THE COURT OF APPEAL

APPROVED

NO REDACTION NEEDED

Record Number: 2023/23

High Court Record Number: 2011/740S

Birmingham P. **Neutral Citation Number [2023] IECA 241**

Faherty J.

Haughton J.

BETWEEN/

CAVE PROJECTS LIMITED

PLAINTIFF/RESPONDENT

AND

PETER GILHOOLEY, JOHN KELLY, JOHN MORONEY, RORY O'BRIEN AND JOSEPH O'HARA

Approved record of JUDGMENT of Mr. Justice Robert Haughton delivered *ex tempore* the 3rd day of October, 2023

1. This is an appeal from the judgment of O'Regan J., delivered in draft *ex tempore* on 7 December 2022 and in final written form on 21 December 2022, and her order perfected on 12 January 2023, by which it was ordered that the judgment be entered in favour of Cave Projects against the second named defendant, John Kelly, for €11,407,826.09 and costs. Judgment was given after a full plenary hearing.

Background and Timeline

2. The sole appellant is John Kelly who had legal representation at all times in the High Court but is now representing himself.

3. The claim relates to successive loans to all five named defendants, culminating in a loan offer 5 September 2007 for €12,065,630, including increased lending of €600,000, on Bank of Ireland Account 23794421. Cave Projects claims the loan offer of 5 September 2007 was signed by all defendants including Mr. Kelly and it provided for joint and several liability of the five borrowers who were acting in partnership. A further loan offer in 2009 was not signed by Mr. Kelly but is not the basis of any claim. There was also a facility letter of 14 August 2007, to advance €130,000 to all the parties to purchase a house in Co. Clare, which was drawn down on a different account, and but that loan was never transferred to Cave Projects and is not part of the claim.

4. The overall purpose of the loans was to provide finance for a portfolio of six properties (ten folios in Limerick, Clare, and Galway) with development, or accrual in value development, potential in mind. The stated purpose of the 5 September 2007 loan was for professional fees, fencing and related site work. The loan was stated to expire on 31 January 2008, subject to review by Bank of Ireland. It was secured by charges over various properties held by all five defendants –

    - Deed of Charge 7 December 2007 (Clare and Limerick);
    - Deed of Charge 20 February 2009 (Galway lands).

5. Cave Projects claim in these proceedings that the defendants defaulted on the loan – the default appears to have been due to the crash in property sector – and it relies on a demand for immediate payment issued by Bank of Ireland 5 January 2011, and Bank of Ireland Statements of account, to prove the indebtedness.

6. The proceedings commenced by Summary Summons issued by Bank of Ireland 24 January 2011.

7. Then on 7 October 2011 the National Asset Management Agency (**"NAMA"**) issued an acquisition notice under s. 90 of the National Asset Management Agency Act, 2009 (**"NAMA Act"**) purporting to acquire the debt and security related to account no. 23794421.
8. Then by Heads of Terms dated 26 July 2012 Mr. Pat McDonagh agreed to buy the debt and security from NAMA.
9. It is claimed that on 22 January 2013 a Loan Asset Sale Deed was executed by NAMA entity National Asset Loan Management (**"NALM"**) with Cave Projects Limited, Mr. McDonagh's nominated company, and also on 22 January 2013 (although mistakenly dated 2012) a Deed of Indenture transferring mortgages from NALM to Cave Projects.
10. On 22 May 2013 the first, third and fourth defendants settled the claims against them – total payments were made by them of €309,831 and they agreed to assign their interest in the secured lands if demanded. Notice of Discontinuance was served and their names should be deleted from the title to the proceedings.
11. On 6 February 2013 an order was made *ex parte* by the Master of the High Court substituting Cave Projects for Bank of Ireland as plaintiff. Cave Projects then applied for summary judgment.
12. On 16 January 2015 the High Court refused summary judgment and adjourned the matter for plenary hearing. Pleadings were exchanged and discovery was made.
13. Importantly, in advance of the hearing, on 20 October 2022 Cave Project's solicitors James O'Brien & Co. wrote to the Mr. Kelly's solicitors *inter alia* formally notifying them pursuant to s. 15 of the Civil and Criminal Law Miscellaneous Provisions Act, 2020 that the plaintiff would adduce as evidence at trial the documents, and information in documents, that had been discovered and copied to the defendants, and also information in

documents contained in a Core Book, served by the plaintiff solicitors on Mr. Kelly's solicitors.

14. On 22 September 2021 Mr. Kelly refused Cave Project's open offer to settle on basis of assignment of his interest in the secured lands.

15. The plenary hearing in the High Court commenced before O'Regan J. on 29 November 2022 and ran over 6 days concluding on 7 December.

16. The evidence was that payments had been made since 2013 that reduced the debt to €11,407,826.09, and judgment was sought in that amount**.**

17. On Day 2 there was a settlement with the fifth defendant – on the basis of a strike out of the proceedings and the fifth defendant's agreement to assign his interest in the secured lands to Cave Projects. Accordingly, the fifth defendant's name should also be deleted from the title to the proceedings. Mr. Kelly thereafter was the sole active defendant.

18. Key Witnesses for Cave Projects were:

(i) Melvin Smith, solicitor, who acted for the defendants in purchase of the lands and arranging the loans and security. He gave evidence of the Bank of Ireland letter of loan offer of 5 September 2007, of which he received an unsigned copy which was put in evidence. He put in place the security required and gave evidence that on 6 December 2007 he received the Deed of Mortgage duly executed by all defendants, and sent it off to the Bank of Ireland solicitors.

(ii) Next was Cathal de Barra, solicitor, employee of NAMA, who gave evidence of the acquisition of the relevant Bank of Ireland account and related security by virtue of the s. 90 Notice which issued on 7 October 2011. He also gave evidence of the signing in January 2013 of the Loan Sale Deed that effected the conveyance of the loan assets by NALM to Cave Projects, and of signing of the Deed of Indenture transferring the charges. His

evidence was that the latter was dated 2012 in error and was in fact completed on 22 January 2013, and he acknowledged his signature "as authorised signatory for NALM".

Mr De Barra also gave evidence that letters dated 22 January 2013 were sent to all the defendants advising of the transfer to Cave Projects.

Mr De Barra also proved the s. 108 Certificate of Title which was reissued on 28 September 2022, and appears at Tab 12 of the Core Book. However, it is important to mention here that ultimately this Certificate was not relied on by Cave Projects as one of its proofs.

(iii) Next was Kevin O'Donovan, a retired bank official from Bank of Ireland, Limerick. Despite objection the court permitted him to refresh his memory by reference to the affidavit which he swore on 24 August 2011 to ground the application for summary judgment.

He gave evidence of the 5 September 2007 loan offer, of receipt of acceptance signed by all the defendants including Mr. Kelly, of default on repayment, and bank statements showing the amount due when demand was sent by letters dated 11 January 2011, and that €11,752,321 was due as of 22 August 2011 on account no. 23794421.

(iv) Mr. Tom Kelly, solicitor, put in evidence the 5 September 2007 loan facility, and the original security documents being the 7 December 2007 Deed of Mortgage and the 2009 Deed of Mortgage.

19. Most significantly Mr. John Kelly gave evidence on Day 4, and the Transcript shows that he made certain admissions. Under cross examination by Mr. Michael Delaney S.C. he accepted:

    i) That he had signed the loan facility of 5 September 2007;

    ii) That the funds referred to in all facility letters up to and including 5 September 2007 were drawn down;

    iii) That the facility of 5 September 2007 related to account no. 23794421;

iv) That he received the letter of demand of 5 January 2011 in the name of Kevin O'Donovan on behalf of Bank of Ireland;

v) That that letter accurately recorded the sum then due on the loan account of €11, 785,543.14;

vi) That he did not dispute that that sum was due for repayment to the Bank of Ireland.

This was the first time the appellant had made such admissions. His counsel also accepted there was no issue on these matters – see the closing submission of Mr. Trainor BL, Day 5 page 51. It is also notable that in his Notice of Appeal and his written and oral submissions to this court Mr. Kelly has not sought to resile from any of these admissions.

20. Certain legal submissions were made in the High Court by Mr. Delaney S.C. on behalf of Cave Projects and accepted by the trial judge. Cave Projects relied on the Civil Law and Criminal Law Miscellaneous Provisions Act, 2020, s. 13 to prove the content of business records, having first satisfied s. 14 conditions of admissibility, and having served the s. 15 notice in the form of the letter sent by its solicitors to the defendants' solicitors on 20 October 2022 which referred to the documents and information in documents listed and furnished in the Core Book. Mr. Delaney submitted in respect of s. 16 of that Act that the interests of justice were not against such admission. Cave Projects therefore relied on the Core Book and evidence adduced to prove the content of facility letters, the creation of the relevant loan account, and the Statement of Account exhibited in Mr. O'Donovan's affidavit showing the transactions/debt on the account from May 2008 to August 2011 – although **not** to prove the demand letter because of a specific exclusion in s. 14 in respect of information compiled in contemplation of civil proceedings.

21. To the extent that it might be necessary Cave Projects also relied on the pre-existing law (in particular as pronounced by Charleton J. in *Ulster Bank v O'Brien* [2015] 2 IR 656 and

Bank of Scotland Plc v Fergus [2019] IESC 91, Baker J. in *Promontoria v Burns* [2020] IECA 87 and Murray J. in *Feniton Property Finance* [2022] IECA 217) as rendering admissible evidence as to the course of dealings in relation to the loan facility and security, including the copy loan Facility put in evidence by Mr. Smith and Mr O'Donovan, the evidence of draw down of the monies, and evidence of the letter of demand (to which Mr. Kelly made no response) given by Mr. O'Donovan.

22. As authority for the proposition that Mr. O'Donovan was properly permitted in giving his evidence to refresh his memory from his 2011 affidavit, sworn in 2011 with the benefit of the bank books and records, and that that should be regarded as a "contemporaneous" document, reliance was place on *McGrath on Evidence* 3rd Edn., 2020, paras. 3-176 – 3-181.Of course, Cave Projects also relied in the first instance on the appellant's admissions under cross examination.

23. Mr. Delaney also submitted that the s. 90 Notice proved the acquisition by NAMA, and obviated the need for any proof of notice to the debtors of acquisition for the purposes of s. 28(6) of the Judicature (Ireland) Act, 1877.

24. In his Defence Mr. Kelly pleaded two issues at some length –

    (i) That the loans were captured by charges given by the Bank of Ireland to the Central Bank in 2008. However, no evidence was called in support of this defence.

    (ii) That the loans were non-recourse (beyond the security given). Again no evidence was given to support such defence.

25. Instead Mr. Kelly pursued in particular two issues not pleaded in his Defence:

    i) The settlements with other defendants, and their implications for the claim.

    ii) An alleged breach of confidentiality by NAMA.

26. The trial judge ruled that these were outside the pleadings. Despite this they were pursued in the High Court in submissions made after the evidence closed, but counsel sought to do so on the basis of allegations that had no foundation in any evidence that had been given.

27. An issue of property valuation as a condition precedent to the loan facilities was also raised in the High Court, although again not part of Mr. Kelly's Defence. However no such condition precedent appears in the September 2007 loan facility. As Mr. Delaney noted in reply, that facility provided for fresh consideration in that there was a further advance of €600,000 which was drawn down. Further insofar as there were conditions precedent relating to property valuation in earlier loan facilities he submitted that it was open to the Bank of Ireland to waive those conditions which were for the benefit of the Bank only. In any event the monies were lent and were repayable on demand.

28. Mr. Trainor B.L. in his submissions on behalf of Mr. Kelly also referred to the following:

- Lack of rent accountability since 2013.

  However, no evidence to support this, or what rent should have been collected, was put before court.

- That Mr. Pat McDonagh, the person behind Cave Projects, engaged in settlement with the first, third and fourth defendants in 2013 but not the other two defendants – thus denying Mr. Kelly the possibility of entering a personal insolvency arrangement– there was no engagement until an offer was made in 2021.

  Once again this was not the subject of any pleading, and no evidence was put before the court.

- To the payment of €309,000 that "came in on the Stockholm Fund" for the three debtors who were let out in 2013.

29. It is apparent from the transcript that the trial judge had a concern that Cave Projects had not taken the assignments available to it on demand under the settlements with the four

other defendants, and had not proceeded to seek to enforce its security, rather than pursuing judgment for the full amount against Mr. Kelly. Mr. Delaney SC explained to the trial judge the problem with that, absent a voluntary transfer from Mr. Kelly (who declined to settle on that basis,) Cave Projects could not perfect its security – it could at best get in four out of five shares in the secured properties. It was therefore easier to get judgment, register as owner of charges and sell as chargee.

30. On 7 December 2022 the trial judge delivered *ex tempore* a draft judgment, finding for Cave Projects. This was confirmed in her written judgment delivered on 21 December, 2022 and reported at [2022] IEHC 718. She was satisfied on the evidence that Mr. Kelly was indebted to Bank of Ireland under the 5 September 2007 loan facility, that the letter of demand was sent and received, and the amount of the debt. She found that Mr. O'Donovan was entitled to refresh his memory from his affidavit, prepared after a review of the bank's books, citing *McGrath* at para. 3.81 in support of this, and she found the affidavit evidence of its nature reliable. She was also satisfied that the loan was proven by a course of dealing, with monies advanced and security given. She also held that the court could rely on the admissions in evidence of Mr. Kelly. Further the court could rely on the admission of the documents (except the information in the letter of demand) as "business records" under s. 14 of 2020 Act.

31. O'Regan J. held that the s. 90 Notice proved NAMA's acquisition of the debt and security; that the loan sale deed was executed on 22 January 2013 and proved the transfer of the facility; and she held that the transfer of the security was effected by the Deed of Indenture dated (incorrectly) 22 January 2012 and in fact executed on 22 January 2013.

Notice of Appeal and Submissions

32. Many of the Grounds of Appeal are vague and generic, and they do not necessarily feature in Mr. Kelly's written submissions, or his brief oral submissions to this court which for the

most part centred on a contention that Cave Projects is not authorised to act as a credit servicing firm under recent legislation. It is therefore more convenient to approach the appeal by reference to issues raised in Mr. Kelly's submissions, which are identified and addressed in Cave Projects reply submissions.

(i) No evidence before the High Court of Course of Dealing showing the debt.

33. This cannot be sustained. Firstly Mr. Kelly admitted the debt under cross-examination. In the High Court he had the benefit of solicitor and counsel, and if he considered that the debt had not been proven it would have been open to him not to have given evidence, and to have argued before the High Court, and on appeal before this court, that Cave Projects had failed to prove the loan or debt. However he chose to give evidence, and hence to be subject to cross-examination, and in the course of that cross examination he admitted signing the Facility Letter of 5 September 2007 to accept the loan including the increase of €600,000, the draw down of funds under that loan (specifically the €600,000) and the earlier loans, and that the loan account was no. 23794421; he also agree there was default and admitted the demand made by Bank of Ireland by letter dated 5 January 201l and he admitted the amount then due by him/the defendants at €11,785,543.14.

Secondly it is well established that a course of dealing between parties may establish a loan/debt – see Charleton J. for the majority of the Supreme Court in *Bank of Ireland v Fergus* [2019] IESC 91 at para. 13. Such a course of dealing was established *inter alia* by the evidence of the solicitor then acting for the borrowers, Mr. Melvin Smith, by reference to a copy of the loan offer of 5 September 2007 and the putting in place of security, and this was evidence which the trial judge was entitled to admit and to accept.

(ii) Trial judge erred in applying s. 14 of the Civil and Criminal Law Miscellaneous Provisions Act, 2020.

34. Firstly, having regard to Mr. Kelly's admissions under cross examination there was no longer any need for Cave Projects or the trial judge to have recourse to this Act. The admission of business records and information in such records was only potentially relevant so long as Cave Projects remained on strict proof of the debt. This no doubt explains why Cave Projects called the witnesses that it did call at the trial. Any need to have recourse to the statutory presumptions in Chapter 3 of the 2020 Act for the admissibility and truth of records or information in a document compiled in the "ordinary course of business" fell away as soon as Mr. Kelly made his admissions.

35.It follows that it was not necessary for the court to decide whether the records/information was compiled "in the ordinary course of business", or whether, if s. 14 applied, the information should be excluded under s. 16(1) "in the interests of justice" based on considerations set out in s. 16(2).

36. Even if no regard is made to the admissions made by Mr. Kelly, it is clear that the trial judge was entitled to find the records and information adduced in evidence arose from the ordinary course of business, and evidenced a course of dealing upon which Cave Projects could rely. She correctly identified the one exception – under s. 14(3)(c) the information in the demand letter of 5 January 2011 could not be presumed admissible or true as it was "information compiled for the purposes or in contemplation of – (iii) civil …proceedings". The trial judge was therefore entitled to rely on the letter of loan offer, the signed version of which was put in evidence by Mr. O'Donovan (a copy was exhibited in his affidavit); and the Statements of Account up to 22 August 2011 showing the transactions and debt due on the account.

37. In advance of the trial the appellant's solicitors had served a Notice of business records in their letter of 20 October 2022, with reference to the Core Book of Documents which were copied to Mr. Kelly's solicitor. That letter evinced an express intention to rely on the documents in the Core Book for the purposes of the 2020 Act. The trial judge was entitled to find that there was compliance with the notice requirement of s. 15 of the Act of 2020. Further the trial judge was entitled to find, as she did in a reasoned manner, that there was no countervailing reason for excluding the evidence under s. 16 "in the interests of justice" having regard to Mr. Kelly's admissions under cross-examination.

(iii) *No evidence of transfer of loan facility and security from Bank of Ireland to NAMA, or from NALM to Cave Projects,and the argument that there was no notice of transfer – no "Hello" or "Goodbye" letters – for the purposes of s. 28(6) of the Judicature (Ireland) Act, 1877.*

38. The contention that there was no evidence of transfer by Bank of Ireland to NAMA must fail. Section 90 of the NAMA Act, 2009 provides, so far as relevant:

> *"(1) Subject to subsection (7), the service of an acquisition schedule on a participating institution in accordance with section 87 or 89 operates by virtue of this Act to effect the acquisition of each bank asset specified in the acquisition schedule by NAMA or the specified NAMA group entity, on the date of acquisition specified in the acquisition schedule as the date of acquisition of the bank asset, notwithstanding that the consideration for the acquisition has not been paid.*
>
> *(2)…*
>
> *(3) Unless otherwise provided in the acquisition schedule, where an eligible bank asset is acquired, every relevant contract is deemed to be assigned to NAMA or the specified NAMA group entity, as the case may be.*

(4) In subsection (3) "relevant contract" means a contract –

(a) relating to the bank asset,

(b) to which the participating institution is a party or in which it has an interest, and

(c) the existence of which has been disclosed to NAMA in writing.

(5)…

(6) Subject to section 91, subsections (1), (3), and (5) have effect in relation to a bank asset notwithstanding–

(a) any legal (including contractual) or equitable restrictions on the acquisition of the bank asset or any part of it.

(b) any legal or equitable restriction, inability or incapacity relating to or affecting any matter referred in the acquisition schedule (whether generally or in particular) or any requirement for a consent, notification, authorisation, licence or document to similar effect (by whatever name and however described), in each case… ."

39. There was uncontradicted evidence from Mr. De Barra of the s. 90 bulk acquisition notice, and that it included account no. 23794421 and any related security. Accordingly, the trial judge correctly found the acquisition by NAMA of the loan and secured lands proven.

40. The s. 28(6) argument that Mr. Kelly should have received prior notice cannot be pursued as it was not raised in the High Court. In any event, no s. 28(6) notice to the borrowers was required because that provision was disapplied to NAMA acquisitions by virtue of s. 90(6)(b) of the NAMA Act.

41. Further the trial judge was entitled, on the evidence of solicitors Mr. Kelly for Cave Projects and Mr. Cashman for NALM, to find the Loan Sale Deed and Deed of Indenture to have been duly executed by all relevant parties and to have effected the transfer of the loan and security

on 22 January 2013. She was entitled on their evidence to find that the date 2012 appearing on the Deed of Indenture to be in error, and to find that the original was executed on or about 22 January 2013.

42. The objection now made that Cave Projects did not provide evidence of notice of the transfer to Mr. Kelly was not advanced in the High Court, and in my view it is not appropriate to allow it to be pursued for the first time on this appeal.

43. In any event once again there is a saver for transfers by NAMA/NALM in s. 139 of the 2009 Act which allows it to transfer bank assets to any person notwithstanding *inter alia* "…any requirement under any enactment…for notice to…any person". It would seem to follow that s. 28(6) once again does not apply to transfers by NAMA, and notice to an affected party is not required in law. Further as Cave Projects point out in their Submissions s. 193(1)(a) of the NAMA Act provides that where a party alleges that a decision by NAMA has been made in error the affected party must challenge it within one month; that was not done here and Mr. Kelly cannot seek to circumscribe the operation of that provision by putting in issue the validity NALM's decision to transfer to Cave Projects, or the actual transfer transactions.

(iv) Written and oral Submission that insufficient evidence to ground the substitution of Bank of Ireland by Cave Projects in February 2013 as Plaintiff.

44. This was not pleaded in the case, was not canvassed in the High Court and did not feature in the judgment. It is not a ground of appeal, and therefore should not be entertained as an argument.

45. In any event the *ex parte* substitution order was made by the Master of the High Court sometime before Cave Projects moved its application for summary judgment in November

2014, and neither before nor at the time of that application, nor since then, was any application made to set aside the substitution order.

(v) Submission that Cave Projects mismanaged the secured property since 2013.

46. This was not the subject of evidence in the High Court, although counsel did attempt to raise it in closing submissions. This was done without any evidential basis, and counsel for Cave Projects understandably raised objection. It was not something that the trial judge needed to address. It is not the subject of any ground of appeal, and it is not appropriate for this court to address it. It also appears that Cave Projects has not to date appointed a receiver or gone into possession of the properties, and the evidence was that rent received from the first defendant has been applied to reduce the outstanding balance on the account.

(vi) Ground of Appeal 13 and Submission that Cave Projects is not an authorised credit servicing firm within the meaning of the Consumer Protection (Regulation of Credit Servicing Firms) Act, 2015, as amended by the Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Act, 2018.

47. At hearing today Mr. Kelly was permitted in the face of objection and *de bene esse* to hand in a Central Bank of Ireland Press Release of 21 September 2023 warning that Cave Projects Ltd. is not a company authorised to engage in the provision of credit servicing.

48. This relates to the requirement that servicing firms apply on or before 21 April 2019 to Central Bank of Ireland for authorisation to act as "credit servicing firms", and that such firms not act in breach of Central Bank of Ireland Codes of Conduct.

49. However, this was not a pleaded defence in the High Court and was not the subject of any evidence before that Court. Further it is not a ground that arises from the High Court judgment. While it was raised in the Notice of Appeal, no amendment of the pleadings has ever been sought.

50. Cave Projects take these objections and further submit that it is "purely a regulatory matter which has no relevance to the claim in these proceedings".

51. That may well be so, although I do not consider it necessary to make any determination on the issue. It would be surprising indeed if the effect of the legislation was that Cave Projects were prohibited in law from opposing this appeal and seeking to hold the judgment granted to it in the High Court, because that would be a serious interference with its constitutional right of access to the courts. Further it certainly cannot be said, on the evidence before the court, that Cave Projects, in defending this appeal in respect of the order for payment to it of €11,407,826.09, to which it is clearly contractually entitled, is engaging in the provision of financial services to members of the public.

52. That said, I would content myself with saying that it is not an issue that was raised or argued in the High Court or the subject of evidence, and it was not addressed in the judgment, and it is not therefore an issue that should be considered on this appeal.

53. I would therefore dismiss this appeal.

Birmingham P. and Faherty J. indicated that they concurred with this judgment and the order proposed to be made.

This record of the ex tempore *judgment is as delivered save that certain caselaw citations are inserted, and paragraph numbering is added for ease of reference.*

APPROVED: