



THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 338

Record Number: 2014/714 & 2014/918

High Court Record Number: 2011/2131S

**Noonan J.
Faherty J.
Ní Raifeartaigh J.**

BETWEEN/

ACC BANK PLC

PLAINTIFF/RESPONDENT

-AND-

SAM DEACON AND BEN DEACON

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Noonan delivered on the 1st day of December, 2020

1. These two appeals arise out of debt proceedings brought by the respondent ("the bank") against the appellants. The primary order appealed against is that of the High Court (Ryan J. as he then was) made on the 28th June, 2013 granting judgment to the bank against the first defendant in the sum of €3,343,379.86 and against the second defendant in the sum of €173,056.89. The second appeal is against the order of the High Court (Cooke J.) made on the 11th December, 2012 striking out certain paragraphs of the defendants' defence for failing to provide adequate particulars of the matters pleaded in those paragraphs pursuant to earlier orders of the court of the 13th November and 5th December, 2012. As will become apparent, the latter order, while still under appeal, assumes somewhat subsidiary significance herein by virtue of the subsequent judgment in the substantive proceedings.

Relevant background

2. These proceedings started life as summary debt proceedings which were subsequently admitted to the Commercial List of the High Court and remitted for plenary hearing on oral evidence. Written statements were provided by the witnesses in accordance with the practice of the Commercial Court and in the case of the bank's witnesses, they adopted as part of their witness statements the evidence on affidavit already tendered by them on foot of the summary summons. The trial took place over five days with a written judgment following.
3. The relevant facts are set out in considerable detail in the judgment of the High Court so that a brief summary will suffice for the purposes of this appeal. The bank's claim was

brought on foot of six different loan facilities entered into between April 2007 and August 2008, referred to as loans 1 – 6 respectively. The first defendant, to whom I shall refer as Mr. Deacon, was party to all six loans whereas the second defendant was party only to loan 1.

4. It would appear that at the time these loans were entered into, Mr. Deacon was the proprietor of a very substantial quarrying business which, at one time, employed some 100 people. He appears to have been regarded as a high net worth individual by the bank who extended significant hospitality to him over a period of time, evidently with a view to securing further business from Mr. Deacon. The purpose of the loans the subject matter of these proceedings was, according to the first affidavit of Eoin O'Sullivan, a special asset manager at the bank, to assist in the purchase of property in County Carlow and County Wexford for use in connection with Mr. Deacon's quarrying and concrete business and to refinance existing borrowings. In the case of each of these loans, and two further loans described as pension backed loans ("PBL's"), Mr. Deacon was represented by his solicitors, Ensor O'Connor of Enniscorthy. A relative of Mr. Deacon's, Ms. Ethel Deacon of that firm, dealt with loans 1 – 3 and Ms. Suzanne Carthy dealt with loans 4 – 6. The two pension backed loans to which I have referred, and which are not the subject of these proceedings, were paid off and replaced by loans 5 & 6. Each of loans 1 – 4 and the PBL's were obtained for the purposes of land acquisition as described by Mr. O'Sullivan with loans 5 & 6 refinancing the PBL's.
5. Each of the loans was repayable on demand. In 2010, the monthly instalments due on foot of the loans went into arrears and on the 30th March, 2011, the bank formally demanded payment on foot of each of the facilities. The proceedings were issued on the 20th May, 2011. After an exchange of affidavits, a defence was delivered on the 3rd August, 2012. Paragraph 6 of the defence pleaded that the two PBL's were not authorised by Mr. Deacon and were carried out by fraudulent means. At para. 18, the defendants pleaded that Mr. Deacon's signature was forged on unspecified documents.
6. Arising out of these pleas in particular, a notice for particulars was served on the 14th August, 2012 asking for particulars of the fraud alleged at para. 6, and identification of the documents allegedly forged referred to in para. 18. The defendants failed to provide the requested replies and accordingly the bank brought a motion which resulted in an order on the 8th October, 2012 directing the replies to be furnished within four weeks. This order was not complied with and eventually, on the 11th December 2012, the court struck out the pleas at paras 6 and 18 of the defence for failing to comply with the order of the 13th November, 2012 and further directions of the court given on the 5th December, 2012.
7. When the matter came on for hearing before Ryan J., a number of defences were raised by Mr. Deacon which can briefly be summarised as follows. The bank was put on strict proof of all documents alleged to constitute the contracts upon which it was relying. Certain documents underpinning the loan transaction were said to show that Mr. Deacon's purported signature thereon was a forgery. The bank was guilty of misrepresentation in

particular in relation to the PBL's. Mr. Deacon denied that he entered into loans 5 and 6 and claimed he had no knowledge of them. He alleged that the bank had purported to act as his financial advisor and this affected its entitlement to recover the monies due. Finally, it was suggested that various codes of conduct and practice had not been complied with by the bank.

Judgment of the High Court

8. The trial judge set out the background and the defences raised as I have described them. He considered that the case resolved itself down to two issues; first, had the bank proved its case; and second, if so, was that undermined by any of the defences raised. The court then reviewed the evidence of the various witnesses called for the parties. Five witnesses were called for the bank, three being current or former employees and the other two being Mr. Deacon's solicitors, Ms. Deacon and Ms. Carthy.
9. The trial judge said that the evidence established that each of the eight loan transactions had been entered into in the same way. In each case the bank sent a facility letter to Mr. Deacon to be signed and returned. The bank also sent a loan pack to Mr. Deacon's solicitors including a similar facility letter. In each case, Mr. Deacon accepted the loan by signing the loan acceptance. His solicitors then returned the documents to the bank having complied with a list of requirements. In each case, the documents were returned under cover of a letter from the solicitors stating that they enclose the loan acceptance "duly completed" by Mr. Deacon.
10. In relation to the execution of the facility letters, the solicitors' evidence was that Mr. Deacon either signed the letter in their presence or brought it in to the solicitor already signed. Mr. Deacon in his own evidence said he did not dispute the evidence of either solicitor. Evidence was then given by Mr. Denis Sexton, who is described as a graphologist and who was tendered as an expert witness on handwriting. It should be noted that the purpose of this evidence was with a view to demonstrating that certain of Mr. Deacon's alleged signatures on relevant loan documentation were in fact forged.
11. This evidence was led despite the fact that the plea of forgery was struck out of the defendant's defence by the order to which I have already referred. However, the trial judge allowed the evidence without apparent objection from the bank, although Mr. Sexton's qualifications to give such evidence were robustly challenged under cross-examination. The trial judge noted that arising from this cross-examination, it transpired that Mr. Sexton did not have any form of qualification in the area of expertise that he professed.
12. Mr. Robert Stamp, the defendant's accountant gave evidence that he did not approve of PBL's and that the bank was in no doubt about his views on them. He advised Mr. Deacon against entering into such PBL's. Two other witnesses were called to identify certain documents that had been sent to Mr. Deacon by the bank in error when those documents clearly did not relate to him but to other persons with the same name.

13. The trial judge then summarised the legal submissions of the parties on the issues that arose. The primary issue raised by way of defence was that the bank had not proved its case and had failed to prove the original loan documents either properly or at all. Since, it was said, that the best evidence rule must apply, the court should dismiss the claim where the bank's documents were clearly "in a mess". A broad range of subsidiary submissions were also considered by the court.
14. In the "Discussion" section of the judgment, the trial judge reached his conclusions on the various arguments advanced. The first issue the court addressed was the issue identified at the outset, namely had the bank proved its case? In that regard, the trial judge said the following (at p. 29 – 31): -

"Central to the defence on this part of the case is an implicit theory that in regard to each loan, it is an essential proof that the actual contract document be produced by the bank and proved in some kind of solemn form of law. The defence approaches this documentary material as if it were a mandatory proof such as a certificate of an essential fact. The document itself is envisaged as having an independent existence from the transaction that it evidences. The comparison may be with a will or with the title documents of land, in which the document itself constitutes a thing. The document or documents of title may be considered to represent the building or land for the purpose of an equitable mortgage or a sale and obviously a will is a thing in itself that has its own existence and an elaborate set of rules surrounding it. Mr. Giblin SC refers to the loan documents in this sense; not that it is evidence of a transaction, but that it is the actual transaction itself; not that it is evidence of a state of affairs or what the terms of agreement were, but that it is the actual agreement. If he is able to cast any doubt on the formal validity of the particular piece of paper that is produced as the agreement, he has undermined the alleged agreement and no judgment can be given on it.

But that is not the situation here. There is nothing of special legal significance about the original documents here. They are not muniments of title or of similar freestanding status. In many contracts there is not any one embodiment of the contract in a document. Even where there is such a contract, it may be signed in a number of copies or versions and there may therefore be more than one original contract.

This case is about the proof of a series of loan agreements, not whether the bank has proved a particular, individual document. Documents are evidence of the agreements and their terms. But it is a misunderstanding to think that the case is about proof of a document and not proof of an agreement.

It is about loan agreements and their terms and whether they were breached. Has the bank proved that it lent the money to Mr. Deacon on the terms stated in the facility letters? The bank can prove the agreement by oral evidence and copy documents to show what was agreed between the parties.

What did the bank prove? In respect of each of the eight loan transactions, the ACC sent loan facility letters to Mr. Deacon and to his solicitors. The solicitors got a loan pack including the facility letter and the terms and conditions plus a list of other items that were required to be performed or provided before the transaction was completed. One of the requirements was that they send back to the bank the facility letter signed by their client and that is what happened in each of the eight cases. The solicitors returned the facility letters 'duly completed', i.e. in accordance with what the bank required. The evidence of the solicitors was that Mr. Deacon either signed the facility letters in their presence or else he brought in the documents already signed and handed them over for transmission to the bank."

15. The court then turned to consider what the effect was of a document sent by a solicitor. In that regard, the judge observed (at p. 31): -

"A document sent by a solicitor stated to have been duly completed by her client is evidence of the facts stated. It is not open to the client to impugn the evidence subsequently in the absence of some challenge to the solicitor's authority or instructions. This point seems too obvious to require to be stated, but the defendants' submissions and Mr. Deacon's own evidence actually seek to escape this elementary proposition. What a party does by his solicitor he does by himself. The fact that his solicitors dealt with the correspondence and sent documents expressed to be duly completed and containing the defendants' signatures and processed all their mortgage and other transactions that were associated or concomitant with the arrangement is evidence that Mr. Deacon did all these things. He cannot disavow all these arrangements, undertakings and transactions that were done on his behalf."

16. The trial judge referred to loans 5 and 6 which replaced the PBL's and of which Mr. Deacon had said that he knew nothing and to which he had not consented. He noted that as with the other documents, the documents involving loan facilities 5 and 6 were evidenced by the testimony of Ms. Carthy and the document trail is similar to the other loans. Mr. Deacon executed the documents and his solicitors, acting on his behalf, confirmed his assent. The judge said that there was accordingly undisputed evidence as to what the contract was and what Mr. Deacon agreed to. His conclusion on this point appears at p. 35: -

"In the result, the conclusion is irresistible that Mr. Deacon agreed to the loans and the terms of the facility letters. The bank has proved that it lent the money to Mr. Deacon on the terms stated in the facility letters."

17. The trial judge then considered the graphologist's evidence. He stated his reservations about Mr. Sexton's expertise and methodology of examination of documents. He found it difficult to accept that Mr. Sexton had demonstrated a scientific and rational basis for his conclusions. However, and importantly, the judge said that even if Mr. Sexton's opinions were to be accepted in their entirety, it would make no difference to the outcome in view of Mr. Deacon's clear acceptance of the terms of the loans as evidenced by his own

solicitors. He concluded therefore that Mr. Sexton's evidence was not of great materiality.

18. On the question of financial advice given by the bank, and the defendant's complaint that he was persuaded to enter into the PBL's by the bank, the judge said this would be relevant if Mr. Deacon had demonstrated any breach of statute law or regulations which he had not. In any event the bank's claim did not relate to the PBL's. At its height, if Mr. Deacon did have a legitimate complaint about the PBL's, that would be a matter for a counterclaim but there is none in these proceedings.
19. On the question of codes, he noted that Mr. Deacon argued that he was a consumer within the meaning of the Consumer Credit Act, 1995 and the Consumer Protection Act, 2007 but no breach of these provisions had been alleged or demonstrated, nor was there evidence that Mr. Deacon had suffered any loss in consequence of any alleged breach of a code. In any event, the judge considered that Mr. Deacon could not be considered to be a consumer and he adopted the observations of Kelly J. (as he then was) in *Allied Irish Bank plc v. Higgins & Ors* [2010] IEHC 219. He noted also Mr. Deacon's (apparently contradictory) complaint that there had been a breach of the Small and Medium Enterprises Code by the bank but even if this had been established, it did not "wipe out the loan or furnish a defence". In conclusion, the trial judge held that the bank had proved its case and none of the points raised provided a defence.

Grounds of Appeal

20. In his notice of appeal, Mr. Deacon essentially revisits all of the issues raised by him by way of defence in the High Court, suggesting that the trial judge erred in failing to accept the submissions made on his behalf in that regard. Accordingly, it is alleged that the bank, in failing to produce original documentation or explain its absence, had failed to prove its case. The trial judge erred in concluding that the evidence of the graphologist was immaterial or that the "discrepancies" in the bank's documentation were not relevant. It is pleaded that the judge was wrong to hold that the bank did not act as Mr. Deacon's financial advisor or that he had available to him the services of a financial advisor. The judge was wrong to hold that Mr. Deacon was not a consumer or that the bank did not need to demonstrate compliance with the SME Code and that such non-compliance was not a defence. The trial judge was in error in failing to hold that the agreements were procured by misrepresentation.
21. I propose to consider the issues arising, as they developed during the appeal, under the headings that follow.

Were the loan agreements proved?

22. The primary plank of the defence in the High Court, and again on appeal, was that there was a failure on the part of the bank to prove original documents to the standard required to establish the contracts upon which they relied. The appellants submit that the trial judge was wrong to allow the terms of the loans to be proved by secondary evidence where the bank had failed to explain the absence of the original documents.

23. I agree with the view of the trial judge that this submission fundamentally misconstrues the purpose and effect of the relevant documents in this case. What the bank was required to prove was an agreement, not a document. A contract to lend money does not have to be signed to render it enforceable. Indeed, it does not even have to be in writing. Clearly however, in the event of dispute as to the fact or terms of an agreement, the resolution of that dispute may be assisted by the existence of documents which provide evidence of the terms of the agreement.
24. In that regard, a document which is executed has the potential to resolve any dispute between the parties as to what the terms of the contract are. The appellants seem to contend that the loan facility letters are to be equated in some sense with a deed under seal such as a title document. Nothing of that nature arises here. What the bank was required to prove, and did prove, was that there was an offer by the bank which was accepted by Mr. Deacon following which the monies were advanced and not repaid in accordance with the agreed terms.
25. The bank established each of these things and what is more, there was no significant dispute about them between the parties. The bank did not simply rely on pieces of paper to prove its case. It called witnesses who were in a position to testify as to the terms of the agreement in each of the eight cases. Those witnesses included Mr. Deacon's own solicitors who gave crystal clear evidence that in the case of each loan, Mr. Deacon signed all the relevant documentation agreeing to the terms and they returned those documents to the bank "duly completed", by him.
26. The bank witnesses were entitled to give the evidence they did, without objection, to prove the agreement and its terms in each case. Recent jurisprudence subsequent to the judgment of the High Court in this case indicates that a bank is entitled to prove the debts of a customer through the evidence of officials familiar with the bank's books and records – see *Ulster Bank Ireland Limited v O'Brien* [2015] 2 IR 656 and *Bank of Scotland plc v Beades* [2019] IESC 61.
27. The trial judge accepted this evidence and indeed, Mr. Deacon admitted under cross-examination that he did not dispute it. There was no suggestion that the solicitors did not have Mr. Deacon's authority to deal with the transactions as they did. I have already referred to the findings of the trial judge in this regard. These were primary findings of fact that cannot be interfered with by this court on well settled *Hay v. O'Grady* [1992] 1 IR 210 principles, unless they can be shown to have been unsupported by any credible evidence. Not only were they supported by such evidence, but that evidence was entirely unchallenged by Mr. Deacon.
28. It is in any event clear to my mind that, notwithstanding the appellants' complaints of shortcomings in the documentary evidence, the original loan agreements were in fact proven in evidence by being put to Ms. Deacon in cross-examination and Mr. Sexton in his evidence in chief. As *Leopardstown Club Limited v. Templeville Developments Limited* [2010] IEHC 152 demonstrates, it is not material how the originals come to be before the court and whether this arises through examination in chief or cross-examination.

29. Although Mr. Deacon accepted that he had entered into loans 1 – 4, he denied loans 5 – 6, being the replacements for the PBL's. Loans 5 and 6 were the last two loans in chronological order entered into by Mr. Deacon. The height of his evidence in that regard was that he was unaware of these two loans. However, both of those loans were in fact proved by Ms. Carthy's evidence which, as previously noted, was unchallenged and was accepted by the trial judge. Further, in his supplemental affidavit sworn on the 29th June, 2012, Mr. O'Sullivan averred at para. 6: -

"(f) Thereafter, the first named defendant decided to convert his pension backed loans to ordinary principal and interest term loans. This is evidenced by a credit memorandum dated 28th July, 2008 submitted to the bank's credit committee on behalf of the bank's Kilkenny branch. I beg to refer to a copy of that credit memorandum upon which, marked with the letters and number EOS15, I have signed my name prior to the swearing hereof.

(g) The bank gave effect to the first named defendant's request to convert his pension backed loans to principal and interest term loans by issuing two loan facility letters dated 11 August 2008. These are the loans designated facility 5 and facility 6 in these proceedings and which appear at exhibits EOS9 and EOS11 to my grounding affidavit. The stated purpose of those facilities was to repay the existing pension backed loans. I beg to refer to statements of account in respect of the pension backed loans upon which, pinned together and marked with the letters and number EOS16 I have signed my name prior to the swearing hereof. As appears from those statements, the capital sums due under those pension backed loans were repaid in December 2008 and the loans were discharged in full in January 2009."

30. These averments by Mr. O'Sullivan were not challenged and in the circumstances, it is clear that the trial judge was entitled to accept the bank's evidence on this issue in preference to the vague assertion by Mr. Deacon.

Fraud and forgery

31. Whilst it could be said that neither of these issues were before the court by virtue of them having been struck from the defence by the earlier order of the High Court, Mr. Deacon was not inhibited in any way in raising whatever matters he wished to raise by way of defence. In fact nothing was advanced by way of alleged fraud at the trial and the issue of forgery rested solely on Mr. Sexton's evidence, about which the trial judge entertained considerable reservations. As I have said, he was clearly of the view that Mr. Sexton had no proper qualifications that entitled him to give opinion evidence of the kind he purported to give.

32. Although the trial judge did not explicitly say so in terms, it is clear that he rejected Mr. Sexton's evidence on the issue of forged signatures by declining to accept that he had demonstrated a scientific and rational basis for his conclusions. Again, these were findings that the trial judge was perfectly entitled to make concerning this witness's evidence which, as previously explained, cannot be interfered with by this court. Quite

apart from that, the important point, as observed by the trial judge, is that Mr. Sexton's evidence was entirely irrelevant in circumstances where the bank had proved the terms of the loan agreements by leading the evidence to which I have already referred.

The bank as financial advisor

33. In his defence, Mr. Deacon pleaded that the bank acted unlawfully as his financial advisor. The trial judge's understanding of that plea was that Mr. Deacon was complaining that he was persuaded to enter into the PBL's as a result of financial advice given by bank officials. Of course the first point to be noted here is that the bank's claim is unrelated to the PBL's, as the trial judge accepted. Even aside from that, the trial judge held that Mr. Deacon had not established that he was given financial advice as such as opposed to mere information about a financial product.
34. While it is certainly true to say that the bank offered Mr. Deacon PBL's, Mr. Deacon was, as the trial judge said, free to accept or reject that offer and indeed he decided to accept it even though his accountant, Mr. Stamp, counselled against it. Aside from whether Mr. Stamp could be regarded as a qualified financial advisor within the meaning of the relevant legislation, the trial judge concluded that Mr. Deacon, as an experienced businessman, was perfectly capable of understanding what was being offered to him and making up his own mind.
35. These again are clear findings of fact that cannot be disturbed by this court. The trial judge also noted that Mr. Deacon was not alleging any form of undue influence against the bank. As the trial judge had pointed out, even if there was any stateable basis for this allegation, it could only ever amount to a basis for a counterclaim, which is not made, rather than a defence. No particulars of any alleged breach of duty have ever been furnished by Mr. Deacon nor has he ever said what losses, if any, he suffered as a result of the breach.

Alleged breaches of codes of conduct

36. It is to be noted under this heading that Mr. Deacon, rather bizarrely it has to be said, makes two mutually contradictory assertions. The first is that he was a consumer and the loans are unenforceable because they do not comply with s. 30 of the Consumer Credit Act, 1995. The second is that he is entitled to rely on the Central Bank's Code of Conduct for Business Lending to Small and Medium Enterprises which, by definition, cannot apply to a "consumer".
37. Leaving to one side that evident contradiction for a moment, it will be recalled that in his first affidavit, Mr. O'Sullivan swore that the purpose of the facilities was to assist in the purchase of land for use in connection with Mr. Deacon's quarrying and concrete business and to refinance existing borrowings for that purpose. That evidence was never contradicted by Mr. Deacon who on the contrary, accepted that the loans were for the purpose of land acquisition. Insofar as the PBL's were concerned, the trial judge noted that Mr. Deacon's company had paid the premiums and benefitted from tax relief in that regard. The judge cited with approval the dicta of Kelly J. (as he then was) in *AIB v. Higgins* [2010] IEHC 219 where the court said: -

“101. The European Court of Justice clearly envisaged that the concept of the consumer was confined to a person acting in a private capacity and not engaged in trade or professional activities. The self same person can be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. Only contracts concluded for the purpose of satisfying an individual's needs in terms of private consumption are protected by the Directive.”

38. The trial judge accordingly concluded that Mr. Deacon could not be considered to be a consumer for the purposes of the relevant consumer legislation, a conclusion with which I fully agree.
39. On the application of the SME Code, the appellants refer to various provisions of the Code but do not identify precisely what the breaches complained of are. As the trial judge noted, the only specific breach alleged was that the bank did not conduct annual reviews of Mr. Deacon's accounts. He felt it was debatable whether any breach in that regard had been established but in any event, whether an annual review was or was not carried out or offered was, in the view of the trial judge, immaterial to the enforceability of the loan. He referred to *Zurich Bank v. McConnon* [2011] IEHC 75 in which Birmingham J., as he then was, rejected the suggestion that a breach of the Code renders the lending contract null and void or otherwise exempts a borrower from the liability to repay, certainly where the Consumer Protection Code is concerned.
40. Although there does not appear to be a case directly on point in relation to the SME, in general it would appear from the recent judgments that where regulatory codes of this nature are concerned, the courts generally do not have a role in considering compliance with such codes – see *Irish Life and Permanent plc. v. Dunne* [2016] 1 IR 92. I am therefore satisfied that the trial judge's conclusion on this point was correct.

Misrepresentation

41. Though the appellants appear to raise a point concerning the agreements being procured by misrepresentation, they have never identified the misrepresentation or how it is said to have induced Mr. Deacon into entering into these loan agreements. No evidence in this regard was tendered by the appellants at the trial and the judge found as a fact that the loan agreements were not procured by misrepresentation. This ground of appeal is therefore not made out.

Conclusion

42. For the reasons explained, I am satisfied that this appeal should be dismissed. With regard to the appeal concerning the earlier order made by Cooke J. striking out certain paragraphs of the defence, that as explained has to a large extent been overtaken by the substantive hearing and is therefore largely, if not entirely, moot. Insofar as it is not however, no basis has been advanced by the appellants for interfering with this order which was in my view clearly an appropriate order to make in all the circumstances. Accordingly, I would dismiss this appeal also.

43. As the bank has been entirely successful in both of these appeals, my provisional view is that it is entitled to the costs of the appeals. If the appellants wish to contend for a different order, they will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, the appellants may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

44. As this judgment is being delivered electronically, Faherty and Ní Raifeartaigh JJ. have indicated their agreement with it.