Neutral Citation Number: [2009] IEHC 220

THE HIGH COURT

COMMERCIAL

2009 728 S

BETWEEN

BANK OF IRELAND

PLAINTIFF

AND

MERVYN WALSH

DEFENDANT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 8th day of May, 2009

1. The application to which this judgment relates is for summary judgment in the sum of €4 million and interest in favour of the plaintiff against the defendant.

2. The principles applicable to the determination of the plaintiff's application for summary judgment and the defendant's application for leave to defend are not in dispute. Counsel for both parties agree that they are those set out by McKechnie J. in *Harrisrange Ltd*. v. *Duncan* [2003] 4 I.R. 1. In that decision, having reviewed a number of prior decisions, McKechnie J. at p. 7, summarised those as follows:

> "(i) the power to grant summary judgment should be exercised with discernible caution;
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> (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
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> (iii) in so doing, the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
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> (iv) where truly there are no issues of simplicity only or issues easily determinable, then this procedure is suitable for use;
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> (v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;
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> (vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;
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> (vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;
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> (viii) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;
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> (ix) leave to defend should be granted unless it is very clear that there is no defence;
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> (x) leave to defend should not be refused only because the court has reason to doubt the *bona fides* of the defendant or has reason to doubt whether he has a genuine cause of action;
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> (xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;
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> (xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

3. As appears from sub-paragraph (vii) above, the threshold is one of an arguable defence and is, in relative terms, a low threshold. However, in making that determination, the Court should have regard to whether what the defendant is saying is mere assertion and whether the proposed defence is credible in the sense explained by Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607.

4. The defendant is a director of Largreen Ltd. ("Largreen"). On 14th September, 2006, he executed a guarantee in favour of the plaintiff of liabilities of Largreen, subject to a limit of €4 million and interest ("the Guarantee"). Whilst, in his first replying affidavit, the defendant raised an issue in relation to the amount of €4 million, at the hearing of the application for summary judgment it was not in dispute that the defendant had executed the Guarantee of liabilities of Largreen in an amount of €4 million and interest referred to therein. Further, his counsel confirmed that the plaintiff was not required to produce in Court the original Guarantee.

5. Largreen is a property owning company with, *inter alia*, property at Portlaoise, County Laois. Such property was being built on by connected companies. It is not in dispute that the plaintiff had made a number of facilities available to Largreen for which it held the Guarantee as security. Further, that on 19th December, 2008, Largreen was indebted to the plaintiff in the sum of €22,439,632.42 for

which the plaintiff held the Guarantee from the defendant as security. Demands were made on the defendant for payment under the Guarantee by letters dated 19th December, 2008, and 23rd February, 2009.

6. On 12th December, 2008, the plaintiff appointed a receiver over Largreen.

7. These proceedings were commenced on 23rd February, 2009, and on 30th March, 2009, admitted to the Commercial List and the application for summary judgment fixed for hearing on 23rd April, 2009, with directions in relation to the delivery of any replying affidavit by the defendant.

8. On 15th April, 2009, the defendant swore an affidavit in which he asserts that Largreen has a claim for damages, then estimated by him at €26,500,000, against the plaintiff for its alleged wrongful refusal to permit the drawdown of a facility of €1.9 million to complete a portion of the development at Portlaoise in September 2008. On the same day, the defendant caused a plenary summons to be issued with Largreen Ltd. (in receivership) as plaintiff, and the Bank of Ireland as defendant, claiming, *inter alia*, damages for negligence, breach of duty, breach of fiduciary duty, breach of contract, misrepresentation and unlawful interference with the business and economic interests of the plaintiff.

9. A further affidavit was sworn on 22nd April, 2009, by Ms. Mary McCarthy, a senior business manager in the plaintiff's regional business unit, south east midlands and the original deponent for the plaintiff, in which she disputed a number of the factual matters in the defendant's affidavit and also pointed out that the damages estimated at paragraph 23 of the defendant's affidavit in the sum of €26.5 million, included a double count to the extent of €12.8 million.

10. The defendant swore a supplemental affidavit on the morning of the hearing, and in the absence of objection on behalf of the plaintiff, was permitted to file this in Court. In that affidavit, he implicitly accepts the element of double count but provides a new estimate of alleged losses to which reference will be made below, and asserts that the true loss suffered by Largreen in respect of which it has a claim for damages against the plaintiff is €23,390,969.

11. The submission of counsel for the plaintiff that it is entitled to summary judgment must be considered in the context of the arguable defence contended for by counsel for the defendant. The submissions of counsel for the defendant may be summarised as follows:

> (i) The defendant's affidavits disclose an arguable claim by Largreen against the plaintiff for damages estimated at €23,390,969.
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> (ii) In any claim by the plaintiff against Largreen to recover the undisputed liability of €22,439,632.42, Largreen is entitled to set off such damages.
>
> (iii) The defendant herein, as guarantor of the debts of Largreen, is entitled in his defence of any claim brought to enforce the Guarantee to rely upon any set off to which Largreen is entitled against the principal debt guaranteed.
>
> (iv) Whilst it is accepted that the defendant's entitlement in his defence to rely upon any set-off to which Largreen is entitled against the plaintiff may be limited or excluded by the express terms of a guarantee, it is submitted that it is arguable that clause 28(ii) of the Guarantee does not exclude such a defence.
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> (v) Accordingly, the defendant has established an arguable defence to the plaintiff's claim for €4 million under the Guarantee and summary judgment should be refused and the defendant given leave to defend and, if necessary, by joining Largreen, pursue Largreen's claim for damages against the plaintiff and set that off against the plaintiff's claim against him.

12. The submissions of counsel for the plaintiff may be summarised as follows:

> (i) The plaintiff accepts the general principle that a defendant guarantor is entitled to rely in his defence upon any set off to which the principal debtor may be entitled against the creditor in respect of the sum guaranteed. However, on the facts of this application, it is submitted that such right is clearly excluded by clause 28(ii) of the Guarantee and it is not arguable that the clause could be otherwise construed. On this ground alone, it is contended that the plaintiff is entitled to summary judgment.
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> (ii) If, contrary to the foregoing submission, it is arguable that the defendant is entitled to advance a defence in reliance upon a claim which Largreen may be entitled to set off against the plaintiff's claim against it for €22,439,632.42 plus interest, then it is submitted that the defendant has not put before the Court any credible arguable claim by Largreen against the plaintiff for damages excess of €18.4 million. It is contended that unless the defendant establishes an arguable claim by Largreen for damages in excess of €18.4 million, then the defendant remains liable on the Guarantee for a sum of €4 million, having regard to the undisputed liability of Largreen to the plaintiff for a sum in excess of €22.4 million.

13. The first issue which must be determined by the Court in the light of the submissions is whether or not the Guarantee in clause 28(ii), clearly excludes the right of the defendant to defend this claim in reliance upon the claim he contends Largreen has for damages against the plaintiff or whether, as contended for by the defendant, it is arguable that it is not so excluded.

Clause 28

14. Clause 28 of the Guarantee provides:

> (i) The Guarantors hereby waive all demands on the Customer [Largreen] for performance of any of the covenants, terms, conditions and agreements of any facility or accommodation or for payment of any moneys by the Customer hereby secured and also hereby waive the necessity for any presentment for payment notice of dishonour protest and such other notice (if any) which the Bank might otherwise be required to give in connection with the exercise of its rights or any of them in respect of any of the obligations contained herein or otherwise.
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> (ii) The Guarantors hereby agree that in any litigation relating to these presents the aforesaid obligations or any security therefore they shall waive the right to interpose any defence based upon any claim of laches or set-off or counterclaim of any nature or description.

15. The principle relied upon by counsel for the defendant is that expressed in the judgment of Roskill L.J. in the Court of Appeal in *Hyundai Shipbuilding and Heavy Industries Company Ltd. v. Pournaras* [1978] 2 Lloyd's Rep. 502, where at p. 508 he cited with approval from Halsbury's *Laws of England* (4th ed. par. 190) which reads:

> "On being sued by the creditor for payment of the debt guaranteed, a surety may avail himself of any right to set off or counter-claim which the principal debtor possesses against the creditor, and any division of the high Court can give effect to it or to any equitable defence raised."

16. Reliance was also placed upon the formulation of the general rule in Andrews and Millet, *Law of Guarantees* (4th ed.) (2006 London Sweet & Maxwell) at par. 11-006:

> "Cross-claims and rights of set-off
>
> The general rule is that where the principal has a right of set-off or cross-claim against the creditor giving the principal a defence to the debt the subject of the guarantee, the surety is entitled to raise it as a defence to the creditor's claim.
>
> . . .
>
> The surety is not seeking here to set up the principal's defence against the creditor as a set-off against his own liability under the contract of guarantee, since there is no assignment of the benefit of the principal's cross-claim: the surety is not in a position of assignee vis-á-vis the principal. What in fact the surety has is an equitable right to be exonerated from liability under the guarantee to the extent that the principal has a defence to the creditor's claim arising out of cross-demands between them. This right is paramount to the principal's right to raise it by separate action against the creditor."

17. The Court's attention was also drawn by counsel to a similar formulation of the principle in O'Donovan and Phillips, *'The Modern Contract of Guarantee',* English Edition, (2003 Sweet and Maxwell), at par. 11-46, where the authors state:

> "In order that the guarantors be exonerated from liability, they may seek to rely on any claims and defences which the principal has against the creditor."

18. Applying these principles to the facts herein, it is submitted by counsel for the defendant that the nature of the defence to be made by the defendant is an equitable right to be exonerated from liability to the plaintiff by reason of Largreen's claim for damages against the plaintiff for its loss, estimated at €23.3 million, and Largreen's entitlement to set off such damages against its undisputed liability of €22.4 million to the plaintiff. The defendant is not seeking to set off any personal claim he has against the plaintiff which counsel submits is what is excluded by paragraph 28(ii) of the Guarantee. In this connection, counsel for the defendant also relies on the approach of O'Donovan and Phillips (*supra*) at paragraphs 11-48 and 11-49, where insofar as relevant, they state:

> "Furthermore, the terms of the guarantee itself may preclude the guarantor from pleading cross-claims and defences available to the principal debtor. Clear and unequivocal words (or an obvious implication) are required to achieve this effect. If there is nothing in the guarantee to exclude the guarantor's right to counterclaim and set-off under the common law and in equity, then these counter claims and set-offs will be available to the guarantor.
>
> Thus, clauses providing that amounts are to be paid 'without any deduction' have been held to be insufficient to exclude an equitable set-off
>
> . . .
>
> Even if there is a specific provision in the guarantee purporting to exclude a right of set-off, a failure to distinguish between the different types of set-off (for example, legal as distinct from equitable) might lead to a restrictive interpretation that excludes some set-offs but not others."

19. Finally, counsel for the defendant relied upon the *contra proferentem* rule and the obligation on the Court to construe the Guarantee against the plaintiff insofar as there was any ambiguity in its terms.

20. The defence which the defendant seeks to advance is a defence that he has an equitable right to be exonerated from liability to the plaintiff because Largreen has a claim for damages against the plaintiff which it is entitled to set off against its liability to the plaintiff for the principal debt which was guaranteed by the defendant. In the context of this application for summary judgment it is contended that clause 28(ii) only clearly excludes the defendant's entitlement to raise a defence based upon his entitlement to set off a liability to him personally against his liability to the plaintiff, as distinct from a defence that his liability on the claim is extinguished based upon Largreen's or "the Customer's" entitlement to set off a liability of the plaintiff to it against the principal debt.

21. I have concluded that the plaintiff has not established that clause 28(ii) clearly means that the defendant has waived his right to advance a defence that he has no liability to the plaintiff under the Guarantee by reason of the fact that Largreen is entitled to set off against the principal debt its claim for damages which is estimated to exceed the principal debt, thereby extinguishing the principal debt and any consequent liability under the Guarantee.

22. I have concluded that clause 28(ii), when construed in the context of the other provisions in the Guarantee, is not so clear as to exclude an arguable defence that the waiver therein is confined only to a defence based upon a set-off to which the defendant is personally entitled against his liability under the Guarantee, and not a defence that the guarantor's liability is extinguished by reason of a set-off to which the principal debtor is entitled against its liability for the principal debt. My primary reasons are the nature of the defence, which is not one of set-off against an admitted liability on the claim, but rather a defence that the debt the subject of the claim is extinguished (albeit by reason of the principal debtor's right of set-off) and two other provisions of the Guarantee. First, clause 25 expressly requires the guarantor to make any payment under the Guarantee without set-off. Such set-off appears to be one to which the guarantor is personally entitled as it relates to a payment by him under the Guarantee and clause 28 appears to be reinforcing this obligation. Secondly, clause 28(i) includes a waiver by the guarantor of certain potential obligations of the plaintiff bank to the Customer. As the relationship between the bank and the Customer is expressly addressed in the preceding sub-paragraph of clause 28, it appears arguable that if the Guarantee was intended to exclude any defence based upon a right of set-off of the Customer against its liability for the principal debt, it would have been so expressly provided.

23. In reaching this conclusion, I have taken into account the words "of any nature or description" in clause 28(ii), but consider it is

arguable that they only refer to types of set-off or counterclaims to which the guarantor may be personally liable.

24. Accordingly, I have concluded that the defendant has established that it is arguable that the type of defence which it seeks to raise is not excluded by clause 28(ii).

25. The next issue therefore is whether the defendant has made out an arguable claim by Largreen against the plaintiff for damages in excess of €18.4 million. It must be of this amount as it is not disputed that Largreen is indebted on the guaranteed facilities for a sum in excess of €22.4 milion. In accordance with the principles set out by McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, it is necessary to consider whether, on the defendant's affidavits, there is more than mere assertion by the defendant that there is an arguable claim that the plaintiff committed an actionable wrong against Largreen as a result of which Largreen suffered loss in excess of €18.4 million.

26. I have concluded that the defendant has not met this low threshold. Both in respect of the cause of action and the quantum of any damages, the evidence adduced by the defendant, in substance, is assertions made by him, and certain of the assertions are not consistent with the contemporaneous documents exhibited by him and undisputed facts.

27. The basis of the cause of action by Largreen against the plaintiff is not clear. The plenary summons of 15th April, 2009, is in typical short form and does not set out the factual basis of the causes of actions pleaded. No statement of claim has been delivered or draft exhibited. It appears from the affidavit of the defendant of the 15th April, 2009 that the primary complaint is an allegedly wrongful refusal by the plaintiff to permit the drawdown by Largreen of a loan facility of €1.9 million, notwithstanding what is asserted at paragraph 19 to have been assurances given at a meeting of 23rd September, 2008, that the defendant could expect to receive the proceeds of the scheduled drawdown within a number of days. In purported support of that contention, the defendant exhibits at Exhibit MW5, an exchange of emails between Largreen and Ms. McCarthy of the plaintiff of 24th September, 2008. Those emails do not refer to any alleged agreement by the plaintiff to permit the drawdown of €1.9 million as asserted by the defendant in his affidavit.

28. The defendant also exhibits a letter of 10th October, 2008, written by him following the plaintiff's failure or refusal to allow Largreen drawdown what is there referred to as € 2.9 million pursuant to a facility letter of 26th May, 2008. Whilst a complaint is made in that letter of the failure or refusal, there is no allegation that any agreement was reached on 23rd September, 2008, following consideration of what is accepted by the defendant to have been an adverse progress report from KRA, rather, it is asserted that, notwithstanding submissions made by Largreen on the adverse KRA report, the plaintiff did not reconsider its position. This relatively contemporaneous letter of complaint is inconsistent with the assertions now made by the defendant in his affidavit.

29. Even if I were to form the view that the defendant has established an arguable cause of action by Largreen against the plaintiff arising out of its refusal to allow drawdown of the facility of €1.9 million in September 2008, I am not satisfied that the defendant has established any arguable claim to damages for loss and damage suffered by Largreen in excess of €18.4 million. In his first affidavit, the defendant, at paragraph 23, quantifies the potential damages on a loss of 137 sales at €26.5 million (for which he took an average price of €250,000, then added an alleged personal contribution and infrastructure costs and deducted likely sales income over time at €150,000 each).

30. When double counting was pointed out in the replying affidavit by Ms. McCarthy, the defendant, in his second affidavit sworn only 8 days later on 23rd April, 2009, then alleged that on a review of the selling price of each of the units the true average was €307,520 rather than €250,000, as originally deposed to in his first affidavit. He exhibited an undated list of alleged selling prices on paper headed "Bergin & associates, Registered Auditors and Accountants" with no explanation as to how such auditors and accountants came to prepare a list of selling prices or their input into same. The defendant also revised his prior estimate of the current average selling prices of the apartments to reduce same from €150,000 to €140,000. There is no evidence other than the assertion by the defendant that Largreen was unable to complete the sales of 137 units by reason of the alleged wrongdoing of the plaintiff. Even that assertion appears inconsistent with the letter of 10th October, 2008, of the defendant, already referred to, in which he stated that the directors of Largreen had then secured third party funding which would finance the third and final phase of the development. There is no evidence other than assertions by the defendant of estimated losses and also a change by him in the basis of the computation of loss which appears to be directed at maintaining a claim in excess of €22.4 million.

31. The assertions made in the defendant's affidavits must be considered in the context of the undisputed fact that the plaintiff made demand on Largreen for the amounts then due to it on 10th December, 2008, and in default of payment, appointed a receiver to Largreen on 12th December, 2008. There is no evidence of any challenge to the appointment by the plaintiff of a receiver to Largreen, nor any explanation as to why no proceedings were commenced by Largreen against the plaintiff until the day upon which the defendant swore his replying affidavit in these proceedings.

32. Accordingly, I have concluded that the defendant has not met the low threshold established by the principles set out above of an arguable defence to the plaintiff's claim herein. I have concluded that this is a case in which the Court should exercise its jurisdiction to grant summary judgment. There is no dispute that the principal amount is €4 million. No submissions were made in the course of the hearing as to the form of order in respect of interest pursuant to the Guarantee to which the plaintiff is entitled. I will hear counsel in relation to this.