

## THE HIGH COURT

[2013 No. 2973 S]

BETWEEN

DANSKE BANK A/S TRADING AS DANSKE BANK

PLAINTIFF

AND

ETHEL MILEY

DEFENDANT

**JUDGMENT of Ms. Justice Baker delivered on the 23rd day of February 2016.**

1. The plaintiff seeks summary judgment against the defendant in the sum of €1,063,448.12 pursuant to the terms of a facility letter dated 18th January, 2012. The matter came before me by way of appeal from an order of the Master of the High Court, who on the 6th November, 2014 gave liberty to the plaintiff to enter judgment in the stated amount. The parties consented to the setting aside of the order of the Master and the matter proceeded by way of motion for judgment before me. This judgment is given with regard to the argument by the defendant that she be permitted to defend the proceedings.

2. The test applicable to the exercise by the Court of its jurisdiction to grant summary judgment is well established, and the judgment of Hardiman J. in *Aer Rianta CPT. v. Ryanair Ltd.* [2001] 4 IR 607 is accepted as setting out the applicable legal principles, namely that a defendant ought to be permitted to defend unless it is "very clear" that the defendant has no case, or as is sometimes said, only if the affidavits of the defendant "fail to disclose even an arguable defence."

3. It is also established by the case law that the court is entitled to assess the "credibility of a defence" as explained by Clarke J. in *Irish Bank Resolution Corporation (in special liquidation) v. McCaughey* 2014 IESC 44 (Unreported, Supreme Court, 11th July, 2014), and that the Court is entitled to consider whether the legal argument proffered by a defendant would provide a defence if determined in favour of the defendant.

4. Finally, it is also established that a mere assertion on the part of a defendant with regard to a state of affairs is not sufficient to raise an arguable defence, and the Court is entitled to look to whether such assertion is borne out by some evidence and whether it is credible in the circumstances.

5. The defendant pleads that she has a defence on a number of grounds and I will deal with each in turn.

**The defendant is a consumer**

6. The defendant argues that at the time of the 2012 facility she was a consumer within the meaning of s. 2 of the Consumer Credit Act 1995 as amended, as she was "a natural person" acting outside her business. It is asserted that the plaintiff breached the provisions of the Consumer Credit Act 1995 (as amended) *inter alia* by failing to provide to the defendant the cooling off period required by s. 30(2), and that the plaintiff was in breach of all of the requirements in s. 38 of that Act.

7. It is common case that the defendant and her now deceased husband borrowed money from the plaintiff in or around the year 2006, and that the borrowings were used by the late Mr. Miley to invest in property both in Ireland and abroad. She does not deny that she was a party to the first loan, and it is the restructuring of that loan in 2012, after the death of her husband, that is the subject matter of these proceedings. It is also not denied by Mrs. Miley that the 2006 facility was not repaid.

8. The defendant argues that her trade, business or profession, both in 2006 and in 2012 when she refinanced the loan in her own name, was that of running a licensed premises, and she was not an investor in property. She argues that she was required to be a party to the 2006 borrowings because the loan was secured on property held in their joint names. The money, she says, was "not really" for her use but for that of her husband, and the fact that she joined in the loan was because of the Bank's security requirements. Mrs. Miley asserts that she did not have any "commercial interest in or direct involvement with the loan transaction", and that she had no "direct interest or involvement with the business operation of Seamus Miley, a sole trader".

9. Mrs. Miley does not suggest that her husband invested in the purchase of property in China, or made other investments solely for his own benefit, and at best what she says is that she had no direct involvement with the investments. I consider her affidavit to be carefully framed, not to suggest that she gained no benefit from the loans or the investments, or that the investments themselves and any profits from them were solely for the benefit of her late husband, and furthermore, she does not deny that she or her family obtained the benefit of the monies borrowed, or the proceeds of the investments.

10. The affidavit evidence gives no information as to the estate of the late Mr. Miley, and whether the defendant is the sole beneficiary. The property at Miley's Bar was in their joint names and may have passed to her by survivorship. This information may have given a more complete picture of the financial elements of the relationship between Mrs. Miley and her late husband. The absence of information in this regard is an omission of note.

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.

12. Certain elements of the 2012 facility, some of which were also in common with the 2006 facility, bear out the characterisation of the loan as not being a consumer facility:-

- The facility provided for furnishing on an annual basis of financial accounts and accountancy information of the company Sagel Ltd., the operating company of the licensed premises;

- Two apartments in Shanghai, China were agreed to be sold in permanent reduction of the loan.
- Professional valuations of what was described as “commercial property at Miley’s Bar, Main Street, Blessington, Co. Wicklow” were to be obtained and renewed at a minimum at three yearly intervals.
- Public liability insurance for the licensed premises was to be provided to the Bank prior to draw down.
- Each of the loans was arranged on behalf of the borrowers by an investment broker, and the officials of the Bank who signed the loan agreements were both working in the business banking division of the Bank

13. The defendant argues that the circumstances of the borrowings are sufficiently similar to those identified in my judgment in *ACC Loan Management Limited v. Browne* [2015] IEHC 722 (Unreported, High Court, 11th July, 2014), and that her needs were “allied to” the needs of her husband. The facts of *ACC Loan Management Limited v. Browne* find no echo in the facts of this case, as the accommodation needs of the second defendant in that case were solely to be met by the borrowings, and the plaintiff bank was so aware. Mrs. Miley has not made out a credible argument that her borrowings were not allied to those of her husband. Further, the 2006 loan was itself a refinancing of a joint loan over the licensed premise of which she was the operator and manager, and which was jointly owned, and the loan was thus directly of benefit to her.

14. The defendant also relies on the judgment of Charleton J. in *Friends First Finance Ltd. v. Lavelle* [2013] IEHC 201 (Unreported, High Court, 9th May, 2013). That case concerned a wife who claimed to have relied on the expertise and direction of her husband with regard *inter alia* to the explanation of financial documents which she had executed. Charleton J. found as a matter of fact that the wife was not dealing with the bank in the context of a business and that she did not have either the interest or “financial wherewithal” in financial business to engage in the property investment business of her husband.

15. I consider that the judgment of Charleton J. can be distinguished in a number of respects from the facts in the instant case. Mrs. Miley is not a stranger to business, and even if she was a stranger to the property investment business in which her husband engaged, she was not unfamiliar with financial transactions in general; she ran the licensed business and it is not credible that she relied on her husband’s expertise or direction with regard to the 2006 loan, which was secured on the premises from which she ran her business. At its height, what the defendant says is that her husband engaged in a business which was other than that from which she derived her livelihood, and she became a joint borrower for his business loans not because it was intended by her, or by the couple jointly, that she would actively involve herself in the purchase of investment property, but because the licensed premises and residence of the couple was to be offered as part of the security for the loan.

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.

#### **The signed acknowledgment is not determinative**

17. Mrs. Miley executed for the purposes of both the 2006 and 2012 loans a certificate or confirmation that she was not acting as a consumer for the purposes of the transaction. She asserts now that she was a consumer for one or other of the transactions, or both.

18. Mrs. Miley relies on the judgement of Barrett J. in *Ulster Bank v. Healey* [2014] IEHC 96 (Unreported, High Court, 28th February, 2014) but also on my judgment in *ACC Loan Management Ltd. v. Browne* referred to above, that the characterisation of the loan as a consumer or commercial transaction was an objective one and that the characterisation that the parties gave the transaction was not determinative.

19. Mrs. Miley signed an acknowledgement that she was not a consumer, and that fact alone may not fully determine how a loan was to be would objectively characterised, and more especially in the context of an application for summary judgment a court must ask whether the defendant has made out a *prima facie* case that, notwithstanding such signed declaration, that the true characterisation of the loan might credibly be other than as appears on the documentation. That proposition must however be seen in the light of the dicta of Charleton J in *National Asset Management Ltd v Barker and Ors.* [2014] IEHC 216 (Unreported, High Court, 10th April, 2014) where he said the following:-

*“If an assertion of fact is made which is in the teeth of a written contract, then a particular scrutiny will be made of that fact and how it is alleged to fit within the matrix that amounted to the contract between the plaintiff and the defendant”*

20. While a signature of itself does not always import sufficient evidence to enable the court to characterise a loan, Mrs. Miley by her signature in both cases asserted a particular fact. My judgment in *ACC v. Browne*, in which no certification had been executed by the defendants that the loan was not a consumer loan can be distinguished. The facts of the present case are in my view, closer to the facts of *ACC v. McEllin & Ors* [2013] IEHC 454 (Unreported, High Court, 18th October, 2013), where Birmingham J. held that the written confirmation made by the defendants, they were not acting as consumers amounted to a representation and warranty to the bank on foot of which the bank was entitled to act and which had contractual import.

I consider that Mrs. Miley has made a representation to the Bank that she was not a consumer. That fact, allied to the findings above have lead me to the conclusion that Mrs. Miley was not a consumer for the purpose of either loan

#### **Undue influence or pressure**

21. At paragraph 9 of her replying affidavit Mrs. says that the 2006 loan was a “structured term loan agreement” for the purposes of “refinancing the existing mortgage” over Miley’s Bar, Blessington, Co. Wicklow. Mrs. Miley gives this evidence in the context of her argument that she was relying on her husband’s knowledge and expertise in the handling of finance, and that she was not given a choice as to whether she would sign it or not. She does not explain how a choice not to sign the documentation would have assisted her, given that the 2006 loan was to refinance a loan secured on property in joint names, and she does not explain how the refinancing of the loan could have happened without her involvement.

22. In her replying affidavit of 12th December, 2015 she says “in or about 2011”, and later that “during late 2011” she met with

representatives of the plaintiff for the purposes of "regularising" the outstanding loans. She avers that on 18th January, 2012 she was required to attend at the Bank's offices in Dublin 24 and was given "no option" but to sign the facility. She said she was "simply there to sign the bank documents". Her evidence with regard to engagement with officials of the Bank through the year 2011 is at best sketchy.

23. I reject the assertion by Mrs. Miley that the Bank exercised duress over her in relation to the loan of 2012, and as she put it she had "no option" but to accept the terms of that agreement. The facts point to the term of the 2006 loan having expired, and default on the part of the borrowers is not doubted. Mrs. Miley did not have to accept the further loan by the Bank, but had she not done so she would have faced consequences that might have flowed from her failure to meet their demand. She could have perhaps borrowed the monies elsewhere, but she has not averred this on affidavit. Mrs. Miley may have been under pressure, but the pressure was one caused by her circumstances, and arose from the fact that she was the sole surviving co-borrower of a loan in default, and in respect of which demand was made.

24. Mrs Miley was also advised and her financial adviser attended at the meeting on 18th January, 2012, at which she signed the acceptance of the 2012 loan offer. This has the effect that any duress or pressure she might have felt was mediated and that she was sufficiently protected at the meeting.

25. I reject the suggestion by Mrs. Miley that any obligations be imposed on the Bank, as a result of what she says was a degree of pressure from her husband that she would enter into the 2006 loan facility, as that facility was a refinancing of a loan secured on jointly owned property

26. There is no presumption of undue influence as between husband and wife: see Kelly J. in *Irish Bank Resolution Corporation v. Quinn* [2011] IEHC 470 (Unreported, High Court, 16th December, 2011). Even if Mrs. Miley could persuade me that she was influenced by her husband in borrowing jointly with him monies which were intended for investment purposes, there is nothing in her affidavit which would suggest that the Bank had any notice, whether actual or constructive, of actual undue influence that might have overborne the will of Mrs. Miley.

#### **Family Home (Protection) Act 1976**

27. Finally, I reject the suggestion on the part of Mrs. Miley that any alleged failure of the Bank to comply with the provisions of the Family Home Protection Act 1976, renders either the loan or the security unenforceable.

28. Apart from the fact that these proceedings are an action in debt, the evidence quite clearly points to the fact that that part of the commercial premises which was the family home of the couple was in joint names, and the consent of a spouse who is a co-owner in those circumstances is not necessary under the legislation.

#### **Conclusion**

29. Accordingly, I consider that the plaintiff has made out its case and the defendant has not established a sufficient basis on which she might be permitted to defend. In the circumstances, I will enter judgment in the amount claimed and I will hear counsel as to the precise figures.