THE HIGH COURT

[2010 No. 2292 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

THOMAS DARCY AND ANTOINETTE DARCY

DEFENDANTS

JUDGMENT of Mr. Justice Sean Ryan delivered 20th July 2012

The bank obtained judgment against the defendants for over €17 million on the 16th February, 2011. The judgment was obtained in the Central Office in default of Appearance by either of the defendants. The bank issued separate proceedings by way of special summons to obtain possession of properties that were the subject of the loans that gave rise to the defendants' liability to the bank in the first place. Those possession proceedings took a protracted course and ultimately led to an order being made in this Court by McGovern J. While the proceedings are quite separate, there is some inevitable cross-referencing from this application by Mr. Darcy on behalf of himself and his wife with the other special summons proceedings that have been determined by this Court.

In this application Mr. Darcy appearing personally and also speaking on behalf of his wife, who is the other defendant, seeks to set aside the judgment that was obtained in the Central Office in default of appearance. He has filed a number of affidavits. One of them is referable to the proceedings before McGovern J. and to why that judgment should be set aside and obviously that is not a matter for me but the issues raised may be advanced by Mr. and Mrs. Darcy in the Supreme Court in any appeal. Nevertheless, Mr. Darcy says that I should have regard to the affidavit because it contains relevant material to the grounds of defence that are advanced by Mr. Darcy in support of his application to set aside the judgment.

Mr. Darcy's case is that the defendants have a good defence in law to the claim by the bank. He claims to have identified in his affidavits 22 legal points in support of his case and against the bank's entitlement, to have demonstrated 12 violations of law or codes perpetrated by the bank and to have 4 fundamental reasons that reveal that the bank is not entitled to have a trading licence. I will deal with the points raised by Mr. Darcy on his and his wife's behalf in his affidavits in due course.

The applicant's first point is that he and his wife have got a good defence to the bank's action. Secondly, he says that he did not defend the proceedings because he was depressed because of a series of tragedies and disasters that befell him and his family. These were the loss of his business, the destruction of his family home by fire and a series of bereavements of family members. He does not exhibit any medical reports to back up this claim but that may be due to the fact that Mr. Darcy is inexperienced in legal matters.

As to the delay in moving to set aside the default judgment, which is from the date of the judgment- 16th February, 2011- to the date of this motion, the 12th April, 2012, Mr. Darcy says that he did not know that he could apply to set aside the judgment until a comment was made by Dunne J. at some point in the protracted course of the court applications in connection with the special summons proceedings for possession of the properties that the defendants acquired with the funds they borrowed from the bank.

The bank's case is that Mr. Darcy has not demonstrated any defence to the claim. Mr. Rossa Fanning, Barrister, points out that the defendants do not deny that the money was borrowed and that it was not repaid and suggests that Mr. Darcy is trying to raise a variety of arguments of a general nature that do not actually amount to any defence in law. Mr. Fanning contends that the loans in this case were advanced for commercial property developments that went badly wrong, as so many other ventures of that kind did. He says that the letters of sanction, the default and the demands are not in dispute. What is being alleged in fact is a series of collateral complaints or grievances.

Mr. Fanning says that the points of suggested defence raised by Mr. Darcy were in fact considered by McGovern J. in the course of the possession proceedings. However, he stops short of saying that there is a legal estoppel arising, but as I understand he says that Mr. Darcy is repeating these points in the hope of succeeding in this Court where he failed to resist the possession application.

Mr. Fanning says in summary that:-

(1) The judgment was regularly obtained;

(2) There is nothing to suggest mistake, error or surprise or anything of that kind;

(3) Mr. Darcy does not explain why he did not challenge the judgment;

(4) Counsel were in and out of the case in the sense that Mr. Darcy was twice represented by Senior Counsel on adjournment applications of the possession proceedings and Mrs. Darcy was represented by junior counsel on one occasion;

(5) There is no explanation for the delay in bringing this motion to set aside the default judgment.

It is helpful to set out the chronology of this matter in a table as follows:-

27th April 2010 Letter of demand.

14th May, 2010 Summary summons.

2nd June, 2010 Summary summons served.

16th February, 2011 Judgment in default in Central Office.

21st March, 2011 Judgment registered.

22nd July, 2010 Special summons for possession etc issued.

11th October, 2010 Substituted service order granted by Peart J. for proceedings on special summons.

18th October, 2010 Special summons served by ordinary post.

26th November, 2010 Master of High Court adjourned special summons.

17th December, 2010 Master of High Court adjourned special summons.

28th January, 2011 Master of High Court adjourned special summons (senior counsel appeared for Mr. Darcy).

25th February, 2011 Master of High Court adjourned special summons (senior counsel appeared for Mr. Darcy).

8th April, 2011 Master of High Court adjourned special summons (Junior counsel appeared for Mrs. Darcy).

7th April, 2011 Appearance entered for Mrs. Darcy.

13th May, 2011 Master sent case to Judges List.

11th July, 2011 High Court adjourned application.

25th July, 2011 High Court adjourned application.

17th October, 2011 High Court adjourned application.

28th November, 2011 High Court adjourned application- application by Mrs. Darcy.

19th December, 2011 Second defendant filed affidavit.

16th January, 2012 Plaintiff filed replying affidavit.

6th February, 2012 Second defendant filed second affidavit and first defendant filed affidavit.

27th February, 2012 High Court adjourned matter.

12th April, 2012 First defendant Mr. Darcy filed affidavit.

12th April, 2012 Grounding affidavit sworn by Mr. Darcy for this motion.

16th April, 2012 High Court ordered possession etc. on foot of special summons, with stay on family home for a period of nine months.

I now want to try to identify all the points of defence that Mr. Darcy raises in his affidavits and then I will examine the questions of surprise, mistake etc. and the final question of delay in moving to set aside the judgment.

Mr. Darcy relied on two affidavits that were sworn respectively on the 3rd July, 2012 and on the 21st June, 2012. I put them in this order because that is the way Mr. Darcy dealt with them. Mr. Darcy's argument as to why he and his wife are entitled to an order setting aside the judgment that was obtain in default of appearance is as follows.

(a) The contract document was "materially flawed" because it was and "adhesion contract" for an interest rollup loan facility.

(b) The money was advanced by the bank on only two conditions namely (i) clearance of account and (ii) refinance and those conditions were not within the control of the defendants so they did not breach any conditions or terms of the contract.

(c) The bank frustrated the performance of the contract by terminating thus imposing an "objective impossibility of the contract to perform".

(d) Because of the termination, the defendants did not derive any interest, benefit or profit from the contract.

(e) The bank induced and encouraged the defendants to enter into the loans on the basis of the two conditions and thereby the bank wilfully misrepresented and concealed material facts.

(f) The contract is void or voidable because of misconduct in the bank being unreasonable, making misrepresentations, behaving oppressively and not notifying the defendants of material changes to the contract.

(g) The contract was unconscionable and totally one sided and the plaintiff changed the terms and conditions at will. Mr. Darcy cites an example of this as he says that occurred on the 3rd September 2009, when the bank without notice appointed a planning consultant to take over the running of the planning of the proposed development and also compelled the defendants to withdraw judicial review proceedings by threatening to terminate the loan facility and to evict the defendants from their family home over which the bank held a legal charge.

(h) The bank "advanced the defendants monies before the contract was in place" which means that the contract is bad

because there was no consideration for the mortgage document.

(i) The bank charged fees for the facilities but made no provision for those charges in the loan contract and Mr. Darcy says this is evidence of gross negligence over "self dealing" by the bank which undermines the entire loan facility.

(j) The bank did not comply with statutory regulatory requirements by liquidity requirements and it did to hold "a true perfected" trading licence.

Mr. Darcy made an additional contention in an affidavit sworn on the 21st June, 2012. He acknowledges that this affidavit is directed to seeking a stay or a review or setting aside the order of McGovern J. rather than to the present motion but he says that the arguments in this affidavit are the additional ones that he wants to advance in support of this application. I ignore the matters that relate specifically to the special summons proceedings.

The demand letter of the 27th April, 2010 seeks repayment of a sum that is different from the amount claimed in the summary summons. Mr. Darcy says that the summons cannot be valid when it demanded a sum that was less by €35,000 than the amount in the demand letter. I may comment at this point that I do not see how such a discrepancy could invalidate the summons.

Discussion
The bank got judgment against the defendants for the amount of the loan that was outstanding at the date of demand and the proceedings claimed continuing interest on the money that was due and owing. The bank subsequently instituted separate proceeding by way of special summons to enforce its charge over the various properties that were provided as security for the loans. The claim for enforcement of security and orders of possession was based on the same loan facilities as the summary summons claiming judgment in the amount of the outstanding balance. It is therefore true to say as Mr. Fanning maintained that there is an overlap between the two sets of proceedings. But if Mr. and Mrs. Darcy were to succeed in having the default judgment set aside and if the matter were to be reheard or heard and sent to plenary hearing, that would have no impact on the enforcement proceedings in which the bank got possession of the properties. It might arguably be a basis for an application to the Supreme Court for a stay on the operation of the orders made by McGovern J. pending the hearing of the defendants' appeal.

It is not easy to see how the criticisms and points made by Mr. Darcy might furnish a defence. The first, that the bank drafted an adhesion contract, is not a ground of defence to the bank's claim for the money it lent.

Neither is it a defence to say that clearance of account and refinance were conditions, without producing any documentation in support of that contention. That is the first fundamental evidential point. It does not seem to me to appear from the letters of sanction that are exhibited. Neither does it furnish a defence to say that the conditions were not in the control of the defendants.

The bank did indeed frustrate the performance or perhaps the further performance of the contract by terminating it and made it impossible to perform or to do so in any further fashion. But the bank did that on foot of a demand letter for the repayment of the money it had lent and that would appear to be in accordance with the terms of the letters of sanction.

It is not a defence to say that the defendants did not derive any interest benefit or profit.

The defendant has not made out any case for misrepresentation by commission or omission.

The contract for the loan is not void or voidable on any basis of fact advanced by Mr. Darcy.

A mere allegation that the contract was unconscionable or one sided and that the plaintiff changed the conditions "at will" is not evidence to prove breach of contract or to afford a defence. The example of oppressive behaviour put forward does not constitute a ground of defence.

Neither is it a defence to say that money was advanced before a facility letter was sent and signed. Continuation of the facility on terms contained in a statement such as in a letter is consideration.

The fact that the bank made charges for the loans is not a ground for defence.

The series of allegations made by Mr. Darcy about regulatory non-compliance by the bank and other statutory breaches is not backed up by any specific information and does not in any event provide a defence to the bank's claim. There was nothing about the transaction in itself that was unlawful or impermissible or that nullified the effect of the agreement. This is not a defence.

The difference in amount between the letter of demand of the 27th April, 2010, and the summary summons is not a ground of defence. In fact as I mentioned above, the letter of demand claims a somewhat higher figure than was claimed in the summary summons. But that does not afford any comfort to Mr. Darcy in seeking to apply to set aside the default judgment. In the result it seems to me that the defendants through Mr. Darcy have not put forward any basis of defence that could justify setting aside the default judgment.

The circumstances of the default judgment
Mr. Darcy has put forward an explanation for not resisting the claim in the summary summons. He says that he was deeply depressed. He had it seems ample reason for being depressed. His business had collapsed, his family home had been destroyed by fire and he had family bereavements. All this means that he is and was deserving of considerable sympathy. Without wishing in any way to diminish the extent of Mr. Darcy's distress, it is of course a legal requirement to demonstrate some incapacity or mistake or surprise or other event that explains why a person failed to respond to a claim made against him or her. The implication of the jurisdiction to obtain summary default judgment is that if a person has a defence he or she will put it forward in some shape or form. And the mere fact that a person has been afflicted by unfortunate events - even a series of unfortunate events - is not sufficient to demonstrate a degree of incapacity by reason of clinical depression. I do not know if Mr. Darcy received medical treatment. Neither do I know when exactly the events that he refers to took place. It seems to me that the explanation for failing to do anything about the summary summons is in the circumstances less than sufficient.

The delay in moving to make this application is more difficult to explain. Mr. Darcy's depression cannot explain that because he was actively engaged in the special summons proceedings and filed affidavits and was represented and he availed himself of opportunities to make his case. Mrs Darcy was also involved in that process. It follows that I think that Mr. Darcy has not overcome this obstacle of explaining the delay.

Overall, it seems to me that the fundamental question here is whether there is a defence to the bank's claim. And in all the circumstances I cannot see that there is.

I refuse this application to set aside the bank's judgment on its summary summons.