Neutral Citation: [2016] IEHC 576

THE HIGH COURT

[2013 No. 1993 S]

BETWEEN

ALLIED IRISH BANKS PLC

APPLICANT

AND

JOSEPH SMITH

DEFENDANTS

JUDGMENT of Mr. Justice Eagar delivered on the 21st day of October, 2016

1. This is an application for summary judgment by the Plaintiff bank against Joseph Smith. The sum sought is the sum of €109,957.37 and no interest is being sought by the Plaintiff in respect of this debt from the initiation of the proceedings on 9th July, 2013. The Plaintiff's claim relates to €21,943.42 being money payable by the Defendant to the Plaintiff at his request and for interest agreed to be paid upon money due to the Plaintiff by the Defendant on foot of a current account no. 94409002 and maintained by the Defendant by agreement with the Plaintiff at its branch office at 41, Main Street, Cavan. Further, €88,013.95 being money payable by the Plaintiff to the Defendant at his request and for interest agreed to be paid upon money due to the Plaintiff by the Defendant on foot of a loan account no. 94822048 openly maintained by the Defendant at the same branch.

2. The grounding affidavit of Robert Amerlynck grounds the application for summary judgment and in this affidavit the deponent swore that the Defendant maintained a current account no. 94409002 and a loan account no. 94822048 with the Plaintiff at the Plaintiff's branch in 41, Main Street, Cavan. He swears that the accounts are subject to the Plaintiff's terms and conditions which include *inter alia* that any monies advanced by the Plaintiff to the Defendant or paid by the Plaintiff for the Defendant bear interest until repayment at the Plaintiff's current bank rates in force from time to time applicable to current account and loan accounts and further that money is due to the Plaintiff on foot of the said accounts or repayable on demand.

3. He swears that on 28th April, 2009 the Defendant was indebted to the Plaintiff in the sum of €21,000 on foot of the current account and in the sum of €68,480.26 on foot of the loan account.

4. Whilst the Plaintiff applies for summary judgment the Defendant asserts that he has a *bona fide* defence and should be afforded the opportunity to have the dispute remitted to plenary hearing. He also claims that he is entitled to defend the case on the basis of a collateral or side agreement reached between the Plaintiff and the Defendant to the effect that he had agreed with the Plaintiff that he would get a 1% set-off on the client account and any excess would be put on the deposit account.

The law

5. The legal test to be applied in an application for summary judgment is set out in the Supreme Court's decision in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75 where Murphy J. stated:

> "*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."*

6. In *GE Woodchester & Anor. v. Aktiv Kapital Asset Investment Limited & Ors*.. [2009] IEHC 512 in a judgment delivered by Clarke J. in this Court, Clarke J. stated:

> "*The standard to be applied in examining whether a Defendant has a fair or reasonable probability of the Defendant having a real or bona fide defence is set out in the decision of the Supreme Court in* Aer Rianta v. Ryanair Limited *[2001] 4 IR 607. In his judgment in* Aer Rianta *Hardiman J. noted that a fair and reasonable probability of a real or bona fide defence is not the same thing as a defence which will probably succeed or even a defence whose success is not improbable. At p. 621 of his decision, Hardiman J. states that "the Defendant's hurdle on a motion such as this is a low one and the jurisdiction is one to be used with great care*".

7. Hardiman J. stated:

> *"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?"*

8. In *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, MacKechnie J. set out a summary of the principles following *Aer Rianta v. Ryanair* to be applied by the Courts in the assessment of summary judgment applications in the following terms:

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
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> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
>
> *(iii) in so doing 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;*
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> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is*

suitable for use;

(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the Defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence [this Court's emphasis]*; or as it is sometimes put, "is what the Defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;*

(viii) this test is not the same as and should be not elevated into a threshold of a Defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the Defendant or has reason to doubt whether he has a genuine cause of action;

(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 and finally;

(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."

9. I am satisfied first of all that the Plaintiff's evidence in the grounding affidavit of Robert Amerlynck provides cogent evidence of the amounts of the debts owed by the Defendant to the Plaintiff, and refers to an letter seeking payment prior to issuing proceedings in Exhibit A of that affidavit. The affidavit of Aoife Scanlan, Manager of Allied Irish Bank's Financial Solutions group, refers to a letter dated 13th September, 2011. The letter was written "in an attempt to bring this matter to a conclusion". The letter states:

> "to write off all Bank charges, interest, excess interest, and surcharges made to your office account and all excess interest charged on your loan account from 1st September, 2005 to 23rd August, 2011 leaving a net amount due by you to the Bank in the sum of €76,671.40.
>
> Provided the said sum of €76,671.46 is paid by you to the Bank within 3 weeks of the date hereof the said sum will be accepted in full and final settlement of your indebtedness to the Bank on foot of loan account 94822048 and current account 94409002 maintained by you at the Bank's branch at 41, Main St., Cavan."

Also attached to the affidavit of Aoife Scanlan is a letter addressed to Mr. Joseph Smith of P. Fitzpatrick & co. Solicitors, described as a letter of sanction, offering him the facilities subject to the terms and conditions set out in the letter. In relation to interest there is "(a) A rate varying, currently 9.3% per annum subject to interest set off arrangement against funds held in client current account at 3%.

10. Mr. Smith states that the Plaintiff had granted him a facility of a 1% set off on his client account in his solicitor's practice. As a result of what he believed to be an inducement he entered into a contract with the Plaintiff based on a 1% set off and relied on this contract and purchase to practice with large borrowings based on the contract and the representations of the Plaintiff. This was in 1984. He relies on a letter, the date of which is hard to read although it relates to 1st September, and it may be 1986. It is the first page of a letter from the bank.

11. In relation to the interest, there is a line, "the normal", and then it looks as if there is an insertion in black ink, "1 % off set charge will be waived in this case" or so it seems. This does not refer, however, to a set off between the two accounts at 1%. The second page of that letter is not attached. In para. 3, the agreement was to commence on 20th September, 1986 and in those circumstances it would appear appropriate that the letter was probably dated 1st September, 1986.

12. Mr. Smith states that he brought these issues to the Bank's attention. He said that there were lots of discussions, but had no proof of any correspondence detailing these issues. It seems to me that a solicitor in practice would be setting out in detail complaints relating to charging of interest at 3%, where the original agreement had been 1%. It is surprising to this Court that Mr. Smith who was a solicitor would not have sent solicitor's letters either from his own office or from a colleague's office in relation to this matter. Mr. Smith also says his accountant was in touch with the Bank but, again, it is surprising to this Court that in relation to any discussions he had with the Bank he has no note of what transpired or who attended these meetings. I am also surprised that in the circumstances of the fraught relations between himself and the Bank that he did not bring his accountant or a colleague with him and in the end of the day he did not seek to change banks. In any event, any claim brought relating to a loan dating from 1986 would be statute barred in 2002.

13. Mr. Smith also said that he made a complaint to the customer services division and an investigation was carried out by a Mr. Tom Cuddy but he has not received a copy of that report. Counsel on behalf of the Plaintiff says that this is not a good defence to repay a debt.

14. Mr. Smith made a freedom of information request and a data request in 2014 and received some of the documentation which is exhibited here. He states that he needs to make further investigations through his data requests.

15. Mr. Smith exhibits a letter which he wrote to the General Manager of the East West Division of Allied Irish Bank at the Bank Centre, dated 15th March, 2000, where he sets out the history. It says:

> "On 10th February, 2000 I was granted a facility of €15,000 overdraft at an interest rate of 8.65% subject to a 3% set off against credit funds in client account."

16. He then states:

> "I have had to put it mildly a chequered relationship with the Bank. For approximately 7 years there was considerable indebtedness by me to the Bank and looking at the present figures this would appear to have been reduced by over half. At all times I have had a healthy client account which Allied Irish Banks have had the benefit of. I would now consider the practice to be in a strong position.
>
> The purpose of writing this letter is to draw your attention formally to the matters which have aggrieved me."

The main thrust of his disagreement was in relation to Mr. Keating.

17. Mr. Smith also stated that the manner in which he was treated did not accord with the Central Bank's position regarding the appropriate role of banks and their solicitor clients.

18. Mr. Smith also referred the Court to the two slips which relate to transactions in the accounts in 2006 and 2007. I am not sure that these slips are necessary for the deduction of the amounts from the bank account. Mr. Smith however says that whoever signed them, it was not his signature. He also says that there still is missing documentation.

19. Counsel for the Bank says that no defence in law has been raised by the Defendant. Making a complaint to the Bank is not a good defence to repaying a debt. In relation to the signatures on the two slips, in this Court's view there is clearly a deduction made of the amounts which Mr. Smith says were forged. This appears to be the first time that this point has been raised in these proceedings. It seems to this Court that, while Mr. Smith is adamant on this point, the Bank would be entitled to apply to make these transactions without any authorising withdrawal slips.

20. Counsel also said that in relation to missing documentation that this again did not relieve the Defendant of the debt.

21. It seems to this Court that in applying the principles set out by McKechnie J. in *Harrisrange Limited v. Duncan* it appears to me that these matters are simple and easily determinable, meaning that the summary procedure is the suitable procedure. The issues of fact which are not, in my view, material to the success or failure of the defence and the Defendant has not satisfied the Court that he has a fair or reasonable probability of having a real or *bona fide* defence. Under these circumstances I have proposed to grant summary judgment as sought by the Plaintiff.