THE HIGH COURT

[2023] IEHC 198

[Record No. 2021/100 S.]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

BRIAN EGAN

DEFENDANT

JUDGMENT of Ms Justice Bolger delivered on the 24th day of April 2023

1. This is the plaintiff's application to enter summary judgment against the defendant in the amount of €748,480. For the reasons set out below, I refuse the application.

Background

2. The plaintiff relies on a letter of offer dated 5 September 2013, which made four facilities available to the defendant to restructure previous loans and an overdraft. The letter also provided the defendant with the option of selling a property which had been provided as security for the debt in return for which the plaintiff agreed to write off some of the debt. If that option was not availed of by the defendant, the facilities remained repayable on demand. The property was not sold due to problems with title which the defendant claims were the fault of the plaintiff but, as the defendant had previously consented to strike out separate proceedings against the plaintiff in relation to that issue, I am not satisfied that this could be relevant in deciding whether the plaintiff is entitled to enter summary judgment.

3. The defendant has made no repayments which, in turn, entitled the plaintiff to make demand on the defendant which it did by letter dated 19 July 2018. The demand letter outlined the sums due

inclusive of interest, but the plaintiff ultimately decided not to claim any interest when it issued these proceedings by summary summons dated 23 February 2021.

4. The defendant sought to rely on a number of issues which he claimed meant it was not "very clear*"* that he had no case (i.e. the test for granting summary judgment as per the Supreme Court in *Aer Rianta v. Ryanair* [2003] IESC 62, [2001] 4 I.R. 607). However, ultimately, his opposition to this application came down to a claim that the plaintiff has failed to sufficiently particularise the debt so that the defendant will know the case they have to meet and satisfy themselves whether they should *"pay or resist"*, as required by the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, [2020] 2 I.L.R.M. 423.

5. The plaintiff argues that their obligation to particularise the debt is satisfied by the detail in the summary summons in relation to the four accounts identified in the 2013 letter, which was to restructure earlier loans dating back to 1994 and which had been previously restructured on a number of occasions over that time. Because the plaintiff has chosen not to seek interest on the 2013 debt, it says the defendant cannot be confused by any absence of calculations, as no calculations were necessary, and the computation of its claim is readily ascertainable. It describes its claim as "based on a straightforward analysis of the indisputable facts in this case" and emphasises the defendant's acceptance of the 2013 letter and the fact that he does not challenge the validity of that agreement. The plaintiff says the defendant is bound by the 2013 letter in spite of the defendant's concern that some of the interest charged prior to 2013 may not have been properly calculated. The plaintiff relies on the decision of the Court of Appeal in *Governor and Company of Bank of Ireland v. Flanagan* [2015] IECA 56, where a loan designed to refurbish the previous loans, which did not advance new or additional funds to the borrower, was enforceable, and where the court rejected the defendant's attempts to rely on the absence of the transfer of any cash to resist the Bank's application for summary judgment and held that consideration had been given by the Bank agreeing to give up its entitlement to enforce the previous loan agreement.

6. The defendant also points to the decisions of this court in *AIB Mortgage Bank & ors v. Hayden & ors* [2020] IEHC 442 and *O'Connell & ors v. Moriarty* [2022] IEHC 565, where there was no dispute that monies were advanced under a number of loan agreements, the particulars of which were described in bank statements exhibited in the affidavit (*Hayden*) and by the defendant accepting the sum due in earlier correspondence (*O'Connell*).

7. The defendant argues that the *O'Malley* requirement to particularise the sums due cannot be avoided by the Bank restructuring a loan, even where the restructured loan agreement was expressly accepted by the defendant. The defendant maintains that there is a lack of clarity around how interest was charged on the loans prior to the 2013 restructuring and says he never agreed to the Bank closing his old loan accounts and opening new loan accounts in 2019, which the plaintiff says was due to a change in their internal account management process and could not be relevant to the issue of the defendant's failure to repay his debts. The defendant wrote to the plaintiff's solicitor in November 2021, after the existence of those new accounts were disclosed in the plaintiff's proceedings, stating that he was unaware of them and requested all transactions on those accounts and on the four old accounts which they had replaced. The defendant never received a reply to that letter, although the plaintiff did exhibit earlier correspondence from 2019, in which they had advised the defendant of the closing of his previous loan accounts and opening of new ones.

8. The information the defendant sought in his letter is, essentially, the detailed particulars of the debt now claimed to which the defendant says he is entitled and without which he says the plaintiff cannot enter summary judgment.

9. The defendant relies on the decision of the Court of Appeal in *AIB Mortgage Bank and Allied Irish Bank Plc v. O'Brien* [2020] IECA 191 which was, like *Flanagan*, a restructuring loan. However, unlike *Flanagan*, the court in *O'Brien* found that the defendant had an argument that no consideration passed from the plaintiff in respect of the restructuring loan facility. The court noted in *O'Brien* that there was no suggestion in the pleadings or the evidence that the plaintiff had relinquished their entitlement under the previous borrowings or that the giving of forbearance amounted to a valid legal consideration (at para. 77 and 78). The court concluded that the issue of whether there was consideration fell to be determined at plenary hearing (at para. 86). The court stated, at para. 64;

> "To my mind, neither the special indorsement of claim nor the affidavit evidence of Mr. Nolan (including his exhibits) provide the requisite narrative (as envisaged by *O'Malley*) pertaining to the consideration for the 2010 facilities, without the Court having to involve itself in joining copious dots in an attempt to ascertain exactly what benefits, if any, passed to the defendants (including to the second defendant vis a vis the €744,000 facility) in 2010. As Charlton J. remarked in *Bank of Scotland plc v. Fergus* [2019] IESC 91, with reference to and applying *O'Malley*, "not only is any proposed defendant in a claim for a liquidated sum

required to engage with the evidence and to demonstrate a defence and to be denied a plenary hearing unless those steps are taken , but it is also required of a plaintiff financial institution to make it clear as to the precise basis that a sum of money is owed." Albeit the High Court judgment in the within case pre-dated *O'Malley* and *Fergus*, the onus which rests on a plaintiff financial institution in summary proceedings to establish a prima facie entitlement to the sum claimed in both its pleadings and evidence was something which very obviously engaged the trial judge in the within case and informed his decision that in the absence of sufficiently pleaded particulars of the basis for their monetary claim against the defendants an entitlement to summary judgment for the plaintiffs did not arise."

10. The defendant also relied on *Havbell DAC v. Harris & ors* [2020] IEHC 147, where Humphreys J. found the endorsement of claim did not explain how the sum claimed was calculated and, therefore, did not comply with the requirements of *O'Malley* or the decision of the Supreme Court in *Bank of Scotland v. Fergus* [2019] IESC 91, [2020] 1 I.L.R.M. 313 (at para. 25 of *Havbell*).

11. Finally, the defendant relied on the more recent decision of Holland J. in *Allied Irish Bank Plc v. Dorey* [2022] IEHC 317, where he held that the provision by the Bank of statements to the defendant borrower over the years did not comply with the *O'Malley* requirement to particularise the calculation of the liquidated sum claimed. Interestingly, he set out at para. 30 what he described as the "current practice on foot of the O'Malley requirement" as;

> "shortly prior to the issuing of the summons, often with the last demand for payment before action, the plaintiff bank sends the intended defendant a complete set of statements of the account from drawdown. Those statements record all transactions on the account including each application of interest and each change in the rate of interest. These statements combine to 'put a debtor in a position where on an individualised basis he or she may see where perhaps a mistake has been made or where interest may have been overcharged or penalties may have been misapplied' as Charleton J said in *Fergus*. It is no burden on the plaintiff bank to do so as it will, as a matter of course in the ordinary conduct of its banking business, maintain such records on its books and can as readily produce them to the Debtor prior to the issue of the summons in order to plead them by reference in the summons, as it can, as it will be required to do in any event to get judgment, exhibit them in its affidavit seeking judgment."

12. It would appear that the "current practice" of the Banks is very similar to what the defendant requested of the plaintiff in his letter of November 2021 (referred to at para. 7 above) which the plaintiff chose to ignore. The plaintiff says they are not required to provide particulars of the old loans in circumstances where the defendant agreed to the 2013 loan agreements and where the plaintiff provided consideration in restructuring the defendant's old loans and allowing him the opportunity to write some of them off if the property was sold for a minimum specified amount.

13. As it happened, the property was not sold and, in accordance with the terms of the 2013 agreement, the plaintiff was entitled to demand the entirety of the debt and the defendant, in effect, lost his opportunity to write some of it off. The 2013 letter expressly refers to the previous loan letter (referred to as the existing offer letter EOL) and confirms the defendant's acknowledgement that one of the purposes of the 2013 offer letter "is to restate and amend the existing offer letter EOL in relation to a Loan that has already been drawn down". It goes on to say:-

> "For the avoidance of doubt as used herein the term 'Loan' shall be deemed to refer to and include the Loan and other sums payable under the Existing Offer Letter which shall be deemed to continue in full force and effect except as restated and amended herein and any security granted to the Bank by the Borrower or other third party in connection with the Existing Offer Letter shall be deemed to continue in full force and effect."

14. That retains the relevance of the previous loan to the plaintiff's current attempts to secure a judgment against the defendant in respect of the debt, albeit that the debt arises from the 2013 loan agreement. In the same way as the Court of Appeal in *O'Brien* distinguished *Flanagan* on the facts, I too distinguish *Flanagan* as there is no express agreement here (as there was in *Flanagan*) by the Bank to give up its entitlement to enforce the previous agreement.

15. If I am wrong on that, I do not see *Flanagan* as supporting the plaintiff's case that a restructuring loan does not have to be particularised beyond the bare terms of its loan agreement. This was not the defence that the defendant unsuccessfully sought to make in *Flanagan*. Its defence was that there was no consideration for the restructuring loan agreement as no actual monies had been furnished. The Court of Appeal quite properly found that defence to have no merit. No such defence is advanced here. Rather, the defendant contends that the lack of particulars of the loan accounts, which he agreed to restructure in 2013, entitles him to proceed to a plenary hearing where he believes discovery of the history of transactions on those accounts over the years will enable him

to defend the plaintiff's claim for an amount of money which he disputes has been properly calculated in terms of the addition of interest prior to 2013. That argument seems to me to be far more akin to the arguments successfully made in *O'Brien*, i.e. that "What is at issue here is that in the absence of funds having actually been drawn down, what was required of the plaintiffs was a more expensive narrative (than heretofore provided) explaining the consideration which underpins the facilities upon which the plaintiffs now rely as the basis for the recoveries of money they claim are due and owing to them". In this context, the *dictum* of Clarke J. in *O'Malley* is apposite when he refers to the necessity, where reliance has been placed by a plaintiff on previously supplied details, "to at least make some reference to those details in a special indorsement of claim" and where he states that "[n]either the defendant nor the court should be required to infer the methodology used, unless that methodology would be obvious to a reasonable person <u>or is actually described in the relevant documentation placed before the court</u>" (emphasis added) (at para. 63).

16. I have not been told of any reason why the plaintiff could not have provided that information when the plaintiff requested it in November 2021. I note the practice out the banks in complying with the *O'Malley* requirements, as set out by Holland J. in *Dorey* and I note the similarities between that practice and the information sought by the plaintiff in November 2021. That type of information was provided by the bank in *Hayden* and in *O'Connell* and they were allowed to enter summary judgment. It was not provided in *Havbell*, *Dorey* or *O'Brien* and the banks' applications to enter summary judgment were refused.

17. The defendant has made an arguable case as to the veracity of the calculations leading to the sum claimed in these proceedings and in the absence of particulars of the claim by way of information on the transactions on his loan accounts prior to 2013, he has satisfied me that the plaintiff has not made it very clear that there is no defence to the claim. The defendant has also established how discovery may assist him in his defence, in the absence of the plaintiff's agreement to furnish him with the information he sought in his letter of November 2021.

18. For the avoidance of doubt, I do not make any finding as to the defendant's entitlement to obtain the information he sought at that time. That may ultimately be the subject of a request for discovery and that will have to be assessed on its own merits.

19. For the purpose of the plaintiff's application for summary judgment, I am satisfied that the defendant is entitled to proceed to a plenary hearing and I, therefore, refuse the plaintiff's application to enter summary judgment.

Indicative view on costs

20. Clarke J. in *ACC Bank Plc v. Hanrahan* [2014] IESC 40, [2014] 1 I.R. 1 observed that where the court remitted the matter to plenary hearing and was satisfied that a plaintiff had acted in a particularly reasonable manner in not agreeing to that course of action, the court should consider whether the justice of the case required that some or all of costs of the summary judgment motion should be borne by the plaintiff. He also said that in the majority of these cases "the costs of a summary judgment motion as result of the proceedings are remitted to plenary hearing should either be reserved or become costs in the cause".

21. In the circumstances of this case the plaintiff believed that the defendant had no defence to its claim. Ultimately this will be a matter for the trial judge and if the plaintiff is correct, he may be entitled to costs of this application as well as to his substantive costs depending on the views of the trial judge. In those circumstances my indicative view on costs is that the costs of this motion should be treated as costs in the cause.

22. I will list the matter for mention before me on 11 May 2023 to allow the parties to make whatever submissions on costs as they may wish to make. I do not require written submissions but if the parties do wish to make them, those submissions should be lodged with the court at least 24 hours before the matter is back in before me.