**THE HIGH COURT**

**[2014 No. 1492 S]**

**BETWEEN**

**BANK OF IRELAND MORTAGE BANK**

**PLAINTIFF**

**AND**

**AIDAN WHITE AND MARY WHITE**

**DEFENDANTS**

**JUDGMENT of Mr. Justice MacGrath delivered on the 22nd day of February, 2019.**

1. This is an application for summary judgment. The amount claimed in the summary summons is €249,615.80 together with interest. This has since been reduced due to the sale of the property, the subject of the mortgage loan offer and the application of the net proceeds of the sale in reduction of the alleged debt. Mr. and Mrs. White are separately represented in these proceedings.

2. Ms. Fiona Cassidy, a manager in the arrears support unit of the plaintiff bank, in an affidavit sworn on 12th September, 2014, grounding the application for summary judgment avers that the defendants applied to the plaintiff for a mortgage loan in respect of property at 75 Riversdale, Oranmore, Galway City. By letter dated 6th October, 2004, the plaintiff offered to loan to the defendants the sum of €220,000 to be repaid over 25 years by means of an "*interest combo mortgage loan*" at an initial fixed interest rate of 2.750% for the first twelve instalments of €503.02. Following this the mortgage loan was to continue at a variable interest rate for the remainder of the 25-year term. At para. 3 of her affidavit Ms. Cassidy avers that the defendants, and each of them, indicated their agreement to the terms of the loan by signing it on 11th October, 2004. Funds were thereafter drawn down into a mortgage account which was in the name of both defendants. The property at 75 Riverdale, Oranmore, Galway City was provided as security for the loan.

3. Ms. Cassidy avers that by signing the said mortgage loan offer letter, the defendants agreed to the conditions contained therein including clause 4(b) which stipulated, *inter alia*, that the plaintiff was entitled to demand early repayment of the principal sum and accrued interest in the event of default. It is contended that the defendants were in breach of clause 4(b) by failing to make repayments on the due dates. The plaintiff demanded repayment by letter dated 10th February, 2011. This act of default, it is pleaded, entitles the plaintiff to exercise the powers conferred upon it to seek early repayment of the principal and accrued interest.

4. On 23rd October, 2013, Mazars were appointed receivers over the property and on 30th October, 2014, the property was sold by the receiver. The gross sale price achieved was €100,000.

5. In response to the application for summary judgment, the first named defendant advances one ground of defence. He contends that the property was sold at gross undervalue and that in the context of such sale, the receiver was acting as agent of the plaintiff, rather than as his agent.

6. Mrs. White advances two grounds of defence. She contends that she did not sign, nor was she party to, the mortgage loan agreement. She does not deny that monies were subsequently transferred into an account in the names of both herself and the first named defendant, but she avers that she did not sign the agreement and she is not bound by the terms of the mortgage loan document. Mrs. White also contends that the property was sold at an undervalue and argues that the receiver effectively took his instructions from the plaintiff and therefore was a *de facto* and *de jure* agent of the plaintiff. It is therefore contended that the plaintiff is ultimately responsible for the actions of the receiver and that any sale at undervalue must be set off against the loan amount allegedly due.

7. In an affidavit sworn on 4th February, 2015, regarding the loan offer of 6th October 2004 allegedly signed by her some days later, Mrs. White avers:-

> *"…I say that the signature that appears on the final page of the exhibit is not my signature and I do not know who signed the letter of offer on my behalf, and I did not give my authority or consent to any other person doing so."*

8. At para. 9 of her affidavit she avers that without prejudice to her assertion that she has no liability to the plaintiff for the repayment of the monies sought in the proceedings, she wishes and intends to examine the conduct of the plaintiff bank and the receiver. She complains that the receiver did not rent out the property as he should have, in order to reduce any liability to the bank. She also complains that the property was sold at undervalue and that from inquiries made by and on her behalf, the market value of the property in October, 2014 was in the region of €140,000, a figure reviewed in a later affidavit. She queries the circumstances surrounding the sale and describes them as being very unusual. Mrs. White resides in the vicinity of the property but never saw a "*For Sale*" sign on the house and there appeared to be no attempt by the receiver to market the house. At para. 10 of her affidavit she avers to her belief that the receiver owes a duty to obtain the best possible price that the circumstances permit and that this was not done. She states that she will adduce expert evidence to this effect. At para. 11 of her affidavit, she avers:-

> *"I am further advised that the Bank may be responsible for the conduct of the receivership and I ought to be permitted to obtain discovery of all communications between the receiver and the Bank."*

Finally, she avers that if it is concluded that she is indebted to the bank, credit should be given for the sale proceeds of the property which "*should have realised if reasonable care had been used".*

9. Mrs. White, in her first affidavit, is critical that when the matter first came before the Court no affidavit had been sworn by the plaintiff bank updating the Court on the fact that the property had been sold.

10. Mr. White, in an affidavit sworn on 17th December, 2014, does not dispute that the monies were received by him. Further, he does not in that affidavit, positively aver that the receiver was acting as agent of the bank. He alleges that the property was sold at an undervalue, that other properties identical in nature to that of the sale property were sold for considerably in excess of the price achieved on sale. However, while it is not expressly contended that the receiver was the agent of the plaintiff, Mr. White refers to the "*plaintiff or its receiver*". It is not expressly averred that the receiver took his instructions and acted under the guidance, and at

the behest, of the plaintiff such that he might be deemed to be an agent of the bank. Nevertheless, it is to be observed that it was only shortly prior to the swearing of the affidavit by Mr. White, that he and his solicitors became aware of the sale of the property.

11. By letter dated 15th December, 2014, Mr. White's solicitors, in correspondence with the solicitors for the plaintiff bank, sought details of the sale of the property and stated:-

> *"Please do not respond to this request by saying we should contact the Receiver directly. The Receiver was appointed by the Bank over the property and accordingly it is appropriate for this request to be directed to yourselves."*

12. On behalf of the bank, Ms. Andrea de Courcey, legal case manager in its arrears support unit, in an affidavit sworn on 29th June, 2015, avers that the alleged failure on the part of the receiver to obtain the best available price for the property does not have any bearing on the plaintiff's entitlement to judgment. The receiver is a separate and distinct legal person from the plaintiff and as a matter of law is the agent of the defendants. Any alleged default on his part, which she denies, does not give rise to a defence of set off or counterclaim as against the bank. She also contends that the price obtained was in fact in excess of the fair market value available at that time.

13. The receiver was appointed to the property on 23rd October, 2013. The property was listed for sale on the open market with a guide price of €90,000. Ms. de Courcey avers that the receiver, on the basis of professional advice he had received, was "*fully satisfied that this was in excess of 'fair value' for the Property, which was set at €82,500*". She exhibits correspondence from the receiver as illustrating that the sale followed a marketing campaign lasting several months and the best price that could be achieved for the property was €100,000. It was sold on 30th October, 2014. The net sale proceeds of €94,000 were applied to the loan account and the defendants have been credited for the sale price received. Having given credit, the amount due by the defendants as of 25th June, 2015 was €164,744.16.

14. Ms. de Courcey makes the point that the first time that Mrs. White raised an issue concerning her signature to the loan agreement was in the affidavit sworn by her in response to this application for summary judgment, some ten years after the loan was taken out. She states that during that time, the defendants had been sent statements of account and standard letters in respect of the loan facilities. She also avers that Mrs. White met with and spoke to numerous representatives of the plaintiff, and never protested about the signature on the loan offer. She highlights that Mrs. White does not deny that the monies advanced by the plaintiff were received by her, nor does she deny that the monies were used to acquire the property in question. She contends that Mrs. White has had full use and benefit of the loan facility to which the terms of the loan offer letter of 6th October, 2004 had been applied for more than a decade.

15. While there is no affidavit from the receiver, it is clear that the plaintiff has been in communication with him in respect of the sale of the property and the manner in which it progressed. It is evident from correspondence that the property was sold by DNG Maxwell Heaslip & Leonard (a firm of auctioneers and valuers in Galway) at the request of Mazars, the receiver. The second defendant points out that this correspondence was generated following the institution of these proceedings.

16. Mr. White in a second affidavit sworn on 6th October, 2015 raises certain objections, including matters relating to the Bankers' Book Evidence Act 1879 because the mortgage lender is not a bank. This is not an argument that was particularly advanced at hearing and was addressed in a later affidavit sworn on behalf of the bank on 15th June, 2017, by Ms. Jacinta Enright, legal case manager in the arrears support unit of the bank, which confirms that the plaintiff holds a banking licence from the Central Bank of Ireland, which it has held since 1st July, 2014, and she exhibits that licence.

17. In his second affidavit, Mr. White avers that the instructions given to the receiver were a cause or contributing factor to the failure of the receiver to achieve the open market price for the property. He suspects that the receiver was not instructed to take all appropriate steps to sell the property; nor did the receiver liaise with him to maximise the sale price. Mr. White states that such matters can only be ruled upon if the official within the plaintiff bank and the receiver set out on affidavit the nature of his appointment and the instructions given to him. Mr. White argues that he has a right of set off given the close connection between the plaintiff and the receiver. He maintains that it is evident from the property price register that other properties in the area sold for approximately €250,000 and he believes that no. 75 should have been sold for this price.

18. Mrs. White in a further affidavit on 3rd November, 2015 reiterates that she did not sign the letter of facility, did not give authority or consent to any person to sign on her behalf, and that her husband, from whom she is separated, handled the finances. He worked for approximately twenty years in the lease/finance department of another lending institution. She denies that she was aware of correspondence in respect of the account which the plaintiff states were sent to her. Having obtained her own valuation from a firm of auctioneers in the Galway area, she alleges that the market value of the property was between €110,000 and €118,000. She takes issue with the receiver having accepted an offer which was up to €18,000 below market value and then charging 6% of the sale price, being €6,000 in fees, without any explanation or justification for the sum so charged. She also avers that the receiver's failure to rent out the property led to a loss of rental income of approximately €1,000 per month over a twelve-month period. Finally, she avers that nowhere has the bank contended that it did not direct the receiver in relation to the sale, despite the fact that it was clear that Ms. de Courcey had contact with the receiver on behalf of the plaintiff.

19. A notice of intention to proceed was served on 9th January, 2017. In an affidavit sworn on 15th June, 2017, Ms. Jacinta Enright, reiterates that the receiver is a separate and distinct party from the plaintiff and, as a matter of law, is agent of the defendants. She submits that nothing contained in the affidavits of the defendants displaces this proposition.

20. Ms. Enright takes issue with the contents of the property valuation report obtained by and on behalf of the defendant, pointing out that the author of that report did not inspect the property, had no information concerning its structural integrity and made certain presumptions and assumptions.

21. Ms. Enright states that an isolated assertion made by the second defendant regarding her signature is insufficient to give rise to an arguable defence and points out that the conditions of the loan offer letter provide that "*in the case of joint borrowers, any notice or demand shall be sufficiently given or served on all borrowers if given or served on the first named borrower only".*

22. Finally, Mr. Fitzgerald, the solicitor representing Mrs. White, in an affidavit sworn on 25th October, 2017, avers that he has obtained an opinion from a handwriting expert who has concluded that "*it is probable that Mary White did not author the questioned signature*". To provide further clarity in the matter, it is stated that the handwriting expert may require access to the original of the document. In a subsequent affidavit sworn on 28th February, 2018, Mr. Fitzgerald makes a complaint that the bank did not make the original mortgage document available for inspection.

**Submissions**
23. Mr. Byrne B.L., on behalf of the plaintiff, submits that there is no authority for the proposition that the absence of a signature on a facility letter absolves a party from the obligation to repay monies advanced and received on foot thereof. He emphasises that the funds advanced on foot of the loan were used to acquire the property in question. That property was registered jointly in the names of both defendants and, he submits, even if the second defendant is not bound by the terms and conditions of the facility letter, this does not absolve her of responsibility to repay the amount advanced to her by the plaintiff, the use and benefit of which she does not deny that she received. He submits further that, accepting that Mrs. White did not sign the agreement, the sums are due on foot of an implied obligation to repay or in consequence of ratification of the agreement. He highlights the limited nature of the averments in Mrs. White's affidavit and submits that she has not taken any real issue with the fact that monies were advanced. He further contends that no admissible evidence is before the court of a sale at undervalue or that the receiver acted in a capacity other than as agent for the defendants. He also highlights that the evidence of alleged undervalue is contradictory.

24. Counsel refers to *Irish Bank Resolution Corporation Ltd. v. Cambourne Investments Incorporated* [2014] 4 I.R. 54, where Charleton J. stated at para. 72:-

> *"The main debt is thus not recoverable under those facility letters. It is otherwise recoverable because Cambourne agreed to borrow the money and Anglo agreed to lend it. As a matter of law, Cambourne is obliged to repay the money borrowed. There is no warrant for construing into the relationship between Anglo and Cambourne any entitlement other than an ordinary obligation to repay that money."*

25. Counsel also argues that there is clear authority for the proposition that a party who does not sign a facility letter may nevertheless ratify its terms and conditions. He relies on *dicta* of Ryan J., as he then was, in *ACC v. Deacon* [2013] IEHC 427 and also on *Promontoria (Aran) Limited v. Hughes* [2017] IEHC 592, where McGovern J. stated at para. 13:-

> *"The offer-letter of 21st February, 2011 has not been signed. However, there has been a draw-down of the funds advanced; so a loan has been offered and accepted, and there must be terms applicable. It has been good law since at least the time of the decision of the House of Lords in Brogden v. Metropolitan Railway Company (1877) 2 App. Cas. 666 that acceptance can be effected by conduct, and likely good law for a great deal longer than that – Lord Blackburn, at 692, refers to a decision of Chief Justice Bryan in a 15th century case that is supportive of this proposition. So the court entertains no doubt but that the necessary elements of a binding contract presented and present on the facts of this case."*

26. As to whether the plaintiff could be vicariously liable for an alleged wrongdoing on the part of the receiver in the sale of the property, such that either of the defendants might enjoy a right of set-off or counterclaim against the plaintiff, it is submitted on behalf of the plaintiff that the position was summarised by McDermott J. in *Danske Bank A/S v. Gillic* [2015] IEHC 375:-

> *"The issue of the appointment of a receiver is entirely irrelevant to the issues in this case. If the second defendant wished to challenge the appointment of a receiver he had ample opportunity to do so but did not. If he has any grievance in relation to the appointment or actions of the receiver or the decisions taken by him or any failure of duty on his part, he should properly pursue that matter with the receiver."*

27. It is submitted that in order to displace this general principle, evidence must exist to the effect that a receiver has somehow ceased to act as agent of the mortgagor and has begun acting as agent of the mortgagee. The plaintiff cites *Lightman & Moss on the Law of Administrators and Receivers of Companies*, 6th Ed. (Sweet & Maxwell, 2017), who state at para. 13–073:-

> *"In the case where the receiver is acting as agent of the debenture-holder, the debenture-holder will be liable for the acts of the receiver as his agent in accordance with ordinary agency principles.* If a receiver is appointed to act as agent for the mortgagor, the exercise of the power of appointment does not of itself render the appointer liable for the receiver's acts or omissions. Accordingly, the mortgagee is not liable if such a receiver sells at an undervalue. But even if the receiver is appointed and acts as the agent of the mortgagor, the mortgagee will be liable and responsible for the receiver's acts and defaults if the mortgagee gives directions to or puts pressure on the receiver or so interferes with the conduct of the receivership as to prevent the exercise of independent judgment by the receiver. *In this case, any provision in the debenture excluding liability of the receiver will be of no avail to the mortgagee, for the mortgagee will be held liable personally in respect of the impugned acts as his own acts, and not merely variously in respect of the receiver*." (emphasis added).

28. The plaintiff further cites Standard Chartered Bank Limited v. Walker & Anor. [1982] W.L.R. 1410 where Lord Denning M.R. stated:-

> *"The debenture holder, the bank, is not responsible for what the receiver does except in so far as it gives him directions or interferes with his conduct of the realisation. If it does so, then it too is under a duty to use reasonable care towards the company and the guarantor." (p. 1416)*

The plaintiff therefore submits that for the argument of the defendants to amount to a bona fide defence to the plaintiff's claim, it is necessary that they provide clear and admissible evidence that:-

> a) The plaintiff "*gave directions*" to and/or "*put pressure*" on and/or otherwise prevented the "*exercise of independent judgment*" by the receiver; and
>
> b) The receiver failed to obtain the best price which could have reasonably been obtained for the property as of 30th October, 2014.

It is contended on behalf of the plaintiff that the defendants have failed to meet either of these requirements.

29. In relation to (a), it is submitted that the evidence before the Court clearly suggests that the receiver exercised independent judgment in completing the sale of the property. In support of this contention, reference is made to a letter dated 25th June, 2015 from Mr. James Heaslip of DNG Maxwell Heaslip & Leonard, addressed to the receiver's firm, not to the plaintiff, and confirms the extensive marketing steps which were undertaken by the sales agents engaged by the receiver. It is submitted that there is extensive evidence in relation to the price in both the affidavit of Ms. de Courcey and Ms. Enright, and that neither of the defendants have tendered any admissible evidence in respect of the sale of the property.

30. It is argued that the defendants' case suffers from a series of insurmountable flaws, in particular, that that evidence is contradictory as between the defendants (the first defendant suggests the property worth was €250,000, whereas the second defendant suggests it was not worth more than €118,000). It is further contended that the evidence is unsupportive of the proposition for which it is offered (the report from BV Business Vision Limited refers to comparator properties, the average price of which was €90,600). It is also argued that the evidence is subject to extensive limitations and caveats, and para. 20 of Ms. Enright's affidavit in this regard, in particular, that no expert has ever inspected the property on behalf of either of the defendants.

31. It is therefore submitted on behalf of the plaintiff that the defendants' contentions to the effect that the receiver may have acted as agent of the plaintiff, and was in breach of the duty owed by him to obtain the best price which could reasonably be obtained for the property, are each in the nature of mere assertions.

32. Counsel for Mrs. White, Ms. Shanley B.L submits that there is no evidence of Mrs. White having agreed to the terms of the mortgage loan and that while a number of bank officials have sworn affidavits, none has given evidence of Mrs. White having had such involvement. There is no documentary evidence of such agreement. An alternative agreement or ratification is not pleaded. The onus of proof is on the plaintiff to establish all necessary terms and conditions of the agreement, including terms as to repayment and interest. Counsel submits that the only evidence advanced by the plaintiff in respect of the contended for agreement is the written contract which the second named defendant avers she did not sign or agree to. It is argued that, on this application, the Court must accept that she did not sign the letter, a proposition which is not seriously disputed by the plaintiff's counsel.

33. Ms. Shanley B.L. accepts that in the case of a single borrower, the drawdown of funds may be evidence of ratification of agreement. Here the bank has produced no evidence that Mrs. White had involvement in opening the bank account into which the loan monies were drawn down and although the account was in their joint names, it is emphasised that Mrs. White's evidence is that her husband handled all of the financial affairs in the marriage. While a mortgage account was created in their joint names and while it is alleged that both were jointly written to in respect of the loan, Mrs. White positively avers that she is separated from her husband and that he handled the finances in the marriage. She also avers that he worked for 20 years in the Lease Finance Department with another financial institution. Where, however, the bank has adduced no evidence that Mrs. White had involvement in opening that bank account into which the loan monies were drawn down, and there is evidence that her husband handled all the financial affairs in the marriage, different considerations arise. She seeks to distinguish *Hughes* on the basis that there was evidence before the Court of a prior course of dealing, such that the drawdown of funds into a joint account to refinance previous borrowings amounted to acceptance of the terms of the non-executed facility letter. It is further submitted that the purchase of property by Mr. White in both their names is not evidence of ratification of the agreement by her or an agreement to expose herself to a liability in debt to the bank which could be enforced against her personal income and assets. It is urged that the plaintiff has not advanced evidence that the second defendant had entered into a contract of loan, express or implied.

34. Ms. Shanley B.L. further submits that reliance on *Cambourne* is misplaced as that case concerned a loan agreement which was dependent upon the fulfilment of a condition precedent. While the agreement may not have been enforceable because there was a failure of the condition precedent, there never was a question but that the defendant intended to enter into it. The court concluded that the loan agreement itself was not enforceable, but there was evidence that Cambourne agreed to borrow the money and Anglo agreed to lend it, and therefore Cambourne was obliged to repay it. Thus, *Cambourne* is authority for the proposition that where a facility letter is not enforceable, for example, where it has not been signed, the law may imply an obligation to repay from other evidence of an agreement between the parties.

35. It is submitted that the plaintiff's reliance on *Promontoria (Aran) Limited v. Hughes* [2017] IEHC 592 is misplaced. *Hughes* is distinguishable because it concerned a history of borrowings by a husband and wife. It was alleged was that they had not signed the most recent facility letters. There was evidence of a prior course of dealings such that the drawdown of funds into their joint accounts to refinance the previous borrowings, amounted to acceptance of the terms of the non-executed facility letter. It is submitted that the fact that the property was purchased in the names of both Mr. and Mrs. White is not evidence of ratification of a separate mortgage loan agreement and that the agreement by Mrs. White to hold property in her name cannot and does not amount to an agreement by her to expose herself to a liability in debt which could be enforced against her personal income and assets. This is not a case in which the second defendant is resisting an order for possession, rather liability for the debt. Thus, it is contended that at this stage of the proceedings, an arguable defence has been made out on this ground.

**Decision**

36. The central test which is applicable on an application for summary judgment was stated by Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Ltd*. [2001] 4 I.R. 607, as follows:-

> *"…the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

This was further elaborated on by McKechnie J. in *Harrisrange v. Dawson* [2003] 4 I.R. 1 at p. 7:-

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
>
> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
>
> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or*

*reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;*

*(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*

*(ix) leave to defend should be granted unless it is very clear that there is no defence;*

*(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*

*(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*

*(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."*

37. Thus, leave to defend should be granted unless it is very clear that there is no defence but it should not be granted where the only relevant averment is a mere assertion of a given situation which is stated to form the basis of the defence.

38. In *Irish Bank Resolution Corporation Ltd (in special liquidation) v. McCaughey* [2014] 1 I.R. 749, Clarke J. stated that the use of the term "credible" in relation to a defence has a very narrow meaning. He observed at p. 759 of his judgment:-

*"It is important, therefore, to re-emphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in Aer Rianta c.p.t. v. Ryanair Ltd. [2001] 4 I.R. 607, be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in McGrath v. O'Driscoll [2006] IEHC 195, [2007] 1 I.L.R.M. 203, the court may come to a final resolution of such issues. That the court is not obliged to resolve such issues is also clear from Danske Bank a/s (t/a National Irish Bank) v. Durkan New Homes [2010] IESC 22, (Unreported, Supreme Court, 22nd April, 2010)."*

39. Clarke J. reiterated that in so far as facts may be advanced, subject to a very narrow limitation, the court will be required for the purposes of summary judgment application to accept facts of which the defendant gives evidence or facts in respect of which the defendant advances as a credible basis for believing that evidence may be forthcoming and that those facts are as the defendant asserts them to be. He observed:-

*"The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta c.p.t. v. Ryanair Ltd. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."*

Important in this context is Clarke J.'s reference to the credibility of the basis for believing that evidence may be forthcoming on a particular matter.

40. Applying these principles to this case, the following is to be stated. First, in so far as the second named defendant's alleged signature on the loan agreement is concerned, on the basis of the evidence adduced, it seems to me that a significant issue arises as to whether she signed the agreement. She denies having executed the agreement. This is supported to some extent by reference to an opinion of a handwriting expert and exhibited to the affidavit of Mr. Fitzgerald. The report is authored by Mr. Madden. He opines it is "*probable that Mary White did not author the questioned signature*". While there may be frailties in relation to the strength and admissibility of that evidence, the fact of the matter is that the second named defendant specifically avers that she did not sign the facility letter and did not give authority to any person to sign it on her behalf. In my view, nothing has been adduced in evidence at this stage which could be said to detract significantly from the *'arguability'* of the second named defendant's contention in this regard, to the extent that would render it a mere assertion for the purposes of the test which must be applied at this stage of the proceedings. Indeed, counsel for the bank largely accepts this to be the situation,

41. That, however, is not the end of the matter. The plaintiff argues that even if the second defendant did not sign the document, she took the benefit of the loan. In *Cambourne*, Charleton J. considered circumstances in which a plaintiff had loaned monies to the first named defendant pursuant to a facility letter. The second and third named defendants were guarantors of the borrowings. Issues arose concerning the interpretation of the contract, and as to whether a condition precedent had failed. At p. 89 of his judgment, he stated as follows:-

*"The primary debt was money borrowed by Cambourne on facility letters that made a loan offer by Anglo. The failure of the conditions precedent as to valuation and as to loan to value ratio in the facility letters offering the loans to Cambourne prevent the operation of that written contract. The main debt is thus not recoverable under those facility letters. It is otherwise recoverable because Cambourne agreed to borrow the money and Anglo agreed to lend it. As a matter of law, Cambourne is obliged to repay the money borrowed. There is no warrant for construing into the relationship between the Anglo and Cambourne any entitlement other than an ordinary obligation to repay that money. Even were the terms of the guarantees given by Peter Curistan and Century City outside the facility letters to have inserted into them a condition that the principal sum borrowed by Cambourne would only require repayment after a reasonable time, such time has passed. Further, the manner in which the bank was treated by Cambourne, through Peter Curistan, entitled the bank to demand its money and to bring the loan to an end."*

42. Counsel submits on behalf of the plaintiff that, as a matter of law, a party who does not sign a facility letter may nonetheless ratify the terms and conditions of the relevant loan facility through conduct. Reliance is placed in this regard on the decision of McGovern J. in *Promontoria (Aran) Ltd. v. Hughes* [2017] IEHC 592 and Ryan J. in *ACC Bank plc. v. Deacon* [2013] IEHC 427. In the latter case, Ryan J. analysed such arguments in the context of whether the bank had proved its case because it had not produced

and proven the loan agreement in the transaction at the heart of the proceedings. Ryan J. observed that central to such defence was an implicit theory that it was an essential proof that the actual contract document be produced by the bank and proved in "*some kind of solemn form of law*". He observed that on such approach, the "*document itself is envisaged as having an independent existence from the transaction that it evidences*".

43. Contrasting this situation with that requiring consideration of a document such as of a will, Ryan J. stated:-

> *"There is nothing of special legal significance about the original documents here. They are not muniments of title or of similar free-standing status. In many contracts there is not any one embodiment of the contract in a document. Even where there is such a contract, it may be signed in a number of copies or versions and there may therefore be more than one original contract.*
>
> *This case is about the proof of a series of loan agreements, not whether the bank has proved a particular, individual document. Documents are evidence of the agreements and their terms. But it is a misunderstanding to think that the case is about proof of a document and not proof of an agreement."*

He concluded that the bank could prove the agreement by relying on oral evidence and copy documents.

44. In Hughes, in the context of an argument that the offer letter had not been signed, McGovern J. stated:-

> *"However, there has been a draw-down of the funds advanced; so a loan has been offered and accepted, and there must be terms applicable. It has been good law since at least the time of the decision of the House of Lords in Brogden v. Metropolitan Railway Company (1877) 2 App. Cas. 666 that acceptance can be effected by conduct, and likely good law for a great deal longer than that…"*

45. It is submitted that there is no evidence that the second defendant queried the transaction as and when it occurred and that there is evidence that the second defendant accepted and ratified the terms and conditions of the loan facility.

46. While no evidence has been adduced by the bank from the person or persons who had direct dealings with the defendants when the transaction was concluded, nonetheless there is evidence of a joint loan account, a joint mortgage account and also evidence that the property was held in their joint names.

47. In assessing whether the second defendant ought to be granted liberty to defend, I must bear in mind, in particular, the dicta of Hardiman J. "*is it 'very clear' that the defendant has no case?*" and that of Clarke J. in McCaughey concerning the meaning of "*credibility*". A defence is not incredible simply because the court is not inclined to believe the defendant. It must be clear that the defendant has no defence. At this stage of the proceedings, as stated, the court must accept that Mrs. White did not sign the agreement. I also accept counsel for the second defendant's contention that where there is no history of a prior course of dealings between the parties, different legal considerations may arise in the context of a suggested implied agreement. With regard to arguments based on ratification, again it seems to me that the second defendant has raised an arguable issue. I would not, however, decide such an issue on a pleading point as has been suggested. It may be appropriate to do so in other circumstances, but I am not satisfied that evidence of ratification has been adduced such that one might conclude that the second defendant has no arguable defence on this point. She has averred that her husband was an official in a lending institution and it is not, at this stage, beyond the bounds of argument that matters were dealt with by him. On this basis, although one may have reservations in relation to the strength of the second named defendant's defence in this regard, to determine such issue as to credibility would be to fall foul of the warning of Clarke J. in *McCaughey*. I cannot conclude that she does not have an arguable defence or that an arguable defence has not been raised by her on this point.

48. Regarding the defence based on whether the receiver was the bank's agent, it is of note that in *Yorkshire Bank plc v. Mashford* [1987] EWCA Civ J0403-2, there was evidence of communication between the receiver and the bank in relation to the sale. There, Slade L.J. observed:

> *"On 1st July 1985 (page 110) the receiver wrote to the defendants' solicitors, thanking them for a letter of 24th June, of which we have not seen a copy, and continuing as follows:-*
>
> *"Contracts for the sale of the property have now been exchanged and completion is anticipated on the 5th July 1985. Mr. Anelay refused to proceed with the purchase of the property without an undertaking from myself that I would not pursue him for the rent for occupation of the premises. I considered his request and consulted with my agents and the Yorkshire Bank PLC. It was my opinion, supported by my agents, that to re-offer the property for sale may result in a lower sale price without further delays. Under the circumstances, no claim is now to be made against Mr. Anelay in repect of occupation of the premises. … "The receiver then expressed the view that Mr. Mashford was largely responsible for the delays in the disposal of the premises."*

Slade L.J. then stated:-

> *"I think it is clearly arguable that the sale of the premises was in fact at an undervalue. It also seems a reasonable inference from the letter of 1st July 1985, that the bank was at the very least a consenting party to the receiver's decision not to offer the premises for re-sale when Mr. Anelay dug in his heels about the rent question. And if there is a lack of evidence as to the exact part which the bank played in that decision, it seems to me that the defendants can hardly be criticised for failing to put in evidence on that point, since the nature of the relevant communications between the bank and the receiver, while within the knowledge of the bank, would presumably not be within the knowledge of the defendants. In the end, while I have been impressed by Mr. Allen's submissions on the interference point, I find myself unable to disagree with the learned judge's conclusion that the defendants have established a triable issue in their assertion that, at the date of the sale, the receiver was the bank's agent and, accordingly, owed the defendants a duty of care in dealing with the company's assets."*

49. Mr. Byrne B.L. argues that there is, as he describes it, no such thread which might be drawn and unravelled by the defendants in this case.

50. In my view, there is no comparable evidence in this case. Here there has been no communication by the defendant with the receiver. The letter in *Mashford* emanated from the receiver and given that the default position is that he is the agent of the mortgagor, it appears to me that there should be little impediment to a mortgagor communicating with a receiver in relation to the

sale. Indeed, it is difficult to see that the receiver might resist such request for information, as he acts as the agent of the mortgagor. That issue, however, does not arise as the evidence in this case is that the second defendant considered it a matter for the bank, rather than what was described in correspondence as "*its receiver*". Thus, there is no evidence that the defendants or others on their behalf sought to raise this issue directly with the receiver. Nor is there evidence of the defendants taking issue directly with the receiver in respect of alleged breach of duty by him in the sale of the property. For the defendants to identify the plaintiff with those alleged acts, there must be some evidence, or something to suggest that such evidence might be available, that the bank gave directions to, put pressure on, or interfered with the receiver's conduct to such extent as to prevent him from exercising an independent judgment in relation to the sale of the asset. There must therefore, be evidence, or at least a basis for contending that such evidence might be forthcoming at trial or through discovery or otherwise, before leave to defend on this ground should be granted.

51. The second defendant argues that in order to overcome the evidential deficit, she has called upon the bank and set out on affidavit precisely the involvement it had in the sales process and what instructions the bank gave to the receiver in respect of the renting of the property or the sale thereof. It is submitted that the bank could have reviewed its file and sworn an affidavit saying that no directions or instructions were given. The bank chose not to do so. Had the bank sworn such an affidavit, it is submitted that the defendants would not be entitled to look behind it and assert the possibility that the discovery process would reveal that the deponent was not telling the truth. Equally, it is asserted that the bank cannot rely on a lack of evidence in the hands of a defendant at summary judgment stage if it is not willing to swear that there is no interference with the receivership.

52. It appears to me that any criticism made against the bank in this regard must be viewed in light of the fact that there is no evidence of an attempt having been made by the defendants to take issue with the alleged sale at undervalue with the receiver, or indeed to seek information from him regarding the circumstances of the sale or his dealings with the bank. Further, no challenge was made to his appointment. It seems to me that an issue to be addressed is whether it is sufficient for a defendant to assert, without more, a belief that the bank had directed the receiver or had otherwise interfered with the sale, and to thereafter call upon the bank to provide an explanation and, in the absence of a response from the bank, to argue that it is only after discovery of documents or other such process, that such an assertion might be established.

53. The fact that it is alleged that property has been sold at an undervalue, in my view, cannot on its own and as a matter of law mean that the receiver thereby becomes agent of the bank such as might justify the transfer of the case to plenary hearing. Here, apart from the assertion that the property was sold at an undervalue, the only other evidence that seems to be relied upon is post-commencement of litigation communications between the bank and the receiver, in relation to the sale and its circumstances and an allegation that once the issue is raised, the bank or the receiver should submit an affidavit to dispute the contention. It seems to me that if the defendant's contention in this regard is correct, then to assert that the receiver is the agent of the bank simply on the basis of sale at an alleged undervalue and the calling on the bank and receiver to prove otherwise, would be to reverse the onus of proof in respect of a matter of law which has long been established.

54. In any event, Mr. Byrne B.L. contends that such evidence as there is before the Court supports the proposition that the receiver exercised independent judgment in completing the sale of the property. He relies on the affidavit of Ms. de Courcey sworn on 29th June, 2015 exhibiting a letter from Messrs. DNG who had carriage of sale of the property on behalf of the receiver. He submits that this letter is addressed to the receivers and not to the plaintiff and confirms the extensive marketing steps which were undertaken by the sales agents engaged by the receiver. On the other hand, as I have stated earlier, the second defendant points to the fact that the communication post-dated the commencement of this litigation. Nevertheless, having considered the totality of the evidence, I am not satisfied that an arguable defence has been advanced by the defendants that the receiver acted as agent for the bank or that an issue therefore arises as to whether any undervalue on sale should be applied in reduction of the debt. In my view, an allegation of sale at undervalue by a receiver does not alter the terms of his agency. There must be more than this and in my view, in this case there is no evidence to justify or to form the basis for arguing for the alteration of his status as agent of the defendants.

55. Nothing in this decision should be read as a view on, or an invitation to the defendants to take such action as they may deem appropriate against the receiver. That is entirely a matter for them.

56. In my view, no arguable defence has been advanced by the first named defendant to suggest that he is not liable for the loan save the argument, which I have rejected, that the receiver acted as agent of the bank, that the property was sold at undervalue, and that the debt due to the bank must be reduced by the amount of such undervalue. I conclude, therefore, that the plaintiff is entitled to summary judgment in the sum claimed, being €171,825.12 plus interest from 2nd June, 2017, as against the first named defendant.

57. In relation to the second defendant, the Court refuses the application for summary judgment and grants her liberty to defend the proceedings on the basis that she did not sign the loan agreement, was not otherwise a party thereto and is not liable thereon.