

THE HIGH COURT

[2021] IEHC 615

RECORD NO 2018/1112 S

BETWEEN:

US MAINSTREAM RENEWABLE POWER INC

PLAINTIFF

AND

JAMES MCGINNIS

DEFENDANT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 3 September 2021

Summary

1. This is an application for summary judgment by the plaintiff who is seeking recovery of the sum of \$114,784. In short, the money was loaned by the plaintiff to the defendant when the defendant was an employee of the plaintiff in 2017. The employment of the defendant was terminated in 2018 and repayment of the monies was sought in June 2018 as per the loan agreement. It is common case that there has been no repayment of the loan amount.
2. In his defence, the defendant relies upon the Consumer Credit Act 1995 as amended (the "Act") and says that, as he was a consumer and the plaintiff a credit body, the terms of the Act apply and that the loan is irrecoverable for failure to comply with the mandatory conditions for a loan such as this.
3. The defendant further asserts that in fact the plaintiff owes him money due to its failure to (a) pay bonuses that he was entitled to and (b) allow him to exercise certain share options. In the circumstances, the defendant argues that his obligation to repay the monies has been discharged as the money alleged to be owing fully extinguishes the plaintiff's claim. Accordingly, he argues that he has a full defence to the claim.
4. Alternatively, he submits that if the sum is not treated as discharged on the basis that it cannot be established that the bonus was in fact allocated to him, then he has an equitable set off as the money owing to him would extinguish the claim and that he has met the requirement of establishing a defence to the proceedings as per the approach identified in the decision in *Moohan v. S & R Motors (Donegal) Ltd.* [2008] 3 I.R. 650 and in *NAMA v. Kelleher* [2016] IECA 118.
5. Finally, in respect of the question as to whether or not he has a counterclaim, counsel for the defendant very fairly admits that, insofar as a point is made about an entitlement to share options in the affidavits sworn, that entitlement was granted not by the plaintiff but by a different company and that therefore it would be difficult to argue that the defendant has a counterclaim such that any judgment for the plaintiff should be stayed pending a decision on the counterclaim.
6. Having heard oral argument and considered the affidavit evidence before me, for the reasons I identify below, I am satisfied that, applying the test in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607, it is probable that the defendant has a *bona fide* defence

in relation to the Consumer Credit Act argument. Accordingly, I will give him leave to defend the proceedings.

7. Because he has been given leave to defend, I do not need to consider whether there is a *prima facie* case for set off in relation to the monies allegedly owing to him in respect of the unpaid bonus. Contrary to the submissions of counsel for the defendant, the question of whether monies alleged to be separately owing can extinguish the claim the subject of the application could not in this case provide a defence, given that no finding has been made that monies are separately owing. Rather, at its height, this claim must be identified in the defence as a counter claim (if the defendant chooses to take this approach) and determined in that context.

The proceedings

8. The application was brought by way of summary summons of 4 September 2018. The plaintiff is a US corporation. The defendant resides in New York. The reason that the proceedings are being brought in Ireland is because the loan agreement at issue here includes as a party an Irish company as well as the plaintiff and provides that the agreement shall be governed by Irish law. That agreement contains an exclusive jurisdiction clause in favour of the Irish courts.
9. On 19 December 2018, the solicitors for the plaintiff brought a motion seeking liberty to enter final judgment in the amount of \$114,784 or the euro equivalent. That motion was grounded on an affidavit of Mr. Kinsella sworn on 18 December 2018 where he avers that he is a director of the plaintiff company and the chief executive officer of the group of companies to which the plaintiff belongs.

Relevant Facts

10. On 10 October 2016, the defendant accepted a position as chief executive of Mainstream Capital, being the investment and financing arm of the group of companies to which the plaintiff belongs, while entering a contract of employment with the plaintiff.
11. That employment contract is exhibited. It refers to the defendant being offered the position of CEO of Mainstream Capital. Mainstream Capital is not described. Nor is the nature of the business carried out by the plaintiff described. However, under the heading "performance bonus", which sets out certain objectives to be achieved by the defendant relevant to the payment of a bonus, some information may be gleaned about the nature of the work to be done by the defendant. For example, the defendant is to lead the equity fundraising process to raise \$100 million –\$300 million at Hold Co. The contract notes that there is a target bonus of \$200,000 up to a maximum bonus of \$600,000, \$100,000 of which will be paid as a signing bonus but will be considered as part of the overall bonus awarded.
12. In his affidavit, Mr. Kinsella notes that in June 2017 the defendant sought a loan from the plaintiff in the sum of \$100,000. He refers to a loan agreement of 9 June 2017 whereby the plaintiff, the defendant and the plaintiff's parent company, Mainstream Renewable Power Ltd. (being an Irish company) entered an agreement, whereby the plaintiff agreed to loan the defendant the sum of \$100,000. It was an express term of the agreement that

the loan was subject to an annual interest rate of 13.5% compounded semi-annually. On 9 June 2017, the plaintiff paid to the order of the defendant by way of loan the sum of \$100,000.

13. The loan agreement is exhibited. It refers to the defendant having requested a loan from the US company (being the plaintiff) “*for personal reasons*”. No other information is identified as to the nature or purpose of the loan.
14. The defendant filed a replying affidavit on 13 February 2019 wherein he claims that the loan agreement is not enforceable by reason of the Act and that in fact, rather than he being indebted to the plaintiff, the plaintiff is in fact indebted to him in the sum of at least \$300,000 in respect of bonus (allowing credit for the signing on bonus of \$100,000). He avers that the loan agreement is intrinsically connected with his contract of employment with the plaintiff. He refers to his entitlement to a target bonus of €200,000 on achieving specified objectives.
15. At paragraph 9 he says that on 9 June 2017, he received from the plaintiff a loan of €100,000 in circumstances where he “*had personal needs for funds and that the payment of my 2016 bonus had been deferred*”. He avers that the sum of €100,000 represented the balance of the target bonus of €200,000, having made allowance for his signing on bonus of €100,000. He asserts that the principal form of repayment of the loan was to be from payment of the 2016 and 2017 bonuses.
16. Mr Kinsella swore a replying affidavit on 3 May 2019. His averments in relation to the purpose of the loan bear careful consideration. At paragraph 5 onwards he avers as follows:

The plaintiff rejects the defendant’s claim, set out at paragraph 4 of the replying affidavit, that the loan agreement is intrinsically connected with his contract of employment. The loan agreement is entirely separate from the defendant’s contract of employment. The question of providing a loan to the defendant was never discussed either prior to the defendant joining as CEO of Mainstream Capital, or upon his taking up that role.

The defendant’s contract of employment makes no provision for loans between the parties, nor does it contain any specific reference to the loan the subject of these proceedings. The defendant asked the plaintiff to loan him money when he developed financial difficulties over six months into his employment with the plaintiff. As a gesture of goodwill, the plaintiff made the loan available to the defendant on the terms set out in the loan agreement.

17. At paragraph 14 Mr. Kinsella again asserts that the loan of €100,000 is completely unrelated to the bonus structure agreed between the plaintiff and the defendant.
18. At paragraph 25 Mr. Kinsella avers that he believes and is advised that the plaintiff is not a creditor within the meaning of the Act and that the said Act does not apply to the loan

agreement. Without prejudice to that averment, he goes on to say that he believes that the five requirements of the Act, referred to in the defendant's affidavit, are broadly met by the loan agreement and that in accordance with s.38 of the Act, the absence of such statements as required in a cash loan agreement do not necessarily render the loan unenforceable where the omission was not deliberate and there is no prejudice

Analysis

19. It is apparent from a review of the above evidence that there is a substantial factual conflict between the parties as to the nature and purpose of the loan. The defendant argues that certain requirements imposed by the Act were not observed by the plaintiff and as such the loan is irrecoverable.
20. A core issue between the parties is whether the Act applies to the transaction. For the Act to apply, it is necessary that one of the parties to the loan is a consumer and the other is a creditor within the meaning of the Act.
21. A consumer is defined in the definitions section of the Act, at section 2, as being "*a natural person acting outside the person's business*". A creditor is defined as a person "*who grants credit under a credit agreement in course of his trade, business or profession and includes a group of such persons*".
22. It is also necessary that there exists a credit agreement. A credit agreement is defined as "*an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a cash loan or other similar financial accommodation.*"
23. The defendant, who argues he is a consumer, has averred that the loan was for personal reasons and that it was intrinsically connected with his contract of employment. If that latter evidence is accepted, it is difficult to see a court deciding he was acting outside his business in obtaining the loan. That would bring him outside the definition of a consumer and the Act would be inapplicable.
24. On the other hand, the plaintiff forcefully argues that the loan was entirely separate from the defendant's contract of employment. If that evidence is accepted, a court might decide that the defendant, in accepting the loan, was acting outside his business and comes within the definition of consumer, as there is no evidence put forward by either party that the defendant was engaged in any other business at the relevant time. Counsel for the plaintiff argues that there is no affidavit evidence put forward by the defendant showing that he is a consumer. However, the definition is phrased in the negative i.e. a consumer is "*a natural person acting outside the person's business*". Therefore, once it is established that a person is acting outside his or her business, the legislation adopts a default approach and treats them as a consumer.
25. Thus, what is required is an examination of whether the defendant was acting outside his business in seeking and obtaining a loan from the plaintiff. That is a matter upon which there is significant amount of conflicting evidence, as identified above.

26. Moreover, the defendant has relied upon the description of the loan in the loan agreement as being for personal reasons and this supports his argument that the loan was sought by him outside his business.
27. Given the conflicting affidavit evidence, as well as the necessity to construe the terms of the loan agreement in relation to the purpose of the loan, it is not possible for me to determine on this application for summary judgment whether the loan was unconnected with the defendant's employment contract and whether the defendant was therefore acting outside his business when seeking and obtaining same. A decision on this issue is a necessary constituent part of any ruling on the applicability of the Act.
28. It was argued by counsel for the plaintiff that, in any case, for the loan to come within the Act, the defendant must show that the plaintiff is a creditor, i.e. a person who grants credit under a credit agreement in course of his trade, business or profession, and that the defendant had not discharged the burden of proof in this respect.
29. There is very little information in this respect from either party. However, the contract of employment indicates that Mainstream Capital were in the business of raising equity. It is also averred that Mainstream Capital (of which the defendant was appointed chief executive) was the investment and financing arm of the group of companies to which the plaintiff belonged.
30. Notably, there is no averment from the plaintiff that it did not make the loan in the course of its trade or business in the replying affidavit of Mr. Kinsella. Rather he simply avers, at paragraph 25, that the plaintiff was not a creditor within the meaning of the Act without explaining why this is the case. This omission is significant given that Mr. Kinsella presumably knows the nature of the business that the plaintiff, the US company and Mainstream Capital are engaged in.
31. In those circumstances, contrary to the submission of counsel for the plaintiff, there is insufficient evidence adduced for me to conclude at this stage that the plaintiff could not be a creditor, particularly given the context in which the plaintiff and its associated companies operated.

Conclusion

32. In conclusion, the burden of proof rests on the defendant to show that there is a fair and reasonable probability that he has a real and *bona fide* defence, in this case that the debt is irrecoverable having regard to alleged non-compliance with the requirements of the Act. I am satisfied that there is a substantial conflict as to whether the plaintiff was a creditor and the defendant a consumer that cannot be resolved on affidavit and that same must be resolved as part of the consideration of whether the debt is irrecoverable. I am also satisfied that if the defendant establishes that the loan comes within the terms of the Act, there is a factual and legal question that requires to be determined as to whether there has been sufficient compliance with the Act and if not, whether any non-compliance renders the debt irrecoverable.

33. In the circumstances, I am satisfied the defendant has discharged the burden of identifying a probability that he has a real and *bona fide* defence in relation to the Act and I therefore give him liberty to defend the proceedings.
34. As noted above, this means I do not have to decide whether he is entitled to defend the proceedings on the basis of an equitable set off in respect of other claims he asserts. He now has an opportunity to identify same in his defence if he considers it appropriate to do so.