Neutral Citation Number: [2010] IEHC 478

THE HIGH COURT

[2010 No. 3257 S]

BETWEEN

ACC BANK PLC.

PLAINTIFF

AND

PAT FLYNN AND HELEN MCGARDLE

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 3rd day of December, 2010

1. This is an application for summary judgment in the sum of €2,674,729.82 with continuing interest from 12th October, 2010 to date of judgment. The plaintiff claims judgment on foot of the terms of a sanction letter dated 25th October, 2007, and accepted by the first named defendant on 30th October, 2007, and the second named defendant on 9th November, 2007, whereby the plaintiff agreed to advance to the defendants a sum of up to €3,606,000 for a term of twelve months from the date of first drawdown for the purpose of funding professional fees and planning contributions relating to the development of a site at Killea, Dunmore East, County Waterford. Interest on the facility is chargeable, pursuant to clause 7 of the sanction letter dated 25th October, 2007, and at the date of swearing of the grounding affidavit of Lorraine Fairley on 14th October, 2010, the interest was accruing at the daily rate of €647.48.

2. A replying affidavit has been filed by the first named defendant and this affidavit was sworn on 15th November, 2010. The second named defendant filed an affidavit sworn by her on 19th November, 2010, in which she adopted the contents of the first named defendant's affidavit.

3. In paragraph 63 of his affidavit, the first named defendant states:

> *"For the avoidance of any doubt, I do not suggest that the monies claimed herein are not owing, but rather, they are not due at this time."*

The defendants contest the plaintiff's application for summary judgment on the basis that they claim that representations were made by and on behalf of the plaintiff to the effect that the monies borrowed would be repaid when the development of lands on the site in question was completed.

4. Mr. John Duan, formerly of the plaintiff bank, disputes the plaintiff's assertion that representations were made to this effect. It is accepted by counsel for the plaintiff that since there is a dispute on certain facts in the affidavits of the defendants, on the one hand, and Mr. Duan, on behalf of the plaintiff, on the other, that the court should disregard the defendants' affidavit and look at the plaintiff's case to determine whether there is a *bona fide* defence to the plaintiff's claim.

5. Counsel for the plaintiff and the defendants are agreed that the principles to be applied by the court in assessing whether or not the plaintiff is entitled to summary judgment are those set out by the Supreme Court in *Aer Rianta c.p.t. v. Ryanair* [2001] 4 I.R. 607, and by McKechnie J. in *Harrisgrange Limited v. Dunkan* [2003] 4 I.R. 1, in which the learned High Court Judge drew together the strands emerging from a number of decisions including the *Aer Rianta* case. I am content to adopt those principles in assessing the plaintiff's application for summary judgment in this case.

6. The only defence raised in this case is that a representation had been made on behalf of the bank that the monies would not be repayable until the development on the relevant lands had been completed. Although the first named defendant says he was given these representations by Mr. John Duan, the second named defendant does not state, in her affidavit, that she was informed by the first named defendant (who is her brother) that these representations had been made. She simply swore an affidavit adopting the contents of the first named defendant's affidavit.

7. It appears to be a fact that it was only when the first named defendant swore his replying affidavit on 15th November, 2010, that he raised, for the first time, the suggestion that a representation had been made on behalf of the bank that the loan would not be called in until the development was complete. In his affidavit, he says, at paragraph 57:

> *"At all material times, I was led to believe by Mr. John Duan that the monies lent for the development were to be repaid when it was completed."*

He accepts that the terms of the loan facility included a term that the monies were repayable on demand or at the end of the term of any particular facility, but he says that, notwithstanding this, his understanding was that they would be repaid when the development was completed.

8. There is no doubt that the monies were lent for the purpose of financing the development of lands and that it was intended that they would be paid out of the proceeds of sale of buildings constructed on the lands. But the agreement relied on by the plaintiff is clear and unambiguous in its terms. It is a facility for a loan of an amount up to €3,606,000 and it is for a term of twelve months from the date of the first drawdown of the facility, unless a demand for earlier payment is made, in accordance with clause 6 of the facility letter. Clause 6 states clearly that the facility shall be repayable immediately on demand. The defendants accept that this was the agreement which they entered into and their signature is to be found in an acceptance document. The letter of demand made on the defendants was dated 17th June, 2010. This followed correspondence by letter and email between the parties in May 2010. On 10th May, 2010, Ms. Lorraine Fairley, on behalf of the plaintiff, sent an email to the defendants, informing them that the bank had instructed its solicitors to commence the process of legal recovery, and in a reply of 17th May, 2010, the first named defendant sought to achieve an agreement which would arrive at the best possible outcome for the defendants and the plaintiff, stating, inter

alia:

> *"We appreciate that the bank are entitled to commence legal proceedings to recover the outstanding monies . . ."*

Nowhere in that email did the defendants allege that the bank was not entitled to claim their monies because of any representation made.

9. The claim in this case arises on foot of monies advanced, pursuant to a facility letter of 25th October, 2007. It is of interest to note that the affidavit of the first named defendant makes various observations about a facility letter of 16th February, 2006, 20th October, 2006, and 17th July, 2007. The latter document was superseded by the facility relied on by the plaintiff in this case. The defendants do not specifically raise their objections in relation to the facility letter relied on by the plaintiff in this case, namely, the letter of 25th October, 2007. As I have already indicated, that facility was offered on terms which are clear and unambiguous on their face. It was a loan for a term of twelve months from the date of first drawdown of the facility, and it was repayable on demand.

10. Applying the legal test which I have referred to in paragraph five above, it seems to me that there could be no reasonable basis on which the defendants could have believed that the monies were not repayable until the building development was complete. On any view of the facts, it does not seem to me that the defendants have satisfied the court that they have a fair or reasonable probability of establishing a *bona fide* defence.

11. Accordingly, I give the plaintiff liberty to enter final judgment in the sum claimed, with interest, pursuant to the terms of the agreement to date of judgment.