THE HIGH COURT

[2019 No. 331 S] [2024] IEHC 165

BETWEEN:

BANK OF IRELAND MORTGAGE BANK UNLIMITED COMPANY

APPLICANT

AND

MOLONEY

RESPONDENT

***Ex Tempore* Judgment of Ms. Justice Gearty delivered on the 20th of March, 2024**

1. This is an application for summary judgment. The Plaintiff extended two separate loan facilities to the Defendant in 2007 and seeks over 4 million euro in respect of the principal sums plus interest, which sums remain unpaid.
2. The Defendant requests that the matter be sent to a plenary hearing on the basis that three matters are at issue between the parties and can only be resolved by a full hearing with the potential for oral argument and motions, such as discovery. The issues are the date of accrual of the cause of action, whether the loans were secured, and alleged inordinate delay in instituting the proceedings.
3. The Defendant borrowed money, and that is not in dispute. The amount is not in dispute and the amount repaid, so far, is not in dispute although a question is raised as to whether the relevant agreements changed. The date on which this cause of action accrued is in dispute.

4. The Statute of Limitations, 1957 ("the Statute") applies and this provides, in s. 65, that where part payment is made the cause of action accrues from the date of that payment. The Defendant resists this interpretation, raising a question about whether there was a new agreement between the parties.

The Agreements: Evidence of New Terms?

5. The Defendant argues that any payment he made may have been on foot of different agreements, made in 2011 and 2012, and that he no longer has any documentation to support this averment. The issue of part payment raises this question: has the Plaintiff proved that the payments made by the Defendant related to the 2007 loans or is it arguable that there were new agreements?

6. The loan offers in respect of properties in Dingle and in Kenmare were exhibited. The terms were that the money, 2 million euro and 2.346 million euro respectively, was advanced in each case, for a period of 300 months, the properties were identified as the mortgage properties, the security was described as a first legal charge over the properties (each one described by address in the relevant offer), payments were to be made monthly and, under clause 4(b), in the event of a repayment not being made as due or any other breach of conditions or covenants, "*the Bank may demand early payment of the principal and accrued interest or otherwise alter the conditions of the loan.*"

7. In other words, the details set out are that the Defendant agrees to pay back the money borrowed, and charges on the houses he claimed to own are created in favour of the Bank, as security. The offers are signed by Billy Moloney.

8. The first dates on which he missed payments were in 2009. The first formal letters of demand sent by the Plaintiff bank to the Defendant were exhibited, both dated 31st of January, 2013. The two demands are clearly directly related to the two loan facilities, the account number is cited in each letter and the addresses of all the relevant properties in Kenmare and two of those in Dingle, are set out in the heading. There was no reference to any agreement in 2011 or 2012. There is no response, or at least none that is exhibited. Letters from 2012 show that other property had been sold and the net proceeds remitted to the bank before the two letters of demand were sent in January of 2013.

9. After the demands were made, numerous properties were sold. These are listed in the affidavit of Ms. Carey for the bank, and the net proceeds of each of these sales was remitted to the bank. Mr. Moloney does not deny this but denies the legal effect of it. He submits that this was not part payment of either of the loans of 2007. He does not deny taking out the two loans with the Plaintiff and has not denied repaying the Plaintiff, but he would like an opportunity to discover documents which might shed light on agreements he says he reached in 2011 and 2012. The payments, he submits, may be unrelated payments of a debt due under the 2011 and 2012 agreements. He no longer has those agreements, or any documents relating to them, and he does not recall their exact effect. But still, he argues, they might be new agreements.

10. There is a full answer to this issue in the exhibits of Mr. Dunne for the Plaintiff bank. These include a forbearance letter referring to an earlier, similar

arrangement. The Defendant himself has referred in submissions to the two alleged agreements in 2011 and 2012 as agreements to voluntarily sell all of the properties in Dingle and Kenmare. The bank's records show that the Plaintiff and the Defendant were in contact about these properties and, at all times, the loans the subject matter of this case were the loans in question from 2007 and the properties were being sold to pay part of those outstanding debts. Further, the net proceeds were actually used for this purpose.

The Bankers Books Evidence Act

11. There is another argument raised about these exhibits. The Defendant has made oral submissions to the effect that they were not exhibited under the Bankers Books Evidence Act. He does not deny the contents of the letters but submits that they are inadmissible in this form and that therefore, the Court cannot act on the contents of the letters.

12. This is a very interesting argument but one that did not persuade me. While technically correct, in that banks' records should ideally be proven under the Bankers' Books Evidence Act, the facts of this case suggest to me that this argument cannot succeed where the contents of the letter exhibited by the bank's deponent are not disputed. In other words, it seems to me that the Defendant cannot refute what is said, but seeks to raise an evidential technicality to render it inadmissible so that he can have more time before the inevitable ruling that he is still liable to pay the outstanding remainder of his two loans to the Plaintiff.

13. The Court of Appeal has considered and rejected similar arguments in *Feniton Property Finance v McCool*, [2022] IECA 217 where Murray J. confirms that the strict hearsay rule does not always apply in such cases. See, in particular, paragraph 52 where Murray J. summarises the relevant law. I am entitled to take into account the failure of the Defendant to challenge the contents of the exhibits and the position of the deponent in the bank. The logic of the Court's conclusions in *Feniton v McCool* is compelling, and in any event I am bound by this decision as a judgment of the Court of Appeal.

Security for the Loans

14. The Defendant argues, further, that the loans were not secured. He claims he is only a beneficial owner of the houses and that his wife and a Mr. McCarthy are the legal owners. He claims, this argument suggests, that he raised over 4 million euro on a group of properties across two loans, that he told his local bank manager that he didn't have any legal title to the houses so the mortgage documents are just a formality and the bank knew this. He also claims that the land registry folios, insofar as any can be produced, cannot be relied upon.

15. In other words, a significant plank of his defence to the case is that as he didn't actually have full title and he can rely on the legal maxim, *nemo dat quod non habet*. Loosely translated, this means: you cannot give what you do not have, applied here to mean that Defendant cannot transfer a better title than he has. The Plaintiff argues that the principle decides, as between two innocent people, who should own the property and is not a means to release borrowers from the

terms of their loans should their title be insufficient to secure the property. This latter interpretation must be the correct one in this context.

16. More fundamentally, it does not matter if he never owned the property if he accepts that he owes the money. It is clear from the exhibits that the Defendant understood that he needed the bank's permission to sell the properties. Letters are exhibited by Ms. Carey in respect of several other properties. In each such letter, the bank reminded the Plaintiff that the total net sum, to be paid to the bank in respect of the property in question, did not redeem the total debt and that he remained liable for the debt. Such letters were written in respect of the two loans as late as 2014. In respect of the loan relating to Dingle, the last payment was in April 2014 and in respect of Kenmare, it was in April 2015. The Defendant has never disputed the contents of the letters.

Part Payment under the 1957 Statute of Limitations

17. Under s. 65 of the Statute of Limitations, if the payments were part payments in respect of the loans, then the action accrued in April of 2014 regarding the first loan and in April 2015 regarding the second loan. The Defendant has sought to persuade me that the payments were not part payments. Merely averring that this may be the case is not sufficient. There must be credible evidence that this is the case for the matter to be remitted to plenary hearing.

18. As far as the accrual of a cause of action is concerned, in the words of Noonan J. in *Bank of Ireland v. Matthews* [2020] IECA 214; "*where the contract calls for a demand before action, the cause of action does not accrue unless and until such demand*

is made". That case involved a similar contract in which the parties agreed that the sum only becomes due on demand. This is clause 4(b) of the contract here.

19. More fundamentally, the Statute itself makes it clear that if part payment is made, the clock is reset. The only cases on which the Defendant could rely to support the argument that the bank had to not only show that the Defendant had repaid part of the debt but had acknowledged the debt, predated the 1957 Statute of Limitations and related to provisions either in a different jurisdiction or in a statute which was not outlined to or provided so that the two could be compared. I cannot see any reason to be guided by cases involving different provisions. The clear terms of s. 65 of the 1957 Act require only part payment and no express acknowledgment of the debt. The letters which accompanied two payments by the defendant into the loan accounts were exhibited. These made it clear that the payments were part payment of the loans and that they did not redeem the debt for which the Defendant remains liable, in full. The Defendant has not disputed the contents of the letters, just their admissibility.

20. The Defendant submits that there is very little case law on the issue of part payment in the context of limitation periods, and I agree with counsel for the Bank that this is because it is a clear provision and it is easy to prove. Here, we have payments by a man to a bank account that was set up to receive loan repayments. He argues that there was some intervening agreement but he has no memory of it (or certainly none sufficient to commit it to affidavit) and no documentary evidence of it. There is no reason to accept this bald averment.

21. All the evidence supports the Plaintiff's argument that any agreement in 2011 or 2012 was by way of forbearance, and there was no agreement to change the character of the loan or to extinguish the Bank's right of action. It was never suggested that the Defendant no longer owes money to the bank. The evidence adduced by the Plaintiff provides overwhelming support for the Bank's action for summary recovery of the money outstanding.

22. Assessing the defence suggested, it appears to me to be untenable. In this case, chronology is very important. If the action accrued in 2014, then this case was taken within 6 years and there is no need to prove that the loan was secured bringing it within the longer, 12-year period provided for loans which are secured. The law in this regard is very clear: once part payment is made, the date of accrual of the cause of action is renewed, essentially.

Evidence of Beneficial Ownership

23. It is not necessary to consider the arguments made in respect of the beneficial interest, if any, that may have been held by any third party. The Plaintiff's argument that there was an equitable mortgage provides further confirmation that this is simply not necessary in any event, even if there was an ambiguity in respect of s.65 of the Statute. It may be helpful to note that if the interest of third parties was to be raised as a defence to summary proceedings, I expect to see evidence in this respect, particularly as it was confirmed that the two "beneficial owners" are alive. There is no reason not to have sworn evidence

from them at this stage in the summary judgment process. Given the view I take of the date of accrual, however, it is not necessary to comment further.

Inordinate Delay

24. In submissions, based on three paragraphs in his affidavit, the Defendant asks the Court to send this matter to plenary hearing as he wants to raise inordinate delay as a reason for this Court to dismiss the Plaintiff's claim. As with all the arguments he raises, the Defendant is careful to acknowledge that while the Plaintiff appears to have a claim against him, it would be unfair to allow a summary judgment in the amount claimed as he is entitled to litigate this aspect of the claim and has raised arguments which warrant a plenary hearing.

25. In this respect, his affidavit specifies the delay complained of and it is between the first default in payment in 2009 and the initiation of summary proceedings in 2019. As the replying affidavits make clear, the Plaintiff bank and the Defendant engaged in numerous exchanges throughout the intervening years and the properties, which are the subject matter of the loans, were sold between 2012 and 2015, with the proceeds being used to repay both loans.

26. In those circumstances, there is no prospect of the Defendant being able to make an arguable case that this Plaintiff delayed, inordinately or at all. The final payment in respect of one loan was made in April 2014 and in respect of the other in April 2015. The case began on 8th April 2019, less than 5 years after the earliest possible accrual date for the former loan and well within the Statute. As the case is within the period allowed by the Statute, as such, there is no basis

for a claim of delay, whether under O.19 of the Rules of the Superior Courts or the inherent jurisdiction of the Court.

27. It was submitted to me that this is a contract case and that any element of public policy is irrelevant. This was in support of the argument that the first missed payment should provide the date on which this cause of action accrued. I do not agree with this submission. Every decision includes an element of public policy. In the simplest contract debt there is a public policy element to the proposition that the contract will be honoured; it is not simply a private, legal decision but one expression of the view that we all require certainty in the law.

28. In a case involving a bank, there are many public policy considerations at play but the one which mitigates against this Defendant is that it is in the public interest and in the interest of banks and financial institutions that the courts facilitate engagement and negotiation around the issue of loan repayments. It is often in the interests of all parties that repayments continue to be made, even if full repayments cannot be made. To interpret the Statute so that it runs from the date a person misses a loan repayment would ignore the clear terms of section 65, the terms of the contract, and the Court of Appeal authority in *Bank of Ireland v. Matthews*, and would also be contrary to public policy, in my view.

29. Here, the Defendant has not invoked Order 19 of the Rules of the Superior Courts which allows him to bring a motion claiming that the case should be dismissed due to delay. It was submitted that he did not intend to bring such a motion. However, he argues that because he has raised the issue in response to

summary judgment proceedings, because of what he characterises as a 10-year delay between default and action, the Court should allow him to make the argument at a plenary hearing.

30. This argument pre-supposes that the delay is in fact one of ten years, but it is not. As set out, this Defendant engaged in numerous interactions with the Plaintiff bank to ensure that he was not made immediately liable for the full sum and to ensure that the bank continued to receive some payments on the two loans. The loans, as is clear from the context and the years mentioned, were initially secured by properties which had higher values when the loans were agreed. The value of the properties fell and, though the Defendant sold them, he still owes a significant sum amounting to well over 4 million euro.

31. The fact that the law does not require cases to be taken within 6 years of a single default in payments, or even multiple missed loan repayments, is not just in ease of both parties in this case, but in the public interest. Insofar as this is a contract case, the terms of the contract make it clear that a demand may be made, not must be made, if a repayment is missed. Here, there were multiple repayment defaults, a clear demand in 2013 and a series of repayments culminating in the final payments made in April of 2014 and April of 2015.

32. The bank negotiated with the Defendant throughout that period and that is in ease of both, and in the public interest also. Comparing the facts of this case with those in *Cave Projects Limited v. Gilhooley* [2022] IECA 245, that case involved a far longer delay. The nearer comparator is *O'Carroll v. ESB* [2013]

IEHC 30, where a 4-year delay within proceedings was held not to be an inexcusable delay. But this Defendant has confined his objections, on affidavit, to the time before the proceedings issued and has not brought a motion under O.19. That would have required details in the proceedings to have been set out.

33. This does not mean that there must be a plenary hearing about the issue but that he has not produced evidence to meet the onus he bears – he must show that there is an arguable defence. This does not mean making averments that, if true, might disclose an arguable case. There must be a real conflict of fact and what the defendant says must be credible, not probable. His averments in respect of different agreements in 2011 and 2012 are not credible. He has not established even an arguable case that there were entirely separate agreements in 2011 and 2012 such that payments were not part payment of the original loans. The contract itself contradicts his submission about the accrual dates of this cause of action. The accrual dates are 2014 and 2015 respectively. The case is within the limitation period of 6 years and the security of the loans is irrelevant. The inordinate delay issue has no foundation, in my view.

Conclusions

34. The Bank seeks summary judgment for the remainder of the money loaned to the Defendant and is opposed on the basis of delay, a legal argument on the date of accrual and an argument about beneficial ownership which is irrelevant given the facts of the case and the date of accrual. The delay argument is bound to fail, given the date of accrual. The Plaintiff is entitled to summary judgment.