Neutral Citation [2013] IEHC 213

THE HIGH COURT

COMMERCIAL

[2012 No. 2092 P]

[2012 No. 51 COM]

BETWEEN

DÓMHNAL SLATTERY

PLAINTIFF

AND

FRIENDS FIRST LIFE ASSURANCE COMPANY LIMITED

DEFENDANT

SUPPLEMENTAL Judgment of Mr. Justice Brian J. McGovern delivered on the 14th day of May 2013

1. On 15th March, 2013, I delivered judgment in the above matter and adjourned it to 16th April, 2013, in order to deal with ancillary orders including costs.

2. Having heard the parties, the following issues appear to the court to arise:-

(a) Whether the default interest clause contained in the Guarantee was properly executed on behalf of the plaintiff, and accordingly, whether the defendant is entitled to rely upon same in obtaining judgment on foot of the Guarantee as ordered by the court;

(b) whether the defendant is properly entitled to claim interest in any event, given the purported delay on its part in seeking to recover on foot of the Guarantee;

(c) the amount of the judgment to which the defendant is entitled on the counterclaim;

(d) the extent to which the plaintiff is entitled to costs on the issue of breach of confidence and the extent to which the defendant is entitled to costs in the claim and on the counterclaim;

(e) the plaintiff's application for a stay.

The Default Interest Clause

3. The evidence disclosed that the Guarantee was entered into on the basis that the default interest clause would be agreed between the parties at a later date. Through an exchange on 18th March, 2008, between Mr. Max Doyle, a principal in Claret Capital, and Ms. Susie Nolan, an officer of the defendant, the rate of 2% above three month LIBOR was inserted as the default interest rate and initialled by Mr. Doyle. Mr. Max Doyle, together with the plaintiff and other directors of Claret Capital, had signed joint and several guarantees, but the plaintiff never initialled the default interest rate which was inserted.

4. In her witness statement, Ms. Nolan had stated her belief that the amendment had been initialled by the plaintiff. However, under cross-examination, the plaintiff absolutely denied that he had initialled the amendment. It appeared to have been done by Mr. Doyle. This was subsequently confirmed. Ms. Nolan ultimately conceded in evidence that the amendment had in fact been initialled by Mr. Doyle.

5. Ms. Nolan went on to contend that in her view, it was of little importance whether the amendment to the Guarantee had been initialled by Mr. Doyle rather than the plaintiff, as the former had been acting as authorised agent on behalf of all guarantors and was, as she put it, the "*point man*". The defendant contends that Mr. Doyle was entitled, based on his actual or ostensible authority as agent, to bind by his initials each of the guarantors including the plaintiff.

6. It was contended on behalf of the plaintiff that he was not aware of nor did he consent to the insertion of the default rate. There was no evidence called on behalf of the defendant to challenge that assertion. While the evidence establishes that Mr. Doyle was acting as a key representative of Claret Capital in its engagement with the defendant, there was no evidence to show that he had any express or ostensible authority to vary the Personal Guarantee in a way which would be capable of binding his fellow principals in their personal capacity. The plaintiff is liable on foot of the Personal Guarantee because it was signed by him even though he claimed to have been unaware of what he was signing at the time. In my view, he cannot be held liable for an amendment to the terms of the Guarantee or the insertion of a default rate of interest if he did not indicate his assent to this addition. If an amendment or addition is being made to a guarantee which is intended to bind the guarantor in his personal capacity, then it is necessary for the defendant to prove that the guarantor (plaintiff) consented to the amendment or additional term, whether by way of his signature or initials or otherwise. I will not allow the defendant to recover the default rate of interest claimed in this case.

The Defendant's General Entitlement to Interest

7. The plaintiff submits that the defendant has been guilty of delay in seeking to recover on foot of the Guarantee, thus giving rise to an excessive liability for interest. Although the plaintiff relied on the authority of *Dawson v. Raynes* [1826] 2 Russ. 466, which held that the sureties to a bankrupt receiver were not to be liable to pay interest upon the receiver's liability to the trust over which he

had acted, in circumstances where the trustees had failed to act with due expedition, this authority seems to deal with circumstances which were quite different to the present case.

8. As I have already indicated in my judgment of 15th March, 2013, the plaintiff does not dispute the Guarantee. There appear to be no exceptional circumstances in this case indicating that the delay by the defendant in recovering on foot of the Guarantee was such as to deny them the entitlement to do so. The courts should be slow to deprive a holder of a guarantee relief on foot of that instrument other than in exceptional circumstances. In this case, the Deed of Guarantee was executed on 18th March, 2008. A letter of demand issued on 10th June, 2010. The timeline must be considered in the context of the facts surrounding the St. Regis Hotel deal and the efforts being made by the parties to rescue it and refinance it.

9. In my view, the plaintiff is entitled to recover on foot of the Guarantee at the rate of interest specified therein but not including default rate of interest.

Costs
10. The plaintiff commenced these proceedings with a view to obtaining a declaration which would relieve him of his liabilities on foot of the Personal Guarantee and entitle the defendant only to limited recourse in accordance with provisions of the Deed of Pledge. The plaintiff lost on that issue which took up most of the time at the hearing. The defendant's counterclaim was also bound up in this issue as it sought to recover such sums as are due to it by the plaintiff on foot of the Guarantee.

11. The plaintiff did succeed on a discrete issue concerning breach of confidence. While it is well established that costs should follow the event, the court retains a discretion to depart from the normal rule in exceptional circumstances. In this case, a lengthy and complex hearing has given rise to more than one operative "*event*" for costs purposes.

12. The parties are agreed as to the appropriate law being set out in the judgments of Clarke J. in *Veolia Water UK plc. v. Fingal County Council* (No. 2) [2007] 2 I.R. 81, and *ACC v. Johnston* [2011] IEHC 500, together with that of Finlay Geoghegan J. in *McAleenan v. AIG (Europe) Ltd.* [2010] IEHC 279.

13. In this case, it seems appropriate that I should deal with costs on the basis of assessing how much of the hearing might be said to be attributable to the issues upon which each party succeeded.

14. It is clear that the question of the interpretation or validity of clause 2.2 of the Deed of Pledge was the core issue in these proceedings and occupied the court's time for the majority of the hearing. The defendant has succeeded on this point and it appears to the court to be most convenient that the costs of the issue upon which the plaintiff succeeded, being the breach of confidence claim, should be set off against the defendant's costs on the main issue.

15. While the plaintiff submits that the manner in which the defendant pleaded multiple alternative approaches at law surrounding the Deed of Pledge should be treated as having unnecessarily added to the length and complexity of the proceedings, I do not accept that this was so. The wide-ranging nature of the legal approach taken by the defendant did nothing to expand the time taken in presenting evidence, and, given the complexity of the issues, the parties' closing submissions were to the point and succinct.

16. The defendant contends that the issue of breach of confidence, based on a content analysis of the transcript, took up only a little over a day of the hearing. It seems to me that this is too simplistic a way of looking at the matter. The plaintiff repeatedly took issue with the sufficiency of the defendant's discovery relating to this point and had even issued a notice of motion to strike out the defence for failure to make discovery which was returnable to the trial of the action but which did not ultimately proceed. Furthermore, the question of the defendant's engagement with its parent company, together with other matters germane to the breach of confidence claim, was canvassed in evidence obliquely and collaterally to the balance of the claim and cannot be easily separated and teased out from the main claim.

17. It seems to me, on a general analysis of the hearing, that approximately 15% of the court's time was devoted, in one way or another, to issues surrounding the breach of confidence claim.

Conclusion
18. In the light of the foregoing analysis, I have reached the following conclusion on the subsidiary issues arising following the judgment of 15th March, 2013:

> (a) The defendant is entitled to interest but this will not include default rate interest. The sum to which the plaintiff is entitled on foot of the Guarantee with interest is €
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> (b) The plaintiff shall be entitled to 15% of his costs, with the defendant, accordingly, being disentitled to that same percentage of its costs. Setting off these figures, the defendant should be entitled to recover 70% of its costs, to be taxed in default of agreement.

Application for a Stay
19. The plaintiff seeks a stay on registration and execution pending an appeal to the Supreme Court. When the matter was last before the court, there was some discussion about whether some form of undertaking might be offered by the defendant as a quid pro quo for the court not imposing a stay pending an appeal by the plaintiff. The Court has been furnished with some correspondence exchanged between the parties 18th and 11th May 2013 in connection with the issue but there has been no agreement as to what undertakings would be acceptable. I have been referred to the decision of Clarke J. in Danske Bank A/S trading as National Irish Bank v Mc Fadden [2010] IEHC 119 and have considered how it might help me deal with the issue of stay in this case. The legal principles set out in that judgment form a useful template to be applied by me in determining whether or not to grant a stay in this case. In McFadden there was a significant judgment in existence against the defendant in favour of another financial institution which had not been satisfied so there was a significant possibility of competing claims and the issue of priority of claims. This has an influence on Clarke J when he made his decision. There is no such evidence in this case. Having heard Counsel on the last occasion when this was before me I am satisfied that there are issues which could be said to give rise to a *bona fide* appeal. Accordingly I will grant a stay on the Order pending an appeal to the Supreme Court on the undertaking of the Plaintiff to prosecute the appeal with diligence. The stay will be a stay on execution.