport to suggest that his father knew nothing about the transaction and was entirely uninvolved in it. The subject is studiously avoided. The only mention of his father's involvement in the matter is in relation to the original loan (at para. 5):

> "I say that AIB secured my borrowings by registering charges over the said development site at Coolaney and the further one-acre site [with planning permission] in South Lavagh, Ballymote, County Sligo which I jointly own with my father. As I understand it, this was the reason my father had to be named as a joint borrower on the 2005 loan. My father never had the means to meet the monthly repayments and would not be involved in developing the site."

22. These averments are patently and demonstrably incorrect as is shown by the affidavits subsequently sworn by the Bank. In the subsequent affidavit sworn by Mr. Rynne on behalf of the Bank, Mr. Rynne explains his involvement as being the person who issued the original letter of sanction to the defendants of the 27th September, 2005. He exhibits a lender's report dated the 12th September, 2005 prepared by him in response to the defendant's loan application. In that report, he notes:

> "Patrick Gormley is a self-employed building contractor with three years' experience in the trade. His father James is a bricklayer employing seven block layers who has many years' experience. They have decided to join forces to buy and develop a site."

23. He goes on to note in another section of his report:

> "They have contracted to buy a site at Coolaney, County Sligo with full planning for six semi-detached houses."

24. Most tellingly however, he avers at para. 9 of his affidavit that the defendants used the moneys advanced in 2005 to purchase the properties described in the two folios to which I have already referred and in respect of which both defendants are the registered owners. Mr. Gormley junior did not swear any affidavit subsequent to Mr. Rynne's affidavit so that he must be taken as accepting the correctness of what is stated therein. Mr. Gormley senior did swear a subsequent affidavit. He does not take express issue with anything Mr. Rynne says beyond saying that he does not accept his averments without more. He declines to make any comment on the fact that Loan1 was advanced to buy property of which he became the joint owner with his son.

25. Mr. Gormley senior swore his second affidavit on the 20th July, 2017. At para. 3, he refers to the fact that he had not seen signed or agreed to the facility letter and he is a stranger to it. Somewhat extraordinarily however, he then goes on to say:

> "I say that your deponent's signature does appear on this document dated the 3rd November, 2010, and I say that it appears that no employee from the plaintiff witnessed same either."

26. One might be forgiven for thinking that this was a typographical error. However, no such suggestion was made on Mr. Gormley senior's behalf in the course of argument by his counsel. Mr. Gormley senior swore a subsequent affidavit over a year later and shortly prior to the hearing on the 30th November, 2018 wherein no attempt is made to suggest that this statement was in any way

erroneous. I must therefore assume that this averment by Mr. Gormley senior that the facility letter bears his signature represents his sworn evidence despite the fact that it is flatly contradicted in this and his other affidavits. To that extent at least, his evidence is entirely ambiguous and unsatisfactory.

27. That is not the only aspect of Mr. Gormley senior's evidence that is unsatisfactory. As I have said, the Bank has put before the court sworn evidence that documents relating to Loans 1 to 4 inclusive were all executed by both defendants without contradiction. Loan 4 was, as I have said, entered into only a matter of weeks before Loan 5. It would therefore be a somewhat surprising state of affairs if, having willingly entered into a loan agreement in October, 2010 together with his son, Mr. Gormley senior should in November, 2010 find himself in a situation where he is the victim of fraud and forgery in respect of an agreement which is virtually identical to the one he had already consented to a few short weeks earlier. Why Mr. Gormley junior should have felt the need to engage in such criminal activity is entirely unexplained by either party in circumstances which clearly call for such explanation.

28. That is not the only matter that remains unexplained. I have already pointed to the fact that both copies of the facility letter of the 3rd November, 2010 were sent to the Gormleys at their different addresses. Mr. Gormley senior says he never got it and knew nothing about it. The Bank's letter of demand of the 12th November, 2014 was sent to Mr. Gormley senior's same address but he agrees he received this letter. He describes this letter of demand as being the first and only occasion when the matter was brought to his attention.

29. From the date of receipt of this letter therefore, Mr. Gormley senior would have been immediately aware that he was the victim of a serious fraud perpetrated by his son, according to himself. One would have expected any reasonable person confronted with such a scenario to immediately contact the Bank to explain the situation and perhaps even the Gardaí to make a complaint. None of that appears to have happened.

30. In fact, there is no evidence of any kind before the court which suggests that complaint was made by Mr. Gormley senior of this matter at any time prior to the swearing of his first affidavit on the 27th April, 2016, a year and a half after he received the letter and more than a year after the Bank instituted proceedings against him on the 3rd February, 2015. One of the affidavits relied upon by the Bank herein was sworn by Sean Quinn Walsh on the 8th February, 2018. Mr. Quinn Walsh was the person who issued the letters of sanction in respect of Loans 4 and 5.

31. He exhibits correspondence sent to Mr. Gormley senior at the same address as the 2014 letter of demand which Mr. Gormley senior agrees he received. Mr. Quinn Walsh wrote on the 13th April, 2011 to Mr. Gormley senior advising him that the facility was in arrears and he wrote again on the 22nd August, 2011 to request payment of the then outstanding amount of €197,728.01.

32. In response, *inter alia* to this affidavit, Mr. Gormley senior swore his final affidavit on the 30th November, 2018 referring back to paras. 6, 7 and 8 of his first affidavit to which I have already referred above. In response to what Mr. Quinn Walsh says, Mr. Gormley senior swears the following at para. 9 of his last affidavit:

> "I say that whilst Mr. Quinn avers to having written to me, I say again that all dealings with the plaintiff were with the first defendant. I refer to para. 6, 7 and 8 of my affidavit of 27th April, 2016, and in that respect, I say that the first defendant collected all or any correspondence received from the plaintiff from your deponent's house, which were left out for him for collection."

33. What this appears to amount to is an averment by Mr. Gormley senior that he may well have received all of the correspondence which the Bank alleges was sent to him but he did not trouble himself to open it, electing instead to leave it for his son to collect. It seems to me that this admission by Mr. Gormley senior renders the averments in his first affidavit to the effect that he knew nothing about the loan until the 12th November, 2014 entirely disingenuous and unreliable.

34. Having regard to the foregoing, it appears to me that the conclusion is unavoidable that both defendants in these proceedings have been, at best, very economical with the truth in the affidavits they have put before the court. The evasive nature of those affidavits is clearly something that I can and must have regard to in determining the issues that arise in this application.

Applications for Summary Judgment – Legal Principles

35. The law in relation to applications for summary judgment was helpfully recently reviewed by the Court of Appeal in *AIB v. Stack* [2018] IECA 128. The defendants were husband and wife who were sued on foot of guarantees allegedly signed by them for the indebtedness of a company. The wife swore an affidavit in which she asserted that her signature on the guarantee was a forgery. This was held by the High Court to be a bare assertion not giving rise to a *bona fide* defence. The defendants appealed. The court's judgment was delivered by Irvine J. who summarised the applicable principles on applications for summary judgment in the following terms:

> "26. It is clear from decisions such as that of Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 that before concluding that summary judgment should be granted to a plaintiff, the court must be satisfied that it is 'very clear' that the defendant has no defence to the proceedings. Otherwise the claim should be adjourned for a plenary hearing.
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> 27. It is also well established that the threshold of arguability which a defendant must exceed to achieve a plenary hearing is a low one. Nevertheless, it is a threshold that amounts to more than mere assertion or stateability. There must be substance to the proposed defence and it must be based on facts which if true and established would amount to a defence and it must also be credible.
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> 28. It is clear from the decision of Clarke J. (as he then was) in Irish *Bank Resolution Corporation v. Gerard McCaughey* [2014] 1 I.R. 749 that if a defendant seeks to advance an issue of law or construction as a basis for providing him with an arguable defence then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide a defence.
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> 29. The following is what Clarke J. stated concerning facts put before a court on an application for summary judgment at p. 759:-
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> > '[23] 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 the 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.'

30. Yet another judgment which is of significance in the context of the within procedures is that of Murphy J. in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75 wherein he described the test to be applied on an application for summary judgment in the following manner:-

'In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyds Law Rep. 21 , which was referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v. Daniel* [1993] 1 W.L.R. 1453 . The principle laid down in the Banque de Paris case is summarised in the headnote thereto in the following terms:-

"The mere assertion in an affidavit of a given situation which was to be the basis of a 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 defendant having a real or *bona fide* defence.' "

36. The court went on to dismiss the appeal holding that the evidence adduced by the defendants did not meet the requisite threshold of arguability for the matter to be referred for plenary hearing.

37. In relation to the forgery allegation in this case, I have already pointed to the many infirmities in the evidence advanced by both defendants. Although of course it is correct to say that the court cannot in general form a view on the credibility of the evidence, that is far from saying that the court must accept at face value any assertion by a defendant, no matter how unlikely or improbable it may be. As the Court of Appeal pointed out in AIB v. Stack, the court has to form a view of the evidence as a whole to determine if the defence being advanced by the defendants is of substance and credible.

38. In *Chadwicks Ltd. V P. Byrne Roofing Ltd*. [2005] IEHC 47, Clarke J. (as he then was) discussed the resolution of factual issues in summary judgment applications:

" Where the facts are in dispute the court should only grant summary judgment where either:-

(a) Even on the facts asserted by the defendant no defence would arise; or

(b) The facts asserted by the defendant amount to a mere assertion of a defence where there is no credible evidence of the defence which the defendant seeks to assert…

Finally it may be observed that the defence may amount to a mixed question of law and fact in which case the court must exercise a judgment as to whether the factual matters in respect of which a credible dispute has been established combined with any legal issues which are not capable of being resolved on a summary judgment motion give rise to a fair or reasonable probability of the defendant having a real or *bona fide* defence."

Discussion

39. *Chadwicks* again demonstrates that although the court is in general not concerned with credibility issues arising from affidavits which may be contradictory on either side of the case, the defence advanced as a whole must be substantial and credible. The court has to decide whether looking at the entire matter in the round, such a defence has been raised. If it is not credible, then by definition it cannot raise a fair or reasonable probability of being *bona fide*. In the light of the observations I have made on the affidavits of the defendants herein, it seems to me that the state of the evidence before the court as it now is falls far short of the requisite threshold on this issue at least.

40. I turn now to the second principle ground of defence relied upon by each defendant to the effect that as there was no new consideration passing from the Bank to the defendants in respect of Loan 5, it is unenforceable. This was said to arise because there was in fact no new advance of funds by the Bank to the defendants on foot of Loan 5 which was effectively simply a renewal of Loan 4 and so forth going back to Loan 1. Particular reliance in that regard was placed by the defendants on the judgment of this court (Binchy J.) in *AIB v. O'Brien* [2018] IEHC 408, the facts of which have similarities to the present case.

41. The bank in that case had advanced funds in 2006 for the purchase of a house which was to be Mr. and Mrs. O'Briens' new family home. Having purchased the house, they went about selling their existing home, it having been anticipated that the sale price likely to be realised would discharge entirely or substantially the loan in respect of the new house. Unfortunately, Mr. and Mrs. O'Brien, in a scenario doubtless replicated on countless occasions in this country, having bought the new house at the top of the market found that before they could sell the old house, its value had collapsed to a fraction of what was anticipated. They were thus left with a very substantial debt and no immediate prospect of being able to discharge it.

42. It would appear that between 2006 and 2010, the O'Briens' debt was restructured a number of times as occurred in the instant case. The facility on foot of which they were ultimately sued by the bank was granted in 2010 but, as here, no new funds were in reality advanced. The bank brought a motion for summary judgment and one of the three core issues identified by Binchy J. was whether or not there had been any consideration in the sense of new funds having been advanced. The defendants' argument in that regard was summarised by the court as follows (at p.7):

"(1) The facilities offered by the plaintiffs to the defendants in 2010 were no more than an internal banking exercise and did not give rise to any actual advance of funds by the plaintiffs to the defendants. Accordingly, those loan agreements were void for want of consideration or on the grounds that the consideration moving between the parties was past consideration."

43. The court went on to set out at some length the respective arguments of the parties on this issue, the bank's arguments being summarised at pp.18 – 20 of the judgment. It is clear from a reading of this passage that the bank's argument in the *O'Brien* case was focused entirely on whether or not there been a drawdown of funds on foot of the new loan to discharge the old loan such as to

amount to good consideration. The bank relied on correspondence between the parties' solicitors referring to a drawdown having taken place and also to the fact that the relevant bank statements showed credits in the defendants' account for the money drawn down.

44. The bank argued further that payments had been made by the defendants on foot of the new loan and certain admissions made by Mr. O'Brien in his affidavits. It seems clear from Binchy J.'s analysis of the arguments that at no stage did the bank argue that the giving of forbearance amounted to valid legal consideration. This much is evident from the Discussion and Conclusions section of the judgment where the court considered that the bank was in effect engaged in a paper exercise which did not in fact involve the provision of any consideration in the sense of a new advance of funds. The court concluded that it could not be said that there was not some substance in the argument that there was an absence of consideration and for that reason the case should be remitted for plenary hearing.

45. However, and importantly, Binchy J. in the course of his conclusions, noted the following (at p. 27):

> "It may well be that the plaintiffs took this course as an act of forbearance rather than call in repayment of the moneys due pursuant to the 2008 facility, and that would represent consideration for the 2010 facilities, but the plaintiffs have not pleaded such an argument."

46. It is thus clear that the issue of forbearance was neither raised by the bank nor determined by the court in that case, in significant contrast to the issues with which I am concerned. In the affidavit of Ms. McDonnell to which I have already referred, she avers at para. 22:

> "When the defendants were offered and accepted the fifth loan they had already failed to make the first repayment of the fourth loan, in breach of the terms and conditions thereof and so there was no subsisting loan agreement between they (*sic*) and the plaintiff."

47. Counsel for the Bank in this case argued that although Loan 4 was not called in at the time Loan 5 was agreed, an implied forbearance arose. In that regard counsel relied on the judgment of this court (Barron J.) in *Commodity Broking Company Ltd v. Meehan* [1985] I.R. 12.

48. The defendant was the beneficial owner of a company which was indebted to the plaintiff. At a meeting between the plaintiff's directors and the defendant, the defendant agreed himself to repay the debt of the company by instalments. After two instalments were paid, the defendant made no further payment. When sued, the defendant pleaded that there was no consideration for the agreement and Barron J. concluded that the defendant was correct and dismissed the claim.

49. The plaintiff had relied on what it contended was an express or implied forbearance from bringing proceedings against the company as amounting to good consideration. The court held that this, if proved, would indeed amount to good consideration but on the facts, there was no evidence of any express or implied request by the defendant not to sue the company. Before coming to that view, Barron J. reviewed much of the old case law on the issue of forbearance and considered whether, as some of the old cases appeared to suggest, there had to be an express agreement to forebear. Having done so, he reached the following conclusion (at p. 21):

> "In my view, these cases establish that the better view is that where a request express or implied to forbear from bringing proceedings induces such forbearance this amounts to good consideration. It is not necessary as the majority decided in *Miles v. New Zealand Alford Estate Company* (1886) 32 Ch. D. 266 that there should be an actual agreement not to sue."

50. In his first affidavit, Mr. Gormley junior deals with the financial difficulties he encountered subsequent to the purchase of the property for which the original 2005 loan was advanced and says the following:

> "7. I say in 2009, AIB was aware I was in serious financial difficulty and my business was gone. The bank had recently terminated a business lease agreement. At the same time a representative from the Tubbercurry branch suggested I take out an overdraft facility to finance my 2008 income tax liability. I did not have the means to pay my tax bill and I accepted the offer of an overdraft. Unfortunately, I could not meet my obligations under that loan which went into default almost immediately and by 2010, AIB was in the process of obtaining judgment against me.
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> 8. I was conscious I was getting myself deeper into debt and that the longer it went on the more difficult it would be for me to get myself and my family out of it. Throughout 2010, notwithstanding my dire financial circumstances, representatives from the AIB branch in Tubbercurry met with me and insisted I signed a new loan offer in substitution of the 2005 loan.
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> 9. Over a period of several months, I point blank refused to sign the new loan offer AIB presented to me. I refused because I knew that I could not make the repayments and the plaintiff was already taking legal action against me. My credit rating was damaged. I was conscious that by signing their loan offer inevitably more interest and penalty interest would clock up against me. Further down the line AIB would again pursue me for judgment this time for considerably more than I owed at that time. I knew I would be less likely to financially recover the older I got."

51. It seems to me that in the course of these paragraphs, Mr. Gormley junior makes clear that he was fully aware that the likely consequence of him not signing the documents regarding Loan 5 was that he would be sued by the Bank. It was already suing him on foot of a lease agreement. He seems to have realised that by signing the new loan agreement, he might yet be sued but as he says himself "further down the line".

52. It can hardly be doubted therefore that on his own evidence, Mr. Gormley junior considered that by signing this agreement, he was buying himself time and staving off what would otherwise likely have been immediate or at least much earlier legal proceedings against him by the Bank. This was clearly, on his own admission, to the forefront of his mind when he signed up to Loan 5. In my view, this evidence together with the evidence of Ms. McDonnell to which I have alluded is sufficient to establish that the consideration underpinning Loan 5 was an implicit forbearance by the Bank from suing the defendants on foot of Loan 4.

53. In the case of Mr. Gormley senior, he too has sought to argue that there was no consideration for Loan 5 in reliance on *O'Brien*. As I have explained, *O'Brien* cannot avail the defendants in this case where the point at issue is quite different. It is also difficult to see how Mr. Gormley senior can argue that there was no consideration for an agreement of which, according to himself, he knew nothing.

54. The final issue raised by the defendants by way of defence was that the Bank failed to comply with the terms of the Consumer Credit Act, 1995. The Act defines a "consumer" as a natural person acting outside his trade, business or profession. It is clear on any view of the matter that Loan 1 entered into by the defendants in 2005 was entered into in the course of their trade, business or profession. Mr. Gormley junior admits as much at para. 15 of his first affidavit:

> "I accept that in 2005 when I took out a loan to fund the purchase of the relevant site I did so in the course of my business as a building contractor. However, as already averred to herein, my personal circumstances had changed by the 5th November, 2010 and at that time I was entitled to the protections afforded by the Act including the statutory cooling off period."

55. It is thus clear that Loan 1 was a commercial loan to which the 1995 Act had no application. It is equally clear that Loans 2 to 5 inclusive were all in effect restructures or refinances of Loan 1. The application of the 1995 Act to such loans was considered by Baker J. in *Danske Bank v. Miley* [2016] IEHC 105 who noted (at p. 3):

> "11. I consider that Mrs. Miley has not made out a prima facie case that she was a consumer for the purposes of the 2012 loan, because the purpose of the loan is quite clearly to refinance what was itself a commercial loan, and because of other factors to which I now turn."

56. The court dealt further with the issue at p.6:

> "16. The case law establishes that it is the purpose of the loan that characterises it as one for either private or business use. The loan of 2006 was undoubtedly for business purposes, and the fact that Mrs. Miley had no involvement with the business does not make the loan to her a personal loan. The case law is clear in that the decision on whether a loan is for commercial or personal purposes must be assessed objectively, not having regard to the subjective intention of the borrower as to how the loan monies would be applied, or in the case of joint or several borrowers, by whom the decisions as to the employment of the moneys was to be made. The fact that Mrs Miley did not herself intend to remain at a distance from investment decisions or from decisions as to how the loan monies were to be spent does not characterise the object or purpose of the loan."

57. Mr. Gormley junior appears to suggest that there was some change in his personal circumstances between 2005 and 2010 which had the effect of transmuting what he accepts was a business loan into something to which the 1995 Act applied. What that change was he does not explain but in any event, it seems to me not to be of particular relevance in circumstances where the court must objectively assess the purpose of the loan. It is in my view beyond any doubt Loan 5 was, as were Loans 2, 3 and 4, a refinance of a business loan. Thus the 1995 Act can have no application to Loan 5.

Conclusion

58. For the foregoing reasons therefore, I am satisfied that neither defendant has demonstrated that he has a fair or reasonable probability of having a *bona fide* defence and I must therefore grant judgment to the Bank in the amount claimed.