# THE HIGH COURT

**[2023] IEHC 115**

**[Record No.: 2019/1069 S]**

**BETWEEN:**

**PEPPER FINANCE CORPORATION (IRELAND) DAC**

**PLAINTIFF**

**AND**

**JEREMY KENNY AND SHARON KENNY**

**DEFENDANTS**

**EX TEMPORE RULING delivered by Ms. Justice Siobhán Phelan on 17th day of February, 2023**

**INTRODUCTION**

**1.** This is my ruling on two motions, being (i) the Plaintiff's application for summary judgment against the two Defendants which comes before the Court by Notice of Motion dated the 5th of October, 2020, and (ii) the Defendants' separate motion dated the 20th of April, 2022 seeking to set aside an order of Ferriter J. made pursuant to Order 17, rule 4 of the Rules of the Superior Courts 1986 substituting the plaintiff in the title to the within proceedings. The applications proceeded on affidavit and I heard the two motions together.

**2.** Both Defendants were present in Court for the hearing of this application but did not have the benefit of legal representation. The First Named Defendant addressed me by way of legal submission.

**CLAIM & EVIDENCE OF PRIMA FACIE CASE**

**3.** The originating summary summons issued in the name of Tanager DAC in October, 2019 and was amended in July, 2020 pursuant to an Order of Murphy J. granting liberty

pursuant to Order 28, rule 1 of the Rules of the Superior Court, 1986 to meet the requirement for particulars identified by the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84; [2020] 2 I.L.R.M. 423 [hereinafter "*O'Malley*"]. The judgment in *O'Malley* had clarified the manner in which a claim in summary summons proceedings should be pleaded and particularised. Relevantly, the Supreme Court held that the special indorsement of claim should specify the manner in which the amount said to be due is calculated, and whether it includes surcharges and/or penalties as well as interest.

**4.** The claim for summary judgment is grounded on the Affidavit evidence of Mr. Karl Smith (director of Tanager DAC) and Mr. Seamus Dowling (Pepper Finance Corporation (Ireland) DAC. Three affidavits in reply have been sworn by the First Named Defendant.

**5.** In this case it is pleaded that a loan agreement was entered into by Bank of Scotland (Ireland) Limited [hereinafter "BOSI"] and the Defendants in November, 2005. The loan facility was made subject to the standard loan terms and conditions of the Bank of Scotland (Ireland). Notably, the Defendants have not disputed that a loan was entered into with the BOSI. The signed loan facility together with the standard terms and conditions of the BOSI are exhibits grounding the application for summary judgment.

**6.** It is pleaded in the Indorsement of Claim to the Summary Summons that all assets and liabilities of BOSI were transferred to Bank of Scotland PLC [hereinafter "BOS"] pursuant to the provisions of S.I. No. 157/2008 - European Communities (Cross-Border Mergers) Regulations 2008 and regulations introduced in both Ireland and the UK. This is a matter of law and is not disputed.

**7.** A deed of purchase dated the 5th of December, 2013 was entered into between BOS and Tanager Limited under which the interest in the loan facility with the Defendants was transferred. The Defendants were duly informed by letters dated the 28th of March, 2014 from BOS and 13th of April, 2014 from Tanager Limited. The Defendants do not dispute receiving this correspondence (which correspondence has been exhibited).

**8.** The Defendants never made any repayments of the agreed monthly instalment on the loan facility entered into. This is not disputed by the Defendants.

**9.** In consequence of the failure to make repayments, Tanager Limited wrote to declare an event of default in June, 2019 and demanded payment of sums due and owing in September, 2019. This correspondence is exhibited and the Defendants have not disputed receiving it. Despite this correspondence, it is not disputed that no payments were made following receipt of this correspondence.

**10.** Full particulars of the claim for interest are set out in the amended Summary Summons albeit that a typographical error refers to the maintenance of the loan being outsourced to Pepper Finance Corporation [hereinafter "Pepper Finance"] from 2008, when the correct date as confirmed on affidavit is 2018. Interest on arrears is charged daily and compounded to bill once a month on the basis of the applicable interest rate which is specified in statements of account issuing periodically. The total sum claimed as due and owing comprising of principal in the sum of €800,000 and interest in the sum of €370,359.94 amounts to €1,170,359.94. The Defendants do not dispute the calculation of interest nor deny receiving statements of account showing the interest claimed and the applicable interest rate.

**11.** In his first affidavit, which predated the Plaintiff's application for summary judgment, the First Defendant refers to a letter dated the 29th of January, 2017 in which the Defendants purported to cancel the contract the subject of the within proceedings pursuant to S.I. No. 224/1989 the European Communities (Cancellation of Contracts Negotiated away from Business Premises) Regulations, 1989 which it is claimed was applicable at the inception of the contract with the BOSI. Reference is also made to the pleaded claim that the serving of the maintenance of the loan was outsourced to Pepper Finance in 2008 on the basis that this was not possible in circumstances where Tanager Limited did not acquire the facility until 2014. It is contended that the statements and correspondence issuing from Tanager Limited was inadmissible as hearsay. The letter purporting to cancel the contract as referred to on affidavit was not exhibited.

**12.** In his affidavit sworn in October, 2020 to ground the application for summary judgment, Mr. Smith sets out his means of knowledge and confirms that the documents exhibited in support of the application are documents compiled in the ordinary course of business. Insofar as they predate December, 2013, he confirms that these were compiled by BOS, and documents predating December, 2010 were compiled by BOSI. He avers that these documents were provided to Tanager upon completion of the assignment. He confirms that

the documents exhibited have been reproduced either from the original documents where available or from scanned versions or computer records held by Tanager that had previously been held by BOSI and BOS and have been reproduced in the course of normal operations of Tanager's control and oversight of its loan books. Counsel for the Plaintiff advised me that Mr. Smith's averment in this regard was made for the purpose of grounding reliance on the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020, specifically Chapter 3 thereof relating to business records and other documents in civil proceedings.

**13.** Thereafter, Mr. Smith exhibits copies of documents directed to establishing a *prima facie* case on behalf of the Plaintiff including:

I. the original facility letter dated the 24th of November, 2005 and the acceptance of same in writing on or about the 2nd of December, 2005. It is noteworthy that the facility letter is addressed in writing to the Defendants' address and states that a copy of the formal loan offer is also issuing to their solicitor. They were advised to liaise with their solicitor with regard to completion of security documentation and signing the acceptance of the Formal Offer. The signed acceptance is witnessed on a date in December, 2005 by a solicitor with BCM Hanby Wallace before being returned to the BOSI;

II. the BOSI Home Loans Terms and Conditions, as expressly incorporated by the terms of the facility, including provision for events of default where there was a failure to pay sums due, declaration of default, demand for payment and securitisation;

III. copy S.I. No. 157/2008 providing for transfer of the facilities of the BOSI to the BOS on cross border merger;

IV. copy redacted deed of purchase dating to December, 2013 recording the transfer of the Defendants' facility to Tanager Limited;

V. correspondence advising the Defendants of the transfer in the form of "*goodbye*" and "*hello*" letters from BOS and Tanager Limited dating to March and April, 2014;

VI. copy Certificate of Reincorporation of Tanager Limited as Tanager DAC dating to September, 2016;

VII. copy correspondence declaring event of default in June, 2019 with demand for payment;

VIII. copy correspondence dated September, 2019, demanding payment in the sum of €1,170,359.94.

**14.** Mr. Smith explains on affidavit that the reference to maintenance of the account by Pepper Finance from 2008 was a typographical error in the amended summary summons which should have read '2018'. Furthermore, he sets out the breakdown of sums due and owing as between interest and principal and confirmed that statements of account were issued periodically showing the total interest due for each month and reflecting changes in interest rates. Mr. Smith further replies to the first Affidavit of the First Defendant confirming that the 1989 Regulations (S.I. No. 224 of 1989) have no application as the facility was not concluded in any of the ways envisaged by s. 3(1) of the Regulations. He points out that the facility letter was sent to the Defendants who had a chance to consider it.

**15.** In a replying affidavit sworn October, 2020, the First Named Defendant complains that the documents exhibited are not original documents and accordingly are not admissible in evidence. Averments relating to the records being compiled in the ordinary course of business by BOS and BOSI are objected to as hearsay and beyond the deponent's means of knowledge. He makes the point that the Plaintiff, Tanager DAC, was not entitled to rely on the Bankers Books Evidence Acts, 1879-1959 as the Plaintiff is not a bank. In this regard, reliance was placed on the decision of Collins J. in *Promontoria (Aran) Limited v. Burns* [2020] IECA 87. In that case Collins J. referred to the earlier decision of the Supreme Court in *Bank of Scotland PLC v. Beades* [2019] IESC 61 (at para. 28) where the underlying difficulty was identified as being the absence in this jurisdiction of any statutory provision providing for the admissibility of business records in civil proceedings.

**16.** In his replying affidavit the First Named Defendant repeated his reliance on the letter cancelling the debt sent in January, 2017 but without addressing Mr. Smith's averments in relation to the non-application of S.I. No. 224/1989 to the loan facility or advancing a factual basis for his contention that the regulations apply, instead quoting lengthy extracts from *Craig and de Burca, EU law, Texts, Cases and Materials (5th ed.)* in relation to EU law consumer protection.

**17.** A further affidavit sworn by Mr. Seamus Dowling was relied upon in seeking summary judgment. Mr. Dowling's affidavit is sworn for the purpose primarily of grounding an

application substituting Pepper Finance as Plaintiff following the sale of the Tanager DAC loan book which included the Defendants' facility to Pepper Finance and the transfer of the facility pursuant to Deed of Transfer dated the 25th of March, 2021. Mr. Dowling exhibits the transfer. In exhibiting the transfer Mr. Dowling recites the words:

> *"I beg to refer to a copy of the Transfer Deed and to the relevant extract from the Schedule to the Transfer Deed confirming the inclusion of the Deceased's loan account upon which, marked with the letters and number SSD1 I have signed my name prior to the swearing hereof."*

**18.** The Defendants take issue with this reference to the "*Deceased's*" loan account as misleading on the basis that it falsely conveys that the Defendants are deceased when they are in fact alive and well and contesting the application for summary judgment.

**19.** Mr. Dowling goes on in his affidavit to refer to correspondence issuing to the Defendants in respect of the transfer and exhibits a further "*goodbye*" and "*hello*" letter.

**20.** On foot of Mr. Dowling's affidavit, an order was duly made by Ferriter J. on the 22nd of November, 2021 substituting Pepper Finance as Plaintiff in lieu of Tanager DAC.

**21.** In a final affidavit sworn in April, 2022, the First Defendant asks the Court to set aside the Order substituting Pepper Finance on the basis that it had been falsely represented to Mr. Justice Ferriter that the Defendants were deceased.

**22.** It is noteworthy that the Defendants do not dispute that the sum claimed is due and owing but nonetheless reject the contention that they do not have a *bona fide* defence to the claim.

**APPLICATION TO SET-ASIDE ORDER OF FERRITER J.**

**23.** I am satisfied that the erroneous reference to the Defendants as deceased which occurred in the formula deployed to refer to an exhibit in the Affidavit of Seamus Dowling is in no way material. The word deceased was used just once in referring to the exhibit and it was otherwise clear from the affidavit of Mr. Dowling that the Defendants were alive. Recent

correspondence directed to the Defendants was exhibited. The inclusion in error of the word "*deceased*" in the manner in which it occurred could neither have misled the judge or affected the application for the order sought. The order substituting Pepper Finance as Plaintiff was properly grounded on the Affidavit of Mr. Dowling and no proper basis for setting aside or declaring that order void has been advanced.

**APPLICATION FOR SUMMARY JUDGMENT**

**24.** The Defendants resist the application for summary judgment and seek leave to defend the proceedings and transfer to plenary hearing. The three principal issues identified by the Defendants as providing the basis for an arguable defence discernible from the papers and oral submissions made to me might be loosely categorised as follows:

I. Admissibility of evidence;
II. The reference to the Defendants as "*deceased*" in grounding the application to substitute the Plaintiff;
III. The cancellation of the loan contract in reliance on European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989 (SI 224/1989) or Council Directive 85/577/EEC.

**LEGAL TEST FOR ENTRY OF SUMMARY JUDGMENT**

**25.** The principles applicable to an application for summary judgment are well established. The Court of Appeal ruled in *Bank of Ireland Mortgage Bank v. Daly* [2022] IECA 88 (Donnelly J.) that the role of a Court hearing a motion for summary judgment is to adjudicate in the first place on whether the Plaintiff had made a *prima facie* case for judgment and thereafter the Court may only grant the summary judgment where there is no arguable defence.

**26.** In *Bank of Ireland Mortgage Bank v. O'Malley* (referred to above), the Defendant contended insufficient particularity of the debt had been provided so as to discharge the initial burden which lies on it to establish its *prima facie* debt. In that case the Supreme Court allowed an appeal against summary judgment finding (Clarke CJ.) at para. 6.7:

*"But it does not seem to me to be too much to ask that a financial institution, availing of the benefit of a summary judgment procedure, should specify, both in the special indorsement of claim and in the evidence presented, at least some straightforward account of how the amount said to be due is calculated and whether it includes surcharges and/or penalties as well as interest. Indeed, if it really is as simple as counsel suggested, then I cannot see any reason why Bank of Ireland should not have set out those calculations. A person confronted with a claim or a court confronted with a question of whether there is prima facie evidence for that claim is entitled to at least enough detail to know the basis on which the sum claimed is calculated. The defendant is entitled to that information to decide whether there is any point in pursuing a defence or, indeed, potentially expending monies on procuring professional advice in that regard. The court is entitled to that information to enable it to form an assessment as to whether there is sufficient evidence to say that the debt has been established on a prima facie basis. Neither the defendant nor the court should be required to infer the methodology used, unless that methodology would be obvious to a reasonable person or is actually described in the relevant documentation placed before the court."*

**27.** In *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607, Hardiman J. observed that leave to defend should be granted unless it was very clear that the Defendant had no defence, not even one which could be described as arguable.

**28.** In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 McKechnie J. observed (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."*

**29.** Reviewing this caselaw, McGrath J. concluded in *AIB PLC v. Grove Oil (Roscrea) Limited* [2018] IEHC 793 as follows (para. 25):

> "*Thus leave to defend ought to be granted unless it is very clear that there is no defence. Leave 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."*

**30.** Accordingly, the question for me on this application is whether, firstly, the Plaintiff has made a *prima facie* case for judgment including by sufficiently pleading and particularising the claim and, if in the affirmative, if it is very clear that there is no defence. Something more than mere assertion is required, and the defence contended for should be supported by evidence. In this regard, I am entitled to look at the quality of the evidence advanced with regard to the defence identified.

**DISCUSSION AND DECISION**

**31.** I do not find the application for summary judgment defeated by reason of a lack of particularity in the pleadings in reliance on the decision in *Bank of Ireland v. O'Malley*. The contrast with the circumstances set out in the *O'Malley* case where a single sum was claimed without any breakdown as to how the sum was reached is obvious. In my view the documents provided are sufficiently clear to meet the requirements of particularity set out by Clarke C.J. in the *O'Malley* decision.

**32.** I do not propose to address further the reference to the Defendants as "*deceased*" in grounding the application to substitute the Plaintiff as this has been dealt with above. It does not provide a proper basis for resisting summary judgment. I propose to address the question of the admissibility of evidence before deciding whether the Plaintiff has made a *prima facie* case for judgment because whether a *prima facie* case has been made out on behalf of the Plaintiff is largely dependent on the answer to this question. I propose to address the remaining question of the applicability of the European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989 (SI 224/1989) or Council Directive 85/577/EEC in deciding whether an arguable defence has been identified which might warrant the refusal of the application and a remittal to plenary hearing.

*Admissibility of evidence*

**33.** I do not consider the Defendants objection to the admissibility of evidence as hearsay to be arguable. Chapter 3 of Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020 addresses the lacuna identified by O'Donnell J. in *Bank of Scotland PLC v. Beades* and Collins J. in *Promontoria (Aran) Limited v. Burns* [2020] IECA 87. Statutory provision now exists permitting business records in document form to be presumed admissible once statutory conditions are met. I am satisfied that the Affidavit evidence of Mr. Smith adequately grounds the application of s. 14 of the 2020 Act in this case in that it confirms compliance with the conditions set down in s. 14(1)(a), (b) and (c), s. 14(2) and s. 14(7).

**34.** It is my view that s. 14 of the 2020 Act provides a full answer to the complaint made as regards the admissibility of documents. I am further satisfied that s.18 of the 2020 Act addresses the Defendants' complaint regarding reliance on copy documents as opposed to originals, noting that the Defendants have not exhibited any correspondence seeking

production of documentation in accordance with their right to do so under the Rules of the Superior Court, 1986.

**35.** As I have concluded that the documents relied upon by the Plaintiff are admissible in evidence pursuant to the provisions of Chapter 3 of the 2020 Act, I am satisfied that the Plaintiff has established a *prima facie* case for judgment in terms of the pleadings. Accordingly, I must next consider whether any basis for an arguable defence has been identified. Just as I reject the objection to the admissibility of the Plaintiff's evidence for the purpose of establishing a *prima facie* case, I am satisfied for the same reasons that no arguable defence arises by reason of a failure of the Plaintiff to prove its case. The only remaining substantive issue identified on behalf of the Defendants as providing the basis for an arguable defence is their reliance on Council Directive 85/577/EEC and their purported exercise of rights under the Directive, as transposed, to cancel the contract by letter in 2017.

*The Cancellation of the loan contract in reliance on the Council Directive 85/577/EEC.*

**36.** The European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989 (SI 224/1989) transposes Council Directive 85/577/EEC. By virtue of Regulation 3, the Regulations apply where the pre-conditions for application are met, namely, when a trader attends at the consumer's home or place of work in the absence of a request for same from the consumer or where the consumer did not know that the supply of goods or services formed part of the trader's commercial or professional activities. No evidential basis has been laid by the Defendants for their asserted reliance on the 1989 Regulations. Although, the First Defendant advanced submissions in this regard, he has not stated on affidavit either that the loan facility was entered into at his home, unsolicited, or that he did not know that the loan was part of Bank of Scotland Ireland's commercial or professional activities.

**37.** While it is established that bare assertion does not suffice to find an arguable defence, in this case I am also further satisfied that such assertion, as advanced in submission, is entirely implausible. The loan facility was clearly offered by a bank and the offer was taken up following the benefit of an opportunity to take legal advice. Acceptance of the facility was signed in the presence of a solicitor in or about a week after the loan offer correspondence issued. In the circumstances, no arguable basis for defending the claim in reliance on the

European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989 (SI 224/1989) or Council Directive 85/577/EEC has been identified.

*Own Motion Obligations*

**38.** Accepting the Defendants' contention that they are "*consumers*" and in view of the acknowledged *ex officio* obligation existing under ECJ case law for a national court to assess, of its own motion, whether a contractual term falling within the scope of the Unfair Contract Terms Directive (93/13/EEC) is unfair (See *AIB v. Counihan* [2016] IEHC 752), I have also considered whether the Defendants may be entitled to the protection under the Unfair Contract Terms Directive and its transposing regulations. The Defendants did not identify a particular provision or provisions of any contractual document as being "*unfair*" under the Unfair Contract Terms Directive. In discharge of my "*own motion obligations*", I have not been able to discern any term that has operated unfairly against the Defendants in the context of these proceedings.

## CONCLUSION

**39.** For the reasons set out above, I am satisfied that the Plaintiff has discharged the burden of demonstrating a *prima faci*e case for judgment. I am further satisfied that the Defendants have failed to identify an arguable defence. Accordingly, I propose to make an order granting the Plaintiff summary judgment against the Defendants in the terms of the Notice of Motion issuing in September, 2020, in the sum of €1,170,359.94. I will hear the parties in relation to consequential matters.