THE HIGH COURT

2016 No. 1277 S

Between:

CABOT ASSET PURCHASES (IRELAND) LIMITED

Plaintiff

– and –

SEAN MOONEY and GRAINNE MOONEY

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 4th May, 2018.

I

Application Brought and Issues Remaining

1. This is an application for a summary judgment for debt. It came to court by way of appeal from an order of the Master. He (the Master) struck out the proceedings in what was a contested application. However, under Order 37 of the Rules of the Superior Courts 1986 (as amended), as interpreted, *inter alia*, by the Court of Appeal in *AIB plc v. Pierce* [2015] IECA 87, the Master ultimately has no jurisdiction in contested cases other than to transfer them for determination by a judge. There was also an issue in the pleadings as to whether Cabot Asset Purchases (Ireland) Ltd was the right party to bring the within proceedings. This ground was effectively abandoned by Mr and Ms Mooney in the course of the proceedings, and rightly so: it is clear from the documentation before the court that Cabot is the right party to come to court claiming the debt owed. That leaves the court with an issue as to whether there has been any default under the loan arrangement pursuant to which default has allegedly been made, an issue concerning how demand was made, and an issue of contractual interpretation.

II

Has There Been Default?

2. By facility letter of 7th April 2006 (the 'Facility Letter'), Mr and Ms Mooney borrowed €201k. The purpose of the loan is described across from the heading "*Purpose*" as "*€200,000 to invest in Liberty Asset Management Crystal Property Development Fund and €1,000 roll up of arrangement fee*". Under the heading "*Repayment*", the Facility Letter provided, inter alia, that "*The capital and interest on the facility will be cleared up at the end of the term from maturing investment. The capital element of the loan will be cleared upon expiry from funds maturing under Friends First Crystal Development Fund policy*". Mr Mooney has repeatedly averred in the course of the within proceedings that neither he nor Ms Mooney has defaulted under the loan. This is no casual averment, not that any averment should be casual: swearing to a particular set of facts is a serious undertaking that falls to be treated seriously by the courts. In his final affidavit, Mr Mooney is quite categorical, averring as follows: "*I say that I have sworn that my wife and I have not defaulted on any of our repayment obligations to Ulster Bank (Ireland) Limited pursuant to the terms and conditions of the Facility, the subject-matter of the within proceedings, and I once more affirm this averment.*" So Mr Mooney has put full-centre a complete denial of default. To the best of this Court's recollection, this is the first time that it has encountered a case where not just a claimed liability is denied, but the actual event of default underpinning that claimed liability has been denied. The effect of the foregoing is that it is for Cabot to establish that there has been an event of default. The court is not satisfied that it has done so on the balance of probabilities.

3. When it comes to establishing default, Cabot relies ultimately on the fact that on or about 24th September, 2014, a letter of demand was served on Mr and Ms Mooney by Ulster Bank. Thus Ms Orla Hughes avers for Cabot in an affidavit of 22nd December, 2016, that "*I say and am advised that the Defendants defaulted in their repayment obligations to Ulster Bank in respect of the Facility and accordingly Ulster Bank demanded the sum of €276,798.41 from the Defendants by letters dated 24 September 2014*". Putting beyond doubt that it is the said letters of demand that are being relied upon to establish default, Mr Niall Purcell, a director of Cabot, avers in an affidavit of 10th August, 2017, that "*I say and am advised that, included in the transfer by Ulster Bank to the plaintiff were copies of letters of demand from Ulster Bank to the defendants dated 24 September 2014 demanding repayment of the loan, the subject matter of these proceedings, due to the defendant's failure to provide for the monthly instalments on the account in the manner contracted. I beg to refer to these letters [as] already exhibited….I say and am advised that this is the evidence of default that the plaintiff is relying upon*." A few difficulties arise with the foregoing:

> – first, though the point was not raised at hearing, the court cannot but note that the letters of demand do not tie in by way of any reference to the Facility Letter;
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> – second, the demand letters do not appear to refer to the repayment arrangements established under the Facility Letter; thus the demand letters state that "*you have not provided for the monthly instalments on your Loan Account in the manner contracted*", but, as the court noted above, the repayment of the facility established by the Facility Letter was and is, per the repayment clause in the Facility Letter, to be "*cleared up at the end of the term from maturing investment. The capital element of the loan will be cleared upon expiry from funds maturing under Friends First Crystal Development Fund policy*"; so no monthly repayments are expressly provided for; in fact, some sort of so-called 'bullet' repayment appears to be anticipated.
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> – third, given the above-mentioned deficiencies, it is, with every respect, barely worth the paper it is written on for staff of Cabot to aver by way of affidavit evidence that they consider money is owed under a particular loan agreement simply because letters of demand relating to some Ulster Bank liability arising between Ulster Bank and the Mooneys when those letters of demand (i) do not tie into the relevant Facility Letter and/or (ii) appear to relate to some form of loan arrangement whereby monthly instalments were payable (which does not appear to be the nature of the repayment scheme contemplated by the Facility Letter).

4. Counsel for Cabot suggested that if there was some confusion on the part of the Mooneys when they received the demand letters, they never manifested that confusion in any of their dealings. Two points arise in this regard. First, it does not suffice to discharge the burden of proof that a debt is owed that the person of whom demand is made does not express confusion regarding such demand when made. Second, in the course of the within proceedings, Mr Mooney has consistently and firmly denied that he has ever defaulted on his repayment obligations. For an assignee of debt to aver that 'I, as assignee, say you did default because the assignor once said you defaulted' goes in and of itself, certainly on the facts at hand, little if anywhere in terms of satisfying the burden that

arises for Cabot as assignee.

III

Is the Loan a Limited Recourse Loan?

5. Separate from all of the foregoing, there is a limited recourse argument being raised by the defendants. They point to the repayment clause in the Facility Letter and say that the text has the effect of making the loan extended under the Facility Letter a limited recourse loan with repayment falling to be made upon maturity of the Friends First Crystal Development Fund policy. (Quite how the repayment monies were to make their way back to Ulster Bank once the Friends First fund matured, *i.e.* whether directly from Friends First or *via* the defendants, is entirely unclear, as is the issue of whether there has been some form of default in this regard). Though an issue of pure contractual interpretation is a matter on which one could conceive a court properly ruling at a summary stage, given that the various deficiencies pointed to above will in any event result in the within matter going to plenary hearing, it seems appropriate, and fairest to both sides, that this issue of interpretation should also be ruled upon by the judge tasked with the plenary hearing, following any (if any) evidence that may be given on the point.

IV

Applicable Legal Principle

6. The hurdle to be surmounted by Mr and Ms Mooney as regards having this matter sent to plenary hearing is notably low, though, if the court might 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?"*

7. 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;
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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;
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> (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;
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> (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;
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> (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;
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> (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."

V

Conclusion

8. Given (i) the failure by Cabot to establish on the balance of probabilities that there has been a default by Mr and Ms Mooney, (ii) the difficulty presenting as regards whether demand was duly made, (iii) the issue as to whether the loan is a limited recourse loan or not (albeit that this ground (iii) could, in isolation, perhaps be resolved by the court), it is not very clear that the Mooneys have no case, it is not the case that there is no issue to be tried, and the issues that present are not simple and easily determined. There is not a failure to disclose even an arguable defence: an absence of default is the most basic of defences to a claim for a sum owing consequent upon default. Mindful of that "*discernible caution*" which McKechnie J. indicates should be brought to the exercise of the power to grant summary judgment, the court respectfully declines to grant the summary judgment sought and will instead refer this matter to plenary hearing.