Neutral Citation [2015] IEHC 375

THE HIGH COURT

[2013 No. 3815 S]

BETWEEN

DANSKE BANK A/S TRADING AS DANSKE BANK

PLAINTIFFS

AND

SEAN GILLIC, MICHAEL COLLINS AND BRIAN GORMAN

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on 21st May, 2015

1. The plaintiff seeks summary judgment against the second named defendant in the sum of €752,581.53. An appearance was entered by the second named defendant on 22nd January, 2014. An appearance was entered by the first defendant on the 31st January and judgment was obtained against the third defendant in default of appearance on an earlier date.

2. The plaintiff, then known as National Irish Bank granted the defendants a facility in the amount of €615,500 for the purpose of funding the purchase of 0.74 hectares at Cristendum, Fairybank, Waterford. The letter contained a condition precedent at clause 9 that a professional valuation be prepared by a valuer designated by the bank in respect of the property showing an open market value of not less than €1,200,000. The letter of facility was dated 1st December, 2006. It provided that the loan would be repaid in a single repayment by 30th September, 2008 and in the meantime interest on the loan was to be paid by eight consecutive quarterly instalments in arrears. The three defendants signed an acceptance of these terms and the money was drawn down. The property was eventually sold in June 2014 for €37,237.51 in the course of a receivership following the deduction of approximately €10,000 in respect of the receiver's fees. The facility was granted notwithstanding the fact that the property did not have planning permission for any development. The plaintiff has given all due credit and reduced the defendants' liability in respect of the net proceeds of sale.

3. It is accepted that the defendants signed the acceptance of the loan facility and drew down the monies. The second defendant claims that there are a number of defences open to him and that the matter should be sent for plenary hearing and this application for summary judgment should be refused.

The Legal Test

4. The principles applicable to this application are well established. In *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 the Supreme Court determined that the test is whether looking at the whole situation, the defendant has satisfied the Court that there is a fair and reasonable probability that he has a real and *bona fide* defence. This does not mean that the party must establish that he has a defence that will probably succeed; rather he must establish that it is probable that he has a *bona fide* defence. The applicable principles were summarised by McKechnie J. in *Harrisrange Ltd. v. Michael Duncan* [2003] 4 I.R.1 as follows:-

> *"(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;*
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> *(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;*
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> *(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;*
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> *(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 said credible?" - which latter phrase I would take as having as against the former an equivalence of both meaning and result;*
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> *(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;*
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> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
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> *(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."

5. The plaintiff claims that the second named defendant failed to make the necessary payments in accordance with the terms and conditions of the loan facility letter and by letters dated 13th August, 2013 wrote to the defendants demanding payment of the outstanding balance. On the 6th November, 2013 further letters of demand were sent for the outstanding money due which was not discharged.

6. The amount claimed also includes an amount of €40,056.76 in respect of a business current account held by the three defendants.

7. By order made the 3rd April, 2014 liberty to enter final judgment as against the first named defendant was granted by the Master of the High Court.

The Grounds of Defence
8. The second defendant submits that three possible grounds of defence arise as follows:

> 1) It is claimed that the loan facility was granted to an investment property company International Property and Investment Ltd. and that the loan agreement was signed by the second defendant in his capacity as director of the company and not in a personal capacity.
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> 2) It is claimed that the appointment of a receiver over the Waterford property is unlawful and in particular, should not have occurred on the 11th November, 2013 some five days after the 6th November, 2013 the date of the letter of demand from Ivor Fitzpatrick Solicitors from the plaintiff. It stated that payment was sought within seven days or the plaintiff may "commence legal proceedings and take whatever action is necessary to protect our client's interest".
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> 3) It is claimed that the plaintiff through its servants or agents made an unambiguous representation that the property would be "parked" for a significant period of 5-7 years from January 2009 and that the plaintiff relied on this representation to his detriment and that the property was subsequently sold for €47,600 in or about June 2015, less than could have been achieved had the property been disposed of at an earlier stage. The plaintiff claims a defence of "promissory estoppel" and that it is necessary for the issue to go to Plenary Hearing in order to allow for discovery of relevant documentation and the examination of various bank officials concerning this issue.

(1) International Property and Investments Ltd.
9. The second plaintiff claimed for the first time in his second affidavit that he signed the acceptance of the loan facility as a director on behalf of International Property and Investments Ltd. He denies that he signed the document in his personal capacity.

10. The evidence offered in support of this submission is that the term loan is referred to as a business loan by the plaintiff in the statement of accounts exhibited in the affidavit of Patrick Kennedy dated 27th February, 2014. Furthermore the facility letter is date stamped as received by the company and also required certified audited accounts of the company as a condition precedent to advancing the loan. In addition, it is said that in an email from an official of the bank, Mr. Noel McCole in 2008, the loan was provided due to the strength of the companies trading activity. The security for the loan was said to be the site of Cristendum, Fairybank, Co. Waterford which it is stated was always owed by International Property Investments Ltd.

11. Mr. Kennedy, in an affidavit on behalf of the plaintiff, states that, at page 6 of the facility letter, the defendants acknowledge that they were acting solely and exclusively on their own behalf within their trade or business as property investors. There was no mention anywhere in the facility letter of their acting in the capacity of directors of the company. The loan facility letter was sent to them at the company address. However it is submitted that that did not mean that the loan facility was drawn down by the company. Mr. Kennedy avers that the bank account into which the loan facility was drawn down was in the name of the three defendants and not that of the company. Furthermore, the audited accounts of the company were required to ascertain the likely income and repayment capacity of the defendants who drew an income from the company. It is claimed that the strong trading activity of the company encouraged the plaintiff to offer the loan to the defendants because they appeared to have a good repayment capacity based on the income they derived from it. The site at Cristendum was represented to the plaintiff as being owned by the defendants jointly and Mr. Kennedy states "I have not seen anything to (collaborate) the averment by Mr. Collin's that it was in fact owned by the company".

12. There is no evidence of any resolution by the board of the company to accept the terms of a loan facility and to authorise the directors to enter into the agreement with the bank. There is no correspondence to that effect. There is no correspondence between the bank and the company. There is no evidence of title adduced by either party to the Court in respect of the ownership of the land in Waterford. There is no evidence that any of the money was drawn down by or to a company account and the evidence of Mr. Kennedy that it was drawn down to an account in the names of the three defendants is uncontradicted. No company accounts are exhibited to support the proposition that the loan was a company liability.

13. The first affidavit submitted by the second named defendant was drafted without legal advice. The second affidavit was sworn on the 15th October, 2014 and is said to be filed by the solicitors, who came on record on the 21st October, 2014. Up to that point there was no suggestion that the defendants in particular the second defendant had entered the loan agreement other than in his personal capacity.

14. The course of dealing between the second defendant and the bank between 2008 and 2014 as set out in the documentation which is exhibited does not indicate that he is acting at all times as the director of the company on behalf of the company in dealing with the bank in respect of a company loan. Rather, the documentation indicates that he is acting at all material times in his personal capacity.

15. I am satisfied having considered the second defendant's response in the affidavits filed and the lack of evidence adduced on behalf of the second named defendant that there is no fair or reasonable probability that the defendant has a real or *bona fide* defence on this ground. The assertion is made late in the day that the second defendant was acting on behalf of the company and is in my view not credible having regard to the previous course of dealing between the parties. The documentation which might establish the involvement of the company in procuring the loan does not exist and there is no evidence in the documentation that the company was ever a party to this agreement, or that the signatures of the directors were rendered on its behalf, or that it ever received the money.

The Receivership
16. The issue of the appointment of a receiver is entirely irrelevant to the issues in this case. If the second defendant wished to challenge the appointment of a receiver he had ample opportunity to do so but did not. If he has any grievance in relation to the appointment or actions of the receiver or the decisions taken by him or any failure of duty on his part, he should properly pursue that matter with the receiver. Clearly, the second defendant considers it inappropriate that the receiver was appointed within the seven day period set out in the letter of demand sent by the plaintiff. The second defendant did not and could not have discharged the amount due within the 7 days. The plaintiff was entitled to initiate proceedings for the recovery of the money. I am satisfied that this ground does not give rise to an arguable defence.

Promissory Estoppel
17. The second defendant claimed that in September 2008 he met with an official of the bank concerning the fact that the loan was in default and required refinancing. On the 19th January, 2009 he held another meeting with the official and suggested a sale of the site or the procurement of a new investor to protect the banks position. He furnished figures concerning his personal income and outgoings. He was disappointed at the banks unwillingness to agree to a sale of the site at that time or to the involvement of another investor.

18. On the 11th June, 2009 a further meeting took place between the second defendant and Ms. Sinead McDonagh and Mr. David Douglas of the bank. A moratorium on payments was requested for at least 18-24 months in order to complete the planning process which would enhance the value of the site and the prospect of obtaining an additional investor. If an additional investor provided funds, the accrual of interest to date and over the period within which the planning process might be concluded would be discharged from this new investment money. Nothing came of this meeting and the second defendant claimed that the bank adopted a "wait and see" policy until the property market improved. The second defendant states that he continued to work hard with his architect and accountant to secure the planning permission and another investor.

19. Following receipt of the letter of demand on 13th September, 2010, a meeting was convened with the bank for the 24th November, 2010. On that date the second defendant claims that the bank proposed that the site be "parked" for a period of 5-7 years until the property market improved. He claimed that it was indicated that the bank would stop interest accruing during that period. He was asked to cooperate with Browne Asset Management Solutions, Cork to complete a report in respect of the site for the bank.

20. On the 30th November, 2010 the second defendant states that he met with Browne Asset Management Solutions and attended a further meeting with them on the 15th December. However, over the course of 2011 and 2012 the second defendant claimed there was no contact from the bank and that he never received a copy of the report. He believed at that stage that a solution had been agreed with the bank.

21. He states:

> "I say that the plaintiff through its servants or agents made an unambiguous representation that the property should be parked for a significant period commencing from their first advices in January 2009. I say that I relied on this representation to my detriment in that I believed the property was sold for €47,000 in or around June of this year, far less than could have been achieved if the plaintiff had not insisted on speculating on the property market for the past five years. I say that this is manifestly unfair in that I am now in far greater debt than I needed to be, had action been taken when requested.
>
> (18) I say and am so advised that I have a good defence of promissory estoppel against the plaintiff and that it is necessary for this matter to go to Plenary Hearing to allow for discovery of relevant documentation and the examination of various bank officials listed above."

22. Mr. Kennedy outlines the following history:

> "I say that Mr. Collins has offered a greatly simplified account of the defendants attempt to sell the site during 2009/2010. I say that the records of the plaintiff disclose a number of meetings with the defendants at which they advised the existence of an investor who was prepared to take a 50% stake in the property for €150,000. The defendants asked the plaintiff to bear with them until the investor came on board and planning permission was obtained for the site. In the event the investor never materialised and planning permission never came through. In late 2010 the plaintiff requested a report from Browne Asset Management Solutions as to the viability of the site and the options open to the defendants in the circumstances. The plaintiff paid for the report. I say that in a meeting with Mr. Collins and Mr. Gorman in November 2011 the plaintiff advised the need to sell the property and that the defendants would then be liable for any shortfall in repaying the loan facility. The defendants were requested to revert within two weeks with their proposals for addressing the situation but they never came back to the plaintiff.
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> (9) I met with Mr. Collins on the 28th June, 2013 and we reviewed the situation. I explained to him that the plaintiff had difficulties dealing with the matter when Mr. Gillic and Mr. Gorman had become uncontactable. Mr. Collins acknowledged the difficulties that had become apparent in relation to the potential sale of the site and he confirmed that he would assist the plaintiff in the sale of the site as best as he could."

23. By way of a specific response to the alleged agreement to "park" the property Mr. Kennedy stated:

> "12 …. I say that the plaintiff did not agree to "park" the property in the manner alleged by Mr. Collins. I say that the plaintiff tried to carry out an evaluation of the likely potential of the property which culminated in the Browne Asset Management Report. I say that it was apparent to both the plaintiff and the defendants in late 2011 that the sale of the property would be very difficult to achieve. I say that the defendants took no steps since that time to dispose of the property or to maximise its sale potential and in fact Mr. Gillic and Mr. Gorman effectively went to ground thereafter. I say that the site was eventually sold in around June 2014 for a sale price of €37,237.51. I say that despite the complaint made by Mr. Collins in para. 17 of his affidavit that this was far lower than the price which he could obtain some years ago, he has adduced no evidence whatsoever to support his contention that the site was more valuable in 2009 or 2010 or that it was even capable of been sold. It is striking that in spite of his complaint he has not advanced any estimate of the market value of the site in 2009 or 2010."

24. The second defendant relies upon the principles of promissory estoppel set out in *Central London Property Trust v. High Trees House Ltd*. [1947] 1 K.B. 130 summarised at para. 2.104 of McDermott Contract Law (Dublin: Butterworths 2001) which states:

"The key elements of a claim of promissory estoppel are as follows:

(i) a pre-existing legal relationship between the parties.

(ii) an unambiguous representation

(iii) reliance by the representee (and possible detriment)

(iv) some element of unfairness or unconscionability

(v) the estoppel is being used not as a cause of action, but as a defence or rule of evidence to stop the other party raising a defence.

(vi) the remedy is a matter for the Court."

25. I am not satisfied that the second defendant has adduced any cogent evidence of the type one might expect to exist if the agreement claimed was reached. There is no precise date given as to when it was agreed interest would not accrue or that interest did not accrue in or about January 2009 because of the agreement reached. There is no correspondence or memorandum of agreement relating to the terms upon which the bank would forebear to sue for the monies owed and for what precise consideration. The suggested duration of the alleged forbearance is said to be between 5-7 years. It is not tenable that the terms of such an agreement would not be committed to writing and precisely defined so that the obligations of the parties would be clearly set out. It appears to me to be unthinkable that the bank would agree to an open-ended unstructured, undocumented, forbearance to sue or to take any steps to secure its interests over a period of 5-7 years. It is not clear what, if any, obligations the second defendant had under any such agreement apart from the suggestion that he would cooperate with Browne Asset Management Solutions. In addition, it is clear from the evidence and accepted by the second defendant in one of the emails exhibited that Mr. Gillic and Mr. Gorman had become uncontactable and "gone to ground". They do not appear to be parties to this agreement. I am not satisfied that any of the essential elements of the creation of an estoppel sufficient to raise an arguable defence have been set out in the affidavits filed by the second defendant.

26. In this case the terms suggested for the "parking" of the loan or a "standstill" on the accrual of interest are unsupported by any documentary evidence and are so at variance with what might be expected to be documented in a normal commercial transaction that it renders the existence of such an agreement highly improbable (see Allied Irish Banks Plc. & another v. Farrell [2014] IEHC 395).

27. I am very conscious that the power to grant summary judgment should be exercised with caution. I have however, considered the entirety of the evidence and the facts set out in the several affidavits submitted. I do not consider that there is a fair or reasonable probability that the second defendant has a real or bona fide defence. I am not satisfied that what is advanced as a defence by the second defendant is credible in the sense in which that term is used in a McKehnie J. and Hardiman J. in Harrisrange and the Aer Rianta cases respectively. I am satisfied that the evidence adduced does not disclose an arguable defence and I am satisfied to grant Summary Judgment in the amount claimed.