Neutral Citation: [2016] IEHC 183

THE HIGH COURT

[2014 No. 620 S]

BETWEEN

DANSKE BANK A/S

PLAINTIFF

AND

CONNOTES LIMITED AND SEÁN MCELVANEY

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 12th day of April, 2016

1. The plaintiff's claim pursuant to notice of motion dated 3rd June, 2014, is for summary judgment against the second named defendant in the sum of €6,397,301.64 on foot of a guarantee.

2. A guarantee was entered into by the second named defendant on 24th August, 1998, in respect of the liabilities of the first named defendant to the plaintiff, then known as National Irish Bank Limited. It is claimed that the second named defendant unconditionally guaranteed all monies due in respect of liabilities of the first named defendants to NIB present or future, actual or contingent together with interest and covenanted that if the first named defendant made default in payment when due, in respect of any of its liabilities to NIB, he would forthwith make payment on foot of the guarantee in respect of any amount demanded.

3. The rights and entitlements of NIB pursuant to the said guarantee were part of those rights and entitlements transferred to the plaintiff bank pursuant to the provisions of the Central Bank Act 1971 (Approval of Scheme of National Irish Bank Limited and Danske Bank A/S) Order 2007, S.I. No. 29 of 2007 and in particular, Article 10(1) thereof.

4. The guarantee entered into by the second named defendant states, inter alia:-

> "Whereby in consideration of the bank making or continuing advances or giving credit or affording facilities or granting time as long as and to the extent that the bank may think fit to Connotes Limited (hereinafter called 'the Borrower'), the Guarantor hereby UNCONDITIONALLY GUARANTEES the complete and prompt payment to the bank on demand of all monies due by and liabilities to the bank of and all its obligations to the bank whether present or future, whether actual or contingent…."

5. The guarantee is signed by Seán McElvaney.

6. The term loan facilities operating in favour of Connotes Limited and in respect of which the bank now seeks to rely was entered into on 13th January, 2004. The purpose of the facility of €6,450,000 by way of term loan and bridging finance of €250,000 was to part fund development work undertaken at Setanta House Hotel and the hotel's projected cash flow requirements. This development was a project undertaken by Connotes Limited. The company indicated its agreement to the terms and conditions of the loan facility through Mr. McElvaney. He acknowledged his obligation and an "All Monies Guarantee" which he completed in favour of the bank, in respect of Connotes Limited, by his signature which appears and is dated 3rd March, 2004. His authority to accept the loan facility offered is evidenced by a company resolution to that effect designating him as the person upon whose instructions the bank might act in respect of the drawing down of the monies under the facility. The authorities and resolutions are also dated 3rd March, 2004.

7. The company defaulted on its obligations and a letter of demand seeking repayment of monies due on foot of the loan facility issued on 21st June, 2011. A further letter dated 23rd June, was issued to Mr. McElvaney asking him to discharge his liability under the guarantee. Mr. McElvaney does not dispute that he signed the guarantee in 1998 or any of the other documents exhibited and upon which his signature appears. Though, he maintained in an affidavit sworn on 14th March, 2016, that he did not believe he was represented in a proper, appropriate fashion when he signed the original affidavit filed in this case and "consent[ed] to certain points that on mature reflection was a mistake" [sic]. Mr. McElvaney, who represented himself in this hearing (accompanied by a McKenzie Friend) indicated that it was not his intention to resile from the contents of the affidavits previously filed or his acceptance that he had signed the documents exhibited by the plaintiff.

8. Mr. McElvaney states that he set up Connotes Limited on 17th October, 1997. He purchased Setanta House Hotel in or about 1998, with finance furnished by National Irish Bank in the amount of €1.3m and Woodfield Investments in the amount of €300,000. At the time of the purchase Mr. McElvaney states that the company was represented by Beauchamp Solicitors and the bank by Whitney Moore Solicitors. He states that he did not have independent legal advice separate to that supplied to the first named defendant when entering the Guarantee.

9. Mr. McElvaney accepts that a loan offer issued in the terms of the letter dated 13th January, 2004, which has been exhibited. He states that this letter of offer itself stipulates that it must be accepted and signed by 30th January, 2004, but that this did not happen. The resolution authorising acceptance of the loan did not issue until 3rd March, 2004 and he claims the letter of offer exhibited was not signed on behalf of the first named defendant. It is quite clear that the loan offer was accepted by and on behalf of the first named defendant by Mr. McElvaney, who was duly authorised to do so as director of the company and in accordance with the company's resolutions. Furthermore, it is entirely open to the bank to extend the time and to confirm the loan acceptance offer notwithstanding the delay in acceptance. This does not, in any way, vitiate the agreement entered into between the parties.

10. Mr. McElvaney states that though he signed the guarantee he was not advised to get independent legal advice concerning its terms. He claims that he did not have very good reading skills due to the fact that he left school at the relatively early age of fifteen years. He said he did not understand the guarantee and, in particular, he did not realise that he had guaranteed all future debts including more than the IR£1.3m that he had borrowed at the time when it was first entered into. He did not anticipate that the personal guarantee would cover any other loans or borrowings in relation to the first named defendant company then or in the future

after the IR£1.3m was paid off. He had no recollection of a discussion concerning the personal guarantee in respect of the 2004 loan. He states that he would never have voluntarily entered into a personal guarantee for €6.4m since he had no personal assets or earnings which would have enabled him to repay such an amount.

11. A further point made in this affidavit is that a receiver was appointed to the first defendant in or around 2011. The second defendant claims that he is unsure as to the quantum now due by the first named defendant following the receivership and that confusion has been caused by the opening and closing of a number of accounts held by the first named defendant with the plaintiff in 2003 and 2004 without the knowledge and approval of the first named defendant.

12. The second defendant does not assert that the monies claimed were never drawn down by the first defendant or that the first defendant was not in default in repaying the monies due under the loan agreement. However, he does complain that a new loan was drawn down on 28th October, 2004, from the plaintiff by the first named defendant. Though he claims that a new loan account was created, he maintains that this was not done not under the agreement set out in the letter of 13th January, 2004.

13. A loan account No. 01030469 with an outstanding balance of €1,375,828.31 was closed on 1st March, 2004. On the same date, a new loan account in the name of the first named defendant, No. 77008910 was opened with the same balance but this was said to have been done in the absence of a request by the defendants. Complaint is made that the main loan account which operated under the letter of agreement was also closed on 28th October, 2011, and a new loan account No. 27008341, in the amount of €6,450,000 was opened on the same date. It is, therefore, claimed that the loan accounts, the subject matter of these proceedings, are not operated under the terms of the loan facility letter of 13th January, 2004. It is implied that these events are unlinked to each other or the guarantee when, as will be seen below, they are clearly a part of a continuing lender/borrower contractual relationship with the bank.

14. The next point made in this affidavit is that the guarantee was entered into in 1998, and that these proceedings did not issue until 26th February, 2014, in respect of a loan entered into in 2004. Consequently, it is said that the plaintiff's claim is statute barred.

The Law

15. The principles governing this case are summarised in *Harrisrange v. Duncan* [2003] 4 I.R. 1, and were set down in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607. The court must exercise caution when considering the issue and should only grant summary judgment if there is no reasonable possibility of an arguable or "credible" defence. Judgment should only be granted if it is very clear that the defendant has no case or there is no issue to be tried or only issues which are simple and easily determined and if the defendants' affidavits do not even disclose an arguable case. It is not the court's function on this application to form any general view as to the credibility of the evidence put forward by the defendant. However, an arguable defence is not established on the basis of mere assertions or unrealistic suggestions that evidence may be available in respect of a proposed defence or based on facts which are contradictory and inconsistent with uncontested documents (*Irish Bank Resolution Corporation (In Liquidation) v. McCaughey* [2014] IESC 44.)

Proposed points of Defence

16. The first point raised is that of non est factum. Three conditions need to be satisfied in order that this defence be successfully raised. Firstly, there must be a radical or fundamental difference between what the defendant signed and what he thought he was signing. Secondly, this mistake must be as to the general character of the document as opposed to its legal effect. Thirdly, there must be a lack of negligence i.e. the defendant must have taken all reasonable precautions in the circumstances to discover what the document was (see Saunders v Anglia Building Society [1971] AC 1004 and Morris J (as he then was) in *Tedcastle McCormick and Co. Limited v McCrystal* (unreported, High Court, 15th March, 1999) and Kelly J (as he then was) in *Allied Irish Banks Plc v Higgins and Ors* [2010] IEHC 219.).

17. Mr. McElvaney accepts that he signed a guarantee in 1998. He states that he was mistaken as to its effect in that he thought it was confined to the loan which existed at that time and did not apply to any future facilities or liabilities of the first named defendant to the bank. It is accepted that he knew the nature of the document i.e. it was a guarantee. He therefore believed and knew it to have the character and the effect of a guarantee. The transaction was clearly a commercial banking arrangement in which the second defendant agreed to be bound by the terms of the guarantee. The guarantee was a condition precedent to obtaining the banking loan facility on behalf of the first named defendant for whom he acted as director in executing the relevant documents. The loan facility letter of January, 2004 also clearly requires a guarantee to be entered into by the second defendant. It was for a substantially increased loan facility than that contracted for in 1998. I am satisfied that in signing a commercial agreement, the second defendant agreed to abide by its terms. If he has not taken the trouble to discover what the document contained or to be informed as to its meaning, he must accept the consequences of having signed such an agreement. I am not satisfied that the second defendant has established an arguable defence of non est factum. He has failed to advance any evidence that would establish the existence of an arguable case in respect of the three matters which are essential ingredients of the defence.

18. The first defendant's liability to the bank, which was not disputed by it or by Mr. McElvaney, grew to €6,449,000 at the end of 2002. The Setanta House Hotel did not reach its expected potential. The purpose of the loan facility letter of 13th January, 2004 was to accommodate a consolidation of the outstanding liabilities of the first defendant into one loan account. This occurred on the 28th of October, 2004.

19. The history of the refinancing of the first defendant's liabilities and loans with the plaintiff is set out in Ms. Moylett's affidavit. She specifically addresses the alleged "confusion" referred to in the second defendant's affidavit as follows:

> (a) the bank accepts that a loan account number 81037269 with a debit balance of €5,078,073.29 euro was closed on 8th of October, 2003 and that the outstanding balance was transferred to loan account number 07008899. This
>
> was done to ensure that the first defendant obtained the benefit of a lower interest rate which was a one month fixed Euribor rate and with the company's agreement;
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> (b) on 28th of October, 2004 the first defendant's then existing loan account number 77008910 with a debit balance of €1,375,828.21 and account number 07008899 with a debit balance of €5,090,225.44 were closed and the debit balances transferred to new account number 27008341. The company's existing loans were thereby consolidated as provided for in the facility letter of the 13th of January, 2004;
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> (c) it is also clear that earlier on 1st of March, 2004 the company's loan account number 01030469 with a debit balance of €1,387,805.21 was closed and the debit balance was transferred to loan account number 77008910. This step was taken in order to reduce the interest rate payable by the company on that loan from 5.0625% to 2.25% to the company's

benefit and with its agreement.

20. In this way the bank afforded the company a better interest rate in respect of its liabilities. Mr. McElvaney did not challenge the accuracy or truthfulness of this chronological history of the company's liabilities. I am satisfied that the change in the loan account numbers and consolidations which occurred do not affect the first defendant's underlying liabilities nor do they affect the continuing obligation of the second defendant under the guarantee. In that regard, on the 2nd September, 2002 when the new term loan was put in place for the first defendant, one of the items of security required was the personal guarantee given by Mr. McElvaney in respect of a sum of €4.7 million euro which was the subject of that loan agreement. In a letter of the 23rd of September, 2002 Mr. McElvaney acknowledged that those facilities were secured by his existing letter of guarantee of the 24th of August, 1998.

21. I am therefore satisfied that the proposition that there was any confusion on the part of Mr. McElvaney as to the nature and extent of the liabilities entered into by the first defendant or that he was mistaken as to the nature and extent of his liability under the guarantee is not supported by and is contradicted by the documentary evidence submitted.

22. The bank appointed a receiver over the hotel property owned and operated by the first named defendant in or about the 24th of June, 2011. The receivership continued until the 17th of October, 2014. The company's property was sold and the bank has received a sum of €815,033 from the receivership to date for which Mr. McElvaney has been given credit. A further sum of €10,569 was also credited to Mr. McElvaney. I am satisfied that any issue which Mr. McElvaney has with the appointment of a receiver or the conduct of the receivership is not relevant to the issues that arise on this motion. It is clear that the bank has given credit for the amount received and has reduced Mr. McElvaney's liability accordingly.

23. The second defendant also claims that the transfer of the business of National Irish Bank to the plaintiff bank is void and of no legal effect because it is claimed that the Minister for Finance, in effecting that transfer under S.I No. 29/2007 unlawfully relied upon section 33 of the Central Bank Act 1971. It is claimed that this section only permits the Minister to approve transfers from a transferor holding a licence issued from the Central Bank of Ireland to a transferee holding a licence issued from the Central Bank. It is claimed that the plaintiff never held a licence from the Central Bank.

24. It is clear from the evidence that the plaintiff's bank has been authorised as a credit institution by the Danish SSA in Denmark and is regulated by the Central Bank of Ireland for the conduct of lending and other banking functions. A letter has been exhibited in the second affidavit of Ms. Moylett from the Register of Companies of 2nd of February, 2007 confirming the establishment of the plaintiff's Irish branch. In addition the plaintiff is listed in section 2A of the credit institutions register published by the Central Bank of Ireland on its website for December, 2015 as a European Credit Institution (ECI) authorised in Denmark and operating a branch in the State. Furthermore, the bank has exhibited a letter from the Danish SSA confirming its authorisation as a credit institution.

25. This specific issue was addressed by Kearns P. in *Danske Bank A/S and Declan Crowe and Marion Crowe* [2015] IEHC 567. The learned judge accepted that though section 33 indicates that a "transferee" must hold a licence from the Central Bank of Ireland, these requirements were superseded and expanded by the European Communities EC (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. No. 395/1992). The court was satisfied that under these regulations, by the 1st of January, 1993, it was no longer necessary for each bank that was a party to a scheme of transfer of banking business to hold a licence issued by the Central Bank of Ireland in order to come within the scope of section 33 of the 1971 Act. The bank was "authorised to act as a credit institution in the State by virtue of the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 (S.I. No. 395/1992)" as set out in the provisions of S.I. 29 of 2007. The court therefore held that the submission as to the validity of S.I. 29 of 2007 was misconceived and that the Minister was entitled to approve the scheme of transfer from National Irish Bank to the plaintiff bank under the provisions of those regulations. I am therefore satisfied that in this case, for the same reasons, Mr. McElvaney has no arguable defence on this ground. Furthermore, Mr. McElvaney's consent was not required for this transfer.

26. Mr. McElvaney discharged his solicitors on the 22nd December, 2015. Prior to their discharge Mr. McElvaney served a notice to cross-examine Ms. Moylett on the 19th of November, 2015. A second notice to cross-examine Ms. Moylett was served on the 9th of January, 2016. The plaintiff served a notice to cross examine Mr. McElvaney on the 29th of February, 2016. The second defendant sought to cross examine Ms. Moylett at the hearing. Having considered the issues in the case I determined there was no factual issue in dispute between the parties such as to justify cross-examination.

27. The main facts of the case are not in dispute. Ms. Moylett was not engaged in the negotiation of the loan agreements or the letter of guarantee. I was not satisfied that cross-examination of either of the deponents in this case would assist me in the resolution of the issue as to whether there was an arguable defence available to Mr. McElvaney. Ms. Moylett was present in court. I requested that Mr. McElvaney identify the relevant conflict or conflicts of fact which he wished to address in cross-examination and he replied that he wished to cross-examine Ms. Moylett generally in relation to the contents of her affidavits. He could not identify any specific issue of fact relevant to the points of defence which he wished to raise in respect of which he might usefully cross-examine Ms. Moylett (see *Irish Bank Resolution Corporation Limited (In Special Liquidation) v Moran* [2013] IEHC 295 per Kelly J and *Lehane As Official Assignee In Bankruptcy In The Estate of Dunne & Dunne* [2016] IEHC 96 per Costello J).

28. I am satisfied that Ms. Moylett was the debt recovery manager for the plaintiff and made her affidavit from her own knowledge and from the examination of the books and records of the plaintiff and examination of the records of the plaintiff bank in accordance with the provisions of the Bankers Books Evidence Act 1879 – 1989. None of the facts set out by Ms. Moylett relating to the operation of the plaintiff company's account are contradicted by Mr. McElvaney. On the contrary, he agrees with many of the core elements and facts of the plaintiff's claim. There was no basis upon which to permit cross-examination of Ms Moylett or direct that the Plaintiff's affidavits might not be relied upon since she was made available for that purpose if it were permitted.

29. Furthermore, I am not satisfied that there is any merit in the objection to Ms. Moylett's affidavits taken by Mr. McElvaney on the basis that they are not in accordance with order 40 rules 4 and 9 and order 90 rule 13 of the Rules of the Superior Courts (see *Kearney v Bank of Scotland Plc and Anor.* [2015] IECA 32).

Conclusion

30. I am satisfied for all of the reasons set out above that there is no reasonable ground for concluding that the second defendant has any arguable or "credible" defence to the plaintiff's claim in these proceedings. I am therefore satisfied that the plaintiff is entitled to judgment.