Neutral Citation: [2015] IEHC 135

THE HIGH COURT

[2014 No. 2792 S.]

[2014 No. 181 COM]

BETWEEN

ALLIED IRISH BANK PLC AND AIB MORTGAGE BANK

PLAINTIFFS

AND

PATRICK WHELAN AND BRIAN WHELAN

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 3rd day of February, 2015

1. The plaintiffs are seeking summary judgment against the defendants in respect of two loans. The first named plaintiff is a bank licensed under the provisions of the Central Bank Acts and the second named plaintiff is a public unlimited company. On 13th February, 2006, the first named plaintiff transferred substantially all of its Irish residential mortgage loan business to the second named plaintiff by virtue of a scheme of transfer dated 8th February, 2006 and the scheme was given statutory approval.

2. By a supplemental mortgage loan offer dated 24th January, 2005, the first named plaintiff granted a facility to the first named defendant in the sum of €580,000. The loan was repayable over a ten year period, the first five years being interest only payments and thereafter reverting to principal and interest payments for the remaining five years. By letter of sanction dated 27th May, 2005, the first named plaintiff agreed to advance to the defendants a loan in the amount of €3.4m to fund a proposed development in Co. Kildare. The facility was subject to the terms and conditions set out in the offer of loan and to the bank's General Terms and Conditions Governing Business Lending. The loan was repayable on demand.

3. By letter of sanction dated 7th April, 2008, the first named plaintiff agreed to advance to the defendants, a loan in the amount of €2.5m which was a restructuring of the €3.4m loan. The original loan had been reduced to €2m following asset disposals in 2007 and the first named plaintiff lent to the defendants an additional €500,000 for ongoing working capital. This facility was subject to the terms and conditions as set out in the letter and was repayable on demand. The loan was also subject to the bank's General Terms and Conditions Governing Business Lending. The facility of 7th April, 2008, was not repaid and by letter of sanction dated 2nd December, 2008, the first named plaintiff restructured the loan in the amount of €2.5m so that the loan was repayable on 27th May, 2009, by a single payment equivalent to the principal amount of the facility plus interest accrued. The defendants signed a form of acceptance of the said offer letter and terms and conditions on 12th December, 2008. The loan was duly made by the first named plaintiff to the defendants.

4. Although there were a number of loan agreements, some of them merely amounted to restructuring of the loan for €3.4m. The result is that there are two loans which are the subject matter of the proceedings. The first is a loan of €580,000 made to the first named defendant and the second is a loan of €2.5m made to both defendants.

5. The two loans have not been repaid in accordance with their terms and "*events of default*" within the meaning of the terms and conditions of the loan have occurred giving the plaintiffs the right to demand repayment.

6. The plaintiff's claim is supported by an affidavit of Ms. Collette Rooney, Head of Corporate/Commercial Litigation Management at the first named plaintiff. The second named defendant has filed a replying affidavit on behalf of both defendants. In it he raises a number of issues. In the first place, he complains that the defendants never dealt with Ms. Rooney and he suggests that she is not in a position to swear the affidavit grounding this application. Having carefully read the affidavit of Ms. Rooney and the supporting documentation, I am satisfied that she is a fit and proper person to make the affidavit. She has exhibited the relevant loan agreements and correspondence between the parties, including the letters of demand and other relevant documentation. In para. 5 of his affidavit the second defendant refers to the fact that Ms. Rooney confirmed that the first defendant signed a form of acceptance of the offer of loan of €580,000 on 31st January, 2005, and that she then stated "*…the Bank duly made the said Loan Account Facility available to the First Named Defendant*". He says that this is incorrect. In fact, he says the Bank made the facility available to the first defendant at an earlier date without any security whatsoever in light of the first defendant's good record with the Bank. After the monies had been advanced to the first defendant, the Bank then subsequently requested that security be put in place. That is a matter which I cannot resolve on the affidavits. But it seems to me that it is immaterial to the issues I have to decide on this motion which is whether or not the plaintiffs are entitled to summary judgment.

7. The second named defendant also states that the first named defendant's borrowings of €580,000 have been reduced to approximately €20,000 and that there was an arrangement to pay the balance at €670 per month. Furthermore, he claims that a sum of approximately €5,000, which was lodged to reduce the debt owed, was diverted unilaterally by the first named plaintiff to clear another loan which was due to be repaid in full by monthly repayments in March 2015 without consultation or agreement.

8. Apart from those issues the defendants claim that they lost substantial sums of money due to poor investments which they made on the negligent advice of the first named plaintiff and/or parties connected with it. That is a quiet separate issue to the plaintiffs claim against the defendants for monies due on foot of the loans.

9. At close of business on 9th December, 2014, the sum due on foot of the first facility, including interest, was €21,255.64 and the sum due on foot of the second facility, including interest, was €2,659,869.75.

10. While the defendants have raised the issues I have referred to in paragraphs 6 and 7 above, the affidavit of the second defendant does not disclose any defence to the claim by the plaintiffs for the balance due on foot of the loans. The exhibits in the

affidavit of Ms. Rooney show that the defendants were trying to pay off the loans by disposing of properties and, indeed, they had reduced the loans through that process. But they have not disputed that they entered into the loan agreements and that the figures outstanding on the loans, as set out in Ms. Rooney's affidavit, are correct.

11. The test to be applied in applications for summary judgment is set out in *Danske Bank v. Durcan New Homes* [2010] IESC 22 and *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607. The test is whether it is "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? The court has to determine whether the defendant's affidavit fails to disclose even an arguable defence. In *McGrath v. O'Driscoll* [2007] 1 ILRM 203, Clarke J. set out the law as follows at p. 210:-

> *"So far as questions of law or construction are concerned the court can, on a motion for a 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 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."*

If the defendant establishes a real or bona fide defence, either based on fact or on law, the court is bound to afford the defendant the opportunity to have the issue tried by a plenary hearing.

12. In this case the defendants have not made out an arguable defence against the sums claimed to be due and owing. Those sums come to a total of more than €2.6m. The losses alleged to have been incurred by the defendants as a result of receiving negligent investment advice are €390,000 in the case of the first defendant and €80,000 in the case of the second defendant. What I have to consider is whether that affords a defence to the application for summary judgment, or whether that claim should be taken into account at this stage. On that issue the court was referred to the case of *Moohan v. S&R Motors (Donegal) Limited* [2008] 3 I.R. 650.

13. The principles set out in that case are relevant in determining what approach the court should take having regard to the claims raised by the defendants that they were given negligent investment advice by the first named plaintiff or its agents. In that case Clarke J. at page 655 referred to *Aer Rianta c.p.t v. Ryanair Ltd*. and the requirement for the defendant to satisfy the court that there is a fair and reasonable probability that he has a real and bona fide defence in order to defeat a claim for summary judgment. He went on to consider the position where the nature of the defence put forward amounts to a form of cross-claim and said that different considerations may apply.

> *"In those circumstances the court has a wider discretion, where the defendant does not establish a bona fide defence to the claim as such, but maintains that he has a cross-claim against the plaintiff then the first question which needs to be determined is as to whether that cross-claim would give rise to a defence in equity in the proceedings. It is clear from Prendergast v. Biddle (Unreported, Supreme Court, 31st July, 1957) that the test as to whether a cross-claim gives rise to a defence in equity depends on whether the cross-claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross-claim may be made out.*
>
> *[10] 4.3 On the other hand if the cross-claim arises from some independent set of circumstances then the claim (unless it can be dependant on separate grounds) will have to be allowed, but the defendant may be able to establish a counter claim in due course, which may in whole or in part be set against the claim."*

Clarke J. went on to set out what the position is to be in the intervening period and made reference to the judgment of Kingsmill Moore J. in *Prendergast v. Biddle*.

14. Having reviewed the law Clarke J. said:-

> *"[13] 4.6 On that basis the overall approach to a case such as this (involving, as it does a cross-claim) seems to me to be the following:-*
>
> *(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 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 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) claim (or have the same, in a case such as that with which I am concerned, refer to arbitration);*
>
> *(c) if the cross-claim amounts to an independent claim, then judgment should be entered on the claim but questions of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principle set out by Kingsmill Moore in Pendergast v. Biddle (Unreported, Supreme Court, 31st July, 1957)."*

Conclusions

15. So far as the plaintiffs claim on the two loans is concerned the defendants have not raised a bona fide defence that would meet the test set out in *Danske Bank v. Durcan New Homes, Aer Rianta c.p.t v. Ryanair Ltd and McGrath v. O'Driscoll* save for one small amount. I refer to the averment in the affidavit of Mr. Brian Whelan where he says that a sum of approximately €5,000 which was lodged to reduce the debt owed was diverted unilaterally by AIB to clear another loan which was due to be repaid in full by monthly instalment in March 2015 without consultation or agreement. While the averment does not go as far as to state that the bank acted in breach of an agreement, and there is some ambiguity on this point, it seems to meet the very low threshold required to show that there is a bona fide or arguable defence on that point. No further affidavit was filed by the plaintiffs to deal with this issue so I think I must let that issue go to plenary hearing notwithstanding the fact that it represents a very small fraction of the debt being claimed. As to the balance of the debt it seems to me that the plaintiffs are entitled to judgment.

16. I now deal with the effect of the defendants claims in respect of loses they claim to have incurred due to the alleged negligence of the first named defendant or its servants or agents in advising them to make certain investments. As I have already stated the loss claimed by the first defendant under that heading is €390,000 and the loss claimed by the second named defendant is €80,000.

This cross-claim amounts to an independent claim so I have to determine whether execution of the judgment to which the plaintiffs are entitled should be stayed by reference to the principles in Prendergast and Biddle set out above.

17. No right of equitable set off applies because the cross-claim does not stem from the same set of facts but rather from an independent set of circumstances. If this claim is pursued it should be by way of separate proceedings as it is unconnected with the matters in dispute in this case.

18. The issue surrounding the €5,000 alleged to have been diverted unilaterally by the first named plaintiff to clear another loan, without consultation or agreement relates to the loan account of the first defendant in the sum of €580,000. The plaintiffs are entitled to judgment against the first defendant on foot of the first loan facility in a sum which, on the 9th of December, 2014 stood at €21,255.64, and which should be brought up to date either by agreement between the parties or by the plaintiffs filing an affidavit. From that sum I will deduct €5,000 which I will remit to plenary hearing. I will hear counsel in due course as to whether the claim relating to the €5,000 should be remitted to the appropriate court having jurisdiction in that amount.

19. The plaintiffs are entitled to judgment against the first and second defendant in respect of the sum which stood at €2,659,869.75 at 9th December, 2014 which sum should be updated either by agreement or by the filing of an affidavit in order to fix the correct sum due as of the date of this judgment. I will put a stay on execution of a portion of that judgment namely a sum of €470,000 being the combined value of the claims against the first plaintiff for negligent advice. This stay will be for a period of three months in order to review what steps, if any, are taken by the defendants in prosecuting that claim.