

THE HIGH COURT

[2022] IEHC 62  
[2020/248 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

KHAWAR WASIM (OTHERWISE WASIM KHAWAR)

AND

SAHER KHAWAR

DEFENDANTS

**JUDGMENT of Mr. Justice David Holland delivered on the 7<sup>th</sup> of February, 2022**

1. This is my judgment in respect of the application of the plaintiff (“AIB”) for summary judgment against the defendants jointly and severally on foot of their default in the repayment of a series of loans which I will describe in due course. The application was moved by counsel for AIB in the summary judgment list on 31<sup>st</sup> January, 2022. The defendants did not appear. I was satisfied as to their having been served with the papers generally and specifically with notice of the hearing of 31<sup>st</sup> January, 2022. I gave judgment against them in the sum of €567,540.12 plus costs. On the suggestion of counsel for AIB, I stayed entry and execution of the judgment for two months from that date and gave the defendants liberty to apply within that period. I indicated at that time that I would give a brief judgment setting out my reasons for that decision, which I now do.

2. The proceedings commenced by summary summons issued on 8<sup>th</sup> September, 2020. The defendants, by a single memorandum of appearance signed by both, appeared in person on 17<sup>th</sup> November, 2020. By notice of motion returnable for 22<sup>nd</sup> March, 2021, AIB sought final judgment for €567,540.12, being the sum in which I have granted judgment.

3. The motion for judgment was grounded in the first instance on the affidavit of Niall O’Reilly sworn on 3<sup>rd</sup> February, 2021. In accordance with the pleas of the summary summons and as a manager employed by AIB, stating his means of knowledge and the evidential basis of his averments, Mr. O’Reilly sets out the history of this matter by reference to five mortgage loans by AIB to the Defendants. €4,540 was advanced on or about 23<sup>rd</sup> August, 2007, €190,460 was advanced on or about 23<sup>rd</sup> August, 2007, €86,000 was advanced on or about 15<sup>th</sup> January, 2008, €190,460 was advanced on or about 18<sup>th</sup> February, 2008 and €139,540 was advanced on or about 18<sup>th</sup> February, 2008. Mr. O’Reilly deposes that, at 26<sup>th</sup> January, 2021, a total of €567,540.12 was due on those five loans (stating a separate balance for each loan) and he exhibits, in respect of each loan, a statement of account from the opening balance of €0 in each case.

4. Mr. O'Reilly also exhibits letters dated 6<sup>th</sup> February, 2020 from the solicitors for AIB to each defendant separately, demanding payment of the total then outstanding of €584,764.84 and letters dated 31<sup>st</sup> August, 2020 from the solicitors for AIB to each defendant separately, enclosing up-to-date statements of each of the five loan accounts since inception. Accordingly, the defendants were in possession prior to the service of the summary summons of the particulars of indebtedness contemplated in the decision of the Supreme Court in **Bank of Ireland Mortgage Bank v. O'Malley**<sup>1</sup> and the summons pleads the provision of those statements to the defendants.

5. Though the defendants, as stated, both appeared to the summons in November, 2020, it seems prudent to record that, by affidavit sworn 25<sup>th</sup> September, 2020, Maria Cecilia Fava proves service of the proceedings by registered post on the defendants and exhibits proof of delivery in accordance with O.9, r.2(iii) of the Rules of the Superior Courts. By her second affidavit of service sworn 4<sup>th</sup> March, 2021, Ms Fava proves service by registered post on both defendants of the notice of motion for judgment returnable for 22<sup>nd</sup> March, 2021 and the said affidavit of Niall O'Reilly and exhibits thereto. By her third affidavit of service, Ms. Fava proves service by ordinary post on each separately of the defendants of a notification that the matter was listed for 21<sup>st</sup> June, 2021.

6. On that date Hanna J., made an order amending the notice of motion by deleting a reference therein to default of appearance. That reference had been in error given the appearance described above. The court dispensed with the requirement to re-serve the motion and adjourned the matter to 8<sup>th</sup> November, 2021.

7. The fourth affidavit of service of Ms. Fava, sworn 27<sup>th</sup> October, 2021, similarly records notification by ordinary post of each defendant that the matter was now listed for 8<sup>th</sup> November 2021. The letter advised that AIB intended to seek judgment on that occasion and that any defence should be set out on affidavit in advance.

8. The matter came before me on 8<sup>th</sup> November, 2021. The first defendant appeared in person and purported to appear on behalf of the second defendant though not, in law, entitled to do so. I should say that he did not, to my impression, intend any error in this regard and I note that the defendants reside at the same address. However, I have, for this reason, taken some care to record both the appearance of the second defendant and the various affidavits of service of documents upon her.

9. On 8<sup>th</sup> November, 2021, the first defendant intimated that he expected to receive presently the proceeds of sale of properties in Pakistan and the United Arab Emirates - which proceeds he intended to apply in repayment of the loans the subject of these proceedings. He did not on that

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<sup>1</sup> Bank of Ireland Mortgage Bank v. O'Malley [2019] IESC 84 (Supreme Court, Clarke CJ, 29 November 2019)

occasion dispute the debts. On that basis, I adjourned the proceedings to 31<sup>st</sup> January, 2022 with AIB having liberty to apply if funds were not received by AIB in accordance with the timetable intimated by the first defendant. In the event, AIB sought to avail of that liberty on foot of the affidavit of Peter Kelly, solicitor for AIB, affirmed 7<sup>th</sup> December, 2021. Mr Kelly recited the course of negotiations between AIB and the first defendant from February, 2020 by way both of telephone conversation and exhibited emails. Essentially, Mr. Kelly records a series of promises to pay significant sums in defrayal of AIB's claim, *inter alia*, by application of the proceeds of sale of the properties in Pakistan and the United Arab Emirates.

**10.** Mr. Kelly records that at the hearing of 8<sup>th</sup> November, 2021 the first defendant had intimated his intended application in diminution of the debts of the proceeds of both sales - which he expected to come close to €700,000. Accordingly, while AIB, before me on 31<sup>st</sup> January, 2022, asserted that the first defendant had, on 8<sup>th</sup> November, 2021, acknowledged his indebtedness in full, that assertion was not strictly correct. However the first defendant did not deny the debts and, as Mr. Kelly states, indicated his intention to apply proceeds of sale to that indebtedness.

**11.** Mr. Kelly's affidavit also recounts events after the hearing of 8<sup>th</sup> November, 2021. Essentially, he asserts that, despite the first defendant having intimated by email that he had already made transfers to AIB or had monies to hand to make such transfers, no monies had in fact been received by AIB. Mr. Kelly also records that, on the information provided to him by the first defendant, it had become apparent that the net proceeds of sale were likely to be in the region of €451,000 rather than the figure close to €700,000 intimated by the first defendant to the court on 8<sup>th</sup> November, 2021. Mr. Kelly also exhibits, by way of proof of service, two letters dated 6<sup>th</sup> December, 2021 advising each of the defendants that AIB intended to avail of the liberty to apply which I had granted on 8<sup>th</sup> November, 2021 and to seek judgment when the matter was again listed on 20<sup>th</sup> December, 2021.

**12.** By her fifth affidavit of service sworn 14<sup>th</sup> December, 2021, Ms Fava proved service on each defendant of letters dated 7<sup>th</sup> December, 2021 and a copy of the affidavit of Peter Kelly affirmed 7<sup>th</sup> December, 2021 and exhibits thereto.

**13.** When the matter came before me on 20<sup>th</sup> December, 2021, the defendants did not appear. I expressed certain concerns as to the means of Mr. Kelly's knowledge whether AIB had received any payments from the defendants since the hearing of 8<sup>th</sup> November, 2021. On that basis, I adjourned the matter and, by affidavit sworn 17<sup>th</sup> January, 2022, Niall O'Reilly confirmed that AIB had provided the first defendant with the details of a bank account into which payment should be lodged and no such payments had been made by the defendants or either of them. By her sixth affidavit of service sworn 21<sup>st</sup> January, 2022, Ms Fava proves service upon each of the defendants of that affidavit of Niall O'Reilly.

14. By affidavit sworn 18<sup>th</sup> January, 2022, Alla Fogheli proves service by ordinary post on each of the defendants of a letter advising that the matter was listed for hearing on 31<sup>st</sup> January, 2022 and that AIB intended to seek judgment on that occasion.

15. The motion for judgment came before me again on 31<sup>st</sup> January, 2022. On that occasion the defendants were called at the sitting of the court but did not appear. Counsel for the plaintiff moved the motion for judgment in accordance with the papers and proofs which I have described above.

16. The defendants have not, at any point, intimated a defence or delivered any replying affidavit intimating a defence to the claim of the plaintiff.

17. In considering the motion for judgment and the circumstances described above and the proofs underlying them, I have borne in mind the principles as to the grant or refusal of summary judgment as set down most notably in **Bank of Ireland Mortgage Bank v O'Malley**<sup>2</sup> (including in particular its reminder that before one considers the question whether the Defendant has shown a bona fide defence, one must first consider whether the Plaintiff has shown a prima facie claim to judgment), **Harrisrange Limited v Duncan**<sup>3</sup> and **Aer Rianta cpt v Ryanair Ltd**<sup>4</sup> (in which Hardiman J stipulated that leave to defend should be granted unless it was "very clear" that the defendant had no defence).

18. In the foregoing circumstances, I was satisfied to grant judgment as recited above on the basis that:-

- AIB had proved the defendants indebtedness underlying the summons in the amount claimed in both the summons and the notice of motion for judgment;
- AIB had proved service of all relevant documents upon the defendants both;
- Despite having appeared, neither defendant had, at any time, intimated or put on affidavit any defence to AIB's claim, much less a *bona fide* defence.

David Holland  
7<sup>th</sup> February 2022

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<sup>2</sup> [2019] IESC 84

<sup>3</sup> [2003] 4 IR 1

<sup>4</sup> [2001] 4 IR 607