

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND
KIERAN DOYLE

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 10th day of July, 2018.

Background

1. This is the plaintiff's motion to enter judgment for the sum of €7,473,348.47 in respect of monies due and owing by the defendant to the plaintiff. The said monies were advanced to the defendant and a number of other persons ("the borrowers") pursuant to a facility letter dated 23 December 2010. The terms of the facility letter were accepted by the defendant and the borrowers and the monies were drawn down.

2. The defendant does not dispute that the monies are due and owing to the plaintiff. The defendant does, however, seek to have the matter remitted to plenary hearing as he maintains that he has established an arguable defence on two grounds.

Defences

3. The defendant puts forward two grounds of defence:-

(i) That a "Debt Resolution Agreement", dated 14 February 2017, between the plaintiff and the borrowers is a release or accord for the purposes of s. 17 of the Civil Liability Act 1961 (as amended) ("the Act of 1961").

(ii) That entry into the "Debt Resolution Agreement" amounted to a breach of the "Joint Venture Agreement" between the defendant and the borrowers and that such breach was induced by the plaintiff.

Test to be Applied

4. The test to be applied in an application such as this is well established. I refer to the oft cited passage in *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75, where Murphy J. speaking for the court stated, at pp. 78-79:-

"For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action (see *Irish Dunlop Co. Ltd. v. Ralph* [1958] 95 I.L.T.R. 70).

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 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the headnote thereto in the following terms:-

'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.'

In the *National Westminster Bank* case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows: 'I think it right to ask, using the words of Ackner L.J. in the *Banque de Paris* case, at p. 23, 'is there a fair or reasonable probability of the defendants having a real or *bona fide* defence?'"

5. In a case such as this where the defendant is relying upon an interpretation of a statutory provision and/or the construction of a contract(s), it seems to me that the judgment in *McGrath v. O'Driscoll* [2007] 1 ILRM is of particular relevance, where Clarke J. (as he then was) stated, at p. 210:-

"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."

6. I am satisfied that the issues raised by the defendant herein are "relatively straightforward" and that "there is no real risk of an injustice being done by determining those" arguments put forward by the defendant on a motion to enter final judgment. Further, it should be noted that at the hearing of the motion I had the benefit of detailed legal submissions together with books of the relevant authorities from Mr. Andrew Fitzpatrick S.C., on behalf of the plaintiff, and Mr. Donnchadh Woulfe B.L., on behalf of the defendant. I will now consider the defences put forward on behalf of the defendant.

Consideration of Defences

7. The first defence which I will consider is the submission by the defendant that the "Debt Resolution Agreement" amounts to a release or accord for the purposes of s. 17 of the Act of 1961.

8. The defendant and the borrowers borrowed the monies from the plaintiff to fund the proposed development of a site at Greenhills, Drogheda, County Louth. The purpose of the loan was to facilitate the restructuring of an earlier loan. Prior to borrowing the said monies, the defendant and the borrowers entered into a "Joint Venture Agreement" dated 16 May 2007. Under this agreement, the parties agreed to come together to form a "joint venture" for the development of both the Greenhills site and other sites.

9. Following the issue of letters of demand by the plaintiff to the defendant and the borrowers, the borrowers entered into a "Debt

Resolution Agreement" with the plaintiff on foot of which, in consideration of the sale of certain properties and subject to other stated conditions, the plaintiff forbore from pursuing the borrowers for the amount outstanding in relation to this loan.

10. The defendant is not a party to the "Debt Resolution Agreement" but does appear to have entered into negotiations with the plaintiff with a view to having the benefit of a debt resolution type agreement. These negotiations did not result in a concluded agreement but a "Discussion Document" setting out "Indicative Heads of Terms" between the plaintiff and the defendant was exhibited in the affidavit of the defendant.

11. In pursuance of the "Debt Resolution Agreement", the borrowers sold a number of properties and the proceeds are credited to the amount due to the plaintiff which was to the benefit of the defendant.

12. Section 17 of the Act of 1961 provides:-

"(1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged.

(2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (h) of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord..."

13. The question is then whether the "Debt Resolution Agreement" is a release or accord for the purposes of section 17. This Court concludes that the terms of clause 10.1, titled "Reservation of Rights", of the "Debt Resolution Agreement" answers this question. Clause 10.1(a) provides:-

"For the avoidance of doubt, each Borrower acknowledges and accepts that:-

(a) this Agreement shall not in any way impair or prejudice, or be construed as constituting a waiver or release or satisfaction of, any of the Bank's rights or remedies or in connection with the Finance Documents whether arising under their terms, at law or equity or otherwise..."

14. "Finance Documents" are defined in the said agreement as including the facility letter pursuant to which the plaintiff made available the loan facility to the defendant and the borrowers. Further, clause 9, entitled "Absolute Bar", provides that:-

"This Agreement may be pleaded and tendered by the Bank as an absolute bar to any defence offered by any defaulting Borrower in any proceedings brought by the Bank in relation to this Agreement or the Finance Documents ..."

15. It is clear to me, based on the wording of the "Debt Resolution Agreement", that it could not constitute a release or accord for the purposes of s. 17 of the Act of 1961. The defendant sought to rely on *ACC Bank plc. v. Malocco* [2000] 3 I.R. 191. In the course of her judgment, Laffoy J. stated, at p. 201:-

"I have no doubt that the submission made by counsel for the plaintiff that the effect of the settlement between the defendant's wife and the plaintiff on the liability of the defendant on foot of the loan agreement falls to be determined by application of s. 17 of the Act of 1961 is correct. What s. 17 means in the context of a wrong which is a breach of contract in the form of non-payment of a debt for which two debtors are concurrently liable and of a settlement agreement with one of the debtors is that, if the settlement agreement indicates an intention that the other is to be discharged, the settlement agreement effectuates his discharge, but, if it does not, he gets the benefit of the settlement agreement and his liability is reduced accordingly. ... As to whether an accord or settlement agreement "indicates", within the meaning of that word in s. 17, that a co-debtor is to be discharged, it seems to me that it does so indicate if such outcome is agreed expressly or by necessary implication."

In my view, this authority is of no benefit to the defendant given what I consider to be the clear and expressed terms of the "Debt Resolution Agreement".

16. The second ground of defence was that by entering into the "Debt Resolution Agreement" the borrowers were in breach of the "Joint Venture Agreement", such breach being induced by the plaintiff. Although it would seem that the plaintiff was aware of the "Joint Venture Agreement", there was no breach of it by virtue of the "Debt Resolution Agreement". I refer to clause 11.1, titled "Duties of Co-Owners regarding Bank Facilities", which states:-

"Each of the Co-Owners undertakes with the others to comply with its individual obligations under the Bank Facility Agreement and the Bank's Security."

Further, at 11.2 titled "Personal Obligation and Indemnity":-

"11.2.3. The Co-Owners agree that their liabilities in connection with the Joint Venture are several rather than joint and will be limited to their respective Property Owner Percentage. If any claim or demand is made against a Co-Owner arising out of this Agreement then each of the Co-Owners agrees to indemnify and keep indemnified the other or others of the Co-Owners against such claim or demand and all proceedings, costs, claims and expenses relating thereto."

17. Given the terms of these clauses, I do not accept that by entering into the "Debt Resolution Agreement" the borrowers have thereby breached the "Joint Venture Agreement". It is clear that the borrowers have to indemnify the defendant, as per the provisions I have referred to.

Conclusion

18. By reason of the foregoing, I am not satisfied that the defendant has established a defence as would oblige me to refer these proceedings to plenary hearing. Therefore, the plaintiff is entitled to judgment in the sum of €7,437,348.47 as against the defendant.