THE HIGH COURT

[2023] IEHC 243

Record number 2016/120S

BETWEEN

BANK OF IRELAND MORTGAGE BANK UNLIMITED COMPANY

PLAINTIFF

AND

GERRY CONNEELY

DEFENDANT

Ex tempore decision of Mr Justice Cian Ferriter dated this 5th day of May 2023

Introduction

1. This is a claim by the plaintiff ("the bank") for summary judgment against the defendant in the sum of €602,277.80.

2. The claim arises in respect of sums outstanding on foot of two loan facilities: the first loan facility, entered on 25 November 2004, in the sum of €800,000, for 20 years, secured by a mortgage over the defendant's property in Castle Ellen, Athenry, County Galway ("the property"), and a second loan facility entered on 2 November 2005 for a 19 year term in the sum of €200,000 also secured by a mortgage over the property.

3. The loan sums were principally used to finance the construction of a new house on the property. The loans fell into default in 2009. Demands were made for the entire sums outstanding on the two loans on 12 December 2013. A pre-action demand was sent on 12 January 2016 and these summary proceedings were issued on 25 January 2016.

4. The defendant seeks to have the matter remitted to plenary hearing on the basis that he has an arguable defence. There is no dispute as to the principles applicable to such an application which are well settled. In short, assuming the plaintiff's proofs are in order, judgment should be entered unless there is a fair or reasonable probability of the

defendant having a real or bona fide defence in which case the matter should be remitted to plenary hearing.

5. The proceedings have a reasonably involved history, which it is not necessary to detail here. Suffice it to say that the bank issued a Civil Bill for possession of the property in Galway Circuit Court on 4 April 2016 and on 16 April 2016 the defendant issued an Equity Civil Bill for Galway Circuit Court seeking relief under section 94 of the Land and Conveyancing Law Reform Act 2009.

6. Both sets of Circuit Court proceedings were struck out on consent on 14 October 2021 and the property was sold for €440,000 on 28 November 2021, the net proceeds of €428,285 being remitted to the bank and applied to discharge the entirety of the outstanding sum on the 2005 loan with the balance being applied to the 2004 loan.

7. In an affidavit of 20 April 2023 the bank avers that sum of €602,077 was due by the defendant to the bank in respect of the current outstanding amount on 2004 loan as at that date.

Contended for Defences

8. The defendant advances two arguable defences which I will deal with in turn below.

Bank should have consented to a much earlier sale

9. The defendant contends that he has an arguable defence on the basis that the bank acted unlawfully or unreasonably from 2016 onwards "*as a result of the refusal of* [the bank] *to consent to the sale of the property at the price at which it was eventually sold*" (as alleged by the defendant at paragraph 24 of his affidavit of 14 April 2022).

10. I do not believe on the facts that the defendant has raised any arguable ground of defence on this basis. In order to *prima facie* substantiate such a defence, the defendant would need to be able to point to evidence of a valuation of €440,000 for the property, a credible arm's-length offer for that amount from 2016 onwards and an unambiguous acknowledgment on the part of the defendant from 2016 onwards to apply that sum in

part payment of the outstanding debt (which was in the sum of €968,000 at the date of issue of these proceedings in January 2016) and to leave over the remaining sum as a sum owed to the bank. Such sum would have amounted to some €540,000 in 2016, assuming a gross sale for €440,000 and realised net proceeds of €428,000, the net proceeds realised on the sale which took place in November 2021. There is no such evidence before me.

11. Rather, the evidence (which is not in dispute) shows that an offer was made for the purchase of the property for the sum of €425,000 in January 2017, which came some seven months after the bank had issued Civil Bill proceedings for possession of the property in Galway Circuit Court and the defendant had countered with his own Equity Civil Bill invoking s.94 of the Land and Conveyancing Law Reform Act 2009. This previously interested party re-emerged with a final offer of €440,000 in April 2018 and confirmed that she was in a position to follow-through on that offer in January 2019. In January 2019, both the bank and the defendant obtained their own separate valuations placing a value of between €450,000 and €480,000 on the property. There was engagement thereafter between the bank and the defendant on the question of a sale, the November 2019 the bank consented to the sale of the property at €440,000. The bank had set out in some detail in an affidavit of John Reid sworn in the Circuit Court possession proceedings on 16 June 2021, and an affidavit of Emmet Pullan sworn on 2 June 2022 in these proceedings, the series of issues which arose between November 2019 and November 2021 which delayed the progress of the sale. These issues including the defendant seeking the resolution of an issue in relation to an agricultural lease in respect of the non-residential portion of the property; the defendant's repeated requests for the bank to accept the property sale in full and final settlement of his debt; the proposed purchaser withdrawing from the prospective sale in January 2021 and the defendant's ex-wife then stepping forward to agree to a sale at the same price (of €440,000); clarification of the source of the funds being used to purchase the property by the defendant's ex-wife and lapse of time as documentation necessary for the sale was awaited from the defendant.

12. In short the necessary evidential foundation for this ground of defence is not there on an even arguable basis. In the circumstances, I am quite satisfied that there is no arguable ground of defence arising from the alleged delay in sale issue.

Bank alleged to be in breach of a condition precedent and a special condition

13. The defendant next contends that an arguable defence arises by reason of an arguable failure by the bank to comply with two conditions of the November 2004 loan offer agreement, the first being a condition precedent and the second being a special condition.

14. The factual circumstances in which this arguable defence is said to arise stem from the fact that it transpired, subsequent to the completion of the construction of the house, that the building suffered structural deficiencies and that the property as built failed to comply with building regulations and planning permission. The defendant averred that these deficiencies became apparent in 2013 (or possibly somewhat earlier after the completion of the property), in any event well after the sums the subject of the loans have been drawn down. The defendant in fact issued a motion in these proceedings seeking to have joined as a third party to these proceedings the engineer engaged by him for the building project (being the engineer who provided certificates to the bank to allow staged drawdown of the loan funds). That motion was ultimately struck out. It also appears that the defendant separately issued proceedings against the engineer in November 2013 but was unable to pursue those proceedings due to lack of funds. The defendant put a series of expert report reports before the court on this application which on the face it substantiate his claims that the building was constructed in breach of the building regulations and planning permission.

15. Against this backdrop, the defendant argues, in broad terms, that the bank acted in breach of 2004 loan agreement in accepting certificates issued to it by his engineer for the purposes of drawdown of funds under the loan agreement, when the property was in fact being negligently constructed in breach of building regulations and planning permission. He argues that there was an implied duty on the part of the bank to satisfy itself that the defendant's engineer was both competent to do the job and performing the job itself competently before advancing funds under the loan.

16. €780,000 of the €800,000 November 2004 loan was drawn down by August 2005. The remaining €20,000 was drawn down in May 2008. The €200,000 the subject of the November 2005 loan was drawn down as to €152,000 in November 2005 and the balance of €40,000 in August 2008.

17. It should be said that there was no even *prima facie* evidence before the court that the engineer in question was not a properly qualified engineer or that the bank was otherwise

on notice at the time it advanced any funds under the loan agreements that the engineer was not constructing the property competently.

18. Turning to the terms of the November 2004 loan offer letter, the letter specifically drew to the borrower's attention "*the fact that this offer letter is strictly subject to the conditions precedent set out in part 3 and that under no circumstances will the lender permit the loan to proceed unless and until all conditions precedent have been complied with in full to the lender's satisfaction*"

19. There was a single condition precedent in part 3 of the loan offer letter. That section of the loan offer stated "*the following conditions (the "Conditions Precedent") must be complied with in full to the Lender's satisfaction before the loan can proceed. (a) The following Conditions Precedent apply to the loan: (i) the Lender will require a suitably qualified architect/engineer to confirm that EUR 600,000 will complete the property, that the works will be supervised and that an opinion on compliance with planning and building regulations will issue on completion*."

20. The defendant says that it is arguable that his condition precedent was for the benefit of both parties and was breached because either the defendant's engineer did not prove suitably qualified or because the condition should be read as meaning that the condition was not satisfied until the completion of the property and the provision of an opinion by the engineer at the point of completion that there had been compliance with planning and building regulations, something which he says the engineer could not properly have done on completion of the project in light of the expert evidence obtained since then that the building was completed in breach of planning permission and building regulations. The defendant submits that it follows that it is arguable that the loan is unenforceable for non-compliance with the condition precedent and that the bank would rather have to have recourse (if it had recourse at all) to a non-contractual cause of action such as monies had and received. The defendant relied on the judgment of Charleton J. in *IBRC v Cambourne Investments* [2014] 4 IR 54 to the effect that while a condition precedent which was to the unilateral benefit of one party could be waived by that party, if on an objective reading of the clause, the clause was for the benefit of both parties, no such waiver could result. He submitted that the conditions precedent clause here was to the benefit of both parties and was breached such that the bank could not rely on waiver of the clause and the breach of the condition precedent rendered the argument unenforceable.

21. It might be noted that the argument now sought to be raised goes in the face of the defendant's own evidence on affidavit on this application that that there was a condition precedent "that the lender required a suitably qualified architect/engineer to confirm that €600,000 would complete the property" (my emphasis) (defendant's affidavit of 14 April 2022 at para 6). There is no evidence before me that the confirmation sought in the condition precedent was not provided by the defendant's engineer and indeed, the defendant himself avers that the engineer "certified to the completion as being possible within the €600,000 balance of the original loan" (same affidavit, para 7).

22. Be that as it may, the question of the construction of the contract and its terms is an objective exercise and the question I have to decide this application is whether the defendant's construction of the condition precedent is an arguable one such that the matter should be remitted to plenary hearing .

23. The clear and plain meaning of the words in the condition precedent clause were that, before providing the sums under the loan, the bank required confirmation from a suitably qualified architect or engineer, firstly, that "€600,000 will complete the property" in the sense of confirmation that that amount would be sufficient to complete the property; secondly, "that the works will be supervised" in the sense that the engineer was confirming at the time of drawdown that the works once commenced would be supervised and thirdly that "an opinion on compliance with planning and building regulations will issue on completion", in the sense that the engineer was confirming at the time of drawdown that an opinion on compliance would be provided upon completion. This is how the defendant himself appeared to understand the terms and understandably so. Objectively, this was designed to provide comfort to the bank that the money was going to be properly used for the construction of a compliant building, bearing in mind that the property was being acquired by the bank as security for its loan.

24. Mindful of the low threshold on this application, is the defendant's construction an arguable one?

25. In my view, the interpretation contended for by the defendant is in truth an absurd one for which there is no arguable basis in the agreement itself or in common sense. In effect, the defendant argues that the clause should be interpreted as requiring confirmation of each of the three matters identified after the event i.e. that confirmation by the defendant's engineer could only be provided once €600,000 had been spent, the project had been supervised and had been completed in compliance with planning and building regulations. However, this would be to create an impossibility as, on the defendant's

construction, €600,000 would have to have been spent, and the property completed within budget, the works would have to have been supervised and an opinion on compliance would have to have been issued on completion all before any monies under the loan to fund the construction of the building could be advanced at all. With respect, I do not believe that this is even an arguable interpretation of the clause. It would utterly negate the whole purpose of the loan, if monies advanced to fund the construction could not be advanced until the property was fully constructed.

26. As such, the question of whether the cause is unilaterally for the bank's benefit and therefore could in any event be waived by the bank, does not arise; the defendant's contended-for construction does not get out of the starting blocks.

27. As regards the contention that the bank breached this condition precedent because the defendant's engineer was not "a suitably qualified engineer", I do not think that the clause can be arguably construed as being retrospectively breached because the engineer subsequently conducted an incompetent job on the building. There is no *prima facie* evidence that the engineer was not suitably qualified at the date of the loan and the date of the confirmation provided under the condition precedent.

28. The defendant next stated that an arguable defence arose by virtue of the bank arguably being in breach of special condition (ii) of the November 2004 loan offer letter. This condition provided that: "*the loan will issue in stages in line with the approved Architect's/Engineer's/Surveyor's report and the following conditions apply: (a) title to the property must pass to the borrower on the first stage payment (b) to draw down each stage, the borrower's solicitor is required to furnish to Lender with their Cheque Requisition form, a Property Report Certificate (from an Architect/Engineer/Surveyor acceptable to the Lender) (c) the final 5% of the loan will be retained until the lender has been furnished and is satisfied with its Property Report Certificate of the supervising architect/engineer/surveyor and a final evaluation from a valuer acceptable to the lender*." I have underlined the parts of the clause which the defendant lays emphasis on in support of his argument on interpretation of the clause.

29. The defendant proceeded on the basis that while he did not put copies of the certificates in question before the court, he was assuming that the bank received such certificates: the defendant averred that the "*loan sanctions by the bank referred to in the loans as issued by the bank both included requirements regarding certification of ongoing progress of works by the engineer*" and that his engineer "*submitted the reports required the by the Bank*" (defendant's affidavit of 14 April 2022 at para 8).

30. The defendant contended that it was arguable that this clause, by using the terms an engineer "acceptable to the lender" and the phrase "its property report certificate", meant or implied that the bank was assuming an obligation of satisfying itself that the defendant's engineer was a competent one and that if monies were advanced on foot of certification by the engineer as to progress of the building but if it transpired that the relevant phases of building funded by those advances were performed negligently by the engineer, that it was arguable that the bank could not recover sums advanced by it as the sums were advanced in breach of this clause. No authority was advanced in support of this radical construction. The logical culmination of the defendant's argument is that the bank, as a result of the terms of this special condition, would require its own engineer to shadow that of the borrower to ensure that the borrower's engineer was doing his job properly with the monies advanced by the bank to the defendant and thereafter by the defendant to the engineer in order for the bank to be able to recover on foot of the loan. Again mindful of the low threshold which the defendant needs to establish on this application to succeed in having the matter is remitted to plenary hearing, I do not see how such a radical construction is even arguably open on the wording of the clause or on any common sense interpretation of same.

31. On ordinary principles, the bank did not owe a duty of care to the defendant to ensure that the defendant's own engineer was competently doing the job which the defendant had engaged that engineer to do; the bank was not party to any agreement with the engineer. The assumption by the bank through a loan agreement with a defendant of such a responsibility would require very clear language. No such language is found, or arguably found, in the condition. The condition simply required the engineer being proposed for certification purposes by the defendant to be one acceptable to the bank. There is no arguable construction open, in my view, which would render the requirement that the borrower's certifying engineer be acceptable to the bank as involving the bank assuming a duty of care to the borrower to ensure his own engineer competently completed the project. The use of the possessive term "its" in the latter part of the condition in my view does not add to, let alone create, any arguable case that such a radical construction is available.

32. The defendant sought to aver by way of summary of his position on this application (at para 15 of his affidavit of 13 May 2019) that his defence was that "*the plaintiff (a) failed to ensure that its certifying architect/engineer/surveyor was competent and/or suitably qualified to complete the development and thus failed in his duty of care to* [the defendant] *(b) negligently advanced monies to* [the defendant] *which monies I have not had the benefit of due to the property now being unsellable and/or due to it now having a dramatically reduced value on account of its non-compliance with planning permission, building regulations, fire regulations etc.*" In the same affidavit (at para. 16), he refers to

the bank "wrongly advancing" the monies under the loan agreements to him. It is well established that there is no tort of reckless lending in Irish law: *ICS Building Society v Grant* [2010] IEHC 17 and *McConnon v President of Ireland* [2012] 1 IR 449. In my view, the defendant in truth seeks to contend for the tort of reckless lending as a defence to the Bank's claims. While the plaintiff might well have a valid cause of action against his engineer and indeed previously issued proceedings against the engineer (and unsuccessfully sought to have the engineer added as a third party to these proceedings), it seems to me that the defendant is effectively seeking to foist the damage said to have been caused by the negligence of his engineer on the bank without any arguable basis in fact or in law as to why the bank assumed liability for such damage through its lending relationship with the defendant.

Conclusion

33. In the circumstances, I am satisfied that no arguable defence has been raised by the defendant and that it is appropriate in the circumstances to give judgment to the plaintiff against the defendant in the sum of €602,277.80.