

THE HIGH COURT

[2013 No. 2656 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

NAMDawn LIMITED, JOHN PHILIP (OTHERWISE JP) RYAN, RICHARD NASH, VICTORIA (OTHERWISE VICKY OTHERWISE VICKI) NASH AND NCW PROPERTIES LIMITED

DEFENDANTS

THE HIGH COURT

[2013 No. 2414 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

HIRAR PROPERTIES LIMITED AND JOHN PHILIP (OTHERWISE JP) RYAN

DEFENDANTS

THE HIGH COURT

[2013 No. 2413 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

NCW PROPERTIES LIMITED, RICHARD NASH, VICTORIA (OTHERWISE VICKY OTHERWISE VICKI) NASH, JOHN PHILIP (OTHERWISE JP) RYAN AND RICHARD NASH & COMPANY LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 21st day of March, 2019

SUMMARY

1. This case (*Record No. 2013/2414S*) is an application for summary judgment by the plaintiff ("AIB") in the sum of €2,862,916.30 against the first named defendant ("Hirar") in respect of a loan, as well as an application for summary judgment in the sum of €2,250,000 against the second named defendant ("Mr. Ryan") of Ballyclough, County Limerick in respect of a guarantee of that loan.

2. The loan in question was extended by AIB to Hirar in connection with a property known as The Globe, on Cecil Street in Limerick city.

3. The defence put forward by Hirar to this application for summary judgment is that prior to the re-structuring of that loan in May 2008 (pursuant to which Mr. Ryan agreed to guarantee that loan), AIB made representations and/or entered into a collateral contract that it would support Hirar's project to have The Globe developed as a hostel by means of investments under the Business Expansion Scheme ("BES").

4. Hirar claims that AIB breached this collateral agreement when, after receiving a request from Hirar/Mr. Ryan by letter dated 10th December 2009, AIB failed to provide its consent to the creation of leases over The Globe, which would have facilitated the BES investment. Hirar claims this led to the BES scheme being abandoned and deprived Hirar of funds and led to a loss on the part of Hirar. Hirar had expected to make a profit on the project, in light of its previous experience using BES investments to develop hostels.

BACKGROUND FACTS

5. This is a case where prior to Mr. Ryan's involvement, Hirar owned The Globe subject to an underlying loan which it had received from AIB. Mr. Ryan states that in April/May of 2008 he was approached by AIB to see if he was interested in acquiring the shares in Hirar, and thereby acquiring The Globe, subject to the underlying loan. Mr. Ryan avers that this approach was made because AIB was concerned that the then owner of Hirar was not able to service the loans.

6. Mr. Ryan agreed to acquire Hirar and take on the underlying loan and on 26th May, 2008, he received a letter of sanction from AIB ("Letter of Sanction") in which the amount of the loan is stated to be €2,250,000 and its purposes is stated as follows:

"Take over existing loan in the company name re the premises known as the Globe, Cecil Street, Limerick."

7. The security is stated to be, *inter alia*:

"Letter of guarantee from JP Ryan in the sum of €2,250,000 (two million two hundred and fifty thousand Euro) supported"

8. It is to be noted that there is no reference in the Letter of Sanction to the development of The Globe as a hostel or to the fact that AIB would support the use of a BES scheme to fund the development of The Globe.

9. It is also relevant to note that AIB did not provide any new funding to Hirar or Mr. Ryan arising from this Letter of Sanction. This is because Mr. Ryan was taking over the existing funding and agreeing to guarantee it arising from his acquisition of the shares in Hirar

and thereby his acquisition of The Globe, since Hirar was the owner of The Globe.

10. However, Mr. Ryan avers that in May 2008, around the time of the Letter of Sanction, he explained to AIB his plan to convert The Globe into a hostel with the assistance of BES investors. He avers in particular that he had 'agreed' with AIB that:

"the Bank would be flexible in the funding to ensure that any necessary amendments would be made to facilitate BES investors in the Project"

There is no mention of leases in this alleged agreement and, in particular, it is relevant to note the vagueness of this alleged agreement, which is that AIB would be 'flexible in the funding' in order to ensure that 'any necessary amendments' would be made to facilitate BES investment.

Amendment to the Letter of Sanction

11. Since Mr. Ryan is alleging that these negotiations with the Bank amounted to a binding commitment, it is significant that Mr. Ryan avers that he was unhappy with the terms of the Letter of Sanction and that he negotiated an amendment to the interest rates, which led to his receiving a subsequent Letter of Sanction with reduced interest rates. Although Mr. Ryan claims that he reached 'agreement' with AIB regarding 'flexibility in funding' and 'amendments to facilitate BES investors', these matters are not referred to in the Letter of Sanction. Despite this, Mr. Ryan does not seem to have regarded the Letter of Sanction he received as incomplete, since he did not seek to amend the Letter of Sanction to insert those terms when he was inserting new terms regarding interest rates.

Joint venture with AIB

12. Mr. Ryan also avers that well over a year after the Letter of Sanction, in November 2009, while he was doing works on The Globe, he met Mr. Liam Healy of AIB at that property and that Mr. Ryan reminded Mr. Healy of the 'loan negotiations' and that Mr. Healy indicated to Mr. Ryan that:

"I should work ahead and that whatever approvals I needed at the time would be forthcoming. I advised Liam that as the BES approval had been received that my advisors would be writing shortly to the Bank to complete whatever formalities were necessary for the transaction to be finalised"

13. However, Mr. Ryan goes further than this. This is because he swore a second affidavit in which he claims that the alleged agreement with AIB whereby it agreed to be 'flexible in the funding' amounted to a joint venture with Mr. Ryan, since he avers:

"I have now had an opportunity to further review my file of correspondence between [AIB] and I concerning the Globe venture. I say and believe that it is clear from that correspondence that there is contemporaneous evidence that the parties were of the view that there was in effect a joint venture between the parties which involved [AIB], in effect, replacing the Guarantors/previous owners of [Hirar] in a non-performing loan by [Mr Ryan] on their representation to facilitate the development of the hostel project by way of providing the necessary consents to facilitate the use of BES investment monies that I intended raising in order to complete the hostel project at The Globe."

Mere assertions

14. It is noteworthy that Mr. Ryan refers to correspondence providing contemporaneous evidence of the joint venture with AIB whereby AIB would, *inter alia*, provide consents to facilitate the BES scheme. However, it is significant that Mr. Ryan does not exhibit this correspondence. This failure simply highlights the nature of much of Mr. Ryan's claims in these proceedings, as mere assertions, since they are not supported by evidence, even when, as in this instance, he claims that such evidence exists.

15. The fact that mere assertions do not amount to a defence to summary judgment proceedings was made clear by Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 at p 622 where he quoted with approval dictum from *National Westminster Bank v. Daniel* [1993] 1 W.L.R. 1453 at 1457:

"The mere assertion in an affidavit of a given situation which is 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."

One contemporaneous document

16. In these proceedings, the only document of significance exhibited by Mr. Ryan which could provide any contemporaneous record of the alleged agreement with AIB, and therefore which might have the potential to make the claim of an alleged agreement with AIB more than a mere assertion, is a letter from the solicitor for Hirar and Mr. Ryan to AIB dated 10th December, 2009. This is a letter regarding the proposed leases of The Globe for the purposes of the BES scheme. This letter states:

"Dear Liam,

As you know we act for Hirar Properties Limited, Mr. JP Ryan.

Mr Ryan is presently endeavouring to do up a BS. He thinks there is a tax scheme for himself in this property. In order to do so, is necessary to create a lease between Hirar Properties Limited to JP Ryan, rent €25,000 per annum. To be reviewed annually and the term is 35 years.

JP Ryan will thereafter be leasing the property to Intelciti Limited, the BS company for a term of 21 years as an annual rent of €15,000 Euro plus VAT per annum. This will also be subject to annual reviews.

We therefore enclose herewith the following:

1. Draft lease – Hirar Properties Limited to John Philip Ryan;
2. Draft lease – Hirar Properties Limited to Intelciti Limited.
- 3.

We would be most obliged if you would forward a letter of consent to the Lease of the above mentioned property.

We look forward to hearing from you."

17. Mr Ryan's claim that he has a binding agreement with AIB regarding the giving of its consent to the leases rests therefore to a certain degree on this letter which seeks consent from AIB to the granting of two leases. Partly in reliance on this letter, the defendants claim that they have a reasonable probability of having a *bona fide* defence based on there being a binding collateral agreement with AIB, and thus satisfy the test laid down in *Aer Rianta* for this case to go to plenary hearing. On this basis, Mr. Ryan claims that he is entitled to a rectification of the terms of the loan agreement with AIB and/or to rely on this collateral agreement. It is relevant to note that while AIB failed to provide the consent requested in this letter of 10th December, 2009, the defendants do not provide evidence of any follow-up letters written to AIB and in particular letters *demanding* consent in light of the alleged agreement between AIB and the defendants.

Caselaw

18. The case of *Ulster Bank v. Deane* [2012] IEHC 248 is particularly relevant to the circumstances of this case. In that case, the defendants claimed that they too had a collateral or side agreement with their bank, Ulster Bank, to the effect that the loans would only be due after the sale of certain sites. At para. 6, McGovern J. stated:

"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."

At para. 12 he continued:

"[...] 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.

At para. 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 repayable on demand."

19. Like in the *Deane* case, there is nothing in this case to suggest that, what might have been at its height an 'understanding' that AIB might facilitate the defendants with their project, was anything other than aspirational and that it acquired the status of a legal obligation.

20. Indeed, as already noted, when Mr. Ryan wanted something to be a binding legal obligation, namely lower interest rates, he amended the Letter of Sanction to achieve this result. He failed to seek to amend the Letter of Sanction to include what he says was a binding agreement with AIB. Similarly, the defendants failed to provide any evidence of follow up letters to AIB from their solicitor even requesting for a second time the consent to the granting of the leases or indeed demanding the consent in light of the alleged agreement with AIB. These omissions highlight, in this Court's view, the true nature of the discussions between AIB and the defendants, as merely aspirational and not legally binding.

21. Also relevant is the Court of Appeal case of *AIB v. O'Toole* [2018] IECA 93. This also concerned an alleged agreement between the defendants in that case and AIB, to the effect that the loans in question were non-recourse. At paragraph 14 of that judgment Peart J. stated:

"In the present case there is no cogent evidence to which the defendants can refer. The documents to which they have referred do not refer to these loans at all. There is nothing of a documentary nature in the background to indicate that something of the nature of a collateral or side agreement exists in tandem with the main agreement, and without which the defendants would not have entered into the loan agreements which they accepted. In my view this results in the defendants not being in a position to argue that there is a *bona fide* ground of defence exists based on their assertion that these loans were intended by the bank and understood by them, to be non-recourse."

22. Like in the *O'Toole* case, in the case before this Court, there is also no suggestion under the express terms of the Letter of Sanction that the Bank was under any obligation to provide consents to leases and that their right to recover the loan would be affected in some way if such consent was not given. The Letter of Sanction provides for the borrowings to be repayable on demand and there is no bar or restriction on that repayment set out in that letter.

23. Despite this, the defendants seek to have inserted into the Letter of Sanction a term which is not there (or have a collateral agreement imputed to the same effect), which would impinge on the right of AIB to recover the full amount of the loan. They do so based on an alleged oral agreement arising from negotiations which were very vague, and refer, *inter alia*, to AIB being '*flexible in the funding*'. The defendants claim that the alleged agreement is that AIB would consent to the granting of leases by Hirar presented to it for the purposes of the proposed BES scheme. However, there is no cogent evidence for this alleged agreement, beyond an assertion of a vague agreement regarding flexibility in the funding and an assertion that Mr. Liam Healy of AIB said that whatever approvals Mr. Ryan needed would be forthcoming.

24. The most that is available regarding documentary evidence to support this bare assertion of an agreement is simply a letter seeking consent from AIB over a year after the Letter of Sanction has been signed. However, this letter is not evidence of any agreement, but rather it is a letter seeking consent. In fact, the letter is noticeably vague and is certainly not indicative of a binding agreement or even of previous discussions between the defendants and AIB, e.g. it states in relation to Mr. Ryan that "[h]e *thinks there is a tax scheme for himself in this property.*" The only other letter upon which reliance is placed by the defendants is a letter

from the defendants' accountant to AIB. However, this letter is written on 7th March, 2012, several years later, at a stage when the borrowings are in arrears and the matter is on an adversarial footing and thus is of less evidential value as a result. In any event it does not positively state that there was an agreement between AIB and the defendants, but simply states that Mr. Ryan expected that AIB would consent to the leases:

"JP Ryan commenced on the works on the building in good faith on the basis that BES funding had been agreed and that the appropriate bank consents would be forthcoming."

25. In these circumstances, it seems to this Court that, as in the *O'Toole* case, there is nothing of a documentary nature to indicate that something in the nature of a collateral agreement exists between AIB and the defendants.

Conclusion

26. For the foregoing reasons, this Court concludes that there is not a fair and reasonable probability of the defendants having a real or *bona fide* defence to the summary judgment. I will hear from counsel regarding the terms of the orders to be made.

27. There are also two other sets of proceedings (*Record Nos. 2013/2656S, 2013/2413S*) brought by AIB for summary judgment against Mr. Ryan in which Mr. Ryan sought those proceedings to be adjourned pending the present proceedings being determined at a plenary hearing. However, as the present proceedings are not being sent forward for plenary hearing, counsel indicated that such an application would not be pursued and I will hear from counsel regarding the precise terms of the orders.