

THE HIGH COURT

COMMERCIAL

[2015 No. 1454 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

BARRY AUGHEY

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 1st day of December, 2015

1. This is an application for summary judgment brought by the plaintiff against the defendant for the sum of €1,514,158.44. This sum represents the total monies lent on foot of four facilities referred to in the grounding affidavit as facility 2, 3, 4 and 5. It is important to record that these proceedings are not brought in respect of a facility in the amount of €14,015,089, lent by the plaintiff to the defendant in relation to Monaghan Retail Park (the "*Monaghan Retail Park facility letter*"). The significance of this will be referred to in the course of this judgment. Both letters of sanction were issued on the same date, namely, 28th April, 2009. The facility letter in respect of facility 2, 3, 4 and 5, reflected the refinancing of earlier loans and was in substitution for (and not in addition to) the earlier facilities. This is reflected in the facility letter. The Monaghan Retail Park facility letter was for the purpose of refinancing two earlier loans and was also stated to be in substitution of all previous letters of offer.

2. The test to be applied by the courts in application for summary judgment is now well established and is to be found in *Danske Bank v. Durcan New Homes* [2010] IESC 22, *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607; and *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75. From these cases and later jurisprudence, a number of principles can be discerned. If the court is satisfied that the defendant has a real or bona fide defence, whether based on fact or on law, the case should be remitted for plenary hearing. In order to grant summary judgment, the court must ask itself the question: "*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. It is not sufficient for a defendant to make mere assertions on affidavit in order to meet the threshold of establishing a real or bona fide defence. The court is entitled to look for some evidence in support of assertions made on affidavit and has to look at the whole situation to see whether a defendant has satisfied the test that there is a fair or reasonable probability of establishing a real or *bona fide* defence. These are the principles which I apply in this case.

3. The defendant does not deny that he signed the facility letters and that he received the monies lent by the plaintiff on foot of those letters. Notwithstanding that, the defendant states in an affidavit sworn on 13th November, 2015, that "*...the terms of the said 2009 facility letter were never agreed between myself and the bank*". The facility letter he is referring to is exhibit "LA1" in the affidavit of Ms. Lynne Allan sworn on behalf of the plaintiff on 13th October, 2015. That is the facility on foot of which these proceedings have been brought.

4. The basis of his defence, as set out on affidavit, is that he was in negotiation with the plaintiff with a view to restructuring his entire indebtedness and while he signed the facility letters or letters of sanction, he returned a copy to the plaintiffs stating that the proposed terms set out were not accepted by him and that his acceptance was conditional upon a satisfactory position being achieved in relation to:-

- (i) a cap on the level of proposed personal recourse to him;
- (ii) an alteration to the interest rates; and
- (iii) a moratorium on repayments.

5. He refers to an exchange of emails and correspondence between himself and the plaintiff but accepts that no final agreement was reached. But all of this took place after he had signed the facility letter and accepted its terms.

6. In a supplementary affidavit sworn by Ms. Miriam Galvin on 23rd November, 2015, she exhibited the letter of sanction in respect of the Monaghan Retail Park facility which is not the subject matter of these proceedings. This letter of sanction is signed on behalf of the bank and by the defendant but also contains in the defendant's handwriting the words "*subject to facility remaining as interest only up to end of Dec 2011 as per original letter of sanction and agreed. B.A.*". The plaintiff does not dispute that there were negotiations between it and the defendant on the level of recourse available to the plaintiff in respect of that facility. But the plaintiff argues that those discussions never came to fulfilment in the form of an agreement and the defendant accepts this. In any event, this only relates to the Monaghan Retail Park facility letter which is not a part of this dispute.

7. When this matter came on for hearing, the defendant sought to rely on a further affidavit which had not been filed in the Central Office or stamped. Because this was an application for summary judgment, I granted a short adjournment to allow the defendant's solicitor to stamp the affidavit and I then permitted it to be filed in court. I also permitted the plaintiff to file in court an affidavit from Mr. Willy Dollard sworn on 26th November, 2015, which authenticated some of the exhibits relied on by the plaintiff and confirmed that they had been reproduced directly from the records of the plaintiff.

8. In the course of the hearing, the defendant's counsel raised, for the first time, a suggestion that some handwritten note was appended to the letter of sanction which is the subject matter of these proceedings and that this amounted to a variation of the facility letter. This was not stated in any affidavit filed on behalf of the defendant and was not supported by any credible evidence.

The existence of such a handwritten note was denied by the plaintiff. Such a statement made by counsel on behalf of the defendant cannot be regarded as anything more than a "*mere assertion*" as understood in the case of *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep 21, as approved by Murphy J. in *First National Commercial Bank Plc v. Anglin*. But in any event, the defendant accepts that he signed the letter of sanction and that no subsequent discussions developed into an agreement. The defendant has not put forward any credible evidence to support his contention that the letter of sanction relied on by the plaintiff in these proceedings was varied in any way.

9. The defendant also raised an argument that the plaintiff was estopped from obtaining summary judgment on the basis of the negotiations between the defendant and the bank. Again, this was raised for the first time at the hearing. There is no evidence on affidavit of any representation, let alone a clear or unambiguous representation made by the bank. Furthermore, insofar as he contends for some altered position flowing from the negotiations between him and the plaintiff, these arose after the facility letter was signed so he could not have been induced to enter into the loan agreement by virtue of such negotiations. The defendant accepts that there was never any concluded agreement on foot of these negotiations. There is no credible evidence that such negotiations, as did take place, related to anything other than the Monaghan Retail Park facility letter which is not relied on by the plaintiff in these proceedings.

10. The burden on a defendant in arguing that a matter should not be disposed of summarily is not an onerous one and there are good reasons why this should be so. But in the face of *prima facie* evidence that the defendant entered into an agreement with the plaintiff for a loan and drew down that loan, the defendant must establish something amounting to a real, *bona fide* or arguable defence. The summary judgment procedure is rooted in public policy principles which require that scarce court time and resources are not wasted on plenary hearings where there is no credible defence. It also acts as a protection to litigants who should not have to incur unnecessary costs of a full hearing in circumstances where no real or *bona fide* defence has been established.

11. I am satisfied that in the circumstances of this case, the plaintiff has proved that it is entitled to summary judgment and the defendant has failed to meet the test required to have this matter remitted for plenary hearing.

12. The plaintiff is entitled to judgment in the sum claimed.