Neutral Citation Number: [2013] IEHC 227

THE HIGH COURT

[2011 No. 2790S]

BETWEEN/

ALLIED IRISH BANK PLC

PLAINTIFF

AND

GEORGE TRACEY

DEFENDANT

[2011 No. 2791S]

BETWEEN/

AIB MORTGAGE BANK

PLAINTIFF

AND

GEORGE TRACEY AND KAREN TRACEY

DEFENDANTS

THE HIGH COURT

[2011 No. 2792S]

BETWEEN/

AIB MORTGAGE BANK

PLAINTIFF

AND

GEORGE TRACEY

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 12th March, 2013

1. These are three sets of proceedings which were heard together in which the plaintiff bank seeks summary judgment as against Mr. George Tracey in the first set of proceedings (2011, 2790S) and its subsidiary, AIB Mortgage Bank, seeks summary judgment as against Mr. George Tracey and Ms. Karen Tracey in the second and third sets of proceedings (2011, 27901S and 2011, No. 2792S).

2. It is a sad commentary on the present state of the country that the law and practice with regard to summary judgment is only too well known to this court. It is accordingly unnecessary to rehearse any of this law in any detail. It is plain from the decision of the Supreme Court in *Danske Bank v. Durcan New Homes* [2010] IESC 22 that a plaintiff is entitled to summary judgment for a liquidated sum unless some arguable defence can be established by the defendants. It should be noted, however, that that case concerned the interpretation of rather complex recourse provisions where both the contract (and the underlying facts) were far from straightforward.

3. The present proceedings are, in one sense, further removed again, since neither the fact of the loans, their terms and the amounts now due are fundamentally in dispute. The defences which have been advanced by Mr. Tracey are, in truth, in the nature of classic counterclaims, although, as we shall presently see, this is not true of the specific defence advanced by Ms. Tracey in the second set of proceedings. In these circumstances the court will have to consider whether a form of equitable set-off should be permitted having regard to the principles articulated by Kingsmill Moore J. in *Prendergast v. Biddle* (1957) and more recently by Clarke J. in *Moohan v. S. & R. Motors (Donegal) Ltd.* [2008] 3 I.R. 650.

4. In *Moohan* Clarke J. noted that the court's jurisdiction with regard to counterclaims was classically wider and was contingent on a range of factors:

> "Where the nature of the defence put forward amounts to a form of cross claim slightly different considerations may apply. In those circumstances the court has a wider discretion. Where the defendant does not establish a bona fide defence to the claim as such, but maintains that he has a cross claim against the plaintiff, then the first question which needs to be determined is as to whether that cross claim would give rise to a defence in equity to the proceedings. It is clear from *Prendergast v. Biddle* (Unreported, Supreme Court, 21st July, 1957, Kingsmill Moore J.), that the test as to

whether a cross claim gives rise to a defence in equity, depends on whether the cross claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross claim may be made out.

On the other hand if the cross claim arises from some independent set of circumstances then the claim (unless it can be defended on separate grounds) will have to be allowed, but the defendant may be able to establish a counter claim in due course, which may in whole or in part, be set against the claim. What the position is to be in the intervening period creates a difficulty as explained by Kingsmill Moore J., in *Prendergast v. Biddle* in the following terms:-

> "On the one hand it may be asked, why a plaintiff with approved and perhaps uncontested claim should wait for a judgment or execution of judgment on this claim because the defendant asserts a plausible but unproved and contested counter claim. On the other hand it may equally be asked why a defendant should be required to pay the plaintiffs demand when he asserts and may be able to prove that the plaintiff owes him a larger amount".

The court's discretion is to be exercised on the basis of the principles set out by Kingsmill Moore J. later in the course of the same judgment in the following terms:-

> "It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counter claim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant could show that the plaintiff was in embarrassed circumstances it might be considered a reason why the plaintiff should not be allowed to get judgment, or execute judgment on his claim, until after the counter claim had been heard, for the plaintiff having received payment by dues the monies to pay his debts or otherwise dissipated so the judgment on a counter claim would be fruitless. I mentioned earlier some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of this discretion".

It seems to me that it also follows that a court in determining whether a set off in equity may be available, so as to provide a defence to the claim itself, also has to have regard to the fact that the set off is equitable in nature and, it follows, a defendant seeking to assert such a set off must himself do equity.

On that basis the overall approach to a case such as this (involving, as it does, a cross claim) seems to me to be the following:-

> (a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiffs claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendants case, it would not be inequitable to allow the asserted set off;
>
> (b) If, and to the extent that, a *prima facie* case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);
>
> (c) If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in *Prendergast v. Biddle*."

5. It is with these by now well established principles in mind that we can proceed to analyse the present claim.

The first set of proceedings
6. The evidence establishes that Mr. Tracey was undoubtedly a major and honourable customer of AIB. Unfortunately for him, he (like many others) found himself over-exposed financially when the economic storm which began in earnest in September, 2008 swept the property market before it. Mr. Tracey had been involved in some major projects and had many financial assets. His difficulties appear to result directly from the fact that the value of many of these assets has plunged since the crisis first struck.

7. In the first set of proceedings AIB seek summary judgment in the sum of €12,731, 306 and for a sterling amount in the sum of £1,006,474. The Euro-denominated sums are based on the sums outstanding in letters of demand dated 9th March, 2011, in respect of nine separate loan account, together with a contract of guarantee in the sum of €148,472, the principal obligor, Enniskerry Propacademy Ltd having defaulted on that sum. The sterling sums refer to three separate sterling loan accounts on which there are outstanding balances.

8. It would seem that between 2009 and early 2011 the parties engaged in protracted negotiations regarding these non-performing loans, but nothing came of it. The plaintiff bank issued letters of demand in March, 2011 and the present proceedings then commenced. Mr. Tracey has raised a number of disparate responses to these claims and I propose now to consider these in turn.

The fact the Bank commenced the proceedings by summary summons
9. Although Mr. Tracey accepts these loans have not been performing since 2009, he points to the fact that the letter of demand did not issue until March 2011 as evidencing that the Bank must have known "the very substantial nature of the matters in dispute between them." Mr. Tracey then objects to the fact that the Bank then commenced the proceedings by way of summary summons when it knows that "the substantial matters in dispute" cannot possibly "be resolved by way of affidavit".

10. It is difficult to know what to make of this objection. I do not think that any clear inference can be drawn from the Bank's failure to send earlier letters of demand and the fact that the plaintiff has elected to proceed by way of summary summons is fundamentally a matter for itself. If it should transpire that the defendant has an arguable defence, then the matter will be adjourned to plenary hearing and no prejudice will be suffered by him.

The dealings with Sammark Properties and Dasnosc
11. Many of Mr. Tracey's business dealings were done with a business colleague, Mr. David Agar. They jointly held shareholdings in three companies known as Dasnoc Ltd., Sammark Properties Ltd. and Herrata Ltd. The plaintiff bank provided banking facilities to Mr. Agar and was the lead banker to the three companies.

12. It is not, I confess, altogether easy to understand why if AIB breached an agreement with Sammark in April, 2007 "causing

immediate disruption" to Mr. Tracey's business and financial affairs this issue is only now being raised – apparently for the first time – in a replying affidavit sworn in November 2011 and then by way of counter-claim only. While I can appreciate that a customer might be reluctant to sue his or her banker unless it was absolutely necessary, one might have expected that at least Mr. Tracey would have protested in writing at the time in the strongest possible terms had this occurred. Yet the averments seem strangely silent on detail and lack the degree of documentary corroboration which a serious claim of this kind might be thought to have engendered.

13. At the same time AIB sanctioned a loan facility in favour of Dasnoc Ltd. which included the sum of €10m. which was to be used for the construction of the infrastructure of a development known as Profile Park, Grange, Dublin 22. This project was certainly an important aspect of Mr. Tracey's development portfolio.

14. Mr. Tracey alleges that sum of €7.2m was diverted by another (named) individual to finance the acquisition by Dasnoc of the shareholding of that person in another (named) company. It is said that all of this was willingly facilitated by the plaintiff bank, the senior officials of which were said to have knowingly permitted this other individual use €7.2m. of the €10m. loan sanction for unauthorised purposes. Mr. Tracey then contends that the "fact that the plaintiff knew it was involved in wrongdoing is effectively confirmed" by an email sent by a senior AIB official, Mr. Brendan Hanratty, to the administrative assistant of the individual who is said to have misappropriated by the money in some way.

15. This email is worth examining in some detail by reason of the fact that it is said to provide objective evidence of misappropriation. Having commenced with some prosaic queries regarding acerage and planning status, Mr. Hanratty continued:

> "The Bank advanced €10m to the companies (through Dasnoc) in March '07 from broad terms as follows:
>
> Site works (to pay John Paul) - 5m
>
> To fund tax - €1.8m
>
> To fund other WC [working capital] accrued to that date - €1.2m
>
> To fund renovation to Craughwell (Foxrock) - €1.7m
>
> Interest roll up - €0.3m
>
> Total - €10m
>
> *Obviously these may have been utilised slightly differently, but this was the understanding at the time*. The facility is fully drawn (balance just under €10m allowing for interest roll up). In conjunction with the €5m which was received from Colin this morning, this is €15m. Can you break down (only in broad terms I don't need precise details) how this was – is being utilised. Is the construction contract with John Paul still €9m or has this changed? You mentioned that David has funded the deposits of the purchasers unhappily from cash flow, however, can I assume that they are included in the €19.1m now sought and as such will be refunded to him on drawdown? If you would get back to me this morning so we can proceed to committee tomorrow morning that would be great…" (emphasis supplied)

16. For my part I cannot see how the email bears the construction which Mr. Tracey urges. At most, it amounts to a routine query for the ultimate benefit of a credit committee as to how the monies advanced for a major development project were spent. The words to which Mr. Tracey attributes great weight seem to me to be no more than an acknowledgement that loan funds advanced for a building project can sometimes be dispersed in a fashion which is somewhat different from that which the developers originally contemplated. But this seems unexceptionable and it is difficult to avoid the conclusion that the sentence has been taken completely out of context.

Mearescourt House

17. In 2004 Mearescourt House, a substantial house in Mullingar, Co. Westmeath, was jointly purchased by Mr. Tracey and another individual for a substantial sum. This purchase was facilitated by a €3.4m. loan advanced for this purpose. Mr. Tracey contends that he subsequently paid a deposit and discharged substantial costs associated with this purchase in the sum of €2.95m. and that this fact was known to the plaintiff Bank. He complains, however, that the Bank "knowingly facilitated" this individual "in the re-finance of an asset in his name for his personal benefit to this joint facility." He then describes how this individual subsequently purchased a property which was then listed on the Mearescourt House loan facility. By contrast, the Bank required him to give ten of his personal assets when refinancing the Mearescourt House loan facility in 2008. All of this is cited as examples of how the Bank was "clearly preferring and advancing the personal interests" of this other individual at Mr. Tracey's "expense and…detriment."

18. Even if allowing all of this to be true, I struggle to see how this can realistically advance Mr. Tracey's case. In substance it is a complaint that the Bank permitted the co-owner of a substantial property to use those co-ownership interests as security for the financing of another acquisition and that Mr. Tracey was treated in a very different fashion when it came to the refinancing of his facilities. But this differing – or, if you, will, unequal – treatment would, at most, have given Mr. Tracey the right to make a complaint to the Financial Services Ombudsman. It is hard to see how this could come within the parameters of any existing cause of action. But still less can I discern any possible basis by which it could be said that this impacted on or affected the Bank's right to recover on foot of a non-performing loan which is admittedly overdue.

The transfer of the Mearescourt House Loans to NAMA

19. It appears that the Mearescourt House loans were transferred to NAMA at some stage in 2010. While Mr. Tracey hints that this transfer was done without notice to him, I do not think that this can be laid at the door of AIB. If the transfer itself was to be challenged, there was a mechanism whereby this could have done: *cf. Dellway Investments Ltd. v. National Asset Management Agency* [2011] IESC 13, [2011] 4 I.R. 1.

20. His substantial complaint, however, is that he had invested in a Asian investment fund which matured in 2011 and which yielded a profit of some €800,000. He contends that these monies have been retained by NAMA and have not been applied to the reduction of the Mearescourt House loans. I will make no further comment on this argument other than to say that this argument is a tenable one.

Application of the principles in *Prendergast v. Biddle* and *SR Motors v. Moohan*

21. The arguments advanced by Mr. Tracey to resist judgment must in strictness be regarded as counter-claims rather than defences as such. He does not, for example, dispute the indebtedness or the validity of the loans or suggest that he was induced to enter

these transactions by reason of misrepresentation on the part of the plaintiff Bank. He rather seeks to invoke equitable set-off, so that the *Prendergast v. Biddle* principles accordingly come into play.

22. Here it must be observed that the claims relate to the alleged mis-management of the accounts by the plaintiff bank, so that these are counter-claims not strictly directly connected with the original contracts of loan. Nevertheless, there is a sufficient connection between these counter-claims so that it would not be inequitable to allow equitable set-off, even if these claims are strictly independent claims.

23. With the exception of the argument advanced in relation to the Asian Fund, I see no reason why these particular counter-claims can be legitimately called in aid to resist the Bank's claim for judgment in the circumstances of the present case. None of these claims were advanced promptly and, moreover, they lack specificity and precision. Many of them – even on closer examination – rarely rise beyond generic pleas of wrongdoing in the administration of the accounts. In many instances – such as the arguments based on the email sent by Mr.Hanratty – the arguments seem forced and contrived.

24. I will, however, allow Mr. Tracey to advance the argument in relation to the Asian Fund, so that I will grant him liberty to defend in respect of that €800,000 claim, so that to that extent the Bank's claim for summary judgment will stand abated by that sum.

25. It follows, accordingly, that the plaintiff bank is entitled to judgment for the sum of €11,931,306 and for £1,006,747 sterling.

The second set of proceedings

26. In the second set of proceedings AIB Mortgage Bank seeks judgment in the sum of €3,364,961 (together with accrued interest) in relation to a mortgage facility which was provided to George Tracey and Karen Tracey in September 2006. The original facility was in the sum of €3,700,000 and the sum was designed to purchase a residential home in Foxrock, Co. Dublin.

27. The loan was originally completely serviced until August, 2007. Some payments were made to the loan thereafter until November, 2008 when payments stopped completely. In May, 2009 Mr. Tracey put a proposal to the plaintiff bank (and its parent bank, AIB plc) which resulted in a loan sanction designed to address all debt owed by Mr. Tracey (including the debt due in respect of this property). This arrangement was never finalised, despite extensive negotiations between 2009 and 2011. Neither defendant denies that the mortgage is substantially in arrears, but each makes out a slightly different case by way of defence.

28. Mr. and Ms. Tracey were married in 1988 and there are two children of the marriage, neither of whom are dependent. The marriage unfortunately came to an end in 2004 when Mr. Tracey left the then family home, which was another residence in Foxrock. In June, 2006 Mr. Tracey purchased at auction another property in Foxrock for the sum of €6.6m. and it is this property which is the subject matter of the facility loan.

29. There is no doubt but that, despite their estrangement, Mr. Tracey purchased this property for his wife so that she and their two children could have secure accommodation. It seems clear that at that one point Mr. Tracey intended – and, subject to financial commitments, perhaps still intends – to transfer this property into the sole name of his wife for her long-term benefit. In July, 2012 Ms. Tracey issued proceedings under the Judicial Separation and Family Law Reform Act 1989, and Family Law Act 1995, against Mr. Tracey seeking declarations that she is the sole beneficial owner of the property and that by virtue of the use of the sale proceeds of the other Foxrock property in November, 2006 she owns the present property on an unencumbered basis. It is perhaps accordingly important to stress that this judgment is concerned only with the entitlement of AIB to obtain judgment against Mr. and Ms. Tracey and save to that extent nothing in this judgment is intended to deal with the rights of the two spouses *inter se*.

30. The original family home was then sold in November 2006 with the net sale proceeds of €1.8m. being applied (in part) to the new Foxrock property. Ms. Tracey then moved into the new family home. Critically, however, as she accepts, she had signed the loan acceptance form on 15th September, 2006, which is the subject of the present proceedings. While Ms. Tracey says that she was not independently legally advised, it cannot be overlooked that she signed a family home declaration which had been prepared by Michael Campion & Co. in which she is described as a client along with Mr. Tracey. She also signed a retainer and authority form on the same day authorising this firm to act for her.

31. As it happens, neither defendant deny that the account is arrears to the extent contended for by the plaintiff bank. In the case of Mr. Tracey, his defence is intertwined with the defence advanced in the first set of proceedings. Ms. Tracey's defence is, however, that the monies were advanced in circumstances where the plaintiff bank knew that she had no independent income of her own and that she was entirely reliant on the loan by being serviced by her husband. One might observe in this context that no suggestion has been made that the bank induced her to sign the loan agreement or that it misrepresented its terms or effects or that she did not understand the full import of the transaction . Her case rather is that the bank knew that it was giving her a loan which she could not afford to repay in her own right:

> "…the Bank, in reality, were on notice that funds from a family home were being used to subsidise the purchase price on [the property], that they were aware that the defendants had separated, that they did not see me as being in a position to meet said onerous repayments nor liable under the loan itself epitomised by the fact that it was prepared to negotiate solely with Mr. Tracey on the loan."

32. All of this is doubtless true. The purchase of this property was probably part of a complex series of property transactions involving Mr. Tracey and the AIB Group. The property in question was purchased in June, 2006 for an exceptional price and it was prices of that kind which led many to believe at the time that property prices could only continue to rise. The stark fact remains, however, that Ms. Tracey knowingly executed the loan transactions in circumstances where, it bears repeating, no suggestion has been made that the Bank misrepresented its terms or effects or that she entered into this agreement by reason of some inducement or promise on the part of the Bank or by reason of some form of collateral contract on foot of such a misrepresentation. She assumed at the time that Mr. Tracey would make good on his promise to assign the property to her on an encumbrance free basis, as, indeed, a letter from her then solicitors McCann Fitzgerald to her husband's solicitors, Lavelle Coleman, on 5thSeptember 2006 makes clear. It is probably fair to assume further that Mr. Tracey would have done just that had financial circumstances so permitted.

33. When all is said and done, the unfortunate fact is that none of these factors can be impleaded against the Bank by Ms. Tracey so as to escape liability on the loan. In reality her position is no different to that of many home-makers who commendably devote their lives to look after home and children and naturally who rely on their spouse to produce sufficient income to discharge the mortgage and other household loans. In view of the letter of undertaking and retainer which had been presented to the Bank, the Bank was nevertheless entitled to assume that she was legally advised. So far as the Bank were concerned, she freely signed the loan agreement and if she was unaware of the possible legal implications of that course of action, this cannot be said to be the fault of the Bank.

34. In the course of the hearing much emphasis was placed on the fact that life cover for Mr. Tracey was ultimately waived by the Bank. What appears to have happened is that although the Bank normally required life cover for Mr. Tracey in respect of the twenty year mortgage dating from September 2006, this was proving difficult to secure. But Mr. Tracey had existing cover for eight years and the loan issued for a term of eight years which allowed for use of existing life cover. It was agreed between the parties that the loan would revert to a 20 year loan once the drawdown was secured. Mr. and Ms. Tracey wrote to the Bank to this effect on 14th September, 2006. On 20th July, 2007, the Bank wrote to the Traceys re-instating the original agreement, with the result that the monthly repayments required dropped significantly. I cannot see how this affects the Bank's entitlement to recover the sums in respect of this property which are now long since overdue.

The third set of proceedings

35. In the third set of proceedings (2011 No. 2792S) AIB Mortgage Bank seek judgment in the sum of €1,438,814 as against Mr. Tracey in respect of four separate loan facilities which were originally advanced to facilitate property acquisitions. Since the arguments advanced here on the part of Mr. Tracey were in substance the sum as those advanced in the first set of proceedings, I cannot see any basis on which this Court could avoid giving summary judgment for this sum.

Conclusions

36. In summary, therefore, my principal conclusions are as follows:

> A. In the first set of proceedings, AIB is entitled to summary judgment for the sum of €11,931,306 and for £1,006,474 sterling, albeit that I will give Mr. Tracey leave to defend in respect of the €800,000 claim arising from the maturing of the Asian Fund which he says was not applied in reduction of the Mearescourt House debt.
>
> B. In the second set of proceedings I must give judgment against Mr. and Ms. Tracey jointly and severally in the €3,364,961.
>
> C. In the third set of proceedings I will give summary judgment against Mr. Tracey in the sum of €1,438,814.

37. I will hear counsel as to the form of orders and any consequential relief which may prove necessary.