Neutral Citation: [2016] IEHC 320

THE HIGH COURT

Record No. 2013/3874S.

Between:

START MORTGAGES LIMITED

Plaintiff

-and-

SHANE HANLEY

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 14th June, 2016.

Part 1: Overview

1. On 3rd November, 2015, the Master of the High Court ordered that Start Mortgages be at liberty to enter final judgment against Mr Hanley for just under €386k plus costs pursuant to a loan agreement of 18th September, 2007, between plaintiff and defendant, in respect of which a default in repayment had occurred.

2. On 25th January last, following an extension of the period for appeal granted by this Court on 15th December, 2015, Mr Hanley, a litigant in person, entered an appeal against the Master's order. That appeal was heard last week as a de novo hearing of the application for summary judgment.

Part 2: Basis of Appeal

3. In essence, Mr Hanley's appeal is grounded on the assertion that he never received the demand for payment that led eventually to the commencement of the within proceedings and ultimately to the Master's order. Instead, the notice went to some other Mr Hanley with whom the Mr Hanley named in these proceedings has no kinship and of whom he had never heard before the commencement of these proceedings. As a result of the foregoing error, which the court accepts as having occurred, Mr Hanley claims that he was denied the period of continuing and heightened negotiation that would typically follow the issuance of a notice of demand. Instead matters, to borrow a colloquialism, 'went legal', and resulted in the Master's order of last November.

Part 3: Various Contentions of Start Mortgages

I. Overview.

4. At the hearing of the within appeal, Start Mortgages advanced five key contentions. First, Start Mortgages is not required by the loan agreement to issue a notice of demand. Second, if a notice of demand is required, the summons whereby the within proceedings commenced sufficed as notice.Third, Start Mortgages is empowered by the loan agreement to commence whatever post-default proceedings it wants whenever it wants. Fourth, applying the usual case-law on summary judgments, Mr Hanley has no arguable defence to the granting of summary judgment at this time. Fifth, Start Mortgages has been waiting a while now for repayment and should not have to tarry further in enforcing Mr Hanley's liability to it.

II. No Requirement to Issue Demand.

5. Clause 12 of the loan agreement provides, inter alia, as follows:

> *"On the occurrence of any of the following [default] events the obligation of the Lender to complete the advance shall absolutely cease and determine and if the advance has been drawn down on foot of the Undertaking referred to the Lender may demand repayment thereof on giving seven days' notice in writing to the Borrower…*
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> *(v) if default shall have been made by the Borrower in payment of any of the monthly instalments to the Lender."*

6. Start Mortgages contends in effect that the word "*may*" in the above-quoted text does not mean 'shall' and that Start Mortgages is not obliged to issue a notice of demand.

7. By way of general remark, the court must admit that it has never in practice encountered a lender that would proceed to litigation without first making demand for payment of a borrower in default. At the very least, making demand indicates the seriousness with which a bank views a particular breach of contract and should bring a heightened focus to endeavours to arrive at some form of corrective behaviour and/or compromise without the need for costly court proceedings. Moreover, although this Court is not tasked with policing the Central Bank's Code of Conduct on Mortgage Arrears, it cannot pretend that it has no knowledge of same, and it has some difficulty in seeing offhand how a lender could satisfy the Central Bank that it was (a) in compliance with para.12 of the Code when a most critical communication (the letter of demand) was not even sent to the correct person, never mind received by same, and (b) in compliance with para.29 a) of the Code (assuming the lender has complied with para.28), without apparently serving a form of letter – which in practice is typically a letter of demand – in which it has indicated that legal proceedings can commence immediately.

8. Irrespective, however, of all that the court has observed in the previous paragraph, the court respectfully does not accept Start Mortgage's reading of clause 12 of the loan agreement. Clause 12, as agreed between the parties, provides that "*the Lender may demand repayment thereof on giving seven days' notice in writing to the Borrowe*r". This does not give the Lender a discretion whether or not to make demand. Rather, it has the effect that repayment of a loan may only be demanded "*on giving seven days' notice in writing to the Borrower".* In the present case, Start Mortgages has failed to comply with this requirement. And if there is any vagueness in the wording of the provision – and the court sees none – that vagueness would fall to be construed against Start Mortgages, in accordance with the principle of *contra proferentem* –consumer credit loans being an *exemplum classicum* of the type

of agreement in which that principle falls to be applied.

9. Separately to the foregoing, the court notes in passing that Start Mortgage's failed effort to serve a notice of demand can be construed as suggestive that, outside the confines of the within proceedings, Start Mortgages does in fact consider a need to serve a notice of demand to arise under the loan agreement with Mr Hanley.

III. The Summons was a Form of Notice of Demand.

10. Start Mortgages contends that the summons which commenced the within proceedings was a form of notice of demand. The court sees at least four problems with this contention:

> (1) although this argument has a certain logical appeal, as Oliver Wendell Holmes, Jr. so sagely observed, "*The life of the law has not been logic; it has been experience"* (The Common Law (1881)) – and experience teaches that there is a real and substantial difference between a letter of demand, on the one hand, and a summons on the other. The man on the DART, the woman on the Luas,they would undoubtedly accept that such a difference presents – and as a general rule, if a line of logic will not hold good 'out there' in the real world, it is unlikely to hold good 'in here' in the legal world.
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> (2) separately but by way of supplement to (1), if one looks to the commercial operations of lenders, typically a letter of demand would issue under direction of a credit officer, whereas by the time a summons comes to be issued, a file will normally have been passed to, or enjoyed active input from, a legal officer. Even in this division of labour, there is indication that the above-mentioned argument of Start Mortgages is wrong.
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> (3) leaving (1) and (2) aside, if one goes to first principles, the fallacy of the contention that a summons is a form of notice of demand can be seen from the fact that (a) a letter of demand is a 'pay up or else' letter, the 'or else' being that legal proceedings will ensue, whereas (b)a summons is the first step in proceedings that have now commenced.
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> (4) leaving all of the foregoing aside, the issuance of a summons in lieu of a letter of demand flies in the face of the behaviours expected by theCode of Conduct on *Mortgage Arrears* – a codeto which the court is entitled to look as evidence of general banking practice; and it does not appear from that Code (and, in truth, the court scarcely needs to have regard to the Code to know as a fact) that in general banking practice a summons is not treated as akin to a letter of demand. It is substantively different and comes at a different stage in the relations between bank and borrower.

11. Ultimately, the court sees nothing more in this line of contention than Start Mortgages trying to persuade the court that it has done what it has not done. It follows from the foregoing observations that the court is not persuaded.

IV. Start Mortgages can Commence Proceedings such as these When It Wants.

12. Clause 4 of the loan agreement provides, inter alia, as follows:

> *"The Mortgage shall be a continuing security to the Lender and the same shall not be prejudiced by the settlement of any account or by any collateral or other security being taken for any of the monies intended to be secured by the Mortgage even if the same shall not be payable until a future time AND notwithstanding anything contained herein or in the Mortgage it shall be lawful for the Lender at any time or times hereafter to sue for and compel payment of all simple contract debts, bills of exchange, promissory notes or other securities for monies on which the Borrower shall be liable as well from the Borrower as from all and every other party liable on such debts, bills, notes or other securities in such manner and at such times as the Lender shall think fit…".*

13. Start Mortgages contends that the "*notwithstanding*" dimension of this clause has the effect that, for example, regardless of whether or not there is compliance with clause 12, Start Mortgages can commence legal proceedings when it wants to.

14. Mr Hanley contends that this is deeply unfair, that he was entitled under clause 12 to a letter of demand, that Start Mortgages stands in breach of this provision and that he has been prejudiced as a result.

15. As Mr Hanley is a litigant in person, the court understands him in effect to contend, although he understandably has not iterated matters so, that to the extent (if at all) that clause 4 of the loan agreement extinguishes the need for a letter of demand to be served, it is an unfair contract term –and so in breach of reg.3(2) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, as amended, given the pre-formulated nature of at least this aspect of the loan agreement. (Indeed, the rather convoluted wording of clause 4 of the loan agreement and the question-mark raised over its interaction with clause 12 of same might perhaps also be contended to raise a difficulty under reg.5(1) of the Regulations, though whether it does or not is not for this Court to decide).

16. If Mr Hanley is correct as to clause 4 being an unfair contract term, in particular by reference to what (if Start Mortgages is correct) is an effective 'strike-out' by clause 4 of clause 12, this would have the effect, under reg.6(1) of the Regulations of 1995, of rendering, at the least, clause 4 non-binding on Mr Hanley…and thus leave him, again at the least, in the position for which he has consistently contended, i.e. still entitled to service to an as yet un-received notice of demand under clause 12 of the loan agreement.

V. Mr Hanley has no Defence to these Proceedings.

17. Given the court's conclusions under headings II, III and IV, it appears to it that Mr Hanley has an arguable defence to these proceedings, being that if Start Mortgages wants to proceed against him under the loan agreement, it must do so in accordance with the loan agreement and to this time has not done so. The court expresses no view as to whether this defence will succeed, butit does consider it a bona fide, arguable defence on the facts and in the circumstances presenting.

VI. Start Mortgages Should Not Be Put to Further Delay?

18. Start Mortgages contends that it should not have to tarry further in recovering Mr Hanley's debt.But it is Start Mortgages that has placed itself in the position in which it now finds itself. There was and remains no reason why, at any point, it could not re-start the recovery process by starting out with a fresh letter of demand, but for whatever reason Start Mortgages has elected to proceed as it has and thus arrived at the present situation. And, anyhow, the court does not have a discretionary power, in a summary claim for monies to which a defendant has an arguable defence, to make the defendant pay up in any event. The court is not about to exercise a discretion that it does not enjoy. But even if the court did have some discretionary or equitable power in this regard (and it

does not), it would not in any event have exercised such power in favour of Start Mortgages without hearing further argument as to whether or not Start Mortgages has acted in breach of the *Code of Conduct* on Mortgage Arrears in the manner touched upon elsewhere above. That is not to give the Code legal effect, nor to render the court its policeman, but merely an acknowledgement that, given the natural comity which exists between the different branches of government, non-compliance with a relevant regulatory code adopted by an executive office or agency will naturally be a factor that informs how a court approaches the later exercise of any (if any) related judicial discretion, including most especially some equitable discretion (given that he who seeks equity must do equity).

Part 4: Applicable Law

19. The hurdle to be surmounted by Mr Hanley as regards having this matter sent to plenary hearing is low. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 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?"*

20. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, at 7, McKechnie J. summarised the relevant principles when a court approaches the issue of whether to grant summary judgment or leave to defend:

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
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> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case…*
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> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff…*
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> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where, however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
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> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?'…*
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> *(viii) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
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> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(xi) leave should not be granted where the only relevant averment is the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*
>
> *(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."*

Part 5: Conclusion

21. Start Mortgages has lent money to Mr Hanley. Mr Hanley has defaulted in the repayment of the loan monies. Start Mortgages is entitled to recover the debt outstanding to it, though only in accordance with applicable law and contract…and when it comes to the presently constituted proceedings, it appears to the court, for the reasons stated above, that Mr Hanley has an arguable defence to the claim now presenting, this defence being that Start Mortgages has not proceeded in accordance with the requirements of the loan agreement. Mindful of the observations of Hardiman J. in Aer Rianta, and mindful also of that "*discernible caution*" which McKechnie indicates, in *Harrisrange*, to be appropriate when it comes to granting summary judgment, the court (a) will respectfully set aside the Master's order, and (b) declines to grant the summary judgment sought, and (c) will refer the within matter to plenary hearing. The court would respectfully exhort the parties in the meantime to seek to arrive at some form of amicable resolution of matters between them, if at all possible.