[2020] IEHC 147

THE HIGH COURT

[2018 No. 53 S]

BETWEEN

HAVBELL DAC

PLAINTIFF

AND

DAVID HARRIS AND RITA HARRIS

DEFENDANTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of February, 2020

1. The plaintiff contends that on 30th November, 2004, Permanent TSB entered into a facility with the defendants for a commercial interest-only loan in the sum of €422,000. Those funds were drawn down. The defendants claim that in 2013 Permanent TSB changed the facility from an interest-only loan to one requiring both repayment and interest. The plaintiff says this was not unilateral but was by agreement.

2. On 19th June, 2015 Permanent TSB's rights under the facility were conveyed to Havbell Ltd. The plaintiff contends that on 23rd June, 2015, the defendants were notified of the transfer. On 16th September, 2016 Havbell Ltd converted to a DAC. The plaintiff contends that on 1st November, 2017, its solicitors demanded repayment of the sum of €113,778.04, being the amount alleged to be due and owing at that time. A summary summons was issued on 16th January, 2018 and a notice of motion for summary judgment followed on 17th May, 2018. On 23rd November, 2018 the Master of the High Court made an order remitting the case to plenary hearing. On 28th November, 2018 the plaintiff issued a motion to set aside the order of the Master under O. 63 r. 9 of the Rules of the Superior Courts. The Master's order was set aside on 28th January, 2019 by consent.

3. On 29th November, 2019 the Supreme Court gave judgment in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 (Unreported, Supreme Court, Clarke C.J. (Charleton and Ní Raifeartaigh JJ. concurring), 29th November, 2019) to the effect that the summary summons and supporting affidavit should provide "*at least some straightforward account of how the amount said to be due was calculated and whether it includes surcharges and/or penalties as well as interest*" (para. 6.7). On 13th February, 2020 the plaintiff issued a further motion seeking to amend the summary summons in the light of that judgment.

4. I have now received helpful submissions from Mr. Keith Rooney B.L. for the plaintiff and from Mr. Jerry Healy S.C. (with Mr. Vincent Nolan B.L.) for the defendants. The matters addressed in the present judgment were dealt with in four short modules or tranches when the original rulings were given, and there were further oral submissions between each tranche; but for simplicity's sake, all of the rulings have been consolidated into the present single written version. The four issues were:

   (i). should the plaintiff's amendment be allowed?;

(ii). costs and consequential issues on the amendment application;

(iii). should summary judgment be granted?; and

(iv). costs and consequential issues on the issue of summary judgment.

Should the amendment be allowed?

5. The ostensible purpose of the amendment is to particularise the debt in accordance with the judgment in *Bank of Ireland Mortgage Bank v. O'Malley.* The proposed particulars are as follows:

> *"Opening balance €302,308.20*
> *Interest €43,283.11*
> *Credits (payments) €50,679.98*
> *Credits (sale of property) €181,133.29*
> *Total due €113,778.04"*

6. This breakdown has already been provided in the sense that the statement of account is exhibited in the grounding affidavit seeking summary judgment.

7. The law on amendment of pleadings has not always been the most consistent area of Irish jurisprudence. But it is important constantly to seek to refocus that area back to first principles, which are firstly the interests of justice, and secondly ensuring that the real issues in controversy are addressed. In that regard, Geoghegan J. in *Croke v. Waterford Crystal Ltd* [2004] IESC 97, [2005] 2 I.R. 383 at 401, referred to the power to amend as being a "*liberal rule*", a dimension stressed in the discussion in Hilary Delany, Declan McGrath & Emily Egan McGrath, *Delany and McGrath on Civil Procedure*, 4th ed, (Dublin, Round Hall 2018) at pp. 281 to 282.

8. In *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296, [2018] 2 I.L.R.M. 56, at para. 78, Peart J. for the Court of Appeal, approved the three-fold test for amendments - arguability, explanation and lack of irremediable prejudice. While that was discussed in the judicial review context, those three criteria are of wider relevance to amendments generally.

9. As far as arguability, the amendment is clearly arguable. Whether the claim as so amended succeeds is obviously a separate question.

10. In terms of explanation, the amendment was clearly prompted by the significant refinement of the requirements of pleading introduced by the Supreme Court in *O'Malley*. That was a tangible modification to the previous law. The concept of some breakdown in the sum sought in a summary summons was envisaged in *Allied Irish Banks Ltd v. The George Ltd* (Unreported, High Court, Butler J., 21st July, 1975), but that obligation was read quite restrictively by Hogan J. in *A.I.B. v. Pierce* [2015] IECA 87 (Unreported, Court of Appeal, 22nd April, 2015), an approach that has been superseded now by the Supreme Court decision in *O'Malley* (I noted the tension between *The George* and *Pierce* previously

at para. 29 of *Crowley v Allied Irish Banks Plc T/A AIB Credit Card Services* [2016] IEHC 154 (Unreported, High Court, 18th March, 2016)). In such circumstances, I think it is fair to say that there has been a certain element of inconsistency or at least development in the caselaw; and it seems unfair to visit the inconsistencies of the legal system on litigants in general or the plaintiff here in particular.

11. Mr. Healy stresses that in *Porterridge Trading Ltd v. First Active Plc* [2007] IEHC 313 (Unreported, High Court, 7th September, 2007), Clarke J., as he then was, noted the need for an explanation for not having pleaded the point raised in an amendment at an earlier stage. But that was in the context of the overall exercise of "*assessing the competing interests of justice involved*." The interests of justice and the determination of the real issues in dispute remain the overall tests.

12. In particular, Mr. Healy complains about the time lapse between the Supreme Court judgment on 29th November, 2019 and the motion seeking the amendment on 13th February, 2020. That is hardly a delay worthy of significant legal attention, but even if there had been a long delay due to oversight, human error or even insouciant inactivity, that does not create an injustice.

13. Mr. Healy suggests that there needs to be an explanation for the full period of delay in seeking the amendment, but there has to be some reality to that process. A lapse of time in moving to seek an amendment of two-and-a-half months including the Christmas vacation is hardly much to write home about in the private law context. As Mr. Rooney eloquently puts it "*before I have to explain a delay there has to be a delay to explain*". That is a legitimate comment here. Delay is very much in the *de minimis* ballpark in this case.

14. Furthermore, the objection raised involves a failure to look at the situation in the round. What is to be explained is why the party did not plead the point the first time around. The fact of the Supreme Court decision explains the delay between the summary summons on 16th January, 2018 up to 29th November, 2019. Admittedly, there is not an express explanation on affidavit as to the delay (if you want to call it delay) between 29th November, 2019 and 13th February, 2020, but firstly, that is minor both in absolute terms and in context, and secondly, practical considerations including the vacation make such a lapse of time well within what is reasonable in the context. In any event, even if there had been a long delay of months or even years due to oversight, such human error can nonetheless amount to an explanation. After all, that is basically what happened in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29, [2012] 2 I.R. 570, where the Supreme Court allowed an amendment after a long gap due to human error.

15. As regards the third leg of the test, namely lack of irremediable prejudice, that has to be distinguished from the question of *mere* prejudice, which can normally be compensated for in costs. Mr. Healy suggests there is prejudice because there is no case without the amendment (although he also makes the separate argument that there is no case even with the amendment). However, requiring a party to answer a potentially winning argument (and I say "potentially" only on the basis of the test of arguability and not to

prejudge the merits) is not legally cognisable prejudice in this context (see comments of Posner J. in *Reed v. Illinois* (Case 14-1749, U.S. Court of Appeals for the 7th Circuit, 30th October, 2015) at p. 9). Prejudice for these purposes could, for example, involve a party having embarked on a particular course of action in reliance on a posture set out in the other parties' pleadings, such that it would be unjust to allow that other party to resile from such a posture; or perhaps derailing a date fixed for hearing. Such factors do not arise here, and any prejudice to the defendants can be addressed in terms of costs.

16. My view that an amendment should be allowed here is reinforced by the fact that this is what happened in *O'Malley* itself. The court remitted the matter back to the High Court to allow the bank to apply to amend the summary summons there (see para. 7.1). In the light of all of these matters, the amendment should be allowed in the interests of justice and to allow the real issues in controversy to be addressed.

Costs and consequential issues arising from application to amend

17. As sought in para. 2 of the notice of motion of 13th February, 2020, I will, by consent, dispense with the requirement to re-serve the amended summary summons.

18. As regards costs, Mr. Rooney seeks his costs or alternatively suggests it may be more practical to order the costs to be in the cause, or to adjourn them to after the motion for summary judgment. Mr. Healy suggests that I should either grant the defendants their costs or alternatively make no order as to costs.

19. In line with the approach taken by Clarke J., as he then was, in *Porterridge Trading Ltd v. First Active* [2008] IEHC 42 (Unreported, High Court, 21st February, 2008) at para. 4.5 (see *Delany and McGrath on Civil Procedure* at p. 307), it seems appropriate to award the costs of the application to amend to the defendants, being the respondent to the application to amend. Such an approach has more resonance in commercial litigation where the court can take the view that an unsuccessful objection may often be distinguished from an unreasonable objection. By contrast, in the context of public law litigation, where case management issues require a more vigorous husbandry of the courts resources to avoid unnecessary multiplication of preliminary and procedural issues, the court might well be required to have a wider view as to what amounts to an unreasonable objection to an amendment, so as to provide for possible costs orders against the unsuccessful objector. In the present circumstances, however, the order will be that the defendants be granted the costs of the application to amend.

Should summary judgment be granted?

20. There is a voluminous body of caselaw on the issue of the test for, and the procedure involved in, applications for summary judgment, which is summarised in the ever-indispensable *Delaney and McGrath on Civil Procedure* 4th ed. at pp. 1156 to 1176; but in a (perhaps optimistic) attempt to cut through the complexity I would suggest that the test as it currently stands could be summarised as follows:

    (i). the plaintiff's claim must be sufficiently pleaded and particularised;

    (ii). the plaintiff must adduce evidence establishing a *prima facie* case;

(iii). if so, the court must inquire whether there is a fair and reasonable probability of the defendant having a real or *bona fide* defence; and

(iv). if so, the defendant must show that this goes beyond mere assertion and is supported by evidence.

I will now deal with these four issues in turn.

Is the case adequately pleaded and particularised?

21. The need for the claim to be sufficiently particularised is stressed in *Bank of Ireland v. O'Malley* (see paras. 5.5 to 5.9 in particular). The particularisation may be done indirectly by referring to another identified document which provides the necessary information (see para. 5.6). Three issues were raised by the defendants as to a lack of particulars.

22. The first issue was a lack of details as to how the interest was calculated. All that the amended summary summons says is that it specifies the interest rate on 26th October, 2017. It also refers to statements of account although they aren't expressly identified in the summons. Clarke C.J. in *O'Malley* refers (at para. 5.6), to the possibility of giving particulars via an "*identified*" document. A general plea as set out in the amended summary summons at para. 10, which states that "*the defendants have been regularly supplied with statements of account …*" does not constitute reference to an "*identified*" document. Clarke C.J. in *O'Malley* states that there must be specification as to how the interest was calculated from time-to-time. That is implicit in paras. 6.4 to 6. 7. That is not just a matter of evidence: he states that the pleadings must specify how the sum due was calculated, even if that is done by reference to another document (see para. 6.11). Thus, the pleadings have to indicate either directly or indirectly how the interest is calculated if the plaintiff is to be entitled to seek summary judgment.

23. Some modest guidance is provided in the subsequent Supreme Court decision in *Bank of Scotland v. Fergus* [2019] IESC 91 (Unreported, Supreme Court, Charleton J. (McKechnie and McGovern JJ. concurring), 18th December, 2019) which refers to *O'Malley* (see paras. 19 and 20), stating that *"the nature of these requirements is 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*". A reference to putting a debtor in a position to know whether interest may have been overcharged implies that the interest rate as it varies from time to time has to be specified together with the periods involved.

24. Charleton J. goes on to say that *"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"*. Again, this reference to the "*precise basis*" is an illuminating gloss on the *O'Malley* decision. Under these circumstances the somewhat meagre particulars of interest pleaded in the special summons are inadequate to support an application for summary judgment.

25. The second question is how the initial loan of €422,000 turned into the "*opening balance*" of €302,308.20. The first named defendant admits the original loan of €422,000, but not

the so-called opening balance of €302,308.20, which is the amount alleged to be the debt at the time of transfer from Permanent TSB to Havbell. The endorsement of claim does not explain how that amount is calculated and, therefore, does not comply with *O'Malley* or *Fergus*. Mr. Rooney submits that this is a matter for evidence rather than particularisation, but I don't accept that. The jurisprudence is clear that the amount claimed must be explained and indeed explained precisely. He also majors on the first named defendant's alleged admission of the residual debt, but the admission does not specify the amount of the residual debt he is admitting to, nor does it waive any counterclaim.

26. The third complaint about the pleadings is that they are inconsistent with the case as now advanced. The pleadings expressly state that the facility offered was "*a commercial interest only loan*" (see para. 3), whereas it is now argued that the loan was restructured to involve repayment of principal as well. It is not appropriate to seek summary judgment on foot of pleadings that positively assert a basis for the debt that has since been changed with no reference in the pleadings to the change of basis of the liability. Given the jurisprudence as to clarity as to how the sum due is made up, it would not be appropriate to allow summary judgment in the present case on foot of pleadings that assert an interest-only loan and make no reference to the restructuring of the facility.

Does the evidence establish a *prima facie* case?

27. It is clear from *O'Malley* (paras. 5.2 and 6.8) that the plaintiff must not merely assert a *prima facie* case, but must support that with evidence. The issues raised under this heading generally do not add much to the issues to the points addressed under the first issue above, although there is one additional matter, which is that as far as the second named defendant is concerned, while it is pleaded that a letter of demand was sent to her, there is no actual evidence of that. If that were the only problem for the plaintiff I would have considered allowing further evidence to be adduced on that point, but given that it is not, there is no point doing so. So the matter would have to be adjourned to a plenary hearing under that heading as well.

Is there a fair or reasonable probability of a defence?

28. This test originates with Ackner L.J. in *Banque de Paris v. de Naray* CA [1984] 1 Lloyd's Rep. 21, at 23, where he said that the question was, "*is there a fair or reasonable probability of the defendants having a real or* bona fide *defence*". Lloyd L.J. in *Standard Chartered Bank v. Yaacoub* [1990] CA Transcript 699, said that this involved the question of asking "*is what the defendant says credible*". Glidewell L.J. in *National Westminster Bank Plc v. Daniel* [1993] 1 WLR 1453 followed the *Banque de Paris* approach, as did Murphy J. for the Supreme Court in *First National Commercial Bank Plc v. Anglin* [1996] IESC 1, [1996] 1 I.R. 75. As noted above, there has been a very large body of caselaw since then, much of which is set out in *Delaney and McGrath on Civil Procedure*. Mr. Rooney placed particular reliance on *Governor and Company of the Bank of Ireland v. White* [2018] IEHC 415 (Unreported, High Court, Faherty J., 29th June, 2018) to which I will refer later.

29. The defence here is that the agreement entered into was for an interest-only loan. That, it is said, was changed unilaterally by Permanent TSB. At the time the first named defendant believed that the financial institution was entitled to do that, but he now considers that not to be the case. Separately, proceedings for damages for breach of contract have been issued in relation to this matter [2019 No. 2501 P]. It is true that the first named defendant accepts in his second affidavit at para. 5(l) that he entered into an agreement for repayment of principal monies accompanied by a repayment holiday, but the affidavit makes clear that the context for that was what he saw as the prior imposition of a unilateral change by the financial institution. In such a context, a positive agreement which included a holiday is not automatically or even probably to be taken as a waiver of his rights. The context for the agreement was a positive unilateral assertion by the bank that the terms and conditions of the loan approval provided that the loan was due to convert to principal and interest (see letter of 1st October 2020). The defendants now argue that the loan agreement provided for no such thing.

30. Much is made of the first named defendant's incorrect original statement that the alleged unilateral change was in February 2012 (because if it occurred at all, it must have occurred earlier), but the timing is secondary to whether a unilateral change happened. The fact that not all the documentation is said to be available to the defendants may be relevant here. As noted above, it is true that the first named defendant did send an email stating that he accepted that he was bound to pay the remaining residual debt, but there is no acknowledgment of the amount of that nor was there any waiver of any set-off or counterclaim. On that point Mr. Rooney submits that the defence under this heading is only really a counterclaim and that this should not preclude grant of summary judgment, relying on *Bank of Ireland v. White*, but the law in that regard even as appears from *White* is considerably more nuanced. The court has what Clarke J., as he then was, in *Moohan v. SNR Motors Donegal Ltd* [2007] IEHC 435, [2008] 3 I.R. 650, at para. 4.2 (cited in *White* by Faherty J. at para. 58) called a "*wider discretion*" depending on whether or not the counterclaim arises from an independent set of circumstances. Here there is no question of an independent set of circumstances. The counterclaim is very much tied into the whole agreement under which the plaintiff now proceeds. So I would adjourn the matter for plenary hearing under this heading as well in any event, subject to the final issue.

Is the defence supported by evidence?

31. What constitutes mere assertion as opposed to evidence is not always immediately obvious, but it seems to me in all the circumstances of the present case that the first named defendant's affidavits do constitute adequate evidence in the circumstances for surmounting this threshold.

Conclusion on summary judgment application

32. Accordingly, I will dismiss the motion seeking summary judgment and adjourn the proceedings to plenary hearing. I do not see any obvious benefit in two separate sets of plenary proceedings dealing with the same issue, so consideration needs to be given as to whether the matter should be consolidated with the separate proceedings [2019 No. 2501 P].

Costs and consequential matters arising from the summary judgment application

33. As regards possible consolidation, I will adjourn the matter for six weeks with a view to consolidating the proceedings on the basis that the defendants will communicate with Permanent TSB. The fact that there is an additional party in the action for damages is not an automatic bar to consolidating the proceedings and given the fairly massive overlap of issues, much could be said in favour of consolidation, but the final decision will have to await some form of notice to Permanent TSB.

34. The intention would be that in the event of consolidation, the defendants' existing proceedings would only stand as against Permanent TSB rather than as against Havbell and would as against them be replaced by a defence and counterclaim in the present proceedings.

35. As regards the question of a stay on the costs of the amendment application which was ordered in favour of the defendants, it is accepted by Mr. Rooney that the costs can be sent to adjudication, but it seems to me that there is a benefit in staying the execution of the costs until the determination of the proceedings, because that may save costs and be more convenient overall given the number of moving parts and the potential for further orders. Consequently, any execution should be in the context of a final state of play, where, in the event of there being anything hypothetically to set-off or to be taken into account in terms of any such costs order, such execution will be in the context of the blowing of the final whistle.

36. As regards the costs of the unsuccessful application for a summary judgment, the normal rule is that such costs be costs in the cause: *ACC Bank Plc v. Hanrahan* [2014] IESC 40, [2014] 1 I.R. 1 at para. 3.5 *per* Clarke J. as he then was. In all the circumstances I do not see sufficient reason to depart from that here, so the costs of the application for a summary judgment will be costs in the cause.

Summary of order

37. In summary, therefore, the order is that I will:

    (i). allow the amendment;

    (ii). dispense with the requirement to re-serve the amended summary summons;

    (iii). grant the defendants the costs of the application to amend;

    (iv). dismiss the motion seeking summary judgment and adjourn the proceedings to plenary hearing;

    (v). adjourn the matter for six weeks with a view to consolidating the proceedings with the plenary action, on the basis that the defendants will communicate with Permanent TSB;

    (vi). stay the execution of the costs until the determination of the proceedings; and

(vii). order that the costs of the application for a summary judgment will be costs in the cause.