Neutral Citation: [2014] IEHC 330

THE HIGH COURT

[2012 3671 S]

BETWEEN

NATIONAL ASSET LOAN MANAGEMENT LIMITED

PLAINTIFF

AND

GREGORY (OTHERWISE GREY) COUGHLAN AND ANNE COUGHLAN

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered on the 9th day of May 2014

1. In this case, the plaintiff is claiming judgment against the second named defendant in the sum of €384,484.85. The background to the application is that by a loan facility letter dated 12th February, 2008, Anglo Irish Bank agreed to make loan facilities available to the defendants as follows:

> (i) Loan facility in the amount of €172,241 (Facility A);
>
> (ii) Loan facility in the amount of €731,000 (Facility B).

2. By way of letters of amendment dated 16th June, 2008, 16th December, 2008, 26th February, 2009, 27th April, 2009, and 5th August, 2009, the loan facility was amended. A final amendment letter of 6th January, 2010, provided that whilst the facilities were repayable on demand, the facilities were to be reviewed on or before 31st July, 2010.

3. The present proceedings, it is important to note, relate only to Facility B, as Facility A was repaid in full on 30th December, 2009.

4. The application for summary judgment is resisted. The primary argument advanced is that the second named defendant is, and was at all stages, a consumer, and that there has been a failure to comply with the provisions of the Consumer Credit Act and the European Communities (Unfair Terms in Consumer Contracts) Regulations. It is said that by virtue of the non-compliance with the terms of the Consumer Credit Act, that the provisions of the loan facility letter and the subsequent amendment letters are unenforceable against the second named defendant. The second named defendant now seeks to have the proceedings against her stuck out with an order for costs in her favour. As an alternative, but it was stressed that this was not the primary relief sought, then the matter could be remitted to plenary hearing.

5. Two subsidiary arguments have also been advanced. It is said that there was a delay in realising security that was available, an apartment at Grand Parade, Cork, and that had this apartment been sold in 2010, when the loan facility expired, that a price well in excess of the current market value could have been achieved. Secondly, the second named defendant says that it is likely that she and her husband were overcharged in respect of an original loan taken out in 2004, which was refinanced by the 2008 loan facility. This argument seems to have been prompted by media reports of the evidence given by the IBRC Special Liquidator in US court proceedings. It is accepted that these subsidiary arguments would not lead to the proceedings being struck out at this stage, but if accepted as having validity, would see the proceeding remitted to plenary hearing.

The Consumer Credit Act Issue

6. The letter of 12th February, 2008, stated that the purpose of the facility - Facility B - was to enable the borrower renew an existing facility which was put in place to purchase a site at Umera, Ardbrech, Kinsale; construct a private dwelling house on the site and capitalise interest and the Bank's management fee. That letter concluded with an acceptance provision. The letter stated as follows:

> "If you wish to accept the terms of this facility letter, please return the duplicate hereof, properly signed by you, within the next seven days, together with:
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> (i) the enclosed Certificate for the purposes of the Consumer Credit Act 1995 and the European Communities (Unfair Terms in Consumer Contract) Regulations 1995, duly executed."

The defendants signed the Borrower's Acceptance section of the letter and also signed a Certificate. That Certificate was in these terms:

> "We, Greg and Anne Coughlan (the Borrower) of Fasnet House, High Road, Ardbrach, Kinsale, County Cork, irrevocably and unconditionally certify as follows;
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> (i) this Certificate relates to two facilities (the Facilities) to be advanced by Anglo Irish Bank Corporation plc (the Bank) pursuant to a facility letter dated 12th February 2008 (the Facility Letter);
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> (ii) Facility A. This facility is made available to enable the Borrower renew an existing facility which was put in place to purchase property at Main Street, Ballydehob, County Cork. Facility B. This facility is made available to enable the Borrower renew an existing facility which was put in place to purchase a site at Umera, Ardbrach, Kilsale, County Cork, construct a private dwelling house on the site and capitalise interest and the Bank's arrangement fee. Additional funds in the amount of €55,000 are made available to enable the Borrower capitalise interest;
>
> (iii) None of the provisions of the Consumer Credit Act 1995 (the Act) apply to the Facilities as the Facilities are being advanced for the purpose of our trade, business or profession, and we are not, therefore, 'consumers' within the meaning of the Act.

(iv) None of the provisions of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (the Regulations) apply to the Facilities as we are not acting for purposes which are outside our business and we are not, therefore, consumers within the meaning of the Regulations.

(v) We understand the effect and importance of this Certificate and have been advised to take and have been given due opportunity to take separate independent legal advice on the effect of this Certificate, and have taken/declined to take such legal advice [neither the option taken or the option declined to take was deleted]."

7. Similar Borrower's Acceptance forms and Certificates were signed by the defendants in the case of a number, though not all of the amendment letters.

8. Notwithstanding the Certificates signed, the second named defendant has contended that she was indeed a consumer and that Facility B had nothing to do with her trade, business or profession. She explains that in 2001, she and her husband, who had been living in England, purchased Umera for the purpose of constructing a family home on the site. They demolished the existing house and built a substantial new home on the site. She says that the project had nothing to do with a trade, profession or business, but everything to do with providing her husband and herself with a family home. She says that when the house was completed in 2008, they renamed it Fasnet House and moved in to live there. She says that the Bank was at all stages fully aware that what was involved was the construction of a private family home. She points to the fact that the facility letters, and indeed the later demand letter, were all addressed to the defendants and her husband at that address.

9. The provisions of the Consumer Credit Act that appear most in issue are these:

(i) The definition of consumer in the Definition section and sections 30, 31, 36, 38 and 140. So far as material, they are in these terms:

"*Consumer* means a natural person acting outside his trade, business or profession.

30.—(1) A credit agreement and any contract of guarantee relating thereto shall be made in writing and signed by the consumer and by or on behalf of all other parties to the agreement, and—

(a) a copy of the agreement shall be—

(i) handed personally to the consumer upon the making of the agreement, or

(ii) delivered or sent to the consumer by the creditor within 10 days of the making of the agreement, and

(b) in the case of any contract of guarantee relating to the agreement, a copy of the guarantee and the agreement shall be—

(i) handed personally to the guarantor upon the making of the contract, or

(ii) sent within 10 days of the making of any contract by the creditor to the guarantor.

(2) A credit agreement shall contain a statement in respect of the cooling-off period that the consumer—

(a) has a right to withdraw from the agreement without penalty if the consumer gives written notice to this effect to the creditor within a period of 10 days of the date of receipt by the consumer of a copy of the agreement, or

(b) may indicate that he does not wish to exercise this right by signing a statement to this effect, this signature to be separate from, and additional to, the consumer's signature in relation to any of the terms of the agreement . . .

31.—(1) A credit agreement for a cash loan, other than an advance on a current account, or a credit card account shall contain a statement of the following—

(a) the amount of the credit lent under the agreement,

(b) the date the credit is to be advanced, (if known),

(c) the amount of each repayment instalment,

(d) the rate of interest charged and the APR,

(e) the conditions under which the APR may be changed,

(f) any charges not included in the calculation of the APR but which have to be paid by the borrower in certain given circumstances,

(g) the number of repayment instalments,

(h) the date, or the method of determining the date, upon which each repayment instalment is payable,

(i) the total amount payable in respect of the loan,

(j) the date of expiry of the loan,

(k) the means and the cost of any termination by the borrower of the agreement before the final repayment instalment . . .

38.—A creditor shall not be entitled to enforce a credit agreement or any contract of guarantee relating thereto, and no

security given by the consumer in respect of money payable under the credit agreement or given by a guarantor in respect of money payable under such contract of guarantee as aforesaid shall be enforceable against the consumer or guarantor by any holder thereof, unless the requirements specified in this Part have been complied with:

> Provided that if a court is satisfied in any action that a failure to comply with any of the aforesaid requirements, other than section 30, was not deliberate and has not prejudiced the consumer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be enforceable.

140.—Except where otherwise provided for in this Act, a creditor or an owner—

(a) shall not, in any agreement—

> (i) exclude or restrict any liability imposed on any person or any right conferred on a consumer, or
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> (ii) impose any further liability in addition to any liability imposed on a consumer, by this Act, and

(b) shall not be entitled to enforce any agreement (other than a housing loan) which so excludes or restricts any such liability or imposes any such further liability."

The Principles Applicable

10. The tests that are to be applied when considering an application for summary judgment have been considered by the Superior Courts in a number of cases in recent years. Indeed, I do not identify any significant disagreement between the parties as to the principles to be applied, rather, what is between the parties and what they do disagree about is what the outcome is if the agreed principles are applied. The leading case in this area is the case of *Aer Rianta cpt v. Ryanair* [2001] 4 I.R. 607, where the test that had been laid down by Murphy J. in *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75, was endorsed by McGuinness J. at p. 615, where she commented:

> "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.
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> . . .
>
> The court does not ask whether Mr. O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr. Byrne's account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible."

11. The issue is also the subject of judgment from Hardiman J. in the same case. In the course of his judgment, he observed at pages 621 to 622:

> "I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the late nineteenth and early twentieth centuries. The formulation used in *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75 and the cases cited in that judgment are useful and enlightening expressions of the test, but I do not believe that this formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. The 'fair and reasonable probability of the defendants having a real or *bona fide* defence', is not the same thing as a defence which will probably succeed, or even a defence whose success is not improbable."

Later, Hardiman J. went on to say 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?"

12. A particularly helpful and concise summary of the applicable principles was provided by McKechnie J. in *Harrisgrange Ltd. v. Duncan* [2003] 4 I.R. 1

13. In the case of *Zurich Bank v. McConnon* [2011] IEHC 75 (Unreported, High Court, Birmingham J. 4th March 2011), I commented that while the jurisdiction to refuse leave to defend and to proceed to judgment undoubtedly existed, that it was a jurisdiction to be exercised very sparingly, and indeed, I remain firmly of that view. In the *Aer Rianta v. Ryanair* case, Hardiman J., as I have just quoted, summarised the test as being "is it very clear that the defendant has no case?" That is the test I will apply. If the answer is in the affirmative, then I will accede to the motion. However, unless it is very clear that Mrs. Coughlan indeed has no defence, there will not be judgment at this stage.

14. On this question of the status of the second named defendant, Mrs. Coughlan, a significant aspect of the evidence relied on is that the original documentation from 2004 relating to the provision of funding for Umera, did not require the defendants to certify that they were not consumers. To the contrary, one letter of 6th August, 2004, included the cover sheet providing relevant information as contemplated by Part III of the Consumer Credit Act, headed up 'Housing Loan Agreement Regulated by Consumer Credit Act 1995'. A second facility letter of 27th September, 2004, is in broadly similar terms. The copy now available does not include a cover sheet and it is unclear whether this was originally included and has become detached. However, one way or another, the body of the letter contains a reference to 'Housing Loan Agreement'.

15. In those circumstances, in my view, it is very clear that the second named defendant has comfortably exceeded the threshold required to be crossed in order for leave to defend to be given. The second named defendant has made out an arguable case that so far as Facility B was concerned, that she was, in fact, a consumer, and it is further arguable that a consequence of the failure to comply with procedures referable to consumers is that the loan facility is unenforceable. Insofar as one of the sections of the Act arguably breached is s. 30, then it is arguable that the breach is one which the Court does not have a discretion to excuse.

16. There remains for consideration the further question whether the position now established is so clear that the Court should go further and strike out the proceedings. Such an order would be an unusual one. It is one that should be made only in the clearest cases as it involves dismissing proceedings in a summary manner. This is not such a case.

17. The second named defendant signed the Certificate which was returned with the duplicate of the facility letter. She stated that she was aware of the effect and importance of the Certificate and had been given an opportunity to take independent legal advice. She stated expressly that she was not a consumer and that the Facilities i.e. Facility A and Facility B were being advanced for the purpose of the defendants' trade, business or profession. For good measure, similar Acceptances and Certificates were signed by her on 17th December, 2008, 30th April, 2009 and 8th December, 2010.

18. It remains to be seen whether the second named defendant can be permitted to contradict and disavow what she signed.

19. The plaintiff has referred to the provisions of s. 140 of the Consumer Credit Act, and says that this was an impermissible attempt to exclude or restrict the second named defendant's rights as a consumer. I do not at all dispute that there is an argument to be made to this effect. However, the Certificate does not in form purport to restrict or exclude rights. Rather, in form, it is a representation as to fact. The defendants know better than anyone else how their trade, business or profession is structured and organised. It remains to be determined whether that structure and organisation could embrace the construction of Fasnet House. Accordingly, I do not believe that this is an appropriate case for striking out the proceedings at this stage, but rather, that the matter should go to plenary hearing.

20. Having reached the conclusions that I have, that this is a matter that should go to plenary hearing, it seems to me that it is neither necessary or appropriate to express a view on the apparent strength or otherwise of the subsidiary arguments in relation to realising security and overcharging. This is all the more so, as the state of the evidenced on these topics, particularly the overcharging topic may evolve very significantly from the present position. To take the overcharging issue as an example, at present, there is no evidence that the Coughlans were ever overcharged, the height of the case that can be advanced is that they may well have been, in that they borrowed at a time when overcharging was widespread.

21. If the second named defendant and her advisers access all relevant documents, and if 'Bankcheck', the organisation that is being approached, prepares a report, then the situation may be much clearer. 'Bankcheck' may report that no overcharging took place, in which case the issue would presumably drop out of the case, or the report might indicate that overcharging did indeed take place, and what the extent of it was. If that was the situation, and if it was accepted or established that there had been overcharging back in 2004, it would then be possible to establish what consequences should follow on from that. However, that is all for the future.

22. In summary, then, I am sending the proceedings to plenary hearing and I will discuss with counsel what further orders are appropriate in relation to pleadings.