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Judgment: approved by the Court for handing down | *Delivered:* **12/06/12**
*(subject to editorial corrections)**

2010 No. 17628

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISON

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BETWEEN:

PATRICK McOSCAR

Plaintiff;

and

BRENDAN LOUGHRAN

Defendant.

_____

McCLOSKEY J

Introduction

[1] The events underlying and giving rise to this litigation disclose an unfortunate story of the rupture, apparently (and sadly) irreparable, of what was clearly a life long friendship between two professional men.

Claim and Counterclaim

[2] The Plaintiff's claim, per the specially endorsed Writ of Summons (issued on 10th February 2012), is particularised as follows:

- Repayment of alleged loan to Defendant: £45,000.

- Contractual interest on £40,000 from 9th June 2008 to 6th April 2009 at 36% per annum (301 days): £13,359.45.

- Less payment received on 6th April 2009: (£5,000).

- Further interest, on £40,000, from 7th April 2009 to 10th February 2010: £12,230.14.

- Total Claim to date of Writ: £65,589.59.

- Continuing interest *per diem*: £39.45.

In an affidavit, the Plaintiff avers that he made a personal loan of £45,000 to the Defendant on 9th June 2008. He did so, he claims, having rejected the Defendant's overtures to him to become financially involved in the Defendant's business activities in Turkey. Those activities entailed residential property developments and a Manganese mining operation. The Plaintiff avers that as the Defendant was a trusted, life long friend and, since he was clearly in need of financial advances, he agreed to lend him £45,000.

[3] By his Defence and Counterclaim, the Defendant:

(a) Denies the loan agreement alleged by the Plaintiff.

(b) Avers that the Plaintiff made an agreement with a Turkish national (one Recai Canakci) on 8th June 2008 to advance an immediate loan of £45,000 in aid of Mr. Canakci's mining venture at Eskiseher in Turkey, with a further advance of £35,000 to follow three months later.

(c) Avers that an interest rate of 36% would apply if the Plaintiff made both advances to Mr. Canakci.

(d) Claims that it was not possible for the necessary legal formalities to be executed prior to the Plaintiff's departure from Turkey on the same date, 8th June 2008.

(e) Claims that he, the Defendant, "*agreed to provide the Plaintiff with written evidence of the loan agreement upon their return to this jurisdiction until such time as the Plaintiff could reasonably complete the necessary formalities with Mr. Canakci*".

(f) Avers that, in the alternative, the alleged loan agreement is not enforceable against the Defendant as it lacks consideration or entails past consideration or involved a time limited promise.

(g) While acknowledging the payment of £45,000 by the Plaintiff, questions whether such payment was made personally by the Plaintiff.

(h) Claims that the alleged interest rate of 36% is an unfair contract term.

(i) Counterclaims approximately £1,400 against the Plaintiff in respect of work and services allegedly performed by the Defendant on behalf of the Plaintiff in a variety of contexts *and* the cost of the Plaintiff's flights to and from Turkey in June 2008.

[4] The Plaintiff made an extensive request for particulars of the matters pleaded in the Defence and Counterclaim. No reply was made. At a review conducted by the court on 26th September 2011, it was determined that the affidavits sworn by the parties (three in total) would serve as witness statements. The court was further informed that the Defendant's Counterclaim would not be proceeding. The Defendant reconfirmed this at the trial. Both parties were represented by both solicitor and counsel until a comparatively late stage of the proceedings. However, by the stage of the trial, each was unrepresented.

The Evidence

[5] The evidence considered by the court had the following components:

(i) The aforementioned affidavits, treated as witness statements.

(ii) A series of documentary materials either formally proved or admitted by agreement and admissible in any event under the Civil Evidence (NI) Order 1989.

(iii) The sworn testimony of the Plaintiff and the Defendant.

The court's determination of the contentious issues is made accordingly. I do not intend to rehearse the evidence exhaustively. Rather, I shall focus on the more salient aspects.

The Documentary Evidence

[6] Most of the key events giving rise to this litigation are either recorded in or can be identified by reference to a series of documents. This includes in particular the following components:

(i) A document entitled "Loan Agreement" bearing the date 9th June 2008, containing the following text:

> "*I Brendan Loughran* [the Defendant] *of …* [address] *… confirm that I today received a loan*

from Patrick McOscar of … [address] *… the agreed terms and amount being as follows:*

Amount £80,000 …

Loan period 6 months renewable for a further 6.

Interest rate 36%."

This is the key document in the evidential matrix before the court. It was agreed that the signatures on this document are those of the Plaintiff and the Defendant. It was further agreed that the signature of the witness is that of the Plaintiff's spouse.

(ii) The First Trust Bank "International Funds Transfer Form" records that on the same date, 9th June 2008, the Plaintiff transferred £45,000 to the account of one Fatma Canakci in Bodrum, Turkey. It was common case that Ms Canakci is the sister of the aforementioned Mr. Canakci.

(iii) At an earlier time on the same date, 9th June 2008, the Plaintiff received an e-mail from one Mr. Taskin who, by common case, is a Turkish national who was an associate of the Canakcis. This was to the effect that the Defendant "*… called me and asked me to send you some details which are written below*". There followed the contact particulars and bank details of the Canakcis.

(iv) By a second e-mail to the Plaintiff from Mr. Taskin on the same date, 9th June 2008, there was attached "*the contract that was sent by one of the biggest Manganese buyer company* [sic] *in China*".

(v) According to the Plaintiff's Visa statement dated 7th July 2008, he paid a Turkish hotel bill (of some £300) on 6th June 2008.

(vi) The stamp on the Plaintiff's passport suggests that he departed Turkey on the same date, 6th June 2008.

(vii) The stamp on the Defendant's passport is inconclusive, on account of its quality.

(viii) In deference to the chronology of events, I interpose here the agreed fact that in early July 2008 the Plaintiff and the Defendant and their respective spouses had a joint holiday in Egypt. On 14th August 2008, the Defendant's secretary conveyed by e-mail to the Plaintiff various particulars relating to a property at Glenwell Road, Glengormley, owned by the Defendant (rental, initial loan, balance of loan, capital payments per annum and annual interest on the loan). Attached

thereto were the plans of the building in question. The parties were agreed that the main work on a contractual prolongation claim undertaken by the Plaintiff on behalf of the Defendant began around November 2008.

(ix) The parties were further agreed that on 2nd April 2009 the Plaintiff made his first verbal demand for repayment of the alleged loan by the Defendant. The documentary trail lay dormant until 4th April 2009, when a payment of £5,000 was made by cheque to the Plaintiff. The payor was Danlor Services Limited, the Defendant's local business.

(x) On 6th April 2009, the Plaintiff made a formal repayment demand to the Defendant, evidently before receipt of the cheque for £5,000. The following day, the Plaintiff received the aforementioned cheque, dated 4th April 2009.

(xi) The Plaintiff's next formal demand for repayment was made by letter dated 14th May 2009, accompanied by a statement which acknowledged partial repayment of £5,000 on 7th April 2009. The subject matter of this letter was described as "Loan Agreement dated 9th June 2008" and the text mentioned "*your assurances given to me on 6th April 2009 …* [and] *… I urgently require repayment of this loan now, as per our agreement …*".

(xii) By a letter dated 14th May 2009 (coincidentally), the aforementioned Mr. Canakci informed his "*clients*" that, following a series of complications, he was hopeful of beginning a Manganese mining operation within four weeks, with a view to producing necessary finance for his property development activities. The letter finished in these terms:

> "*Our plan is that as soon as we get a steady cash flow from the sale of the Manganese we will be back on our projects to complete and finish all our outstanding agreements and responsibilities*".

(xiii) By letter dated 20th May 2009, the Defendant's solicitors wrote to the Plaintiff as follows:

> "*Our client: Brendan James Loughran …*
>
> *Premises : 2 Glenwell Road, Glengormley …*
>
> *We act on behalf of our above-named client who is the legal owner of the above premises. We confirm that at present there is a first legal charge over the above premises registered in favour of Bank of*

Ireland. We have received instructions from our client to advise you that in the event that the property is sold and after the first charge in favour of Bank of Ireland has been redeemed in full that we undertake to forward the sum of £40,000 to you from the net proceeds of sale if and when received by us".

(xiv) By letter dated 4th June 2009, the Defendant adverted to "*the letter of undertaking from O'Hare Solicitors*" and enclosed a bank statement indicating a debt of some £164,000 secured on the property and an estate agent's valuation, dated 1st June 2009, indicating a current market value of around £500,000 and advising the withholding of the property from the market. This letter ended:

> "*As stated previously I am 100% committed to having the monies repaid to you as soon as possible*".

(xv) By letter dated 11th June 2009, the Plaintiff requested his solicitors to consider a variety of materials, including particularly the letter from Messrs. O'Hare and to advise on the merits of the undertaking contained therein. The parties were agreed that they remained on speaking terms until late June 2009. Their last conversation took place when they met in a coffee shop in Belfast. The parties were further agreed that during the summer of 2009 the Plaintiff persistently attempted to make contact with the Defendant regarding repayment and the Defendant took various evasive measures, including steps which prevented the Plaintiff from entering the Defendant's office.

(xvi) By further letter dated 14th September 2009, the Plaintiff requested the Defendant to repay the loan urgently and threatened legal proceedings.

(xvii) The Defendant replied by letter dated 15th September 2009, making the following case:

> "*During your visit to Turkey in May/June 2008, you decided to invest in a mining company in Turkey. The decision to invest was your decision and the agreement was that you would invest £80,000 in the mining company and the managing director of that company, Recai Canakci, agreed the rate of 36%. Upon your return you transferred £45,000 to Fatma Canakci, the sister of Recai.* ***I did not receive any money from you despite the loan agreement that I signed***. *As I have already said to you on numerous occasions the mining licence was temporarily suspended due to environmental objections.*

> *However, the court has reinstated the mining licence and it should be in production in the next few months.* ***You are also aware that, as your friend, I instructed my lawyers to give you a charge on my property in Glenwell Road. This was purely to give you some security about your investment in the mining company ...***
>
> ***You are also aware that Danlor paid you on account £5,000 for preliminary work in connection with probable court case in Dublin ...***
>
> *I am doing the best I can but unfortunately as you are also aware things are very difficult financially. Your threat of litigation will not serve any useful purpose and may mean withdrawal of the solicitor's undertaking*".
>
> [My emphasis]

(xviii) By letter dated 18th September 2009, the Plaintiff rejoined, expressing disbelief and dismay.

By the end of the trial, there was no appreciable controversy between the parties about any of the facts rehearsed in the eighteen subparagraphs above, subject of course to the significant qualification that the core elements of the dispute between the parties are rehearsed in the letters exchanged in September 2009.

[7] The evidence establishes that the aforementioned letter dated 18th September 2009 from the Plaintiff to the Defendant signalled the end of all communications between the parties. Chronologically, the next material development consisted of a pre-action letter dated 27th January 2010 from the Plaintiff's solicitors to the Defendant. The Writ of Summons followed swiftly thereafter, on 10th February 2010.

The Parties' Evidence and Affidavits

[8] In both his sworn evidence and affidavit, the Plaintiff made a case broadly consistent with the documents rehearsed above, as the following resume demonstrates. In particular, he asserted that on the final day of their second joint visit to Turkey, on 6th June 2008, the Defendant escorted him to **his** Manganese mining project and invited the Plaintiff to invest therein. The Plaintiff declined. The persuasion had begun earlier that day, when the Defendant produced two pages containing both printed and manuscript entries. [It was common case that the Defendant was the author of the latter entries]. Following their return to Northern Ireland, on 9th June 2008, the Defendant repeated his investment invitation and the Plaintiff reiterated his rejection thereof. However, the Plaintiff agreed to make a

loan of £45,000, on the understanding that this would be deployed to finance the Defendant's Turkish business operations. The bank transfer to Turkey was made at the Defendant's request. The information received by e-mail concerning the Manganese mining operation was presumably designed to reassure the Plaintiff about the wisdom of the loan. The high repayment of 35% was attributable to the representation about the profitability of Manganese in Turkey. The Plaintiff first requested repayment, at least partial, some nine months later, in March 2009.

[9] At the trial, the Defendant declined to give formal sworn evidence in the witness box. As the hearing progressed, he made certain representations to the court, which were duly noted. He also cross-examined the Plaintiff. The Defendant, in turn, was cross-examined on his affidavit by the Plaintiff. The Defendant also relied on certain aspects of the documents received in evidence by the court.

[10] The case made by the Plaintiff in his evidence was unchallenged by the Defendant in various respects. In particular, there was no, or no effective, challenge to the following assertions and claims made by the Plaintiff:

(i) The Defendant was clearly involved with the Canakcis in joint business activities in Turkey, which included in particular the development of residential properties.

(ii) In May/June 2008, the Defendant and the Canakcis were in dire need of cash.

(iii) One of the causes of this cash crisis was the Defendant's failure to secure control over the proceeds of the sale of one particular Turkish site which were, in effect "seized" by one of the Defendant's Northern Irish business associates (from whom he subsequently separated) and sent home to local investors.

(iv) The Plaintiff's claims regarding the Defendant's repeated assurances that he, the Defendant, would repay the Plaintiff.

(v) The Plaintiff's assertions regarding the professional services rendered by him to the Defendant in connection with a "prolongation" claim arising out of a contractual operation involving one of the Defendant's business ventures in Dublin (subject to the caveat that the Defendant questioned the adequacy of the Plaintiff's report and alleged that the Plaintiff was unwilling to give evidence in the related arbitration process).

(vi) The Plaintiff's description of the circumstances in which the Defendant's solicitors' undertaking regarding the Glengormley asset materialised.

(vii) The assertion that the Defendant had originally represented that this asset had a value of £1.6 million.

(viii) The Plaintiff's assertion that the Defendant continues to own the Glengormley asset, subject to the bank's prior interest.

(ix) The Plaintiff's description of his increasingly desperate attempts to contact the Defendant (particularly during the period April/September 2009) and the Defendant's associated measures of evasion.

Findings and Conclusions

[11] I make the following main findings and conclusions **:**

(i) I found the Plaintiff to be an impressive witness. His evidence to the court had the ring of truth throughout. His case finds strong support in the contemporaneous documents generated throughout the course of events, outlined above, in particular the written loan agreement dated 9th June 2008.

(ii) In contrast, the Defendant, who chose to give evidence under the guise of cross-examination only, was unimpressive, adopting in the main a sweeping, unparticularised and evasive approach.

(iii) As noted above, the Defendant did not challenge a substantial number of the claims and assertions made by the Plaintiff in his evidence and I make findings accordingly.

(iv) In particular, the Defendant made no convincing attempt to explain his failure to respond to the Plaintiff's various letters until mid-September 2009.

(v) I find that both the payment of £5,000 by the Defendant's company to the Plaintiff and the undisputed facts bearing on the Glenwell Road asset are fully consistent with the Plaintiff's case. I reject unhesitatingly the Defendant's case on these issues which was, in substance, that these were simply goodwill gestures to a friend who had rashly parted with his life savings to a stranger in a foreign country.

(vi) Furthermore, the Defendant provided no explanation of the timing of the case made in his letter dated 15th September 2009 to the Plaintiff.

(vii) The Defendant's attempts to distance himself from and dilute what was plainly a close, life long friendship with the Plaintiff were self-serving and particularly unimpressive.

(viii) The Defendant's unsubstantiated claim that he has never had to borrow money cannot be accepted. The evidence, including that relating to the liquidation of the Defendant's local business (Danlor), points firmly to the contrary.

(ix) Equally unimpressive was the Defendant's rejection of the description of Mr. Canakci as a friend.

(x) The Defendant's suggestion that the Plaintiff invested his life savings by entrusting them to a stranger in a foreign country for the purpose of a business enterprise (the Manganese mining operation) about which he knew virtually nothing and which he had not even visited, without any form of security, defies belief. The Plaintiff struck me as an industrious, cautious and conservative businessman and, in tandem, a responsible husband and father, the kind of person who would be inherently unlikely to engage in such patently risky conduct.

(xi) The Defendant's explanation of the circumstances in which he executed the loan agreement was unsatisfactory and lacking in any credibility. I find that the Defendant, an educated and experienced businessman, received a loan of £45,000 from the Plaintiff on 9th June 2008 for the purposes of business activities in Turkey in which he was directly and centrally involved and, further, that he knowingly and voluntarily committed himself to the repayment obligations contained in the written agreement. This finding is based on the court's evaluation of the evidence of both parties and is substantially reinforced by the documentary evidence. I reject without hesitation the Defendant's contention that the loan agreement is to be read, construed and understood as simply providing the Plaintiff and his spouse with some measure of comfort. Properly analysed, the Defendant's case was that there was no underlying intention to create legal relations between the parties. Having regard to all the evidence, this is simply untenable.

(xii) I find specifically that the Defendant had, as a minimum, a business interest in the Canakcis' Manganese mining operation in Turkey. Even if this was not a partnership or shareholding or direct financial interest of sorts, the Canakcis' Manganese mining operation was clearly financially linked to the joint property development activities of the Defendant and the Canakcis in Turkey. The Defendant's claim that he had no interest whatever in the Canakcis' Manganese mining enterprise is utterly untenable. I find that while the precise

destination and deployment of the Plaintiff's loan of £45,000 to the Defendant was unclear, the Defendant had an obvious interest and incentive in providing financial support to all of the aforementioned Turkish business activities.

(xiii) I further find specifically that, upon completion of their second visit to Turkey, the parties returned to Belfast on 6th June 2008, a Friday. This finding is based on the Plaintiff's persuasive evidence to this effect, duly substantiated by the clear stamp on his passport and the date when he settled his Turkish hotel bill. Based on this finding, I reject the Defendant's attempted explanation for the absence of any formal Turkish security for the alleged loan by the Plaintiff to Mr. Canakci, which was based on an assertion that the day in question was a Sunday, when the services of a Turkish lawyer were unavailable. I reject this evidence. This finding serves to undermine the Defendant's credibility in a highly significant respect. Furthermore, it lays the ground for the court's forthright rejection of the Defendant's rationalisation of the written loan agreement: see subparagraph (xi) above.

(xiv) The Defendant's claim that he "*thought*" that the Plaintiff had transferred only £40,000 (and not £45,000) to Turkey is not believable. It is confounded by the unambiguous terms of the loan agreement and I find this to be a self-serving attempt to explain why the solicitors' undertaking of 20th May 2009 was in the amount of £40,000. The Defendant's claim that the payment of £5,000 to the Plaintiff in April 2009 was wholly unrelated to the loan between the parties documented in the June 2008 agreement was wholly unconvincing. I find that the solicitor's undertaking was directly related to the repayment obligations undertaken by the Defendant pursuant to the loan agreement and the reduction of the Defendant's debt to the Plaintiff from £45,000 to £40,000 a month earlier.

Giving effect to the above findings, I conclude that the Plaintiff has established his case to the requisite standard, viz. on the balance of probabilities.

[12] I make no formal determination of the Defendant's counterclaim since, as recorded in paragraph [4] above, the court was informed at a pre-trial review hearing that this was not to be pursued. At the trial, the Defendant confirmed this. Furthermore, he adduced no evidence in support of the counterclaim. At trial, aspects of the counterclaim featured intermittently, particularly in the cross-examination of the Defendant by the Plaintiff. It is appropriate to record that the Defendant's credibility was further shaken by the wholly unpersuasive terms of his counterclaim, coupled with its abandonment.

The Rate of Interest Claimed

[13] The interest specified in the loan agreement, 36% is, on any showing, an extraordinarily high rate. This prompts careful examination of the the terms of the agreement, the evidence relating to the surrounding circumstances and the findings which the court has made. Applying the relevant established law of contract template to this equation, the two main questions which arise relate to certainty of terms and consent.

[14] By the terms of the loan agreement, the loan period was "*six months renewable for a further six*". The specified interest rate of 36% was not expressed unambiguously to apply to *both* six month periods. Furthermore, the agreement was silent on the rate of interest, if any, to be levied following the expiry of these two six month periods. I give effect to the general principles rehearsed in Chitty on Contracts [30th Ed], Volume 1, paragraph 2-139 *et seq*. I find that, in its formulation, the interest provision in the loan agreement was, for these reasons, uncertain and imprecise. It lacks the clarity and precision sufficient to subject the Defendant to a clear contractual obligation to repay interest at the rate of 36% for an indefinite, immeasurable period and to confer on the Plaintiff a corresponding contractual right to this effect. This finding does not vitiate the agreement as a whole – see Chitty, paragraph 2-146.

[15] Next I consider the question of *consensus ad idem*. This is described in Chitty as "*the first requirement*" for the formation of a legally binding contract [see paragraph 2-001]. It is an agreed fact that the Defendant made no repayment of any amount during the first six month period, which expired on 8th December 2008. I find that the parties agreed to extend the repayment date for a further six months, from 8th December 2008 to 8th May 2009. At the time when they struck their bargain, both parties must have contemplated as a realistic possibility that the Defendant would fail to make repayment, in whole or in part, by the latter date. Objectively, 36% is an enormous rate of interest, particularly in the context of a personal loan between friends. It may be contrasted with the Defendant's competing rate, which is 1½% above bank base lending rate throughout the period in question: the parties were agreed that this would be approximately 5½%. In the Defence, it is pleaded that the interest rate of 36% is –

> "*…both unconscionable and a patently unfair contract term and, as such … unenforceable …*".

In the absence of legal representation for either party, the court received no argument on this issue. It is clear that the Unfair Contract Terms Act 1977 does not apply to the contract between the parties. Accordingly, the court has no role in this guise. The court must, however, consider the question of whether the Defendant truly consented to repaying his debt of £45,000 to the Plaintiff at this exorbitant rate. It is trite that true consent is an essential ingredient regarding all aspects of any contract. The principle of *consensus ad idem* continues to apply as a general rule: see

Halsbury's Laws of England (4th Edition Re-Issue) Volume 9(1), paragraph 631. See also the discussion in Cheshire, Fifoot and Furmston's Law of Contract (15th Edition), pp. 15 and 38 and the reference to Chitty [*supra*]. While the court must of course pay careful attention to the outward and visible signs of any agreement, these are not, in my view, invariably determinative of the true terms of the bargain struck between the parties. The court is obliged to evaluate all the evidence bearing on the bargain and the surrounding circumstances and to make findings, both direct and inferential, accordingly. This, in my view, is the judicial task. I find that when the Defendant executed the contract his economic plight was desperate. I further find that there was no true consensus between the parties that interest would be repaid at the astonishingly elevated rate of 36% for an indefinite and immeasurable period. Such a term would, in my view, be unanimously regarded in all circles as exorbitant and unconscionable. I further find that the parties agreed implicitly that interest would be repaid at a reasonable commercial rate. In my view, such a rate is represented by base bank lending rate plus 1½%. It is agreed between the parties that this was, in the round, 5½% during the period under scrutiny.

Omnibus Conclusion

[16] Giving effect to the above findings and conclusions:

(i) The Plaintiff will have judgment against the Defendant for £40,000, being the balance of the amount of £45,000 loaned, together with interest as specified below.

(ii) Having found that the contractual rate of interest truly agreed between the parties was 5½%, I award interest at this rate to the Plaintiff from 9th June 2008 until 6th April 2009 [£6.78 *per diem* for 290 days]: £1,966.29

(iii) Further interest is awarded at the same rate, 5½% on £40,000, from 7th April 2009 until the date of judgment, 12th June 2012 [being 3 years plus 66 days at the rate of £6.03 *per diem*]: £6,997.98.

(iv) The aggregate of the principal amount of £40,000 plus the interest figures rehearsed above is £48,964.27. The Plaintiff will have judgment against the Defendant for this amount.

(v) Hereafter, interest will accrue at the judgment rate prescribed by Rules of Court.

(vi) The court grants a stay of execution until 1st July 2012.