[2020] IEHC 254

THE HIGH COURT

[2016 No. 753 S]

BETWEEN

PENTIRE PROPERTY FINANCE DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

ANDREW CORRIGAN AND JANET CORRIGAN

DEFENDANTS

JUDGMENT of Mr. Justice Michael MacGrath delivered on the 3rd day of April, 2020.

Introduction

1. This is an application by the plaintiff for summary judgment for sums due in respect of the defendants' alleged liability on foot of a loan facility provided by the now dissolved Bank of Scotland (Ireland) Limited ("*BOSI*"). The plaintiff alleges that through a series of transactions it enjoys rights under the facility and seeks to enforce them. These alleged rights are contested and the application for summary judgment is opposed. One of the issues raised by the defendants relates to interest. From the outset, and in order to progress this application, counsel for the plaintiff, Mr. Gorman B.L., advised the court that the plaintiff restricts its claim for summary judgment to the capital sum advanced and that issues concerning interest, its amount and method of calculation, should be transferred to plenary hearing. The capital sum claimed is €925,000.

Background

2. By facility letter dated 20th November, 2007, BOSI offered a loan facility to the defendants in the sum of €925,000 ("*the loan*"). The offer was made in accordance with the terms of a facility letter and on the basis of BOSI's general conditions. The loan was accepted. The facility letter was signed by the defendants on 27th November, 2007. The defendants also entered into a deed of mortgage with BOSI. This was executed on the 28th February, 2008. The sum of €925,000 was drawn down. No issue arises in relation to the execution of the loan agreement by the defendants. The defendants dispute the alleged transfer of the loan and contest the validly and legality of a number of transfers and transactions whereby the plaintiff alleges that it became entitled to the benefits and rights under the loan agreement.

The transfers leading to the plaintiff's claimed entitlement to the benefit of the loan.

3. No evidence has been produced to the court of any account transaction or dealing that may have taken place between execution of the mortgage/charge and an arrangement, known as the cross- border merger, which took place on 31st December, 2010.

Cross–Border Merger

4. The plaintiff claims that, by virtue of a cross-border merger pursuant to the European Communities (Cross-Border Mergers) Regulations 2008 (Ireland) and the Companies (Cross-Border Mergers) Regulations 2007 (United Kingdom), approved by the High Court on 22nd October, 2010 and by the Scottish Court of Session on 10th December, 2010, all of the rights and obligations of BOSI under the loan and the mortgage were vested in Bank of Scotland plc ("*BOS*") with effect from 11.59 p.m. on 31st December, 2010. BOS is incorporated under the laws of Scotland. Through a further series of transactions, it is alleged that the interest of BOS in the loan was transferred to the plaintiff. These include

a purchase agreement between BOS and CarVal Investors UK Limited ("*CarVal*"), a deed of novation made between CarVal, Pentire Property Finance Limited ("*Pentire*"), and BOS and a deed of assignment between BOS and Pentire.

The Purchase Agreement between BOS and CarVal

5. On the 29th November, 2014, BOS entered into a purchase deed ("*the purchase agreement*") with CarVal, a company incorporated in England, whereby BOS agreed to sell to CarVal the "*purchase assets*" and for CarVal to take over the "*assumed obligations"* on the terms and conditions of that deed. It is contended by the plaintiff that by virtue of this agreement CarVal acquired a portfolio of loans then on the loan book of BOS, which included the loan advanced to the defendants, at which time the amount stated to be due and owing was €1,305,921. A second 'loan' in the amount of €19,719 was transferred and the name Simon Davidson is referred to in connection with this.

The Deed of Novation

6. A deed of novation was executed on the 12th December, 2014 between CarVal, as transferor, Pentire Property Finance Limited ("*Pentire*"), as transferee, and BOS as the continuing party. Pentire's address is described as "*C/O Carval Investors UK Limited, 25 Great Pulteney Street, London."* This was supplemental to the purchase agreement between CarVal and BOS and provided for CarVal to novate to the plaintiff the entirety of its rights and obligations under the purchase deed on the effective date. BOS agreed to the novation. The "*effective date*" is the date of the deed, the 12th December, 2014.

7. By virtue of Clause 3.1 of the deed of novation the parties agreed that, as and from the date of the agreement, the transferee:-

> *"…shall be and is hereby substituted in place of the transferor as a party to the purchase deed and that the purchase deed shall be treated in all respects as if the transferee had been, from the date of execution, the original party to the purchase deed instead of the transferor."*

Deed of Assignment to Pentire

8. By deed executed on the 20th April, 2015 BOS transferred the loan facility and assigned its interests in the loan and mortgage to Pentire.

Letter of Demand, '*Goodbye'* and '*Hello'* letters and the involvement of Pepper

9. On the 9th March, 2015, Pentire wrote to the defendants advising them of the deed of purchase and informed them that the rights, title and interest in the facility letter were transferred to Pentire. The amount then owing was stated to be €1,496,231.69 representing the principal sum together with accrued interest and a demand for payment was made.

10. On the 20th March, 2015, BOS sent to the defendants what is known as a '*goodbye letter'* informing them of the sale. The defendants were also advised that Pepper Finance Corporation (Ireland) Limited t/a Pepper Assets Servicing ("*Pepper*") had been appointed to provide portfolio and asset management services on behalf of the purchaser and that Pepper might contact them in relation to the facilities.

11. In April, 2015, Pepper wrote to the defendants advising them of their involvement and of their role, which included collecting payments, attending meetings, establishing and maintaining lines of communication and gathering relevant information in relation to any proposals which might be made or considered.

12. A statement of account dated 20th April, 2015, prepared by BOS was sent to the defendants. This recounted transactions which had taken place since the 28th April, 2013. The opening balance at that time was €1,178,317.25. Sums in respect of interest and arrears of interest were debited to the account so that at the time of the statement, the amount stated to be due was €1,387,819.76.

13. Pepper prepared a statement of account showing that the closing balance as of the 4th July, 2016 was €1,532,273.67. The opening balance in the statement was €1,387,819.76. This matches the closing balance on the BOS statement. In the Pepper statement to Mr. Corrigan, the entry of the 20th April, 2015 is described as *"Opening arrears balance transferred from Lloyd's as at 20th April"* (emphasis added). The defendants contend that this is not evidence that this sum represents the amount or any amount owing and due by them, given the reference to *Lloyd's* in the statement. It is to be noted, that in a statement issued to the second defendant, no reference is made to Lloyd's.

General Principles- onus of proof and leave to defend

14. This is an application for summary judgment. The onus of proof lies, in the first place, on the plaintiff to establish *prima facie* evidence of debt. The test as to whether judgment ought to be entered, or whether the defendant be given liberty to defend, is that which was succinctly summarised by Hardiman J. in *Aer Rianta cpt v. Ryanair* Limited [2001] 4 I.R. 607 at p. 623:-

> *"In my view, 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?"*

15. This was expanded on by McKechnie J. in *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1.who stated that the power to grant summary judgment should be exercised with discernible caution. He amplified the applicable principles which at p. 7:-

> *"From these cases it seems to me that the following is a summary of the present position:-*
>
> *(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. "

16. It is the contention of the plaintiff that the defendants do not have a *bona fide* defence to the claim and that appearances have been entered solely for the purpose of delay.

Evidence on Affidavit

17. The application for summary judgment was initially grounded on the affidavit of a named official of the plaintiff company and was responded to by Mr. Corrigan. Replying affidavits

have been filed. They include affidavits sworn on behalf of the plaintiff by Mr. Donal O'Sullivan, a director of the plaintiff.

Cross Examination

18. Mr. Lyons applied to the court for leave to serve a notice to cross-examine the deponents on their affidavits. In a previous judgment the court ruled that the application for leave was unnecessary. The Rules of Superior Courts provide that if a deponent does not present him or herself for cross-examination, the court is entitled to disregard the contents of the affidavit in an application for summary judgment. The deponent who swore the grounding affidavit on behalf of the plaintiff was unable to attend for cross-examination for stated and understandable reasons. Mr. O'Sullivan therefore filed a further affidavit in which he deposed to, and confirmed, the contents of the initial grounding affidavit. The notice to cross-examine was served on Mr. O'Sullivan and he attended for cross-examination which took place on the 22nd January, 2020.

Grounds of Defence

19. The grounds of defence have been advanced in affidavits sworn by Mr. Corrigan and Mr. Lyons. They have been expanded upon in submissions which have been advanced with eloquence by Mr. Lyons on behalf of his clients. They may be summarised as follows:

    i. The defendants do not challenge the cross – border merger, rather they maintain that there is no evidence that the loan the subject matter of the facility letter was at the date of the transfer, or as Mr. Lyons puts it, at 23:59 on 31st December, 2010, an asset of BOSI. Therefore, there is no evidence that the loan was transferred from BOSI to BOS under the cross-border merger or that the loan was transferred thereafter to the plaintiff.

    ii. The transfer of the loan by way of purchase deed from BOS to CarVal on or about the 29th November, 2014 is invalid, void and of no legal effect; there is uncertainty as to what, if anything, was transferred and it is unenforceable against the defendants.

    iii. The defendants did not consent to the assignment or transfer of their loan. It was not open to BOSI (or BOS) to assign the benefit of the loan facility or mortgage to the plaintiff.

    iv. It is an implied term that the Bank could not consent to the transfer of the loan to an unregulated or unauthorised entity and that the transfer of the loan was in breach of the terms of the agreement. The transfer of the loan in April, 2015, to an unregulated entity, is invalid.

    v. The purchase agreement dated 29th November, 2014 between BOS and CarVal is unenforceable because at the time of the agreement, CarVal was not appropriately authorised or licenced pursuant to the Financial Services and Markets Act, 2000 (U.K.).

vi. The defendants are consumers and are entitled to the benefit of the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 *("the Act of 2015").*

vii. Neither the plaintiff nor Pepper are licenced pursuant to the Central Bank Act 1971 ("*the Act of 1971*") and therefore the proceedings cannot be maintained, and the loan is effectively null and void.

viii. In the original grounding affidavit, although the deponent referred to the sum due of €1,582,493.08, she failed to stipulate the source or basis of her knowledge of the amount claimed; and appeared to rely on the statement of accounts issued by the bank and by Pepper.

ix. No evidence has been adduced as to the capital sum allegedly due. The sum claimed of €925,000, albeit referred to in the facility letter, takes no account of any principal or capital repayments which may have been made by the defendants since the drawdown of the loan facilities; and there is insufficient evidence as to what, if any, sums are due for principal or interest.

x. There is a lack of clarity as to how the transfer documents relate to each other, particularly given that substantial redactions were made to them in the exhibited copies. It is not possible to relate the loan to its alleged reference in those documents.

xi. There is an apparent reference to two loans in the names of each of the defendants, but those loans do not in any way relate to the loans advanced on foot of the facility letter. Three items are referred to in the documents of transfer; this is particularly referable to the customer name in respect of a loan allegedly transferred as "*Simon Davidson, rec to A&J Corrigan."*

xii. In an affidavit sworn by Mr. Corrigan on the 15th December, 2017, additional grounds of defence are advanced, particularly with regard to the chain of title and whether the beneficial ownership of the loan was in truth vested in BOS as of the date of the merger. Referring to Mr. O'Sullivan's affidavit, Mr. Corrigan avers:-

> *"Undoubtedly he will be in a position to confirm to the court the full background and the history of the instant loan facility and also the issue as to what fines were levied against Bank of Scotland."*

This is referable to proceedings taken in Scotland in relation to certain banking practices, in respect of which it is contended that BOS was subject to a fine. Mr. Corrigan avers to the alleged manipulation of the Euro Interbank Offered Rate (EURIBOR) and London Interbank Offered Rate (LIBOR) rates and maintains that the plaintiff has failed to show the necessary detail as to how the claimed sum had been calculated, the interest rates applicable and whether they were manipulated. Mr. Corrigan also references certain admissions which were made by another company, Tanager DAC, in respect of a computer system provided by BOS and of

significant irregularity in relation to the calculation of interest payments. In reply, Mr. O'Sullivan makes the point that BOS is not a party to these proceedings. The plaintiff maintains that, in any event, such allegations relate to the interest claimed, and may be dealt with at the plenary hearing of the issue relating to the interest aspect of the claim.

xiii. There has been a partial write down of loans. Prior to the merger, 40% of the overall loans of BOSI were written off and failed to transfer and therefore the defendants' loan may have been written off. At para. 15 of Mr. Lyons' affidavit sworn on the 31st January, 2019 he avers:-

> *"I say evidence will be given at the hearing of this matter that the group accounts of Lloyd's Banking Group confirm that the said in payment amount recorded as group losses in its former Irish subsidiary Bank of Scotland (Ireland) Limited but subsequently claimed as a tax asset to be set off against future profits in the group. I say in those circumstances and strictly without prejudice to any of the foregoing arguments, that 40% of the loans the subject matter of the action were written off in Bank of Scotland (Ireland) Limited prior to the merger into Bank of Scotland plc and therefore failed to transfer on the merger."*

The Plaintiff's response

20. The response of the plaintiff is outlined in affidavits sworn by Mr. O'Sullivan and in submissions made by Mr. Gorman B.L. on its behalf. These may be summarised as follows:

i. The bank's general terms and conditions made clear that it was entitled to assign the loans to a third party and that such assignment was not contingent on the prior consent of the borrower. Counsel for the plaintiff emphasises the definition of finance documents, loan, and loan agreement. "*Loan*" is defined as the facilities made available pursuant to the facility letter; and "*loan agreement*" means the facility letter and the general conditions which are deemed to be expressly incorporated into the terms of the facility letter between BOSI and the borrower. Clause 14 of the General Conditions provides as follows:-

> *"14.1 The borrower shall not be entitled to assign or transfer all or any of its rights, benefits or obligations under any of the finance documents.*
>
> *14.2 The bank may at any time without the prior consent of the borrower assign, novate or transfer any of its rights and benefits and transfer any of the obligations under any of the finance documents to any person, firm or company or sub – participate or subcontract any of its obligations or obligations under the finance documents."*

"*Finance document*" is defined as:-

"each of the loan agreement, the security documents in any agreements, documents, arrangements letters or undertakings that may be entered into or executed pursuant thereto or in connection therewith and any one of the 'finance documents'"

ii. The deed of assignment was redacted because it governs a series of loans which do not concern the defendants and it is inappropriate to exhibit an unredacted copy of the deed of assignment which would disclose personal details of other borrowers.

iii. It is clear from the deed of assignment that the loans relating to the defendants were included in the assignment and that the balance on the loan as of the 20th April, 2015 was €1,305,921.

iv. Schedule 1 to the purchase deed dated 29th November, 2014, includes two entries relating to the defendants, albeit there is only one loan. The first refers to the customer number assigned to the loan facility sanctioned by BOSI on the 20th November, 2007 and subsequently adopted by Pentire. The entry referable to Mr. Davidson is also explained. The bank appointed him as receiver on foot of the mortgage on 3rd April, 2012. The sum appearing opposite his name, €19,719, represented legal costs incurred by him in proceedings which he brought against the defendants in 2012. These do not form part of the claim in these proceedings.

v. From Mr. O'Sullivan's examination of the books and records of BOS, Pepper and the plaintiff, the indebtedness of the defendants to the plaintiff as at the 16th June, 2017 was €1,643,714.90. Mr. O'Sullivan exhibits an updated statement of account.

vi. With regard to the validity of the transfer of the loan from BOS to CarVal and the subsequent transfer to the plaintiff, counsel for the plaintiff submits that this issue has already been decided by Costello J. in *Hinde v. Pentire Property Finance DAC & Kavanagh* [2018] IEHC 520, and therefore the plaintiff cannot succeed on this point. Counsel also relies on *Leahy v. Bank of Scotland plc and ors* [2019] IEHC 203, a decision of Simons J. who held that the argument based on the alleged preclusion of a sale to an unregulated entity was misconceived. Counsel therefore submits that there is no credible basis for suggesting that the Act of 2015 applies and, as was acknowledged by the defendants in the facility letter, they are not consumers.

vii. The plaintiff does not require a licence under the Act of 1971 because, as confirmed by Mr. O'Sullivan in evidence, it does not accept deposits and therefore does not engage in *banking business* within the meaning of s. 2 of that Act.

viii. With regard to the alleged lack of clarity regarding the amount claimed and the calculation of interest, Mr. Gorman B.L. submits that if an issue is taken as to whether capital sums were paid, it was a simple matter for the defendants to depose on affidavit to any sums which they claim they had paid/repaid in respect of the loan. The defendants have failed to take this step because to do so may

constitute an acknowledgement of the debt and thereby undermine the other defences upon which they purport to rely. He submits, therefore, that any arguments on this point, amount to no more than bare assertions which ought not to be taken into consideration in the determination of whether the defendants have an arguable ground or grounds of defence.

ix. The plaintiff has no difficulty with a contention that, in accordance with the requirements of good accounting and banking practice, the value of a loan book might be written down by 40%. It is submitted that it does not follow that any particular loan or that the entirety of certain loans, amounting to 40% of those on the books were written off. The plaintiff maintains that this is a mere assertion on the part of the defendant for which no evidence has been advanced.

Discussion

Matters not in dispute

21. There is no dispute that the defendants signed the loan facility letter dated 27th November, 2007. It is not in dispute that a capital sum of €925,000 was advanced to the defendants by BOSI on foot of that loan facility. No evidence has been placed before the court by either party that the defendants made any repayments. There is thus no evidence to dispute the plaintiff's contention that the defendants are in default. Nor is there evidence of any transaction, exchange or communication between BOSI and the defendants from the date of the execution of the mortgage on 28th February, 2008 to the date of the cross border merger.

22. I am satisfied therefore that the plaintiff has established that BOSI advanced €925,000 to the defendants and that this sum was received by them. Whether it necessarily follows that this equates with the capital sum now claimed in this application for summary judgment shall be addressed below.

The cross-border merger and the transfer of the loan

23. As to the defence that there is not now before the court evidence of the amount of the loan outstanding at 23:59 on the 31st December, 2010, immediately prior to the merger between BOSI and BOS, the plaintiff submits that the clear undisputed evidence is that a loan was taken out by the defendants two years prior to the cross-border merger and there is no evidence that this loan, or any part thereof, was transferred or assigned to a different entity prior to the merger.

24. The decision of the Supreme Court in *Kavanagh v. McLaughlin* [2015] 3 I.R. 555 is pertinent to this issue. There, the defendants argued that the cross-border merger did not transfer the benefit of any security held by BOSI to BOS, a claim which was rejected both in the High Court and on appeal to the Supreme Court. Clarke J. (as he then was) stated at p. 574:-

> *"It must be recalled that one of the consequences of such a merger is that one or more of the entities involved are likely to cease to exist. Where, as here, the entity which ceases to exist (being BOSI) is the one in whose favour security is held, then*

it follows that, if the argument put forward on behalf of the McLaughlins is correct, that security can no longer be held by BOSI (because it has ceased to exist) nor by BOS (because it was not transferred). Thus it must, in substance, be accepted that a consequence of the McLaughlins' argument is that the involvement of a company holding security in a cross-border merger may lead to that security simply ceasing to have effect by virtue of it being neither capable of being owned by an entity which has ceased to exist, nor being transferred to another entity which is to continue in existence in the aftermath of the relevant merger. It cannot be doubted that such a result would have a consequence which was the direct opposite of the intention of the Directive (being to facilitate cross-border mergers). It would mean, in effect, that, despite there being no intention to be found to that effect in the wording of the Directive, the cross-border merger regime would have little or no application in the case of secured lenders."

25. It seems to me that this applies equally to the ground of defence under consideration. I am satisfied on the evidence adduced that the defendants' loan was transferred from BOSI to BOS by virtue of the cross-border merger arrangement and that any contention to the contrary by the defendants amounts to no more than a mere assertion.

Partial transfer of the loan

26. No evidence has been advanced by the defendants beyond the assertion that their loan was reduced by 40% or that it was in a cohort of 40% of loans which did not transfer. This was canvassed in the cross-examination of Mr. O'Sullivan by Mr. Lyons. Mr. O'Sullivan accepts that he had not seen any document dealing with the position immediately prior to the merger, although he was satisfied from the documentation which he had reviewed, that there was no evidence of a write down of 40% of the defendants' loan. He examined the books of BOS as part of files transferred from BOS to Pentire at the time of the sale as they related to this particular loan transaction. He agreed that he could not say from that examination whether, prior to the merger, there had been a write down of the value of the defendant's loan by 40% by BOSI. He accepts that he did not examine the BOS' books in their entirety but stated that the defendant's loan was included in the purchase deed. From his examination of the books he was satisfied that the defendant's loan transferred from BOS to Pentire and he had not seen any document to contradict the entitlement of BOS to transfer this loan to Pentire.

27. In my view, any defence advanced on this point is at best speculative and runs contrary to other evidence before the court regarding the transfer of the loan, including the contents of the schedule to the purchase deed and the statements of account. The suggested defence requires the court to assume that the entirety of this loan simply vanished as part of a group of loans amounting to 40% of the loans transferred. This again requires the court to speculate and I am satisfied that this too is a mere assertion. Nothing of this nature has emerged from Mr. O'Sullivan's evidence, nor has evidence been advanced which might be said to form the basis for such contention and nor has it been shown that credible evidence might become available in support. No evidence has been advanced of any agreement to this effect, or, indeed, that any consideration was

forthcoming from the defendants for such write down/reduction in their liability. Even if it is the case that a 40% write down of loans was effected by BOSI or BOS, it does not appear to me that in the circumstances this can, as a matter of law and principle, affect the plaintiff's entitlement to seek recovery of the loan.

28. Insofar as an argument arises in respect of the reference to Lloyd's in the Pepper statement to Mr. Corrigan, while it may be said to introduce an unnecessary element of confusion, in my view it does not give rise to an arguable ground of defence. It is clear that in the statement issued to the second defendant, no reference is made to Lloyd's. Further, in opening balance in Pepper's statement of account is €1,387,819.76. This also showed closing balance as at of the 4th July, 2016 was €1,532,273.67. The opening balance in this statement matches the closing balance on the BOS statement.

Financial Services and Markets Act 2000 (U.K.) and the absence of evidence that CarVal was authorised or licensed thereunder

29. In *Hinde*, the plaintiff sought a declaration that the purported transfer of the BOS loan to CarVal on the 29th November, 2014 was invalid, void and of no legal effect. The plaintiff also sought a declaration that the transfer of the BOS loan to Pentire on the 20th April, 2015 was invalid. The defendant brought an application pursuant to O. 19, r. 28 to strike out the plaintiff's proceedings on the grounds that they did not disclose a cause of action and/or pursuant to the inherent jurisdiction of the court on the grounds that they were frivolous and vexatious and bound to fail. In a replying affidavit, the plaintiff had sworn:-

> *"I say and am advised that the transfer of the loan as between Bank of Scotland Plc ('BOS UK') and CarVal Investors UK Ltd is unenforceable against me according to s. 26 of the Financial Services Market Act, 2000, a UK Act which governs whether or not UK entities are required to be licensed and setting out the consequences for any entity not so licensed, being the unenforceability of the said transfer. I say that the loan connected to my property is a regulated asset, as defined by the said Act. I say and am advised that the strictures of the UK's banking regulations apply in the circumstances given that both companies involved are governed by UK financial regulatory law.'"*

30. Costello J. observed that the plaintiff did not aver to the source of the advice which formed the very basis of the case. It seems no advice had been obtained, or evidence adduced from, a suitably qualified expert in the relevant area of English law. Mr. Gorman B.L. directed this court's attention to para. 31 of the judgment which, he submits, is equally applicable to the facts which pertain in this case. Costello J. stated:-

> *"It is apparent from the extracts from her statement of claim which I have quoted above that in order to succeed in her claim she must establish certain propositions of English law as matters of fact and she must establish the legal effect of those propositions on the Purchase Deed, the Deed of Novation and the sale of the loans including the Loan, all of which are governed by Irish law. At the trial of the action an expert on foreign law, in this case English banking law, must prove as a fact that the plaintiff's statement of English law is the correct statement of the law, and not*

merely an arguable proposition and must state as a matter of fact that the effect of section 26 of the Act of 2000 is as she asserts."

31. Also, having considered the relevant provision of the U.K. Act, Costello J. stated that under s. 26 of that Act, agreements made by unauthorised persons were unenforceable against "*the other party*" and not against "*another party"* to the agreement. She stated that it was clear from the plaintiff's claim that there were two propositions which were essential for her to establish, one of which was she had to bring herself within the scope of the provision of s. 26(1) of the U.K. Act, and in order to do this she must show that as a matter of English law she came within the expression "*the other party*" to the agreement. A further matter which had to be proved by the plaintiff, on the assumption that she had established that the purchase deed was unenforceable against her because CarVal was an unauthorised person within the meaning of the U.K. Act, was to establish as a matter of English law that novation of the purchase deed was not permissible as a means of avoiding the provisions of s. 26 with the result that the purchase deed as novated to Pentire was also unenforceable, as a matter of English law, against the plaintiff.

32. Costello J. came to the conclusion that the plaintiff had advanced no credible basis for asserting or arguing that she is "*the other party*" to the purchase deed, given that the loan was one of many loans CarVal agreed to purchase from BOS. She also concluded that the plaintiff had advanced no credible basis to show that s. 26 of the U.K. Act had any application to the deed of novation. In the circumstances, it was found that the plaintiff's case was based upon mere assertion for which no evidence, or no credible evidence for believing that there could be any evidence, was advanced in support of the alleged propositions of English law. Of the deed of novation, which is governed by Irish law, Costello J. stated:-

"The onus is on her to put forward a credible basis for suggesting that it may be possible at trial to establish the facts which are asserted, and which are necessary for succeeding in the proceedings. She has not done so. Based on the matters placed before this court, I conclude that this is one of those cases, which are few in number, where it is appropriate to exercise the inherent jurisdiction of the court to dismiss a claim as being bound to fail."

The proceedings were therefore dismissed.

33. In *Leahy* the defendants also brought an application to strike out proceedings on the grounds that they were frivolous and vexatious and/or disclosed no reasonable cause of action. The essence of the claim made by the plaintiff was that BOS had acted unlawfully in transferring the plaintiffs' loans to Pentire on 20th April, 2015. This is the same transaction which is at the heart of the arguments advanced by the defendants in this case. Noting the plaintiff's argument that the conditions of the loan agreement between BOSI and the plaintiff precluded the bank from transferring the loans to an unregulated entity such as Pentire, Simons J. held that:-

"… the conditions of the loan agreements entered into between the plaintiffs and Bank of Scotland's predecessor in title, Bank of Scotland (Ireland) Ltd, expressly provided for the transfer of "the finance agreements" (as defined); moreover, the plaintiffs had not suffered any loss or prejudice as a result of the transfer of their loans in that the plaintiffs continued to enjoy precisely the same rights as prior to the transfer."

34. He summarised the position at para. 3:-

"…The legislative amendments introduced under the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 have remedied what was perceived to be a lacuna under the previous regime whereby there was no requirement for an unregulated entity to comply with certain provisions of the Central Bank legislation. In brief, the effect of the amendments introduced under the 2015 Act is that an entity which holds the legal title to credit granted under a credit agreement (as defined) must either (i) arrange to have credit servicing undertaken by an authorised credit servicing firm, or (ii) obtain authorisation itself. The amended legislation did not have the effect of retrospectively invalidating transfers to unregulated entities."

35. With regard to the contention that the loan could not be transferred to Pentire because it was not a regulated entity, referring to the Act of 2015, Simons J. observed at para. 48 that:-

"… the legislation implicitly recognises that a loan may be lawfully transferred to an unregulated entity. The Oireachtas has sought to protect consumers by ensuring that 'credit servicing' activities are only ever carried out by a regulated entity. 'Credit servicing' is broadly defined and includes inter alia communicating with the borrower in relation to matters such as the taking of any necessary steps for the purposes of collecting or recovering payments due under the credit agreement from the borrower. The definition of 'credit servicing' excludes the taking of steps by a person who holds the legal title to credit for the purposes of enforcing a credit agreement."

36. At para. 58 of *Leahy*, Simons J concluded:-

"In conclusion, there was no statutory restriction in force which precluded Bank of Scotland from transferring the Plaintiffs" loan agreements to Pentire on 20 April 2015. The legal position in this regard has not been changed by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015. The 2015 Act did not introduce a statutory preclusion on a regulated entity transferring the ownership of loans to an unregulated entity. Still less did the 2015 Act have the effect of retrospectively invalidating transfers to unregulated entities which had already taken place prior to 8 July 2015."

37. The plaintiffs in *Leahy* had also claimed damages. A receiver had been appointed post the enactment of the Act of 2015 and Simons J. concluded that this meant that the plaintiffs (whose claim was dismissed) had suffered no loss.

38. Counsel submits insofar as it is contended a defence arises by virtue of the fact that the loan was a consumer loan, even if that position is correct as a matter of fact, then the decision of Simons J. is applicable and that there was no impediment on the plaintiff receiving or holding the loan. I agree and see no reason to differ from the reasoning in *Leahy* as applies to the question of the suggested invalidation of the transfer.

39. It seems to me that the reasoning in *Hinde* and *Leahy* and the decisions referred to therein provide a complete answer to the defendants' allegations that the transfer is invalid because it was to an allegedly unauthorised person

40. This conclusion is reinforced by the decision of the Supreme Court in *Launceston Property Finance Limited v. Burke* [2017] 2 I.R. 798 which was also referred to by Simons J. in Leahy. Launceston had appointed Pepper, a regulated entity, to service the loan. It was held that the transfer to Launceston was not in any way vitiated. McKechnie J. stated at para. 20:-

> *"[20] The Oireachtas, in enacting the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 ("the 2015 Act"), amended, inter alia, Part V of the 1997 Act. It did so in order to ensure that borrowers who had a "regulated loan" which was acquired by an "unregulated body" would continue to have the protection of various consumer codes and statutory provisions. The effect of the amendment so created, as applying to this case, is that Launceston Property, as an unregulated body, must use an agent or an intermediary which is regulated by the Central Bank. It is argued on behalf of the defendants that no such licensed intermediary has been so appointed and, accordingly, that the underlying security relative to their loan cannot be enforced in these proceedings.*
>
> *[21] It is clear from, inter alia, the provisions of the 2015 Act that Launceston Property is not itself obliged to be "authorised" by the Central Bank of Ireland in order to legally operate within this State, in the sense of defending this appeal. It can do so even if unregulated, subject only to the requirement as mentioned. To facilitate this, there is a system of registration in place which is governed by Part V of the 1997 Act, as amended. The question, therefore, is whether such an agent has been appointed, for if it has, that will sufficiently support the status of Launceston Property to continue with these proceedings."*

41. The Act of 2015 has been modified by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 ("*the Act of 2018")* which amends Part V of the Central Bank Act, 1997 Act. While the court was not addressed in any great detail on the effect, if any, of this amendment on the loan or the proceedings, it is not suggested that this in any way detracts from, or in some way affects, the reasoning in the above decisions. While the Act of 2018 amends the statutory framework by providing that the owner of the loan must

now also be regulated, no argument has been advanced, nor has authority been opened, to suggest that the Act of 2018 operates retrospectively to invalidate transfers, such as transfers which took place before the Act of 2018 came into operation. No reason has been advanced to suggest that the reasoning of Simons J. in *Leahy* should be distinguished on any such basis.

The defendants are consumers and protected by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015

42. Counsel for the plaintiff further submits that there is no credible basis for suggesting that the Act of 2015 applies because the defendants acknowledged, in the facility letter, that they are not consumers. Further, counsel directs the court's attention to the fact that the family home is excluded from the security by way of separate folio and clearly divisible from the property charged. An examination of the facility letter bears this out.

43. The signed acceptance of the facility at p. 7 contains an acknowledgment by the defendants that *"for the purposes of the Consumer Credit Act 1995, in availing of the facility and drawing down the loan we are acting within our business, trade and profession."*

44. Therefore, in so far as this argument is concerned, I am satisfied that the defendants are not consumers but, in view of the Court's earlier finding, it is not necessary to determine whether this too would provide a complete answer to a defence based on the application of the Acts of 2015 (and 2018).

The Plaintiff is not licenced pursuant to the Central Bank Act 1971

45. Section 2 of the Act of 1971 describes "*banking business"* as meaning business which consists of:-

> *"(a) the business of accepting deposits payable on demand or on notice or at a fixed or determinable future date, but excluding deposits with a trader from persons employed by him in his trading business or from his customers in the normal course of his trading business and deposits or instalments in respect of the letting or selling of goods under a hire-purchase agreement or a credit-sale agreement, or*
>
> *(b) the business aforesaid and any other business normally carried on by a bank."*

46. Having considered the evidence, including the oral evidence of Mr. O'Sullivan and the statements placed before the court, I am satisfied that the plaintiff does not accept deposits, is therefore not engaged in banking business for the purposes of the Act of 1971 and does not require a licence under the Act of 1971.

The adjournment of proceedings pending the outcome of the appeal in Hinde

47. Mr. Lyons referred to an aspect of *Hinde* in the context of the application to adjourn this application pending the outcome of the appeal in Hinde.

48. Following the conclusion of the hearing of the case, but in advance of delivering judgment, the plaintiff in *Hinde* applied *ex parte* for leave to adduce further evidence in support of a factual issue, regarding the relationship between CarVal and BOS. He was

given liberty to bring a motion on notice to the defendant. In the events which transpired, the decision was delivered in advance of the hearing of the motion. Costello J. subsequently considered and refused the application to admit the further evidence. She concluded that, even if admitted, such evidence could not have had an important influence on the result. She observed at para. 16 of her judgment*, Hinde v. Pentire Property Finance DAC* [2018] IEHC 575 delivered on 19th October, 2018:-

> *"They do not relate to the case as pleaded by the plaintiff. They do not relate to the case as argued by the plaintiff in her written submission. They related solely to an assertion advanced by her counsel on his feet which was unsupported by any evidence: that CarVal and Pentire were a single economic unit or that Pentire was the agent of CarVal and that this in turn had a relevance to the alleged effect of FSMA upon the assignment of the plaintiff's loan to Pentire. I should also state that my judgment did not proceed on the basis of an assumption either as to the relationship or the absence of a relationship between CarVal and Pentire."*

49. The defendants contend that a potential defence arises for the above discussion. Again, in my view this does not venture beyond a mere assertion based on something counsel said in another case.

50. In the circumstances, having considered Mr. Lyon's application for an adjournment, I am not satisfied that it has been established that the court should suspend judgment or adjourn the plaintiff's application, pending the outcome of the decision of the Court of Appeal.

The amount and breakdown of the claim

51. The plaintiff accepts that the claim in respect of interest ought to be transferred to plenary hearing. On this application, therefore, the court is concerned with the claim for the capital sum. Mr. Lyons submits that the plaintiff has adduced no proper evidence of the capital sum of €925,000 in respect of which it seeks summary judgment.

52. As previously noted, the court does not have evidence on this application of any transactions, or as to what may have transpired, between 28th February, 2008, being the date of the execution of the mortgage, and the date upon which the interest of BOSI was vested in BOS by virtue of the cross-border merger. Counsel for the plaintiff accepts this.

53. This is an application for summary judgment. As was reiterated by Clarke C.J. in *Bank of Ireland v. O'Malley* [2019] IESC 84, the obligation on a defendant to establish an arguable defence only arises if the plaintiff has first placed before the court sufficient evidence to establish *prima facie* that the debt alleged is due. If not, then the matter cannot proceed to summary judgment. If yes, then the court must consider whether, in accordance with established jurisprudence, the defendant has advanced an arguable ground or grounds of defence. The Court also reiterated that it was well settled that the general obligation to provide sufficient particulars in a summary claim has the objective of ensuring that litigants properly know the case which they have to meet, to ensure, as per Cockburn C.J. in *Walker v. Hicks* (1877) 3 Q.B.D. 8, that a defendant has sufficient

particulars to enable him/her to satisfy his/her mind whether he/she ought to pay or resist payment. In *Walker*, Cockburn C.J. stated at p. 9:-

> *"I think a party, who is placed in the predicament of being liable to have a judgment signed against him summarily, is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist … It seems to me that a party is entitled, before summary proceedings for judgment are taken against him, to know specifically what is the claim against him."*

54. It has been suggested that the case should proceed on the basis that the claim for interest be transferred to plenary hearing and that judgment be given for the capital sum advanced. The defendants maintain that no evidence has been adduced as to the proper capital sum allegedly due and that the sum claimed of €925,000, albeit referred to in the facility letter, takes no account of any principal or capital repayments which may have been made by the defendants since the drawdown of the loan facilities; and there is insufficient evidence as to what, if any sums are due for principal or interest. Counsel for the plaintiff submits that it was open to the defendants to place before the court records of payments which they may have made, but whether, as suggested, this may have been for tactical reasons, does not it seem to me to alter the onus of proof on the plaintiff to satisfy the court, on a *prima facie* basis, of the amount claimed in the proceedings. It ought also to be recorded that no issue has been raised by the defendants regarding compliance with the requirements of O. 4, r. 4 of the Rules of the Superior Courts, as discussed in *O'Malley.*

55. It is inherent in the nature of summary judgment applications, that the amount in respect of which judgment is sought to be entered should be clear and that the assessment of the amounts due for interest and capital repayments, must also be clear.

56. It is also evident that the court has jurisdiction to enter judgment for part of a sum claimed and to transfer the remainder to plenary hearing. This was confirmed in *O'Malley,* where Clarke C.J. stated at para. 6.10:-

> *"I would, for clarity, emphasise that somewhat different considerations apply in circumstances where there is prima facie evidence of the precise amount said to be due but where the defendant puts forward an arguable case which could only go so far as providing a defence to a portion of the claim. In such circumstances, it is common practice for a court to award judgment for a lesser sum than that claimed, reflecting the outer extent of any possible defence. The analysis which leads to such a result does not depend on any failure of the plaintiff to have put forward prima facie evidence of an entitlement to a specific sum but rather stems from the possibility that a defence might successfully be mounted, although the extent of that defence may not be absolutely clear."*

57. The Supreme Court was careful to note that the judgment did not affect the entitlement of the court to enter judgment for a sum and to transfer part of a claim to plenary hearing.

58. I do not believe that anything that may have been said in *O'Malley* necessarily detracts from the general jurisdiction of the court under O. 37, r. 7 to attempt to confine the issues at plenary hearing and thereby save time and costs.

59. It seems to me that it is open to the court in accordance with O. 37, r. 7 of the Rules of the Superior Courts to transfer certain issues to plenary hearing. Order 37. R.7 provides:-

> *"7. Upon the hearing of any such motion by the Court, the Court may give judgment for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just."* (emphasis added)

60. In *National Asset Loan Management Limited v. Garrett Kelleher* [2016] IECA 118, Finlay Geoghegan J. rejected the assertion that that the High Court does not have jurisdiction to limit the defences which may be raised by a defendant, once the court has made an order remitting the entire of the claim to plenary hearing. At para. 19 of her judgment she stated:-

> "*Having reconsidered the matter I remain of the view that where on an application for summary judgment the court decides that the defendant has raised an arguable defence to the entire claim such that the court decides to adjourn the full claim for plenary hearing the court may also limit the defences which may be pleaded to those which have met the threshold identified by the Supreme Court in Aer Rianta v. Ryanair and the judgments referred to therein. This conclusion stems from the nature of summary proceedings and the provisions of O. 37, of the Rules of the Superior Courts."* (emphasis added)

61. In answer to a question put to him in cross examination on the breakdown of the figures of the amounts alleged to be due, Mr. O'Sullivan stated that he had not given a breakdown of the figure, which as of the 5th May, 2016, was €1,513,859. He stated that it included the original principal that was drawn down, any principal repaid over the course of the loan, and interest charged since the loan was drawn down.

62. Having considered the above and the evidence in its entirety, in the absence of evidence of payments or lack thereof, the court cannot be satisfied that the amount in respect of which summary judgment is claimed of €925,000 is principal and only principal and that it constitutes the principal sum advanced.

63. It is accepted that the claim in respect of interest should be transferred to plenary hearing, and it seems to me appropriate that the entire amount claimed, in respect of principal and interest, be transferred to plenary hearing.

Conclusion

64. The proceedings shall be transferred to plenary hearing. In the court's view no arguable grounds of defence have been advanced other than on the issue of quantum, the breakdown between capital and interest and as to the liability of the defendant for interest.