Neutral Citation: [2014] IEHC 109

THE HIGH COURT

COMMERCIAL

[2013 No. 2653 S]

[2013 No. 189 COM]

BETWEEN

VESTA MORTGAGE INVESTMENTS LIMITED

PLAINTIFF

AND

PAUL DEVINE AND MARY DEVINE

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 6th day of March 2014

1. This is an application brought by the plaintiff against the defendants for summary judgment in the sum of €18,872,399.47 together with continuing interest.

2. The debt was incurred by the defendants on foot of facilities granted to them by EBS Building Society ("EBS"). EBS was converted into a private limited company (EBS Ltd.) on 1st July, 2011. On 30th November, 2012, the plaintiff ("Vesta") purchased from EBS Ltd. the facilities together with related security and other rights.

3. Because this is an application for a summary judgment, the principles set out by the Supreme Court in *Danske Bank v. Durkan New Homes* [2010] IESC 22 apply. If the judge hearing the application is satisfied that the defendant has a real or bona fide defence, whether based on fact or on law, he is bound to afford the defendant an opportunity of having the issue tried in the appropriate manner. In *Aer Rianta cpt. v. Ryanair Ltd.* [2001] 4 I.R. 607, Hardiman J., having reviewed the Irish cases on the subject, said at p. 623:

> *"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?"*

In *McGrath v. O'Driscoll* [2007] ILRM 203, Clarke J. said that a court can, on a motion for summary judgment, resolve questions of law or construction but should only do so where the issues which arise are relatively straightforward and there is no real risk of injustice in determining them in a summary fashion. In *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75, Murphy J. cited with approval at p. 76 the following summary of the test set out in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 21:

> *"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."*

4. These are the tests that I have to apply in determining this application.

5. The defendants in this case have adopted something of a "scattergun approach" in defending the claim. They have raised the following issues in defence of the application for summary judgment:

(i) The plaintiff's capacity to bring these proceedings;

(ii) the plaintiff's capacity to claim interest as it is not a bank;

(iii) whether the requirements of the Bankers Books Evidence Act 1879 and 1959 have been complied with;

(iv) whether the plaintiff is estopped from maintaining these proceedings on the basis of an alleged undertaking by an employee of EBS that the loans would not be sold;

(v) whether a partnership agreement existed between the EBS and the defendants in connection with the purchase of property in Germany;

(vi) whether the plaintiff has breached the Data Protection Acts;

(vii) whether the first named defendant was an employee of the EBS;

(viii) whether the plaintiff was obliged to take into account certain tax implications arising for the defendants if the loans are called in;

(ix) whether the debt is ascertained.

The Plaintiff's Capacity to bring these Proceedings
6. These proceedings arise out of a series of twelve loan facilities advanced to the defendants by EBS Building Society between 1998 and 2008. On 1st July, 2011, EBS Building Society was converted into a private limited company named EBS Ltd. That conversion occurred under an Acquisition Conversion Scheme which was confirmed and registered by the Central Bank pursuant to s. 104 of the Building Societies Act 1989. The plaintiff acquired the facilities from EBS Ltd. under a Deed of Assignment dated 30th November, 2012.

7. Clause 2 of EBS Standard Conditions provided that the facilities are "*subject to the Rules of EBS except where the security documentation and/or Offer Letter provide otherwise*". Clause 7(1)(d) of the Rules entitles EBS to transfer, assign or dispose of any of its loans, whether absolutely or by way of security or otherwise. The requirements of s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 for a valid legal assignment of a debt have been met in this case. The Deed of Assignment expressly provides at clause 2.1 for the absolute assignment of the facilities to the plaintiff. The Deed of Assignment is in writing and has been sealed by EBS Ltd. in the presence of two authorised signatories. The defendants were notified in writing of the assignment. I am satisfied, therefore, that there was a valid assignment of the defendants' loans with EBS to the plaintiff.

The Plaintiff's Capacity to Claim Interest
8. The defendants assert that the plaintiff is not entitled to recover the monies advanced under the facilities and, in particular, interest on those monies, because it is not licensed by the Central Bank to do so. I accept the plaintiff's contention that it is not engaged in any regulated activity which requires a banking licence. It does not carry on "banking business" within the meaning of the Central Bank Act 1971, and, in particular, it does not receive monies from members of the public on deposit or as repayable funds. This assertion has not been challenged by the defendants. Neither is the plaintiff a money lender within the meaning of the Consumer Credit Act 1995, because it does not supply credit to consumers. This is not disputed by the defendants. The plaintiff's entitlement to levy interest arises on a contractual basis, on foot of the assignment of rights by the EBS to it. In my view, therefore, the defendants' assertion that the plaintiff is not entitled to claim interest is unsustainable.

Have the Provisions of the Bankers Books Evidence Act been complied with?
9. Mr. Mark Hughes, a manager in EBS Ltd., swore an affidavit verifying the sums due under each of the facilities granted to the defendants. It is clear from his affidavit and the exhibits therein that the provisions of the Bankers' Books Evidence Act have been complied with. Mr. Hughes is an officer of the EBS and as such is entitled to prove its books and records. He has exhibited copy statements of account in respect of each of the twelve facilities granted to the defendants.

Alleged Undertaking by EBS through Ms. Emer Finnan that the Facilities would not be sold by EBS
10. This claim by the defendant involves setting up a collateral agreement. The defendants allege that Ms. Emer Finnan on behalf of EBS said that the facilities would be "*rolled on a long-term sustainable basis"* and not sold. In support of this claim, the first named defendant exhibited an email from him to Ms. Finnan on 17th June, 2011, in which he said "*I appreciate EBS's willingness in principle to roll the facility forward on an interest only basis for the next 12 months. I am also much more comfortable that it is acknowledged that the portfolio will need to be kept intact to enjoy the much needed recovery to build back value*". In the same email he said "*I, and the majority of your commercial clients like myself are in limbo until a long-term plan is agreed . . . this is a piece of work that Conor and I will work on over the coming months, but your input will be necessary and invaluable*". That was as far as any discussion went on the issue as to how the loans were to be managed and falls way short of establishing a collateral agreement.

11. Furthermore, the Rules of the EBS prohibited Ms. Finnan from entering into the agreement contended for by the defendants as clause 12(4) provides that the Board of EBS is the entity which can, in agreement with a borrower, vary the terms of repayment of a loan facility. The Defendants agreed to accept the facilities on those terms. The plaintiff also argues that even if the agreement contended for by the defendants existed that it could not affect the plaintiff's title to the facilities having acquired them for value and without notice of any such agreement. While it might potentially give rise to a claim by the defendants against EBS, it could not affect the plaintiff's title to the facilities.

12. It is of some significance that although the defendants sought and were granted liberty to issue a motion to join EBS as a third party in these proceedings they did not do so. The defendants have not raised any issue to be tried on this point.

Was there a Partnership between the EBS and the Defendants?
13. The defendants claim that their purchase of property in Germany with monies advanced by EBS constituted a joint undertaking or partnership arrangement. The first named defendant exhibited a letter from Mr. Mark Hughes of EBS dated 17th January, 2011, in support of this contention. But the letter does nothing to suggest that it was written other than in the context of a relationship of lender and borrower and in no way supports a contention that there was a partnership. While I cannot ignore the fact that the defendants contend that there was a partnership, it is clear that the mere assertion of this in an affidavit does not of itself provide leave to defend since the court has to look at the overall situation to see whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence on the issue.

14. Having read the voluminous amount of documents in this case and considered the pleadings and submissions, it is clear beyond any doubt that the relationship between the EBS and the defendants was one of lender and borrower. The defendants have adduced no evidence which would call into question that relationship to the extent that this is an issue which should go for plenary hearing. In *Badeley v. Consolidated Bank* [1888] 38 Ch. D 238, Cotton L.J. held at p. 250 that where the participation in profits arises from a clause in an agreement entered into between parties, it is wrong to say that this is *prima facie* evidence of a partnership "*because you must look, not only to that stipulation, but all the other stipulations in the contract, and to determine whether on the stipulations of the contract taken as a whole you can come to the conclusion that there is a partnership - that there is a joint business carried on behalf of the two - or whether the transaction is one of loan between debtor and creditor, a loan secured by giving a certain interest in the profits*".

15. In this case, there is no provision for a sharing of profits or anything to suggest a partnership, and looking at the agreements as a whole, they are quite clearly agreements between a lender and a borrower. But even if the defendants were able to establish a partnership with regard to the monies advanced to purchase properties in Germany, it would not afford a defence to the plaintiff's claim for payment of the monies due and owing on foot of the facilities granted.

16. The defendants also raise a subsidiary objection in relation to the funds advanced for the purchase of properties in Germany. They claim that a building society is not entitled to exercise its power outside the State without the approval of the Central Bank. I am satisfied on the evidence that the facilities were advanced to the defendants in this jurisdiction and did not involve the exercise by the EBS of powers outside the State, even if security was provided by the defendants over properties in Germany. The defendants have not raised any arguable defence on this basis.

Data Protection

17. The defendants' assertion that the sale of the facilities by ESB to the plaintiff "*may be in breach of the Data Protection Act*" is unsustainable. In the first place, they do not allege that it is a breach. But, in any event, personal data may be processed in a variety of circumstances including where "*necessary . . . for the performance of a contract to which the data subject is a party*" (s. 2A of the Data Protection Act 1988, as inserted by s. 4 of the Data Protection (Amendment) Act 2003). Since the facilities granted to the defendants included an entitlement for EBS to assign them to a third party, and this was accepted by the defendants, it would not be possible for the assignment to have taken place without providing to the plaintiff information from which the defendants could be identified. That data was therefore necessary for the performance of that part of the contract between the defendants and EBS which provided for the assignment of the facilities. The point taken by the defendants on this issue does not give rise to an arguable defence.

Employment Relationship between First Named Defendant and EBS
18. One of the more puzzling claims made by the first named defendant is that he was an employee of EBS because he was in receipt of a sum of €8,000 *per* month on foot of variations agreed between EBS and the defendants in respect of a number of facility letters. In an affidavit sworn by him on 7th February, 2014, he claims that he was induced by EBS to resign from Cobalt Technology Ltd. ("Cobalt") and was paid €8,000 net *per* month by EBS. He says "*I was employed for over a year so I am a permanent pensionable employee of EBS*". There seems to be little evidence to support this extravagant claim of the first named defendant. Furthermore, it is difficult to see how this would afford a defence to the plaintiff's claim.

19. The first named defendant never took any proceedings against EBS in relation to any breach of an employment contract and existence of any employment contract between him and the EBS is denied. He claims that the EBS or the plaintiff will have to fully address his entire employment, tax and pension rights in the context of these proceedings. It is difficult to see how this could be so. But what I have to decide is whether it meets the test for leave to defend in a summary judgment application.

20. In January 2012, the EBS varied a number of facility letters as follows:

> *"EBS agrees to the transfer by Standing Order of €8,000 on the first day of each month from the rent account to Paul Devine personal bank account 63409583 in BOI subject to all interest payments charged on the EBS commercial loan accounts being up to date."*

In the same facility letter, it is provided that EBS had agreed to an interest only-period for a period of twelve months, expiring 21st September, 2012. It also provided that all rental income from certain secured properties in Germany and Ireland were to be mandated to EBS. The plaintiff argues that this is clearly one of the conditions on which EBS agreed to provide an interest-only period to the defendants and that the facility letter permitted the first named defendant to retain a portion of the rental income that he would otherwise be required under the facilities to remit to the EBS as a condition of the interest-only period. The plaintiff argues that there is no evidence to suggest that this gave rise to an employment relationship between EBS and the first named defendant.

21. Furthermore, the defendants do not deny that they have failed to make interest payments due under the facilities and therefore the first named defendant's entitlement to retain €8,000 *per* month from the rental income on the secured properties ceased when the defendants failed to pay the interest.

22. Applying the Summary Judgment test outlined in para 3 above, it seems to me that the defendants have raised an arguable case and that there is an issue to be tried as to whether or not the agreement contended for by the first named defendant exists and, if so, whether there should be any set-off arising from any such agreement.

Defendants' Tax Liability
23. The defendants claim that they will be exposed to a significant tax liability on the sale of the assets on which the facilities are secured. It seems to me that this is of no relevance to these proceedings. The plaintiff's claim is for judgment in respect of the monies due under the facilities only. No relief is sought concerning the security acquired by the plaintiff from EBS. But even if the plaintiff ultimately relies on such security and it has tax implications for the defendants, this is not something which affords a defence to the plaintiff's claim and therefore is not an answer to the claim for summary judgment.

Is the Debt Ascertained?
24. This is the real issue in the case. The defendants admit borrowing monies from EBS and acknowledge that monies were due to EBS on the date of acquisition of the facilities by the plaintiff. But, while they allege that the sums due are "unascertained", there has been no real attempt by the defendants to engage with the evidence proffered by the plaintiff setting out the amounts claimed to be due. No affidavit from a financial expert has been submitted on behalf of the defendants to suggest that the sums claimed are not due and owing or that the sums set out in the verifying affidavits of Mr. Mark Hughes and Mr. Jeffrey Johnson exhibiting statements of account are incorrect.

25. In an affidavit sworn on 7th February, 2014, the first named defendant conceded that he owed an unascertained amount to EBS at 30th November, 2012. The second named defendant has not repudiated that statement or said anything that would call it into question. In the same affidavit, he says that he paid €63,871.63 to the plaintiff in error in 2012. The plaintiff disputes that this was paid in error but there is sufficient dispute raised between the parties to bring the defendants within the ambit of the *Danske Bank v. Durkan New Homes* jurisprudence, so I will allow the defendants defend that issue at a plenary hearing. In that affidavit, the first named defendant refers to his accountant, Mr. Gerry Carron, and says that he spoke to him in February 2013, and it was agreed Mr. Carron would seek a refund from the plaintiff. There is no affidavit from Mr. Carron challenging any other sums claimed by the plaintiff from the defendants.

Conclusion
26. It seems to me that in the absence of any credible evidence challenging the sums claimed up to 30th November, 2012, the plaintiff is entitled to summary judgment for whatever sums are due on foot of the facilities up that date including interest under the terms of the facility letters. The sums due are what is shown on the statements of account in respect of the various loans as verified by Mr. Mark Hughes on affidavit.

27. I will allow three issues go to plenary hearing. The first is the extent (if any) to which the defendants are entitled to credits in the sum of €8,000 *per* month in respect of an alleged employment relationship between the first named defendant and EBS. The second issue is whether the defendants are entitled to credit for a sum of €63,871.63 which the first named defendant claims was paid in error to the plaintiff. And the third is the amount due since the 30th November 2012.