THE HIGH COURT

[2025] IEHC 97

Record No. 2021/497S

BETWEEN:

CABOT FINANCIAL (IRELAND) LIMITED

Plaintiff

AND

GERARD REYNOLDS

Defendant

JUDGMENT of Ms. Justice Nuala Jackson delivered on the 10th February 2025.

INTRODUCTION AND BACKGROUND

1. The Plaintiff seeks liberty to enter final judgment against the Defendant in the sum of €231,580.11. A Summary Summons was issued on the 18th August 2021and it recites details of the loan advanced by the Plaintiff to the Defendant. These details are not disputed by the Defendant. Pursuant to a facility letter of the 11th April 2011, the then lender, ACC Bank plc, agreed to lend to the Defendant the maximum sum of €556,000 in the context of restructuring other indebtedness. The principal sum of €556,000 was drawn down by the Defendant on or about the 12th September 2011.

2. ACC Bank plc re-registered as a private company on the 23rd June 2014 at which time it became ACC Bank Limited. There was a subsequent change of name of this legal entity and it became ACC Loan Management Limited on the 27th June 2014 with a subsequent conversion to a designated activity company on or about the 9th August 2016. Thereafter, on the 31st October 2018, ACC DAC transferred a number

of loans to Cooperative Rabo Bank U.A which transfer included the loan the subject of the within proceedings. The loan was further transferred from Cooperative Rabo Bank U.A. to the Plaintiff herein on the 15th July 2019. The notification of these transfers to the Defendant was proved before me. In the case of the transfer from Cooperative Rabo Bank U.A. to Cabot Financial (Ireland) Limited, the Defendant was notified by letters of the 30th April 2019 (from the assignor) and the 15th July 2019 (from the assignee). I am satisfied that the transfer from ACC DAC to Cooperative Rabo Bank U.A. (as well as the subsequent transfer) was notified to the Defendant, in any event, by the letter of demand of the 21st February 2020 in accordance with the judgment of Baker J. in **Allied Irish Banks plc v. Thompson** [2017] IEHC 515.

3. The loan was a secured loan and the real property security in respect thereof was sold in and about 2014 with the Defendant co-operating with the said sale. The net proceeds of sale derived from this sale were applied in reduction of the loan balance outstanding. A significant shortfall arose with a loan balance remaining subsequent to the disposal of the security and it is in respect of this outstanding sum that the Plaintiff now seeks summary judgment.

4. The Plaintiff made demand of payment of the outstanding balance in the sum of €231,580.11 by letter of the 21st February 2020. No sums were paid consequent upon this demand. This demand letter enclosed a copy of the Defendant's statement of account relating to the Facility and set out the particulars of the debt due and owing, to include all applicable interest sums and rates, together with all surcharges charged pursuant to the terms of the Facility. The Plaintiff agreed to waive any claim for further simple interest and has not applied any interest to the Defendant's account since the date it acquired the Facility.

5. At hearing herein, the Defendant, fairly and openly, informed me that he was not disputing the figures in respect of sums due as calculated by the Plaintiff.

6. An Appearance was entered by the Defendant on the 27th August 2021. In accordance with Order 37 of the Rules of the Superior Courts, the Plaintiff has now issued a motion for liberty to enter final judgment against the Defendant.

7. This motion is grounded upon the Affidavit of Tom Dillon sworn on the 3rd March 2023. Exhibited therein are:
   (a) The Facility Letter of the 11th April 2011;
   (b) The Credit Terms and Conditions of ACC Bank;
   (c) A schedule of drawdown details, transactions thereafter and balances arising. The reduction in the balance due and owing is reflected in the payment of €351,043.36 against the loan balance on the 2nd January 2015 arising from the sale of the security property;
   (d) The documents pertaining to the re-registration of ACC Bank plc as a private company (ACC Bank Limited);
   (e) The documents pertaining to the name change to ACC Loan Management Limited;
   (f) The documents pertaining to the conversion of ACC Loan Management Limited to a designated activity company;
   (g) The documents pertaining to the sale of loans (including the loan the subject of the within application) to Cooperative Rabo Bank U.A.;
   (h) The documents pertaining to the sale of the loans (including the loan the subject of the within application) to the Plaintiff;
   (i) Letters notifying the borrower of the loan transfers;
   (j) The letter of demand sent by the Plaintiff on the 21st February 2020.

8. A replying Affidavit was sworn by the Defendant herein on the 20th November 2023. The Defendant relies upon this Affidavit in support of his argument that he has a good defence to the claim being made by the Plaintiff and that, in consequence, that summary judgment should be refused and that this matter should be adjourned for plenary hearing. This is a brief Affidavit and the defence asserted is a straightforward one. The Defendant avers that, prior to the sale of the lands securing the indebtedness, he

"entered into discussions with ACC Bank and it was agreed that I would sell my lands and under this agreement with ACC Bank, my lands were sold for the sum of four hundred and twenty-nine thousand euros (€429,000.00). After expenses and tax, a sum of three hundred and fifty-one thousand and forty-three euros and thirty-six cents €351,043.06 was paid to ACC. I say that I had spoken to the Manager in ACC Bank who assured me that because of my cooperation in selling the lands that they would not pursuant me for the balance, but that this could not be put in writing to me. I say that the sale was completed in 2014. This left a balance of approximately two hundred and five thousand euros (€205,000)."

The Defendant further avers:

"I say that I advised Cabot Financial (Ireland) Limited that ACC Bank should not have sold my Loan, as they had agreed to write off the Loan Balance with the sale of my lands."

There are no exhibits or supporting documents in the Affidavit of the Defendant pertaining to the circumstances deposed to by him.

9. Before considering the legal principles applicable in deciding whether or not to grant summary judgment, it is necessary to consider the second Affidavit filed on behalf of the Plaintiff herein, the deponent again being Tom Dillon, sworn on the 15th March 2024. Exhibited therein is a copy of a letter from Aidan Cawley, the designated Case Manager in ACC to the Defendant's then solicitors. This letter preceded but was clearly in the context of the sale of the security. First, it confirms that the lender is agreeable to the sale of the lands concerned. However, importantly, the letter also states:

"On completion of the sale of the Property please note that the Borrower will remain liable for any residual balance owing on the Loan Facility after the payment of the net sale proceeds."

10. Additionally, it is clear that the lender confirmed this to be the position shortly after the completion of the sale of the lands. By letter of the 2nd February 2015, Mr. Cawley again wrote (this time to the Defendant directly) stating, *inter alia*:

> *"Please find enclosed interim statement of loan account as at close of business 30 January 2015 quoting balance after receipt of sale of lands Braganstown."*

The letter then proceeds to reference steps towards a repayment plan in respect of the balance.

11. A further important correspondence is exhibited being a letter dated the 17th June 2016, again from Mr. Cawley to the Defendant directly. This correspondence is important in two respects:
    (i) It seeks proactivity in relation to arriving at a payment plan in respect of the loan balance but also
    (ii) It references a letter of the 19th May 2016 received by the lender from the Defendant's then solicitors which letter had indicated an inability on the part of the Defendant to repay the loan either in full or in part. The letter from Mr. Cawley states:

> *"We acknowledge receipt of letter dated the 19 May 2016 from John C Kieran & Son Solicitors Ardee indicating inability on your part to repay all or part of the above mentioned facility. However, John C Kieran & son does not provide any independent information to support this position nor outline a proposal."*

12. There is no suggestion that the Defendant's legal advisers were denying that there was any outstanding sum due and owing for the reasons indicated by the Defendant in his replying Affidavit in this application. There would appear to be an amount of correspondence seeking that the repayment of the balance be addressed but there is no evidence before me of any response by or on behalf of the Defendant disputing that any such repayment arose for the reasons now deposed to by him.

THE LAW

13. The principles applicable in determining whether to grant summary judgement are well established. In **First Commercial Bank plc v Anglin** [1996] 1 I.R. 75, the Supreme Court (Murphy J.) stated:

> *"For the Court to grant summary judgment to a Plaintiff and to refuse leave to defend it is not sufficient that the Court should have reason to doubt the bona fides of the Defendant or to doubt whether the Defendant has a genuine cause of action (see Irish Dunlop Company Limited v Ralph 95 I.L.T.R. 70).*
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> *In my view the test to be applied is that laid down in Banque de Paris v de Naray 1984 1 Llyod's Law Reports 21 which was referred to in the Judgment of the President of the High Court and reaffirmed in National Westminster Bank Plc. v Daniel 1993 1 W.L.R. 1453. The principle laid down in the Banque de Paris case is summarised in the head note thereto in the following terms:-*
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> > *"The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence."*
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> *In the National Westminster Bank case Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-*
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> > *"I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case, at p.23, "Is there a fair or reasonable probability of the defendants having a real or bona fide defence?" The test posed by Lloyd L.J. in the Standard Chartered Bank case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 "Is what the defendant says credible?," amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence."*"

14. This dictum of Murphy J. was endorsed by the Supreme Court in **Aer Rianta cpt v. Ryanair Limited** [2001] 4 I.R. 607 where, having recited the passage above, McGuinness J. stated:

"Thus it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr. O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or bona fide defence. Since there had been no oral hearing and neither deponent has been cross-examined on his affidavit, it was not for the learned High Court Judge to weigh the affidavit evidence of Mr. O'Leary and Mr. Byrne or to attempt to resolve the factual contradictions contained in it. Still less is it for this court to attempt any such task. In deciding whether the defendant may have a "credible" defence, the court must concentrate its attention on the matters put forward in the defence itself. The court does not ask whether Mr. O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr. Byrne's account of events is more likely. The question is rather whether the proposed defence is so far-fetched or so self-contradictory as not to be credible."

Hardiman J. stated the test to be:

"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. The matter was again considered in **Harrisrange Limited v. Duncan** [2003] 4 I.R. 1 (McKechnie J.) where the applicable principles were very clearly set out and in which it is stated:

"9. 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, "s 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. In **Feniton Property Finance DAC & Ano. v. McCool** [2022] IECA 217 the matter was considered by the Court of Appeal (Murray J.) which stated:

"11. At the same time, while the court must be cautious in granting summary judgment, and while the requirement that a defendant establish a fair and reasonable probability of the defendant having a defence is a relatively low threshold, it is a threshold: it is neither in the public interest nor in the interests of the parties that straightforward claims for a debt or liquidated demands should require to be determined by plenary hearing, with the additional delay and cost that such a hearing involves and the additional burden thereby placed on the resources of the courts (see Promontoria (Aran) Ltd. v. Burns [2020] IECA 87 (' Burns' at para. 4). The defendant must, accordingly, lay a basis on which the court can conclude that there is in truth an issue to be tried, and that that issue is neither simple nor capable of being easily determined (see Prendergast v. Biddle, Unreported, Supreme Court, 31 July 1957). Thus, in

IBRC Ltd. v. McCaughey [2014] 1 IR 749, Clarke J. (as he then was) stated that the type of factual assertions which may not provide an arguable defence are those that amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence may be available, or which comprise facts which are in and of themselves inconsistent or contradictory."

17. I have also had regard to the judgment of Irvine J. in **Allied Irish Banks plc v. Stack and Another** [2018] IECA 128 and, in particular, paragraphs 26 to 30 of that decision. There must be more than mere assertion or stateability. There must be *"substance"* to the proposed defence and it must be *"based on facts which if true and established would amount to a defence"* and it must be *"credible"*. Where an issue of law is advanced, it must be *"stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide a defence."*

APPLICATION OF LAW TO THE FACTS

18. I am mindful of the caution to be exercised in refusing a Defendant an entitlement to defend a claim made against him in the context of an application for summary judgment. I am mindful that the right of access to justice in this context necessitates a careful balancing of liberty to enter final judgment or leave to defend in a manner which achieves a just result. The fair and reasonable probability of a defence is a relatively low threshold but it is a threshold. That threshold is whether or not it may be concluded that (i) there is an issue to be tried and (ii) this is an issue is neither simple or capable of easy determination.

19. The Defendant herein essentially asserts an oral contract or some form of estoppel between himself and the lender that the unsecured balance of the loan would not be pursued if the security lands were disposed of and he co-operated with such disposal. The averments in this regard are vague and very considerably lacking in detail. There is no detail of the "discussions" with the lender or the circumstances or date of same. The essence of the alleged defence seems to be that there was an "assurance" from an unnamed bank official that the lender would not pursue the Defendant for the balance of the loan because of his co-operation in the sale of the

lands upon which the loan was secured. Importantly, it is averred that these assurances could not be put in writing.

20. I must look at the entirety of the situation. I must have regard to the alleged defence of the Defendant but also, in the context thereof, I must have regard to the cogency of the evidence adduced by the Plaintiff, always being mindful of the difficulties inherent in the assessment of conflicting affidavit evidence. In this instance, the exhibits of the Plaintiff clearly indicate that it was expressly indicated to the Defendant in writing prior to the sale of the lands that there would be a balance due and owing. The exhibits also show that the then owner of the loan was consistent in repeatedly seeking the repayment of the balance. Additionally, the correspondence indicates that there was written communication between the then lender and the Defendant's then solicitors in which both sides accepted a continuing liability. Nowhere in this correspondence is there any suggestion by or on behalf of the Defendant that the sums being demanded are not due and owing and nowhere is there any suggestion by the Plaintiff that the debt has been disputed (save in the context of an asserted inability to pay). There does not appear to be a real prospect that some material support for the Defendant's case would emerge if the case proceeded to plenary hearing with discovery, interrogatories and oral evidence. The position asserted by the Defendant is flatly contradicted by documentation exhibited and there is little to suggest that other evidence may be available which would advance the position put forward by the Defendant. It is my conclusion that there is an absence of credibility as regards the "defence" asserted by the Defendant. On the totality of the circumstances set out in the affidavits before me, I am not satisfied that the Defendant has a fair or reasonable probability of having a real or bona fide defence. I am satisfied that the only relevant averment in the totality of the evidence is a mere assertion of a given situation which is otherwise considerably contradicted.

21. I am therefore satisfied that the Plaintiff is entitled to the relief sought in the Notice of Motion herein and in consequence I will grant to the Plaintiff liberty to enter final judgment against the Defendant in the sum of €231,580.11. I am of the view that the Plaintiff is entitled to an order for costs as against the Defendant but I will stay

such costs order for a period of 14 days, giving the parties liberty to apply in the event that they wish to argue to the contrary.