

THE HIGH COURT

[2013 No. 2523 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

MARGARET LIKELY

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 11th of October, 2016

1. This is an application in which the plaintiff seeks an order setting aside the order of the Master of the High Court made the 14th October, 2014 dismissing the plaintiff's claim herein because the said claim was said to have been pleaded personally against the defendant and not as executrix of the estate of her late husband, James Likely and also seeks summary judgment against the defendant.

2. Paragraph 2 of the special endorsement of claim on the Summary Summons dated the 6th August, 2013 describes the defendant as:

"A retired draftswomen and at all material times, is and or acts in the capacity of sole executrix of the estate of one James Likely (otherwise Hugh James Likely) deceased, late of "La Rocha", Driminnin, Barnesmore in the County of Donegal."

3. Paragraph 4 describes how a grant was extracted from the Probate Office of the High Court on behalf of the defendant in respect of the estate of the late James Likely on 30th March, 2012. Paragraph 5 clearly states as follows:

"The plaintiff's claim against the defendant, in her capacity as sole executrix and legal personal representative of the estate of the late James Likely (herein and after referred to as the deceased) is for the sum of €1,544,927.32 together with further interest as set out hereunder for which a lawful demand has been made and which amount remains due and owing to the plaintiff. ..."

4. In the prayer for relief set out in the Special Indorsement of Claim the plaintiff claims:

"(a) An order of this honourable Court directing that the defendant do pay the plaintiff the sum of €1,554,927.32."

5. I am satisfied that there is no doubt that the plaintiff's claim is and could only be brought against the defendant as executrix of her late husband's estate pursuant to the grant of probate referred to above. That is the capacity in which she is sued and is the only capacity in which she could be made liable as it is made perfectly clear by the terms of the Special Indorsement of Claim which sets out in considerable detail the history of her late husband's dealings with the bank leading to the liability claimed against the estate and in particular para. 5 thereof. I am satisfied that this paragraph is in full compliance with o. 4, r. 9 of the Rules of the Superior Courts and Appendix B, Part 1 thereof and clearly demonstrates a capacity in which the defendant is sued and the amount claimed. I am satisfied therefore to set aside the order of the Master of the High Court.

Legal Principles

6. The legal principles applicable to an application for summary judgment are well established. They are summarised as follows Ryan J. (as he then was) in *Allied Irish Banks plc -v- Farrell* [2014] IEHC 395 (at paras 32 to 34) applying the decision of the Supreme Court in *AerRianta v. Ryanair* [2001] 4 I.R. 607:

1. Is there a fair or reasonable probability of the defendant having a real or *bona fide* defence? If so, judgment must be refused and the matter determined at plenary hearing. If not, the plaintiff is entitled to judgment.
2. The mere assertion in an affidavit of a given situation as the basis of a defence does not of itself provide leave to defend.
3. To grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the *bona fides* of the defendant or to doubt whether the defendant has a genuine cause of action.
4. The court looks at the case as a whole to see whether the defendant has established that there is a fair or reasonable probability of having a real or *bona fide* defence.
5. Is what the defendant says credible? If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.

(i) The standard of proof for a defendant at this stage must as a matter of principles be a low one.

(ii) The onus of proving lack of credibility is on the plaintiff.

6. In *AerRianta*, McGuinness J. identified the issue whether the proposed defence is so far fetched, so self-contradictory as not to be credible.

7. Hardiman J. asked: Is it "very clear" that the defendant has no case?

(i) Is there either no issue to be tried or only issues which are simple and easily determined?

(ii) Do the defendant's affidavits fail to disclose even an arguable defence?

8. The court takes the nature and context of the dispute into account. Hardiman J. referred to the facts of the cases in the authority cited and observed that in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, "the indisputable documentation of a commercial transaction rendered the alternatively chronology proposed by the defendant quite untenable".

7. These principles were also summarised by McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1. The learned judge emphasised that leave should not be granted where the only relevant averment in evidence is a mere assertion of a given situation which is to form the basis of the defence. 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 and the overriding determinative consideration of the constitutional right of access to justice and the achievement of a just result.

The Plaintiff's Claim

8. The claim is based upon a number of Guarantees given by the deceased.

Guarantees Re James Likely Limited

9. On 26th June, 2006, the deceased James Likely provided a written guarantee to the plaintiff whereby he agreed to guarantee all sums which were or would thereafter become due and owing to the plaintiff by James Likely Ltd. not exceeding the sum of €890,600.00 together with specified interest.

10. On 5th July, 2006, the plaintiff agreed to provide various credit facilities to James Likely Ltd. which included:

(a) An overdraft facility in the amount of €400,000.00 as working capital to be reviewed on the 8th June, 2007 and a second facility in the amount of €120,599.55 to an existing loan account. A third facility in the amount of €370,000.00 was provided pursuant to a second loan account it was a new account payable over four years from 1st July, 2006 for the purpose of prefunding pension contributions for the deceased as a Director of James Likely Ltd. The guarantee as a security had to be put in place before drawdown of the funds.

11. On 8th May, 2007, the deceased James Likely provided an additional guarantee in writing to the plaintiff (which the plaintiff claims was not in substitution for the previous guarantee of 5th July, 2006) whereby, in consideration of the plaintiff agreeing to make or continue advances to James Likely Ltd., the deceased agreed to pay on demand all sums which were or would thereafter become due and owing to the plaintiff by James Likely Ltd. in the amount not to exceed €1,011,000.00 together with specified interest.

12. On 28th February, 2008, the plaintiff granted additional credit facilities to James Likely Ltd. and agreed an overdraft facility in the amount of €600,000.00 upon the net aggregate balances of the current accounts bearing numbers 20874053 and 20873089 held and maintained on behalf of the company by the plaintiff for the purposes of providing working capital to James Likely Ltd. which was subject to review on 19th February, 2009. It was subject to the terms and conditions set out in the letter of sanction provided to the company dated 19th February, 2008. The advances to the company were repayable upon demand.

13. On 20th April, 2009, the plaintiff agreed additional credit facilities with James Likely Ltd. pursuant to which an overdraft facility was provided in the amount of €800,000.00 upon the net aggregate balance of the current accounts numbers 20874053 and 20873089 held and maintained on behalf of the company by the plaintiff for the purpose of providing working capital to the company.

14. The plaintiff claims that it was agreed by the plaintiff and the company that the advance of these credit facilities was subject to the following special conditions that:

(a) Outstanding arrears in the amount of €16,996.10 accrued upon the loan account number 20873402 would be cleared in full and

(b) The existing overdrawn balance upon the current account number 20873089 held and maintained on behalf of the company would be cleared upon the debiting of the current account bearing number 20874053 also held by the company.

The borrowings upon the various accounts as provided by the plaintiff to the company under the various extensions of credit facilities pursuant to the letter of sanction dated 20th April, 2006 was repayable upon demand.

15. The plaintiff claims that James Likely Ltd. operated each of the various overdraft facilities upon the net aggregate balance of the current accounts bearing numbers 20873089 and 20874053 outside the terms and conditions applicable and made default in repayments due to the plaintiff pursuant to each of the loan accounts numbered 20873402 and 4142618000510826. It is claimed that in so doing the company was in default of the terms and conditions applicable to the respective letters of sanction which were defined by the General Terms and Conditions Governing Business Lending. The plaintiff therefore sought the sum of €1,275,063.10 to the aggregate amount of the debit balances upon the respective accounts as follows:

Account Number Amount Due

Current Account No. 93718520873089 €72,143.13

Current Account No. 93718520874053 €1,013,432.36

Loan Account No. 93718520873402 €182,221.36

Loan Account No. 4142618000510826 €7,266.25

Total Due €1,275,063.10

16. The plaintiff demanded of the defendant in her capacity as executrix of the estate payment in the amount of €1,132,238.99 then due on the 12th June, 2012 on foot of the guarantees, as the aggregate of the debit balances due on the various credit facilities and

loan accounts held and maintained on behalf of the company James Likely Ltd. by the plaintiff.

Guarantee Re: Ballyshannon Hire Centre Ltd.

17. On 20th August, 2009, the deceased provided an additional guarantee in writing to the plaintiff as a condition of granting credit facilities to Ballyshannon Hire Centre Ltd. under which the deceased agreed to pay the plaintiff on demand all sums which were or would thereafter become due and owing to the plaintiff by the said company. The amount of the guarantee was not to exceed the sum of €66,000.00 together with specified interest.

18. On the same date the plaintiff agreed to provide credit facilities to Ballyshannon Hire Centre Ltd. in the amount of €66,000.00 pursuant to an existing loan account bearing number 02292100 held and maintained on behalf of the company by the plaintiff for the purpose of restructuring of and in substitution for existing facilities upon the loan account. This was made subject to a special condition that the sum of €24,350.00 provided by the plaintiff pursuant to this facility would be used by the company to clear an outstanding balance on 20th August, 2009 which had accrued upon current number 02292027 held by the company with the plaintiff. That credit facility was subject to the terms and conditions set out in a letter of sanction provided on 20th August, 2009. It was also a term of that agreement that the company would make consecutive weekly payments in the amount of €208.07 per week to the plaintiff over eighty-four months commencing on 28th August, 2009. The sum advanced was repayable on demand. Ballyshannon Hire Centre Ltd. operated current account number 02292027 with the plaintiff and it was agreed that any overdrawn balance would be repayable on demand. The plaintiff claims that Ballyshannon Hire Centre Ltd. operated that account outside the terms and conditions applicable. It also claims that the company made default in repayment of the loan agreement number 02292100.

19. As a result, the plaintiff claims that Ballyshannon Hire Centre Ltd. had become liable to the plaintiff in the amount of €46,056.56 as debited balances upon the respective accounts as follows:

Account Number Amount Due

Current Account Number 93718502292027 €4.70

Loan Account Number 93718502292100 €46,056.56

Total Due: €46,061.26

20. On 12th June, 2012, the plaintiff wrote to the defendant in her capacity as executrix of the estate of the late James Likely demanding the payment of the amount of €44,091.79 on foot of the guarantee.

James Likely Deceased

21. The deceased in his own capacity entered into agreements with the plaintiff pursuant to which sums of money were advanced by way of loan or credit facility to him. On 11th July, 2008, the plaintiff agreed to provide credit in the amount of €249,000.00 pursuant to the renewal for an additional period of twelve months of an existing loan facility under account number 07294184 operated by the deceased for the purpose of assisting with the costs of renovations to three adjoining properties at East Point, Ballyshannon, Co. Donegal. The terms and conditions previously applicable to the said loan account were continued in accordance with the terms and conditions of the letter of sanction dated the 11th July, 2008.

22. This loan was restructured pursuant to a further agreement dated the 18th February, 2009. Quarterly interest charges due upon sums advanced in respect of account number 07294184 during the intervening period between 11th July, 2008 and 18th February, 2009 were charged to another current account bearing the number 20876850 in the deceased's name. The advance of this credit facility was made subject to a special condition that, if the balance of the account number 07294184 had not been cleared in full by the 13th February, 2009, capital and interest repayments would commence upon terms satisfactory to the plaintiff.

23. On 20th August, 2009, a future agreement was entered into whereby credit facilities were advanced to the deceased as follows:

(a) An overdraft facility in the amount of €10,000.00 upon the net aggregate balance of current account numbers 20876182 and 20876421 held and maintained on behalf of the deceased by the plaintiff;

(b) Credit in the amount of €238,652.00 pursuant to the existing loan account number 07294184 held by the deceased for the purpose of the renewal of and in substitution for existing facilities held by the deceased with the plaintiff; and

(c) Credit in the amount of €134,512.00 pursuant to existing loan account number 20876934 for the purpose of the renewal of and in substitution for existing facilities held by the deceased with the plaintiff and assisting with the purchase of a property by the deceased.

24. The advance of these credit facilities was subject to the terms of the letter of sanction dated 20th August, 2009. It was also agreed that the terms and conditions that had previously applied to the existing loan account number 07294184 and 20876934 would continue to be applicable on foot of the advance of the additional credit facilities.

25. The defendant agreed that the outstanding amount of €238,652.00 due on foot of loan account 07294184 would be repaid over a period of one hundred and twenty months commencing on 20th September, 2009 by twelve consecutive monthly instalments of €791.19 in respect of interest to be followed by one hundred and eight consecutive monthly payments of €2,632.55. It was also agreed that the amount of €134,512.00 due on loan account number 20876934 would also be repaid over the same period by way of twelve consecutive monthly payments of €445.94 in respect of interest to be followed by one hundred and eight consecutive monthly payments to the plaintiff of €1,483.79. In addition it was agreed that all of the borrowings on the various accounts were repayable upon demand. The plaintiff claims that the deceased at various times operated the overdraft facility on current accounts bearing numbers 20876181 and 20876641 outside the terms and conditions applicable and made default in repayments due to the plaintiff pursuant to each of the loan accounts bearing numbers 07294184 and 20876934. As a result, the plaintiff claimed that the deceased became liable personally in the aggregate amount of €223,802.96 as follows:

Account Number Amount Due

Current Account Number 93718520876181 €9,992.54

Loan Account Number 93718507294184 €106,582.41

Loan Account Number 93718520876934 €106,232.01

BBIBBALO/Account Number 91290012 €996.00

Total Due: €223,802.96

The plaintiff sent a letter of demand to the defendant as executrix of the estate of her late husband enclosing a certificate of balances on the account of the deceased as of the close of business of 5th June, 2012 and demanding payment of €384,239.00 which was the amount then representing the aggregate of the debit balances of these accounts which was reduced to €223,802.96 following the application to the debit balances of the proceeds of a policy of life assurance held by the deceased.

26. The total aggregate amount due on foot of all of these accounts and guarantees was initially €1,600,239.78.

Proposed Points of Defence

27. The following are the proposed points of defence which were raised in the affidavit submitted by the defendant.

The 2007 Guarantee

28. The defendant claims that the first guarantee in respect of James Likely Ltd. dated 5th July, 2006 whereby the deceased gave a guarantee of an amount not exceeding €890,600.00 was superseded by the guarantee entered into on 8th May, 2007 which it is said was a substitution for the earlier guarantee. The later guarantee was in an amount not exceeding €1,011,000.00. Both were in respect of liabilities of James Likely Ltd. to the bank.

29. Clause 13 of the 2007 Guarantee states:

"The guarantee shall be in addition to and not in substitution for any other guarantee or security for the obligations of the customer given by the guarantor to the bank."

The customer's name is James Likely Ltd.

30. There is no evidence apart from the assertion made which is clearly contrary to the terms of Clause 13 that the second guarantee was in substitution for the first guarantee. I am satisfied that this proposed ground did not go beyond a bold assertion and does not reach the threshold of an arguable or credible defence.

Alleged Pension Fund Loses

31. The defendant claims as executrix of her husband's estate to have a defence of set off in respect of the plaintiff's claim. It is alleged that the plaintiff advised the deceased to contact Goodbody Stockbrokers to obtain advice in relation to his pension. The defendant states that Goodbody Stockbrokers though now under different ownership was until in or about September 2010 a member of the AIB Group of companies. The defendant alleges that the plaintiff is liable to her late husband's estate because of misconduct which is alleged at paras. 15 to 32 of the defendant's affidavit of the 23rd January, 2015.

32. The relevant principles applicable to a claim of set-off in an application for summary judgment were considered by Clarke J. in *Moohan v. S & R Motors (Donegal) Ltd.* [2008] 3 I.R. 650 in which he held that when a cross-claim is advanced the court has a somewhat wider discretion than that available under the test formulated in *Aer Rianta* for the granting of leave to defend. He stated at para. 4.2:-

"(a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiffs claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendants case, it would not be inequitable to allow the asserted set off.

(b) If, and to the extent that, a prima facie case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate portion of) the claim (...)

(c) If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in *Prendergast v. Biddle* (Unreported, Supreme Court, 21st July, 1957)."

33. It is claimed that in January 2007 the deceased entered into a "discretionary account agreement" with Goodbody Stockbrokers for the opening of an "Approved Retirement Fund" and "Approved Minimum Retirement Fund". This provided that Goodbody Stockbrokers agreed to manage a portfolio for and on behalf of the deceased and to make investments on his behalf subject to any instructions that he might give. It provided that the investment was for the purpose of procuring capital growth with a moderate level of risk and involved a period of investment of three to five years. At the time the agreement was made the deceased was sixty-one years old and considering his retirement.

34. The defendant claimed that her late husband invested a sum of approximately €900,000.00 in this pension portfolio having taken 25% of the initial investment of €1.2 million. The source of the funds to be invested is apparently unclear from records available to the defendant but included:

(a) A transfer of the balance on a Construction Industry Federation pension;

(b) A transfer of the balance of a New Ireland Assurance pension;

(c) Sale of land;

(d) A loan from the plaintiff to James Likely Ltd. of €370,000.00 for the purpose of prefunding pension contributions.

35. The loan was advanced by the plaintiff to James Likely Ltd. in the amount of €370,000.00 payable to a new loan account number 20873402 on 5th July, 2006, the same day as the first guarantee given by the deceased in respect of the facilities granted by the bank to the company. The value of this portfolio which included matters set out at (a) to (d) stood at €250,000.00 on 10th October, 2012 which it is claimed, represented a loss in the region of €650,000.00 to the estate of the deceased. It is claimed that Goodbody's

recommended investments were of a character that put the capital value of the portfolio at risk; they were entirely unsuitable as they were comprised of investments in "very high risk structured products" which were not listed on any exchanges and therefore very "illiquid". It is claimed that the completely inappropriate nature of some of these investments and the extent of the capital losses at a time so near to her late husband's retirement were clear evidence that Goodbody and the plaintiff were in breach of their duty to the deceased. Furthermore, both were aware that her husband was not advised and did not take independent legal advice in relation to the pension fund.

36. Complaint was made that Goodbody Stockbrokers did as follows:

(a) Recommended shares and loan notes in a joint venture company called Taggart Holdings to acquire sites for property development in Belfast.

Goodbody's described themselves as "members of Allied Irish Banks Plc.". The bank funding was advanced by First Trust Bank, a UK subsidiary of the plaintiff. The deceased is said to have invested STG£100,419.80 in this transaction which as of 10th October, 2012 was valued at STG£0.11p.

(b) The deceased invested €130,000.00 in a European hotel consortium through European Hotel Investment No. 1 Limited Partnership.

(c) The sum of STG£150,478.83 was invested in "Mezzanine Equity" by Crescent Link LM Plc. which advanced an interest free loan into a corporate structure set up to develop land in Northern Ireland. A letter from Goodbody is exhibited relating to this investment dated 3rd July, 2009.

(d) A future structured investment to purchase €100,000.00 in unsecured loan notes issued by International Securities Trading Corporation.

37. The defendant attributes all of the losses incurred by her late husband to Goodbody's. She claimed that the loan of €370,000.00 was procured by the intervention of Goodbody Stockbrokers with the plaintiff bank. The plaintiff recommended that the deceased take pension advice from Goodbody's who in turn recommended that the monies be borrowed from the plaintiff to make the pension investment.

38. The plaintiff claims that although a loss of €650,000.00 was claimed in para. 21 of the replying affidavit no claim was made against Goodbody Stockbrokers or the plaintiff prior to the institution of these proceedings. The plaintiff refutes the submission that there is "either a partnership or agency" between the plaintiff and Goodbody Stockbrokers or that they were operating "as a single economic entity" and maintains that there is no evidence to support this contention other than the defendant's assertion that the plaintiff and Goodbody Stockbrokers were acting together in relation to her husband's pension and investments. In respect of the €370,000.00 loan the plaintiff correctly states that borrowings were made by James Likely Ltd. for the express purpose of prefunding pension contributions for the deceased on 5th July, 2006 and that the obligation under the guarantee was that the deceased must make repayment without any deduction for set off or counter claim from the deduction.

39. In that regard, Clause 16 of the guarantee states that all sums payable by the guarantor

"... shall be paid in full without any deductions set off, counter claim or withholding whatsoever and without any deduction for or on the account of any present or future taxes, levies, impose, duties, deductions or withholding or other charges of whatever nature imposed, levied, collected, withheld or assessed unless the guarantor is compelled by law so to do ..."

A similar clause is contained in the guarantees entered into in May 2007 and 12th June, 2012.

40. Thus it is submitted by the plaintiff that apart from the fact that Goodbody Stockbrokers and the other entities involved in the various investments are separate legal entities from the plaintiff, there is no other legal basis upon which to seek a set off in respect of the guarantees the subject matter of these proceedings.

41. I am satisfied that no evidence has been tendered beyond the assertion that losses have been incurred to support the proposition that they were due to negligence and breach of duty or negligent misstatement by or on behalf of the plaintiff or indeed Goodbody Stockbrokers. The suggestion or opinion is advanced that because of his age the investments which the applicant was directed towards were unsuitable for his pension fund whether funded from the loan obtained from the bank or the other sources referred to above. That is not sufficient.

42. I am not satisfied that the alleged privity or proximity between the plaintiff and Goodbody Stockbrokers as asserted in these proceedings or as suggested between the plaintiff and the other entities involved in the investments offer any defence to the plaintiff's claim in these proceedings. There was no attempt on the part of the defendant to frame a set off on the basis of a recognisable cause of action which is based on negligence, breach of duty, misrepresentation, negligent misstatement or otherwise based on cogent evidence. I am satisfied therefore that the defendant has no defence or one that could be described as arguable against the plaintiff or that there is fair or reasonable probability of a real or *bona fide* defence. Furthermore, if the defendant has a cause of action it seems to primarily lie against Goodbody Stockbrokers, if at all. I am not satisfied that the defendant has demonstrated a sufficient basis upon which to mount a cross claim whether by equitable set off or otherwise. There is no sufficient evidence to justify advancing such a claim nor is there any material advanced upon which the particulars of any such claim might be framed against the bank.

Acknowledgment

43. The defendant acknowledges that there is a debt owed to the plaintiff by the estate and has made payment from the proceeds of sale of assets of the estate which were secured in favour of the plaintiff in part discharge of that liability. The defendant has an issue with the involvement of a receiver appointed in respect of a number of properties and the realisation of the value of the assets the subject of the receivership. That is not a matter for these proceedings. Furthermore, due allowance was made for payments made to date by reduction of the liability of the estate and I am satisfied will be made where appropriate if further money is generated by the receiver.

Conclusion

44. I am therefore satisfied that judgment should be granted for the amount claimed.

