

THE HIGH COURT

[2023] IEHC 199

[Record No 2017/2593 S.]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

PAUL LYNCH

DEFENDANT

[Record No 2018/3 S.]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

PAUL LYNCH and ANNE LYNCH

DEFENDANTS

JUDGMENT of Ms Justice Bolger delivered on the 24th day of April 2023

1. The plaintiff has brought two applications in relation to a loan taken out by the defendants in October 2005 to (1) amend the proceedings to particularise the claim in the light of the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, [2020] 2

I.L.R.M. 423, and (2) enter final judgment on the basis that the defendants have no *bona fide* defence to the proceedings.

Background

2. The defendants took out a loan to purchase two investment rental properties. The facility letter of 28 October 2005 refers to interest only repayments for three years and thereafter 214 monthly instalments of interest and principles. However, the defendants claim that they had a verbal/gentleman's agreement with the plaintiff's predecessor that their repayments would be interest only for the entirety of the mortgage and would be paid from the rental income on the properties. The defendants proffered no evidence to corroborate their claims and did not identify the persons with whom they had this agreement. They claimed the agreement was premised on the value of the apartments rising but said there was no discussion about what would happen if their values decreased. The first named defendant in his submissions to the court suggested that this would "have worked out". There is a lack of commercial reality to the defendants' version of the terms of their loan agreement.

3. Shortly after the three years of interest-only repayments, the loan went into arrears. The defendants continued to discharge the interest from the rental income. Around that time the defendants (1) acknowledged that the loan went into arrears and made proposals for what was referred to in their correspondence as their debt and (2) expressly accepted an offer by the plaintiff to allow a short period of interest-only repayments after which the defendants acknowledged they would make repayments of interest and principle. A Mortgage Form of Authority dated 16 February 2012 was signed by the first named defendant confirming that agreement. The first named defendant acknowledged in his affidavit of 1 November 2019 that he accepted this offer but said he had to as it was the only thing on offer. Had the defendants in fact had the legal entitlement to an interest-only repayment arrangement as they claim, they would have had the alternative option of standing on that entitlement. They made the decision not to do so. That undermines their claim that they had a legally enforceable right to such a repayment arrangement by virtue of a verbal agreement reached in 2005, in express contradiction to the written terms signed by them.

4. The defendants also pointed to documentation from the bank, including bank statements, some of which included the words "interest only". I am satisfied that those documents along with

the loan facility letters, insofar as they referred to "interest only", related to the three-year period during which the defendants had agreed with the plaintiff's predecessor that they would make repayments on the loan on an interest-only basis. I do not accept those documents evidence a legally binding agreement whereby the defendants could repay the loan on an interest only basis for the lifetime of the 20-year loan or until such time as they chose to sell the asset and realise monies to repay the principle from what the defendants seemed to believe would definitively have been an increased value from when the apartments were purchased in 2005.

5. The defendants asserted unclear and undefined legal rights which they claim flowed from proposals they made to the plaintiff prior to and since the institution of the proceedings. In the absence of evidence of any contractual entitlements to require engagement (nothing of which was put before the court), any negotiations that took place could not have given rise to legal entitlements no matter how reasonable the defendants may have believed their proposals to have been.

6. The defendants sought to rely on the Central Bank Code of Conduct on Mortgage Arrears, without any clear explanation as to the legal basis for same. The properties here were investment properties which meant that the provisions in the Code about a mortgagee's principal residence could never have been applicable. A breach of the Code could give rise to a separate regulatory complaint of the type that was instituted by the defendants to the Financial Services Ombudsman, but I have not been satisfied of any relevance that any such asserted breach could have for the plaintiff's right to seek repayment of an unpaid loan or the defendants' obligation to repay it.

7. The defendants also claim that the plaintiff had unnecessarily delayed in the sale of the properties, thereby causing a loss in the net proceeds obtained. I have not been satisfied of the merits of any such claim and in any event, any delay that may have occurred could only be relevant to costs and not to the plaintiff's right to seek repayment of the loans. Neither am I satisfied that the plaintiff failed to properly calculate interest due or calculate the net proceeds of sale. I am satisfied that any deductions made from the monies generated by the sale of the properties were properly made as fees, charges and interest. At least some of the defendants' argument in this regard seem to be based on a misunderstanding of the legal costs applicable to possession proceeding, rather than the legal costs arising from the sale of a property.

1) The Motion to Amend

8. The plaintiff seeks to amend the Indorsement or Claim to the Special Summons to further particularise its claim in light of the decision of *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, [2020] 2 I.L.R.M. 423, relying on O. 28, r. 1 of the Rules of the Superior Courts. The test for such an amendment is that it ensures the interests of justice and the real issues in controversy are addressed and was applied to an application very similar to this by Humphreys J. in *Havbell DAC v. Harris* [2020] IEHC 147 where the amendments were allowed. I adopt the same approach here. The amendments sought are in the interest of justice and will ensure the real issues in controversy between the parties are before the court. They do not seek to change the plaintiff's case but simply seek to particularise the figures.

9. The defendants' arguments, including various points made in relation to the service of proceedings, the veracity of documentation, and a claim of hearsay evidence along with the plaintiff's role in the defendant's attempt to secure a personal insolvency arrangement, lack validity. The defendants asserted prejudice because they said they had no information in relation to the *O'Malley* decision. That is not evidence of prejudice. They claim the interest figures were inaccurate. I am satisfied that any such inaccuracies relate only to the defendants' analysis of those figures. Some misunderstanding arose from the fact that the plaintiff decided to charge simple, rather than compound interest, from a certain point in time which is to the benefit rather than the prejudice of the defendants.

2) Motion for Summary Judgment

10. In my decision refusing an application to enter summary judgement in *Duggan v. Supermacs Ireland Ltd* [2022] IEHC 630, I held that the court must be satisfied that it is very clear there is no defence and accepted the principles espoused by McKechnie J. in *Harrisrange Ltd v. Duncan* [2002] IEHC 14, [2003] 4 I.R., as well as the analysis of the Supreme Court of what is meant by the credibility of a defence set out by Clarke J. in *IRBC v. McCaughey* [2014] IESC 44, [2014] I.R. 749. The possibility of a defendant's position being improved by discovery and/or oral testimony must be considered, albeit there must be a reasonable and viable prospect of such an improvement rather than merely speculative or optimistic expectations.

11. The court has also had regard to the summary of the well-established test set out by McMenamin J. in the Supreme Court in *Ulster Bank Ireland Ltd v. O'Brien & ors* [2015] IESC 96,

[2015] 2 I.R. 656, where he identified, *inter alia*, the need to assess whether the defendant has disclosed "even an arguable defence" (para. 7).

12. The defendants in this case have asserted a number of points which they say give them a good defence, some of which are analysed above. At no time have the defendants identified any evidence they intend to call by way of witnesses or discovery. They have not identified any person with whom they say they had a verbal/gentleman's agreement or any intention to scope out an evidential basis for their claims. At no time have they disputed that they borrowed the money and knew that interest would be charged on it. Their dispute relates to the basis on which they say they agreed to repay the loans, what they claim is their right to have their proposals accepted by the plaintiff and the plaintiff's obligation to retain the property pending its value recovering in an improving market. None of those claims have any basis in law and do not identify an arguable defence to the defendants' failure to repay the debts that they have acknowledged.

13. Insofar as the defendants claims to rely on a defence based on a tort of reckless lending, no such tort exists, as per McGovern J. in *Osbourne v. KBC Bank Ireland Plc & ors* [2016] IEHC 220. Neither does any right arise from the defendants' asserted non-compliance with the Bank's Code of Conduct on Mortgage Arrears, which entitles a borrower to make a complaint to the Central Bank (as per Binchy J. in *Bank of Ireland v. McMahon & McMahon* [2018] IEHC 455) but does not give rise to a defence in a case of an unpaid loan such as this.

14. None of the defendants' assertions have any credible basis in fact or in law and, whilst they may be genuinely held views, cannot equate to an arguable defence or a defence that could realistically improve at trial with the benefit of oral evidence and/or discovery.

15. I therefore allow the plaintiff's applications both to amend the proceedings and to enter judgment against the defendants in the terms of the Notices of Motion.

16. I will put the matter in for mention before me on 9 May 2023 for the purpose of making final orders and to address costs. I am not giving any indication on costs as it was indicated to me in the course of argument that any delays that were allowed to occur as well as any confusion that may have been caused to the defendants by different versions of the documents, could potentially be addressed by costs. I make no such findings on either point pending hearing any submissions on

costs. In the event that either party wishes to submit written submissions, they must be shared with the other side and furnished to this Court 48 hours before the matter is back before me.

Counsel for the plaintiff, Nevan Powell BL.

The first named defendant represented himself.