

THE HIGH COURT

COMMERCIAL

[2015 No. 1039 S.]

BETWEEN

LSREF III STONE INVESTMENTS LIMITED

PLAINTIFF

AND

EDWARD SWEENEY

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 3rd day of November, 2015

1. This is an application for summary judgment in the sum of €28,792,326.80, with continuing interest on the principal sum of €28,604,863.64, from 25th June, 2015, to date of judgment.

2. The legal principles applicable to an application for summary judgment are well established and are to be found in the following cases:-

Danske Bank v. Durcan New Homes [2010] IESC 22;

Bank of Ireland v. Education Building Society [1999] 1 I.R. 220;

Aer Rianta c.p.t. v. Ryanair Limited [2001] 4 I.R. 607;

McGrath v. O'Driscoll [2007] 1 ILRM 203; and

First National Commercial Bank Plc v. Anglin [1996] 1 I.R. 75

3. From these cases, the following principles can be discerned. Once a judge is satisfied that the defendant has a real or *bona fide* defence, whether based on fact or on law he is bound to afford the defendant an opportunity of having the issue tried. The judge must ask himself the question "...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? (per Hardiman J. in *Aer Rianta v. Ryanair* at p 623). The mere assertion of facts in an affidavit stated to be the basis of a defence is not of itself sufficient to allow leave to defend. The court has to look at the entire situation to see whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. Those are the legal principles which I apply in considering the plaintiff's application for summary judgment in this case.

4. The plaintiff's claim arises out of a number of guarantee and indemnity agreements entered into by the defendant whereby he unconditionally and irrevocably covenanted to Anglo Irish Bank Corporation plc (Anglo) to pay and guarantee payment on demand from IBRC of all the obligation's indebtedness and liabilities whether actual or contingent which may be due owing or incurred by the following limited liability companies:-

(a) Andounia Properties Limited (Andounia), a company incorporated in Cyprus;

(b) Mayenne Investments Limited (Mayenne), a company incorporated in Jersey;

(c) Pavilion Leisure Complex Limited (Pavilion), a company incorporated in Ireland;

(d) Sandreed Investments Limited (Sandreed), a company incorporated in Ireland; and

(e) Mead Investments Limited (Mead), a company incorporated in Jersey.

In July, 2011, Anglo Irish Bank Corporation plc and Irish Nationwide Building Society were merged to form the IBRC.

5. Counsel for the defendant accepts that for the purpose of this application, the terms of each guarantee and indemnity agreement, so far as they affect the liability of the defendant, are, broadly speaking, the same and it is not necessary to refer to each agreement separately. Counsel for the plaintiff argues that the terms of the various agreements are clear and unambiguous and that having entered into these agreements, the defendant is liable for the sum claimed. The defendant argues that he has a *bona fide* defence to the claim or, at least, a claim to the extent that the court is required to remit the dispute to plenary hearing.

6. Before exploring in more depth the terms of the guarantee/indemnity agreements relied on by the plaintiff, it is necessary to look at the nature of the defence put up by the defendant to see if it meets the threshold requiring the claim to be remitted to plenary hearing.

7. At the end of an affidavit sworn by the defendant on 30th July, 2015, he summarises his defence. He states that his defence has a number of strands which he describes in the following terms at para. 76 of the affidavit:-

"----These proceedings are, inter alia, in breach of agreements entered into for consideration and binding on the plaintiff, made at the time of the entry into the guarantees:

----Guarantees would only be enforced if there was a shortfall following the completion of the sale of all assets:

----The plaintiff had accepted a 'co-operation fee' in return for its agreement that it would work with and co-operate with the Borrower Companies until sales have been completed:

----The plaintiff refused to co-operate with the Borrower Companies in the sales process and was in breach of these agreements:

----Procurement of the default of the Borrower Companies by the plaintiff, inter alia, in refusing to consent to sales and unilaterally (and unlawfully) raising interest rates and margins giving rise to:

----Alteration of the underlying circumstances of the loan the subject of the guarantees leading to the vitiation of the guarantees:

----Prejudice caused to the guarantee leading to the guarantees being rendered invalid."

The defendant also states that he has a counterclaim under the heading of overcharging of interest on all accounts and misselling and overcharging arising out of interest rate swaps that the Borrower Companies were forced to enter into.

8. By loan sale deed dated 31st March, 2014, and a deed of transfer dated 11th July, 2014, each made between IBRC, Kieran Wallace and Eamon Richardson (as joint special liquidators of IBRC) and Stone Investments (the Plaintiff), Stone Investments purchased a portfolio of loans and related security from IBRC which included the Borrower Companies referred to in paragraph 4.

9. The deed of transfer provides:-

"...the Assignor (IBRC) unconditionally, irrevocably and absolutely transfers, conveys and assigns to the Assignee (Stone) all such rights, title, interests, benefits, liabilities, duties and obligations as the Assignor may have in and to the Assets (subject to and with the benefit in each case of the related Finance Agreement) with effect from the date of this Deed."

10. In moving this application for summary judgment, the plaintiff lays emphasis on the fact that the defendant is liable on foot of a guarantee and indemnity agreement whereby he is the sole or primary "obligor" and that the loans are repayable on demand. The effect of this guarantee/indemnity agreement is to make the defendant liable for the debts of the Borrower Companies as though he, himself, had borrowed the funds. The plaintiff also relies on the fact that in the guarantee/indemnity agreement, the defendant has waived his right to interpose any defence based on set-off or counterclaim and has also agreed that the Bank has full and unfettered right to assign the debt owned by the Borrower Companies.

11. The affidavits sworn for the purpose of this application establish a conflict on a number of issues. These may be broadly stated as follows:-

(i) whether or not the defendant co-operated with the plaintiff;

(ii) whether there was an agreement that the plaintiff would only act upon the guarantee/indemnity if there was a shortfall following the sale of property;

(iii) whether the interest charged by the Bank was excessive and/or incorrectly calculated for the purpose of this claim; and

(iv) whether the plaintiff and/or the Bank or its servants or agents had frustrated the defendant and/or the Borrower Companies in their attempts to achieve the best price for the secured properties.

12. It seems to me that the defendant has gone somewhat further than merely making allegations without any supporting facts. In his affidavits, the defendant has named individual employees of the Bank and described the occasions on which various agreements and understandings were concluded and then breached by the plaintiff or the Bank. The plaintiff argues that there is nothing in writing to support the defendant's position and there is no provision in the guarantee/indemnity agreement restricting the Bank from enforcing its claim against the defendant until the secured properties have been sold. Specifically, the plaintiff relies on the following key terms of the personal guarantee/indemnity:-

(i) the defendant is liable for all debts of the Borrower Companies to the plaintiff;

(ii) the defendant unconditionally and irrevocably covenanted to pay on demand all monies due by the Borrower Companies to the plaintiff;

(iii) the defendant agreed as a separate and independent condition that his liability is as a sole or primary obligor and not merely as surety; and

(iv) the plaintiff's recourse to the defendant shall exclude his family home.

13. The plaintiff makes much of the fact that the defendant's liability is as a sole or primary obligor and not merely as surety and argues that many of the complaints advanced by the defendant are complaints to be made by the Borrower Companies and should be prosecuted by them if they have a claim. The fact that the Borrower Companies may have a claim against IBRC does not provide the defendant with a defence to this claim.

14. I have to assess the plaintiff's claim for summary judgment on the basis of the legal principles set out by me at the beginning of this judgment and ask myself is it *"...very clear that the defendant has no case?"*. The threshold for setting up a defence which is sufficient to have the dispute remitted to plenary hearing is a low one. In circumstances where a defendant is sued on the basis that he has stepped into the shoes of the Borrower Companies and is liable as a sole or primary obligor, the courts must exercise caution before deciding the case in a summary fashion. Such caution should be balanced against the desirability of ensuring that the court's scarce time and resources are not wasted on a plenary hearing where, on any objective view, there is no bona fide defence to the

claim. It is also undesirable that in such circumstances, the parties would incur unnecessary (and in a case such as this substantial) costs. In the case of a successful plaintiff this would often result in an inability to collect those costs.

15. Having considered the submissions made on behalf of the parties and the issues in dispute, it seems to me that the defendant has met the threshold required to have this matter remitted for plenary hearing. It seems to me that it is, at least, arguable that if the defendant is liable as a sole or primary obligor and not merely as a surety, he is entitled to make points by way of his defence that would have been open to the Borrower Companies. I am not holding that this is so but it does seem to be, at least, an arguable proposition considering the wording of the deed of transfer which '*unconditionally, irrevocably and absolutely*' transferred, conveyed, or assigned '*all such rights, title, interests, benefits, liabilities, duties and obligations*' that IRBC may have had in the Borrower Companies and other assets to the plaintiff.

16. I direct that the matter be remitted for plenary hearing.