

APPROVED

[2023] IEHC 44



THE HIGH COURT

2021 No. 349 S

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

AND

RITO MACARI  
TERESA MACARI

DEFENDANTS

**JUDGMENT of Mr. Justice Garrett Simons delivered on 7 February 2023**

**INTRODUCTION**

1. This judgment is delivered in respect of an application to enter summary judgment. The principles governing an application for summary judgment are well established. In brief, the court must assess whether the defence set out in the affidavits, together with the documents exhibited therewith, is credible; or in other words, whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. In deciding whether the defendant has a credible defence, the court should concentrate its attention on the matters put

NO REDACTION REQUIRED

forward by the defendant. (*Aer Rianta cpt v. Ryanair Ltd (No 1)* [2001] 4 I.R. 607, [2002] 1 I.L.R.M. 381).

2. If issues of law or interpretation are put forward as providing a credible defence, then the court can determine whether the propositions advanced are stateable as a matter of law. The court should, however, only carry out such an assessment where the issues are relatively straightforward and where there is no real risk of an injustice being done. (*Irish Bank Resolution Corporation v. McCaughey* [2014] IESC 44, [2014] 1 I.R. 749).

### **FACTUAL BACKGROUND**

3. The defendants are a married couple. These proceedings relate to two loan facilities entered into between Bank of Scotland (Ireland) Ltd and the defendants. The terms of the first loan facility are set out in a letter of offer dated 23 April 2007. This first loan had been in the sum of €4,056,000. The loan was to be for a period of 20 years, including a 24 month period during which principal repayments were to be deferred, i.e. an “*interest only*” period.
4. The terms of the second loan facility are set out in a letter of offer dated 8 May 2007. This second loan had been in the sum of €250,000. The loan was to be for a period of 6 years.
5. Both of the loan facilities were subject to Bank of Scotland (Ireland) Ltd’s general conditions as of 1 January 2004.
6. On 10 December 2010, the Scottish Court of Session made an order pursuant to the United Kingdom’s Companies (Cross-Border Mergers) Regulations 2007. The effect of this order was that the business of Bank of Scotland (Ireland) Ltd

was merged with that of its parent company, Bank of Scotland PLC, on 31 December 2010.

7. Thereafter, by purchase deed dated 29 July 2015 and deed of conveyance and assignment dated 20 November 2015, the assets of Bank of Scotland PLC, including, relevantly, the loan facilities the subject-matter of these proceedings, were transferred to Ennis Property Finance Ltd.
8. The loan facilities were subsequently transferred to Pepper Finance Corporation (Ireland) DAC, i.e. the plaintiff herein, by mortgage sale and purchase deed dated 7 August 2020 and global deed of assignment of the same date.
9. By letters dated 21 July 2017, Ennis Property Finance Ltd had made demand for payment in the sum of €4,652,414.20. By subsequent letters dated 10 December 2020, the plaintiff, through its solicitors, demanded the repayment of €3,456,226.50. This reduced figure reflects the fact that certain properties, which had been provided by way of security for the borrowings, had been sold. This demand has not been satisfied.
10. Detailed particulars of the balance outstanding have been set out in the summary summons. In the case of the first loan facility, a sum of €2,291,436.19 has been credited by way of total repayments and credits. The equivalent figure in the case of the second loan facility is €45,626.22.
11. The defendants entered an appearance to these proceedings on 17 June 2021. The plaintiff issued a motion for judgment on 24 September 2021. The motion is grounded on the affidavit of Mr. Todd Bowen.
12. Thereafter, on 21 February 2022, the defendants filed a response to the proceedings in the form of a signed letter. The defendants' signatures on the letter appear to have been witnessed by a practicing solicitor. The letter does not

comply with the requirements for an affidavit under the Rules of the Superior Courts. However, in circumstances where the plaintiff has not raised any objection to the form of the document, I propose to consider the contents of same *de bene esse*.

13. In brief outline, the following points are raised in the letter of 21 February 2022. First, the defendants acknowledge that they borrowed a sum of €4,306,000 from Bank of Scotland PLC. It is said that the purpose of these borrowings was to purchase a variety of properties (including a restaurant and an apartment) and to refinance three shop units and two residential units. It is suggested that the original understanding of the defendants had been that the loan could remain “*interest only*” on an ongoing basis on request. This suggestion has not been substantiated and would appear to be contrary to the express terms of the loan facility and the general conditions.

14. The second point in the letter is stated as follows:

“We were then contacted by Ennis Property Finance Designated Activity Company who claimed [that] they were sold the loan and they wished to appoint a receiver to liquidate the assets securing the loan. We cooperated with the Ennis Property Finance Designated Activity Company on the understanding that the liquidation would be a full and final settlement of the debt in 2018.

At the time my wife and I were very stressed and didn’t understand the importance of engaging the advice of legal services.

All properties were sold to various third parties. I now rent one shop unit where I operate a food business.”

15. Thirdly, it is suggested in the letter that there has been difficulty in obtaining certain documentation from Pepper Finance Corporation (Ireland) DAC via its solicitors Maples Group. The response made by the plaintiff, to this correspondence, is to say that true copies of the documents evidencing the

transfer of the loans from Bank of Scotland PLC to Ennis Property Finance Ltd and then to Pepper Finance Corporation (Ireland) DAC have been exhibited as part of these proceedings.

16. The application for judgment had been listed for hearing on 19 December 2022 but was adjourned until 23 January 2023, at the request of the defendants for personal reasons.
17. At the hearing of the application to enter summary judgment on 23 January 2023, Mr. Macari frankly admitted that he did not have any documentation which supported the points raised in his letter of 21 February 2022. In particular, there is no documentation in respect of the assertion that the “*interest only*” period was to be extended beyond the 24 month period specified in the first loan facility.
18. As to the events surrounding the receivership and the sale of the mortgaged properties, Mr. Macari asserted that he and his wife had co-operated in the sale but had not been offered legal advice. Mr. Macari also asserted that this co-operation had been on the “*understanding*” that there would be a full and final settlement of the debt. In response to a question from the court, Mr. Macari was unable to say who had represented to him that the sale proceeds were to be in full and final settlement of the debt. Mr. Macari simply stated that the representation had been made orally and that he had “*a terrible bad habit of not requesting things in writing*”.
19. Mr. Macari also asserted that the receiver, prior to the sale, had been collecting rent from the mortgaged properties. Mr. Macari then suggested that the figures in the statements of account did not “*add up*”. (The implication, seemingly, being that the sale proceeds and rents might not have been properly credited against the final figure for the indebtedness).

20. The court then asked the defendants whether or not they wished to request an opportunity to file an affidavit addressing the points raised by them. The defendants were given an opportunity to consider this over the lunchtime recess. The case was called again at 2 pm. At that time, Mr. Macari indicated that neither he nor his wife wished to file an affidavit, and confirmed that they were not now contesting the proceedings.

### **CONCLUSION AND PROPOSED FORM OF ORDER**

21. The test for granting summary judgment requires the court to assess whether the defence set out in the affidavits, together with the documents exhibited therewith, is credible. Here, the defendants have not filed any affidavit evidence which complies with the Rules of the Superior Courts, nor have they provided any corroborative documentation. Nevertheless, I have considered *de bene esse* the content of the unsworn letter filed on behalf of the defendants in February 2022. For the reasons which follow, I have concluded that the letter does not raise any issue which could be said to give rise to a credible defence.
22. The point in relation to the defendants' "*understanding*" that the "*interest only*" period would be extended on request is not substantiated and is contradicted by the express terms of the loan facility and general conditions.
23. As to the supposed full and final settlement of the debt at the time of the sale of the mortgaged properties, the defendants have been unable to identify any specific representation to this effect.
24. The defendants had also raised, in their initial oral submissions, a concern as to whether the statements of account accurately reflected the value of the rents collected by the receiver and the sale proceeds arising from the disposal of the

mortgaged properties. In the event, this concern was not pursued by the defendants and no affidavit evidence has been filed in support of same.

25. I have carefully considered the affidavits and exhibits filed by the plaintiff in support of the application for summary judgment. These establish that the loan facilities were entered into; that the funds were drawn down; and that demand for repayment has been made and remains unsatisfied. They also establish the chain of events whereby the loan facilities ultimately came to be owned by the plaintiff.
26. No credible defence to the proceedings has been demonstrated. Judgment will, accordingly, be entered in terms of the notice of motion of 24 September 2021.
27. My provisional view is that a stay of six months should be placed on the entry of judgment. This is to allow the defendants time to pursue, if they so wish, an application for a personal insolvency arrangement pursuant to the Personal Insolvency Act 2012. The defendants have previously mooted an intention to pursue such an application.
28. As to the costs of these proceedings, my provisional view is that, in circumstances where the defendants did not ultimately contest the application, each party should pay their own costs.
29. These proceedings will be listed before me, remotely, on Monday 13 February 2023 at 10.30 o'clock to finalise the order and to hear any submissions in respect of the proposed stay and costs. If this date does not suit, the parties should advise the registrar of alternative dates.

*Appearances*

Eoin Martin for the plaintiff instructed by Maples and Calder (Ireland) LLP  
The defendants appeared as litigants in person

Approved  
S. M. M. S.