Neutral Citation Number: [2012] IEHC 35

THE HIGH COURT

COMMERCIAL

2011 3257 S

BETWEEN

BANK OF SCOTLAND PLC

PLAINTIFF

AND

PATRICK SHOVLIN, PATRICK FITZPATRICK, ANTHONY FITZPATRICK, DEREK QUINLAN, RONAN O' CAOIMH, PATRICK MOONEY, PETER LAVELLE, AND NBH INVESTMENTS LTD

DEFENDANTS

Judgment of Mr. Justice Charleton delivered on the 23rd day of February 2012

1. This is an application for summary judgment by the plaintiff bank against such defendants as are later particularised in this judgment. It is made under a loan agreement dated the 28th August, 2006. The loan was for €180 million and the purpose of the defendants in borrowing that sum was to buy the Bank of Ireland headquarters in Baggot Street in Dublin. From the papers, it appears that the defendants purchased that building and that, through various corporate vehicles, it was leased back to the Bank of Ireland. The borrowing was made in the expectation of substantial profits. These may not, for whatever reason, have materialised.

Claim

2. The matter is based on the Rules of the Superior Courts 1986. Order 37 rule 7 provides:-

> "Upon the hearing of any such motion by the Court, the Court may give judgement for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just."

3. The papers sworn to on affidavit properly prove the loan, the demand and the failure by the defendants to pay the sums now due. This loan was a partial recourse loan; one where the liability of the defendants was not to the full sum borrowed, but to the sum of €25 million only and whatever proportion of the interest on the principle in its entirety should fall into arrears. Substantial proportions of the recourse amount have been paid by several of the defendants and interest payments have also been made. The sum due at the date of hearing can be stated in respect of each defendant on this motion as follows:

> Patrick Shovlin – recourse amount €6,250,000; interest up to 20 June 2011, the date of demand €1,162,741; additional sum up to hearing €516,706; total €7,929,447.
>
> Patrick FitzPatrick – recourse amount €3,125,000; interest up to 20 June 2011, the date of demand €581,370; additional sum up to hearing €258,353; total €3,964,723.
>
> Anthony FitzPatrick – recourse amount €3,125,000; interest up to 20 June 2011, the date of demand €581,370; additional sum up to hearing €258,353; total €3,964,723.
>
> Ronan O'Caoimh – recourse amount €1,223,500; interest up to 20 June 2011, the date of demand €207,618; additional sum up to hearing €101,150; total €1,523,268.
>
> Patrick Mooney– recourse amount €1,356,025; interest up to 20 June 2011, the date of demand €138,663; additional sum up to hearing €112,106; total €1,606,794.
>
> Peter Lavelle – recourse amount €407,825; interest up to 20 June 2011, the date of demand €75,871; additional sum up to hearing €33,716; total €517,412.

Summary judgment

4. The law as to entering judgment in a summary manner is clear. I am analysing whether I am required by the facts to enter judgment hereby or to instead remit the matter to a plenary hearing. To enter judgment now, it must be very clear that the defendants have no defence. Should an issue of law arise, I am entitled, but not bound, to decide that issue at this hearing. The mere statement of a defence in an affidavit is not necessarily enough to require a case to be sent to a full hearing; any defence must have sufficient credibility to have a reasonable prospect of success. Where a case is based on documents, a defendant must be in a position to show that the defence which they seek to make is not totally undermined by the contract in issue or by the correspondence between the parties. Denham J. summarised the relevant law in *Danske Bank v. Durkan New Homes Ltd.* (unreported, Supreme Court, 22nd April, 2010) [2010] IESC 22 at paragraphs 14-16 in this way:-

> 14. Several cases were opened before the Court which have addressed this jurisdiction. These included *Bank of Ireland v. Educational Building Society* [1999] 1 I.R. 220 where Murphy J. emphasised that it was appropriate to remit a matter for plenary hearing to determine an issue which is primarily one of law where a defendant identified issues of fact which required to be explored and clarified before the issues of law could be dealt with properly. He stated at p.231:-

> "Even if the position was otherwise, once the learned High Court Judge was satisfied that the defendant had "a real or bona fide defence", whether based on fact or on law, he was bound to afford them an opportunity of having the issued tried in the appropriate manner."

15. In Aer Rianta c.p.t. v. Ryanair Limited [2001] 4 I.R. 607, Hardiman J. reviewed Irish cases and concluded 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?"

16. In McGrath v. O'Driscoll [2007] 1 ILRM 203, Clarke J. described the law as follows, at p.210:-

> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

5. I am applying these principles in this judgment. Since I am satisfied that the debts against each of the defendants have been properly proven, I turn to the points raised in defence with a view to discovering whether or not it is very clear that there is no defence. If any defence is reasonably capable of affecting the result, then leave to enter final judgment must be refused and, instead, the matter must be remitted for a plenary hearing on oral evidence. I have a discretion as to whether to decide complex issues of law on this hearing. The issues raised are straightforward.

Amendment

6. For the first three defendants, Patrick Shovlin, Patrick FitzPatrick and Anthony FitzPatrick, it has been persuasively argued that there is an error in the summary summons. This is correct. The claim for relief seeks, as against each of the defendants, a proportion of the recourse sum of €25 million. The summons also seeks a due proportion of interest shortfall as demanded by the letter of the 20th June, 2011. No issue can arise in relation to that. These sums which are unarguably due and owing are set out over the first eight paragraphs in the prayer for relief. At paragraph (i) the following is claimed:

> Interest pursuant to contract from 20 June 2011 until the date of judgment on the sums set out at (a) to (h) above with a further interest from the date of judgment pursuant to contract and/or pursuant to statute.

7. What in fact should have been claimed is expressed as follows, in terms of the amendment sought in rectification of this understandable confusion:

> Such further interest on the principal sum as may occur until the date of judgment herein.

8. The Court, it is urged, is not entitled to amend the foregoing paragraph because to do so would be to amend the summary summons, a procedure outlawed by the Rules of the Superior Courts 1986. I cannot accept that that argument is correct under the current version of the Rules. I am satisfied that continuing interest can be claimed in judgment against a defendant where a principal sum is proven. In *Dublin Docklands Development Authority v. Jermyn Street Ltd. and Black Tie Ltd*. [2010] IEHC 217 at paragraph 3.4, a helpful indication of the situation in law was given by Clarke J. as follows:-

> "It was accepted on behalf of Jermyn Street that, by reference to *Stokes v Kerwick* [1921] 56 ILTR and *Gold Ores Reduction Company Ltd v Parr* [1892] 2 QB 14, continuing interest can be claimed in summary summons proceedings where the interest is provided for and ascertainable under the terms of the relevant contract or instrument or is fixed by statute. It is clear, therefore, that continuing interest can be claimed even though that interest accrues after the date on the summary summons is issued. It seems to me that there is no reason in principle by continuing rents cannot be claimed on the same basis. A failure to pay ongoing interest due under a contract is a fresh breach of the relevant contractual provision each time an obligation to pay newly accruing interest is not met."

9. I accept that statement of the law as being correct. In *Kiely v. Massey* (1880) LRI VI 445, Lord O'Hagan C. refused a motion for summary judgment on the basis of an absence of proof, stating at page 447:-

> "It appears to me that the exercise of the summary jurisdiction we are invited to apply ought to be strictly guarded, and that there should not be any looseness of practice in a matter in which, without the formalities of procedure which would formerly have protected a person impleaded, the Court is required summarily to make final adjudication, and conclude a defendant without enquiry, when, possibly, a fuller investigation might furnish grounds for a different decision."

10. I agree with the sentiments expressed in this decision which conform to the modern law as to summary judgment set out above. What is argued for the defendant is that the court has no power to amend a summary summons. In *Caulfield v. Bolger* [1927] 1 I.R. 117 a similar point to the previous case arose. What happened was that an endorsement on a summary summons was defective in failing to give particulars as to how a sum was due. An application for amendment was refused in the context of a requirement under the then existing Rules, that any such sum should be supported by particulars. The Rules were regarded, in the decision, as making such particulars central to a good endorsement of claim both in fact and in law. In this claim, however, there is no defect in the particulars furnished. Rather, the particulars summarise the claim and in full detail set out how each amount becomes due. I do not accept that the general power of amendment cannot now apply. This is not a case of any defect in the summons; far from it, here we see a properly pleaded summons containing within it an ambiguity which should be clarified. Order 28 rule 1 provides that the court may "at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just". That text goes on in an apparently imperative fashion; requiring that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties". The only real issue in controversy between the parties here is whether this sum of interest is due. On that there is no controversy. It is therefore appropriate to allow the amendment. An issue as to appropriate costs may, however, arise on which I will hear the parties.

11. The above point was not argued by the fifth named defendant and nor by the seventh named defendant, Ronan O'Caoimh and Peter Lavelle. Instead, the latter seeks a stay of three months of the entry of judgment against him and the former seeks a similar stay of six months duration. It is entirely reasonable, in the context of the sums claimed, and the attitude of these defendants to the claim, that time should be allowed. I propose to enter a stay of three months in respect of Peter Lavelle and a stay of five months for

Ronan O'Caoimh. Both sides will be liberty to apply in that regard.

No recourse

12. On behalf of the sixth named defendant, Patrick Mooney, it has been argued that a defect within the contract does not allow judgment to be entered. Rather than rehearsing the argument that has been made by quoting combative affidavit evidence, it is best to go straight to the contract. There are two points: that the bank is described in the contract as both an agent and as a principal; and that in the absence of evidence of the sale of Bank of Ireland headquarters, or at least its valuation at under the sum for recourse, that no money is due. I am, having read the contract documentation, satisfied that there is no bar to a party entering into an agreement as agent and as principal, provided that this is done in good faith and not with a view to obtaining an advantage by deception. The plaintiff, as party to the contract, always intended that the burden of the loan of €180 million would be spread among other large financial institutions. This was done by virtue of transfers that were later effected as to one third shares of the borrowed amount to National Irish Bank and Danske Bank. Even if, at the time of entering into the agreement for a loan as of the 28th August, 2006, the plaintiff was not then an agent, it is clear from the subsequent turn of events that the plaintiff always intended to become an agent and did become an agent for the other two banks. Thereby, had there been any defect, it was cured. I do not accept, in any event, that there was a defect in the first place.

13. The limited recourse clause is not so easy to construe. Clause 16.1 provides:

> Notwithstanding any other provision of the finance documents, the finance parties' recourse to each of the borrowers and each of the nominees in respect of the obligations shall (save as provided by clauses 16.2, 16.3 and 16.4) be limited to the secured assets. If the secured assets proved to be insufficient to meet all the obligations, the finance parties agree that they shall not (save as provided by clauses 16.2, 16.3 and 16.4) have any further recourse to any of the borrowers or their other assets or to the nominees.

14. Does this mean that the Bank of Ireland headquarters in Baggot Street must be sold before the summons can issue? I am prepared to take judicial notice of the fact that property prices in Ireland have crashed since peaking in 2007 and that today most properties are worth well over 50% less than at that time and, further, that development land and development buildings have fallen in value by approximately 70%. In some areas, the fall is more extreme; in others it is not so bad. The plaintiff says that if it is required to produce a valuer, it will do so. I am not prepared, however, in relation to any individual building to substitute my own view as to what it might be worth for evidence. A general picture of the marketplace does not necessarily translate into any particular value as regards the property in question in litigation. The expression "limited recourse" set out in paragraph 16.1 is subject to the exceptions therein set out. This includes clause 16.4, which provides as follows:

> Notwithstanding clause 16.1, each borrower and his assets shall be severally liable, and the finance parties shall have recourse to that borrower and his other assets, for: 16.4.1 is due proportion of all interest payable in respect of the facilities; and 16.4.2 his recourse amount as notified to the agent in writing by the borrowers' agent after the date of this agreement (the aggregate of all such recourse amounts is €25 million).

15. The foregoing makes it clear that there is no limit of recourse on the amount of interest on the principal sum of €180 million that has been borrowed and that, as to the principal sum, recourse is to be had only to €25 million. The clear distinction drawn between the interest payment and the recourse amount is inherent in the contract and is not dependent upon the sale of the assets or any valuation in that regard. It is clear that clause 16.1 is qualified by clause 16.4. The amount claimed is therefore due.

Result

16. In the result, I am required to enter judgment as against each defendant in the sums as set out above at paragraph 3. This is subject to a stay as earlier set out in respect of the fifth and seventh named defendants. I am making no order against any other defendant not mentioned in this judgment.