

**[2019] IEHC 743  
THE HIGH COURT**

**[2016 No. 1868 S.]**

**BETWEEN**

**ALLIED IRISH BANKS PLC**

**PLAINTIFF**

**AND**

**TIMOTHY F MCCARTHY**

**DEFENDANT**

**JUDGMENT of Mr. Justice Barr delivered on the 7th day of November, 2019**

**Introduction**

1. This is the plaintiff's application seeking summary judgment in the sum of €119,402.09 against the defendant in respect of a loan advanced to the defendant in 2007. The defendant has sought to defend the application on a number of grounds. He contends that the matter ought to be remitted to plenary hearing.
2. The plaintiff's application for summary judgment is based on the affidavit of Mr. Tom Walsh, a manager in the headquarters of the plaintiff bank, sworn on 3rd May, 2017. In his affidavit, Mr. Walsh states that the defendant maintained a loan account with the plaintiff at the plaintiff's branch at West Square, Macroom, County Cork. By letter dated 31st May, 2007, the plaintiff offered a loan to the defendant in the sum of €140,000 to be repayable over 228 months, to help purchase lands at Liscarrigane, Clonrohid, Macroom, Co. Cork. The Facility Letter set out the details of the loan, and the terms and conditions applicable thereto. The bank reserved the right to demand repayment at any time. The letter stipulated that the facility offered was not covered by a payment protection plan. The letter also stated in the Special Conditions that life cover was to be put in place prior to the drawdown of the monies. There is no dispute that the loan was advanced to the defendant in May 2007.
3. Mr. Walsh further stated that from his inspection of the plaintiff's books, accounts and records, on 15th June, 2016 the defendant was indebted to the plaintiff in the sum of €108,861.20 on foot of the loan. A demand for repayment was made of the defendant by the plaintiff's solicitor by letter dated 3rd October, 2016, which was exhibited in Mr. Walsh's affidavit.
4. When payment was not made by the defendant, the plaintiff issued a summary summons on 7th October, 2016, seeking the sum of €108,861.20 on foot of the single loan account. An appearance was entered by the defendant on 9th November, 2016. By notice of motion dated 7th December, 2017 the plaintiff sought liberty to enter final judgment against the defendant in the sum stipulated in the summary summons. This was grounded on the affidavit of Mr. Walsh, sworn on 3rd May, 2017.
5. A replying affidavit was sworn by the defendant on 15th February, 2018, in which he, inter alia, denied owing the plaintiff the sum stipulated in the summary summons. The defendant raised a number of matters which he stated should persuade the Court to refuse the application for summary judgment. He asserted that these issues constituted

arguable defences, which would warrant him being given liberty to defend the action at plenary hearing.

6. According to the most recent affidavit of Ms. Clíodhna Clancy sworn on 25th September, 2019, who is a manager employed by the plaintiff at Bankcentre, Ballsbridge, Dublin 4, the sum sought by the plaintiff now stands at €119,402.09.
7. The issue for this Court to determine is whether, having regard to the evidence before it, the plaintiff is entitled to summary judgment against the defendant in the sum stated by Ms. Clancy, or whether the defendant has successfully established that he has a real or bona fide defence, and the matter ought to be remitted to plenary hearing
8. As per the test as set out in *Aer Rianta CPT v Ryanair Limited* (No.1) [2001] 4 IR 607 and the principles set out in *Harrisrange Ltd v Duncan* [2003] 4 IR 1, a plaintiff seeking to obtain summary judgment against a defendant must establish that their claim is clear and easily quantifiable, and that the defendant does not have any valid defence. For a defendant opposing the application for summary judgment, they must establish that there are arguable grounds of defence within the established case law.

#### **Evidence of the Defendant**

9. In his replying affidavits, the first of which was sworn on 15th February, 2018, the second sworn on 21st January, 2019 and the third sworn on 7th February, 2019, the defendant set out his defence to the plaintiff's application for summary judgment, which he submitted would warrant the matter being remitted to plenary hearing.
10. The defendant accepted that by letter dated 31st May, 2007, he borrowed the sum of €140,000 to help purchase lands at Liscarrigane, Clonrohid, Macroom, Co. Cork. The defendant exhibited this loan offer in his affidavit sworn on 15th February, 2018.
11. In his affidavits the defendant asserted that the plaintiff bank did not act prudently in granting the loan and that it failed in its duty of care towards him as a borrower. He asserted that the plaintiff did not have due regard to the substantial borrowings he already had, which should have caused the plaintiff not to advance further monies to him. He stated that in the months leading up to May 2007 his accounts were regularly overdrawn. He stated that the plaintiff was aware of his poor financial position. In his second affidavit, dated 21st January, 2019, the defendant reasserted that the plaintiff ought to have known about his poor financial situation and breached their duty of care by lending to him. This was further reiterated in his third affidavit dated 7th February, 2019, when he submitted that the plaintiff was reckless in its lending practice, as it should have been within their contemplation that he would not be able to make repayments as and when same fell due.
12. In his first affidavit, the defendant stated that the plaintiff misrepresented his position as someone who did not have employees, which was not true, as he had always had employees in his cleaning business since the early 1980s. He stated that the plaintiff knew that he employed people, and this was deliberately misrecorded by the plaintiff in

order to facilitate the loan and subsequent mortgage protection and life cover policies; from which, he alleged, the plaintiff earned a lot of money. This misrecording issue was reiterated in subsequent affidavits of the defendant as something the plaintiff did deliberately to ensure he qualified for the loan.

13. In his affidavits, the defendant further asserted that the conduct and behaviour of the plaintiff caused him to lose property sales, as they were excessively slow in consenting to a sale of certain properties that he owned. The monies from these sales would have been used to help him reduce his borrowings with the plaintiff. The defendant stated that the plaintiff failed to mitigate its losses in this regard.
14. The defendant further alleged that he was wrongly and aggressively sold life cover and mortgage protection by the plaintiff. The defendant stated that he requested that the policies be cancelled, but he subsequently re-instated them after sustained pressure from the plaintiff.
15. In his third affidavit the defendant referred to the statements of account that were exhibited in the affidavit of Ms. Clancy sworn on 8th June, 2018. At page 20 of those statements, he pointed to what he alleged was a discrepancy between the total sum due and that stated on the summary summons. He accepted that this alleged discrepancy had provided him with the benefit of a small discount, however, he believed that this was an indication that the plaintiff was unsure of the exact amount owing at the date of issuing the summary summons, and thus this Court ought not to rely on it.
16. In his second affidavit the defendant stated that he had made irregular payments between November 2011 and April 2013. He asserted that by accepting these payments, the plaintiff had accepted new terms of repayment and thus the original contract was changed substantially.
17. Further, the defendant pointed to a number of alleged misstatements and typographical errors. For example, he submitted that the plaintiff was slow in setting out the interest due on his statements of account. He pointed to the statements of account exhibited in the affidavit of Ms. Clancy sworn on 8th June, 2018, and pointed to how the statements only began setting out the interest accruing in December 2012, although his loan started going into arrears in November 2010. The defendant submitted that the plaintiff was obliged to set out what charges were due from November 2010. The defendant also pointed to how the description of the property on the Loan Offer indicated that the defendant was the owner of 52 acres of land, whereas it was actually 25 acres. The Loan Offer also stated that the drawdown date was 30th June, 2007, when in fact it was 17th July, 2007.
18. The defendant further submitted that according to the plaintiff's own paperwork, which he received under the Freedom of Information Acts, they were aware of his financial situation. On a File Note obtained from the plaintiff, exhibited by the defendant in his first affidavit, he drew inferences from the statement "*cannot fund further borrowings*".

According to the defendant this was further evidence that the plaintiff was reckless in lending to him, as they were aware of his financial position.

**Submissions on behalf of the Plaintiff**

19. It was submitted by Mr. Rutherford B.L., that the plaintiff ought to be granted final judgment in the sum of €119,402.09, against the defendant, as it was not contested in the defendant's replying affidavits that he had borrowed the sum of €140,000 from the plaintiff in May 2007. Further, the defendant did not contest the averments of Mr. Walsh in his affidavit sworn on 3rd May, 2017, that the loan was called in by a demand letter dated 3rd October, 2016 from the plaintiff's solicitor.
20. Counsel asserted that there did not appear to be any dispute as to the advance of monies, or that the loan was called in, or that the defendant failed to pay the sum due. Despite this, the defendant had raised a number of matters which he asserted constituted arguable defences. Counsel for the plaintiff submitted that none of the matters raised by the defendant in his replying affidavits constituted arguable grounds of defence which would warrant the case being sent to plenary hearing. Counsel relied on the Supreme Court's approval in *Aer Rianta cpt v. Ryanair Ltd* (No 1) [2001] 4 IR 607 of the applicable test on a motion for summary judgment as set out in *National Westminster Bank v. Daniel* [1993] 1 WLR 1453:

"The mere assertion in an affidavit of a given situation which is to be the basis of a defence did not of itself provide leave to defend: the court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of the defendants having a real or bona fide defence".
21. With regards to the averment of the defendant that the plaintiff bank did not act prudently and that it failed in its duty of care by granting him the loan, counsel for the plaintiff stated that the defendant had in essence put forward a defence of "reckless lending". Counsel submitted that this was not a stateable proposition at law and pointed to cases where it had been held that there was no tort of reckless lending in Irish law. In particular he relied on the dicta of Charleton J. in *ICS Building Society v. Grant* [2010] IEHC 17, Hogan J. in *Healy v. Stepstone Mortgages* [2014] IEHC 134 and Noonan J. in *Bank of Ireland v McMahon* [2017] IEHC 600.
22. Relying on the affidavit of Ms. Clancy, counsel submitted that the recording of the defendant as having "no staff" was not central to the granting of the loan, which was influenced by many other factors. Counsel submitted that nothing turned on the misrecording so as to invalidate the contract, and that it did not amount to a real or bona fide defence.
23. With regards to the averments made by the defendant that the plaintiff caused him to lose property sales, counsel submitted that there was no evidence on the facts put forward by the defendant that the plaintiff acted unreasonably. According to the letters exhibited by the defendant in his first affidavit, it took 2 years and 3 months to complete the sale of property at Coolea Village, Coolea, Cork, after the plaintiff had consented to it

by way of letter dated 24th November, 2011. In consenting to the sale, the bank stipulated that it was to receive €20,000 from the proceeds, however it only received €11,065.50. Further, with regards to the averment that the plaintiff caused him to lose property sales, counsel submitted that the plaintiff was not obliged to release its security, until and unless it was paid.

24. Counsel submitted that there was no error in the calculation of the sum demanded in the summary summons, as was asserted by the defendant. With reference to the statements of account exhibited by Ms. Clancy in her affidavit sworn on 8th June, 2018, and in particular page 20 of those statements, the defendant believed that he was getting the benefit of a discrepancy made by the plaintiff's calculation of the relevant sum. The defendant had added the principal sum to which the account was in arrears, which was €89,399.11 on 1st April, 2016, to the €20,074.72, which was due for interest. This was displayed in a box at the top right hand corner of the statement. Counsel stated that the interest displayed was to the date of the statement, 22nd August, 2016, which would be after the date of calculation, 15th June, 2016. The plaintiff only claimed interest up to the date of calculation and therefore there was no error in the sum demanded.
25. With regards to the life cover, counsel submitted that this was an express condition of the loan. It was stated in the Facility Letter under Special Conditions that "*life cover for full exposure to be put in place prior to drawdown*". The defendant suggested that the life cover was "*wrongfully and aggressively*" sold to him. However, as stated by Ms. Clancy, life cover was a reasonable requirement; which was common to many property loans. Ms. Clancy further submitted in her affidavit that the defendant had had no contractual right to cancel the policy. In response to the defendant's complaints regarding mortgage protection, counsel submitted that the Facility Letter stipulated that the facility was not covered by a payment protection plan. Ms. Clancy stated in her affidavit that the defendant was not asked to take out, nor did he take out payment protection assurance.
26. The defendant pointed to an error in the Facility Letter which stated that he provided security of 52 acres, when in fact it was 25 acres. Relying on the affidavit of Ms. Clancy, counsel for the plaintiff accepted that this was a typographical error, but he submitted that nothing turned on it.
27. Finally, counsel submitted that the irregular payments which the defendant suggested constituted an acceptance by the plaintiff of new terms of repayment, was wrong as there was no evidence of any agreement between the parties to a variation of the terms of the loan agreement.

#### **Findings of the Court**

28. Having regard to the submissions made by counsel for the plaintiff, and the arguments raised by the defendant, the Court can make the following findings. It was common case that the loan was advanced by the plaintiff in accordance with the Facility Letter dated 31st May, 2007. It was not contested that repayment of the loan was demanded by way of demand letter dated 3rd October, 2016. A summary summons was issued against the defendant on 7th October, 2016. According to the affidavit of Ms. Clancy sworn on 25th

September, 2019, the amount owed by the defendant to the plaintiff stood at €119,402.09.

29. The test which the Court must apply where a defendant seeks to resist summary judgment and have a matter remitted to plenary hearing, has long been established in Irish jurisprudence. In *Aer Rianta cpt v. Ryanair* (No.1) [2001] 4 IR 60, Hardiman J. set out the test as follows:

“Was ‘it very clear’ that the defendant had no case? Was there either no issue to be tried or only issues where were simple and easily determined? Did the defendant’s affidavits fail to disclose even an arguable defence?”

30. In *Harrisrange Ltd v. Duncan* [2003] 4 IR 1, McKechnie J. set out a number of principles to be applied by a Court when deciding whether to grant summary judgment, or whether to remit the matter to plenary hearing. These principles state that the power to grant summary judgment should be exercised with discernible caution. It further compels the Court to have regard to the entirety of the situation and have regard to all issues of fact and law. McKechnie J. stated that one of the relevant factors is:

“(7) [...] whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put ‘is what the defendant says credible?’, which latter phrase I would take as having as against the former an equivalence of both meaning and result.”

31. Having regard to the above mentioned line of authority, I now turn to the various defences raised by the defendant, to ascertain whether he has a real or bona fide defence, such as would warrant the remittal of this matter to plenary hearing.

32. The defendant raised a number of issues in his affidavits which amounted to the allegation that the plaintiff bank was reckless in advancing the loan to him. However, having regard to the case law opened to the Court by counsel for the plaintiff, it is clear that reckless lending does not exist as a tort in Irish law.

33. In *ICS Building Society v. Grant* [2010] IEHC 17, Charlton J. stated that “The tort of reckless lending does not exist in law as a civil wrong”. In the conclusion of his judgment he stated:

“It is difficult to imagine the parameters of such a law since those who seek a loan will have a view as to what should be borrowed, and if a loan is badly made by a bank, how can the issue of contribution be escaped from by the borrower who sought the money in the first place.”

34. The decision in *ICS Building Society* was followed by Kelly J. (as he then was) in *McConnan v. President of Ireland* [2012] IEHC 184, who was satisfied that the alleged tort of “reckless lending” does not exist as a civil wrong in Ireland.

35. Citing both of the above decisions, Hogan J. concluded in *Healy v. Stepstone Mortgages* [2014] IEHC 134 that "There is simply no tort of reckless lending which is known to the law".
36. In the recent case of *The Governor and Company of the Bank of Ireland v. McMahon* [2017] IEHC 600, Noonan J., in refusing to allow the defendants leave to defend, stated that their arguments amounted only to allegations of reckless lending. He stated at paragraph 24:

*"It appears to amount to little more than an allegation, unsupported, of reckless lending by the Bank, a path repeatedly trodden by many defendants and long since rejected by the courts as giving rise to any cause of action. There is no tort of reckless lending."*
37. Having regard to the submissions of both parties and the above mentioned case law, I am satisfied that there is no tort of "reckless lending" in Irish law, accordingly there is no substance to this ground of defence raised by the defendant.
38. With regards to the discrepancy in the amount of interest stated in the statement of account and in the summary summons as raised by the defendant in his second affidavit sworn on 21st January, 2019, I am satisfied based on the submissions made by counsel for the plaintiff, and having regard to the explanation set out in the affidavit of Ms. Clancy, that that was simply a misunderstanding on the part of the defendant and that the correct sum has been claimed by the plaintiff.
39. I am satisfied that the typographical error in the Facility Letter, describing the security as a 52 acre property, when in fact it was a 25 acre property, does not amount to an error of significance. As clarified by Ms. Clancy, the plaintiff bank sanctioned the loan based on 25 acres of land, and the defendant duly executed a charge over those 25 acres. I am satisfied that this typographical error is not of any consequence.
40. With regards to the defendant's averment that he was misrepresented in the plaintiff's records as not having employees, I am satisfied based on the affidavit of Ms. Clancy that this was not a deliberate misrecording. More importantly, no weight is attached to this, as it was not relevant to the loan offer.
41. With regards to the defendant's suggestion that the irregular payments made by him altered substantially the terms of the contract, which was then accepted by the plaintiff bank, I am satisfied that this simply is incorrect. Such irregular payments did not constitute a variation of the original terms of the contract. As submitted by Ms. Clancy in her affidavit sworn on 25th September, 2019, the irregular nature of the payments made by the defendant, are simply further evidence of breach of contract.
42. The defendant suggests that the plaintiff was responsible for him losing property sales. Having regard to the letters exhibited by the defendant in his first affidavit sworn on 15th February, 2018, it is clear, however, that the delay was caused by his own actions as opposed to anything done by the plaintiff. The plaintiff was not obliged to release the

security and there was no evidence that the plaintiff acted unreasonably or unlawfully when considering whether to consent to the proposed sales. The plaintiff was not obliged to consent to the sales at any particular time, or at all.

43. Finally, turning to the point raised by the defendant that he was wrongly and aggressively sold life cover and mortgage protection, I accept the statements made by Ms. Clancy in her affidavit and the submission of counsel for the plaintiff, that this was a condition of sanction of the loan, as stipulated in the Facility Letter. This was a reasonable requirement which is common in property loan agreements. The Facility Letter stated in the Special Conditions: "*Life cover for full exposure to be put in place prior to drawdown*". The defendant had no contractual right to cancel it. That he subsequently reinstated it, was not evidence of any wrongdoing on the part of the plaintiff.

**Conclusion**

44. Having regard to the findings made by me herein, I am not satisfied that the defendant has persuaded the Court that he has a real or bona fide defence sufficient to cross the threshold provided for in the *Aer Rianta* and *Harrisrange* cases. Accordingly, I refuse to remit the matter to plenary hearing.
45. I am satisfied that the defendant is indebted to the plaintiff on foot of the loan in the sum set out in Ms. Clancy's affidavit. Accordingly, the plaintiff is entitled to summary judgment herein. I award the plaintiff judgment against the defendant in the sum of €119,402.09.