

THE HIGH COURT

[2011 No. 1032 S]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

BRENDAN FLYNN

DEFENDANT

[2014 No. 3235 P]

BETWEEN

BRENDAN FLYNN

PLAINTIFF

AND

PAUL MURRAY, MICHAEL FLYNN, THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND, MARTIN CALLINAN, EUGENE GALLAGHER, IAN BRENNAN, WILLIAM FRY SOLICITORS, BRIAN MURPHY, LIAM LAVELLE

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 12th day of April, 2016

1. In the first set of proceedings (Record No. [2011] 1032 S) the plaintiff bank seeks judgment against the defendant, a businessman, for €135,980.91 as money owed on foot of two credit agreements. In the second set of proceedings (Record No. [2014] 3235 P) the plaintiff seeks damages against the Bank and Mr. Brian Murphy and Liam Lavelle, a senior official and senior solicitor with the Bank.

2. By order made the 9th October, 2014 (Hogan J.) it was directed that the Bank's claim (Record No. [2011] 1032 S), be set down for trial and that witness statements be exchanged by both parties for the 19th December, 2014. By a further order made 22nd June, 2015 (Hedigan J.) it was directed that the plaintiff's claim against the third, eighth and ninth defendants in the second set of proceedings Record No. [2014] 3235 P, namely the Bank, Mr. Murphy and Mr. Lavelle, be linked with the Bank's claim and that both sets of proceedings be heard at the same time.

The Bank's Claim

3. Under the first agreement dated 21st December, 2004 (the December 2004 Agreement) the plaintiff advanced €25,000.00 to the defendant repayable over a forty-eight month term. This was a motor loan agreement. The main issues in this case derive from controversy surrounding a second "credit agreement". Under the second agreement dated 23rd January, 2007 the plaintiff advanced a loan of €113,000.00 for a term of three months (the January 2007 Agreement). The purpose of that loan was to assist the restructuring of existing facilities namely, a personal overdraft account number 3718699690351 which had an overdraft of €89,483.24 and an overdrawn current account of Governetz Commercial Limited number 21850303903541 which was overdrawn in the amount of €22,878.18. This loan was to be repaid by 30th April, 2007.

4. By letters dated the 26th January and 4th March, 2010 the plaintiff demanded payment of the monies due on foot of each of the agreements. As of the 24th June, 2014 the amount outstanding was said to be €135,980.91 particularised as follows:

To monies due on loan account 75204761 (the December 2004

Agreement)..... €11,144.20

To monies due on loan account 60586349 (the January 2007

Agreement)..... €124,836.71.

The defendant did not pay this money in response to the demands made.

5. The proposed basis of the defence to this claim is set out in an amended defence and counter claim dated 16th February, 2015. The defendant denies liability to the plaintiff under the two credit agreements with a particular focus upon the second. He claims that the January 2007 Agreement was made by him because of undue influence or duress exerted upon him by bank officials who sought to conceal alleged wrongs in their dealings with the accounts of two companies in which he had invested.

6. The following facts were outlined in support of this defence. In or about June 2005, the defendant was the founder and a director of Eagle Flag Ireland Ltd. and Governetz Commercial Ltd. It is alleged that as a result of certain actions by two fellow directors of these companies, Mr. Michael Flynn (the defendant's brother), and a Mr. Paul Murray, a fraud was perpetrated on the defendant which involved the illegal transfer of shares and the falsification of the companies' accounts. On discovery of this fraud, the

defendant took steps to remove his fellow directors from both companies. He claims that the Bank was notified about these developments. As a result the Bank knew that the two should no longer have access to the bank accounts of the two companies. The defendant convened a meeting of the boards of both companies and the two directors were removed. The plaintiff requested fresh mandates regarding the operation of the accounts of the two companies. The board of Governetz Commercial Ltd. designated the defendant as the sole authorised signatory to the account of Governetz Commercial Ltd. on the 6th June, 2006. The defendant also claims that a properly constituted board meeting was held by Eagle Flag Ireland Ltd. on the 22nd June, 2006 which also authorised a fresh mandate in respect of its accounts with the plaintiff and designated the defendant as a sole authorised signatory in respect of its accounts. The defendant claims that notwithstanding the furnishing of these new mandates in respect of both companies' accounts, the plaintiff closed the accounts of Governetz Commercial Ltd. and suspended the accounts of Eagle Flag Ireland Ltd. in or about the 30th June, 2006 as a result of which both companies ceased to trade. The defendant alleges that the Bank failed to operate the accounts on foot of the new mandates which authorised the defendant alone to carry out transactions and issue instructions in respect of the two accounts.

7. The defendant alleges that as a result, both companies were unable to trade or deal with any financial matters or continue with their day-to-day business. He complains that the Bank failed to give any or any adequate notice of the freezing or closure of the accounts and effectively prevented the defendant from refinancing the companies by securing credit from another bank. This caused the collapse of both companies as a result of which the defendant lost his investment in both companies (including future profits).

Loan Agreement

8. The loans which form the basis of the Bank's claim arose in the following way. On 21st December, 2004, the sum of €25,000.00 was advanced to Mr. Flynn for a term of 48 months. Under a further agreement of 23rd January, 2007, the plaintiff advanced a loan of €113,000.00 for a term of three months. This was accepted by Mr. Flynn on 26th January, 2007. Letters of demand issued in respect of the loans due to default of payments on 26th January and 4th March, 2010, respectively. The monies due were not discharged. The plaintiff, therefore, claims €135,980.91 due on foot of the loan agreements.

The Statute of Limitations

9. Mr. Flynn claims that the Bank's claim on foot of the two loan agreements is statute barred. I am not satisfied that this is so. Payments were made in respect of the 2004 loan in December 2006 and July 2007. Mr. Flynn's default under the terms of the loan agreement occurred thereafter and the plaintiff had six years under s. 11(1)(a) of the Statute of Limitations 1957 as amended to initiate proceedings. The summary summons was issued on the 11th March, 2011.

10. The 2007 Agreement was for a period of three months. It expired on April 30th, 2007. Mr. Flynn was then obliged to repay the loan amount in full, together with interest. Since the fixed period expired on April 30th, 2007 the plaintiff had six years from that date to initiate proceedings. It did so by issuing the summary summons on the 11th March, 2011. This point of defence fails.

11. Insofar as Mr. Flynn makes the case that the Bank is guilty of inordinate and inexcusable delay in pursuing these proceedings, no evidence of such delay was furnished to the court and no evidence of prejudice was established that might inhibit the fair hearing of the action. I am not satisfied that any such prejudice arose or was demonstrated during the course of the hearing.

Duress and Undue Influence

12. Mr. Flynn seeks to defend the claim on the basis that he was induced to enter the loan of 26th January, 2007, under duress. In evidence, he claimed that because he was in financial difficulties between June 2006 and January 2007, as a result of the collapse of his business interests in Eagle Flag Ireland Ltd. and Governetz Commercial Ltd. (outlined above), he was obliged to expend personal funds in trying to keep the two companies going. He built up an overdraft as a result and was obliged to take over personal liability in respect of Governetz Commercial Ltd. He claims that he was directed by Mr. Brian Murphy, Senior Business Manager with the Bank to attend a meeting at the Grand Hotel Malahide, Co. Dublin, on 23rd January, 2007. Mr. Murphy informed him that if he did not sign a further term loan agreement with the Bank, it would move to obtain judgment against him, and he would be made bankrupt and lose his family home. He was threatened with "financial ruin" by Mr. Murphy. He was informed that the Bank wished to consolidate his personal overdraft and any sums due under his personal guarantee in respect of Governetz Commercial Ltd. into the term loan for a two year period.

13. Mr. Flynn claims that he was then directed to attend at the Regional Office of the Bank to sign the new term loan on the 26th January, 2007. Ms. Eleanor O'Connor attended this meeting on behalf of the Bank. He claims that when he attempted to read the conditions of the loan and pointed out that the term was limited to three months and not to the two years which had been agreed, he was informed by Ms. O'Connor, that he must sign "or else". On asking what "or else" meant, he said he was informed that "that was a matter for others" but that her instructions were to obtain his signature without discussion or alteration. She was also described as behaving in a threatening and intimidatory manner towards him. In later evidence, Mr. Flynn resiled from this position to a degree suggesting that he half-heartedly suggested a change to the term in a somewhat light-hearted way, to which Ms. O'Connor did not agree.

14. Mr. Brian Murphy gave evidence that the term loan applied for was initiated as a result of discussions with Mr. Flynn. Mr. Murphy had no recollection of meeting Mr. Flynn at the Grand Hotel Malahide and denied that Mr. Flynn was threatened at any meeting prior to the signing of the agreement.

15. Mr. Murphy states that the consolidated agreement followed a number of meetings and discussions which he had with Mr. Flynn in respect of his current account No. 37186886 with a liability of €88,240.00 and the account of Governetz Commercial Ltd. No. 21850303 with a balance due of €22,702.00, in respect of which Mr. Flynn had given the guarantee. Mr. Murphy recalled that Mr. Flynn had been in discussions with a Mr. Kelly and an entity called Oceanis Development to procure funding to complete a golf course development at Cisse Blossac, Rennes, France which, if concluded, would enable him to discharge these balances. It was anticipated at the time that agreement would be reached between Mr. Flynn, Mr. Kelly and Oceanis Development by 16th January, 2007. I am satisfied that Mr. Flynn sought a term loan agreement on the 8th January, 2007.

16. In an internal file memorandum dated 8th January, 2007, Mr. Murphy, referring to these accounts, noted that he met Mr. Flynn on that date, following other meetings and phone contacts over the previous months. He noted that Mr. Flynn had been in discussion with Mr. Kelly and Oceanis Development to raise funding to complete the golf course development and to clear the balances. Mr. Flynn was made aware that Bank of Ireland would require the debt to be "sorted in the short term". Mr. Flynn advised that he held heads of agreement from both Mr. Kelly and Oceanis Development and expected full contracts to be agreed and signed on 16th January. He was to furnish a letter from his solicitor confirming the situation with a view to furnishing a full "unconditional undertaking" to clear the debt from the proceeds of investment received from Mr. Kelly and Oceanis Development. Mr. Murphy noted that he would diary the matter for 16th January.

17. On 17th January, 2007 Mr. Murphy filed and submitted a "Business Link Credit Application" internally, which describes the Bank's relationship with Mr. Flynn and its involvement in Eagle Flag Ireland Ltd. and Governetz Commercial Ltd.'s issues which had evolved during 2006. The purpose of the application was to allow Mr. Flynn to move his personal overdraft and a Governetz Commercial Ltd. debt into a "bridging term loan". The loan was to be unsecured but with an unconditional undertaking from Mr. Flynn to clear the entire debt from the proceeds of the investment from Mr. Kelly and Oceanis Development. The purpose of the loan was to allow him to clear his debt. This was deemed to be the Bank's best option to have the overall debt cleared including that in respect of Governetz Commercial Ltd. and the loan was therefore recommended.

18. Mr. Murphy also stated that if Mr. Flynn did not sign the term loan within one month, the outstanding debts would be called in. On 17th January a loan was sanctioned for Mr. Flynn in the amount of €113,009.00.

19. On 23rd January, 2007, Mr. Flynn sent an email to Mr. Murphy indicating that the deal in respect of the French golf course would proceed with a number of investors led by Mr. Kelly but without the involvement of Oceanis Development. Mr. Flynn stated that he would be in a position to provide an undertaking to the Bank in respect of the discharge of the outstanding amount on the signing of an agreement with the group's solicitor. In a replying e-mail on 24th January, Mr. Murphy indicated that the letter of loan offer would be ready for signature on that date.

20. The letter of loan offer is dated 23rd January and was executed by Mr. Flynn in the presence of Ms. Eleanor O'Connor on 26th January at the Bank's premises at Omega House, Collinstown Cross, Cloghran, Co. Dublin. Mr. Flynn alleged that Ms. O'Connor also behaved in a threatening manner on 26th January. In her evidence, Ms. O'Connor totally rejected this allegation. She stated that if any issues arose in respect of documents to be signed, this would have been referred to another authority. She had no particular recollection of the encounter on the 26th but was adamant that it was not her practice to threaten customers and rejected that suggestion.

21. Mr. Flynn was a very experienced businessman involved in extensive property deals and investments throughout his career. I am satisfied that he was not under any duress or subjected to intimidatory threats by Mr. Murphy or Ms. O'Connor in entering this term loan. He had liabilities in respect of which he had obligations. There was extensive engagement between Mr. Flynn and Mr. Murphy before the loan was sanctioned and the letter of offer issued on the 23rd January, as is evidenced by the "Business Loan Credit Application" and the e-mails exchanged on the issue. This facility was clearly advanced as part of the financing of Mr. Flynn's business affairs and continuing commercial transactions. He was offered the opportunity to review his obligations to the Bank, as a result of which he agreed to consolidate his obligations into the term loan agreement. I do not accept Mr. Flynn's account of the Grand Hotel meeting nor do I accept the account of his encounter with Ms. O'Connor at Omega House on the 26th. It is also clear from the subsequent forbearance of the Bank, when the money from Mr. Kelly's group of investors failed to materialise, and Mr. Flynn was faced with a period of illness, that sympathetic consideration was given to his difficulties prior to the initiation of these proceedings.

22. I prefer the evidence of Mr. Murphy and Ms. O'Connor on these events to that of Mr. Flynn. I am therefore satisfied that the Bank has established that it is entitled to recover the amount claimed on foot of the term loan agreements which remain undischarged.

The Counterclaim and the Second Set of Proceedings (Record No. [2014] 3235 P)

23. In the amended defence and counterclaim, the defendant claims that the loan agreements were unenforceable against him and seeks damages for breach of contract, negligence, breach of duty, breach of statutory duty, negligent misstatement, misrepresentation and breach of fiduciary duty. It recites the history of the alleged fraud perpetrated against the defendant, Eagle Flag Ireland Ltd. and Governetz Commercial Ltd. A chronology of those alleged events is important to an understanding of Mr. Flynn's claim.

Brendan Flynn, Eagle Flag Ireland Ltd. and Governetz Commercial Ltd.

24. In evidence, Mr. Brendan Flynn, explained the background to these proceedings arising from his business relationship with a Paul Murray and his brother Michael Flynn. In or about 2003, Mr. Flynn acquired a golf resort at Rennes, France as part compensation for work done on other projects for the sum of €600,000.00. This entailed the purchase of the shares of a company which owned this property. The book value of the property was €2.2 million. Mr. Flynn invited two other sets of investors, a John Kelly and Frank McCarthy, and Paul Murray to purchase 25% each of the shareholding in this company for €300,000.00. This agreement was reflected in the shareholding of Eagle Flag Ireland Ltd., a company purchased for the purpose of this investment. Mr. Flynn became managing director of the company at an annual salary of €150,000.00 per annum.

25. A disagreement arose between the investors. A compromise resulted in payment of €300,000.00 to Messrs. McCarthy and Kelly by Paul Murray on condition that they transfer their 25% shareholding to Mr. Flynn. It was agreed that Paul Murray would receive the first €1 million profit from the French development in lieu of losses sustained in related transactions. 75% of the shares in Eagle Flag Ireland Ltd. were now vested in Mr. Flynn and 25% in Paul Murray. Mr. Flynn later agreed to transfer 5% of his shares to Michael Flynn and 5% to a Raymond King who had been elected chairman and a Jean Testu. This compromise enabled the release of €635,000.00 in funds in related investments which were then invested by way of loans to Eagle Flag Ireland Ltd. and another company Governetz Commercial Ltd., in which Mr. Brendan Flynn had invested.

26. Governetz Commercial Ltd. was a company formed to advise and assist local authorities in England to relocate their staff to provincial areas. The shareholding was divided as follows: 80% to Mr. Flynn, 15% to a David Warren and 5% to Raymond King, previously referred to. Mr. Flynn advised on a business plan. Paul Murray joined the company. Mr. Flynn agreed to transfer 10% of his shareholding in Governetz Commercial Ltd. to Paul Murray.

27. In February 2006 as a result of disagreements with his brother Michael Flynn, Mr. Flynn informed Paul Murray that it was no longer possible to share an office with Michael Flynn and he wished to set up an independent office for both companies.

28. Mr. Flynn claims that due to the rapid growth of Governetz Commercial Ltd. he could not fund the company to complete the scheduled developments and sought outside finance. Paul Murray offered to provide "bridging finance", a part of which was an overdraft facility with the Bank of Ireland for €150,000.00 secured by a €75,000.00 deposit and joint and separate guarantees for €150,000.00 each by Mr. Flynn and Paul Murray. In return Mr. Murray increased his shareholding in the company to 50% which was ratified at a board meeting on 22nd March, 2006.

29. A serious dispute arose between Mr. Murray, Mr. Flynn and Michael Flynn. Mr. Flynn alleges that Paul Murray acted unlawfully in his position as director of Governetz Commercial Ltd., purported to issue 99% of the shares in the company to Michael Flynn and received a forged transfer of shares, purportedly from Mr. Flynn in Eagle Flag Ireland Ltd., the holding company for the project in France. These purported transfers were dated 2005. Board meetings were convened and the directors were misled as to the issued

shareholdings. False correspondence and bank applications had been made in France and Ireland (including to the Bank of Ireland) falsely describing these new shareholdings. Mr. Flynn states that he immediately advised all directors in both companies, the staff and the Bank of Ireland about these matters. Michael Flynn resigned from both companies with immediate effect. Brendan Flynn contends that Paul Murray and Michael Flynn called to the Bank of Ireland at Balbriggan and attempted to remove the funds of Eagle Flag Ireland Ltd. in the amount of €140,000.00. The Bank refused to permit the removal of funds because at that stage Michael Flynn had resigned his position with the company and was no longer an authorised signatory for the company account.

30. On the 6th June, 2006 a board meeting of Governetz Commercial Ltd. was held. This meeting had been convened after Mr. Murray made a series of accusations against the plaintiff, Mr. King and Mr. Warren. Mr. Murray notified the board that he would not be attending the meeting. Mr. Flynn claimed that once the records of shareholdings from the company's office were produced and examined and Mr. Murray's contentions were shown to be completely untrue, the board removed Mr. Murray as director by a unanimous vote. William Fry solicitors acting on behalf of Mr. Murray informed the Bank that on the 30th June, 2006 their client attempted to attend the meeting and participate by telephone but was notified by the board that this facility was not available. He therefore claimed to be unlawfully excluded from the meeting and that any business purported to be carried out at the meeting was invalid. Therefore the solicitors complained that the bank mandate was altered at what they alleged to be an invalidly convened board meeting.

31. The Bank responded by letter dated 30th June, 2006. At this stage they had carried out their own enquiries and were in possession of a board resolution appointing the new signatory to Governetz Commercial Ltd. in respect of the mandate which was dated 6th June, 2006. The Bank concluded that the resolution was in order and that it would act on it. The Bank satisfied itself that all directors were properly notified of the board meeting of 6th June, 2006. It had received a copy of e-mail correspondence from Mr. Murray acknowledging the convening of the meeting. Mr. Brendan Flynn claims that the Bank concealed the investigation carried out by it concerning the validity of this mandate and board resolution. I do not accept that this is so.

32. In the same letter dated 30th June, the Bank also noted that they were in possession of a board resolution appointing a new signatory to the mandate for the account of Eagle Flag Ireland Ltd. dated 22nd June, 2006 and were at that time seeking confirmation that proper notice had been issued to all directors. On the 30th June, Mr. Murray made a complaint to the Garda Bureau of Fraud Investigation (GBFI) stating that the Bank had informed him that the plaintiff had lodged a fraudulent mandate for Eagle Flag Ireland Ltd. This was a misrepresentation of the Bank's position.

33. By letter dated 3rd July, 2006 the Bank informed Mr. Flynn that the overdraft facility previously approved in a letter of offer dated 2nd January to Governetz Commercial Ltd. was withdrawn. The amount outstanding, then €19,739.40, was repayable on demand: a request was made to lodge funds covering the outstanding balance. The Bank claimed that it had to act "as a result of the serious dispute which has occurred among the Directors of the company", which was a material adverse change in circumstances and because one of the guarantors (Mr. Murray) now wished to limit his exposure under the letter of guarantee. Mr. Flynn's obligation under the personal guarantee in respect of the liabilities of Governetz Commercial Ltd.'s account was subsumed later into the new loan account the subject matter of the Bank's claim.

34. In respect of Eagle Flag Ireland Ltd., Mr. Liam Lavelle, the solicitor to the Bank, in evidence, stated that he was contacted in or about the 3rd or 4th July, 2006 and informed that a dispute had arisen between the directors Mr. Murray and Mr. Flynn and that it was not clear whether the Bank could continue to operate the company's account as the mandate appeared to be in question. Correspondence from Eagle Flag Ireland Ltd. dated 22nd May, 2006 had been received by the Balbriggan branch signed by Mr. Murray directing that the current mandate be stopped. It was alleged in that letter that Mr. Michael Flynn had resigned as secretary of the company and withdrawn his services. The Bank had also received from Mr. Brendan Flynn handwritten minutes of a board meeting and EGM of Eagle Flag Ireland Ltd. recording that a new bank mandate had been adopted with Brendan Flynn as sole signatory on 22nd June, 2006. Correspondence had also been received from William Fry solicitors dated 3rd July acting on behalf of Mr. Murray stating that their client had received no notice of the board meeting and indicating that they might commence proceedings including a claim for injunctive relief and costs against the Bank.

35. Mr. Lavelle states that he discussed the matter with an official and that they were both of the view that in the circumstances the Bank could not allow transactions to occur on the account while conflicting instructions had issued from two different factions in the company which had effectively rendered the mandate inoperable. Mr. Lavelle recommended what he believed to be a practical and legal solution. He prepared draft responses to be furnished to Mr. Flynn and to William Fry solicitors acting for Mr. Murray. The Bank required a fresh mandate to be completed with the agreement of both sides stating that unless the mandate was completed together with an appropriate board resolution, the account could not be operated. The letter to Mr. Flynn was engrossed and signed and sent by Mr. Brian Murphy, the senior business manager dealing with the file. The letter to William Fry solicitors was engrossed and signed by Mr. Lavelle.

36. Mr. Lavelle wrote to William Fry solicitors on 6th July, 2006 indicating that he was satisfied concerning the validity of the new mandate for Governetz Commercial Ltd. pursuant to which a valid instruction was received for the transfer of the sum of €75,000.00 from the deposit account to the company's current account and confirming that the overdraft facility formally provided to the company had been withdrawn.

37. Mr. Diarmuid Desmond, a senior bank official, in evidence summarised the Bank's position in relation to the new mandate for Eagle Flag Ireland Ltd. dated 22nd June, 2006. William Fry solicitors on behalf of Paul Murray wrote to the Bank stating that Mr. Murray had not been notified of the board meeting which resulted in the change to the mandate. The Bank's legal services department advised that the Bank could not act on the new mandate until details regarding the notification of the meetings to directors was clarified. This position was set out in a letter to the plaintiff dated 4th July, 2006. The Bank therefore sought a new mandate to be sanctioned at a board meeting and sought copies of the notification of the meeting sent to each director. The existing mandate dated the 29th April, 2005 was deemed to be inoperative in view of the dispute between Mr. Flynn and Mr. Murray.

38. As already noted the amended defence and counter claim alleges that the Bank unlawfully froze the accounts of Governetz Commercial Ltd. and suspended the account of Eagle Flag Ireland Ltd. as a result of which they were unable to trade or engage in normal daily financial transactions. Consequently, Mr. Flynn alleges that he ceased to receive an income from either company and was therefore unable to service the original agreement. He was obliged to spend significant personal funds in trying to sustain both companies. He claimed that in those circumstances he was vulnerable to duress and coercion from Mr. Murphy to enter the loan agreement in January 2007. He claims that the Bank was responsible for the demise of the two companies because of their failure to act on the mandate instructions issuing from the respective companies on the 6th June and 22nd June, 2006.

39. In the second set of proceedings (Record No. [2004] 323 SP), the general theme of the defence and counter claim was maintained and expanded upon. There are a number of notable additional serious allegations set out by Mr. Flynn in the statement of

claim. Mr. Flynn alleges fraud against the Bank, Mr. Brian Murphy, assistant manager of the Bank and Mr. Liam Lavelle the bank solicitor. He claims in respect of the term loan account that:-

"The Bank of Ireland created a new facility for Brendan Flynn personally, by making a false application in the name of Brendan Flynn without his knowledge (in direct opposition to Central Bank Regulations and Code) and forced him to accept same under duress in order to conceal the frauds the Bank had perpetrated at the behest of Paul Murray and William Fry (Solicitors to Mr. Murray)."

I am not satisfied that a false application for the facility was made by officials of the Bank in Mr. Flynn's name without his knowledge. There was a detailed engagement with Mr. Flynn by Mr. Murphy in respect of this facility. I do not accept that Mr. Flynn was unaware of any aspect of the steps taken by Mr. Murphy to process and secure this loan facility on his behalf and with his authority and consent. He was not dealing with the bank as a "consumer" under section 2(1) of the Consumer Credit Act 1995 (as amended). The purpose of the 2007 loan was to facilitate the advancement and conduct of his commercial business. Furthermore, I am not satisfied that there is any evidence that any misrepresentation or negligent misstatement was made to Mr. Flynn in respect of this agreement.

40. In the statement of claim, Mr. Flynn makes serious allegations against the Bank, Mr. Murphy, Mr. Desmond and Mr. Lavelle that they were involved in a fraudulent conspiracy against him because they refused to act on the fresh mandate of 22nd June in respect of Eagle Flag Ireland Ltd. He contends that the Bank should have carried out an inquiry into the provenance of the mandate similar to that conducted in respect of the fresh mandate furnished concerning Governetz Commercial Ltd. before it had been deemed valid. He points to an internal memorandum dated the 4th July, 2006 from Ms. Mary Finan assistant to Mr. Murphy, to Mr. Lavelle attaching a letter from Mr. Flynn. Mr. Flynn's letter alleges that Mr. Murray forged a B1 Form lodged in the company's office purporting to show his increased shareholding in Eagle Flag Ireland Ltd. The letter insists that Mr. Paul Murray was properly voted off the board of the company on 22nd June and was no longer a director. It pointed out that Mr. Murray was refusing to attend board meetings and that the requirements of the Bank concerning the terms upon which it would accept a new mandate could not be completed. It requested that the Bank reconsider its position in order to minimise the damage to Eagle Flag Ireland Ltd. He complains that the Bank failed to accept his submissions on these issues based on the documents furnished.

41. By this time Mr. Murray, for his part, had complained to the Garda Bureau of Fraud Investigation (GBFI) on the 30th June, 2006 that Mr. Flynn was guilty of an attempted fraud against him and the company. He described the board meeting of 22nd June as illegal and invalid claiming that he had not been advised in advance of the meeting which passed an allegedly illegal resolution resulting in a revised bank mandate which had been lodged with the Bank in order to extract funds from the company for Mr. Flynn's benefit. The complaint suggested that Mr. Murphy had advised Mr. Murray on 29th June of the revised mandate received by the Bank. In his statement of claim Mr. Flynn suggested that it was evident from Mr. Murray's complaint that Mr. Murphy, Mr. Desmond, Mr. Lavelle and the Bank actively participated in a false criminal complaint which damaged Mr. Flynn's reputation and his ability to obtain credit. I am satisfied that the letter of 29th June is not evidence of their participation in the criminal complaint and could not be so construed. There is no evidence to support this allegation.

42. Mr. Flynn contends that Mr. Brian Murphy as of the 4th July, 2006 had notice of the allegations made by Mr. Murray to the GBFI since the Bank was in possession of a copy of the complaint dated 30th June. Mr. Murphy has no recollection of this letter: he states that he was investigating the issue of the notice issued to the directors and the alleged illegality or invalidity of the meeting of the 22nd June as set out in the correspondence with William Fry solicitors on behalf of Mr. Murray.

43. By letter dated 14th July, 2006 concerning Governetz Commercial Ltd. and Eagle Flag Ireland Ltd., Mr. Flynn informed Mr. Murphy that he had made a complaint concerning matters in issue between him, Mr. King, Mr. Warren, Mr. Murray, Mr. Michael Flynn and William Fry solicitors to the Office of the Director of Corporate Enforcement. He stated that he had refused offers to compromise the issues between the parties because he did not want to "compromise the investigation".

44. In September/October 2006 it became necessary to make a number of payments from the Eagle Flag Ireland Ltd. account to various parties to enable its business to continue. The Bank agreed to permit these payments on a once-off basis pending the resolution of the disputes between the parties. On the 16th October, 2006 the Bank set out the terms upon which it would make these payments. It required Mr. Flynn and Mr. Murray to sign five cheques drawn on the company account for the purpose of purchasing five drafts which would issue in respect of each of the proposed payments. On the 17th October, Mr. Flynn wrote to Mr. Murphy concerning these payments. He enclosed cheques for payments to SA Eagle Flag Ltd. and a named notary. Two sums were to be paid to SA Eagle Flag Ltd. He requested that both payments be made by electronic transfer to the account of SA Eagle Flag Ltd. in France. The Bank declined to do so. Mr. Murphy claims that the Bank declined to transfer this money by electronic transfer because of the difficulties which existed between Mr. Flynn and Mr. Murray. The Bank transfers were backed by the cheques which had been lodged but which could be countermanded before presentation for payment. Mr. Flynn requested the electronic transfers because he said time was of the essence to the making of the payments. The French bank would not accept Bank of Ireland bank drafts. Mr. Murphy said that he acted on legal advice in declining to transfer the funds by electronic means. Mr. Lavelle in his evidence states that he did not give any such legal advice concerning electronic transfers and if it was given it must have been given by another solicitor within the Bank.

45. It is also alleged in the statement of claim, that the Bank failed to "correct their frauds or damage to Brendan Flynn" when they were notified of and accepted that Michael Flynn (the defendant's brother) was guilty of fraudulent behaviour and received two notifications from their staff that the alleged fraud had taken place. It is alleged that bank officials removed "proof of their involvement with fraud from the general file". A complaint is also made that the Bank acted on a false complaint made by Mr. Murray and Mr. Michael Flynn and their solicitors against the defendant.

46. Mr. Flynn alleged extensive misbehaviour against Mr. Murphy and Mr. Lavelle. In the course of the hearing, all allegations against Mr. Lavelle were withdrawn. They were simply untrue. They included an allegation that Mr. Lavelle had given wrong advice to Mr. Murphy in his capacity as bank solicitor "as a favour" to William Fry solicitors acting on behalf of Mr. Murray which resulted in the freezing or closing of the company accounts of Governetz Commercial Ltd. and Eagle Flag Ireland Ltd. knowing their actions to be illegal and thereby facilitating a series of frauds which destroyed the companies. It was alleged that Mr. Lavelle, as a solicitor, ignored the facts underlying the creation of false mandates for these companies and then covered up illegalities perpetrated against the defendant. These accusations were unwarranted and unsustainable: they were an unjustifiable attack on Mr. Lavelle's personal and professional reputation and integrity. Mr. Flynn eventually withdrew the allegations and accepted Mr. Lavelle's evidence explaining the limited nature and extent of the advice which he had given on these issues.

47. Once the allegations of professional misconduct and wrongdoing against Mr. Lavelle were withdrawn, Mr. Flynn concentrated on the alleged wrongdoing of Mr. Murphy concerning the term loan account and the events between June 2006 and January 2008 concerning the operation of the bank accounts of Governetz Commercial Ltd. and Eagle Flag Ireland Ltd.

48. Mr. Flynn relied on a somewhat altered factual narrative set out in the statement of claim to underpin the allegations against Mr. Murphy. He now claimed that as a senior bank official handling Mr. Flynn's accounts and the accounts of both companies, Mr. Murphy was fully aware of the shareholding structures of the companies. Although Mr. Flynn acknowledges that when Mr. Michael Flynn notified his resignation as a director of both companies to the Bank and when Mr. Paul Murray sought to remove €140,000.00 from the Eagle Flag Ireland account, the Bank correctly refused to act on their instructions, he, nevertheless, continued to pursue a series of allegations of wrongdoing against Mr. Murphy. In particular, he focused upon what he maintains is the inconsistent approach adopted by the Bank to the operation of the Governetz Commercial Ltd. accounts and those of Eagle Flag Ireland Ltd.

49. Mr. Flynn rightly points out that the Bank was satisfied that a fresh mandate had been duly authorised by a newly constituted Board of Directors, in the case of Governetz Commercial Ltd., on 6th June, 2006. The Bank rejected an attempt by Mr. Paul Murray to undermine the legality of that mandate and its ratification by a board meeting. However Mr. Flynn complains that three days later Mr. Murphy accepted an instruction from Mr. Dermot Desmond, his superior, and Mr. Lavelle, to close the Governetz Commercial Ltd. accounts on what he alleges, were entirely false and illegal grounds, and a further direction to freeze the account of Eagle Flag Ireland Ltd., thereby collapsing Governetz Commercial Ltd. and ensuring the total loss of the defendant's equity in Eagle Flag Ireland Ltd.

50. In particular, Mr. Flynn complains that having accepted the fresh mandate of Governetz Commercial Ltd. and the evidence that Mr. Michael Flynn and Mr. Murray had told "untruths" in respect of their positions as shareholders and directors in Governetz Commercial Ltd., the Bank nevertheless refused to accept a change of mandate authorised by the Board of Directors in Eagle Flag Ireland Ltd. dated 22nd June, 2006, though the company directors were duly notified of the board meeting (which sanctioned the change of mandate) by the company auditors. In so doing, the Bank is said to have acted inconsistently and arbitrarily and without holding a proper investigation into the authenticity of the fresh mandate. It acted contrary to what was known about the misbehaviour of Mr. Michael Flynn and Mr. Murray in their dealings with Mr. Brendan Flynn and the companies. It is also alleged that Mr. Murphy "knew at all times as per his agreement with Paul Murray to take these illegal actions (confirmed by letters on bank file) that he and the Bank were acting illegally". Mr. Flynn relies on the correspondence between Mr. Brendan Flynn and the Bank on the one side and that of Paul Murray and William Fry Solicitors and the Bank on the other side in support of his case.

51. Mr. Flynn also continued to allege that Mr. Murphy endorsed the allegation of criminal conduct against Mr. Flynn made by Mr. Murray to the GBFI on the 30th June, 2006 which, he claims, relies upon Mr. Murphy as the source or authority for an allegation that a fraudulent mandate had been lodged by Mr. Brendan Flynn. I am satisfied that this allegation is entirely baseless and misconceived. Mr. Murray, in the course of a complaint against Mr. Flynn to GBFI set out a history of events which included his interpretation of Mr. Flynn's dealings with the Bank, and Mr. Murphy but which was, at no stage, authorised, adopted or contributed to by Mr. Murphy. Mr. Murray made his own complaint in his own words and for his own purposes. I am satisfied that the source of any allegation made was not Mr. Murphy and that he did not contribute in any way to its formulation nor did he authorise, verify or authenticate it. It is clear from the evidence, that the Bank took, what I regard, as a neutral stance in relation to a bitter dispute which had erupted between the directors and shareholders of the two companies and in particular, between Mr. Brendan Flynn and Mr. Michael Flynn and Mr. Paul Murray. It is noteworthy that the complaint to GBFI was made at the height of the controversies surrounding the fresh bank mandates.

52. On the 3rd July, 2006 Mr. Murphy wrote to Mr. Flynn as secretary of Governetz Commercial Ltd. advising that the overdraft facility of the company was withdrawn because of the serious dispute between the directors resulting in what the Bank regarded as a material adverse change and because one of the guarantors, Mr. Murray wished to limit his exposure under the letter of guarantee. A further overdraft facility was to be negotiated and an alternative acceptable security was to be provided.

53. On the 4th July Mr. Murphy again wrote to Mr. Flynn as company secretary of Eagle Flag Ireland Ltd. setting out the correspondence which it had received from William Fry solicitors for Mr. Murray asserting that he remained a director of Eagle Flag and stating that he was given no notice of a board meeting at which the fresh mandate had been adopted. The Bank was therefore on notice that the validity of the mandate was in issue and could not act upon it. Until the matter was clarified it would be unable to operate the account. This would remain the position unless a fresh mandate was returned to the Bank with a copy of a duly passed board resolution together with copies of notice to each director. It is clear from the evidence that this bitter dispute continued between Mr. Flynn and Mr. Murray and led to High Court proceedings under s. 205 of the Companies Act 1963 as amended which were eventually compromised under terms of settlement dated the 24th April, 2007. They were settled on the basis that Mr. Murray would receive a total of €1 million in staged payments in consideration of the sale and transfer of his entire stock holding and interest in Eagle Flag Ireland Ltd. to Mr. Flynn for €1.00 and on condition that he resign as a director of the company within ten days of payment. The sum of €40,000.00 in the company's Bank of Ireland account was to be returned to the company and Mr. Murray would sign all necessary documents to that end. It is clear that notwithstanding the continuation of this dispute, the Bank endeavoured to facilitate, to the extent that it could, the continued operation of the company's accounts, with limited cooperation from Mr. Murray and Mr. Flynn, against a background of mutual distrust between them. I am satisfied that Mr. Murphy and the Bank were responding to a difficult situation created by that dispute between the directors.

54. Mr. Murphy's attitude towards Mr. Flynn is evidenced by an e-mail to Mr. Dermot Davis on the 25th July, 2008 following a discussion with Mr. Flynn the previous day. Mr. Flynn indicated that he hoped to receive management fees the following September with which he hoped to discharge his liability to the Bank. Mr. Murphy noted:-

"While this is not ideal I feel we will get cleared and may need to have patience with this deal."

55. I am not satisfied that any of the allegations set out at para. 5 of the statement of claim alleging that the Bank and Mr. Murphy "joined in and became an integral part of" frauds committed by Michael Flynn and Paul Murray or participated in any false criminal complaint to destroy Mr. Flynn's character or his ability to obtain credit and conduct business, have been established. Mr. Flynn has not proven any facts to establish the existence of any cause of action arising out of these allegations. Mr. Flynn's claim for damages for "criminal libel" against the defendants arising out of these events is also entirely misconceived.

56. Furthermore, I am not satisfied that the Bank, in refusing to transfer sums by electronic means on behalf of Eagle Flag Ireland Ltd. were in breach of duty or negligent in their dealings with Mr. Flynn or in breach of any contract with him. There was no breach of fiduciary duty by the bank to the company nor was any such duty owed to Mr. Flynn by the bank in respect of its operation of the company accounts. The bank's officials, as they were entitled to do, in the circumstances, acted with care and caution giving the nature of the dispute between Mr. Murray and Mr. Flynn. This was a dispute which arose out of commercial dealings between them involving the two companies which had accounts with the Bank. Neither company brought proceedings against the Bank or made any complaint in respect of any loss or damage allegedly sustained as a result of the Bank's behaviour or actions or in respect of any alleged loss of profits arising there from. The accounts were company accounts not the personal accounts of Mr. Flynn.

57. I am satisfied, that even had Mr. Flynn established liability on the part of the Bank in relation to its dealings with Eagle Flag Ireland Ltd., he has not established any loss in respect of which he would be entitled to damages. The value of Eagle Flag Ireland Ltd. was in the development of the golf course in France. In the settlement terms agreed on the 24th April, 2007 in respect of the s. 205 proceedings third parties paid a sum of €1 million to Mr. Murray and assumed control over Eagle Flag's assets and business in France. Mr. Flynn claims that his "equity position was wiped out" as a result. However, I am not satisfied that Mr. Flynn has established on the balance of probabilities that the company or he sustained a loss of €1 million or any damages as a result of the Bank's acts or omissions. I am therefore satisfied that the counterclaim and the claims made in the second set of proceedings should be dismissed.

Conclusion

58. The court is satisfied to grant judgment to the Plaintiff bank in its claim against Mr. Flynn in the sum of € 135,980.91 and dismisses Mr. Flynn's counterclaim in those proceedings and the entirety of his claim for damages in the second proceedings.