COURT OF APPEAL

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High Court Record No.: 2018/213 S

Haughton J.
Murray J.
Binchy J.

BETWEEN

PATRICK STAFFORD

PLAINTIFF/RESPONDENT

- V –

THOMAS MURRAY

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 24th day of February 2021

1. This is an appeal against the judgment and order of the High Court of 10 February 2020 whereby the Court acceded to the application of the plaintiff for judgment against the defendant in the sum of €180,000.

2. The case is unusual. It arises from a transaction entered into between the parties in 2005. There is no dispute that as part of that transaction the plaintiff advanced to defendant a total sum of €230,000 and there is no dispute that €50,000 of that sum was repaid by the defendant to the plaintiff in 2015. However, that is the extent of the consensus. The plaintiff says that the monies were provided by way of a loan. The defendant says that they were advanced by way

of an investment in a company promoted by him. The plaintiff says that this advance was to be repaid within five years and that while he extended that period at the defendant's request it is now due; the defendant says that the company in which the investment was made collapsed and that the money has been lost so that there is nothing due.

3. The overall context is most unfortunate. The respective wives of the plaintiff (a college lecturer) and the defendant (the owner of a business involved in plant hire and waste management and disposal) had been friends since their early childhood. The plaintiff and defendant thus became acquainted and, together with their wives, regularly socialised together. The plaintiff said in his grounding affidavit that the parties had been friends for forty years, and the defendant averred that they holidayed together, purchased a villa in Spain together and assisted each other on many occasions over the years on personal and financial matters.

4. The plaintiff's evidence is that in 2005 he and his wife were the owners of a residential property in Lucan. That property was mortgaged to EBS Building Society with a sum of approximately €100,000 outstanding on the loan. However, at that time the property had a value in the region of €400,000. PTSB agreed in January 2005 to refinance this loan enabling an equity release. The property was mortgaged favour of PTSB to a total amount of €400,000 thereby releasing a sum of €300,000. Of this, the plaintiff says that he advanced €230,000 to the defendant and that the defendant used this money to invest in his company, Kilford Properties Ltd. ('Kilford'). Kilford was, at the relevant time, involved in the business of constructing holiday villas and apartments in Turkey.

5. According to the plaintiff, the loan was to be repayable within five years and, in the meantime the defendant was as part of the arrangement to pay the interest accruing on the advance. This, the plaintiff said, was paid by the defendant's waste management company, M&T Plant Hire Limited ('M&T') until the institution of these proceedings in 2018. The plaintiff says that cheques from that company made out to him personally were lodged to his personal bank

account from which he proceeded to pay the interest. He says that this happened from 2005. However, he was able to obtain bank statements only from 2011, which he exhibited in his first affidavit.

6. In that first affidavit, the plaintiff did not explain what had happened to the remaining €70,000 after the advance to the defendant. In his second affidavit he disclosed that €63,000 of that sum was actually paid to Kilford to purchase an apartment in Turkey, that investment being documented (and the relevant documentation being exhibited). In his second affidavit, he stated that this loan was arranged at the defendant's request by a financial advisor, Mr. John Hartley, that the documentation was signed at the defendant's business premises in Waterford and that the defendant was present when that loan was so arranged.

7. The plaintiff then says that in 2008, the defendant acknowledged his advance. In his first affidavit, he quoted from a document which, it is not disputed, was signed by the defendant. This says as follows:

> '*I Thomas Murray enclose this signed confirmation that I borrowed the sum of €230,000 of Mr. Patrick Stafford's €400,000 loan. I subsequently pay on a monthly basis the loan payments on the €230,000 to PTSB* ***and I also pay on a monthly basis to Permanent TSB the loan repayments on Mr. Stafford's car'***

8. The statement I have highlighted was not quoted in Mr. Stafford's first affidavit, although it was recited in his third. Neither party has addressed this aspect of the arrangement in any way in their affidavits, both adopting the position that the making of loan repayments in respect of the motor vehicle had nothing to do with the arrangements the subject of the proceedings. The plaintiff does not say how and why the defendant came to acknowledge either the debt or the fact of payments being made in relation to the plaintiff's car in this way.

9. In 2013, the defendant took out a life insurance policy in the sum of €230,000 which he assigned to the plaintiff. According to the plaintiff, this was done '*to allay'* the plaintiff's concerns about repayment of the loan. In February 2015 a sum of €50,000 was paid by the defendant to the plaintiff which, the plaintiff said, was accompanied by an assurance that the defendant hoped to pay the balance within two years. The plaintiff then said that he was further assured by the defendant in May 2015 and in July 2016 that the loan would be repaid, and that in March 2017 the defendant said he would pay the plaintiff €100,000 from the proceeds of sale of a property in Wexford, also offering him a mobile home he owned in Wales which, he said, was worth €60,000. The plaintiff declined that offer. Then, in June 2017 the plaintiff and the defendant met in the company of the latter's financial advisor, a Mr. Rory Fahey. At this meeting the defendant asserted that the monies in question had been paid by way of an investment in a property deal in Turkey, offering to pay €180,000 over seven years but with no interest. The plaintiff said he would extend the period by six years if the interest was also continued during that period. According to the plaintiff this was the first occasion on which it was said by the defendant that the monies had been advanced by way of such investment.

10. Finally, the plaintiff refers to being contacted shortly before the hearing of this matter in the High Court by a Paul Collins. Mr. Collins (who describes himself in an affidavit sworn later in the proceedings as a '*lay representative'*) indicated that he was representing the plaintiff in some way in connection with the proceedings. The plaintiff avers that Mr. Collins '*acknowledged that the defendant was indebted'* to him and that the defendant wanted to '*sort out a deal'*. Mr. Collins, the plaintiff and the plaintiff's wife met in Carlow at which meeting, it is said by the plaintiff, Mr. Collins proposed that the defendant would repay the monies following certain property transactions in which he was involved. Mr. Collins denies any acknowledgement of the debt and claims the meeting he had with the plaintiff and his dealings with him were '*without prejudice'*, further averring the plaintiff agreed with the '*without prejudice'* statement and that he did not, at any stage, state the defendant was indebted to the plaintiff.

11. The defendant's account starts in early 2005. By then, he says, Kilford had taken many deposits for properties and its order book continued to grow, making it an attractive prospect for investors. That was the context, he says, in which the plaintiff approached him at a social function at around that time, noted that Kilford seemed to be doing very well and asked for details of what was being built by it. Their conversation concluded with the plaintiff indicating an interest in the project and their agreeing to meet again to discuss it. Such a meeting took place a few weeks later at the defendant's office in Wexford and the plaintiff was told the expected sales and returns of the business. This induced the plaintiff to say that he wanted '*a slice of the action'*. The defendant says that he advised the plaintiff that there was an opportunity to invest and that over a subsequent two week period it was agreed that the amount of that investment would be €230,000. The defendant is vague as to what the terms of that investment were (and in particular how the return on it would be determined), but he says that the plaintiff was told that over a five year period he could expect '*a healthy return'* on the investment, although there were no guarantees. He says little about the manner in which this sum was raised, recording that he is a '*stranger to the loan agreement entered into by the plaintiff with PTSB in 2005'*.

12. The defendant does not exhibit any documentation evidencing the investment he alleges was made by the plaintiff. The defendant suggests that he was seeking to obtain company documentation from his former fellow director, Mr. Nolan, but provides no explanation as to how Mr. Nolan had that documentation to the exclusion of the defendant or, indeed, why the defendant did not invoke his rights at law as a director of the company to obtain access to it. In his fourth affidavit he stated that the investment (as he describes it) made by the plaintiff '*was effected through my Director's Current Account with the company in or about the years 2005 to 2007'*.

13. The defendant says that Kilford fell victim to the global economic crash of 2007 and that '*all investments'* were lost. Then, he says, in early 2008 he received a telephone call from the plaintiff's wife. In a later affidavit, he suggests that that call occurred against the background of the plaintiff having defaulted on his loan to PTSB. He describes her during the call as being *'clearly angry'*. She said (according to the defendant) that she was unaware that her husband had borrowed money against their house, and that he (the defendant) needed to repay the loan the plaintiff had made to him. She told the defendant that the €230,000 which she described as having been loaned by the plaintiff to him had been invested by the defendant in Kilford. The defendant says that he told the plaintiff's wife that he had not borrowed money from the plaintiff. He says he told her that the plaintiff had borrowed the money and that he had invested it in Kilford. He says that following that conversation the plaintiff's wife made contact with his wife in relation to the matter and that this, essentially, resulted in pressure on him to resolve the matter. The plaintiff in his affidavit evidence says that all interest payments due on foot of the PTSB loan were discharged up until January 2018.

14. That was the context in which, the defendant says, he met with the plaintiff in 2008. According to the defendant in the course of that meeting the plaintiff told him that '*his mistake in making the investment'* was destroying his marriage, and that he needed to find a way of resolving the issue. The defendant avers that the loan obtained by the plaintiff on the house he owned with his wife was obtained without her knowledge or consent and indeed in the course of one of his affidavits accuses the plaintiff of forging his wife's signature on the loan documentation. In an attempt to assist the plaintiff, the defendant says that while he could not accept responsibility for his investment, he would '*try to help him sort the problem out'*. This, the defendant said he was doing for the sake of their friendship and that of their wives. He said that this was not the first time he had helped out the plaintiff '*in financial strife'*. In a later affidavit, the defendant addresses the document he signed in 2008 acknowledging the loan saying that the reason he signed this was '*to convince'* the plaintiff's wife that the plaintiff had lent him money, and for that purpose alone.

15. He explains the signing by him of the acknowledgement of the debt, as follows:

> '*the Plaintiff virtually begged me to allow him to tell his wife that he had loaned this Deponent the money he borrowed against their family home. I agreed to this strategy on the part of the plaintiff in the belief that the plaintiff would eventually sort out his problems and get the loan to Permanent TSB back on track. To further convince his wife, the plaintiff asked that I sign a short note produced by him saying that I had borrowed the money and would make repayments. I explicitly told the plaintiff before and after signing the note that the piece of paper I signed for him was* ***for one purpose only****, to show his wife. That is how the plaintiff came to be in possession of the note bearing this deponent's signature …'*

16. He says that he thus agreed to pay the plaintiff the amount he had invested '*as a gesture of goodwill and friendship'*. However, he stresses, this did not create any legal relations. He says he paid a sum monthly from 2008 and that he was then able to pay a sum of €50,000 in 2015. He says that he did not agree to pay the plaintiff the interest from PTSB in 2005. He never specifically explains why he took out a life insurance policy and assigned it to the defendant.

17. At a late stage in the exchange of affidavits in connection with the plaintiff's application for summary judgment, he served an affidavit from a Mr. Patrick Nolan. Mr. Nolan describes himself as a director and secretary of Kilford, averring that he was a director from 2004 until Kilford was dissolved in 2013. He says that he was unaware of any investment from the plaintiff in that company and avers that he has consulted what he describes as '*the Company Accounts and Books'* (which he avers to holding) but that these contain no record of such an investment. To this, the defendant responded claiming that he had been seeking documents from Mr. Nolan since 2013, exhibiting correspondence from his solicitors to Mr. Nolan (post-

dating the latter's affidavit) seeking access to these records, noting that no response was received to that correspondence, and outlining disagreements between himself and Mr. Nolan in relation to the affairs of Kilford.

18. In acceding to the application for judgment, the High Court Judge said that the payments going from the defendant to the plaintiff and life assurance policy were '*wholly implausible if this had been an investment in the defendant's company'*. She said that the proposition that the acknowledgement was signed by the defendant to placate the defendant's wife was '*a ludicrous proposition that a man of business would write … that he was indebted to the plaintiff to that sum simply to keep someone happy and would never at any point put it in writing that it wasn't in fact a loan but was an investment'.* She said that the defendant's description of what happened was '*wholly untenable'*. She felt it was '*utterly implausible that the defendant would have no documentary evidence whatsoever in relation to the investment he claimed that was made by the plaintiff in the company'*. The judge also adopted the position that the stance of the defendant in offering monies to the plaintiff while at the same time adopting the position that this was an investment which he had no liability to repay, further demonstrated how untenable his position was.

19. The legal principles are well known. The jurisdiction to grant summary judgment should be exercised with great care. It should not be granted where there is a serious conflict as to a matter of fact or any real difficulty as to issues of law. The relevant test was explained by Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 IR 607 in terms of whether it is '*very clear'* that the defendant has no case (at p. 623). The litmus test – whether there was a fair and reasonable probability of the defendant's having a real or *bona fide* defence - he explained in that case, is not the same thing as a defence which will probably succeed or even a defence whose success is not improbable.

20. In that connection, central to many applications for summary judgment is the question of whether the defendant has demonstrated that the defence they seek to have remitted to plenary hearing is '*credible'*. McGuinness J. in *Aer Rianta v. Ryanair* expressed this on the basis that the defence must be '*so far fetched or self-contradictory as not to be credible'* (at p. 615). However, it is not for the Court to decide if either parties' evidence is probable, '*or likely to be true*'. A defence is not incredible simply because the judge is not inclined to believe the defendant (per Clarke J. in *IBRC Ltd v McCaughey* [2014] IR 749 at p. 759).

21. Usually, this issue is determined within familiar boundaries. The plaintiff – often a financial institution or its assignee – will produce and rely upon documentation signed or otherwise acknowledged by the defendant which, the plaintiff contends, evidences a loan or guarantee. This, when combined with admissible evidence of the amount outstanding on foot of these agreements, will operate to effectively shift the evidential onus to the defendant to identify the legal and factual basis on which there is no such liability. From there a well-trodden analysis is conducted by the Court of whether the claim that (as the case may be) the documentation was not signed, does not present a liability recoverable in law, was unenforceable because of collateral representations or otherwise, discloses a defence of such substance that it can, in justice, only be determined following a full plenary hearing. In undertaking that exercise, the court conducts what is, effectively a '*sense check'* as to whether the defence enjoys any reality. That, however, is often an inquiry that is pointed in only one direction. The proposition that money advanced on foot of a documented lending facility or signed guarantee is recoverable in law will, by definition, be inherently credible in all but the most extraordinary circumstances.

22. In this case, by contrast, the Court is faced with positions by the parties each of which, in one way or another are highly unusual. As helpfully iterated by counsel for the plaintiff in his cogent submission, it cannot be disputed based on the evidence before this court that the defendant received payment of €230,000 from the plaintiff, that the money advanced made its way to the company, that from 2008 to 2018 he paid interest on this advance, that in 2008 the

defendant signed a document acknowledging the liability, that in 2013 the defendant took out a life assurance policy in favour of the plaintiff, and that in February 2015 he paid a sum of €50,000 to the plaintiff.

23. Added to that is the fact that the defendant has no documentary evidence of the investment transaction, that he has failed to specify the terms thereof or to provide any clear statement of the basis on which the return would be calculated or determined, and that at no point did he pursue the steps one might expect him to take as a director of a company to obtain from the company evidence of the investment alleged by him. All of this, the plaintiff says, points to this being a loan transaction as alleged by the plaintiff and, it is suggested, none of it is consistent with the claim advanced by the defendant that this was an investment by the plaintiff.

24. However, the cases are clear that it is not just a question of assessing the defendant's evidence. As explained in a passage in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 21 as approved in the judgment of Murphy J. in *First National Commercial Bank v. Anglin* [1996] 1 IR 75:

> '*the court ha[s] to look at the whole situation to see whether the defendant ha[s] satisfied the court that there was a fair and reasonable probability of the defendant's having a real or bona fide defence.'*

25. The problem from the plaintiff's perspective is that his account also presents aspects that are, objectively viewed, most surprising. He says that he lent a very significant sum to the defendant not only without any security, but without any documentation whatsoever, and that he did so for a return equating only to the cost to him of obtaining a loan in the amount of his advance. While the defendant did sign a document three years after the advance confirming that the monies were advanced by way of loan, I do not think this can be equated to contemporaneous loan documentation, not least of all in circumstances in which the plaintiff tenders no explanation as to why, on his case, the acknowledgement came to be signed at that time.

Moreover, the defendant alleges that the loan from PTSB was obtained in a manner which involved the fraudulent forging of the plaintiff's wife's signature on documentation charging a property owned jointly by them. The plaintiff has not engaged with this claim, adopting the position before the Court that these questions are not relevant to the issues before this Court. While in one sense this may be true, the Court must operate on the basis of the evidence before it and if that claim were to be substantiated at trial it would only underscore the extraordinary nature of what – on the plaintiff's account – transpired, involving as it would have done the taking of a remarkable risk for no return whatsoever. The only immediately obvious explanation for this – that all of this was being done to help a friend – is resonant of nothing more than the explanation tendered by the defendant for his signature of the document acknowledging the debt in 2008.

26. I should state in this regard that my comments as to the absence of evidence or explanation from the plaintiff of certain matters are not a criticism. Counsel for a plaintiff in a case such as this will often adopt the position that they will seek to avoid the clarity of the case they wish to advance being obscured by tangential factual disputes. There are good reasons for adopting that strategy. What is critically relevant here is not in and of itself the absence of explanation from the plaintiff of the matters to which I have referred: it is the fact that there are so many matters that call for explanation in the first place.

27. While this is not necessarily a case in which each side has the same amount of explaining to do, each presents questions which I do not think can or should be resolved on an application for summary judgment. The Court, when faced with these conflicts cannot on an application of this kind resolve them – tempting though it may be to do so – by asking itself which case is the least extraordinary. It has to look at '*the whole situation'* and in so doing must ask itself not simply whether the defendant's *defence* having regard to the evidence he adduces is credible but whether the defendant's defence *when viewed in the light of the plaintiff's claim* and the evidence *he adduces* is credible. This case thus falls within the principle that, where the court

would be in a better position to determine the issue of law after a closer and fuller look at the facts, then the defendant should be given liberty to defend (per Barron J. *Bank of Ireland v. Educational Building Society* [1999] 1 IR 220 at p. 233).

28. For these reasons, I am of the view that this case must be remitted to plenary hearing for a full determination. I do so with some considerable regret having regard to the likely expense this will involve for the parties and taking account of the unfortunate context – to which I have referred. I would re-iterate the concern expressed by the Court at the first hearing date that the parties should carefully reflect on this case and its implications for all concerned and would urge again that they revisit the question of mediation.

29. I should finally say that insofar as this conclusion departs from that of the trial Judge – and noting the emphasis placed by the plaintiff on the necessity to afford deference to her findings – I believe that the Judge, with respect, ought to have focussed on the issues surrounding the cases of both parties, not just the infirmities attending that of the defendant.

30. It is my view that the costs of the application for judgment in the High Court and in this Court should be reserved. I adopt this view because the outcome of the plenary action can only be that one of the parties has proffered on oath a deliberately false account of events in this application and because, in those circumstances, ordering of costs on this application would be premature. Each should reflect on that, and upon the potential consequences for whoever it is who may ultimately be found to have lied to the Court on oath.

31. Haughton J. and Binchy J. are in agreement with this judgment and the order I propose.