Neutral Citation Number: [2010] IEHC 41

THE HIGH COURT

COMMERCIAL

2009 1624 S

BETWEEN

ACC BANK IRELAND PLC

PLAINTIFF

AND

GEORGE FAHEY, EVELYN FAHEY,

GEORGE MCGRATH AND CATHERINE MCGRATH

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 12th day of February, 2010

Introduction
When these proceedings began, the plaintiff (the bank) sought to recover judgment against the defendants for a sum of €3.5m together with interest thereon which, as of 17th June, 2009, amounted to €711,697.93 giving a grand total of €4,211,697.93. There was also a claim for continuing interest calculated at a rate of €1,386.24 per day. By February 2010 that added a further €310,000 approximately to the defendants' liability.

On the day of trial (2nd February, 2010), the bank reduced its claim from in excess of €4.5m to €3,273,611. The bank was quite right to adopt that course but the reasons for so doing raise a number of troubling issues.

The plaintiff
The bank has its registered office at Charlemont Place in Dublin and carries on business at a number of locations in Ireland. The transactions the subject of these proceedings emanated from the bank's Galway Financial Services Centre.

The defendants
The first and second defendants are married to each other as indeed are the third and fourth. The first three defendants are described in the statement of claim as property developers and the fourth is described as a retired nurse.

The third defendant (Mr. McGrath) both in an affidavit sworn by him and in the witness box described himself as a retired Garda. He is now 53 years old and retired on pension from the Garda force three years ago having served 30 years as a member of it. Twenty five of those years were spent in Loughrea, County Galway. He was the only defendant to give evidence at the trial. He was the conduit through which the bank transmitted information to the other defendants.

Over the last twenty years or so, Mr. McGrath has been heavily involved in the acquisition and development of properties and lands. In information supplied to the bank in October 2008, Mr. McGrath was shown to own 22 properties in his own right to a total value of €5.7m. He was also in partnership with the first defendant (Mr. Fahey) under the partnership name of G. & G. Properties which had a property portfolio consisting of development and residential properties valued at €12.2m. In addition, he was a partner with three others (one of whom was Mr. Fahey) in a partnership called DFGM Properties which owned property to a total value of €26.1m. Both Mr. McGrath and Mr. Fahey were also partners in a four-man partnership called the Portmore partnership which owned the Thai Garden Restaurant at Spanish Arch, Galway, valued at €2.7m. Finally, he was also a partner in a three man partnership called the Pier Road partnership which owned a property in Portumna to a value of €1.5m. Thus, it is clear that although his career was as a member of the Garda, Mr. McGrath acquired a considerable knowledge and expertise in the acquisition and development of lands and properties.

As of October 2008, Mr. Fahey was the owner of 25 properties in his own right to a total value of €6.5m. He was also a partner in the various partnerships which I have already alluded to.

Whilst many of the properties owned by Mr. Fahey and Mr. McGrath were mortgaged, in January 2008 a credit report prepared by the bank noted that they had a combined certified net worth of €25.86m as at October 2007.

The relevance of the wealth of Mr. McGrath from his property transactions as distinct from his earnings as a member of the Garda will become apparent later in this judgment.

The transaction in suit
In 2006, the defendants wished to obtain a bridging term loan from the bank in the sum of €3.5m to assist in the purchase of a property at Moore Street/Bride Street, Loughrea, County Galway. Their application was successful.

On 9th May, 2006, a letter of loan sanction and agreement for bridging finance was sent to the defendants at Mr. McGrath's address.

The defendants were offered the facility of €3.5m for a one year term. The letter was materially inaccurate when it described the property to be purchased as being situate at Main Street, Loughrea, County Galway. It was also wrong when it said that a planning permission had been granted in respect of the property.

The letter from the bank was signed on its behalf by Aidan Corcoran, a Relationship Manager and Pat O'Callaghan, a

Senior Manager.

The defendants accepted the offer contained in the letter and on 19th May executed a form of acceptance. Each of the defendants appended their signatures to the acceptance and each signature was witnessed by Mr. Brian Doherty Solicitor. Mr. Doherty acted for the defendants in the transaction.

The inaccuracies in the letter of 9th May, 2006 were spotted both by Mr. McGrath and by Mr. Shane McSweeney who was the solicitor acting for the bank. He had been sent a photocopy of the letter of offer and he recommended to the bank that they correct the inaccuracies and issue a fresh one. Mr. McGrath likewise drew Mr. Doherty's attention to the inaccuracies.

The bank issued a fresh letter of sanction dated 7th June, 2006. This letter correctly described the property but despite Mr. McSweeney's advice continued to inaccurately describe it as having the benefit of a planning permission for residential office and retail units.

The letter of 7th June, 2006 specifically provided that it cancelled and superseded the offer extended by the bank in the letter of 9th May, 2006.

The uncontroverted evidence of Mr. McSweeney is that funds totalling €3,279,000 were transferred to his client account by the bank on 9th June, 2006. The reason why the sum is less than the €3.5m is because there was deducted from that sum €206,000 interest rollup and a bank arrangement fee of €15,000.

On 12th June, 2006, Mr. McSweeney received a request from Mr. Doherty on behalf of the defendants seeking to draw down the funds.

The following day €3,273,611 was transferred from Mr. McSweeney's client account to the client account of Mr. Doherty. The reason for the small discrepancy between the sum lodged and the sum paid out from Mr. McSweeney's client account arises from the fact that he was authorised to deduct a portion of his fees from that sum. Nothing turns on this.

The defendants accept that they received €3,273,611 from the bank.

The bank has in its possession the letter of 7th June, 2006, which was purportedly signed by each of the defendants and witnessed by Mr. Aidan Corcoran. The acceptances and the witnessing of the signatures bear the date 8th June, 2006.

In accordance with the terms of the letter of 7th June, 2006, the loan became due and owing on 9th June, 2007, one year from the draw down date. The repayment date was extended until 8th February, 2008 and a further extension was granted until August 2008.

The defendants failed to discharge interest payments on the loan since 1st August, 2008.

In February and March 2009, correspondence took place between the bank and the defendants which, *inter alia*, involved the defendants suggesting that the bank roll up interest for a further year and complaining about a high interest rate. Ultimately, the bank demanded repayment of all outstanding monies. This was done by a letter of 5th March, 2009, at which stage the amount due on foot of the loan of 7th June, 2006, was €4,066,142.55. The money was not paid.

This litigation
These proceedings were commenced in April 2009, and an appearance was entered on 25th May, 2009. On 17th June, 2009, the plaintiffs issued a motion seeking to transfer the litigation to the Commercial List and also sought summary judgment.

On 22nd June, 2009, I made an order transferring the litigation to this division and fixed 14th July as the date for the hearing of the plaintiffs' application for summary judgment. That application was grounded upon an affidavit of Hilda Hewson who also gave evidence before me at the trial.

Prior to the hearing of the application for summary judgment, each of the defendants swore an affidavit. Each of them averred in unequivocal terms that they had not signed the revised letter of loan sanction of 7th June, 2006. They swore that the signatures on the document were not theirs. They all alleged that the first time that they had ever seen the letter of 7th June, 2006, together with the purported acceptance of it was when they read the grounding affidavit of Ms. Hewson. They also alleged that, quite apart from not receiving or signing the letter of 7th June, 2006, they did not receive the document described in the first sentence of that letter and known as the bank's "*general terms and conditions applicable to commercial credit facilities*". There are a number of other matters dealt with in the affidavits which are not germane for the purposes of this judgment.

The defendants cogently made the point that the loan instrument relied upon by the bank in support of its claim had never been furnished to them, were never signed by them and was seen by them for the first time when they read the affidavit sworn by Ms. Hewson.

In response to these affidavits, the bank filed two affidavits. The first was sworn by Mr. McSweeney, solicitor, setting out what I have already described in this judgment.

The second was from Mr. Corcoran, the bank's Relationship Manager. In respect of the contentions made by the defendants he said this:-

> *"I again refer to paragraph 3 of the defendants' affidavits, and the assertion that they have collectively not seen the June 2006 letter before. A copy of the June 2006 letter was furnished to the defendants however I cannot specifically recall the circumstances surrounding the transmission. It may have been the case that I either posted the June 2006 letter to the defendants or the defendants collected it from me.*
>
> *5. I recall receiving the 2006 letter signed by the Defendants, and then I would have added by (sic) own signature though the June 2006 letter refers to me witnessing the signatures, which was not the case."*

I heard the application for summary judgment on 14th July, 2009. The bank pressed for judgment but I refused its application and adjourned the action for plenary hearing. I also directed an exchange of pleadings. Subsequently, on 12th October, 2009, I fixed 2nd February, 2010, for the commencement of the trial.

The trial
In opening the bank's case, its counsel made a number of significant concessions.

First, he indicated that the bank was no longer pursuing any claim against the defendants other than for the recovery of the €3,273,611 which was the net amount transferred to Mr. Doherty's account on 13th June, 2006. All claims for any further sums whether by way of principal or interest were abandoned. He indicated, as is the case, that no monies at all have ever been repaid by the defendants to the plaintiff either in respect of principal or interest. The interest was provided for initially by way of a rollup.

Counsel also accepted that the replying affidavit which had been sworn by Mr. Corcoran on the application for summary judgment was "*unsatisfactory*" from the point of view of the bank.

The court was assured that the questions raised by the defendants' replying affidavits were taken extremely seriously by senior management within the bank. Within a week of my order of 14th July, 2009, both Mr. Corcoran and Mr. O'Callaghan had been interviewed by the head of internal audit at the bank. Shortly after the internal auditor's investigation, Mr. Corcoran tendered his resignation from the bank. It became effective on 31st October, 2009. Subsequent to his resignation, he declined to cooperate with the prosecution of these proceedings. Mr. O'Callaghan has also left the employment of the bank.

Counsel went on to point out that the bank had elected not to subpoena Mr. Corcoran and thus it followed that the bank would not be in a position to call evidence to the effect that the defendants signed the letter of loan sanction on 7th June, 2006. But he went further. He told me that the bank had engaged an independent handwriting expert who came to the conclusion that the signatures on the document were not those of the defendants. It followed that the bank was not going to challenge the intended evidence of the defendants indicated in their witness statements to the effect that they did not sign the letter of loan sanction of 7th June, 2006. He conceded that they were not bound by its terms.

He thus confined his claim to that which was contained as a plea in the alternative in the prayer of the statement of claim for the recovery of the principal sum advanced as money payable to the bank for money lent by it to the defendants.

Three witnesses gave evidence at the trial. The first was Mr. McSweeney, the second, Ms. Hewson and finally, Mr. McGrath.

At the conclusion of his cross-examination, Mr. McGrath accepted that the bank lent him the money in suit and that he was obliged to repay it. In the light of that concession, and subject only to a pleading point made by the defendants' counsel, it might be possible to dispose of the claim at this juncture with judgment being entered for the plaintiffs.

Unfortunately, I cannot do so since, in addition to the apparent forgery of the defendants' signatures on the loan instrument, two other matters of concern emerged in the evidence.

The P. 60 issue
Prior to the institution of proceedings, representatives of the bank including Ms. Hilda Hewson held meetings with Mr. McGrath and Mr. Fahey. The first such meeting took place in Loughrea on 11th November, 2008 and the second was in Dublin on 23rd January, 2009.

On 3rd November, 2008, Mr. Corcoran called to Mr. McGrath's house in anticipation of the meeting with Ms. Hewson which was to take place the following week.

In the course of conversation, Mr. Corcoran is alleged to have said to Mr. McGrath that they should "*both be on the hymn sheet*" for the meeting the following week. If Mr. McGrath were asked about his wages, he should, said Mr. Corcoran, indicate that they were in the sum of €107,000, and that his wife should also have a high figure. Mr. McGrath asked how could he say that since the bank officials at the meeting would ask for P.60 certificates. Mr. Corcoran is alleged to have said that that was covered and that he had P.60s. Mr. McGrath asked him where he had got them. Mr. Corcoran replied that an accountant friend owed him a favour.

Mr. McGrath gave evidence that he believed that the bank was in possession of P.60 forms in respect of his earnings and those of his wife. In his witness statement, he referred to and exhibited a P.60 form for the year ended 31st December, 2005. It shows total pay of €24,951. That was in respect of a period when he was working as a garda but was doing so on a half-time basis. That was the correct figure by way of earnings for him for that year.

In March 2009, Mr. McGrath wrote to the data controller of the bank. He wrote on his own behalf and on behalf of the other defendants. Each defendant applied for the data retained by the bank in respect of them. The request was made pursuant to the provisions of the Data Protection Acts.

The bank responded to the request by furnishing two large boxes containing eleven files. The documents enclosed dealt with all of the dealings which the defendants had with the bank over the years. Included amongst the documents was a P.60 form that purported to be in respect of Mr. McGrath and to deal with his earnings for the year ended 31st December, 2005. It purported to certify that he earned €89,952.35 for that year. This was false. Mr. McGrath believes that the original of this document is still in the possession of the bank.

Mr. McGrath has no idea as to how this false P.60 came into being or got into the possession of the bank. He swears that he had no part in its creation, or procurement.

In the course of his evidence he also referred to other documents which had been retrieved from the bank containing inaccurate information, none of which he supplied to the bank.

It is worrying that the bank should apparently have been in possession of a false P.60 certificate purporting to certify a level of pay far in excess of what was, in fact, the case.

Ms. Hewson's evidence is that the bank had no interest in Mr. McGrath's earnings since its decision to lend was based on the defendants' net worth and not on their earnings. She found no P.60 on the file which she had been working on since September or October 2008. In fact, she told me that P.60s would only be of interest to the bank in respect of personal borrowings and not commercial borrowings of the type in suit. That approach on the part of the bank appears to me to make sense. It would not have been reasonable or sensible for the bank to have advanced €3.5 million to Mr. McGrath on the basis of his garda earnings. What was important was his net worth, and indeed, that of his co-defendants. From what I have set out in the earlier part of this judgment, it is clear that the defendants were persons of substantial net worth and it was on that basis that the monies were lent.

Nonetheless, there is evidence before the court of the bank being in possession of what appears to be a fictitious P.60. That is a matter of concern.

The final email
At 11.23pm on the night before the trial began, Mr. McGrath sent an email to the bank's solicitor. It was drawn to my attention by counsel for the bank, who described it as a, "*not very subtle threat to obtain some unwarranted concession from the bank*". He also said that it was "*impossible to interpret that email as other than a threat and an attempt to intimidate the plaintiff from bringing this case before the court today*".

The email reads as follows:

> *"Claire,*
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> *My solicitor, Mr. John Mitchell, advised me that we were meeting in Galway today at 4.00pm to discuss 'settlement' of our issues. Unfortunately, when we arrived there at 4.00pm, you were gone. It was intimated that your case in court finished early and you left for Dublin. I wish to clarify the following with you. John Mitchell advised me that he contacted you by phone this morning to arrange the proposed meeting. He further states that he advised you that we, his clients, would be willing to settle and conclude the matter by walking away from the site, leaving same to ACC, provided ACC did not seek a judgment order. John Mitchell was not acting on my expressed authority to offer or agree those terms and I did not advise him so. He was surmising that I would be happy with that result, that is not the case.*
>
> *I am confident that tomorrow, in the High Court, Judge Peter Kelly will rule in our favour, and that he will insist on the matter being investigated further by the Director of Public Prosecutions, for the following reasons:*
>
> *(i) The fraudulent loan offer dated 7th June, 2006;*
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> *(ii) the forged signatures on the loan offer;*
>
> *(iii) the forged form P.60s that were concocted in my name;*
>
> *(iv) the ACC Bank's failure to comply with my rights under section 4 of the Data Protection Acts 1988 and 2003;*
>
> *(v) the fraudulent overcharging of interest by ACC Bank to the tune of €521,581.66.*
>
> *It is my intention to pursue the matter rigorously through the courts, specifically, the Criminal Justice (Theft and Fraud Offences) Act 2001. I will also be advising the financial services regulatory authority on the matter. I have only spoken to a small circle of friends about my situation with ACC Bank, and their pursuing me in the High Court. That being said, my story seems to have leaked out, and since last Thursday, I have been approached on four occasions and literally begged to go public with my situation. Having discussed the matter with my partners, we decided not to liaise with this particular group, fearing slightly that they may have their own specific agenda. This morning, at 9.10am, I received a phone call stating that I would receive a substantial sum of money, in exchange for going public. At this point, I have neither accepted nor rejected the offer.*
>
> *My intention was, had we met today, I would advise you of my situation and you, in turn, could advise your clients, ACC Bank. On 21st January, 2010, I emailed Hilda Hewson of ACC Bank, and requested that she meet with me, on a one-to-one basis; she declined.*
>
> *I attach my statement of evidence and a report from 'BANKCHECK' outlining the interest overcharged. I have not attached the exhibits, but I am sure that Arthur Cox, solicitors, will make them available to any interested parties."*

This email was copied to three persons. They were (i) Nicola Turley, Press Contacts, ACC Bank, (ii) Brian Bell, Public Relations Consultants and (iii) Hilda Hewson, ACC Bank.

At the conclusion of the email, the following was stated:

> *"I request that Nicola Turley and Brian Bell forward this email immediately to the present CEO of ACC Bank, Mr. Robert Hartog, and also to his eminent successor, Mr. Kevin Knightly. Please also forward to Raymond Salet and Roelina Bolding. As I do not have their respective email addresses, I will be forwarding a hard copy of this email to all, in course."*

Mr. McGrath gave evidence concerning the sending of this email. He said it was sent for the purpose of highlighting discrepancies to the bank. He denied that its purpose was to threaten the bank or to try and deter it from proceeding with the case. He said, "*I didn't threaten anybody. My intention was not to threaten. My intention was to alert. And had*

I met with Claire McGrade, yesterday, as we thought we would, I would have told her and that would be that."

It is difficult to see why Mr. McGrath thought it necessary to send this email to the bank's solicitor the night before the trial began. He had a competent solicitor and counsel appearing for him who were well able to communicate whatever his concerns might be. The copying of the email or request to do so to the other persons named makes his explanation of simply seeking to impart information implausible. I think it much more likely that the email was sent with a view to attempting to put improper pressure on the bank to drop its claim.

In *McGivern v. Kelly* [2008] IEHC 58, I had to consider whether the sending of a minatory email in that case was a contempt of court. I reviewed the relevant authorities and said as follows:

> *"It is of the highest importance that a citizen who exercises the right to litigate should be able to do so free of threats or obstructions. Conduct that is calculated to inhibit a litigant from availing himself of the constitutional right to have his legal entitlements determined by the court by the use of threats is a contempt of court. From as far back as 1744, it was held that threatening a party if he allows an action or suit to continue amounts to contempt of court. It is so because it creates an obstruction to a party to proceedings."*

In the present case, I think it likely that it was Mr. McGrath's intention to put improper pressure on the bank. I am not, however, going to hold him in contempt of court in that regard. I do so because I believe the email was sent out of a sense of desperation. He only became aware of the concessions concerning the bank's claim on the day of the hearing. So, on the night before, he believed that the bank was seeking to visit him with liability for the full amount that would have been due on foot of the letter of 7th June, 2006. He knew that the signatures on that letter, both of himself and his co-defendants, were forged. He obviously had a great sense of injustice in relation to that. In these circumstances, I propose to take no action in relation to the sending of this email.

The pleading point
Despite the acceptance by Mr. McGrath that he and his co-defendants had received the monies from the bank and were obliged to repay them, his counsel argued that the statement of claim delivered subsequent to the application for summary judgment being refused was deficient. Counsel for the plaintiff did not rely on many of the recitals in the statement of claim and I am satisfied that the pleading is quite in order.

Whilst the document sets out the background to the transaction in some detail, the alternative prayer is for a simple payment of money to the plaintiff in respect of money lent by it to the defendants. It is in the precise form which is recommended in Bullen and Leake and Jacobs *'Precedents of Pleadings'* (13th Edition). The money was sought to be recovered as a simple contract debt.

The matter is put succinctly in *'Chitty on Contracts'* (29th Edition) at para. 38-229, where it is said:

> *"If money is proved, or admitted, to have been paid by A to B, then in the absence of any circumstances suggesting a presumption of advancement, there is prima facie an obligation to repay the money; accordingly, if B claims that the money was intended as a gift, the onus is on him to prove this fact."*

In the present case, there is neither a presumption of advancement nor any suggestion of a gift. This was a commercial loan made by the bank to the defendants and the defendants admit that they received it. They also accepted, through the mouth of Mr. McGrath, that they have an obligation to repay. The statement of claim is drafted in such a way as to encompass such a claim.

It follows, therefore, that the bank is entitled to recover judgment.

Result
There will be judgment in favour of the bank for the net sum received by the defendants, namely, €3,273,611. No interest is payable in respect of that sum and, indeed, none is sought by the bank. The bank also, quite properly, has indicated that it does not seek the costs of these proceedings against the defendants.

In view of the disturbing evidence concerning the apparent forgery of the defendants' signatures on the loan instrument of 7th June, 2006, I am referring the papers in this matter to the Director of Public Prosecutions.

I am also concerned at the fact that the bank appears to have been in possession of a fictitious P.60 certificate in respect of Mr. McGrath. This matter also requires investigation by the appropriate authorities. The referral of the papers to the DPP will also encompass a request for his consideration of that matter.