

THE HIGH COURT

[2018 No. 238 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

MARTIN MCGOWAN AND PATRICIA MCGOWAN

DEFENDANTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of February, 2020

1. The defendants, who are husband and wife, say that they acquired Scholars Townhouse Hotel in Drogheda in or about 2005 and have operated that property since then. The hotel was bought with a loan from Bank of Scotland (Ireland), but subsequently the business needed an overdraft facility, so the defendants approached AIB. The date that happened is not altogether clear, but seems to have been in 2005.
2. The defendants say that between 2005 and 2010, Bank of Scotland (Ireland) provided AIB with a letter of credit, but was not prepared to renew that letter after 2010. The business was struggling at that time. The plaintiff says that each of the defendants entered into an overdraft facility on 1st June, 2010 for €100,000 with an interest rate of 7.95%. Both of the letters concerned were exhibited and both state that the overdraft is repayable on demand. According to the defendants, they then entered into a debt settlement arrangement with Bank of Scotland (Ireland). They say that had AIB called in the letter of credit, then the overdraft would have been rolled up with the other debt to Bank of Scotland (Ireland) and settled at that time, albeit that the exact time was unspecified.
3. The plaintiff says that it was not clear to it that there would not be an extension of the Bank of Scotland (Ireland) letter of credit. The defendants say that the overdraft facility expired on 16th February, 2012 and have exhibited a letter from AIB supporting that. The plaintiff has exhibited a letter dated 29th May, 2013 stating that the overdraft would expire on 5th June, 2013, but it is hard to know what that means in circumstances where there is previous correspondence indicating that the overdraft facility had already expired. The plaintiff claims the defendants continued to draw down on the overdraft facility until 2013.
4. According to the plaintiff, the last payment made by the defendants in part-satisfaction of the debt was on 26th February, 2015. That is said to be in the amount of €1,000 as appears on p. 827 of an 832-page exhibit of statements. The natality of that particular information is an exhibit to a misnamed "*supplemenatal*" affidavit of Mr. Gary Mulholland, which exhibit the plaintiffs admit they did not serve on the defendants, through human error, prior to the hearing of this motion.
5. The plaintiff contends that a default in payment occurred and it demanded the sum due on 6th February, 2018; and again letters to each defendant are exhibited. On 27th February, 2018 a summary summons was issued seeking judgment in the sum of

€122,202. On 31st July, 2018 (although the year is blank in the copy furnished to me) the plaintiff issued a notice of motion for summary judgment. That was returnable before the Master on 25th October, 2018 as it was issued prior to the termination of his jurisdiction in summary judgment matters under practice direction HC 84 in February, 2019. The motion was transferred to the common law motion list on 12th March, 2019 and from there on 27th May, 2019 to the non-jury list, given that the hearing was likely to take over fifteen minutes.

6. I am now dealing with that motion and I have received helpful oral (and in the case of the plaintiff, written) submissions from Mr. Conal Ellis B.L. for the plaintiff and from Mr. Ross Gorman B.L. for the defendants.

Criteria for summary judgment

7. The law on the criteria for summary judgment has been rebalanced somewhat recently by the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 (Unreported, Supreme Court, Clarke C.J. (Charleton and Ní Raifeartaigh JJ. concurring), 29th November, 2019) in a manner that imposes somewhat more onerous requirements on plaintiffs than was previously understood. That judgment was applied recently by that court in *Bank of Scotland v. Fergus* [2019] IESC 91 (Unreported, Supreme Court, Charleton J. (McKechnie and McGovern JJ. concurring), 18th December, 2019), and I have had occasion to discuss the law in this area recently in *Havbell Ltd v. Harris* (Unreported, High Court, 21st February, 2020). Essentially, there are four criteria:

- (i). is the plaintiff's claim sufficiently pleaded and particularised;
- (ii). has the plaintiff adduced evidence establishing a *prima facie* case;
- (iii). if so, whether there is a fair and reasonable probability of the defendant having a real or *bona fide* defence; and
- (iv). if so, has the defendant shown that this goes beyond mere assertion and is supported by evidence or other indicators.

Is the plaintiff's claim sufficiently pleaded and particularised?

8. Mr. Gorman submits that the plaintiff has not particularised the debt sufficiently in terms of principal versus interest in line with *O'Malley*. Complaint is made by Mr. Ellis that this point was not signalled in advance and that the defendants had not taken issue on affidavit, or otherwise, with the amounts or the calculations in the plaintiff's summary summons or supporting affidavits. However, this point does not need to be signalled in advance. It follows from *O'Malley* that this is a burden the plaintiff must overcome, and it is always open to a defendant to submit at the close of a plaintiff's application that the plaintiff has not discharged such onus as is on it. That is all that happened in this particular case, and under this heading I must hold that the plaintiff has failed to comply with the onus on it to sufficiently particularise the sum claimed in accordance with *O'Malley*, because the summary summons here merely offers a global sum without any adequate or proper breakdown.

Has the plaintiff produced evidence establishing a *prima facie* case?

9. While the matter goes to plenary hearing anyway on foot of the first point, it is worth pointing out that there is a certain lack of clarity on the evidence adduced on behalf of the plaintiff. The letter of 29th May, 2013 refers to a balance of €97,229.61 and also refers to surcharge interest of 12% on the entire balance in addition to the annual interest rate of almost 8%. The statement of 15th October, 2018 shows a balance of €90,079.51 excluding interest of over €38,000. The endeavour to furnish over 800 pages of statements exhibited to a grounding affidavit seeking summary judgment does not conveniently provide the appropriate level of clarity as to how much is principal and how much is interest, and at what rate. It is no great surprise that Mr. Gorman says the matter is unclear. The fact that the plaintiff did not serve the 800-plus pages of statements on the defendants prior to the hearing date means it would be unfair to allow the plaintiff to rely on this exhibit in any event. So, as the plaintiff has not overcome the necessary onus to duly particularise the matter in evidence either, the case should be adjourned to plenary hearing under this heading as well. I will consider the question of the defendants' defence in case I am wrong about the foregoing, but what follows is *obiter* in those circumstances.

Is there a fair and reasonable probability of the defendant having a real or *bona fide* defence?

10. Three elements of a possible defence have been positively identified:

- (i). failure to call in the letter of credit;
- (ii). the statute of limitations; and
- (iii). the question of penal interest.

Failure to call in the letter of credit

11. There is a considerable lack of evidence on behalf of the defendants as to this point, which is advanced at a certain level of generality. The problem for the defendants is that a financial institution is not obliged to enforce its security in any particular way. As put by Lord Templeman in *China and South Sea Bank v. Tan Soon Gin* [1990] 1 AC 536 at 545, [1990] 2 WLR 56, "*the creditor is not obliged to do anything*". Such an approach has been followed consistently, see e.g. *Kotonou v. National Westminster Bank Plc* [2010] EWHC 1659 (Ch), *AIB v. Yeats* [2016] IEHC 60 (Unreported, High Court, 5th February, 2016) *per* Noonan J., and *Bank of Ireland Mortgage Bank v. Neary* [2019] IEHC 169 (Unreported, High Court, 15th March, 2019) *per* Simons J. I would view the *China and South Sea Bank* approach as sufficiently established and as the appropriate approach in law in this jurisdiction, so as to mean that the defendants haven't demonstrated a viable defence under this heading. Some sort of point about a collateral contract was mooted, but that was insufficiently developed at this stage to see how it can even arguably get around the *China and South Sea Bank* problem.

Statute of Limitations

12. The limitation period is six years from accrual of the cause of action: s. 11(1)(a) of the Statute of Limitations 1957. The established law seems to be that the cause of action in the case of a loan of indefinite duration, repayable on demand, is the date on which the

loan is made: see Martin Canny, *Limitation of Actions*, 2nd ed., (Dublin, Round Hall 2016) para. 10-14, p. 188. While I don't have to decide this interesting legal point, the traditional approach of time running from the date of the loan itself has a definite logic to it and I should add that I probably would have upheld that as being the correct legal position, as against the bank's battery of alternative, later dates on which time contendedly ran, such as the date of expiry of the facility or the date of the letter of demand. I could add that it seems implausible that a belated letter of demand could start the clock for statute purposes as this would give continuing life to debts of unlimited antiquity.

13. The bank however also makes an alternative, and probably weightier, argument that payment was made in part-satisfaction in 2015, thus re-starting the clock for statute purposes. However, as I have said, it would be unfair to take any account of the unserved exhibit; and shorn of that information Mr. Mulholland's averment on this issue is not much more than mere assertion. Merely making a payment, in any event, does not automatically constitute acknowledgment of a debt, or all of it. One would need evidence as to the circumstances, and in my view a one-line comment in Mr. Mulholland's latest affidavit is not sufficient to put the bank in a position where it can be said that it is very clear that it will succeed on the statute point. The defendants rely on the fact that Barniville J. in *Promontoria (Arrow) Ltd v. Burke* [2018] IEHC 773 (Unreported, High Court, 19th December, 2018) gave leave to defend on a statute point, albeit in somewhat different circumstances, but ultimately, as in *Burke*, I cannot say in the present case that the defendants have no defence under this heading.

Penalty clause

14. Mr. Gorman submits that the imposition of the 12% surcharge rate in addition to the standard rate of interest of 7.95% comes to almost 20%, and is at the level of an unenforceable penalty clause: see *Flynn v. Breccia* [2018] IECA 273 (Unreported, Court of Appeal, Finlay Geoghegan J. (Peart and Hogan JJ. concurring), 30th July, 2018). That also seems to me to be an arguable defence. The plaintiff complains that it is not on notice of this, but since the point arises from correspondence already exhibited, I do not think the plaintiff can really complain.

Is the proposed defence mere assertion or is it supported by evidence or indicators?

15. In my view the defendants have adequately overcome this issue having regard to the fact that the penal interest issue is stated in the bank's own correspondence and the statute point arises from the material exhibited.

Should the matter be remitted to plenary hearing on limited grounds?

16. Mr. Ellis submits that if I remit the matter to plenary hearing on the basis of *O'Malley*, I should give leave to defend only on that ground. That, however, is a misunderstanding. *O'Malley* relates to a defence to an application for summary judgment. If a matter is going to plenary hearing, any lack of particularisation can be dealt with in the statement of claim and replies to a notice for particulars. Any outstanding lack of particulars after that process will be a matter for the court to assess in the light of all the evidence. Where a plaintiff fails to overcome the threshold burden of adequately particularising and

evidencing its case for the purposes of summary judgment, however, the court does not get to the point of making a formally binding decision (as opposed to *obiter* comment) on the strengths or otherwise of the defence. Therefore, it would not be appropriate to limit the defence in any particular way under such circumstances. Where an application for summary judgment fails on an *O'Malley* basis, therefore, the default order must be general leave to defend. The fact that I have taken the view *obiter* that one of the defence points is not of any great weight is not in itself a reason to depart from that approach.

Order

17. Accordingly, the order will be:

- (i). to dismiss the plaintiff's motion;
- (ii). to give the defendants leave to defend on any grounds that they may be advised;
and
- (iii). to adjourn the matter to plenary hearing.