Neutral Citation [2016] IEHC 440

THE HIGH COURT

[2015 No. 2201 S.]

BETWEEN

LSREF III STONE INVESTMENTS LIMITED

PLAINTIFF

AND

AIDAN FOY AND PHILIP FOY

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 27th day of July, 2016

1. In this application, the plaintiff seeks summary judgment against the defendants in the sum of €1,089,847.88. As there was no real dispute between the parties as to the figures put forward by the plaintiff, it is not necessary to set out the nature of the plaintiff's claim in great detail.

2. The application was based on an affidavit sworn by Mr. John Hennessy, a director of the plaintiff company, which was sworn on 24th February, 2016. In the affidavit, Mr. Hennessy set out the background to the plaintiff's claim against the defendants. By facility letter dated 16th February, 2006, Irish Bank Resolution Corporation Limited ("IBRC"), then known as Anglo Irish Bank Corporation plc. made certain facilities available to the defendants and Mrs. Attracta Foy. The purpose of the loan was (a) to complete the purchase of a property at No. 12, The Turnstiles, Thornwood, Blackrock, Co. Dublin, (b) to provide working capital to part fund construction of a property at Citywest, Dublin 24 and (c) to effect the release of equity in a property at 114 Mount Merrion Avenue, Blackrock, Co. Dublin in the amount of €200,000 for the conversion of the property into two separate units to be sold to repay the indebtedness to the bank.

3. On 23rd January, 2009, IBRC issued a new facility letter which rescinded and superseded all previous facility letters and which set out the terms on which IBRC was prepared to make facilities available to the defendants. A copy of that letter was exhibited in the affidavit.

4. The relevant terms of the facility letter were as follows:

> a. The amount of Facility A was €1 million for the purpose of enabling the defendants to renew the existing facility until 30th April, 2009;
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> b. The amount of Facility B was €20,000 for the purpose of providing the defendants with a 6 month interest role up facility until 30th April, 2009;
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> c. The security for the loan was a first legal mortgage on the property;
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> d. the interest applicable to the loan was calculated by the bank at an annual rate equivalent to the aggregate of 3.25 % above Three Month EURIBOR plus RAC and was to be debited to the defendants' account at the end of each calendar month;
>
> e. The defendants were required to make monthly interest payments of €4,000 per month with the remainder of interest due to be rolled up to the limit of Facility B until 30th April, 2009;
>
> f. Facility A and Facility B were repayable on demand. Without prejudice to the demand nature of both facilities, final payment was due on or before 30th April, 2009.

5. The terms of the facility letter were accepted by written form of acceptance signed by each of the defendants on or about 16th February, 2009. Mr. Hennessy averred that the defendants did not pay the loan by the required date, i.e. in advance of 30th April, 2009.

6. Mr. Hennessy stated that pursuant to the Irish Bank Resolution Corporation Act, 2013 and the Special Liquidation Order, 2013 made by the Minister for Finance on 7th February, 2013, IBRC was placed in special liquidation. Mr. Kieran Wallace and Mr. Eamonn Richardson, both of KPMG, were appointed special liquidators of IBRC and were charged with the task of selling the loan assets of IBRC.

7. Pursuant to (i) a Deed of Transfer dated 11th July, 2014, and (ii) a Deed of Conveyance and Assignment dated 11th July, 2014, each made between (i) IBRC, (ii) Kieran Wallace and Eamonn Richardson, and (iii) the plaintiff, the plaintiff purchased a portfolio of loans and related security from IBRC which included the defendants' commercial loan facilities and the guarantees and IBRC's interest in the mortgages. Copies of the Deed of the Transfer and Deed of Conveyance and Assignment were exhibited in the affidavit.

8. Mr. Hennessy stated that IBRC notified the defendants of the fact that the defendants' commercial loan facilities, which were guaranteed by the defendants, had been sold. On 7th July, 2014, the plaintiff notified the defendants of the fact that the loans had been purchased by the plaintiff. The relevant letters of notification were exhibited to the affidavit.

9. The defendants, having failed to repay the loan by the required date, by letter dated 13th March, 2015, the plaintiff demanded that the defendants pay the sum of €1,058,819.69, which was the amount then due in respect of the loan inclusive of principal and interest in arrears. These letters of demand were exhibited to the affidavit.

10. The defendants failed to repay the loan on foot of the letters dated 13th March, 2015. Accordingly, by letters dated 3rd

November, 2015, the plaintiff demanded that the defendants pay the sum of €1,109,296.46, which was the amount then due in respect of the loan inclusive of principal and interest in arrears. These letters were exhibited to the affidavit.

11. Mr. Hennessy stated that while the plaintiff was contractually entitled to apply default interest to the sum due and owing by the defendants, and the figures provided in the demand letters issued to the defendants on 13th March, 2015 and 3rd November, 2015, each included default interest, the plaintiff had decided not to seek recovery of the default interest in these proceedings.

12. Accordingly, as of the date of commencement of the within action, the sum of €1,087,315.07, inclusive of interest (but excluding default interest) remained due and owing by the defendants above all just credits and allowances. A copy of up to date statements of account confirming the amount due and owing were exhibited to the affidavit.

13. Mr. Hennessy stated that the sum due and owing to the plaintiff by the defendants, as of the date of the swearing of his affidavit, amounted to €1,089,847.88, inclusive of interest (but excluding default interest), and this sum remained due and owing by the defendants above all just credits and allowances. A copy of up to date statements of account were exhibited to the affidavit. In this application, the plaintiff seeks judgment for this amount as against the defendants jointly and severally.

14. Mr. Hennessy stated that from his knowledge of the facts, he did not believe that either of the defendants had any *bona fide* defence to the plaintiff's claim. It was his belief that an appearance had been entered by the defendants solely for the purposes of delay and not because there was any *bona fide* defence to the action. Accordingly, he sought judgment in the amount set out in the notice of motion.

The Defendants' Defence

15. In an affidavit sworn on 5th April, 2016, the second named defendant set out the defence which he and his father, the first named defendant, had to the plaintiffs' claim in these proceedings. He stated that in or about January and February 2013, an agreement had been reached between the first and second named defendants and Anglo Irish Bank plc (now IBRC) that the two properties, the subject matter of the loan facility in dispute, would be sold immediately. He stated that his sister, who operated a crèche in the ground floor of the premises known as Rathengle, 114 Merrion Avenue, Blackrock, Co. Dublin, had offered to purchase the entire property for €550,000. The second named defendant alleged that the bank had agreed that the property could be sold to Ms. Rice for this sum. He stated that at the request of the bank, he and his father had consented in writing to the sale of the property to her.

16. Mr. Foy stated that the apartment property at 12 The Turnstiles, Thornwood, Booterstown Avenue, Co. Dublin, was in very good condition. He stated that a purchaser had been identified to purchase the property and it had been agreed that the apartment would be sold for €490,000. He stated that if the sales of the two properties had gone ahead at that time, the entirety of the loan which was due and owing to IBRC would have been discharged and there would have been a small surplus sum of money left over to be divided between him and his father.

17. Mr. Foy went on to state that on 6th February, 2013, IBRC went into special liquidation. He stated that while a representative of the bank, one Ms. Ciara Doggett, had contacted his solicitor and the crèche owner to confirm that although the two sale deals had been agreed, the bank had now gone into liquidation and the liquidators would be in contact with the two purchasers and with Mr. Foy and his father, as the two sales would go ahead. However, he heard nothing further from the bank's representatives until in September 2013, he was contacted by the bank's representatives and told that the two sales were still proceeding. Mr. Foy and his father were asked to formally consent again to the agreed sales in writing, which they duly did.

18. Mr. Foy stated that, for whatever reason, the bank did not forward the title deeds to his solicitor so as to permit the sales to proceed. Eventually, due to the inaction on the part of the bank, the two sales were lost. Nothing further was done by the bank and interest continued to accrue on the principal sum.

19. Mr. Foy alleged that but for the reckless behaviour and delays on the part of the bank and due to the breach of its agreement to permit the sales to proceed, the sales were lost and, as a result, an opportunity was lost to repay the entire of the loans and they also lost the small surplus sum which would have been available to them, had the sales proceeded. Mr. Foy stated that he and his representatives contacted various people in IBRC to seek to rectify the matter, but despite of all of these efforts, nothing was ever done by the bank and he was simply ignored. Mr. Foy stated that the sole blame for the losing of the sales in 2013, was due entirely to the breach of agreement, negligence and inaction on the part of IBRC. He stated that the two properties were just sitting idle with no effort at all being made to sell them.

The Second Affidavit of Mr. Hennessy

20. A replying affidavit was sworn on behalf of the plaintiff by Mr. John Hennessy on 25th April, 2016. He stated that it was important to note that Mr. Foy did not dispute that the debt was advanced or that there was an obligation to repay it, nor did he allege that the plaintiff had been guilty of any wrongdoing. The defendants' case was based exclusively on acts and omissions attributed to IBRC, which was not a party to the action and held no interest in the loan, the subject of the case. He stated that he was unable to confirm with IBRC whether Mr. Foy's factual allegations were correct or not, but he had been advised that these allegations did not amount to a defence.

21. Mr. Hennessy went on to make a number of observations about the defendants' purported defence. Firstly, he stated that IBRC was entitled to have any property or properties secured against a loan, sold to discharge the loan. There was no need for a fresh "*agreement*" that any property or properties secured against a loan be sold to discharge that loan, because such property or properties would be charged against the loan and would be earmarked and/or appropriated to the repayment of that loan from the moment the charge documents were created.

22. Secondly, the allegations that IBRC breached the agreement which Mr. Foy asserted were hard to understand. Mr. Foy did not put much detail before the court as to the manner in which the agreement was reached and the detail that he did give, did not appear to provide a full description of the situation. He pointed out that Mr. Foy had referred throughout the affidavit to the "*crèche owner*" being willing to purchase the property at 114 Mount Merrion Avenue, when this person was, in fact, the defendants' sister. In such circumstances, the alleged agreement to purchase the property could hardly be considered to have been negotiated commercially and at arm's length.

23. He further stated that while the two properties had not yet been sold, there was no evidence that this had been due to the wrongdoing of IBRC. The second named defendant had simply asserted on affidavit (without giving any detail to support the assertion), that IBRC was asked to provide the title deeds to two properties so that the properties could be sold, but that because IBRC went into liquidation there were significant delays and ultimately the title deeds were not provided. He pointed out that the

second named defendant had not exhibited any correspondence, or provided any detail as to the nature of his communications with IBRC, so as to allow the court to ascertain whether what he said was a bare assertion, or whether there was anything more to it than that. He stated that there did not appear to be any factual basis contained in the affidavit upon which an allegation of breach of contract or negligence could be maintained against IBRC. Thirdly, he stated that if the court was satisfied that there was sufficient evidence that such a claim in negligence or breach of contract could lie against IBRC, that claim would lie only as against IBRC and would not be actionable against the plaintiff. The fact that a possible claim lay against IBRC, did not give rise to a cause of action against the plaintiff, such that the defendant may be relieved of the obligation to repay the loan. He pointed out that the plaintiff was barely mentioned in the affidavit sworn by the second named defendant. The allegation which was made at para. 7, that the plaintiff was in some way estopped from pursuing him and was bound to complete the two agreed sales, had no basis as it was not alleged that the plaintiff had entered into any agreement, nor was it alleged that the plaintiff committed any wrongdoing or made any representation to the defendants.

24. Mr. Hennessy stated that it seemed clear that the defendants acknowledged that the loan was advanced and that there was an obligation to repay it. The reason that they had put forward for refusing to repay the loan, was that there was wrongdoing on the part of IBRC. No detail whatever was given in respect of this allegation and no evidence was before the court which would enable the court to identify whether what was said amounted to a mere assertion, or whether it was supported by any form of external evidence. He stated that even if the court accepted that what was said could possibly amount to a claim against IBRC, that did not, as a matter of law, give rise to a defence against the plaintiff's claim.

Second Affidavit of Phillip Foy

25. The second named defendant swore an affidavit in response to Mr. Hennessy's second affidavit, on 9th May, 2016. He stated that the averment in Mr. Hennessy's second affidavit, to the effect, that the defendants were arguing that "*the debt the subject matter of this case is not repayable*", was a mistaken interpretation of their defence to the plaintiff's claim. The defendants were not contending that the loan was not repayable at all, but rather, that an agreement had been reached with IBRC as to how the debt would be repaid and that the plaintiff as an assignee of IBRC's interest was bound by such agreement and was not entitled to anything further.

26. The second named defendant stated that the plaintiff, as an assignee of the interest of IBRC, could not stand in any better position than the bank, as against the defendants. He noted that in Clause 3.1 of the deed assigning the interest in the loans to the plaintiff, it was stated that the plaintiff receives "*all such rights, title, interests, benefits, liabilities, duties and obligations as the Assignor may have in and to the Assets*".

27. In essence, the defendants' defence was that because the IBRC had agreed in January or early February 2013 that the Thornwood and Mount Merrion properties would be sold to the proposed purchasers at the sums indicated, and that such sales would have permitted the full repayment of the loan then due to IBRC, together with a small surplus for the defendants, and that such sales were lost due to the breach of contract and negligence on the part the bank itself, therefore, the defendants could say in response to a claim by the bank, that they were prevented from seeking anything more than the proceeds which they would obtain on a present sale of the two properties. The defendants maintain that as such a defence would have been available to them as against IBRC, it was likewise available to them as against the plaintiff.

28. Mr. Foy further asserted that due to the failure of the bank to complete the sales in January or February 2013, as it had agreed to do, the defendants had suffered loss and damage. He stated that in January 2013, all interest on the loan was fully paid up. Had the loan been repaid at that stage, none of the subsequent interest claimed by the plaintiff would be due. In addition, the defendants would have been entitled to the surplus realised by the sale of the property. He stated that the defendants were entitled to set off any such amounts as against any claim made by the plaintiff.

29. Mr. Foy stated that as a result of the agreement made by IBRC, which was fully binding on its assignee, that the plaintiff was estopped from maintaining these current proceedings and instead was bound to observe the agreement previously made in relation to how the loan would be repaid. The fact that the loan remained outstanding was due to the failure of IBRC to proceed with the agreed sales in 2013, and in these circumstances, the plaintiff was not entitled to any further sum over and above that which would be realised by the sale of the Thornwood and Mount Merrion properties.

30. Mr. Foy stated that while there may be a lack of documentary evidence of the agreement reached between the IBRC and the defendants in January or February 2013, and/or of IBRC's breach of same, that may be remedied when IBRC fully complies with the Data Protection Request made by the defendants of the bank and when the court has had the opportunity to hear the relevant witnesses in evidence. In addition, he stated that an order of discovery of documents may provide additional clarity in relation to the alleged agreement and its breach. He stated that in these circumstances the action was not suitable to be determined on a summary basis.

The Applicable Law

31. It was submitted on behalf of the plaintiff that a creditor has a number of avenues of redress as against a debtor. The creditor can sue the debtor, they could sell the mortgaged securities or they could sue a surety, if there was one. In this instance, the plaintiff had pursued the defendants on foot of the loan agreement, which it was perfectly entitled to do. In support of this proposition, the plaintiff referred to the decision of the Privy Council in *China and South Sea Bank Limited v. Tan Soon Gin (Alias George Tan),* [1990] 1 A.C. 536, at p. 545:-

> *"In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all."*

32. The plaintiff submitted that there was no allegation of wrongdoing as against the plaintiff company and it was fully entitled to pursue the debtors on foot of the loan agreement which had been assigned to the plaintiff. If the defendants were willing to sell the properties, the plaintiff was perfectly agreeable to that and the proceeds of sale being furnished to the plaintiff, in full or part discharge of the debt as the case may be.

33. In their submissions to the court, the defendants referred to the decision of the Supreme Court in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 and in particular to the following portions of the judgment of Hardiman J. at p. 621:-

> *"More recent Irish authority, in my view, supports the impression gleaned from authorities from the early days of the summary judgment jurisdiction, that the defendant's hurdle on a motion such as this is a low one and that the*

jurisdiction is one to be used with great care."

34. Having reviewed certain Irish authorities, Hardiman J. continued as follows:

> *"In light of these authorities, I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the late nineteenth and early twentieth centuries. The formulation used in First National Commercial Bank plc. v. Anglin [1996] 1 I.R. 75 and the cases cited in that judgment are useful and enlightening expressions of the test, but I do not believe that this formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. The 'fair and reasonable probability of the defendants having 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."*

35. Further on, Hardiman J. stated as follows at p. 623:-

> *"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?"*

36. The court has also had regard to the decision of the Supreme Court in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, where McKechnie J. commented on the conclusions reached by Hardiman J. in the *Aer Rianta* case and stated as follows at p. 7:-

> *"In his analysis of the law, Hardiman J. surveyed what might be described as the historical cases as well as the most modern authorities on this topic. His conclusion was, I think, that leave to defend should be granted unless it was 'very clear' that the defendant had no defence, not even one which could be described as arguable.*
>
> *From these cases it seems to me that the following is a summary of the present position:-*
>
> *(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(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;*
>
> *(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; 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."*

Conclusions

37. As noted in the above decisions, the hurdle which a defendant must cross in an application such as this, is a low one. The defendant will be allowed to defend the action in full plenary hearing, unless it is very clear that the defendant has no case. The court must ask itself is there either no issue to be tried, or only issues which are simple and easily determined? Do the defendants' affidavits fail to disclose even an arguable case?

38. It seems to me that the plaintiff's response to the defendants' allegation is somewhat misconceived. Firstly, the plaintiff states that as there is no allegation of wrongdoing against it, the defendant cannot successfully resist the plaintiff's application for judgment. However, this seems to me to miss the point that the plaintiff, as assignee of the debt from IBRC, cannot stand in any better position vis-à-vis the defendants, than the bank would have done.

39. The principle that the assignee of a chose in action has no greater rights than the rights of the assignor is well settled. In

Mangles v. Dixon (1852) 3 HL Cas 702 , St. Leonards L.J. at p. 731 stated:-

> *"If there is one rule more perfectly established in a court of equity than another, it is, that whoever takes an assignment of a chose in action, which this charter-party was, for it is not assignable in law, although it is in equity, takes it subject to all the equities of the person who made the assignment."*

40. This statement of principle was applied in Irish law in *Connelly v. Munster Bank* (1886) 19 L.R. Ir. 119, where the Vice Chancellor stated at p. 130:-

> *"In the case of Mangles v. Dixon (2) the principle of equity is laid down as one of the most perfectly established rules, that whoever takes an assignment of a chose in action takes it subject to all the equities of the person who made the assignment."*

41. In more recent times, this principle has been stated as being the law in *Treitel's The Law of Contract,* 14th Ed. (Peel) at para. 15 – 067:-

> *"An assignee takes 'subject to the equities', i.e. subject to any defects in the assignor's title and subject to certain claims which the debtor has against the assignor. He takes subject to such defects and claims whether they arise at law or in equity, and whether or not he knew of their existence when he took his assignment. And he cannot recover more than the assignor could have recovered. The object of these rules is to ensure that the debtor is not prejudiced by the assignment."* [Footnotes omitted]

42. A similar statement of the law in this jurisdiction is to be found in the textbook, McDermott, *Contract Law* (Dublin: Tottel, 2001) where the author states at para. 18.118:-

> *"An assignee takes subject to any equities that have matured at the time of notice to the debtor. The effect is that the debtor may plead against the assignor all defences that the debtor could have pleaded at the time when he received notice of the assignment."*

43. Finally, these statements of principle were accepted as reflecting the current law in Ireland by Haughton J. in his judgment in *Sheehan v. Breccia* [2016] IEHC 67.

44. I am satisfied that the statements cited above correctly represent the state of the law in this jurisdiction. Thus, the defendants are entitled to raise any defence which would have been available to them as against any claim made by IBRC. The fact that the wrongdoing alleged relates to the alleged breach of agreement and negligence on the part of IBRC, and that there is no allegation of wrongdoing on the part of the plaintiff, is irrelevant.

45. Secondly, the plaintiffs appear to be under a misapprehension, that the defendants were arguing that it had been agreed in January or February 2013, that IBRC, would only have recourse to the securities which they held for repayment of the loan. I do not understand the defendants to be making that case. Instead, they put forward a fairly simple proposition in the following terms: the defendants state that in January or February 2013, there was an agreement between them and the bank that the two properties would be sold for a combined total of €1,040,000. Thus, the defendants argue that, had the bank gone ahead with the sales at the time when it had agreed to do so, they would have been fully repaid their loans. Indeed, there would have been a small surplus left over for the benefit of the defendants. The defendants go on to argue that as the bank acted in breach of their agreement and recklessly and negligently failed to complete the sales at that time, and as those sales were lost, the bank would be restricted to whatever it would get on the sale of the two properties at the present time. The defendants argue that the plaintiffs, as assignee of the debt concerned, are in no better position than the bank and that they are similarly confined to whatever can be recovered on a sale of the two properties.

46. The defendants further argue that if the sales had gone ahead in January or February 2013, no further interest would have accrued on the principal sum and accordingly, the present plaintiff is not entitled to any interest which accrued subsequent to that time. Furthermore, the defendants argue that they are entitled to be given credit for the small surplus that would have been available to them, had the sales been completed in 2013.

47. It seems to me that in these circumstances, the defendants have raised an arguable defence to the plaintiff's claim herein. Accordingly, I will remit the action to plenary hearing.