

**THE HIGH COURT****2008 505 SP****BETWEEN****ANGLO IRISH BANK CORPORATION PLC****PLAINTIFF****AND****OISIN FANNING****DEFENDANT****JUDGMENT delivered by Ms. Justice Dunne on the 29th day of January 2009**

The plaintiff's claim herein is for an order that the defendant deliver up possession of lands and premises comprising 24.464 acres known as Forenaughts House, Naas, Co. Kildare on foot of a mortgage entered into between the plaintiff and the defendant on the 10th November, 2005, which was duly registered on the 16th October, 2006.

The special summons herein was grounded on an affidavit of Paul Corry sworn herein on the 19th June, 2008. It sets out the details of the loans secured by the mortgage the subject of these proceedings. The first loan was offered by letter of the 14th September, 2005, to the defendant and Ms. Pearl Roche in the sum of €7,900,000.00 secured by a mortgage on the property, the subject of these proceedings. The purpose of the loan was stated to be:-

"To enable the borrower to participate in forthcoming Smart Telecom Plc share placing and to refinance a Bank of Ireland loan in the amount of €2.9 million."

The security was to be the house and a legal charge over the shares being purchased with the loan. It was provided that the loan was for a period of twelve months. These terms were accepted by the defendant and Ms. Roche.

A further loan offer was made by letter of the 11th October, 2005. It provided for a loan of €505,000.00. The security included a provision that the loan was to be secured on the property the subject of these proceedings and Smart Telecom shares being purchased with the loan. The purpose for the loan was stated to be:-

"For the personal investment purposes of the borrower."

The period of this loan was stated to be three months. The terms of the offer were accepted by the defendant and Ms. Roche.

The final letter of offer was dated the 1st November, 2006. It provided for a loan secured by way of mortgage in the sum of €8,048,000.00. In this case, the security was stated to be the property the subject of these proceedings and "a first legal charge of 15,675,000.00 Smart Telecom shares". It incorporated the terms of the previous loan agreements and stated that it was to be read in conjunction with the previous facility letters. Again the terms of this letter were accepted by the defendant and Ms. Roche.

The sums advanced to the defendant were as follows:-

€500,000.00 on or about the 11th October, 2005.

€5 million on or about the 9th November, 2005.

€2,900,00.00 on or about the 30th January, 2006.

Thereafter, it appears that the payment on foot of the mortgage being payments of interest only went into default in April 2007. The plaintiff demanded payment of the sums then due by letter dated the 9th May, 2008, these proceedings then issued on the 20th June, 2008. Following service of the proceedings, an appearance was entered on the 16th October, 2008. A replying affidavit was sworn by the defendant on the 5th November, 2008.

In his affidavit, the defendant sets out the background to obtaining the loan. He was the Chief Executive Officer (CEO) of Smart Telecom Plc. Mr. Brendan Murtagh became involved with Smart and became its largest shareholder. In 2005 Mr. Murtagh provided €8 million to Smart. That year, the company embarked on a fundraising campaign to raise €44 million through a share placing. Mr. Murtagh suggested to the defendant that he should be seen to invest in Smart. The defendant and Mr. Murtagh discussed this. The defendant indicated to Mr. Murtagh that he did not have the finances to do this. Apparently he was not in receipt of a monthly salary from the company. Ultimately, the defendant tried to raise €5 million to invest in shares. He approached Bank of Scotland with whom he had a home-loan in the sum of €2.9 million. They refused.

Mr. Murtagh then advised the defendant to contact Mr. Corry of the plaintiff bank, who was Mr. Murtagh's bank manager. According to the defendant, Mr. Corry had no difficulty in providing this sum, although there is some dispute between the defendant and Mr. Corry as to the precise circumstances in which the loan was approved. In my view, nothing turns on this. The defendant expressed surprise at the loan approval as two years earlier, the plaintiff had refused to fund the defendant or his company.

The defendant set out details of a number of discussions and dealings with Mr. Murtagh. The defendant stated that on the basis of Mr. Murtagh's assurances to him he entered into the loan. It appears that interest on the loan was paid by the defendant in circumstances where the defendant's account was credited with the interest due to the plaintiff by a transfer of the necessary sum from Smart to his account.

The defendant then set out details of proceedings he has commenced against Mr. Murtagh and others arising from the breakdown of

the relationship between Mr. Murtagh and the defendant, which led to the ousting of the defendant from his position in Smart. He has also sought an indemnity from Mr. Murtagh in respect of the sum of €5 million (together with interest) "allegedly" due to the plaintiff herein.

A meeting was scheduled to take place between the plaintiff and the defendant on the 3rd August, 2007, and in advance thereof, the defendant wrote to the plaintiff seeking details of the dealings between Mr. Murtagh and the plaintiff in connection with the loan approval in respect of the defendant. There was no reply prior to the meeting. Subsequently, the defendant by fax "withdrew" that letter. He offered in the course of the letter to "split" the loan – i.e. to pay the interest due on the sum of €2.9 million but he indicated that he was not in a position to discharge the amount due on the loan. By letter of the 12th October, 2007, this proposal was rejected by the plaintiff. I do not think it is necessary to set out all the details of those letters which were exhibited in the proceedings.

The defendant continued his affidavit by setting out what appears to be the gist of his complaint:-

1. That in the course of the negotiation of the loan, the plaintiff was influenced by Mr. Murtagh.
2. That the loan was advanced not on the basis of the security provided but on the security and assurances given by Mr. Murtagh that interest on the loan would be serviced and that it would be repaid in due course.
3. That the plaintiff made no inquiry into the defendant's financial situation or ability to repay the loan.
4. That the plaintiff relied upon the assurances of Mr. Murtagh and never intended to rely upon the security given for the loans.

The defendant goes on to say that if he has any liability to the plaintiff he is entitled to a full indemnity from Mr. Murtagh.

Mr. Corry swore a replying affidavit on the 28th November, 2008. He took issue with a number of the defendant's averments. In particular, he pointed out that the loans made to the defendant were subject to formal approval processes of which the defendant was aware. He reiterated that the facilities afforded were afforded to the defendant on the basis of his personal situation, assets and the security he provided.

A final affidavit was sworn by the defendant on the 5th December, 2008, by way of response. In that affidavit, the defendant, *inter alia*, contends that the plaintiff has failed to make full disclosure of all documentation relevant to the issues raised herein and asserts that he has a *bona fide* defence to the proceedings.

### Submissions

Mr. Murphy, S.C. on behalf the plaintiff submitted that no defence was disclosed on the affidavits before the court. He pointed out that the plaintiff was a stranger to any arrangements made between Mr. Murtagh and the defendant or Smart Telecom. The fact that payments were made to the defendant's account by Smart Telecom to meet the direct debits in respect of the interest due to the plaintiff was not apparent to the plaintiff. He referred to the assertion that the plaintiff never intended to recover the loan from the defendant and asked if that was so, why was security taken and a Deed of Mortgage executed? He noted that the defendant did not dispute the fact that €2.9 million was due in respect of the home-loan. He added that there was an undisputed sum due on foot of the entire loan and that as this was a suit for possession and not a suit for the debt, the plaintiff was entitled to possession even if there was a dispute as to part of the indebtedness. He relied on the case of *Birmingham Citizens Permanent Building Society v. Caunt* [1962] 1 Ch. 883 in support of this argument.

Mr. Hayden S.C. in his submission reiterated the points made by the defendant in his affidavits, principally, that he would never have borrowed the monies but for Mr. Murtagh's assurances. He referred to the fact that Bank of Scotland had declined to give the defendant a loan in respect of the €5 million required to purchase shares. He questioned the appropriateness of the description of the loan in this case as a home-loan. He stated that his client's position was that the loan was not his client's loan but was that of Mr. Murtagh. He emphasised that some two years earlier, the plaintiff had made it clear that they would not provide the defendant with a loan because of his previous business dealings.

Counsel then referred the court to a number of authorities relating to the circumstances in cases of summary judgment both in the context of special summons proceedings and summary summons proceedings including *National Irish Bank Limited v. Graham* [1995] 2 I.R. 244, *Bayworld Investments v. McMahon* [2004] 2 I.R. 199 and *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75, and a list of the cases referred to is appended to this judgment.

I accept the general principles to be derived from the authorities to which I was referred. Finlay C.J. in *National Irish Bank Limited v. Graham* to which I have referred above stated at p. 249:-

"The purpose of a plenary hearing instead of a summary judgment in a case of this description is for the purpose of resolving a dispute of fact which remains between the parties and the determination or resolution of which is necessary for the decision in the case."

In *Bayworld Investments v. McMahon* referred to above, the Supreme Court considered the appropriate procedures in relation to the adjournment of the proceedings commenced by special summons to plenary hearing. In that case, the application concerned was brought to obtain delivery of documents, deeds and papers from a solicitor by a client. It was contended that the proceedings should have been adjourned to plenary hearing. McCracken J. at p. 216 of the judgment stated:-

"An order to remit the special summons proceedings to a plenary hearing is in any event a discretionary order, and having read the affidavits and the transcripts of the cross-examinations, I am quite satisfied that the trial judge was correct in determining the issues on the evidence before him."

I note that in this case Mr. Corry was available in court to be cross examined at the option of the defendant on foot of a notice to cross examine, but this option was not pursued on behalf of the defendant.

The other cases referred to deal with the issue of circumstances giving rise to granting leave to defend in summary proceedings. I think the principles in cases such as *First National Commercial Bank Plc. v. Anglin*, *Aer Rianta v. Ryanair Limited*, [2001] 4 I.R. 607 and *Harris Range Limited v. Duncan* [2003] 4 I.R. 1 are clear and well established and do not need to be referred to in detail here and I accept the principles set out in those cases.

## Decision

The defendant in this case is a businessman, formally the CEO of Smart Telecom Plc. He entered into a series of transactions with the plaintiff. Following the issue of each and every letter of offer, he accepted the terms and conditions. Each letter of offer set out the requirements of the plaintiff by way of security. It is clear that the loans were two-fold:-

1. To purchase shares in Smart Telecom Plc.
2. To refinance his home-loan.

There is no doubt that the terms involved could not be described as a typical home-loan – but this was not a typical borrowing by an individual to purchase a home. This was a commercial transaction to facilitate the defendant in buying shares in the company of which he was CEO. It was in that context that his home became a security for the loan. It was also clearly not a typical home-loan in the sense that the term of the loan was originally a twelve month period. There is nothing unusual about banks seeking security over an individual's home in respect of loans provided by the bank to an individual, be it in connection with a farming enterprise, a business or other commercial transaction.

In the course of the submissions, I asked if the defendant would not have profited from the transaction involved had the share placement of Smart Telecom been successful. The answer to that had to be in the affirmative. It was clearly envisaged by the plaintiff and the defendant that the loan was to be repaid after this had occurred. It was clearly never contemplated that the loan was to be repaid out of the defendant's salary. As he explained, he did not take a monthly salary from the company. Unfortunately things did not work out as anticipated and it is clear that the defendant left the company in acrimonious circumstances.

The question I have to consider is whether I should adjourn the proceedings herein to allow the defendant to litigate the plaintiff's entitlement to judgment. On the facts before me, I cannot see the basis for challenging the amount claimed to be due by the plaintiff. I can see no basis to suggest that there was any deficiency involved in the execution of the indenture of mortgage. Indeed in this context, it is relevant to note that not only was the defendant asked to sign the acceptance of the various letters of offer but his partner, Ms. Roche, was also a signatory on each occasion, the last such occasion being the 1st November, 2006. Further, Ms. Roche completed a deed of confirmation on the 10th November, 2005, the date of execution of the mortgage which was expressed to be supplemental to the indenture of mortgage in which she confirmed to the plaintiff that any beneficial interest she may have in the mortgage property was covered by the mortgage. In those circumstances, it is difficult to accept the contention of the defendant that the plaintiff did not intend to rely on its security in light of the clear facts as to the careful steps taken by the plaintiff in the taking of the security.

As I have said, the central contention of the defendant is that the loans the subject of these proceedings would not have been forthcoming to the defendant were it not for the assurances of Mr. Murtagh to the plaintiff. This contention is supported by reliance on the fact that the defendant had previously applied unsuccessfully to the defendant for a loan. Apart from the defendant's contention to this effect, there is no evidence to support such a contention. Mr. Corry denies that this was the case. The defendant has also strongly contended that it was on the basis of Mr. Murtagh's assurances to him that he entered into the loan with the plaintiff. Indeed this point is expressly made by the defendant at para. 19 of his first affidavit. I simply do not believe that such a loan would be provided on that basis. I cannot see how what amounts to, at best, a collateral agreement between the defendant and Mr. Murtagh can affect the plaintiff's entitlement to enforce its security. My view in this regard is, I think, supported by the proceedings brought by the defendant against Mr. Murtagh in which the defendant seeks an indemnity from Mr. Murtagh "in respect of the alleged indebtedness to Anglo Irish Bank in the sum of €5 million together with all interest accrued thereon". It is interesting to note that in the context of those proceedings, the defendant clearly does not seek to fix Mr. Murtagh with liability in respect of the home-loan aspect of the borrowing. Equally, it is clear that in the correspondence prior to the issue of these proceedings, the defendant himself in the letter of the 30th July, 2007, made a distinction between the sum borrowed to buy shares in Smart Telecom and the amount due in respect of the home-loan. The distinction between the home-loan and the loan to purchase shares in Smart Telecom is germane to the submission of Mr. Murphy in relation to the jurisdiction of this Court. In the *Birmingham Citizens Permanent Building Society v. Caunt* case which is relied on by Mr. Murphy, it was stated by Russell J. at p. 891 as follows:-

"There appears no trace, prior to 1936, of any right in any court to deny a mortgagee asserting or claiming his right to possession, the appropriate order - though to this a qualification has to be made in that a court in the exercise of its inherent jurisdiction for proper reason to postpone or adjourn a hearing might by adjournment for a short time afford the mortgagor a limited opportunity to find means to pay off the mortgagee or otherwise satisfy him if there was a reasonable prospect of either of those events occurring. Indeed, it would be to me surprising if there had been such a trace, having regard to the fact that a legal mortgagee does not necessarily require any assistance from the court to assert his right to possession. Moreover, a mortgagee once rightfully in possession could never be ousted by the mortgagor except on paying off in full."

On that basis it is contended that regardless of any dispute over the part of the loan attributed to the purchase of shares, there is a sum due in respect of the home-loan element of the borrowing. There is default in respect of that element of the loan and therefore the plaintiff is entitled to possession.

I find it difficult to disagree with the proposition. On the facts of this case, the defendant is in default. It is true he offered to pay the interest payable on the home-loan element of the borrowing but there has been no proposal to discharge any of the principle. The term of the loan has long since passed. I cannot see how the plaintiff can realise the sums due otherwise than by an order for possession. That is so in respect of the sum of €2.9 million just as it is so in the case of the balance of the borrowings. In those circumstances, even if I am wrong in my view that the court in its discretion should not adjourn the proceedings to plenary hearing to litigate the issues raised by the defendant in respect of that part of the loan used to purchase Smart Telecom Shares, I am of the view that in any event, the plaintiff is entitled to possession by reason of the default in the home-loan element of the borrowing secured by the mortgage.

## APPENDIX

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**ANGLO BANK CORPORATION PLC**

**PLAINTIFF**

**AND**

**OISIN FANNING**

**DEFENDANT**

1. National Irish Bank Limited. v. Graham [1995] 2 I.R. 244
2. In the Matter of the Kilcullen Parochial Hall [1947] I.R. 458
3. Bayworld Investments v. McMahon [2004] 2 I.R. 199
4. First National Commercial Bank Plc v. Anglin [1996] 1 I.R. 75
5. Philip Clarke v. Stevens (Unreported, High Court, Clarke J. 19th June, 2008)
6. ACC Bank Plc v. Malocco [2000] 3 I.R. 191
7. Harris Range Limited v. Duncan [2003] 4 I.R. 1
8. Bank of Ireland v. Educational Building Society [1988] 2 I.L.R.M. 451
9. Aer Rianta CPT v Ryanair Limited [2001] 4 I.R. 607
10. Criminal Assets Bureau v. Kelly [2000] 1 I.L.R.M. 271