



THE COURT OF APPEAL

Woulfe J.

Murray J.

Ní Raifeartaigh J.

Neutral Citation No.: [2023] IECA 75

Court of Appeal Record No.: 2018/132

High Court Record No.: 2015/594S

Between

AIB MORTGAGE BANK AND EVERDAY FINANCE DAC

Plaintiffs/Respondents

-and-

ELAINE HEFFERNAN

Defendant/Appellant

-and-

Court of Appeal Record No.: 2018/133

High Court Record No.: 2015/595S

Between

ALLIED IRISH BANKS PLC AND EVERYDAY FINANCE DAC

Plaintiffs/Respondents

-and-

ELAINE HEFFERNAN

Defendant/Appellant

JUDGMENT (NO.2) of Mr. Justice Woulfe delivered on the 31st day of March, 2023

1. This ruling of the Court relates to two issues which have arisen consequential upon the judgment of the Court (Woulfe J.; Murray J. and Ni Raifeartaigh J. concurring) delivered on the 21st December, 2022, which dismissed the appellant's appeals and affirmed the decision of the learned trial judge to grant summary judgment against the appellant in each case.

Surcharge Interest

2. In the course of the judgment, I dealt with one of the issues put forward by the appellant as giving rise to an arguable defence, to the effect that terms in the loan agreements providing for surcharge interest on arrears could be viewed as unfair terms as per the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995.

3. At para. 48 of the judgment I stated as follows:

“Returning to the terms providing for surcharge interest on arrears, the issues of whether such terms do in fact fall outside the core terms of the loan agreements and, if so, whether such terms are unfair were not argued in any detail in this Court. From a perusal of the account statements exhibited, it appears to me that surcharge interest was in fact probably not charged on the accounts arrears which arose, other than the overdraft facility, but the Court will seek confirmation of this from the respondents. If the respondents wish to maintain any claim for surcharge interest, it seems to me that it will be necessary to hear further submissions on these issues.”

4. After delivery of the judgment, the Court then gave directions that the respondents file a supplemental affidavit to confirm whether in fact surcharge interest was charged on any account arrears, to exhibit full legible sets of statements for each account to evidence this, to confirm whether or not the respondents wished to maintain any claim for any such surcharge

interest, and to confirm the total figures now claimed with or without any such surcharge interest.

5. The respondents filed an affidavit sworn by Danny Ryan on 24th January, 2023. Mr. Ryan stated that he was a case manager and employee of Allied Irish Banks PLC. For the avoidance of doubt he confirmed that he was employed by both Allied Irish Banks PLC and AIB Mortgage Bank. He was employed in certain groups or units within the retail banking department. He stated that he was authorised by the respondents to make the affidavit for them and on their behalf, and to do so from facts within his knowledge and having examined the books and records of the respondents in respect of the loan accounts, the subject matter of the within sets of proceedings and appeal, and save where otherwise appeared he believed the same to be true.

6. Mr. Ryan dealt first with the three accounts the subject of the above first entitled proceedings (“the Mortgage Bank proceedings”). He confirmed that no surcharge interest was levied on these accounts, and averred that no adjustment is required in respect of this judgment amount.

7. Mr. Ryan then dealt with the two accounts the subject matter of the above second entitled proceedings (“the PLC proceedings”). He confirmed that surcharge interest was levied on one of the two loan accounts, but suggested that no surcharge interest was levied on the other account. When the matter came before the Court again on 25th January, 2023, the Court indicated that this suggestion appeared to be inconsistent with statements of account previously exhibited by the respondents during the course of these proceedings. Having acknowledged that apparent inconsistency, the respondents were directed to file a further supplemental affidavit to clarify the matter.

8. The respondents then filed a further “supplement corrective affidavit” sworn by Mr. Ryan on the 3rd February, 2023. At the outset he repeated the same averments regarding his

employment status, his authority to swear the affidavit for the respondents, and his means of knowledge, as set out at para. 5 above.

9. As regards the charging of surcharge interest in the PLC proceedings, Mr. Ryan corrected the position as suggested in his previous affidavit. He now confirmed that surcharge interest was levied on the two accounts the subject of these proceedings. As regards the overdraft facility, the total amount charged for surcharge interest and compound interest thereon was €1,466.84. As regards the loan facility, the total amount charged for surcharge interest and compound interest thereon was €13,486.86.

10. Mr. Ryan went on to state that he was advised by his solicitor, who was also the solicitor on record for the co-respondent, to whom the relevant facilities were transferred by the first named respondent since the date of the High Court judgment, that the co-respondent had agreed to waive the combined sum of €14,953.70 in its entirety from the judgment amount. The High Court judgment sum of €242,292.98 could thus be reduced by €14,953.70 to the lesser sum of €227,339.28.

11. The appellant filed a replying affidavit sworn on the 27th February, 2023. In her affidavit she does not challenge the figures for surcharge interest set out by Mr. Ryan. She stated, however, that his affidavits are not reliable and should not be held admissible by this Court. While the reasons for this assertion are not set out very clearly or succinctly, ultimately two reasons appear to emerge.

12. Firstly, it is suggested that it was incompatible with EU law that the deponent, Mr. Ryan, was an employee of AIB within the retail banking department; it was submitted that the deponent should be from the corporate banking division. Secondly, the appellant refers to Mr. Ryan's averment that he was, at the date of swearing his affidavit, employed by both AIB PLC and AIB Mortgage Bank. She goes on to exhibit an extract from an accounts document filed by AIB Mortgage Bank in the Companies Registration Office, entitled "AIB Mortgage Bank

Unlimited Company Directors' Report and Annual Financial Statements 2021". At p. 85 of that document, it was stated as follows:

“For the financial year ended 31 December, 2021 the monthly average number of employees was nil (2020: 2). As at 31 December, 2021, the Bank had no employees (2020: 2).”

The appellant states that therefore she is entitled to an explanation by the deponent for the respondents as to how he can confirm that he is an employee of AIB Mortgage Bank, when the official document submitted clearly states that it has zero employees.

Decision

13. I would reject the challenge to the admissibility of Mr. Ryan's affidavit. Firstly, the appellant has failed to identify any specific requirement of EU law which mandated that the respondents' deponent must be from AIB's corporate banking division rather than from the retail banking department. Secondly, the extract from the 2021 accounts document exhibited by the appellant refers to AIB Mortgage Bank having had no employees as of the 31st December, 2021, as opposed to having had two employees in 2020. This exhibit, however, does not directly contradict Mr. Ryan's averments that, at the date of swearing his two affidavits in early 2023, he was an employee of AIB Mortgage Bank as well as an employee of AIB PLC.

14. In the circumstances I accept the uncontradicted averments of Mr. Ryan confirming that no surcharge interest was charged on the accounts the subject of the Mortgage Bank proceedings, and confirming that surcharge interest was charged on the two accounts the subject of the PLC proceedings. Accordingly, in the above first entitled appeal (2018/132), I would simply dismiss the appeal and affirm the decision of the learned trial judge. However, in the above second entitled appeal (2018/133), I would again dismiss the appeal but would

vary the High Court order by substituting the sum of €227,339.28 in place of the sum of €242,292.98.

Costs

First Entitled Appeal (2018/132)

15. As regards the costs of the above first entitled appeal (2018/132), I have had regard to ss. 168 and 169 of the Legal Services Regulation Act 2015, (“the 2015 Act”). In circumstances where the first named respondent has been “entirely successful” in this appeal, the first named respondent is entitled to an award of costs against the unsuccessful appellant, subject to the following proviso, arising from the particular nature and circumstances of these proceedings.

16. After the judgment of the Court was delivered on the 21st December, 2022, it was necessary to list the matter before the Court again on the 25th January, 2023, for submissions on any claim by the respondents for surcharge interest. As set out at para. 7 above, on that date it was necessary for the Court to direct the respondents to file a further supplemental affidavit to clarify the issue of surcharge interest in the PLC proceedings, and the matter was adjourned to the 15th February, 2023.

17. On the 15th February, 2023, there was a problem with late service of the respondents’ “supplemental corrective affidavit”, and it was necessary to adjourn the matter again to the 1st March, 2023. On that date the respondents were not present in court, due to an inadvertent diary error on their part, and it was necessary to adjourn the matter again to the 8th March, 2023, when submissions as to surcharge interest were finally heard by the Court.

18. In the light of the circumstances set out above, I would order that the appellant is entitled to the costs of the appearances on the 25th January, 2023, the 15th February, 2023, the 1st March, 2023 and the 8th March, 2023, against the first named respondent.

Second Entitled Appeal (2018/133)

19. As regards the costs of the above second entitled appeal (2018/133), I have again had regard to ss. 168 and 169 of the 2015 Act. While the decision of this Court was to dismiss the appeal, the Court also decided to vary the High Court order by reducing the judgment sum by €14,953.70 to the lesser sum of €227,339.28, to reflect the waiver of surcharge interest by the respondents.

20. In the circumstances it could be said that the respondents were not “entirely successful” in this case, or alternatively that the appellant was “partially successful”. I am of the view that the appropriate costs order is that the first named respondent is entitled to an award of 85% of its costs, both in this Court and in the court below. The award of costs in this Court is subject to the same proviso as applied to the earlier costs order, *i.e.* that in the light of the circumstances set out at paras. 16 and 17 above, the Court will order that the appellant is entitled to the costs of the appearances on the dates in question against the first named respondent.

21. As this judgment is being delivered electronically, I note that each of Murray J. and Ní Raifeartaigh J. have indicated their agreement with it and with the orders I propose.