Neutral Citation Number: [2010] IEHC 271

THE HIGH COURT

COMMERCIAL

2010 1571, 1573 & 1574 S

BETWEEN

ANGLO IRISH BANK CORPORATION LIMITED

PLAINTIFF

AND

MICHAEL SHERRY, DERMOT O'DONOVAN AND

ADRIAN FRAWLEY

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on 20th day of July, 2010

Introduction

The plaintiff (Anglo) seeks summary judgment against each defendant in the sum of €21,460,077.38 inclusive of interest up to 29th June, 2010. It is also claiming continuing interest.

Three separate sets of proceedings are involved, but they were heard together and this judgment deals with all of them.

The claims arise out of the defendants' involvement in three limited companies and two partnerships.

The companies were Fordmount Property Group Limited, Fordmount Developments Limited and Fordmount Developments (Savoy) Limited. The partnerships were the Fordmount Partnership and St. Munchin's House Partnership. All five entities were involved in property development.

It is admitted that the defendants were shareholders in the three companies and partners in the partnerships. Each defendant had a 12.5% participation percentage in the two partnerships.

These proceedings relate to guarantees executed by the defendants in favour of Anglo in respect of liabilities of the three companies and borrowings made by the two partnerships.

Each defendant acknowledges that the sums of money alleged to have been lent by Anglo were in fact lent to those companies and partnerships. Each defendant acknowledges that he executed the guarantees in question. There is no dispute as to the amount due nor is any point taken in respect of any of the demands made by Anglo upon the principal debtors or the defendants.

Notwithstanding those admissions, the defendants maintain that they have a *bona fide* defence to the plaintiff's claim in its totality.

The Defendants

The defendants are all solicitors of no little experience. Each of them has sworn affidavits in which they acknowledge that they are such and are familiar with personal guarantees and their consequences. They each aver that they did not require to obtain independent legal advice to understand the meaning and import of the guarantees the subject of the proceedings. But each of them also swears:-

> *"There was never a moment's doubt in my mind that the plaintiff would not seek to enforce the guarantees as aforesaid against me and I relied on this in executing the guarantee. If there was ever a question of my actually being exposed to the potential liability comprised in the guarantees, I simply would not have executed those sureties. It would have been preposterous to have done otherwise as I do not have access to assets which would be capable of remotely addressing the extent of the indebtedness against which the plaintiff now seeks to be indemnified."*

The defendants are partners in the firm of Dermot G. O'Donovan and Partners, a long established firm of solicitors in Limerick. That firm advised the companies and partnerships in suit in respect of at least some of their activities. On the guarantees the defendants were, it might be said, their own legal advisors – not a wise thing at any time.

A fourth partner, Thomas Dalton, was also sued by Anglo in respect of the same claims that are made against these defendants. He did not seek to defend those proceedings but consented to judgment in the full amount being entered against him.

The passage from the defendants' affidavits from which I have just quoted relates only to a defence in respect of the claims made on foot of the guarantees.

Insofar as the claims made in respect of the borrowings of the two partnerships are concerned, the defendants also contend that they have a defence. The defence to that part of the claim is summarised in further affidavits which have been sworn by the defendants as follows:-

> *"My defence to the claim in respect of the partnership liabilities rests on the plaintiff's negligence and breach of it's duty of care and of it's fiduciary duty to me in advancing funds to the Fordmount Group and securing guarantees from this defendant at a time when it knew or suspected or ought to have known or suspected that the Fordmount Group was*

subject to a significant fraud or at the very least that there were reasons to believe that the business of the Fordmount Partnership was being conducted in a suspiciously unconventional manner."

Anglo contends that the defence sought to be asserted in respect of the guarantee claims is contrived and has *"no credibility whatsoever"*. It also asserts that no defence has been demonstrated in respect of the claim brought on foot of the partnership borrowings.

I will examine each of these purported defences in turn. I will do so by reference to the standard which is applicable on an application for summary judgment.

The Standard
The principles applicable to an application for summary judgment have been considered by the Supreme Court and this Court on many occasions.

In *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75, which was a guarantee case, Murphy J. in the Supreme Court in refusing leave to defend said:-

> *"For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action… In my view the test to be applied is that laid down in Banque de Paris v. de Naray [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in National Westminster Bank Plc v. Daniel [1993] 1 W.L.R. 1453. The principle laid down in the Banque de Paris case is summarised in the headnote thereto in the following terms:-*
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> > *'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence.'*
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> *In the National Westminster Bank case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-*
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> > *'I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?' The test posed by Lloyd L.J. in the Standard Chartered Bank case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.'"*

Anglo calls particular attention to those observations in its analysis of the affidavit evidence proffered by the defendants.

Anglo also relies upon the observations of McGuinness J. in *Aer Rianta v. Ryanair Limited* [2001] 4 I.R. 607, where, having endorsed the approach of Murphy J. in *Anglin*, she said:-

> *"Thus it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr. O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or bona fide defence…. The court does not ask whether Mr. O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr. Byrne's account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible."*

Attention is also drawn to the observations of Hardiman J. in the same case where he said that:-

> *"The fair and reasonable probability of the defendant having a real or bona fide defence, was not the same thing as a defence which would probably succeed, or even a defence whose success was not improbable."*

Particular reliance is placed upon the *Banque de Paris* case which it is alleged has striking factual similarities to the present one. There, the Court of Appeal refused to allow leave to defend notwithstanding the assertion of a collateral agreement that a guarantee would not be enforced on the basis that it was only required *"for cosmetic purposes"*. That court took the view that that line of defence on the facts of that case lacked the necessary credibility to justify a refusal of summary judgment.

Defence to the Guarantee Claim
How did each of the defendants arrive at a situation where they had *"never a moments doubt in my mind that the plaintiff would not seek to enforce the guarantees against me"?*

They each allege that it was represented to them that Anglo would not seek to enforce the guarantees against them.

It is to be noted that the guarantees executed by them contain no such assurance and indeed in their terms are entirely inconsistent with such an approach. The defendants in executing the guarantees *"unconditionally"* guaranteed the payment of the monies in question.

The defendants have sworn that they were familiar with such instruments and their consequences. Given that to be so, it would not be unreasonable to expect that if these guarantees were not to be enforced they would insist upon documentary material from Anglo supporting that contention. Ideally, this would take the form of a side agreement between the defendants and Anglo to that effect. There is no such agreement.

Alternatively, it would be reasonable to expect the defendants to have sought a letter from Anglo indicating in clear terms that it would never seek to enforce the guarantees. There is no such letter, nor was one ever sought. Indeed, there is no document at all emanating from Anglo on the topic.

In the absence of something in writing from Anglo, one might reasonably expect the defendants, as experienced solicitors, to have made a careful attendance note recording when, where and who on behalf of Anglo represented to them that the guarantees would never be enforced. There is no such record. Nor indeed could there be, since no official of Anglo ever made such a representation to them. Rather the representation was made by one Michael Daly. Whatever else may be said about Mr. Daly, he was never at any

stage an officer, official or employee of Anglo.

This is an unusual state of affairs and one which presents great difficulties for the defendants in attempting to put forward a credible case in support of their belief as to the non-enforceability of Anglo's guarantees.

Their own counsel, whose submissions were always rooted in reality, said of the defendants *"they have not behaved in a fashion that might be characterised as becoming of a prudent solicitor in terms of either note keeping or memoranda or correspondence with the bank"*.

Given the lack of any documentary evidence from Anglo supporting this line of defence together with the absence of any statement made by any official of Anglo to the defendants in support of their belief, the focus turns to Mr. Daly and what he is alleged to have said.

Michael Daly
Michael Daly is an accountant by profession who worked in that capacity in Limerick for over twenty years before becoming a property developer. He was the chairman of the Fordmount Property Group and later became its managing director during 2005. He retained that position until he resigned in June 2009.

Since 2005, Mr. Daly has been the owner of 50% of the Fordmount Group with the other 50% being held equally by the three defendants and Mr. Thomas Dalton.

Thus it is clear that Mr. Daly was a fellow shareholder with the defendants in the three limited companies in suit. He was also their co-partner in the two partnerships involved. He was a co director of Mr. Sherry in the companies. In none of those capacities could Mr. Daly be considered to have any authority to bind Anglo by whatever representations or statements he made to the defendants.

Mr. Daly's Assurances
The defendants contend that Mr. Daly provided them with assurances that the guarantees that they were entering into were just a formality. He is alleged to have told them that he received those assurances from Seán Fitzpatrick the former chief executive and chairman of Anglo and/or David Drumm, Mr. Fitzpatrick's successor as chief executive. Mr. Daly told the defendants that he had been picked out as a *"favoured developer"* by Mr. Drumm who spoke about making a fund of half a billion Euros available to Mr. Daly for investment/development.

The defendants aver that Mr. Daly on many occasions, always around the time of signing letters of loan approval, indicated that the guarantees would never be relied upon and that they were merely part of a *"box ticking"* measure for the credit committee of Anglo. Mr. Sherry, to whom these representations were made, passed on that information to Mr. O'Donovan and Mr. Frawley. Mr. Sherry mentions a number of specific occasions when such representations were made namely on 19th March, 2008 and 30th September, 2008. On those occasions, he alleges that Mr. Daly told him that following discussions which he had had with Anglo the guarantees were not going to be relied upon and that they were a formality to complete the plaintiffs' *"paperwork"*.

The defendants contend that they genuinely believed the representations made to them by Mr. Daly. They point to a number of reasons for their so doing.

First, they appear to have been convinced that Mr. Daly did have some form of special status as far as Anglo was concerned. Not merely had he conveyed to them what was allegedly said to him by Messrs. Fitzpatrick and Drumm but he had been taken on several foreign trips including golfing holidays by Anglo. One such trip involved travel on the Orient Express at what is described in the evidence as *"huge cost"*.

Second, they contend that they were told by Mr. Daly that the reason why Anglo was happy not to rely on the guarantees was that it had taken the position that there were underlying assets in the Fordmount Group of exceptional value and that Anglo was to obtain a first legal charge. That was, they were told, sufficient security for the borrowings and they sincerely believed that to be so.

Third, they say that Anglo never required any form of statement of means from them. Thus it could have no reason to believe that they were persons of sufficient means to meet a demand on foot of the guarantees. They argue that if Anglo was serious about the guarantees as a form of security it would surely want to know the means and assets of the defendants before taking the guarantees.

Fourth, they allege that Anglo entrusted all dealings in connection with the execution of the guarantees to Mr. Daly and that they did not have communication with any official of Anglo. They believe that if Anglo intended to rely on €21m worth of guarantees per person they would have expected somebody to have spoken to them or arranged a meeting or communicated with them in some way. Rather this was all, they say, left exclusively in the hands of Mr. Daly.

Flaws
Anglo says that it is incredible that experienced solicitors such as the defendants could really believe as they assert. They could not genuinely believe in the non-enforceability of these guarantees. Anglo goes further and points to a number of specific flaws in the defendant's version of events.

First, it calls attention to the actual wording of the guarantees. Each defendant, by signing the guarantee *"unconditionally guarantees to the bank the payment of…all sums of money…unpaid to the bank"*.

Second, the defendants are unable to produce a single document emanating from the bank in support of their contention.

Third, the defendants are unable to produce a single document generated by themselves by way of a contemporaneous note in support of the representations alleged to have been made.

Fourth, no officer or employee of the bank ever made any such representations to the defendants.

Fifth, insofar as the defendants contend that Mr. Daly should be regarded as having authority to give such representation on behalf of Anglo, they themselves acknowledge that it would be *"extremely unorthodox"* that such should have been the case. As part of this element of their case, the defendants have asserted that Anglo conducted all of its dealings with the defendants exclusively through Mr. Daly. That, however, was not the case. This is clear from material put before the court in a second affidavit sworn by Mr. Kieran Dowling on behalf of Anglo. That demonstrated a significant amount of correspondence passing between Anglo's solicitors and Dermot G. O'Donovan and Partners dealing *inter alia* with the guarantees in suit. That correspondence also demonstrates that by times the

standard form guarantees were amended by the defendants so as to demonstrate that their obligations should not exceed 12.5% of the indebtedness of the companies being guaranteed. If the guarantees were not to be enforced, one wonders why a guarantor would be at pains to specifically limit liability.

These are by no means all of the flaws in the defendant's contentions which have been identified by Anglo.

Despite them, the defendants continue to assert the existence of an arguable defence to the claim. In this regard, they place considerable reliance on what has occurred in proceedings which were commenced by Anglo against Michael Daly.

The Daly Proceedings
Mr. Daly is being sued by Anglo in this Court, (Record No. 2010/425 S) for the recovery of approximately €84m in respect of the same transactions involving the instant defendants. The action against Mr. Daly antedates these proceedings.

Those proceedings commenced by Summary Summons and an application for summary judgment was heard in the Commercial List by Charleton J. In essence, the same defence is relied upon by Mr. Daly in those proceedings concerning the non-enforceability of the guarantees. He alleges that representations were made to him by Anglo personnel to the effect that the guarantees would not be enforced. Those representations were made, he said, by senior executives of Anglo. He does not name Mr. Fitzpatrick or Mr. Drumm in that regard. Rather he alleges that the assertions were made by a Mr. Spillane.

Charleton J. took the view that Mr. Daly had made out an arguable defence and refused summary judgment to Anglo. He adjourned the action for plenary hearing and the proceedings will come to trial early in Hilary Term 2011.

The defendants argue that that order having been made by Charleton J., I ought to adopt the same course here and to do otherwise could result in an injustice. If summary judgment is entered against the defendants in the present proceedings then, subject only to an appeal, that is the end of the matter. If Mr. Daly persuades the court on a plenary hearing of his case that Anglo are not entitled to judgment against him on the guarantees for the reasons set out by him, the defendants will have been denied a trial where those issues can be ventilated by them.

It is true that there are many common features between the line of defence relied on here and that asserted by Mr. Daly in the proceedings taken against him. There are, of course, additional difficulties for the current defendants, some of which I have outlined.

Conclusions on the Guarantee Claim
Were it not for the decision made by Charleton J. in the case brought against Mr. Daly, I would be very inclined to refuse leave to defend these proceedings. Whilst this case has features in common with his, there are additional layers of difficulty which these defendants face.

Pivotal to the success of their defence will be the credibility of Mr. Daly and of the defendants themselves. If Mr. Daly in his case succeeds in persuading the court of trial that his version of events is correct and these defendants were deprived of the opportunity of having a trial on oral evidence touching upon much the same issues, I think there would be a risk of an injustice being perceived to have been done. I am conscious of the fact that judgment against these defendants will not merely be ruinous to their own financial stability but may have serious implications for their future professional lives. It is in these circumstances that I conclude that I ought in the interests of justice to adjourn the action for plenary hearing and refuse summary judgment insofar as the guarantee claims are concerned.

The Partnership Debts
I have already set out how the defendants have summarised their defence in respect of the partnership debts. They contend that the monies ought not to have been lent because of a state of knowledge on the part of Anglo concerning how the affairs of the partnerships were being conducted by Mr. Daly.

The allegation is that the activities of the partnerships were being carried on in either a fraudulent, unlawful or irregular fashion.

In the fourth quarter of 2008, Anglo reviewed the manner in which the companies and the partnerships had applied funds provided to them. A firm of accountants called Cooney Carey was appointed by Anglo to undertake a review in that regard. That commenced in March 2009 and led to queries being raised to which unsatisfactory answers were made.

Anglo contends that it did not become aware of any issue as to fraud or unlawful activity until June 2009. By then, the bulk of the facilities had already been drawn down. In such circumstances, the claim that the bank advanced funds at a time when it knew or suspected that the group was the object of a fraud or unlawful activity appears incorrect. It is true that funds were advanced in July 2009 but it is alleged that they were simply provided to fund outstanding creditors as of then.

Much reliance is placed by the defendants upon the report which was commissioned from Cooney Carey. That report has not been disclosed to the defendants or to the court. They assert that its contents will be supportive of their view that the affairs of the partnership were, without their knowledge or consent, being run in an irregular fashion for some time and that was known or ought to have been known by Anglo. The defendants also point out that no evidence has been adduced by Anglo from any of the personnel who were involved at the time when all of these transactions were taking place. Rather it relies exclusively upon affidavit evidence sworn by Mr. Dowling whom it is said has no direct knowledge of all of these events.

In Anglo's proceedings against Mr. Daly, Charleton J. also adjourned this element of the case against him for plenary hearing. I accept that there are features of Mr. Daly's defence which are similar to those relied upon by the defendants here but there are also substantial differences. It seems to me that the contents of the Cooney Carey report may have a large part to play in this aspect of the case and its contents are unknown to the court and the defendants at present.

I have come to the conclusion that for broadly the same reasons which I advanced concerning the guarantee claim, this element of the case must also be adjourned for plenary hearing.

Result
The action will be adjourned for plenary hearing. This is not a warranty as to the strength of the defendants' case still less as to their ultimate prospects of success. It is merely an acknowledgment that I am unable to answer the question *"is it very clear that the defendants have no case?"* in the affirmative with the degree of confidence that is required.