Neutral Citation Number: [2012] IEHC 248

THE HIGH COURT

BETWEEN

[2012 No. 768 S]

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND

ANTHONY DEANE

DEFENDANT

AND

THE HIGH COURT

BETWEEN

[2012 No. 769 S]

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND

SEAN DEANE

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 20th day of June, 2012

1. In these proceedings, the plaintiff ("the Bank") seeks judgment against the defendants in the sum of €19,876,130.55. The defendants are brothers and it has been agreed that both cases can be dealt with together as they comprise similar claims. These proceedings arise on foot of an application for summary judgment and the court has been informed that there is no dispute on the figures.

2. The plaintiffs claim arises on foot of two loan agreements and a guarantee. The two loan agreements are evidenced by two facility letters, each dated 12th September, 2008. The plaintiff also claims against the defendants on foot of a guarantee made on 2nd December, 2008, between the Bank and each of the defendants on foot of which each of them guaranteed all present and future liabilities of the other to the Bank. The total sum due on foot of the facility letters and the guarantee is €19,876,130.55.

3. While the plaintiff applies for summary judgment, the defendants assert that they have a *bona fide* defence, and that following a line of authority opened to the court, they should be afforded the opportunity to have the dispute remitted to plenary hearing. They also claim that they are entitled to defend the case on the basis of a collateral or side agreement reached between the plaintiff and each of the defendants to the effect that the loans were due only on the occasion of the sale of sites at Stocking Lane in Dublin.

4. The parties were in agreement as to the legal test that applies at a hearing of a motion for summary judgment. This test was outlined by Clarke J. in *G.E. Capital Woodchester Ltd. and Another v. Aktiv Kapital and Others* [2009] IEHC 512, where he said at para. 6.1:

> *"6.1 The legal test to be applied in an application for summary judgment is set out in Banc (sic) de Paris v. de Naray [1984] 1 Lloyds Law Rep.21, as adopted by the Supreme Court in First National Commercial Bank v. Anglin [1996] 1 IR. 75, where, at p. 79, the following is said by (Murphy J):-*
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> > *"6.1 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 WL.R. 1453. The principle laid down in the Banque de Paris case is summarised in the head note 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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> *6.2 The standard to be applied in examining whether a defendant has a fair or reasonable probability of the defendants having a real or bona fide defence is set out in the decision of the Supreme Court in Aer Rianta v. Ryanair Limited [2001] 4 IR. 607. In his judgment in Aer Rianta Hardiman J noted that a fair and reasonable probability of a real or bona fide defence is not the same thing as a defence which will probably succeed or even a defence whose success is not improbable. At p. 621 of his decision, Hardiman J states that, 'the defendant's hurdle on a motion such as this is a low one and the jurisdiction is one to be used with great care'. In summary, Hardiman J concluded, at p. 623 of his decision:-*

> *'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?"*

5. When one looks at the nature of the agreements in this case, it is clear that on their face, they are demand loan facilities. This is clear from each of the facility letters relied on by the plaintiff.

6. The defendants argue that the loans were not repayable on demand but were long-term loans to be paid for out of the sale of various properties. At para. 5 of his replying affidavit, Mr. Anthony Deane says that, *"throughout our commercial relationship with Ulster Bank, we were told that Ulster Bank would lend to us and what was expressed to be a 'long-term' basis"*. The affidavit refers to instances of what they were told by representatives of the Bank. At para. 9 of his affidavit of 2nd May, 2012, Mr. Anthony Deane says, *"I was told that the various loan agreements, such as those exhibited in the affidavits of Andrew Thompson, were merely 'paperwork ' for some purpose of the bank"*. He claims to have been told by representatives of the Bank that the loans offered were long-term loans and that he was told this prior to signing the two contracts described as the First Facility and the Second Facility. The defendants have not produced any written documentation to support this claim. It appears, therefore, that they are seeking to alter the terms of the facility letters which are clear on their face by means of parol evidence. This is not permissible. For reasons of public policy, the courts have not permitted oral evidence to be admissible if it is introduced in an attempt to contradict the terms of a written agreement between the parties. This is known as the *'parol evidence'* rule. See *Macklin v. Graecen & Co*. [1983] I.R. 61, and *O'Neill v. Ryan* [1992] 1 I.R. 166. In short, a party is not permitted to adduce evidence which, in effect, contradicts the reasonable construction of words used in a written agreement.

7. A further argument is made by the defendants that they are entitled to rely on a collateral agreement or side agreement. They rely on the decision of the English High Court in *City and Westminster [*1934] *Properties Ltd. v. Mudd* [1958] 2 ALL. ER.733, and *AIB v. Galvin Developments (Killarney) Ltd.* [2011] IEHC 314.

8. In the English case, a tenant had signed a lease containing a covenant *"not to use or permit the use of the said premises except as the shop of the [tenant] for his business as hereinbefore described"* and not to do or suffer to be done anything which might render the premises liable to be assessed as a dwelling house. The landlords knew, however, that the tenant resided on the premises as well as using it for his business. The tenants subsequently applied for a new lease and the landlords claim that the lease was forfeited and that they were entitled to possession because he was living on the premises. But their claim to forfeit the lease and assume possession failed because the tenant had executed the lease in reliance on a promise made to him by the landlords at the time not to enforce against him personally the covenant to use the demised premises for business purposes only, and thus, an enforceable contract had been created from which the landlords could not resile. The circumstances of that case are quite different because there had been detailed discussions between the landlords and tenant on the specific issue of the user of the premises when tenant first asked for a new lease. The tenant's solicitors deleted a covenant against using the premises for lodging, dwelling or sleeping, and added a note on the draft lease that the tenant had been residing at the premises for some years and had spent a significant sum of money on decoration. The landlords were advised that to permit the tenant to reside on the premises might cause the Rent Restrictions Acts to apply and they objected to the deletion, but a representative of the landlords orally informed the tenant that the landlords would not object to his residing on the premises if he would sign the lease in its original form.

9. In the plaintiffs application, Ms. Teresa Cole, the relationship manager in charge of the defendants' loan accounts, swore an affidavit stating there was no collateral or side agreement which overrode the facility letters. Mr. Norman Ginelly of the plaintiff Bank also swore an affidavit in which he specifically denied any collateral agreement. The defendants have offered no evidence other than verbal discussions which they say altered the terms of the facility letters, but such evidence is inadmissible, being in breach of the parol evidence rule and is a long way short of what was held to constitute a collateral agreement in the *City and Westminster Properties [1934] Ltd.* case.

10. In *AIB v. Galvin Developments*, the facts were also very different to this case. A collateral agreement was to be found in written Heads of Agreement drawn up by the Bank according to which the Bank agreed to limit its right of recourse to 50% of the drawn debt. But in the case before me, the defendants have been unable to point to any written document which purports to vary the terms of the facility letters or on foot of which they agreed to sign the facility letters. At para. 97 of her judgment, Finlay Geoghegan J. stated:

> *"In my judgment, GDK and the Galvin Brothers are entitled to succeed in their contention that there existed a collateral contract according to which AIB agreed to limit its right of recourse to 50% of the drawn debt. I am using 'collateral contract' in the sense explained by Cooke J , in the Supreme Court of New Zealand in Industrial Steel Plant Ltd. v. Smith [1980] 1 N.Z.L.R. 545, at p. 555, quoting with approval from Cheshire and Fifoot on Contracts (5th N.Z. Ed. 1979, 53-54):*
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> > *'The name is not, perhaps, altogether fortunate. The word 'collateral ' suggests something that stands side by side with the main contract, springing out of it and fortifying it. But, as will be seen from the examples that follow, the purpose of the device usually is to enforce a promise given prior to the main contract and but for which this main contract would not have been made. It is rather a preliminary than a collateral contract. But it would be pedantic to quarrel with the name if the invention itself is salutary and successful'."*

11. In the *AIB v. Galvin Developments* case, Finlay Geoghegan J. held that the Heads of Terms were a representation by the bank that subject to conditions, it would make facilities available on the terms and conditions indicated. The two conditions were formal approval by the bank and the issuance of a formal letter of sanction. The representations were intended to induce the potential borrowers to continue in negotiations with the bank to obtain the facilities referred to therein. The bank knew that the terms set out in the Heads of Terms were fundamental as far as the defendants were concerned.

12. The facts of that case bear no resemblance to the case which I have to decide, and the defendants have simply not been able to point to any written document or any facts which go any way near to establishing a collateral agreement.

13. The defendants make much of the fact that they were assured that the Bank only expected payment out of the proceeds of sale of dwellings which were being constructed by the defendants' company Deane Homes Ltd. The defendants understood that this was a long-term relationship and Mr. Eamon Moyles, a financial accountant retained by the defendants, said on affidavit that he understood the banking relationship was a *"long-term"* one and that the Bank would be repaid as and when furnished dwellings were sold. I am quite satisfied that this was the understanding of the parties when they entered into the agreement, but there is nothing to suggest that such an understanding had acquired the status of a legal obligation. It was merely aspirational. The monies were lent on the

basis of facility letters which were clear on their face and which were payable on demand.

14. A close look at the facility letters relied on by the Bank in this case shows that they were loans made to the defendants personally and cross-guaranteed by them. The first facility letter of 12th September, 2008, shows that the purpose of the loan to Mr. Anthony Deane was for three purposes:

(a) To provide a sum to fund the purchase of 34 apartments in Ballyboden, Rathfarnam, Dublin 16;

(b) to fund tax expenses and pay for costs in relation to a Bank of Ireland Brussels loan and to fund a UK investment, and

(c) a sum to be used to fund interest on the facility.

The second loan made to both the defendants was for the purchase of a neighbourhood shopping centre at Sandyford Hall, Sandyford, County Dubin, and the third loan made to Mr. Sean Deane was for the provision of funds for three purposes, namely:

(a) To provide for the purchase of 34 apartments in Ballyboden, Rathfarnam, Dublin 16;

(b) A sum to fund tax expenses and to pay for costs in relation to a Bank of Ireland Brussels investment; and

(c) A sum to be used to fund interest.

None of these loans involved the purchase of land for development purposes or for the purpose of funding development of sites. However, there was loan made on 17th December to Deane Homes Ltd. for a sum of €40,500,000 for the purpose of funding the site purchase at Stocking Lane, Rathfarnam, and providing working capital for the project, and also for the purpose of partially repaying directors' loans. That is a facility letter which is not relied on by the plaintiff in these proceedings and is quite separate and distinct. Yet, the defendant seems to place a great deal of linkage between the Stocking Lane site and an understanding which, it says, existed between the defendants and the Bank that they would be repaid out of the proceeds of sale of dwellings at Stocking Lane. There does not appear to be any immediate connection between the two, and in any event, the loan in respect of the Stocking Lane site which was made to Deane Homes Ltd. was a demand loan facility and was known by the directors to be such because they passed a resolution on 17th December, 2006, in which they acknowledged that they carefully considered the terms of the facility letter. The resolution stated, *inter alia*, *"It was noted that under the Facility Letter, the Bank agreed to make available to the Company the demand loan facility detailed therein (the 'facility)"*. The company went on to resolve that the company should avail of the facility. It is difficult to reconcile these facts with the defendants' contention that the loans made personally to them were not payable on demand when the terms of the facility letter say that this was so, just as they did in the case of their company.

15. I have stated at the beginning of this judgment that there is no dispute among the parties as to the figures claimed by the Bank. The defence rests on two grounds. The first is inadmissible because it seeks to breach the parol evidence rule. The second defence which raises a collateral agreement is not supported by any credible evidence that would meet the criteria for such an agreement. The affidavits sworn on behalf of the defendants fail to disclose an arguable defence, and accordingly, I hold that the plaintiff is entitled to summary judgment in these cases.