

THE HIGH COURT
COMMERCIAL

[2016 No. 149S]

BETWEEN:

KBC BANK IRELAND PLC

PLAINTIFF

-AND-

VINCENT MCNAMEE AND MARCELLA MCNAMEE

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on 20th day of June, 2016

Introduction

1. This case involves an application for summary judgment by the plaintiff (the "Bank") against the defendants in the sum of €1,921,983.45. The defendants are lay litigants and have filed an unsigned affidavit dated 26th April, 2016 denying that the Bank has any right to judgment. Mr. McNamee is a lay litigant and he represented himself and his wife, Mrs. McNamee, at the hearing.

2. In this somewhat curiously worded affidavit Mr. McNamee states that he is "*a non-person (a non-persona), a man living and not dead, acting as a business man*" and the attestation clause states that he is "*acting in role as Grantor, Governor General, Executor General, Guardian General A living man & all rights reserved*". In the body of the affidavit, Mr. McNamee alleges that the "*claim of the plaintiff cannot be verified in the absence of the wet inked original instruments; Thus this matter, has no subject matter jurisdiction since the outset, as the matter stands*". At the hearing of this case, Mr. McNamee outlined that in seeking to defend these proceedings, the defendants were relying on the fact that they had not been provided with sight of the 'wet-ink' versions of the loan documentation which the Bank are relying upon to bring these proceedings.

3. This Court must consider whether the defendants have a credible defence, such as to deny the plaintiffs summary judgment and have the matter sent for a plenary hearing.

Background

4. The plaintiff produced sworn evidence to the Court (which evidence was not controverted by the defendants, save to the extent of the defendants' claim of not having sight of the wet-ink versions of the loan documentation), which supported the plaintiff's contentions that:-

- a. The defendants borrowed funds from the plaintiff, then known as IIB Bank plc, to refinance existing Bank of Ireland debt relating to the Wonder Years Crèche, Rosbracken, Letterkenny, Co. Donegal and to finance an extension of that property.
- b. The Bank sent a facility letter to the defendants on 6th June, 2008, and same was executed by the defendants. Pursuant to the terms of that facility, the sum of €1,800,000 was advanced to the defendants, which loan was due to be repaid in full on or before 1st August, 2028.
- c. This loan facility was subject to a number of amendments as the facility was restructured over the years since 2008. The most recent version of the facility letter which was signed by the defendants is dated 26th June, 2013, and it provides for a sum, at that stage of €1,888,301, to be repaid by monthly instalments by the defendants. Under the Bank's standard terms and conditions attached to that letter, it provided that in the event of default the Bank was entitled to require immediate payment in full of the balance.
- d. On or about 1st February, 2014, the defendants defaulted in their payments to the Bank and on the 9th November, 2015, the Bank issued a letter to the defendants demanding full repayment of the amount then outstanding of €1,902,469. The Bank, by letters dated 10th December, 2015, and 29th January, 2016, again sought repayment of the outstanding amount.
- e. By Deed of Appointment dated 20th November, 2015, a receiver was appointed over the property given as security for the loan facility. The secured property has not yet been sold and no proceeds have been raised to discharge any or all of the defendants' liability under the loan.

The Law

5. The key issue to be considered in this case is whether the plaintiff should be granted summary judgment or whether the defendants should be given liberty to defend the plaintiff's application for judgment at a plenary hearing.

6. The law in this area is settled and that the principles set out in *Aer Rianta v. Ryanair* [2001] 4 IR 607; *First National Commercial Bank v. Anglin* [1996] 1 IR 75; and *Harrisrange Ltd v. Duncan* [2003] 4 IR 1, are the principles to be applied by this Court in considering whether to grant summary judgment. It is clear from those cases that the test for determining whether to grant summary judgment is a test of whether the defendants' defence is credible.

7. With this in mind, the nature of the defendants' defence to these proceedings must now be considered by this Court. On 1st

February, 2016, the defendants sent identical letters in response to the letter of demand for repayment dated 18th November, 2015, from the Bank. A marked feature of these letters is, like the affidavit to which this Court has already referred, the quasi-legal style in which they are written. The letters state, inter alia:-

"You are on notice that whilst acknowledged, I do not legally and lawfully accept, and I do not legally and lawfully consent, to any and all correspondence received from KBC Bank Ireland plc to date (as the bank has never verified its claim), as my original business was with IIB Bank from the outset."

In this letter, the defendants also demand "a sworn and attested" and "*un-defaced original wet inked signed*" copy of the loan application, the loan offer agreement, the deed of mortgage and the deed of transfer and assignment. In these letters, the defendants stated that they also sought access to those documents for the purpose of having them forensically viewed by the defendants' experts.

8. These points contained in the defendants' letters of 1st February 2016 were addressed by the Bank in their letter of 12th February, 2016 in the following manner:-

"To assist your understanding, please note that the bank is a public limited company. The bank was incorporated in Ireland under the Companies Acts 1963, as amended, on the 14th February 1973, under the name Irish Intercontinental Holdings Limited. On the 25th April 1973, it changed its name to Irish Intercontinental Bank Limited. On the 10th January 2000 it changed its name to IIB Bank Limited.

On the 29th March 2006, the Bank re-registered as a public limited company under the name IIB Bank plc, and on the 24th October 2008 it changed its name to KBC Bank Ireland plc.

As you know, by facility letter dated 6th June 2006 (as amended), the Bank set out the terms on which it contracted to lend sums to you and your wife jointly. The terms of the facility letters were accepted by you both. At that stage, the Bank was IIB Bank Limited.

Insofar as you had confusion on whether the Bank had contractual entitlements under the facility letter (as amended), we trust that this response now assuages your concern."

In this Court's view, this clarifies the point made by the defendants regarding the name of the plaintiff in these proceedings as there is no evidence produced by the defendants to contradict these statements by the Bank.

9. As regards the defendants having access to the original loan documentation, the Bank wrote in their letter of the 12th February, 2016, to the defendants in the following terms:-

"In relation to your (apparent) request to inspect mortgage documentation, pursuant to Section 91 of the Land and Conveyancing Law Reform Act, 2009 (as amended), a mortgagor's entitlement to inspect documents of title is exercisable "*on payment by the mortgagor (i.e. you) of the Mortgagee's reasonable cost and expenses in relation to the exercise*".

The Bank shall allow inspection of the title documents at our offices at a mutually convenient time, upon discharge of the Bank's reasonable costs and expenses of €300.

Upon discharge of the sum, we can arrange a mutually convenient inspection time and in this regard, please write to us directly quoting reference KBC 001/0021/HK/DW."

The Defendants did not take up this offer from the Bank to inspect the original loan documentation and no reason has been put forward by the defendants for their failure to do so. Yet, at the hearing of this case, Mr. McNamee outlined that his only defence to the summary proceedings was that he had not seen the original loan documentation.

Decision

10. The defendants have made clear that their defence to this summary judgment is that they did not see the original loan documentation. They have not sought to deny that the loans had been made or that they had failed to repay them.

It is not a credible defence to summary judgment for the defendants to rely on the fact that they have not seen the original documentation which supports the claim for summary judgment, when in fact they were offered the opportunity to inspect those originals (pursuant to the statutory right to do so under s. 91 of the Land and Conveyancing Law Reform Act, 2009), but refused to take up that opportunity. On this basis this Court must conclude that no credible defence is available to the defendants in this case and so this Court has no option but to grant judgment to the plaintiff in the sum of €1,921,983.45 plus interest of €19,085, giving a total sum of €1,941,068.45.