Neutral Citation: [2015] IEHC 795

THE HIGH COURT

2015 1856S

BETWEEN:

KBC BANK IRELAND PLC

PLAINTIFF

-and -

JAMES OSBORNE

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 15th December, 2015.

I: Nature of Case.

1. This is an application for summary judgment in respect of a debt owing by Mr Osborne to KBC Bank.

II: Background Facts.

2. Pursuant to a facility letter dated 11th November 2002, as amended, KBC made three secured loan facilities available to Mr Osborne: (1) Facility 1, being a sum up to €1.116m by way of a 15-year term loan to refinance existing debt of Mr Osborne from Permanent TSB, secured on certain industrial units located at Gorey Business Park in County Wexford; (2) Facility 2, a development finance loan which has since been repaid and thus merits no further consideration; and (3) Facility 3, being a sum up to €2.15m, by way of 15-year term loan to refinance Facility 2 upon the completion of the relevant development works. (For ease of reference, the court hereafter refers collectively to these loan arrangements as the "First Facility"). The 2002 facility letter provided that KBC was entitled to demand repayment of the First Facility at any time.

3. In addition to the First Facility, pursuant to a facility letter dated 11th October 2004, KBC made the following two loan facilities available to Mr Osborne: (1) Facility 1, a development finance loan which has since been repaid and thus merits no further consideration; and (2) Facility 2, being a sum up to €2.5m, by way of a 15-year term loan to refinance Facility 1 upon the completion of the relevant development works. (For ease of reference, the court hereafter refers collectively to these loan arrangements as the "Second Facility"). The 2004 facility letter provided that KBC was entitled to demand repayment of the Second Facility at any time.

4. In 2007, an additional loan facility in the sum of €1.985m was made available by KBC by way of amendment to the 2004 facility letter, to fund additional construction and other costs relating to the completion of Gorey Business Park. Also, the amount of the facility made available under the Second Facility increased by €250k. No further security was granted at this time, KBC apparently being satisfied that the LTV ratio was such that no additional security was required.

5. A total of just over €7m was drawn down pursuant to the 2002 and 2004 facility letters, as amended.

6. In 2009, Mr Osborne reported that he was continuing refurbishing works at the business park but was experiencing cash-flow difficulties and was unable to meet scheduled payments. KBC agreed to capitalise the arrears, pursuant to amending facility letters dated 28th September, 2009, the repayment requirements being restructured to allow for payment of interest and part-payment of capital. Over the course of 2010–2012, KBC agreed, following requests by Mr Osborne, to provide further capital moratoria and to capitalise the arrears as Mr Osborne continued not to be able to meet his repayment obligations.

7. Pursuant to the 2002 and 2004 facility letters, KBC required an assignment of certain leases. No such assignments were ever provided. Moreover, certain significant rental income (it appears in excess of €600k per annum) is apparently being received by Mr Osborne but has not been paid to KBC in repayment of his outstanding loan obligations. KBC has included at clause 11(a) of its standard terms and conditions a provision that *"Any indulgence by the Lender in the enforcement of any term or condition of a facility letter (or any agreement relating thereto) or a waiver by the Lender of any breach of any term or condition shall not constitute a general waiver of such term or condition and will be without prejudice to any other term or condition".* The effect of this clause is that,e.g.KBC's non-insistence upon certain security requirements, rebounds ultimately on Mr Osborne, not KBC.

8. In any event, in or around January 2013, the facilities reverted to full interest and capital repayments. A request for a further interest-only period made by Mr Osborne at this time was declined. In March 2013, KBC requested that Mr Osborne provide additional security in return for a revised repayment plan. No proposal as to revised security was received from Mr Osborne. Moreover, around this time, Mr Osborne indicated that certain fire safety works were required to be (and, the court understands from Mr Osborne's contentions at the hearing, have been and continue to be) made to Gorey Business Park. Mr Osborne indicated that these works would require to be funded from rental income and would not be completed until November 2016. Although KBC has repeatedly requested detail on these works and the expenditure required, the desired level of detail has not been forthcoming.

9. Between January and May 2014, Mr Osborne indicated that a purchase of the business park or a refinancing by a third party could be forthcoming. Neither came to fruition.

10. On 13th November 2014, KBC issued what it calls a *"reservation of rights letter".* In ordinary parlance it is a 'Do what you're supposed to do or we'll do what we can do' letter. It is the kind of letter that all of us would fear to receive from a lending institution as it suggests that the institution is getting serious about enforcing its contractual rights if matters do not improve. Notably, however, even after this letter issued, KBC sought to achieve a consensual agreement with Mr Osborne. Throughout the summer of this year, KBC met on numerous occasions with Mr Osborne and appears to have been pushing him to sell all of the units that he owns in the business park with a view to satisfying as much of his outstanding debt as he could. Perhaps KBC would then have been willing to 'take a view' on any still outstanding debt – who knows? – but the point is moot; Mr Osborne was not willing to take the course being advocated by KBC.

11. By September of this year, it was clear that no consensual agreement would be reached between bank and borrower. Accordingly, KBC issued a summary summons against Mr Osborne on 29th September last and the matter came on before this Court a couple of months later.

III: The Test for Summary Relief.

12. The hurdle to be surmounted by Mr Osborne as regards having this matter sent to plenary hearing is a low one. 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?"

13. 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;*
>
> *(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…*
>
> *(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…*
>
> *(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;*
>
> *(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?'…*
>
> *(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;*
>
> *(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."*

14. The court returns to these principles later below. First, it pauses to consider certain contentions of Mr Osborne as to why this matter is not one suitable for summary judgment and ought instead to go to full hearing.

IV: Mr Osborne's contentions.

i. Is Mr Osborne a 'consumer'?

15. Mr Osborne contends that he is a *"consumer"* within the meaning of the Consumer Credit Act 1995, as amended, and that the requirements of this Act have not been observed by KBC. There is no basis for this contention. Even a cursory examination of the loan documentation clearly indicates that what is involved is commercial lending. These are business loans issued to a businessman in respect of a business park. There is no consumer dimension to them. Moreover, Mr Osborne at clause 8 of the 2004 facility letter warrants that *"…he is availing of the facility in connection with his business or profession as a Business Park Proprietor and, accordingly, he is not borrowing as a consumer for the purposes of the Consumer Credit Act 1995."*Of course, such a representation does not prevent the court from finding that a person is other than what he represented himself to be, but neither does it assist that person when he subsequently claims not to be as he previously represented. In any event, with or without the presence of this representation (and one cannot lightly get over the fact that it is 'with') all the facts of this case indicate most clearly that Mr Osborne in treating with KBC in respect of the loans in issue did not and does not do so as a consumer for the purposes of the Act of 1995.

16. In arguing that he was a *"consumer",* Mr Osborne referred to the recent judgment by Baker J. in *ACC Loan Management Ltd. v. Browne and Anor* [2015] IEHC 722. This judgment includes the conclusion in respect of the Consumer Credit Act, at para.52, that:

> *"[T]he legislation is such that a person is a consumer unless it can be shown that the person is acting inside the person's business. I accept the argument of counsel for the defendant that the legislation is drafted such that in a sense the default position is that all natural persons are consumers unless it can be shown they [are not]".*

17. This Court, respectfully and regretfully, cannot agree with this particular conclusion. It seems to this Court, with respect, that the default position under the Consumer Credit Act 1995, as amended, is that some natural persons are consumers and some are not, and no more. A natural person does not benefit from any default position or presumption as to his or her status, and his or her opponent has no default position or presumption to overcome in this regard. The only default position arising under the Act of 1995 is that a person other than a natural person cannot, at this time, be a consumer thereunder. Whether this last fact ought to be so, whether there are some non-natural persons whose business affairs are so small in scale that they merit protection as a form of consumer is a matter of policy for our lawmakers – though it does seem odd that the moment a natural person in effect incorporates herself or himself to avail of the benefits of limited liability, s/he must immediately forfeit the benefits of the Consumer Credit Act regime.

18. As it happens, Mr Osborne is a *"consumer"* within the meaning of the Central Bank's Consumer Protection Code, though not a *"personal consumer".* However, he has not claimed that any of the requirements of that Code have been breached by KBC. Indeed, the court cannot but note that KBC appears to have acted with that spirit of forbearance and reasonableness in its dealings with Mr Osborne which generally informs the provisions of the Code, in circumstances where Mr Osborne has failed to put in place certain

assignments of leases, not paid over rent monies received, embarked upon curing the fire safety issues without responding to certain reasonable queries from KBC, and ultimately been unable to agree any way forward that satisfies KBC as lender.

ii. Is Mr Osborne in a partnership with KBC?
19. Beyond asserting that he is in a partnership with KBC, Mr Osborne has not offered any proof of this assertion. He has, it is true, pointed to his longstanding practice of keeping KBC apprised of the various details of developments at, and issues concerning, Gorey Business Park. In fairness to KBC, however, it does not appear that Mr Osborne has always been forthcoming with every detail, e.g., as to the details of what is happening regarding the cure of the fire certificate deficiencies and what appears to be the expenditure in that process of rent monies that KBC clearly considers could be put towards loan repayment. But be that as it may, the court, in any event, does not see in the aforementioned provision of information anything more than the natural commercial desire of a prudent commercial borrower to keep his lender apprised of matters so as to avoid any misunderstandings arising if repayment difficulties, breaches of covenant or other problems should arise. Mr Osborne's commercial 'reward' for his general openness likely finds manifestation in the degree of indulgence and forbearance that KBC has hitherto afforded him. But there is nothing in any of this that hints of partnership.

iii. The fire certificate.
20. As the court understands Mr Osborne's contentions in this regard, it is that he was required to mortgage certain premises for the benefit of KBC and to the satisfaction of its solicitors. It appears that the absence of a fire certificate was not recognised when the requisite mortgage documentation was executed and that Mr Osborne has been seeking of late to resolve the issues that this presents. But taking Mr Osborne's arguments at their height (and ignoring the obstacles that appear offhand to arise), even if he were able to establish that KBC and/or its solicitors were guilty of some form of negligence as regards the original procurement of the certificate, and he has as yet commenced no proceedings alleging such negligence, this is no defence to the within application.

iv. Complex proceedings.
21. In his affidavit evidence, Mr Osborne claims that the within proceedings *"are grounded in complex financial transactions… stretching over a number of years"* and that their very complexity requires that this matter go to plenary hearing. The court, with respect and regret, does not agree with him in this regard. The key elements of the relevant loan agreements are as identified above, there has been protracted default on, amongst other matters, the repayment obligations, and KBC is now seeking recovery of what is owed to it under those loan agreements. The amounts involved are vast, the dealings between the parties are considerable, the documentation in place is lengthy, but the matters in issue are simple: borrowing has happened, default has arisen, recovery is sought, no defence is apparent. There is nothing in this that requires that this matter be sent now to plenary hearing.

V. Conclusions.
22. It seems to the court that, even taking the very low threshold identified by Hardiman J. in *Aer Rianta*, it is very clear that Mr Osborne has no defence to the recovery of the monies sought in the within application and that there are no issues to be tried in this regard. Any such issues as Mr Osborne has sought to raise are readily addressed, and have been addressed above. Mr Osborne's affidavit evidence fails to disclose even an arguable defence. Mindful of that circumspection urged by McKechnie J. in Harrisrange, mindful of the considerable time and energy that Mr Osborne has expended on Gorey Business Park over the years, and mindful most of all that the cost of legal representation is now such that Mr Osborne has been compelled through circumstance to argue his case in person and so without the benefit of professional assistance, the court considers nonetheless that, even bringing *"discernible caution"* to the question of whether or not to grant summary judgment, it is a lamentable but inexorable consequence of all the foregoing that the summary judgment now sought by KBC must be granted as sought, and that there is no basis for referring this matter to full plenary hearing.

23. In closing, the court notes that at the hearing of this matter, Mr Osborne sought to emphasise his honesty. KBC rightly indicated that it did not seek to impugn Mr Osborne's honesty. Neither does the court. If certain security was not put in place or certain information was sometimes not provided, that is the 'way of the world'. These things happen, there is generally nothing more to them than that they occurred, and there is certainly nothing more to them here.

24. As Mr Osborne is a so-called 'lay litigant', the court would respectfully draw his attention to the fact that he is entitled to bring an appeal against this judgment.