Neutral Citation [2013] IEHC 59

THE HIGH COURT

[2011 No. 2721 S.]

BETWEEN

FRIENDS FIRST FINANCE LIMITED

PLAINTIFF

AND

FRANK CRONIN

DEFENDANT

JUDGMENT of Mr. Justice Herbert delivered the 15th day of February 2013.

1. The plaintiff's claim in this motion is for liberty to enter final judgment for a total sum of €148,525.95 alleged owing on two loan agreements in writing made on the 2nd August, 2006, and the 28th May, 2008, between the plaintiff and the defendant. An appearance was entered on behalf of the defendant on the 21st July, 2011. The grounding affidavit of Gordon Hill, arrears controller of the plaintiff, sworn on the 3rd August, 2011, avers that this appearance was entered by the defendant solely for purpose of delay and that the defendant does not have a *bona fide* defence to the plaintiff's claim in law or on the merits. In his replying affidavit sworn on the 12th December, 2011, and in two supplemental affidavits sworn respectively on the 16th April, 2012, and the 18th October, 2012, the defendant does not deny that he executed these agreements and does not challenge the amount of the claim.

2. In his supplemental affidavit sworn on the 16th April, 2012, the defendant claims that the plaintiff was guilty of the tort of deceit. Reliance upon this allegation was very properly abandoned by counsel for the defendant in argument before this Court. In his affidavits the defendant asserts that he had a *bona fide* defence to the entire claim of the plaintiff on other grounds. The Master of the High Court, in exercise of his powers pursuant to the provisions of O. 37, r. 6 of the Rules of the Superior Courts transferred the case to this Court. The power conferred on this Court by O. 37, rr. 7 and 11 is to grant judgment for any relief to which it considers the plaintiff is entitled, dismiss the claim, or, if it considers that the affidavits disclose even an arguable defence to permit the defendant to defend the action, either unconditionally or subject to terms and, for that purpose adjourn the case for plenary hearing or make such other order for the determination of the questions in issue as it considers just.

3. In his first supplemental affidavit at para. 17, the defendant states that he was, "director of sales" of the plaintiff with a role, "centred around the management of the relationship with motor dealers which included the management of a team of motor finance representatives". He asserts that David Taylor was at all material times the managing director of the plaintiff and this is not disputed. The defendant then goes on to state:-

> "Mr. Taylor told me, when discussing the investments products with me that they were 'akin to a little savings schemes' and 'we would make a small profit'."

4. The defendant claims that this was a misrepresentation and a misstatement of fact and a breach of a duty of care which Mr. Taylor as managing director of the plaintiff and his direct superior owed to him as an employee.

5. The investment products referred to are identified by the defendant in the further supplemental affidavit sworn by him on the 18th October, 2012 as "The Diamond and Thistle Investment Funds", which were being sold by Friends First Life Assurance Limited. The defendant states that this company, like the plaintiff, was a subsidiary company of Friends First Holdings Limited and this is not disputed. In this further supplemental affidavit the defendant also claims that what he now describes as the "information" given to him by Mr. Taylor that these investments products were "akin to a saving scheme", (the word "little" has been dropped), was not in fact true. He claims that documents, (not exhibited), produced in the course of a complaint made by him to the Financial Services Ombudsman in relation to his dealings with the plaintiff and Friends First Life Assurance Limited show that these investment products carried levels of "mezzanine debt" and "rolled-up debt", something which was known to the plaintiff and to Friends First Life Assurance Limited but was not disclosed to him in any documentation produced to him, (none exhibited), or in any presentation or in any advice given to him which fundamentally affected the risk attaching to these investments so that they were not akin to a savings scheme. In his first replying affidavit sworn on the 12th December, 2011, the defendant described these investments products as "high risk property investments". The defendant asserts that if he had been informed of this risk, it would have affected his decision to take up the loans and purchase these investment products.

6. The defendant accepts in the supplemental affidavit sworn by him on the 16th April, 2012, that David Taylor has stated in correspondence that he has no recollection of discussing the merits or otherwise of these investment products with the defendant. It might well be a matter of defence to be considered and determined at a plenary hearing whether, when, and in what circumstances Mr. Taylor spoke these alleged words; and if he spoke them whether or not they amounted to a representation or should properly be regarded as no more than casual remarks made in the course of a casual conversation; and if he spoke them whether Mr. Taylor owed a duty of care to the defendant for breach of which the plaintiff is responsible and, if he spoke them, whether Mr. Taylor ought to have foreseen that a reasonable person would treat them as a considered opinion on to the merits of these investment products and would rely on what was said in deciding whether or not to purchase the investments. However, the defendant does not state in any of his affidavits and, in particular at para. 17 of his supplemental affidavit sworn on the 16th April, 2012, that he did rely on this alleged misrepresentation or misstatement by Mr. Taylor or that it caused or induced him to enter into the loan agreements with the plaintiff as a consequence of which he has suffered loss.

7. In my judgment, the defendant cannot in fact credibly make such an allegation. At para. 11 of his supplemental affidavit sworn on the 16th April, 2012, the defendant states as follows:-

> "I purchased the investment products following separate presentations given to employees of the Friends First Group by their colleagues who failed to point out the potential risk in purchasing the investment products."

8. This statement is repeated by the defendant in a different phraseology at para. 13 of that supplemental affidavit. Therefore, applying the test formulated by the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, insofar as it is based on these alleged words which the defendant claims were spoken to him by Mr. Taylor, the defendant has not demonstrated that he has even an arguable defence to the plaintiff's claim.

9. In his affidavit sworn on the 12th December, 2011, the defendant states that this particular presentation was given by a private investment team from Friends First Life Assurance Limited and, at para. 5 of his supplemental affidavit sworn on the 18th October, 2012, he states that he relied upon their expertise. In his first supplemental affidavit sworn on the 16th April, 2012, the defendant claims that the plaintiff, as employer though aware of his salary level provided him with access to funds to enable these investment products to be sold to him by Friends First Life Assurance Limited without giving any consideration to his ability to make repayments particularly in the event of a change in his financial circumstances. He claims - and this is expressly denied by Mr. Taylor in his affidavit sworn on the 5th March, 2012 - that in so doing the plaintiff departed from its own lending rules and policies.

10. The defendant claims in his replying affidavit sworn on the 12th December, 2011, that this presentation took place in July 2006, while Mr. David Taylor in his affidavit sworn on the 5th March, 2012, states that he believes that it took place in June 2006. In this affidavit the defendant also refers to what he describes as the "bullish nature of Brian O'Neill's sales pitch" which he states focused on the successful past performance of these investment products and made no mention of any downside or risks. The defendant claims that he was not advised by the plaintiff or by Friends First Life Assurance Limited to obtain independent advice about these products or as to the risks involved in investing in them. In his affidavit sworn on the 5th March, 2012, Mr. David Taylor states that Brian O'Neill only joined Friends First Life Assurance Limited in September 2006. However, this and the issue as to the date of the presentation are matters which would form part of the evidence at a plenary hearing. What is important in considering whether what is stated by the defendant in his affidavits together with the exhibited documents does or does not disclose an arguable defence to the plaintiff's claim is the fact that there is no denial by the plaintiff that this alleged presentation by a team from Friends First Life Assurance Limited was given.

11. At para. 4 of his supplemental affidavit sworn on the 18th October, 2012, the defendant claims that Friends First Life Assurance Limited, from whom he purchased these investment products, and the plaintiff, from whom he borrowed the funds to make the purchases, are linked as both are subsidiaries of Friends First Holdings Limited. At the hearing of this application, counsel for the plaintiff claimed and counsel for the defendant denied that so far as this claim is concerned, the borrowing and the investment by the defendant were two entirely separate transactions conducted at arms length and entered into by the defendant with two separate and distinct corporate entities.

12. The defendant claims that the plaintiff owed him a duty of care in two capacities, both as an employee and as a customer:-

> (a) To advise him of any possible downsides or risks involved in purchasing the investment products which were reasonably foreseeable by it.
>
> (b) To ensure that the investment products being sold to him by its related company were not high risk products and to make an independent and proper assessment in that regard.
>
> (c) Not to rely on the expertise of its related company but to carry out with due diligence its own full evaluation of the investment products.
>
> (d) To provide adequate safeguards for his financial welfare when it knew or ought to have known that he had no knowledge or familiarity with foreign property investments.
>
> (e) Not to induce him to gamble a significant portion of future salaries in unsuitable and high risk investment products by affording him easy access to funds to purchase the same.
>
> (f) To underwrite the loans provided to him by means of exchange or buy-back arrangements.
>
> (g) To explain the nature and effect of the loan agreements and the consequences to him of a failure to meet repayments.
>
> (h) To have regard to the stress, anxiety and emotional distress he would suffer, particularly with regard to meeting loan repayments, in the event of a change in his financial circumstances or the investment products failing.

13. The defendant claims that the plaintiff negligently withheld from him important information regarding the downside and risk of investing in these investment products which was reasonably foreseeable by it. He also claims that the plaintiff negligently misstated the nature of these investment products. In addition at para. 3 of an affidavit sworn on behalf of the defendant on the 7th December, 2012, it is alleged that the plaintiff and its related company Friends First Life Assurance Limited were in breach of the provisions of s. 117 of the Central Bank Act 1989, ss. 23 and 37 of the Investment Intermediaries Act 1995, s. 8H of the Consumer Credit Act 1995 (as amended), and s. 61 of the Insurance Act 1989, in the following respects:-

> (a) They made no inquiry as to the financial position of the Defendant or the suitability of the investment for his circumstances;
>
> (b) In making the loans secured on the investment they carried out no due diligence at all on the ability of the defendant to make repayments outside of the security;
>
> (c) They failed to disclose to the defendant (i) the borrowings made on the Diamond Investment Portfolio, (ii) the mezzanine finance element of Thistle Investment Portfolio, and (iii) the portion of unpaid interest after investment was made;
>
> (d) They failed to extract the key risk factors that had been identified in third party due diligence supplied to them and failed to properly incorporate such risk factors into the investment briefing and investment memoranda given to the defendant;
>
> (e) They fundamentally misrepresented the nature of the investments at the initial briefings and failed to rectify the misrepresentations at any time up to the expiry of the cooling off period;

(f) In light of the points above, the Plaintiff failed to comply either with the letter or the spirit of the Code of Conduct and therefore failed to comply with the provisions of aforementioned Acts.

14. From the foregoing, it appears to me that four defences to the plaintiff's claim herein are being advanced by the defendant. The first ground of defence appears to be that the plaintiff negligently and in breach of a duty of care owed to him as his employer failed to investigate the nature of the investment products being offered to him by its related company Friends First Life Assurance Company, failed to advise him of the alleged high risk nature of the investment products, particularly to him, which was reasonably foreseeable by it and, failed to underwrite the loans which it provided to him for the purchase of those investment products, as a result of which he has suffered economic loss, stress and anxiety.

15. The second ground of defence appears to be that in breach of an implied duty of care owed to him as a customer in the circumstances and against the background in which the loan agreements between him and the plaintiff were made:-

1. Failed to draw to his notice and to correctly explain to him the nature and effect of the loan agreements.

2. Failed to carry out a full and independent evaluation of the investment products being offered to him by the related company which it knew the defendant intended to purchase with the funds arising from the loan agreements.

3. Failed to advise him to obtain independent advice before entering into the loan agreements which facilitated the purchase of the investment products from its related company.

4. Failed to inform him of the high risk nature of the investments products, in particular to him, which it knew he intended to purchase with the funds derived from the loan agreements and, of the consequences to him of failing to meet any scheduled repayments under those loan agreements.

5. Failed to observe its own lending rules and criteria and induced or facilitated his entering into loan agreements to purchase high risk and unsuitable investment products from its related company.

6. Failed to warn him of the high risk of committing a significant portion of future salaries to the purchase of high risk foreign property investments with which it knew or ought to have known he was unfamiliar.

16. The only remedy available to the defendant were this defence to succeed would be an order setting aside the two loan agreements.

17. The third ground of defence appears to be that the loan agreements are unenforceable because of the failure of the plaintiff to comply with the provisions of the indicated statutes and of the Consumer Protection Code 2006. This Consumer Protection Code 2006, provides as follows:-

"A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it:

1. Acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market;

2. Acts with due skill, care and diligence in the best interests of its customers;

3. Does not recklessly, negligently or deliberately mislead a customer as to the real or perceived advantages or disadvantages of any product or service;

4. Has and employs effectively the resources and procedures, systems and control checks that are necessary for compliance with this Code;

5. Seeks from its customers information relevant to the product or service requested;

6. Makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer;

7. Seeks to avoid conflicts of interest;

8. Corrects errors and handles complaints speedily, efficiently and fairly;

9. Does not exert undue pressure or undue influence on a customer;

10. Ensures that any outsourced activity complies with the requirements of this Code;

11. Without prejudice to the pursuit of its legitimate commercial aims, does not, through its policies, procedures, or working practices, prevent access to basic financial services; and

12. Complies with the letter and spirit of this Code."

18. The fourth ground of defence appears to be that on the special facts of this case the court should look behind the separate corporate personality of the plaintiff and of Friends First Life Assurance Limited and, regard the latter as the alter ego or implied agent of the former in all matters relating to the funding and purchase of the investment products. In such circumstances the plaintiff claims that the loan agreements should be declared rescinded as having been procured by misrepresentation and/or misstatement.

19. In *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 at 623, Hardiman J. (and Denham J., as she then was concurring) held as follows:-

"In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

20. Applying these guidelines in the present case, I find that the defendant does not have an arguable case on the first ground of

defence. *In Reid v. Rush and Tompkins Group* [1989] 3 All E.R. 228, Ralph Gibson L.J. held as follows (at p. 235):-

> "The position is, accordingly, that although the duty of a master to his servant may extend to warning him of unavoidable risks of physical injury, it has hitherto not been extended to the taking of reasonable care to protect the servant from economic loss. Apart from *Deyong v. Shenburn* [1946] 1 All E.R. 226, [1946] K.B. 227 and *Edwards v. West Herts Group Hospital Management Committee* [1951] 1 All E.R. 541, [1957] 1 W.L.R. 415, which were mentioned in argument, we were not referred to any case in which the court has considered and rejected any such claim and no doubt the reason for that is not only the limitation of the duty, as stated, to personal safety but also the fact that it must be rare for any matter of economic loss to have been arguably caused by a breach of duty of the master without it being a breach of contract. If a servant is to have a claim in tort against his employer in respect of economic loss it must be based on some special factor in the circumstances or in the relationship between them which justifies the extension of the scope of the duty to cover such a claim or on a separate principle of the law of tort which imposes such a duty."

21. What is under consideration here is the general duty of care owed by an employer to an employee arising out of that relationship. It is on the basis of this relationship that his first ground of defence is advanced by the defendant. However, the defendant points to no separate principle of the law of tort in this jurisdiction which imposes such a duty on an employer. Additionally, the affidavit evidence does not disclose any special factor in the circumstances or in the relationship of the plaintiff and the defendant as employer and employee which could give rise to such a duty. To borrow the words of Neill L. J. p. 244:-

> ". . . on the facts alleged in the statement of claim it is impossible to imply any term into the plaintiff's contract of service of which a breach would entitle the plaintiff to recover damages for the loss he has sustained and (b) that it is not open to the court to extend the duty of care owed by the defendant to the plaintiff by imposing a duty in tort which is not contained in any express or implied term of the contract. . . ."

22. There is no evidence in the defendant's affidavits of any misrepresentation or misstatement about the investment products having been made by the plaintiff. If Mr. David Taylor were to be held to have been the agent of the plaintiff to make the statement about the investment product attributed to him by the defendant what is stated in the defendant's affidavit is conclusive proof that the defendant did not rely on that statement in deciding to purchase the investment products.

23. The second ground of defence is based upon the relationship of lender and customer between the plaintiff and the defendant rather than that of employer and employee. The plaintiff is not a "bank" but is a credit institution regulated under the Consumer Credit Act 1995. This ground of defence appears to derive from *Lloyds Bank Limited v. Bundy* [1974] 3 All E.R. 757. In that case and in the reported cases following it in England and in this jurisdiction, the courts considered that a duty of fiduciary care may arise in circumstances where a special relationship is found to exist between a bank and a defendant. This duty was held to impose on a bank an obligation to ensure that the defendant "form an independent and informed judgment" on the proposed transaction before committing himself. Whether or not there has been a due observance of this duty by a bank usually depends upon whether the other party received a full explanation and proper advice, usually independent advice, as to the nature and advisability of the proposed transaction. These cases are mostly concerned with disputes between banks and vulnerable sureties or between banks and spouses where constructive notice of dominance by the other spouse is in issue. Where such circumstances are found to exist, the court will set aside the agreement.

24. I am satisfied that it is at least arguable that this principle of fiduciary care applies also as between a Credit Institution and a borrower. As was held by Sir Eric Sachs in *Lloyds Bank v. Bundy* (Ante) at p. 766, citing the decision in *Tufton v. Sperni* [1952] 2 T.L.R. 516 at 522, "the relationships which result in such a duty must not be circumscribed by reference to defined limits". The onus of proof lies on the defendant to establish that in the particular circumstances of this case, such a special relationship of "confidentiality" had arisen between him and the plaintiff. Having regard to the contents of the defendant's affidavits I could not be satisfied that the defendant does not have an arguable defence on this ground. I do not find that this is a defence which may probably succeed or even that it is not improbable that it might succeed. As was pointed out in *Aer Rianta c.p.t. v. Ryanair Limited (Ante)* by Hardiman J. p. 621, "the hurdle on a motion such as this is a low one and the jurisdiction [to grant summary judgment] is one to be used with great care". I do not consider that this second ground of defence is "so far fetched or so self contradictory as not to be credible" even taking into account the defendant's status within the plaintiff company and the fact that each of the loan agreements contained a "no-penalty" cooling off period of fourteen days.

25. I find that the defendant does not have an arguable case on the third ground of defence. There is nothing in the affidavit evidence to show that the plaintiff is a "licence holder" or, a "person supervised" by the Central Bank or that the Central Bank has provided codes of practice for such persons pursuant to the provisions of s. 117(1) of the Central Bank Act 1989. If it has, the sanction for failing to comply with the Code is a "written direction" pursuant to the provisions of section 117(3)(b). A failure to comply with the terms of such a direction is an offence, carrying a fine, on summary conviction no exceeding €1,000, and on indictment, not exceeding €25,000 pursuant to section 117(4). There is no evidence in the defendant's affidavits even suggesting that the plaintiff is an "Investment Business Firm" within the provisions of the Investment Intermediaries Act 1995. Section 23 of that Act deals with advertisements and the publication and display of information specified by a supervising authority. There is no affidavit evidence that any supervising authority has drawn up or issued a Code of Conduct for investment business firms. If it has, a failure to comply with the provisions of such a code is not an offence within the provisions of s. 79 of the Act of 1995, but under the provisions of s. 74 of that Act, an Authorised Officer may apply to this Court or, if so requested by the alleged offender, to a Committee appointed by the supervising authority, to determine if there has been a breach of the code. The statutory penalties for such a breach are a reprimand or the payment to the supervising authority of a sum not exceeding €500,000.

26. The affidavit evidence establishes that the plaintiff is a credit institution regulated by the provisions of the Consumer Credit Act 1995 (as amended by s. 35 and Schedule part 25 of the Central Bank and Financial Services Authority of Ireland Act, 2003). A breach of the Consumer Protection Code 2006, published pursuant to the provisions of s. 8H of the Consumer Credit Act 1995 (as amended), is not an offence within the provisions of s. 12(1)(a) of the Act of 1995 (as amended). If as alleged - and I do not make any finding whatsoever in this regard - the plaintiff has failed to comply with any of these statutory provisions and with the provisions of the Consumer Protection Code 2006, in particular, such non-compliance cannot afford a defence to the defendant in these proceedings. There is nothing in any of these statutes which expressly or impliedly would render the loan agreements illegal, invalid or unenforceable because of a breach by the plaintiff of any of these statutory provisions or of the Consumer Protection Code 2006.

27. As regards the fourth ground of defence, it has been repeatedly emphasised by the Superior Courts that each company in a group is a separate legal entity. In *Re Frederick Inns Limited* [1991] 1 I.L.R.M. 582 at 587-8, Lardner J. held that this principle applied to the relationship between holding companies and subsidiaries and to transactions between them and third parties. In *The Albazero* [1975] 3 All E.R. 21 at 28, Roskill L.J. considered it to be a long established fundamental principle of English law that, ". . . each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and

liabilities . . .". The decision of the Court of Appeal in that case was reversed, ([1976] 3 All E.R. 129), by the House of Lords but without impugning in any way this statement of Roskill L.J. which I am satisfied also represents the law in this jurisdiction. The defendant claims however, that on the special facts of this case, the interests of justice require that this Court should look behind the separate corporate personality of the plaintiff and Friends First Life Assurance Limited so that the acts and omissions of one should be regarded as equally relating to the other.

28. In *Adams v. Cape Industries plc* [1991] 1 All E.R. 929 at 1019, Slade L.J. held as follows:-

> "Mr. Morison described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As Sir Godfray Le Quesne submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22, [1895 -9] All E.R. Rep 33 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities."

29. It seems to me that it is at least arguable that the Courts here have taken a different view - *Re: Bray Travel Limited and Bray Travel (Holdings) Limited* (Unreported, Supreme Court, 13th July, 1981) and *Power Supermarkets Limited (trading as Quinnsworth and Quinnsworth Limited) v. Crumlin Investments Limited and Dunnes Stores (Crumlin) Limited* (Unreported, High Court, Costello J., 22nd June, 1991).

30. It may well be, as suggested by Prof. Davies *et al.* at para. 8.1 of Gower and Davies, *Principles of Modern Company Law*, (8th Ed., Sweet and Maxwell, 2008) that this phrase, "interests of justice" in applications for this nature represents just a simple way of referring to the identified grounds in which the veil of incorporation has been pierced. These grounds are, where the court finds that the corporate structure is a mere façade or sham concealing the true facts; where in interpreting a statute or a contract, the court, having regard to proven economic realities, considers that a parent company and a subsidiary should be treated as a single economic unit for some purposes and, where in the special circumstances of a particular case, the court is satisfied on the evidence that a subsidiary company should be treated as the implied agent or trustee of the holding company. Prof. Pennington at p. 63 of the 7th edition of *Company Law* (Butterworths, 1995), considers that:-

> "Despite the fancifulness of the agency or trusteeship implied in some of the cases where the separate legal personality of a company has been disregarded, it is submitted that the courts are still not free to imply an agency or trusteeship merely in order to give what they believe to be a just decision."

31. I am satisfied that it is at least arguable that the matters advanced by the defendant in his affidavits are sufficiently special to justify this Court in piercing the corporate veil in the interests of justice if such a decision is open to the Court or, perhaps on the basis of an implied agency.

32. The appropriate means of determining the questions raised by these two grounds of defence, since they raise mixed issues of fact and of law, is a plenary hearing. I will therefore adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons. I will hear the parties further on the question of pleadings, discovery and other interlocutory orders.