Neutral Citation Number: [2011] IEHC 26

THE HIGH COURT

COMMERCIAL

2010 3061 S

BETWEEN

ZURICH BANK

PLAINTIFF

AND

RICHARD COFFEY, BRIAN O'HAGAN, DONAL HUNT, RORY O'CALLAGHAN AND VIV O'CALLAGHAN TRADING AS SEAFIELD HOLDINGS PARTNERSHIP

DEFENDANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 28th day of January, 2011

1. The plaintiff seeks summary judgment against the defendants in the sum of €8,157,545.06, together with interest, pursuant to a loan facility letter dated 6th December, 2007, as amended by a loan facility letter dated 21st January, 2009. The defendants oppose the application for summary judgment and seek leave to defend and that the matter be remitted for plenary hearing.

2. The background facts to these proceeding are not in dispute. In June 2006, the defendants formed the Seafield Holdings Partnership to purchase and develop properties in Bantry, County Cork. They initially purchased premises known as Vickery's Hotel in Bantry for the sum of €4.5 million, which was financed by a loan from AIB of €3.6 million. The defendants subsequently agreed to purchase two adjacent properties in Bantry known as Kiddycare and World Choice Travel for €2.9 million.

3. Following negotiations in 2007 between the plaintiff and certain of the defendants, the plaintiff issued a facility letter dated 6th December, 2007, offering a loan in the amount of €7,985,000. The defendants accepted the facility by each signing an acceptance attached to the facility letter on or before 17th December, 2007. The facility was expressed to be available for twelve months from drawdown, which was on 11th January, 2008. By a further facility letter of 21st January, 2009, accepted in writing by all the defendants on or before 24th February, 2009, there were two amendments made to the loan agreement. First, the term of the facility was extended and the final repayment date became 11th October, 2009. Secondly, there was an amendment in relation to the manner in which interest was to be paid, to which I will return.

4. Subsequent to 11th October, 2009, there were a series of meetings and communications between the plaintiff and certain of the defendants. The defendants appointed advisers to represent them in their dealings with the plaintiff. Ultimately, letters of demand dated 19th May, 2010 were sent to each of the defendants for the sum then allegedly owing to the plaintiff and, thereafter, these proceedings commenced.

5. The proceedings were admitted to the Commercial List by order of 12th July, 2010. Thereafter, the defendants were given an opportunity to file affidavits in response to the application for summary judgment. One affidavit of Mr. Richard Coffey, sworn on 13th September, 2010, was filed. He makes the affidavit on his own behalf and on behalf of all the other defendants. No replying affidavit was filed on behalf of the plaintiff.

6. The evidence on the application for summary judgment is that contained in the grounding affidavit of Mr. Kieran Gilmartin, filed on 30th June, 2010, grounding the application, and that of Mr. Coffey. In addition, submissions were made by counsel for the plaintiff and counsel for the defendants.

Test for summary judgment

7. It is common case that the test to be applied by the Court on this application is that set out by the Supreme Court in *Aer Rianta cpt. v Ryanair Limited* [2001] 4 I.R. 607. The judgments of McGuinness J. and Hardiman J. in that decision approve and explain further the test established by the Supreme Court in *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75. McGuinness J., in her judgment at p. 614, cites from the judgment of Murphy J. in *First National Commercial Bank plc. v. Anglin*, where he states, *inter alia*, at p. 79:

> ". . . In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v. Daniel* [1993] 1 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the headnote thereto in the following terms:—
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> > 'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence.'
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> . . ."

8. Hardiman J. at p. 623, having considered the judgment in *National Commercial Bank Limited v. Anglin* and the authorities referred to therein, stated:

> "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?"

9. I was referred by counsel for the defendants to the more recent application of those principles by the Supreme Court in *Danske Bank A/S trading as National Irish Bank v. Durkan New Homes* [2010] IESC 22. Denham J., in the only judgment delivered, cites the above extract from the judgment of Hardiman J. in *Aer Rianta cpt*. She also refers with approval to the following from the judgment of Clarke J. in *McGrath v. O'Driscoll* [2007] 1 ILRM 203, 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."

In that appeal, the defence raised related to a question of law. Denham J. identified that the issue on the appeal was "whether the appellants have satisfied the court that they have an arguable defence".

10. I propose applying the test above, set out in *Aer Rianta cpt v. Ryanair Limited*, to this application, bearing in mind the restriction on the resolution of questions of law as stated by Clarke J. in *McGrath v. O'Driscoll* and approved by the Supreme Court.

Defences

11. The defendants do not dispute that they entered into a written loan agreement on the terms of the facility letter dated 6th December, 2007, and that they agreed to the written variation of the loan facility by acceptance of the facility letter dated 21st January, 2009. Nor do they dispute that the amounts referred to were drawn down or that the amounts now claimed for interest remain unpaid by them.

12. The primary defence sought to be made is that the true nature of the loan agreement between the plaintiff and the defendants is not as set out in writing in the accepted facility letter of 6th December, 2007, as varied by the accepted letter of 21st January, 2009. The defendants seek to contend that the true nature of the agreement between the plaintiff and them was that the facility was a "non-recourse facility" in the sense that the defendants have no personal liability to the plaintiff for the repayment of the sums advanced to them or for the payment of interest thereon. Rather, the plaintiff is only entitled to look to the properties over which it held security for repayment of principal and interest.

13. The factual basis for this contention, as outlined in Mr. Coffey's affidavit is, in summary, as follows. The purpose of the loan as set out in paragraph 6 of the facility letter of 6th December, 2007, is:

> "The Facility shall be available and utilised by the Borrower as follows:
>
> (a) €1,250,000 to purchase the property known as Kiddycare, New Street, Bantry, Co. Cork.
>
> (b) €1,425,000 to purchase the property known as World Choice Travel, New Street, Bantry, Co. Cork.
>
> (c) €4,155,000 to refinance current borrowings with AIB on Vickerys Hotel, New Street Bantry, Co. Cork.
>
> (d) €241,000 Stamp Duty
>
> (e) €840,000 to fund professional fees.
>
> (f) €74,000 Loan Fee."

14. Mr. Coffey avers that, in truth, the sum of €840,000 was not intended for professional fees. €550,000 of that sum was intended to meet a requirement set as one of the condition precedents to the loan in the facility letter, namely that €550,000 be placed on deposit by the plaintiff to be used towards the discharge of the interest payments due under the facility. Mr. Coffey, at paragraph 22 of his affidavit, states that he was told by Mr. Treston, the assistant lending manager with whom he was dealing, that the figure of €840,000 was going to be set out in the sanction letter in respect of professional fees of which €550,000 was to be placed on deposit to fund the interest on the loan for the first year of the facility. He further states that this sum of €550,000 was forwarded to the plaintiff's own solicitor and then one month later, replaced on deposit out of which the interest payments were made. At the end of the first year, there was a shortfall in interest repayments of €37,019.09, and following a request from Mr. Treston, it appears that the defendants paid this interest shortfall.

15. Mr. Coffey has obtained internal documentation, pursuant to the Data Protection Act, from the plaintiff. It includes the Memoranda to the plaintiff's credit committee, including two "Executive Summary" documents, which are different in material respects. At paragraphs 24 and 25 of his affidavit, Mr. Coffey states what, in fact, he believes occurred, and the probable understanding of the plaintiff's credit committee.

> "24. What did in fact occur is that, in the knowledge that the Defendants were not prepared to invest or fund the project and in the knowledge that the Defendants would only take the loan from the Plaintiff if it was 100% funded by the Plaintiff, Mr. Treston represented to the Credit Committee that the professional fees were €840,000 when in fact they were not and the figure of €550,000 included in the sum of €840,000 was to be set aside to service the interest payments on the loan in the first year.
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> 25. Therefore, the Plaintiff was financing the interest payments to itself and it seems the Credit Committee of the Plaintiff were unaware of this, having been misinformed as to the true quantum of professional fees. I say and believe that from a review of documents I have now seen pursuant to the Data Protection Act disclosure made by the Plaintiff, the Plaintiff's Credit Committee understood that the Defendants were servicing the payments of interest from their personal resources."

16. For the purposes of this application for summary judgment, the defendants are entitled to have the Court assume that they will establish such facts at a full hearing. From those primary facts, Mr. Coffey, in his affidavit, draws certain inferences and conclusions and seeks to make out a defence at paragraphs 50 to 53 inclusive:

> "50. In conclusion I say and believe that the Plaintiff's Credit Committee approved the loan facilities in this matter in the mistaken belief that the Defendants were investing a further €550,000 in the project in the sense of their willingness to service the interest for the year after the draw-down of the loan.
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> 51. I can only infer that Mr. Treston and Ms. Plunkett were unwilling to put the proposed interest roll-up before the Credit Committee as they would have known, from their internal experience, that such an application would not have been approved.
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> 52. I say and believe that if the true facts of the situation had been made known to the Credit Committee by the Plaintiffs own lending executive the Credit Committee would not have approved the facility at all.
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> 53. In those circumstances, where the Plaintiff, through its servants or agents, was fixed with the knowledge that the Defendants did not have the ability to service even the interest on the loan for its first year, I say and am advised that the Defendants have an arguable case that the Court ought to construe the conduct of the parties in relation to the matter generally as constituting an implied variation of the terms of the loan facility whereby as it was accepted by the Plaintiff, through the conduct of its servants or agents Mr. Treston and Ms. Plunkett in putting the disguised interest roll-up in place, that there was simply no reality to any personal recourse to the Defendants, and that the true commercial nature of the agreement between the parties was intended to be, and was a loan without recourse beyond the security provided."

17. On the primary facts, which the Court accepts for the purpose of this application, it appears to me arguable that a Court would draw the inferences and reach the conclusions to which Mr. Coffey avers in paragraphs 50 to 53 inclusive of his affidavit.

18. However, even on an assumption that such inferences would be drawn and conclusions reached, it does not appear to me that such facts support an "arguable defence" in the sense used by Hardiman J. in *Aer Rianta cpt. v. Ryanair Limited*, that the true nature of the loan agreement between the plaintiff and the defendants was one in which the plaintiff has no recourse to the defendants personally and only recourse to the security provided for the repayment of principal and payment of interest.

19. It is beyond argument that the express written terms of the facility letter of 6th December, 2007, as varied by that of 21st January, 2009, both accepted in writing by the defendants after legal advice, make the defendants personally liable for the repayment of the principal, and pursuant to the variation in the letter of 21st January, 2009, liable for the payment of interest. The defendants are listed individually in paragraph one and referred to as the "Borrower". Paragraph 4.1, as originally drafted and varied, provides:

> "On the Final Repayment Date, the Borrower shall repay the Loan (together with any unpaid accrued interest on the Loan) and any other unpaid costs and expenses payable under this Facility Letter)."

20. Further, condition 10 of the plaintiff's standard conditions, which it is not disputed were incorporated in the facility letter, provides:

> "As the Borrower comprises more than one person, the liability of each such person under this Facility Letter and each Security Document to which the Borrower is a party, shall be joint and several. This means that each Borrower is fully responsible for all terms of this Facility Letter and the Security Documents."

21. It is important, in considering the alleged arguable defence as to the true, non-recourse nature of the loan agreement, to note that Mr. Coffey does not contend that any express oral agreement was reached between the defendants and Ms. Plunkett and Mr. Treston on behalf of the plaintiff, that the loan would be "non-recourse" in the sense that the defendants would have no personal liability for repayment of the principal or payment of interest to the plaintiff. At paragraph 9 of his affidavit, he states:

> "At that meeting both Brian O'Hagan and I made it perfectly clear that if the proposed financing with the Plaintiff was to proceed it would have to be on the basis of 100% financing by the Plaintiff with no funds being invested by the Defendants and no additional security over and above the properties being acquired, including Vickery's Hotel which had already been acquired with the support of AIB facilities. I explained to Ms. Plunkett and Mr. Treston that AIB had refused to support the application on these grounds and that AIB required additional finance or security from the Defendants which was not available and it was for these reasons that the Defendants were looking for alternative funding. The Defendants also wanted the release of the other properties secured to AIB and Ms. Plunkett agreed that the Plaintiff would not require those other properties as security."

Mr. Coffey does refer to an email which he sent to his co-defendants which refers to "non-recourse", but, very properly, Mr. Coffey does not seek to rely on this as evidence of an agreement reached with the plaintiff. It appears to me that there may have been some confusion on Mr. Coffey's part between the security which had to be provided and the use of the term "non-recourse" as meaning the defendants had no personal liability to the plaintiff.

22. The defendants contend that they have an arguable defence by reason of the misstatements relating to the amount for professional fees which was, in reality, provision for the rolling up of interest in the sum of €550,000, to imply a term that the plaintiff has no recourse to the defendants other than in relation to the security provided. Counsel for the plaintiff submits that there is no arguable basis for implying such a term into the loan agreement between the plaintiff and the defendants in accordance with the well established principles applied by Kelly J. *in Ringsend Property Limited v. Donatex and McNamara* [2009] IEHC 568. Commencing at p. 21, Kelly J. set out with approval and applied the two tests set out by Steyn J. (as he then was) in *Associated Japanese Bank (International) Limited v. Credit du Nord S.A.* [1988] 3 All E.R. 902:

> " . . . In that case, the judge considered the traditional and well-established test for implying a term into a commercial contract which is derived from the decision in the *Moorcock* [1889] 14 P.D. 64. He said this:
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> > 'In the present contract, such a condition may only be held to be implied if one of two applicable tests is satisfied. The first is that such an implication is necessary to give business efficacy to the relevant contract *i.e.* the guarantee. In other words, the criterion is whether the implication is necessary to render the contract (the guarantee) workable. That is usually described as the *Moorcock* test. It may well be that this stringent test is not satisfied because the guarantee is workable in the sense that all that is required is that the guarantors who assumed accessory obligations must pay what is due under the lease'.
>
> . . .

Steyn J. went on:

> 'But there is another type of implication, which seems more appropriate in the present context. It is possible to imply a term if the court is satisfied that reasonable men, faced with a suggested term which was *ex-hypothesi* not expressed in the contract, would, without hesitation say: yes, of course that is 'so obvious that it goes without saying': see *Shirlaw v. Southern Foundries* [1939] 2 K.B. 206, 227 *per* Mackinnon L.J.
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> . . .
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> Although broader in scope than the *Moorcock* test, it is nevertheless a stringent test, and it will only be permissible to hold that an implication has been established on this basis in comparatively rare cases, notably where one side is dealing with a commercial instrument such as a guarantee for reward.
>
> . . ."

23. Applying the *Moorcock* test to the present facts, I do not consider that there is any basis for the implication of a non-recourse term such as it intended. Similarly, applying the second test, which although broader in scope than the *Moorcock* test is, nonetheless, stringent, again, I can see no basis on the present facts for implying a non-recourse term based on that test. Accordingly, I have concluded that there is no arguable basis for the implication of a non-recourse term in the written loan facility between the plaintiff and the defendants.

Secondary defence

24. Counsel for the defendants submitted, in the alternative, that having regard to both the averments of Mr. Coffey as to representations made on behalf of the plaintiff to the effect that it was anxious to get involved in the Irish property market for "the long haul", and positive discussions in relation to the construction phase of the development and the facts already referred to in relation to the misrepresentation of the purpose of part of the €840,000 expressed to be for the purpose of funding professional fees, that the defendants were entitled to have the full facts put before the Court on a plenary hearing prior to the Court construing the written loan agreement in its relevant factual matrix. It is not contended either that the representations as to the plaintiff's intention in relation to the Irish property market were actionable misrepresentations, or that there was a binding agreement in relation to the provision of construction finance. I am not satisfied that the defendants have raised as an arguable defence any issue on the construction of the written loan facility (as amended), accepted in writing by each of them, which would provide a basis for this Court remitting the matter to plenary hearing for the purpose of ascertaining the factual matrix in which the written agreement should be construed. On the issue potentially in dispute *i.e.* whether or not it is an agreement which imposes personal liability on the defendants for repayment of principal and interest, the written agreement is clear in accordance with its express terms which do not require construction of this Court in any particular factual matrix.

25. Accordingly, I have concluded that the defendants do not have an arguable defence to the plaintiff's claim. The plaintiff is entitled to judgment against the defendants jointly and severally in the sum of €8,157,545.06 as sought in the notice of motion.