THE HIGH COURT

[2022] IEHC 565

[2019 No. 362 S]

BETWEEN

PADRAIG O'CONNELL AND PAT MCGAHERN

PLAINTIFFS

AND

JOHN MORIARTY

DEFENDANT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 30th day of June, 2022

Introduction

1. This is the plaintiffs' application for summary judgment against the defendant in the sum of €650,000. It is alleged that this sum is due and owing on foot of a loan agreement of 15 December 2006.

2. The defendant has submitted that the plaintiffs are not entitled to summary judgment and that the issue ought to be adjourned for a plenary hearing.

The loan agreement

3. The loan agreement is in the form of a letter sent by the plaintiffs to the defendant. The letter states the sum of €300,000 would be made available to the defendant on his signature. The loan was for the purpose of investing in property projects. Under the heading "repayment" the following is stated: -

"The Loan is to be repaid in its entirety by no later than the 1st day of September, 2007". Interest was to be payable at the rate of 40% per annum. Under the heading "Prague Option" it was stated: -

"Subject to our being satisfied that the current value of the Prague Option is not less than €600,000.00 we are agreeable that upon our obtaining a 50% interest in the said option the Loan and accrued interest shall be deemed to be repaid."

Under the heading "Project Kulinoto Ski Site" the following is stated: -

"In the event of us not proceeding with the Prague Option we will be entitled to repayment of the loan by delivery to us of Loan Participation Notes in the Project Kulinoto Ski Site in Bulgaria. ..."

4. The loan was not repaid and the plaintiffs sought recovery of the said amount by summary summons, issued 15 April 2019. Before the issue of the proceedings there was inter partes correspondence, which I now refer to.

Inter partes correspondence

5. By letter dated 3 November 2011 sent by the defendant to the plaintiffs the following is stated: -

"I refer to the loan of €300,000 from yourselves in late 2006 which is now overdue. The gross amount due is €650,000".

The letter then proceeded to set out that there are other unrelated proceedings, on the conclusion of which it was the defendant's intention *"to settle all of my liabilities".*

6. The next letter from the defendant to the first named plaintiff is dated 29 June 2012, which, *inter alia*, states: -

"As I have stated previously, once the above are settled and proceeds distributed, I will address all of my liabilities. It is my intention to pay all the outstanding monies due to you and Pat McGahern at that time. The quantum of costs and damages which we will be seeking exceeds all my liabilities."

Once again, in this letter there was reference to the unrelated proceedings.

7. By an email dated 14 September 2016 sent by the defendant to the first named plaintiff the following is stated: -

"The fact remains that I owe you and Pat the money, and that has not changed."

8. Having considered the contents of this correspondence, a number of matters are clear. Firstly, the defendant did receive the monies lent by the plaintiffs. Secondly, the defendant accepted that the outstanding amount was €650,000, the amount being claimed by summary judgment. Thirdly, and possibly most significantly, it was the stated intention of the defendant to repay the sum due, but that he would only be in funds to do so when other unrelated proceedings were finalised. Fourthly, there was no reference to the "Prague Option" or the "Project Kulinoto Ski Site".

Legal principles to be applied

9. The principles that a court should apply on an application such as this are well established. I refer to the following passage from the judgment of McKechnie J. in *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1, where he stated: -

"(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;

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

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10. Of particular relevance to this application is the following passage from the judgment of Clarke J. (as he then was) in *McGrath v. O'Driscoll* [2007] 1 I.LR.M. 203 at p. 210: -

"So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

Defences

11. The following are the defences raised by the defendant: -

(i) That the plaintiffs' claim is statute barred;

(ii) Whether on the proper construction of the loan agreement it was agreed that the mode of repayment was in the form of money;

(iii) Whether the plaintiffs are estopped from maintaining the within proceedings on the basis of delay; and

(iv) Whether the calculation of the sum claimed by the plaintiffs has been sufficiently particularised.

Consideration of defences

12. The plaintiffs submit that the claim is not statute barred and rely on the email dated 14 September 2016 as being "acknowledgement" for the purposes of the Statute of Limitations Act, 1957 (As Amended). I have set out the relevant portion of this email at para. 7 above.

13. Section 56 (1) of the Act of 1957 (As Amended) states: -

"56 (1) Where—

(*a*) any right of action has accrued to recover any debt, and

(*b*) the person liable therefore acknowledges the debt,

the right of action shall be deemed to have accrued on and not before the date of the acknowledgment."

14. Section 58 provides: -

"58.—(1) Every acknowledgment shall be in writing and signed by the person making the acknowledgment.

(2) An acknowledgment under section 51, 52, 53, 54, 55, 56, or 57 of this Act—

(*a*) may be made by the agent of the person by whom it is required to be made under whichever of those sections is applicable, and

(*b*) shall be made to the person or the agent of the person whose title, right, equity of redemption or claim (as the case may be) is being acknowledged."

15. The plaintiffs relied on the following passages from Canny, Limitation of Actions, 2nd Ed., 2016: -

"It is settled law that no special form of words need be used and that the document relied on as constituting the acknowledgment may have been written without any intention on the acknowledger's part to make the acknowledgment."

> "The 1957 Act does not require that an acknowledgment identifies the amount of the debt and it may instead acknowledge a general indebtedness, provided that the amount of the debt can be ascertained by extraneous evidence. This occurred in *Dungate v. Dungate*, where a debtor sent a letter to his brother saying '[k]eep a check on totals and amounts I owe you and we will have an account now and then…Sorry, I cannot do you a cheque now.' It was held that this was a sufficient acknowledgment of indebtedness."

16. I am satisfied that the email of 14 September 2016 comes well within what is required for an "acknowledgment". It clearly states that the defendant owes the plaintiffs the money due. Though it is an email, it is "signed" by the defendant. I believe that I can safely reach this conclusion without the necessity of directing a plenary hearing.

17. The defendant maintains that, looking at the loan agreement, *"there is no basis for the Plaintiffs to allege that the sum advanced was to be repaid by way of a monetary payment"*. If the defendant was correct on this, it would follow that the plaintiffs would not be entitled to seek recovery of the sum sought as a liquidated amount. In my view, there is no substance to this defence. Indeed, referring to the correspondence that passed from the defendant to the plaintiffs, the defendant himself was of the view that a monetary amount, €650,000, was due and owing to the plaintiffs. On any construction of the loan agreement, the amount loaned was to be repaid by money, though there were other options for repayment which were clearly not exercised by the defendant.

18. The plaintiffs have been guilty of delay in issuing the proceedings seeking recovery of the amount. Were it not for the acknowledgment, these proceedings would be statute barred. However, such delay as there has been does not have legal consequences for the plaintiffs. At no stage has the defendant alleged that, as a result of the delay, any identifiable prejudice has arisen preventing him from defending these proceedings.

19. There has been no failure on the part of the plaintiffs to particularise the sum being sought. The loan agreement provided for interest to accrue at the rate of 40% per annum. However, in the grounding affidavit of the first named plaintiff it is stated that the plaintiffs agreed with the defendant to waive any additional interest on the loan *"such that the principal and interest due on foot of the loan agreement was €650,000.00"*. This sum was specifically referred by the defendant in his letter to the plaintiffs of 3 November 2011.

20. I am satisfied that the various defences raised by the defendant can be determined within this application for summary judgment. I do not see any basis for referring these proceedings to a plenary hearing, which would unnecessarily increase costs and lead to further delay. Such would amount to an injustice for the plaintiffs.

Conclusion

21. By reason of the foregoing, I am satisfied that the plaintiffs are entitled to judgment in the sum sought, being: €650,000. As for costs, my initial view would be that, as the plaintiffs have been entirely successful, they are entitled to the costs of these proceedings. Should the defendant wish to contest this, he may do so by lodging short written submissions no later than the 14th day of July, 2022. I will list this matter on the 21st day of July, 2022 for the purposes of making final orders.