Neutral Citation: [2014] IEHC 216

The High Court

Commercial

Record Number 2013/4426 S

Between:

National Asset Loan Management Ltd

Plaintiff

and

Michael Barker, Conor O'Brien, Joseph Hannon, John Lenihan and Martin Fitzpatrick

Defendants

Judgement of Mr Justice Peter Charleton delivered on the 10th day of April 2014

The plaintiff is the national agency which has taken over non-performing loans from the State's banks. The defendant Michael Barker is an architect who, as regards this case, was involved in a property investment transaction. The loan to fund this investment was made to him by Allied Irish Banks plc and there is no question but the loan was property transferred to the plaintiff subsequent to it running into difficulties.

The plaintiff seeks summary judgement against Michael Barker for the sum of €1,249,366.16. The principles upon which summary judgement will be given to a plaintiff have been often rehearsed in prior decisions of the High Court and Supreme Court. In brief, since summary judgement involves a decree being entered on foot of affidavits exhibiting contracts and scrutinising any replying affidavits to see if there is a defence, this jurisdiction is an exception to the constitutionally mandated requirement that courts should hear witnesses, should allow cross-examination and should listen to any submissions made at the end of such a process. Summary judgement, however, is a means whereby liquidated sums can be recovered in short form where there is proof of the existence of a debt and where there is no defence disclosed by the defendant. It has to be clear indeed that the defendant has no defence. A defendant does not have to establish a defence that would probably succeed in order to be permitted a plenary hearing. All the defendant need do is to show factual material which if it is accepted could amount to an answer to the claim. If a defence in law is mounted on facts which are agreed, or more or less agreed, then the High Court hearing this kind of application is entitled to decide the case straight away but is also entitled, as a matter of discretion, to await the more elaborate argument that is attendant upon a plenary hearing. A bald assertion of a fact in answer to a claim may not be enough when it is not backed up by any independent material, most especially if it is highly unlikely. Every such case, however, must be judged on its own merits. If an assertion of fact is made which is in the teeth of a written contract, then a particular scrutiny will be made of that fact and how it is alleged to fit within the matrix that amounted to the contract between the plaintiff and the defendant. Where a case is based on documents, a defendant must be in a position to show that the defence which they seek to make is not totally undermined by the correspondence between the parties.

The matter is based on the Rules of the Superior Courts 1986. Order 37 rule 7 provides:-

> Upon the hearing of any such motion by the Court, the Court may give judgement for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just.

Denham J. summarised the relevant law on entering a summary judgment in *Danske Bank v. Durkan New Homes Ltd.* (unreported, Supreme Court, 22nd April, 2010) [2010] IESC 22 at paragraphs 14-16 in this way:

> 14. Several cases were opened before the Court which have addressed this jurisdiction. These included *Bank of Ireland v. Educational Building Society* [1999] 1 I.R. 220 where Murphy J. emphasised that it was appropriate to remit a matter for plenary hearing to determine an issue which is primarily one of law where a defendant identified issues of fact which required to be explored and clarified before the issues of law could be dealt with properly. He stated at p.231:-
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> "Even if the position was otherwise, once the learned High Court Judge was satisfied that the defendant had "a real or bona fide defence", whether based on fact or on law, he was bound to afford them an opportunity of having the issued tried in the appropriate manner."
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> 15. In *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, Hardiman J. reviewed Irish cases and concluded at p.623:-
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> "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?"
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> 16. In *McGrath v. O'Driscoll* [2007] 1 ILRM 203, Clarke J. described the law as follows, at p.210:-
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> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

I am applying these principles in this judgment.

The relevant facility letter is dated 4th July 2008. It offers an overdraft of €30,000 and also offers a loan account of €957,000 for the purpose of continuing an "existing facility originally sanctioned to fund the purchase of The Angler's Rest Pub and adjoining 3.5 acre site at Clonlara, Co. Clare". All loans have to be repaid, unless the contract makes a loan dependant upon the success of the underlying business venture. The question of repayment is dealt with in the letter by specifying that there should be a review "by 13/12/2008" and that interest should, in the meantime, be provided for as it falls due.

The first point made in defence of this application is that the general terms and conditions of lending were not notified by the bank to Michael Barker. These are, however, actually mentioned in the very first paragraph of the letter, where it states:

> The Bank is pleased to offer you the facilities below subject to the terms and conditions set out in this letter and subject to the Bank's General Terms and Conditions Governing Business, a current copy of which is enclosed. These are legal documents should be read very carefully.

It will depend upon specific circumstances as to whether general terms and conditions are incorporated into a contract which itself contains detailed conditions. This matter was dealt with in some detail by Finlay Geoghegan J in *Allied Irish Banks plc v Galvin Developments and Others* [2011] IEHC 314. Cases can differ from detail to detail. The general principle therein set out from paragraph 76 is nonetheless important:

> 76. AIB relies upon its General Terms and Conditions Governing Business Lending in support of its entitlement, in March 2010, to demand repayment of both capital and interest then due on the various facilities advanced to GDK and the Galvin Brothers in the three facility letters of 4th September, 2008. The first issue is whether or not those General Terms and Conditions form part of the agreement under which the facilities were renewed or made available in September 2008.
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> 77. Each of the three letters of sanction commence with the words:
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> "The Bank is pleased to offer you the facilities below subject to the terms and conditions set out in this letter and subject, also, to the Bank's General Terms and Conditions Governing Business Lending, a current copy of which is enclosed. These are legal documents and should be read very carefully."
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> 78. I found, as a fact, that the copy of the bank's General Terms and Conditions Governing Business Lending was not enclosed with each of the letters as indicated. Nevertheless, there is an express and clear reference to the incorporation of those terms in the offer made by AIB to GDK and the Galvin Brothers which was accepted by each in writing. GDK and the Galvin Brothers could have sought a copy of the Terms if they so wished. They did not do so.
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> 79. It is a well-established principle of contract law that terms may be incorporated into a written agreement signed by the parties by express reference. The failure to enclose a copy of the conditions does not preclude their incorporation by express reference. See, *inter alia*, *Sweeney v. Mulcahy* (1993] ILRM 289, and *Leo Laboratories Ltd. v. Crompton B.V.* [2005] 2 I.R. 225. In my judgment, the agreement between AIB and GDK and the Galvin Brothers, respectively, in September 2008, in relation to all the facilities the subject matter of these proceedings, included, by express reference, AIB's General Terms and Conditions Governing Business Lending.

In his replying affidavit, which is filed in order to establish a defence, Michael Barker has the following to say:

> 4. I say that I was not provided with a copy of the bank's general terms and conditions of business lending when the facilities were advanced.
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> 5. I say that at all times these facilities were advanced by the bank for the purpose of funding the development of the land in question and repayment [was only to be due when the lands were] developed. This is evident from a bank memo of 2009 which clearly shows that the bank had agreed that no repayment of capital would be made until the pub was sold.
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> 6. It is clear that the bank was participating in the venture to the extent that its fortunes and the ultimate repayment of the facilities were tied to the success of the venture.

The relevant memo to the credit committee of the bank is later than the contract. While the behaviour of parties can sometimes give an indication as to what the nature of a contract was, a written contract which incorporates all the relevant terms and conditions is hard to quarrel with and is even more difficult to challenge on the basis of subsequent conduct. In reality, this memo, states that the relevant pub was well located and has frontage onto Lough Derg and is close to Shannon Airport. It is a business analysis and shows that the pub had done well in the past but that the current tenant was in serious difficulties and that a new tenant was awaited who might be able to pay about €50,000 per annum. The valuation that is given to the pub by the bank was at around €900,000. There is nothing in this to establish a defence.

Then there is the question that the bank was a participant in this venture as a kind of a business partner and was only due back its money if the venture succeeded. Going even on the terms of the letter of sanction dated 4th of July 2008, there is no indication that this might be in any way be supported. This is a normal letter of loan related to a particular purpose and supported by a legal charge over the relevant pub. It may be that in some circumstances a bank might be foolish enough to become involved, through perhaps negligent misrepresentations that might be strong enough to overcome the written terms of a contract, in a business venture. The bald assertion made is not support supported by details of conversations or written memoranda passing between the borrower and the bank. Furthermore, on the issue of the wider terms, a business person is entitled to ask for a copy of terms of business in documentary form were it to be the case that a letter did not include that standard form. On the basis of persuasive precedent, these terms were incorporated given the precise factual matrix of the defence asserted. Under clause 2.1.1, overdraft facilities are repayable on demand but under normal circumstances it states that the bank would expect such a facility to be available until the review date without any obligation by the bank to continue to provide the facility after that date passed. On the issue of loans, whether term loans or simple straightforward loans as in this case, clause 3.1.1 governs the situation. This provides that loan facilities are to be repayable on demand but under normal circumstances it states that the bank expects that the loan will be available as stated in the letter of sanction. Furthermore, even if none of this applied, the bank had a right to demand repayment if any event of default occurs. Events of default are defined at clause 4.2 as including the expiry of a term loan, which does not apply here, and includes the failure of the borrower to make any repayment of principal or interest on the date that a loan is due. The plaintiff has proved by primary evidence that there has been a default of repayment of interest and of principle and that a demand was properly made on 4th of September 2013.

The Court therefore has no option but to enter summary judgement in the amount claimed by the plaintiff against the defendant.