THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 56

APPEAL NUMBER: 2014/478

(Article 64 transfer)

Kelly J.
Peart J.
Mahon J.

BETWEEN:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF/RESPONDENT

AND

JOHN FLANAGAN AND GERARD LILLIS

DEFENDANTs/APPELLANTS

JUDGMENT OF THE COURT DELIVERED ON THE 19th DAY OF MARCH 2015

1. This is an appeal against the judgment of Ryan J. (as he then was) dated 14th May 2012 in which he concluded that none of the issues raised by the appellants in their replying affidavits amounted to a *bona fide* defence to the respondent bank's claim to be entitled to judgment in a sum of €1,743,896.15 plus accruing interest on foot of various loan facilities which were ultimately restructured on foot of a loan facility letter dated 4th March 2009. Accordingly, he refused the appellants' request that the Bank's claim be adjourned to plenary hearing, and gave judgment to the Bank for the amount claimed.

2. This appeal was conducted by the first named appellant, John Flanagan in person, on his own behalf and also on behalf of the second named appellant. This Court expressed concern at the outset of the appeal that Mr Flanagan could not represent the second named appellant. He has no legal entitlement to do so. The Court was assured by Mr Flanagan that it was the second named appellant's express wish that Mr Flanagan should look after his interests in the appeal, and expected that he would do so. The Court has proceeded on the basis that Mr Flanagan has represented himself, but that the second named appellant, being fully aware that the appeal was listed for hearing, is content that Mr Flanagan should make all possible arguments in support of the appeal, and that he himself had nothing to add in addition to anything being urged upon the Court by Mr Flanagan. The Court's conclusions are in respect of the appeal lodged by each appellant.

3. These proceedings were by way of summary summons. Once an appearance was entered by the defendants following service of the proceedings upon them the Bank sought liberty to enter final judgment by Notice of Motion dated 11th May 2011 pursuant to the provisions of Order 37 RSC. That motion came initially before the Master of the High Court on the 28th October 2011. A number of affidavits were filed by each side, and the motion was ultimately transferred to the Judge's List and came on for hearing before Ryan J .

4. Two loan agreements are set forth in the Schedule contained in the Special Endorsement of Claim in the Summary Summons as the basis for the Bank's claim against the defendants. The first is a loan facility dated 20th March 2006 in the sum of €1,500,000 secured by way of a commercial mortgage for the purchase of a Guesthouse and Restaurant at Doolin, Co, Clare. The second loan referred to is one dated 31st May 2007 in the amount of €230,000 being a bridging loan. That bridging loan was restructured by a further facility letter dated 2nd January 2008, and in due course all these loans were restructured by a loan referred to in a loan facility letter dated 4th March 2009 which refers to two sums by way of loan – (a) €1,449,471 (existing), and (b) €232,941 (existing). The purpose of this facility is clearly stated to be a restructuring of existing loans, and not an advance of new or additional funds to the borrowers.

5. There are two aspects of this facility letter which should be noted, since some reliance is placed on them by the appellants. Firstly, within the facility letter are references to a "drawdown" of the facility. The appellants submit that there was never any such drawdown. Secondly, there is a clause which provides *"Deed of Covenant to be held in respect of the Liquor Licence for the above premises"*. It appears that no such deed was ever put in place, and the appellants seek to rely on that omission. These submissions will be considered in due course.

6. A number of matters were offered by the appellants in the High Court as amounting to a *bona fide prima facie* defence to the Bank's claim for the purpose of the claim being adjourned to a plenary hearing. These will be dealt with below.

7. Having, in this Court's view correctly, set forth the test for whether a *prima facie bona fide* defence had been put forward by the defendants by reference to the judgments of the Supreme Court in *Aer Rianta v. Ryanair* [2001] 4 1.R. 607, namely whether it is 'very clear' that the defendant has no case, and whether the defence is so far-fetched or so self contradictory as not to be credible, Ryan J. stated:

> *"The plaintiff must establish a clear case before it can get judgment. But that is not enough. Even in the face of an apparently strong prima facie case, the defendant will be allowed to defend and the matter will be sent to plenary hearing if he is able to demonstrate a basis of defence in law or fact that achieves a minimum level of arguability and/or credibility.*
>
> *The jurisdiction in summary judgement is not limited to a case in which no ground of defence is to be found in the papers. The procedure exists for a plaintiff to recover judgement if no bona fide basis of resisting the claim is shown, albeit that the threshold is high where the facts are put in issue."*

8. No submission is made by the appellants on this appeal that Ryan J. applied an incorrect test.

9. The judge proceeded to consider each of the grounds of defence advanced by the defendants, and concluded that none met the threshold of arguability required for the case to be adjourned for a plenary hearing. The appellants contend that he erred in reaching that conclusion, and have essentially made the same arguments before this Court in an effort to persuade this Court that it should reach a different conclusion.

10. The six matters advanced by the appellants as amounting to a *bona fide* defence for the purpose of a plenary hearing are conveniently set forth as follows in the judgment of Ryan J :

> (i) Each facility letter had as one of its terms that security consisting of a deed of covenant in respect of an intoxicating liquor licence for the premises whose purchase was being funded by the loans was to be put in place.
>
> (ii) Following the signing of facility letter No. 4 by the defendants, discussions continued in regard to the loan terms between the defendant and the Bank and this invalidates the Bank's reliance on that letter as a completed contract.
>
> (iii) Facility letter No. 4 is an unenforceable contract because money was never actually drawn down and there was also no consideration.
>
> (iv) The Bank misrepresented these loans for regulation purposes to make them look like performing loans and this again furnishes a defence.
>
> (v) The Bank is limited in its recourse to trading profits from the hotel premises only.
>
> (vi) In addition, Mr Flanagan argued at the hearing that there was not a formal event of default or, alternatively, that the Bank had not notified him and his co-defendant of same.

11. This Court will consider these issues in that same order, and the submissions made by the parties.

(i). Each facility letter had as one of its terms that security consisting of a deed of covenant in respect of an intoxicating liquor licence for the premises whose purchase was being funded by the loans was to be put in place:
12. It is common case that this condition precedent contained in the relevant facility letters that a Deed of Covenant would be put in place in relation to the liquor licence was never satisfied. The Bank had apparently advanced most of the monies with which that licence was purchased in the sum of €170,000, and it was intended that the licence would attach to the premises being purchased by the borrowers as soon as the necessary planning permissions had been obtained. It appears that some difficulties were encountered in relation to that planning application, and so that the liquor licence would not lapse, the borrowers and the Bank agreed that it should be transferred to another premises. It appears that the necessary application was made to the District Court to achieve such a transfer. The company which owned the premises to which that liquor licence was transferred went into receivership, and the value of the licence has therefore been lost to the appellants. They submit now that the Bank were negligent by not having put in place the security specified in the facility letter, namely a Deed of Covenant in respect of the licence, and that this gives them an arguable defence to the claim by the Bank in these proceedings. The point seems to be that if such a deed had been put in place, the borrowers would have been able to argue in the receivership of the company to whom the licence was transferred that their own Bank had a prior claim to the licence, and in that way its value would not have been lost to the appellants.

13. The Bank has submitted that the appellants misunderstand the nature and effect of this condition precedent to drawdown of the facility, and that in fact the condition is for the benefit of the bank and not of the borrowers. The Bank submits that it was open to it to refuse to complete the drawdown in the absence of the deed of covenant, but that it was also open to it to waive that condition precedent and proceed without it, and that it would be in ease of the appellants for the Bank to have so acted. The Bank submits that this feature of the case is not relevant to the appellants' obligations to repay the loan monies, and cannot amount to even a prima facie bona fide defence to the proceedings.

14. The trial judge agreed with the Bank's submission, and in this regard stated:

> *"Clearly, the Bank would have been entitled to withhold advancing the loans until that security was in place. In fact, it appears that it proved to be impossible to have the license attached to the relevant premises, so that element of the security was not actually put in place. But the fact that the loan was nevertheless advanced was in ease of the borrowers and represented a waiver by the lender of its right to require that piece of security. It is quite illogical and frankly makes no sense to suggest that because the Bank agreed to waive this element it is thereby prevented from recovering its loan. That amounts to an absurdity, in my view, and it is equally illogical to suggest that even if the Bank is not prevented from recovering or claiming the recovery of the money it lent, there is nevertheless some reduction in the Bank's entitlement."*

15. This Court is also satisfied that the appellants' reliance upon this ground of purported defence is misplaced. This is not a case where, as in *Bauer v. Bank of Montreal* [1980] 2 S.C.R. 102 relied upon by the appellant's, the Bank has damaged the security which it held. Rather, this is a case where the Bank simply agreed to forego a piece of security which they would otherwise have been entitled to insist upon before any drawdown could take place. It was in the appellants' interests that the licence be kept alive by having it made available for use in association with a different premises, since the appellants had run into some difficulties in relation to obtaining planning permission for their own premises, and the Bank agreed to it being transferred. The fact that it has now disappeared within a Receivership of the company to which it was transferred cannot be laid at the door of the Bank. This Court is satisfied that this ground cannot amount to a bona fide defence to the Bank's claim or even to part of it.

(ii) Following the signing of facility letter No. 4 by the defendants, discussions continued in regard to the loan terms between the defendant and the Bank and this invalidates the Bank's reliance on that letter as a completed contract.
16. The factual basis on which this ground is advanced is that 20 days after signing their acceptance of the restructuring loan facility dated 4th March 2009, the borrowers wrote a letter to the Bank seeking some amelioration of the repayment terms contained in the facility letter in order to take account of the seasonality of the hotel business, or at least some flexibility in relation thereto. That request for flexibility was rejected by the Bank as can be seen by its letter to the appellants dated 2nd April 2009. It was contended in the High Court that this correspondence evinced an incomplete contract with the Bank. The trial judge rejected this ground of defence saying that it had no merit, noting that it was not contended by the appellants that they had in fact reached any new agreement arising from this correspondence. This Court considers that the trial judge was entirely correct in his conclusion on this point, and it is unstateable as a defence in the face of the evidence of the correspondence itself upon which the appellants have

relied. In any event this point was not pursued on this appeal.

(iii) Facility letter No. 4 is an unenforceable contract because money was never actually drawn down and there was also no consideration.

17. In this ground of defence, the appellants are attempting to make something out of nothing. As already set forth, the facility dated 4th March 2009 is a loan for the purpose of restructuring all the previous borrowings. No new funds were being advanced. The appellants refer to the fact that, nonetheless, the facility letter more than once refers to a drawdown of funds, which it undoubtedly does. But, as noted by the judge in his judgment on page 8 thereof:

> *"the facility letter put in place a new arrangement between the parties which replaced the earlier provisions and this was done by agreement between them. In return for the agreement by the defendants to make the payments as now scheduled in the facility letter, the Bank agreed to give up its entitlement to enforce the agreements that were previously in place. The submission that there was no actual transfer of cash, either from the Bank to the defendants or internally from one place to another in the Bank, is a misunderstanding of what happened as a matter of contract between the parties when this last facility was agreed".*

For the appellants to try and argue that because the facility refers to drawdown and no actual drawdown in fact took place the Bank are in some way disentitled to the repayment of the monies the subject of this facility is a contrived and empty argument devoid of any merit whatsoever. It is quite obvious that being a loan in the nature of a restructuring of existing borrowings, no physical drawdown of any additional funds took place in the sense of funds being made available to the borrowers for use by them. The drawdown, quite obviously, was achieved by way of an internal accounting exercise whereby the previous borrowings were repaid by the restructuring loan. The judge rejected this as a bona fide ground of defence, and this Court agrees completely with that conclusion.

(iv) The Bank misrepresented these loans for regulation purposes to make them look like performing loans and this again furnishes a defence.

18. This ground amounts to a mere assertion by the appellants in their affidavits, and is unsupported by any evidence whatsoever. In such circumstances it cannot amount to an arguable *bona fide* defence. The ground is put forward by way of bald assertion in the affidavit of John Flanagan sworn on the 26th January 2012 where at paras. 6 – 7 he seeks to characterise the Bank's restructuring of these loans as a unilateral act on the Bank's part in order to "avoid a possible trigger of clause 12 – an event of default". He states at paragraph 7:

> *"I say and believe and am so advised that the plaintiff continued to engage in this unilateral restructuring of the loan facilities so as to 'window dress' the appearance of these impaired loan facilities on the plaintiff' as accounts, and to give these loans the appearance of performing loans for the obligatory financial reports on all loan facilities to be provided by the plaintiff for the Financial Regulator and/or the Central Bank under the EU Directives and/or the Basel 11 Framework …".*

19. The suggestion made by Mr Flanagan in that affidavit is rejected out of hand by Derek O'Neill on behalf of the bank in his affidavit sworn on 20th March 2012. At paragraph 8 thereof, he responds as follows:

> *"Mr Flanagan asserts, without any evidence, that the plaintiff sought to avoid its obligations to the Financial Regulator and/or the Central Bank. This assertion is wholly unfounded. Rather, I say and believe that the plaintiff has at all times complied with its obligations under the EU Directive and the Basel Framework, and I absolutely refute any allegations to the contrary, which allegations are scurrilous and solely designed to sully the good name of the plaintiff."*

20. Mr Flanagan, in response to Mr O'Neill has stated that all documents and/or reports relating to the Bank's obligations to the Financial Regulator are within the possession and control of the Bank alone, and accordingly he is not in a position to do other than make his assertion in this regard. He says that he has requested copies of same and that same have not been given to him. If this matter is adjourned to plenary hearing he indicates an intention to seek discovery in relation to any such materials.

21. The learned trial judge concluded that even if everything that the appellants were saying in this regard was correct and there was some misreporting in relation to these loans as alleged:

> *"it is of no assistance to Mr Flanagan and his colleague and does not furnish a defence. How could it? It is nothing to so with the defendants; they are not involved in the process; their liability is not increased or diminished; they are not in any way prejudiced or indeed affected. This point also is a misunderstanding."*

22. This Court agrees with that conclusion. It cannot avail the appellants even if all that they simply assert is taken as being factually correct. The Court agrees with the conclusion reached by McGovern J. in his judgment in *Freeman and anor v. Bank of Scotland plc*, unreported, High Court, 29th May 2014 when he stated at para. 18 of that judgment in relation to the similar issue raised in those proceedings:

> *"It is clear, therefore, that non-compliance with a statutory code does not relieve a borrower from his obligations under a loan to repay the lender, nor does it deprive the lender of its rights and powers under the loan agreement. If that is the case so far as statutory codes of conduct are concerned, then, a fortiori, the plaintiffs in this action cannot make the case that they are relieved from their obligations under the loan or that the Bank is deprived of its rights under the loan agreements, if there has been a breach by the Bank of what is a voluntary code."*

(v) The Bank is limited to trading profits from the hotel premises only:

23. The next ground urged to amount to a bona fide defence is that there was agreement between the appellants and the Bank that the Bank's only recourse was against the trading profits from the hotel/restaurant business which was purchased with the loans in question. Again, there is only Mr Flanagan's bald assertion in that regard as contained in his supplementary affidavit sworn on the 26th January 2012. He states in that regard:

> *"8. I say and believe that it was at all times understood and expressly agreed between the parties that the trading profits from the Tir Gan Ean House Hotel was the only available income to service the interest on the loan facility and ultimately repay the debt, and I say that the plaintiff was never relying on any other income and/or assets of the defendants for any performance of these loan facilities …. I say and so advised that in such circumstances the plaintiff was not entitled to summary judgement against the defendants in this matter."*

24. Mr O'Neill by way of response denies that there was any such agreement or understanding. He notes that although Mr Flanagan stated that it was "expressly agreed" between the parties, nothing evidencing any such agreement has been exhibited by him. He goes on to refer to the fact that at the time of the original loan sanction considerable profits were being generated by another company owned by the appellants at the time and through which they were expected to service their loans.

25. The trial judge noted that this alleged agreed restriction of the Bank's recourse to the trading profits of the hotel business was not referred to anywhere in the correspondence between the parties, or even in the earlier affidavit filed by the appellants, and that the Bank's response to the assertion had not been the subject of any later contradiction by the appellants. He concluded that *"it was wholly inconsistent with the course of conduct of the defendants previously and with the documents and transactions between the parties",* and that *"there is nothing in the circumstances of the case, including the documents, the correspondence or affidavits to demonstrate any basis for this suggested factual issue".*

26. This conclusion by the trial judge is wholly justified. The appellants availed themselves of an opportunity on this appeal to argue this point of defence, but it could not be advanced beyond a point of mere assertion. It has no basis in objective fact. The terms of the facility letter are clear. What the appellants contend for under this point is inconsistent with the agreed facility letter, and it cannot therefore amount to a bona fide defence even on a prima facie basis for the purpose of sending the case to a plenary hearing. It does not pass the threshold.

(vi) There has been no formal event of default or, alternatively, that the Bank had not notified the defendants of same:
27. The appellants do not accept that any event of default has occurred which would entitle the Bank to take steps to recover the amount due on foot of the loan. They submit that the terms of the facility letter are not sufficiently clear as to the precise repayment terms, and therefore that it is not clear what would amount to an event of default. However, they do accept that repayments were not made on foot of these facilities as the Bank might have expected them to be made. The Bank on the other hand considers that the position is clear and that the facilities were on demand facilities, and that an event of default occurred when the appellants failed to repay on foot of the letters of demand sent by the Bank. Mr Justice Ryan considered these matters and concluded in his judgment that the appellants' failure to make repayments in accordance with the terms and conditions amounted to an event of default, entitling the Bank to issue a letter of demand for payment of the amount owing to the Bank on foot of the facilities. This Court is satisfied that the trial judge was correct to so conclude. The Bank's Terms and Conditions which formed an appendix to the facility letter dated 4th March 2009 contain paragraph 12, which sets out clearly a number of matters that can constitute an event of default, entitling the Bank to call for the immediate early repayment of all outstanding amounts as provided in Clause 12. One such event is that at (ii) thereof and which states:

> *(ii) If the borrower defaults in the payment of any principal, interest, or other amount payable hereunder when due."*

28. There is no room for doubt on the facts of this case that by the time the Bank issued its letter of demand the appellants were significantly in default in respect of the loan. They do not really dispute this, even though it is put somewhat differently, namely that they accept that repayments had not been made as the Bank might have expected them to be made. Perhaps the real point made under this issue is one not appearing in the affidavits filed, but rather through submissions. They have complained that the Bank gave them no advance warning that they might be considered to have committed an event of default, giving them perhaps an opportunity to remedy the situation before any steps were taken.

29. The trial judge concluded that no bona fide ground of defence arose under this heading. This Court agrees with that conclusion. Once an event of default has occurred, the Bank has certain entitlements. It can proceed to take such steps as it may be advised in order to seek to recover the debt. At its option, it may of course desist from doing so for a time, and instead offer the borrower an opportunity to put matters in order. But the Bank has no legal obligation to give such an opportunity once an event of default has taken place. The fact that some official from the Bank did not get in contact with the appellants and warn them that they were defaulting on their repayments and offer them an opportunity of rectifying their situation could not possibly form the basis of an arguable defence against Bank's claim for judgment.

30. For all these reasons this appeal is dismissed.