THE HIGH COURT

COMMERCIAL

[2017 No. 123 S.]

BETWEEN

CHELDON PROPERTY FINANCE DAC

PLAINTIFF

AND

JOHN HALE AND MARY HALE

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 4th day of July, 2017.

1. The plaintiff has applied for summary judgment against the defendants in the sum of €1,930,393.86, arising out of a loan made on 21st November, 2005, by Permanent TSB ("the bank") to the defendants in the sum of €1,901,000.00. The bank transferred the loan to the plaintiff on 14th October, 2013.

2. The loan facility was subject to the terms and conditions set out in the facility letter including the bank's General Terms and Condition for Commercial Loans. The term of the loan facility was 240 months repayable by way of monthly instalments. The loan facility was repayable on demand. The defendants accepted the terms and conditions applicable to the loan facility by signing the facility letter on 24th November, 2005, and subsequently drew down the full amount of €1,901,000.00 and have had the benefit of that sum to their own use. The purpose of the loan facility was to fund renovations on a crèche premises owned by the defendants.

3. On 8th July, 2015, the bank exercised its contractual entitlement to sell the loan facility to the plaintiff. A deed of transfer was executed on 14th October, 2015.

4. On the date of transfer, there were arrears of €390,439.14, on the loan facility. These arrears continued to accumulate until 25th January, 2016, when the plaintiff demanded repayment of the sum then outstanding of €1,882,561.94. Although some negotiations took place between the parties with a view to settling the indebtedness of the defendants, no agreement was reached and the plaintiff commenced these proceedings on 26th January, 2017.

5. The matter was entered into the Commercial List. The defendants filed an affidavit setting out the basis of their defence and a hearing date was fixed for an application for summary judgment.

6. The defendants raised three grounds of defence to the application for summary judgment, namely:-

> (a) they allege that the court ought to imply a term into the loan facility to the effect that the bank was precluded from transferring the loan facility to the plaintiffs;
>
> (b) they assert that an incorrect interest rate was charged by the bank during the currency of the loan facility; and,
>
> (c) they contend that the application of default interest (at a rate of 2%) by the plaintiff is unlawful.

7. In the course of the summary judgment hearing, the plaintiff informed the court that it was prepared to waive its claim for default interest so it is not necessary for the court to consider any arguments raised on that ground.

8. The legal test to be applied by the courts in an application for summary judgment is well established and can be found in *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75; *Banque de Paris v. de Naray* [1984] 1 Lloyds Law Rep. 21; *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1; *McGrath v. O'Driscoll* [2007] 1 I.L.R.M. 203; and *Aer Rianta cpt. v. Ryanair Ltd.* [2001] 4 I.R. 607. As the law on this topic is now so well established, it is unnecessary to set out in any great detail the principles arising from these cases. I will set out some of these principles which are relevant to this case,

9. The starting point is that, in applications of this kind, the power to grant summary judgment should be exercised with discernible caution. Where there are no real issues or the issues are simply disposed of and easily determinable then this procedure can be used. The court has to consider whether the defendants have satisfied the court that they have a fair or reasonable probability of having a real or *bona fide* defence. Having considered the evidence, is it clear that the defendants have no defence? The mere assertion in an affidavit of a situation said to give rise to a defence does not of itself provide leave to defend. The court has to look at the whole situation to see whether such an assertion is backed up by credible evidence so that it can be said that the defendants have satisfied the court that there was a fair or reasonable probability of the defendants having a *bona fide* defence. In approaching the issues that arise in this application for summary judgment, I have applied the test set out in the decisions which I have referred to above.

Transfer of Loan Issue

10. Clause 18 of the bank's General Terms and Conditions for Commercial Loans states:-

> "The Bank may, without the consent of the Borrowers, grant a participation in or assign or transfer or otherwise dispose of the whole or any part or parts of its rights, benefits and obligations in respect of the Facility. The expression the 'Bank' wherever used herein shall to the extent of its interests for the time being herein, include every successor in title, participant, assignee, transferee or party to whom a disposal is made as aforesaid who shall, to the extent of its interest for the time being herein, be entitled to enforce and proceed upon this Facility Letter and exercise all rights, powers and discretions of the Bank hereunder as if named herein in place of the Bank."

The wording of the clause is clear and unambiguous and formed part of the loan facility agreement which was accepted by the defendants as evidenced by their respective signatures on 24th November, 2005.

11. The defendants invite the court to imply a term into the loan facility to the effect that the bank would not transfer the loan to "an unregulated or unauthorised entity". The loan is serviced by Pepper Assets Servicing which is a credit servicing firm within the meaning of the Consumer Protection (Regulation of Credit Servicing) Act 2015 and is regulated by the Central Bank of Ireland. The regulatory authority has made no issue of the fact that the loan is serviced in this way.

12. In *Flynn v. Breccia* [2017] IECA 74, the Court of Appeal considered the test for implying terms into a contract. The Court found that the trial judge had correctly applied the law on that issue. The appeal court adopted the decision of the Supreme Court in *Sweeney v. Duggan* [1997] 2 I.R. 531 which included an affirmation of the views expressed by Lord Wilberforce in *Liverpool C.C. v. Irwin* [1977] A.C. 239 wherein he stated:-

> "…Whether a term is implied pursuant to the presumed intention of the parties or as a legal incident of a definable category of contract it must be not merely reasonable but also necessary. Clearly it cannot be implied if it is inconsistent with the express wording of the contract…"

13. In the *Breccia* case, the trial judge drew together the various strands emerging from jurisprudence in this State and in England and Wales on the subject of incorporating implied terms and from these authorities he held that the following principles emerge:-

> "[B]efore a term can be implied…:
>
> (1) it must be reasonable and equitable;
>
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
>
> (3) it must be so obvious that 'it goes without saying';
>
> (4) it must be capable of clear expression;
>
> (5) it must not contradict any express term of the contract…"

14. The terms which the defendants seek to have implied in the loan facility do not meet the above tests and would have the effect of contradicting an express term of the contract. As a matter of law, such a claim is bound to fail. Accordingly, this is an issue capable of being determined in an application for summary judgment. There is no warrant for implying such a term and I decline to do so.

15. In *O'Rourke v. Considine and Ors.* [2011] IEHC 191 at para. 18, Finlay Geoghegan J. addressed the requirements of s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877, which created a statutory mechanism for affecting the legal assignment of debts. She held that a creditor seeking to prove the assignment of a debt has to show that:-

> "(a) The assignment was of a debt or other legal chose in action.
>
> (b) The assignment was absolute and was not by way of charge only.
>
> (c) It was in writing under the hand of the assignor.
>
> (d) Express notice in writing thereof was given to the debtors."

16. Where these conditions have been satisfied, the Act provides that the assignment would have certain legal effects and the assignment "shall be and be deemed to have been effectual in law…to pass and transfer the legal right to such debt". In addition, the assignment is deemed to transfer "all legal and other remedies" for the debt, and to transfer, "the power to give a good discharge" for the debt. The assignee does not require the "concurrence of the assignor" to exercise these rights. It takes effect from the date of the notice given to the debtor and operates "subject to all equities which would have been entitled to priority over the right of the assignee if [the] Act had not passed".

The Interest Rate Issue

17. The facility letter makes provision for the charging of interest as follows:-

> "Interest on this facility shall be charged at an aggregate of the bank's A rate and a margin of -0.8%.
>
> The interest rate currently applicable to this facility is 3.65% per annum."

18. During the course of the hearing, counsel on behalf of the defendants conceded that the interest rate charged by the plaintiff was that provided for in the loan facility and was the bank's interest rate as varied from time to time.

19. The defendants relied on a report of Mr. Eddie Fitzpatrick of BANKCheck. Although he was introduced as an expert, no evidence was given as to his qualifications or competence to offer an expert opinion. Be that as it may, he challenged the interest charged by the plaintiff on the basis that it purported to unilaterally apply a rate of Euribor one month rate plus 6.5% which is different to that set out in the 2005 loan agreement. In fact, the loan interest was not linked to Euribor. It is perhaps understandable that Mr. Fitzpatrick thought that the interest was linked to Euribor because the plaintiff's agent had mistakenly referred to it as such. But eventually it was agreed by counsel for the defendants that the rate of interest, in fact, charged was the bank's rate of interest as provided for in the loan facility. This was the rate that also appeared on the bank statements which were issued from time to time to the defendants.

20. Nevertheless, an alleged discrepancy of €14,761.18 was identified by Mr. Fitzpatrick based on the actual rates charged. While the plaintiff did not accept that there was a discrepancy, it accepted that this was an issue raised by Mr. Fitzpatrick and it waived any claim to that sum for the purpose of this application for summary judgment. Therefore, no further issue arises on that point between the parties.

21. Counsel for the defendants relied on the case of *Paragon Finance plc. v. Nash* [2001] EWCA Civ. 1466 to argue that a term will be implied that the rates of interest would not be set dishonestly, for an improper purpose, capriciously or arbitrarily and that the bank would not exercise its discretion in an unreasonable way. But the defendants did not offer a shred of evidence to suggest that any of

these considerations arose in the present case. The transcript shows that counsel for the defendants stated:-

> "The rates did change but I am introducing an argument that they shouldn't have changed in the way they did because of the need to explore whether the implied term, which is inherent in the setting of a bank's variable rate, was breached in terms that the variable rate set was either capricious or dishonest or unreasonable." (Page 41 lines 18-24)

22. This does not meet the test required of the defendants to show an arguable defence on that issue. It does not even go so far as to amount to a "mere assertion" which in itself would be insufficient. It merely suggests that this is something which needs to be explored. In my view, that is not a credible basis for establishing a defence in an application for summary judgment.

23. Another issue raised on behalf of the defendants is that the plaintiff could not continue to charge the Permanent TSB rate because that rate remains with Permanent TSB. I must confess I did not understand that argument. Once the plaintiff bought the loan it took over the loan with all the rights and obligations of the bank. That meant that the only interest that it was lawfully entitled to charge was that agreed between the defendants and the bank. It is accepted by counsel for the defendants that that is the rate which was in fact charged. The plaintiff became "the bank" so far as its relationship with the defendants was concerned.

24. The defendants also claimed that the notice of the interest rate changes were insufficient because they were given retrospectively through the bank statements. But the loan facility and general conditions provided for notice to be given in this way. In any event, the defendants did not claim any prejudice on this account or explain to the court how this would in any way affect their indebtedness to the plaintiff. This point is of no significance and is not an answer to the application for summary judgment.

25. The application for summary judgment was heard on 26th April, 2017. Sometime thereafter, an application was made to admit further evidence from Mr. Fitzpatrick. An affidavit was sworn by the defendants' solicitor Mr. David Turner in which he exhibited a report which he says he received on 2nd May, 2017, which seemed to touch on the question of the interest charged on the loan. The affidavit suggested that Mr. Fitzpatrick recollected other clients of his with Permanent TSB being written to and given the Permanent TSB rate on particular dates which, it is contended, were different to the rates exhibited in the bank statements of the defendants in these proceedings. The affidavit of Mr. Turner exhibited a letter from Mr. Fitzpatrick which suggested that further information had come to light of which he felt the defendants should be made aware. He invited the defendants to discuss the matter if they wished to do so.

26. Mr. Fitzpatrick also swore an affidavit on 8th May, 2017, in which he explained why he had performed a set of calculations based on Euribor when the defendants' position was first presented to the court. His affidavit explained how sometime around 28th April, 2017, he had cause to check some files to see whether he had any historical letters from Permanent TSB to clients setting out what the Permanent TSB A rate was at a point in time. He says that he found two letters which were given to him by clients of Permanent TSB and he exhibited those letters. The letters were redacted so that the names of the Permanent TSB clients and their account numbers are not visible. Quite what this correspondence was intended to show is not clear.

27. Whether Permanent TSB had some other arrangement with other clients involving different rates of interest is irrelevant to this case. This is particularly so in light of the fact that counsel for the defendants on several occasions agreed that the rate of interest charged was the rate provided for in the facility letter. This Court must base its decision on the agreement between the bank and the defendants and not on any other terms that may have been agreed with other clients of the bank.

28. While the plaintiff submitted that the court should not entertain this further evidence it seemed to me that I should consider it for what it was worth since this is an application for summary judgment. If a plenary hearing had concluded and additional evidence was sought to be adduced the position might be different. It is quite clear from the affidavit of Mr. Fitzpatrick and the correspondence exhibited by him that this was correspondence and information available to him before the hearing on 26th April, 2017. In those circumstances it is not new evidence. But, in any event, as this is an application for summary judgment I took the view that it was appropriate for me to consider it. Having done so, it adds nothing to the case and has no bearing on the issues between the plaintiff and the defendants.

Conclusion

29. Of the three grounds of defence raised by the defendants and referred to in para. 6 of this judgment only two remain for consideration since the plaintiff has waived any claim to default interest. The two remaining issues are whether or not the court ought to imply a term into the loan facility to the effect that the bank was precluded from transferring the loan facility to the plaintiff and whether the correct interest was charged by the bank (and the plaintiff). I have already held that the terms sought to be implied cannot be implied for the reasons set out in para. 14 above. I am satisfied that the interest charged was on the basis agreed in the facility letter.

30. The sum claimed in the summary summons is €1,930,393.86. BANKCheck identified a discrepancy in the calculations of €14,761.18. While the plaintiff does not agree that there was such a discrepancy it has informed the court that it is prepared to waive that claim so that it is not an issue that requires to be remitted to plenary hearing. The plaintiff has also waived its claim to default interest in the sum of €12,084.48 so this is not an issue that the court needs to consider. Deducting these two sums leaves a balance of €1,903,548.20.

31. Having concluded that the transfer of the loan was valid and that the interest charged was at a rate contracted for, I am satisfied that the plaintiff is entitled to summary judgment. The defendants have not challenged the plaintiff's evidence that they received the monies on foot of the facility letter and that there are substantial sums in default. They have not met even the very low threshold required to have this matter remitted for plenary hearing. The plaintiff is entitled to judgment in the sum €1,903,548.20.