Neutral Citation: [2016] IEHC 507

THE HIGH COURT

[2014 No. 1606 S.]

BETWEEN

ALLIED IRISH BANKS PLC.

PLAINTIFF

AND

KENNETH MACMORLAND

DEFENDANT

EX TEMPORE JUDGMENT of Ms. Justice O'Regan delivered on the 27th day of July, 2016

1. These proceedings come before the Court on foot of a summary summons of the plaintiff of 19th June, 2014 and in effect summary judgment is sought in the sum of €6,091,208. There was a misstatement in the notice of motion but by consent that has been amended.

2. An appearance was put in by the defendant and subsequently a notice of intention to proceed on 29th July, 2015 was served by the plaintiff and the within motion was then processed, dated 5th August, 2015. The plaintiff's motion is grounded on the affidavit of Joe Lyons of 28th July, 2015 and the defendant has responded in resisting the motion by an affidavit of 17th November, 2015 in which he claims to be a tax consultant and company secretary.

3. One of the grounds on which the defendant seeks to remit the matter to plenary hearing is because he wants to examine or cross examine Margaret O'Donnell. Ms. O'Donnell didn't put in an affidavit but there is an assertion made by the defendant to the effect that it was because of a representation made by her to the defendant that in fact the defendant agreed to sign the full guarantee of 26th October, 2006. On the other hand the plaintiffs accept that the defendants' evidence in this regard must be taken at its height so the need to examine or cross examine Margaret O'Donnell does not arise in my view and could not possibly be a basis to adjourn the matter for a plenary hearing.

4. By way of factual background, I do note that an allied matter in which the defendant was involved (*Grady & Ors v. McMoreland & Ors*, Unreported, High Court) came before Ryan J. who delivered a judgment on 3rd February, 2012 and somewhat contrary to the assertion made in these proceedings by Mr. McMorland, Ryan J. found, at para. 9 where he states as follows:-

"*Mr. McMorland moved quickly. He put together a consortium of local investors to back the project. On 11th April, 2006 a contract for the sale of land was signed by a solicitor in trust for Mr. McMorland and Mr. Jackie McMahon. They in turn were acting on behalf of the consortium. The price was €9,850,000 plus VAT and the solicitor paid the deposit of €985,000 which was later reimbursed by the investors*."

5. That case demonstrates that not only is the defendant a tax consultant and company secretary, but he was also the promoter of the relevant company being Forresthaze Developments Limited and he was its CEO. That company was incorporated on 17th July, 2006.

6. Initially Mr. McMorland signed a guarantee commensurate with his shareholding in this company which was 14 % and that partial guarantee was executed on 25th October, 2006. He subsequently signed a full guarantee for the full indebtedness of the company on 26th October, 2006 following an amended letter of sanction which was also signed by him.

7. In these circumstances the issues that arise at present would be:

i. In what circumstances might summary judgment be afforded, or should it be adjourned for summary hearing.

ii. The full guarantee and the lack of legal advice in advance of that, and representation by Ms. McDonnell.

iii. The fact that Mr. McMorland was not requested to secure independent legal advice nor does he waive same in advance of the full guarantee.

iv. Mr. McMorland also suggests that if he had known about the restructuring in February, 2010 he would have orchestrated a set of circumstances whereby that would not come about.

v. He also says that the need for independent legal advice was a condition precedent within the letter of loan offer.

8. If we turn to the law on the question of the granting or withholding of summary judgment or adjourning to plenary hearing, the case of *ADM Londis Plc -v- Arman Retail Ltd* [2006] IEHC 309 of 12th July, 2006 being a judgment of Clarke J. is relevant. Clarke J. reviews prior case law and quotes from a previous judgment in *McGrath v. O'Driscoll* [2006] IEHC 195to the effect that:-

> "...*but any evidence of fact which would, if true, arguably give rise to a Defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved*.
>
> *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*."

9. The defendant's assertion as to the conversation between himself and Ms. McDonnell will be taken as fact and thereafter we will proceed to look at the legal issues which have arisen.

10. In the case of *Irish Bank Resolution Corporation v. Quinn* [2011] IEHC 470 being a judgment of Kelly J. delivered on 16th December, 2011, the issue of *non es factum* was considered by the Court and Kelly J. quoted from Morris J. in the preceding case of *Saunders v. Anglia Building Society* [1971] AC 1004 where it was stated:-

> "*I am satisfied that a person seeking to raise the defence of non est factum must prove:-*
>
> (a) *That there was a radical or fundamental difference between what he signed and what he thought he was signing;*
>
> (b) *That the mistake was as to the general character of the document as opposed to the legal effect;*
>
> and
>
> (c) *That there was a lack of negligence i.e. that he took all reasonable precautions in the circumstances to find out what the document was*."

In the case before Kelly J., at para. 36, the Court posed the question, "*What could be more negligent than willy-nilly signing formal legal documents without giving any thought as to their effect?*".

11. In relation to the document and the fact that the plaintiff claims that he was advised that this was short term there is no evidence before the Court that he corresponded subsequently with the Bank seeking confirmation that the full guarantee had terminated and, in fact, the documents which he signed at the time clearly made it obvious to him that it was a full guarantee and there was no time limit actually involved. In relation to the assertion of the *non es factum* or that he understood that he was signing a guarantee of short duration, I do not find that there was any basis for this assertion.

12. Insofar as waiver of independent legal advice is concerned the defendant has referred to the judgment of Charleton J. in *Irish Bank Resolution Corporation Ltd v. Cambourne Investments Inc & Ors* [2012] IEHC 262, and the defendant in submissions quotes:-

> "*50. The effect of a condition precedent for the benefit of both parties not being met is that the contract of loan on the two facility letters, which includes the guarantee on the facility letters made by Peter Curistan and Century City, does not come into operation*."

I did review that case and there were a number of other paragraphs that I felt were relevant, including the facts.

13. The facts in that case were that it was agreed that the ratio of loan to value would be 80% and there was in that document a necessity to secure a valuation. In fact, when the valuation came through, it established that the loan was going to be 120% of the value of the property and the guarantor felt that he should have been told and assented to the change in valuation, and he argued that the valuation issue was therefore a matter that was for the benefit of both parties and not just the lending institution as he claimed that he would not have gone ahead if he had known of the valuation.

14. In para. 29 of Charleton J.'s judgment, he says:-

> "*As a contract it contained a number of conditions precedent*."

And that is why he felt that the contract had not come into effect because of a condition precedent. In para. 45 he states:

> "*If on a proper construction of a contract, a term is exclusively for the benefit of a particular party by whom it is waived, that term may be rendered inoperative by that waiver*."

He went on to apply the test that was also applied in *Maloney v Elf Investments Ltd* [1979] ILRM 253 and said there were two matters to be considered:-

i. the term must be of its nature exclusively for the benefit of one and,

ii. it must be severable.

15. Most significantly is what is contained at para. 71 in that the Court held that the guarantee that was comprised within the facility letter failed but two other separate deeds of guarantee were held to be valid.

16. Added to all that is the judgment of Finlay Geoghegan J. of 30th March, 2012 in *Bank of Scotland v. Fergus* [2012] IEHC 131 in which she looked at these waivers of legal advice and she indicated at para. 27 that the purpose of obtaining Mr. Fergus's signature is to obtain certain information from him by which the bank seeks to exclude potential defences to the entitlement to enforce the guarantee against Mr. Fergus.

17. In this matter I adopt her view as to the purpose of the waiver/independent legal advice.

18. I am satisfied that it was for the benefit of the bank and that the bank were entitled to waive it and it was severable from the balance of the document.

20. Insofar as the restructuring in 2010 is concerned, I do not accept that that is any valid ground on behalf of the defendant, as the defendant could not have created any difficulty in that restructuring. In fact if one looks at the restructuring document, it related to the original loan plus roll-over interest so I do not believe that that comprises a valid ground to adjourn the matter for plenary hearing.

21. Finally, in relation to the assertion that there is a condition precedent requiring either independent legal advice or a waiver in respect of the guarantee of the 26th October is concerned, when one looks at the document it does not state that it is a condition precedent but rather a special condition, and if one looks at the series of conditions under the heading "Special Condition", it seems to me that these are in fact for the benefit of the bank and are in the normal course of events, special conditions, as opposed to, what is now claimed by the defendant, a condition precedent.

22. For all the reasons above, I believe that this matter can be disposed of on a summary basis and I am not acceding to the request to adjourn the matter for plenary hearing.

23. In these events the plaintiff is entitled to judgment in the sum of €6,091,208. The plaintiff is entitled to its costs of and incidental to the within proceedings. There will be a stay on the order for judgment and the order for costs until 30th November, 2016 but no

longer insofar as this Court is concerned.