Neutral Citation Number: [2011] IEHC 456

THE HIGH COURT

COMMERCIAL

2011 3116 S

BETWEEN

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

APPLICANT

AND

MARTIN FEELEY & LEO HALPIN

RESPONDENT

JUDGMENT of Mr. Justice Ryan delivered the 9th day of December 2011

The Facts

1. Pursuant to a facility letter dated the 14th November 2007 the plaintiff bank agreed to give the defendants a €5 million loan facility. The defendants drew down the money on the 23rd November 2007. The loan was for two years during which the defendants were only required to pay interest on the capital sum. A fund was set up out of the loan to cover interest payments as they fell due. The agreement was that when the loan expired it was to be restructured onto a mutually agreed amortisation term or refinanced or repaid in full, "subject to approval". The bank says that following the expiration of the two-year term of the loan, it engaged in negotiations with the defendants in regard to restructuring and/or refinancing but it proved impossible to reach agreement on a satisfactory arrangement. On 7th June 2011 the bank demanded payment of the principal and interest then due under the facility. At the time of the demand letter the interest fund was sufficient to service the loan until December 2012. That account was also due to be credited by more than €40,000 because reductions in interest rates between 2007 and 2009 had not been reflected in the Standing Order from the interest account. The defendants did not pay on foot of the demand letter and the bank now seeks judgment in the sum of €4,861,204.37 plus continuing interest.

2. The matter comes before me as an application by the bank for summary judgment. The defendants submit that they have a defence to the claim and that the case should be remitted for plenary hearing. They make three points. First, they argue that the loan is non-recourse as against the defendants personally and the bank is limited to whatever it can recover out of the lands whose development was the purpose of the facility. Second, the bank by its conduct led the defendants to suppose that it would not demand repayment of the principal as long as they continued to service the interest payments. When the demand letters were issued, the defendants had enough money on deposit to service interest on the loan until December, 2012. Third, the bank wrongfully withdrew money from the interest fund and collected excessive interest. The issue for the Court is whether the defendants have made out sufficient grounds of defence to defeat the bank's claim to summary judgment.

3. As to the first line of defence, the defendant Mr Halpin, whose affidavit was filed on behalf of both defendants, acknowledges that the conditions attached to the facility letter did not restrict recourse to the lands in Rathdrum that the defendants intended to develop. He says that the defendants assumed that the loan was non-recourse and that there would be no question of the bank pursuing them over and above what might be realised out of the proposed development lands. The contention is contradicted by the affidavit filed by the bank in reply. Mr Halpin concedes that he has been advised that his understanding of the facility does not accord with its express terms, "which I am advised provides for the joint and several liability of the defendants".

4. The second point that Mr. Halpin relies on is that the Bank agreed that it would not seek payment of the capital sum as long as the defendants kept up the interest payments. Mr Halpin says that he and his co-defendant deduced from the fact that the bank continued to take interest payments out of the fund after the expiration of the loan term in November 2009 that the bank would not enforce any rights that they had to demand repayment of the money. He says that this assumption was confirmed at a meeting with Mr Drew Corry of the bank that took place at the Rathdrum property on the 4th February 2010. Mr Halpin says that he and Mr Corry had a discussion of the facility and that the latter

> "made it clear to your deponent that the plaintiff had not called in the loan so long as the defendants continued to service interest on the loan. I was not surprised at all by this, as the plaintiff's actions in continuing to take interest from cur deposit account since the expiry of the facility in November 2009 was consistent with this position."

5. It is not in doubt that there was a meeting with Mr. Corry when he visited the land in Rathdrum but Mr. Corry denies the alleged agreement and says that he would not have agreed to any such alteration of terms and that he did not even have authority to do so.

6. Mr Halpin says that the main purpose of the meeting on the 4th February 2010 was to discuss the possibility of financing the purchase of an adjoining development whose developer had gone bankrupt.

> "I further say that Mr. Corry not only unambiguously represented that the facility would not be called in so long as interest was serviced, he went on to express the opinion that a repayment of the loan should be frozen for four or five years on the basis that the property market was severely depressed and that myself and the first named defendant did not have the personal assets to discharge the outstanding loan to the plaintiff."

7. The Bank's answer to this is, first, an affidavit from Mr. Corry which rejects this version of events. The bank goes further, however. The argument that Mr. Abrahamson B.L. puts forward is that the conduct of the defendants in the aftermath of the alleged agreement of the 4th February, 2010 was wholly inconsistent with there being any agreement such as Mr. Halpin sets up in his affidavit. If the Bank had indeed agreed as Mr. Halpin claims, then there would have been some subsequent reference to this by Mr. Feeley or Mr. Halpin. Their immediate reaction to any threat by the Bank to call in the loan --and certainly at the time when the Bank actually called in the loan in June 2011 -- would have been to point out that the Bank had agreed through Mr. Corry to continue with

the facility as long as there was sufficient money on deposit to cover interest payments. It is clear that there was such a fund that was good until December 2012.

8. The correspondence that followed the meeting of 4th February 2010 begins with the bank seeking details of the defendants' financial affairs, which were furnished over a period. In a letter dated 25th May 2010 seeking further information, the bank stated that the loan had expired in November 2009 and that the loan was in breach of the terms of the facility letter. A note of a meeting on the 9th June 2010 between Mr Halpin and Mr Lorenzen of the bank recorded that the customer had been advised that the bank "has a short term strategy which contradicts customer's long term strategy." The memorandum went on:

> "Further, the servicing of interest is not sufficient for the Bank. A sustainable strategy has to be agreed. Current Facility has not been formally extended. When information re Martin Feeley accounts have been received by the Bank (in 3-4 weeks), the Bank will assess the case again."

9. On the 28th July 2010 the bank wrote that the facility had not been extended and that renegotiation had to take place as soon as possible. Another meeting on the 7th October 2010 attended by Messrs Lorenzen, Halpin and Feeley was minuted by the bank in which it was noted inter alia that the defendants "were surprised of bank's position, since interest cover for at least 18 months is evident" and that the defendants "acknowledged a security shortfall and understood (at least) why the Bank had to act." The minutes recorded that Mr Lorenzen said that the bank would not defer a decision for another year and that a sustainable proposal had to be provided by the customers within weeks.

10. Solicitors acting for the defendants began to correspond with the bank on the 29th November 2010 seeking security documents, including in particular a guarantee by Mr Halpin. Any such security has not been raised by way of defence on this motion. On the 14th February 2011, the bank threatened to demand full repayment under the facility if the defendants did not make satisfactory proposals. The solicitors continued to refer to "a non-recourse guarantee" executed by Mr Halpin. The bank insisted that the facility letter on which the loan was advanced did not incorporate a guarantee.

11. On the 21st April 2011, the bank again called on the defendants to put forward satisfactory proposals as to security and interest servicing. It referred to its right to require full repayment but said that it would defer a decision for 28 days. The bank issued its letters of demand to the defendants on the 7th June 2011.

The Law

12. The fundamental principle is that a party should not be excluded from making any reasonably maintainable defence. In *Aer Rianta v Ryanair* [2001] 4 I.R. 607, Hardiman J cited *Sheppards and Co. v. Wilkinson and Jarvis* (1889) 6 T.L.R. 13, where Lord Esher said that the summary jurisdiction to enter final judgment must be used with great care. "A defendant ought not to be shut out from defending unless it was very clear indeed that he had no case in the action under discussion." The Supreme Court endorsed two tests from the English jurisprudence that that Court had previously adopted in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75. These might be called respectively [and respectfully] the Ackner and Lloyd tests, after their learned progenitors.

> (i) whether the defendants or either of them have satisfied the court that there is a fair or reasonable probability of their having a real or bona fide defence.
>
> (ii) Is what the defendant says credible?

13. The Supreme Court in *Aer Rianta* took the nature and context of the dispute into account. Hardiman J referred to the facts of the cases in the authorities cited and observed that in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, "the indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the defendant quite untenable."

14. It appears therefore that while the circumstances do not dictate the nature of the test by which the defence is judged, they influence the application of the criteria. Some points of differentiation of contractual claims may be identified: Is it a commercial transaction? Is the contract a familiar one or does it have unusual terms? Is there documentary evidence to counterpose the case advanced by the defendant? 15. In *Harrisrange Ltd v Duncan* [2003] 4 IR 1, McKechnie J summarised the Courts' approach to summary judgment in 12 propositions, of which the following are applicable in this case:

> "(iii) the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;"
>
> "(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence;"
>
> "(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

16. The Court's task is not simply to examine the affidavits and exhibits to discover whether there is a conflict of fact on a decisive point. Neither is it to weigh conflicting depositions in the balance to decide which is more probable. The court's function is to apply the above credibility tests to the proposed defence. That is what the Courts did in *First National Commercial Bank v. Anglin, Aer Rianta v Ryanair* and the other Irish and English authorities.

Submissions

17. When the case was called on for hearing, Mr. Cormac Ó Dúlacháin S.C. said that he appeared for the first named defendant, Mr. Feeley, although his solicitors had not yet entered an appearance. Counsel for Mr. Halpin was Mr. Nathan Reilly B.L., who had previously acted for both defendants. Mr. William Abrahamson B.L. appeared for the Bank.

18. Mr. Ó Dúlacháin sought an adjournment. He explained that he had only come into the case late in the previous week and there had not been time to file an affidavit on Mr. Feeley's behalf. Mr. Ó Dúlacháin was vague as to what was different about the case as compared with the one deposed to by Mr. Halpin on his own and Mr. Feeley's behalf. He referred to pre-existing liabilities that were extinguished by the loan of November 2007 and the different proportionate interests in those loans and in the proposed development partnership by the two defendants. I did not accede to Mr. Ó Dúlacháin's application. It seemed to me that nothing had come to light in the recent past that would justify postponing the proceedings. Neither had Counsel put forward any argument to explain why the application was made at this late stage by Mr. Feeley. He had known that the case had been accepted into the Commercial Court,

appearances had been made on his behalf at the different stages of the Court process and he knew or had means of knowing that the case was coming on for hearing and the date. There had not been any late change of circumstances or discovery of information. The application for an adjournment was unmeritorious in my opinion.

19. Mr. Ó Dúlacháin's client was not in fact at any disadvantage. He was able to make arguments on the interpretation of the documents in the case. Mr Reilly, for Mr Halpin, argued the issues raised in his client's affidavit. If either approach succeeded, it would inure for the benefit of both.

20. Mr Ó Dúlacháin made submissions as to the nature of the agreement and the relevant documents and the inferences that might be drawn from them. He submitted that it was maintainable, if tenuously, that the contract documents provided only for recourse to the lands of Rathdrum that were intended to be developed. It was more arguable that the Bank was obliged to have first recourse to that land and then to look for the remaining balance due on the loan. The Bank had decided not to pursue that course. Mr. O Dúlacháin was referring to a provision of the facility under the heading Covenants at item 9, as follows:

> "If loan remains outstanding at the two year anniversary of loan term, lands sufficient to clear our debt to be placed on the open market by the borrowers".

21. This is not a security provision that entitles the Bank to step in and sell the land and then sue the defendants for the balance. I do not think it affords support to Mr. Ó Dúlacháin for the proposition that there is a defence to the action available because of this provision. It is a demand the bank can make on the borrowers but not a restriction to that option only.

22. He argued that the purposes of the loan set out in the facility letter revealed the several nature of the transaction as opposed to a joint venture and that there was an issue accordingly as to the nature and extent of Mr. Feeley's proportionate interest in the partnership with Mr. Halpin and his liability for the full amount of the debt. Mr. Ó Dúlacháin also submitted that the post expiration negotiations broke down because there was no agreement in respect of security requirements but there was no provision for that situation and a stalemate came about, wherein interest was not chargeable. It does not seem to me that there is any substance in these arguments. There is no basis for suggesting that the Bank is prevented from proceeding against the borrowers until it has first exhausted the sale of the land. The loan was given to the defendants jointly and severally according to the terms of the facility letter. I also think it is obvious that continuing interest applies following the expiration of the term and that there is no basis for suggesting otherwise.

23. Mr. Nathan Reilly for Mr. Halpin relied on the points of the defence raised by his client in his affidavit. He emphasised the factual issues that arose from the meeting of the 4th February, 2010 between Mr. Halpin and Mr. Drew Corry of the Bank. The result, he said, was that the facility was not due and owing at present and this claim was premature. Mr. Reilly also expanded on the third point raised by Mr. Halpin, which is the allegedly wrongful withdrawal and misapplication by the Bank of the funds in the interest account. He also adopted the submissions made by Mr. O Dúlacháin as to the meaning and effect of the facility letter and its terms. I discuss the Halpin issues below.

Application to the Proposed Defences

24. On Mr. Halpin's case, as contained in his affidavit sworn on behalf of both defendants, the three points that arise are - (a) non-recourse, (b) Mr. Corry agreed that payment of the capital sum would not be demanded as long as sufficient funds were deposited to cover interest payments (c) the Bank wrongfully withdrew money from the interest fund and collected excessive interest.

25. The first point raised by Mr Halpin does not constitute a sufficient basis of defence on any interpretation of the legal tests to justify refusal of judgment. This was a commercial loan and there is nothing in the documentation to suggest any restriction on recourse by the bank. The fact is as the deponent acknowledges that there is simply nothing to suggest that it was a non-recourse loan.

26. In respect of point (b) the argument focussed on the conversation of the 4th February 2010 and the alleged alteration of the terms of the loan. Is there such a conflict of fact about this matter that the case must be referred to plenary hearing? It is clearly not something that can be resolved by considering the affidavits - in the sense that one cannot decide as between one deponent and the other as to where the truth lies. However, the bank makes the case that there is no substance whatsoever in this proposition. It says that it is inherently improbable that any bank official would agree to such a radical alteration of a term in a loan of this kind. It also argues that the defendants conducted themselves after the 4th February, 2010 in a manner that was completely inconsistent with the proposition now being advanced. In a word, if such an agreement had in fact been reached or if the defendants had ever believed that such an agreement had been reached, they would have made it clear in the aftermath of the meeting of February 2010 that the bank was bound by this accord. In fact, the bank contends, the defendants behaved in an entirely different way and continued to seek the indulgence of the bank and to provide new and improved security in the hope of meeting the bank's requirements.

27. The correspondence does not support the alleged accord. It is inconceivable that if the defendants believed that the bank had agreed that the loan would continue on an interest only basis that would not have even been mentioned in correspondence from the defendants or their solicitors or at meetings with the bank. I do not think there is credibility in the defence that the bank agreed through Mr Corry not to claim the principal for as long as the interest was paid. It does not make sense that the bank would agree to the continuation indefinitely into the future of a special, favourable and temporary regime that existed for the first two years. I accept the bank's argument on this issue.

28. There is a written record of the 4th February meeting but I discount it as a reliable contemporaneous note because it was made some 10 days later.

29. Mr. Halpin also complains in his affidavit of the actions of the Bank in withdrawing the sum deposited in the interest fund and applying it against the amount claimed to be due and owing on foot of the facility and interest. Additionally, he complains about the amount that was collected by way of excessive interest payments. This final point does not amount to a defence to the Bank's claim. On any view, even if it is assumed that the Bank behaved wholly unjustifiably, it merely means that it acted prematurely. Alternatively, it could be argued that the Bank was in the wrong and that some part of this money ought to be credited by way of set-off but that is actually what happened. In all the circumstances, I cannot see that this really arises even if the Bank is considered to have been somewhat high handed or to have not been entitled to behave as it did in relation to the interest deposit account.

30. The loan in this case was a commercial transaction involving a substantial commitment. It was effected by a formal document signed by the borrowers in which the bank advised the defendants to obtain legal advice.

Conclusion
31. Applying the criteria laid down by the Courts, it is clear in the factual circumstances of the case that the defendants do not have a defence to the plaintiff s claim. There will accordingly be judgment for the plaintiff on foot of its claim in the Summary Summons.