BEAUCHAMPS

BANKING UPDATE

Pat Nyhan

DATE: 30/11/2017

WHAT WILL THIS UPDATE COVER?

Default interest

Flynn and Benray v Breccia

Guarantees

- Allied Irish Banks plc v McKeown and McCarthy
- AIB v Marino Motor Works

Harrington V Gulland

- Harrington v Gulland
- Woods v UBIL, James Meagher and Adrian Trueick


DEFAULT
INTEREST

FLYNN AND BENRAY V BRECCIA

DETAILS OF THE CASE

- Decision of Haughton J. on 5 February 2016
- Facilities transferred from Anglo to NAMA to Breccia
- Demand letter sent in August 2014 - related to appointment of Receiver
- May 2015 – redemption figure sought
- Redemption figure was far higher than anticipated
- Breccia retrospectively applied default interest from the original default dates in 2010 / 2011

FLYNN AND BENRAY V BRECCIA

ANGLO IRISH BANK GENERAL TERMS & CONDITIONS

"Any monies due by the Borrower to the Bank and for the time being unpaid will bear surcharge interest at the rate of 4% over the Facility Interest Rate or at the Bank's discretion at a rate equivalent to the aggregate of 4% over the Facility Interest Rate on the due date calculated on a daily basis from the due date to the date of actual payment after as well as before any demand is made, any judgment obtained hereunder or the insolvency of the Borrower"

FLYNN AND BENRAY V BRECCIA

Flynn / Benray relied on Dunlop Pneumatic and Tyre Co. v. New Garage Motor Co. Ltd (House of Lords decision dating from 1915):

"The essence of a penalty is a payment of money stipulated as in terrorem of the offending party. The essence of liquidated damages is a genuine covenanted pre-estimate of damage"

Haughton J. noted that the UK Supreme Court has recently reformulated the Dunlop test in Cavendish Square Holding BV v Talal El Makadessi and Parking Eye Ltd. v Beavis

FLYNN AND BENRAY V BRECCIA

New UK test:

- *"whether the impugned provision is a secondary obligation which imposes a detriment on the contract – breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation"*

Only applies to provisions triggered by breach of contract so it may be possible in some cases to draft around the rule

Bargaining positions are equal - strong presumption that the parties are the best judges of what is legitimate

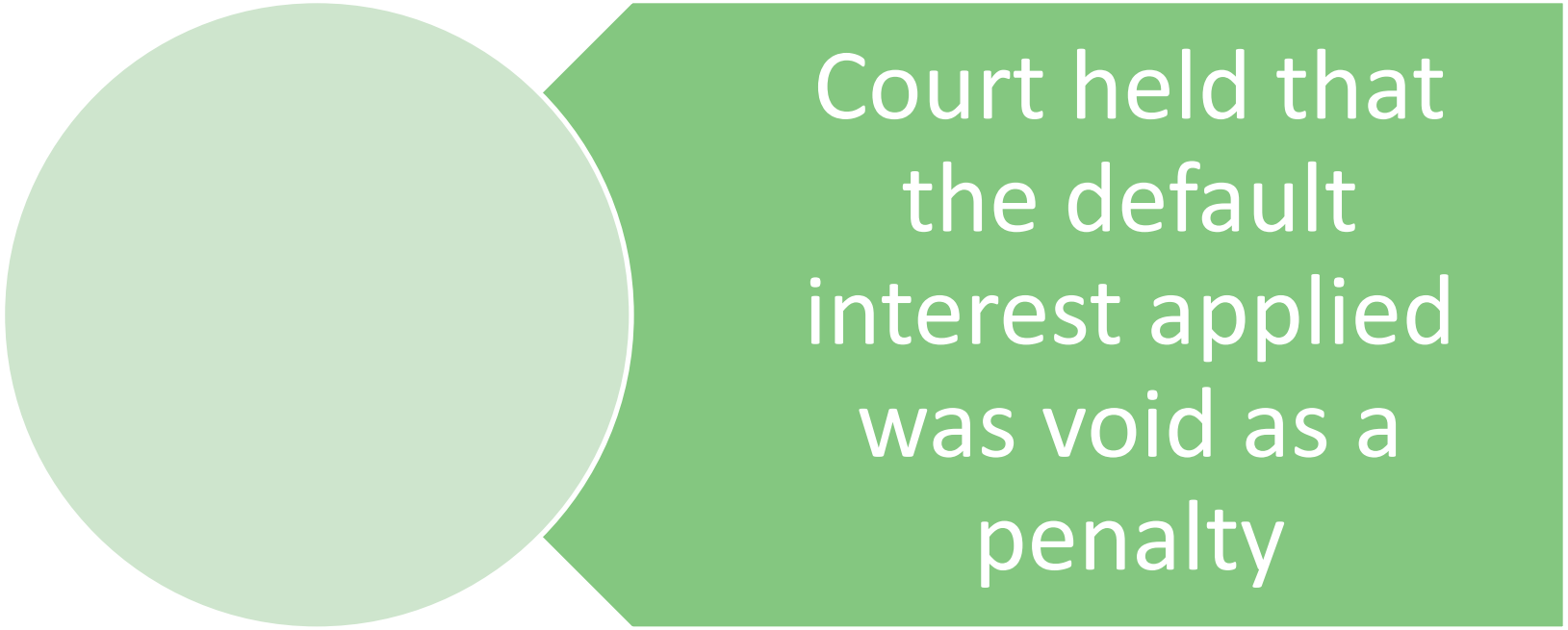
Proportionality is important

FLYNN AND BENRAY V BRECCIA

High Court held it could not depart from Dunlop test which is the established test at Irish law. Court also looked at expert evidence including:

- NAMA had never applied default interest
- surcharge rate of 4% was over and above cost of funds for the lender
- surcharge rate would have at least doubled and for some periods tripled the normal rate for much of the default period

FLYNN AND BENRAY V BRECCIA



LESSON FOR LENDERS

Banks / lenders should give careful consideration to the judgment before deciding to include default interest in any demands

If lenders try to charge a lower rate – technical argument could be raised that contractually they cannot do this

GUARANTEES

GUARANTEES


TWO RECENT CASES
Allied Irish Banks plc v McKeown and McCarthy
AIB v Marino Motor Works

ALLIED IRISH BANKS PLC V MCKEOWN AND MCCARTHY

DETAILS OF THE CASE

- Decision of Costello J. 12 May 2017
- Personal Guarantees (PGs) given in 2009
- Facilities were refinanced in 2013
- PGs were all sums and Bank argued they continue to apply
- Guarantor argued that the refinance automatically discharged Guarantees

ALLIED IRISH BANKS PLC V MCKEOWN AND MCCARTHY

Relevant clause in PGs provided:

- *"The Bank shall be at liberty without obtaining any consent from the Guarantor and without thereby affecting its rights or the Guarantor's liability hereunder at any time: (i)to determine, enlarge or vary any credit to the Borrower …"*

In previous dealings – new PGs obtained

Court agreed that the refinance was a material variation of the previous facilities but that:

- *"Plaintiff was expressly entitled to vary the first named defendant's facility without obtaining any consent from the Guarantor and without thereby affecting it's rights or the Guarantors' liability under the Guarantee"*

LESSON FOR BORROWERS AND LENDERS

BORROWERS

- Be informed that if such a clause is in your Guarantee – terms of underlying facilities can be changed without your consent

LENDERS

- While Deeds of Confirmation / consents to variation of facilities are usually obtained – if these are not held this judgment will offer assistance in seeking to continue to rely on Guarantees

AIB V MARINO MOTOR WORKS

DETAILS OF THE CASE

- Decision on Tuesday 27 June 2017
- Before the Master's Court – defendant had sought and been refused breakdown of interest charges to be reviewed by their accountant
- Defendants accountant argued that there was potentially significant overcharging of interest
- Replying affidavits from the Bank pointed out basis for calculations were incorrect

AIB V MARINO MOTOR WORKS

Bank pointed to the usual clause:

- *"a certificate issued by any officer of the Bank as to any amount payable in respect of facilities will be final and binding on the borrower save in the case of manifest error"*

The Court noted that no such certificate had actually issued in this case – rather sworn affidavits with no indication as to how figures were calculated

Court sent the matter for plenary hearing:

- *"concern is that a summary judgment would be entered for a particular sum when neither the defendant nor the court is in a position to check, on the information available, that the figures are correct"*
- *"doubtful whether a conclusive evidence clause…necessarily means that the customer can be deprived of the information enabling him or her to engage his or her own professional accountant to double-check the total figure presented to the court…"*

LESSON FOR LENDERS

Lenders will likely see an increased number of requests for detailed account breakdowns


HARRINGTON
V GULLAND

HARRINGTON V. GULLAND

DETAILS OF THE CASE

- Decision of Baker J from 2016
- Anglo facilities sold to Gulland – Receiver appointed
- Charge was registered on folio but Gulland was not registered owner of charge at date of appointment of Receiver

HARRINGTON V. GULLAND

Section 64 of the registration of title act, 1964

"(1) The registered owner of a charge may transfer the charge to another person as owner thereof…

(2) There shall be executed on the transfer of a charge an instrument of transfer in the prescribed form…but ***until the transferee is registered as owner of the charge that instrument shall not confer on the transferee any interest in the charge"***

HARRINGTON V. GULLAND

Previous case law affirming contractual power to appoint prior to registration as owner was distinguished on the basis that it related to transfers of charges from Bank of Scotland Ireland to Bank of Scotland by cross border merger – ie operation of law

Harrington v Gulland dealt with 'loan sale' situation

Held arguable case had made out

Injunction was granted

Important to note – injunction proceedings only

Court was only looking at whether arguable case made out

WOODS V ULSTER BANK

Woods v Ulster Bank Ireland Limited, James Meagher and Adrian Trueick - Decision of Baker J. from February 2017

Primarily the case was about whether or not the power to appoint a receiver had been contractual incorporated into the charge

One of the issues that arose was whether or not there was power to appoint a receiver prior to registration of the charge on the folio

Section 62(2)

- *"Until the owner of the charge is registered as such,* ***the instrument shall not confer on the owner of the charge any interest in the Land****"*

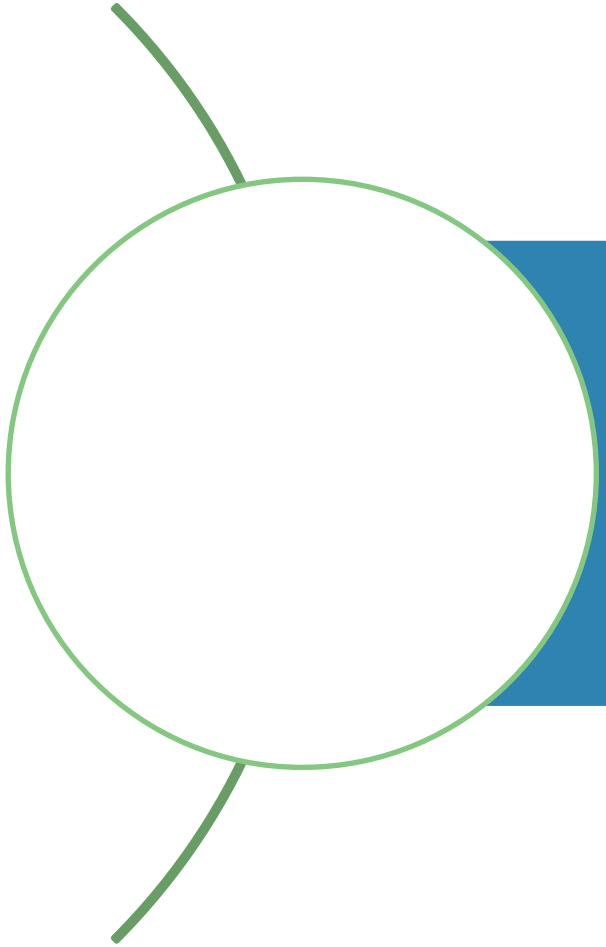
WOODS V ULSTER BANK

Court held appointment of Receiver was valid

"the joint receivers were appointed under a contractual power and did not require that at the time of the exercise of that power the charge be registered, as the Bank was not seeking to engage a power dependent on its being the registered owner of the charge"

Case did not deal with a loan sale scenario which was the scenario before the court in Harrington v Gulland

LESSON FOR LENDERS



Harrington v Gulland still a potential issue - preferable that a loan purchaser is registered as owner of a charge before taking enforcement action