

THE HIGH COURT

[2021] IEHC 741  
2018/671S

**BETWEEN:**

**PEPPER FINANCE CORPORATION (IRELAND) DAC**

**PLAINTIFF**

**AND**

**EDDIE KENNY, DOROTHY KENNY AND YVONNE KENNY**

**DEFENDANTS**

**Judgement of Mr Justice Cian Ferriter delivered this 25th day of November 2021**

**Introduction**

1. This is my judgment on the plaintiff's application for summary judgment against the defendants on a joint and several basis in respect of a sum of €366,410.20 claimed to be the amount outstanding in respect of a loan facility in the sum of €402,000 dated 13th February, 2008 provided by the predecessor in title of the plaintiff, Bank of Scotland (Ireland) Limited ("Bank of Scotland" or "the Bank"), to the defendants to be repaid with interest over a 20-year term ("the 2008 loan agreement").
2. Before hearing the summary judgment application, I made orders amending the summary summons to bring it into line with the requirements of *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 and substituting Pepper Finance Corporation (Ireland) DAC ("Pepper") as plaintiff in place of Feniton Property Finance DAC in circumstances where the latter had sold and assigned the loan contract the subject of these proceedings to Pepper.

**Applicable legal principles**

3. The applicable legal principles to an application for summary judgment are well established and are not in dispute. The Court must apply the principles laid down by the Supreme Court in *Aer Rianta v. Ryanair* [2001] 4 IR 607, as elaborated upon by McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 IR 1 (HC). *Dicta* of Clarke J (as he then was) in *GE Woodchester v Aktiv Kapital* [2009] IEHC 512 ("*GE Woodchester*") are also relevant to this application. In short, it must be "very clear" that the defendants have no arguable case.

**The relevant evidence**

4. The defendants do not deny that they entered into the 2008 loan agreement, nor that they drew down the loan on foot of that agreement, nor that a significant balance remains outstanding. The central ground of defence contended for by the defendants is that in or around March 2010, they entered into an agreement with Bank of Scotland whereby the bank agreed to accept monthly repayments of €1,200 until further notice in discharge of the 2008 loan agreement i.e. that the 2008 loan agreement was varied by agreement in 2010. I will refer to this as the "alleged 2010 agreement".
5. The first named defendant, Yvonne Kenny ("Ms Kenny"), has sworn three affidavits on behalf of the defendants in support of their opposition to the plaintiff's application for summary judgment. The plaintiff properly accepts, in the absence of evidence from a Bank of Scotland witness who dealt with the defendants in March 2010, and

subsequently, that it is obliged to take the defendants asserted case as to the circumstances of the alleged 2010 agreement at its height.

**The alleged 2010 agreement**

6. Ms. Kenny avers in her first affidavit, in relation to the alleged 2010 agreement, as follows:

*"[6] I say that on or about March 2010, I attended at an office of the Bank at Bank of Scotland House, 124-127 St Stephen's Green, Dublin 2. I say that the First Named Defendant, Eddie Kenny, also attended at the meeting. I say that an employee of the Bank who introduced himself as Patrick met with this Deponent and with the First Named Defendant. I say that said employee agreed to restructure the instalments, and under this revised agreement I was to pay €1200 per month until further notice. I say that I was furnished with an account number at this time in order that I may set up a standing order which I subsequently did.*

*[7] I say that the first payment of the agreed amount of €1200 was made on or about 20th April 2010. The most recent payment of this amount was made on the 20th November 2018.*

*[8] I say that for a period of approximately five years I received no further correspondence from Bank of Scotland and this agreement remained in place."*

7. In her second affidavit, Ms Kenny further avers as follows in relation to the alleged 2010 agreement:

*"[14] As a supplemental averment to that contained in paragraph 6 of my Replying Affidavit, I say that I attended with my father, Eddie Kenny, at the office of BOSI at Bank of Scotland House, 124-127 St. Stephen's Green, Dublin by prior appointment in or about March or April on account of my inability to maintain the previously contracted for monthly payments of circa €2,283.09 on the Loan. Upon entering the reception area, at approximately 3:30 pm. I approached the receptionist at the reception desk and advised her that I had an appointment at 3:30 p.m. to discuss the Loan. She asked us to sit down and that 'somebody would come down to us.' I say that we sat down in the reception area and a short while later a man who introduced himself as Patrick came down and brought us in the lift to a meeting room on an upper floor which contained a round table and chairs. We had a general conversation at first during which he told me that he had just relocated to Donegal with his wife and new child and that he had been brought back by the bank to deal with the mortgage arrears crisis. He said that I had requested the meeting and asked me to explain why. I responded that I had been paying interest only on the loan and that I was now required under its terms to discharge capital and interest in the amount of €2,283.09 and that I was not in a position to discharge this. He enquired as to the amount that I was in a position to discharge and asked if I could discharge the sum of €1,800 per month to which I replied 'no'. He then enquired as to what the average rent in the area was for this type of property and what rental*

*payment it could achieve. I told him that the property could achieve a rental payment of €1,200 per month and in response to a question from him as to whether I could make this payment I responded that I could. He advised that a payment of €1,200 per month would have to comprise €400 in respect of the principal sum due and €800 in respect of interest payments and he explained that the reason for this was that the interest payments have to be higher to cover the unknown costs of the variable interest rate payable. I advised him that this was satisfactory and he said that I would then have to setup a new standing order in respect of the payment. I duly set up this new standing order and the first payment under the agreement was made by me in April 2010. Because of the 2010 Agreement, I continued making payments on the loan and made the first payment of €400 and €800 interest on or about 20 April 2010, as shown by exhibit 2DOS2 to the replying affidavit of Donal O'Sullivan."*

#### **Post the alleged 2010 loan agreement**

8. It is common case that the defendants missed a significant number of payments on the revised repayment schedule they contend was the subject of the alleged 2010 agreement, amounting to over 25 missed payments in the years 2013 to 2018.
9. There was a meeting between Pepper and the defendants in October 2017. Demand for the outstanding sums was made in December 2017 and these proceedings were instituted in May 2018.

#### **The parties' submissions**

10. The plaintiff makes the case, in short, that even taking the defendants' case at its height in respect of the alleged 2010 agreement, the alleged 2010 agreement is not an enforceable agreement as a matter of common law in circumstances where there is no consideration identified in respect of the agreement and where there is no evidence of a memorandum or notice in writing in writing for the purposes of the Statute of Frauds evidencing the alleged agreement. Further, the plaintiff relies on the rule in Pinnel's case to the effect that an agreement to accept less than 100% of an outstanding debt does not preclude the lender from seeking to subsequently sue to recover the balance of the debt unpaid.
11. The plaintiff makes the point that the defendants do not in the evidence put before the Court on this application assert that there was a variation in the overall amount of the loan i.e. no write down of any part of the loan is contended for and furthermore it is not contended that there was an agreed variation of the loan period of 20 years in circumstances where if, on their case, there was a variation of the original loan agreement to reduce the monthly payments to €1200, it would have to follow that the term of the loan would have been greatly extended.
12. The plaintiff submits that the only plausible conclusion on the evidence before the Court is that the defendants entered a temporary accommodation with Bank of Scotland in 2010 that fell far short of even an arguable legally-binding variation of the 2008 loan agreement.

13. The plaintiff relies in this regard on repeated references by Ms. Kenny to a desire on the part of the defendants in their interaction with the Bank and with Pepper, subsequent to the alleged 2010 agreement, to "regularise" their affairs, a position which the plaintiff says is inconsistent with there being any binding agreement in place.
14. The plaintiff further contends that, even if it could be said that there was a *prima facie* enforceable agreement in 2010 to vary the original 2008 loan agreement, the defendants are manifestly in breach of the varied agreement by virtue of a large number of missed monthly payments and accordingly the plaintiff (and its predecessor in title) were perfectly entitled to rely on such non-payment as an event of default and to proceed to demand the outstanding sums and to issue these proceedings.
15. The defendants for their part sought to assert that there was at least an arguable case that there was a binding variation to the 2008 agreement agreed in 2010. In their written submissions on the application they asserted that the effect of the alleged 2010 agreement was to extend the loan, although in oral submissions it was contended that the defendants were not in a position to know whether there was such a variation and that discovery and other pre-trial tools could be availed of by them to establish what the bank asserted to be the precise terms of the alleged 2010 agreement, including any term as to the variation of the period for repayment of the loan.
16. The defendants contend that there is an arguable case that a binding and enforceable variation to the 2008 loan agreement was reached in 2010 as borne out by their unchallenged averments as to what occurred in 2010. As regards the question of alleged absence of consideration, the defendants submitted that there is an arguable case that Bank of Scotland obtained a collateral benefit (or obviated a disbenefit), following the agreed variation, by the Bank being able to treat the loan as a performing loan at a time when such a categorisation would have led to liquidity and regularity benefits for the Bank. The defendants say this the arguable existence of a collateral benefit to Bank of Scotland arising from the alleged 2010 agreement also answers the plaintiff's reliance on the rule in *Pinnel's case*, citing in this regard the judgment of Laffoy J. in *The Barge Inn v Quinn Hospitality Ireland* [2013] IEHC 387.
17. The defendants further submit that, in accordance with the *dicta* of Clarke J. in *GE Woodchester*, there is a credible basis to believe that Bank of Scotland may hold documents which will evidence the alleged 2010 agreement such as to allow the defendants satisfy the requirements of the Statute of Frauds, the defendants emphasising in this regard that the concept of a memorandum or note writing is an expansive one and that it must be the case that the Bank has some documentation evidencing the alleged 2010 agreement.
18. In relation to the contention that the alleged 2010 agreement was breached by the defendants, such as to entitle the plaintiff's predecessor in title to move to enforcement, the defendants say that they have an arguable defence that there was estoppel by acquiescence on the part of the Bank. They say that this arises in circumstances where the Bank conducted a number of internal reviews of the performance of the defendants'

loan but did not take any action arising from the missed payments and continued to accept payments following the missed payments. They say that there has been detrimental reliance on that state of affairs, sufficient to raise an arguable case in estoppel by acquiescence.

19. Ms Kenny avers as follows as to that alleged detrimental reliance:

*"[16] I say and believe that the full nature of the 2010 Agreement requires determination as it impacts on the amount of arrears that can properly be stated to be outstanding. I make this averment particularly in the context of the seventh paragraph of the replying affidavit of Donal O'Sullivan, where it is averred that I missed 17 payments of €1,200 "over a 22-month period" within the nine years since the 2010 Agreement was reached. That averment, if accurate, would, in accordance with the 2010 Agreement, bring my current arrears of €20,400 -. By contrast to this, it is averred at paragraph 9 of the replying affidavit of Donal O'Sullivan that the arrears that I owe on the Loan are €163,511.39. I say and believe that my missed payments to date come to €30,000 -. but I say further that the current ambiguity as to the actual amount of my arrears is having real implications for me as I am unable to properly obtain insolvency advice to which I have a statutory entitlement until such time as I have certainty as to the amount of my actual arrears. I say and believe and am advised that, as the Plaintiff was not a party to the 2010 Agreement, it cannot know with certainty the amount of my arrears."*

20. In a separate line of defence, the defendants maintain that the plaintiff's predecessor in title was in clear breach of the requirements of clause 9 of the Bank's standard terms and conditions (which, it is agreed, formed part of the original 2008 loan agreement). The relevant part of clause 9 provides as follows:

*"Before the termination we will serve you a notice specifying the breach and informing you what must be done to remedy the breach in the time specified. We will then serve notice on you terminating the agreement. If you do not remedy the breach of agreement within 21 days of the service to you of the notice, we will then enforce our rights against you."*

21. In answer to this alleged arguable defence, the plaintiff says that it is clear from the evidence before the court that the defendants were in fact on notice of the fact that the plaintiff regarded them as being in breach, as is clear from the minutes of a meeting of 26th October, 2017 which makes reference to Pepper having issued a letter to the defendants on the subject of arrears. It is further submitted that the subject matter of that meeting was to discuss resolution of the arrears in circumstances where the defendants' entitlements under the MARP process had been exhausted. It is also submitted that the defendants were not in a position to pray in aid reliance on the alleged breach of the notice requirements of clause 9 in circumstances where, on their own case, they were contending that there were no arrears; this was not a case where they were contending that if they had been given notice in accordance with the terms of the loan

agreement, that they would have been in a position to satisfy the claim to arrears within the notice period.

**Discussion**

22. In my view, the defendants - just about - surmount the low hurdle of demonstrating an arguable case by way of defence to the plaintiff's claim for summary judgment. I do not believe I can justly and safely determine at this point that it is very clear that the defendants have no case.
23. The facts as revealed to date demonstrate a conflict as to the correct characterisation of the 2010 arrangement and as to whether there was some detrimental reliance by the defendants on the Bank's forbearance following non-payment after the 2010 arrangement. In my view, the defendants have raised sufficient by way of evidence and argument to demonstrate that there is a credible basis for asserting that, following the availing of procedural devices such as discovery, interrogatories or the like (to deploy the language of Clarke J in *GE Woodchester*) it may be demonstrated that a binding variation of the 2008 loan agreement was agreed in 2010; that Bank of Scotland obtained a collateral benefit (or obviated a potential disbenefit) from the agreement; that Bank of Scotland acquiesced by forbearing from enforcing breaches of the varied agreement and that the defendants placed some level of detrimental reliance on such forbearance.
24. It seems to me that a fuller and clearer factual position might well emerge at trial which might arguably support some or all of the lines of defence signalled by the defendant's in the course of their opposition to the plaintiff's claim for summary judgment; it is at least not very clear to me that the defendants' various lines of defence are unarguable.
25. Accordingly, I refuse the plaintiff's application for summary judgement and will remit the matter to plenary hearing.
26. I will hear the parties further on the question of the costs of the application. I am minded to reserve the costs of the summary judgment application in circumstances where it might well transpire following trial in the matter (if that stage is ever reached) that there was in fact no substance to any of the lines of defence put forward in outline terms by the defendants in answer to this application. However, I will give liberty to the parties to apply within 10 days on the question of costs should either party wish to contend for a different costs order.