[2018] IEHC 82

THE HIGH COURT

2015 No. 1487 S

Between:

ALLIED IRISH BANKS PLC

Plaintiff

– and –

JIMMY COEN AND BREDA COEN

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 21st February, 2018.

I

Background

1. This is a summary application for certain monies that Allied Irish Banks plc claims are owing to it by Mr and Mrs Coen. The issue arising is whether the summary judgment sought should be granted or whether, alternatively, the matter should be sent to a plenary hearing.

II

Problems with the Sum Sought

(i) The Summary Summons.

2. On 27th July, 2015, Allied Irish Banks plc issued a summary summons on which the Special Endorsement of Claim reads, *inter alia*, as follows:

> *"1. The Defendants by Letter of Sanction made in writing on or about the 5th April 2002 agreed for value received to pay to the Plaintiff the following three sums:*
>
> *a) The sum of €242,000.00 repayable by way of 30 half-yearly instalments of €13598.38 each. The purpose of the advance was to facilitate a land purchase. The said advance was made on the 5th April 2002 and the Annual Percentage Rate of interest charged thereon was prime rate varying plus 3.5% per annum.*
>
> *b) The sum of €26,958.00 repayable in from estate of P Greaney on completion of administration thereof. The purpose of the advance was made on the 5th April 2002 and the Annual Percentage Rate of interest charged thereon was a One to Three Year Term Loan rate varying at the time 10.55% per annum.*
>
> *c) The sum of €6,176.00 repayable over 2 months from 5th April 2002 by consecutive payments of €312.36 per month by way of standing order commencing on 10th May 2002 for a tractor purchase. The said advance was made on the 5th April 2002 and the Annual Percentage rate of interest charged thereon was a One to Three Year Term Loan rate varying at the time 10.55% per annum.*
>
> *2. The Defendants made default in the payments due under the Agreement and the Plaintiff sent a letter of demand to the Defendants dated the 25th November, 2014.*
>
> *3. There is now due and owing to the Plaintiff on foot of the said Letter of Sanction the sum of €446,408.52."*

(ii) Grounding Affidavit.

3. It is difficult, not impossible but difficult, to reconcile the foregoing with the text of the grounding affidavit. In that affidavit, Mr Mark Hughes, an AIB manager avers, *inter alia*, as follows:

> *"2. The Defendants by Facility Number 1 in the Letter of Sanction made in writing on or about the 5th April 2002 agreed for value received to pay to the Plaintiff the sum of €242,000.00 repayable by way of 30 half yearly instalments of €13,598 each for the purpose of a land purchase. The said advance was made on the 5th April 2002 and the Annual Percentage Rate of interest charged thereon was prime rate varying plus 3.5% per annum. I beg to refer to the said Letter of Sanction [attached; the court turns to consider same later below].*
>
> *3. The Defendants made default in the payments due under Facility Number 1 in the Letter of Sanction and the Plaintiff sent a letter of demand to the Defendants dated the 25th November, 2014….*
>
> *4. By reason of such termination aforesaid, the Defendant became liable to pay to the Plaintiff the sum of €446,408.52 under Facility Number 1 of the Letter of Sanction.*
>
> *5. The Plaintiff claims the sum of €446,408.52 in respect of the amount due and the costs of these proceedings."*

4. So the Special Endorsement of Claim says that there was one letter of sanction comprising three parts, viz. (1) €242k repayable by way of 30 half-yearly instalments of €13,958.38, (2) €26,958 repayable upon the completion of the administration of the estate of a Mr Greaney, and (3) €6,176 repayable over a 2-month period. A default in payment has resulted in a total liability of €446,408.52. But the grounding affidavit indicates that it is only in respect of Loan (1) and default thereunder that claim is being made; yet the liability in respect of Loan (1) alone, it is averred, is €446,408.52. No explanation has been offered by AIB as to how to reconcile the details in the Special Endorsement of Claim and those in the grounding affidavit. The suspicion arises that Loans (2) and (3) were short-term

loans and were repaid, so that it is only Loan (1) in respect of which payment has ever been sought. However, that is guesswork on the part of the court and summary judgment is not to be had on the strength of a guess by the court. In any event, matters are further complicated by the terms of the letter of demand.

(iii) Letter of Demand.

5. The letter of demand exhibited to the grounding affidavit states that as of 25th November, 2014, the account balance is "€337959.19" but that at the same date "there was owing by you to Allied Irish Banks plc…the sum of €442,693.28". In other words what is stated is that 'Our accounts show that you owe us €X. We are demanding an amount larger than €X.' Again the suspicion arises that the amount stated to be the account balance is the amount owing before interest is applied. However, that is guesswork on the part of the court and summary judgment is not to be had on the strength of a guess by the court.

III

Problems with the (Possibly Draft) Letters of Sanction

6. Exhibited to the grounding affidavit are what appear to be two draft letters of sanction dated 5th April, 2002. They are not signed by any AIB bank official. They are not printed on AIB headed paper. There is no indication that they ever issued to the Coens. Yet AIB contends that the terms and conditions outlined in the letters of sanction are the terms and conditions to all of Loans (1), (2) and (3) as described above. Perhaps they are; perhaps they are not; the court does not know. At a guess, they may be, but summary judgment is not to be had on the strength of a guess by the court.

IV

Problems with the Evidence as to Drawdown

7. Perhaps AIB has an explanation as to why the court has been presented with what appear to be two draft letters of sanction. If so, it has not provided any such explanation. Were there some explanation and if it could be established, for example, that the Coens did or must have received letters of sanction and the standard terms booklet referred to therein, then of course the subsequent drawdown of the amounts indicated in the letters of sanction (or some like amount, with an averment as to why it was not the amount stated in the letters of sanction, e.g., because an arrangement fee had been deducted from the loan amount) would be evidence of a loan offered and accepted and the terms applicable. In this regard, the court notes that it has been good law since at least the time of the decision of the House of Lords in *Brogden v. Metropolitan Railway Company* (1877) 2 App. Cas. 666 that acceptance can be effected by conduct, and likely good law for a great deal longer than that – Lord Blackburn, at 692, refers to a decision of Chief Justice Bryan in a 15th century case that is supportive of this proposition.

8. Unfortunately, even when it came to drawdown, there were grave difficulties with the evidence before the court. The (what appear to be draft) letters of sanction before the court are dated 5th April, 2002. There are also a bundle of bank statements before the court which are exhibited together but which relate to different accounts, one ending with '9' and one ending with '6'. When the court asked at hearing which statement/s showed the amount/s that had been loaned pursuant to the letters of sanction, it was referred to the statements most contemporaneous to the 5th April, 2002. But if the court looks to those statements:

> – the account ending in '9' shows three debit amounts entered into the account, one (on 10th May, 2002) in the name of a firm of solicitors for €127,990 and two which appear to come directly from AIB of €25,198.08 and €76,264 (both entered on 7th June, 2002); and
>
> – the account ending in '6' this shows four debit entries on 9th April, 2002, a reversal of a debit of €15,332.76, two debits marked 'DRAFTS', one for €153,26.46 and one (presumably the one reversed) for €15,332.76, and a separate debit, again in the name of a firm of solicitors for €9,777.10.

9. The court has no idea if or how those figures equate to the amounts said to have been loaned by AIB pursuant to the (what appear to be draft) letters of sanction. In truth, the court is not even sure, given the confusion in the summary summons and the grounding affidavit, what loans were drawn down, or even that it is looking at the right figures. And there is no explanation in the evidence that might assist in this regard.

10. If a bank is going to come to court seeking summary judgment and wishes to point to a letter of sanction coupled with drawdown as indicative of acceptance of a loan on particular terms and conditions, then the least the bank must do is to provide the court with the necessary averments and exhibits as will enable the court properly to reach the conclusion desired by the bank.

V

Possible Problem under the Statute of Limitations

11. On AIB's own case, funds were advanced in 2002 without there being any signed contract for the loan and no payments have been applied to the account since 2005. Moreover, as the court has indicated above there are difficulties, certainly on the evidence now before the court, with the 'letter of sanction + drawdown' scenario advanced by the bank as indicative of acceptance of a loan on particular terms and conditions. All the foregoing being so, counsel for the Coens rightly indicated that it can be argued that AIB's claim is statute-barred.

12. AIB claims that there was a fresh acknowledgement of debt by a solicitor acting for Mr Coen, which acknowledgement came in a letter of 20th December, 2013. (To further complicate matters, it is not clear whether the solicitor was acting for Mrs Coen). Mr Coen or both of Mr and Mrs Coen, as appropriate, intend to argue that the said solicitor's letter issued in any event on a 'without prejudice' basis (though, it is acknowledged by Mr Coen in his affidavit evidence that there is some level of debt owing to the bank, but nothing like what the bank maintains is owed).

13. If it is established that the solicitor's letter was issued on a 'without prejudice' basis, then, *inter alia*, the issue of whether and when a 'without prejudice' letter may be admitted as an acknowledgement of debt will then arise for consideration. This last issue, the court understands, has been the subject of consideration by the House of Lords in *Bradford & Bingley plc v. Rashid* [2006] 4 All ER 705, but appears not yet to have been considered in this jurisdiction.

VI

Possible Problem under the Consumer Credit Act

14. Counsel for the Coens submitted that they are consumers and that certain problems present for AIB under ss.30 and 38 of the Consumer Credit Act 1995. Neither Mr nor Mrs Coen has expressly averred that he/she is a consumer. However, Mr Coen does aver in his final affidavit that "*I say that I have an arguable case that the Bank is not entitled to enforce the loan facility by virtue of its non-compliance with section 30 of the Consumer Credit Act 1995*"; and he could only make that argument if he believes himself (and his wife) to have been acting as consumers. This averment was sworn on 24th April, 2017, and it is striking that AIB has never responded to same and, at hearing, could only submit that Mr Coen's argument was something of a 'catch-all' argument, thrown in for effect but not amounting to much. Even a catch-all argument could conceivably amount to an arguable defence in the right case. However, the court does not need to consider this aspect of matters in much detail as there is in any event more than enough in the difficulties identified in the preceding pages for the court to conclude that the within application requires to go to plenary hearing.

VII

Applicable Legal Principle

15. The hurdle to be surmounted by Mr and Mrs Coen as regards having this matter sent to plenary hearing is notably low, though, if the court might respectfully observe, rightly so, given what can be at stake for defendant debtors. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 623:

> *"[T]he 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?"*

16. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, at 7, McKechnie J. summarised as follows the relevant principles applicable 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."*

VIII

Conclusion

17. The within matter, on the evidence now before the court, is patently one that cannot fairly be adjudicated upon by the court in a summary application. There are, on the pleadings before the court, problems regarding as to how the bank has arrived at the sum sought. There are ostensible and, at this time, unexplained conflicts between the summary summons and the grounding affidavit. There is, remarkably, an ostensible and, at this time, unexplained conflict within the text of the letter of demand. There is a difficulty, as yet unexplained, as regards the purported letters of sanction and whether they were ever executed or issued. That difficulty coupled with the difficulty that presents for the court in identifying in the exhibited statements of account when and if the claimed loan monies issued, creates a consequent difficulty for AIB in terms of relying on the 'letters of sanction + drawdown' as establishing acceptance of a loan on particular terms and conditions. There is a possible difficulty presenting under the Statute of Limitations. There is a related possible issue arising as to the acknowledgement of debt and whether and when a 'without prejudice' letter may be

admitted as an acknowledgement of debt. There may even be an issue as to whether Mr and Mrs Coen are consumers, though there is in any event more than enough in the foregoing for the within summary application to be refused. Mindful of that "*discernible caution*" to which McKechnie J. refers in *Harrisrange*, and returning to the wording of Hardiman J. in *Aer Rianta*, it is not very clear that Mr and Mrs Coen have no case, there are issues to be tried, those issues are not simple and easily determined, and the affidavit evidence before the court does not fail to disclose an arguable defence. All this being so, the court will send the within matter to plenary hearing.