Neutral Citation Number: [2011] IEHC 162

THE HIGH COURT

2009 3551 S

BETWEEN

KILSARAN CREDIT UNION

PLAINTIFF

AND

MARK LOWTH

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 14th April, 2011

1. In these proceedings the plaintiff credit union applies for summary judgment in the sum of €94,584.62 arising out of a loan agreement on 23rd May, 2008, whereby the plaintiff agreed to make a loan of €90,000 to the defendant, Mr. Lowth. It is not in dispute but that only a small portion of the capital has been repaid or that the defendant is currently in default. The defendant, however, advances two separate defences to this application. First, it is contended that the loan was *ultra vires* s. 35 of the Credit Union Act 1997 ("the 1997 Act") in that the loan was made to a non-member. Second, it is argued that the plaintiff did not comply with the rules of credit unions prepared by the Irish League of Credit Unions. Before examining these defences, it is first necessary to set out the key background facts.

2. At the time of the provision of the loan, Mr. Lowth, who is a qualified accountant, was a director of a company entitled Danucci Ltd., a chocolate manufacturing company. It appears that the company had decided to expand its business and to move to new premises. The relocation was to be funded in part by a grant of some €90,000 from Enterprise Ireland, but the provision of this funding was delayed. It was thus necessary for the company to obtain bridging finance to cover these re-location costs.

3. The company applied for short-term finance from two banks, but it in the end no loan facilities were forthcoming. Mr. Lowth accordingly decided to apply to the plaintiff credit union for a loan and inquired for this purpose for a business loan. The plaintiff informed him that it did not provide business loans and that any loans which were approved would be provided as a personal loan to him.

4. It seems reasonable to infer that this was very much a second best solution so far as the defendant was concerned. Ideally, the loan would have been taken out in the name of the company, but since this option was not forthcoming and since the situation was pressing, Mr. Lowth presumably felt that he had no alternative in the matter. In any event, he did apply for a loan in his own name and the plaintiff duly approved the loan. The loan cheque was crossed and made payable to him personally, so that it could not have been cashed unless it was presented for payment in respect of an account held by the defendant.

5. There is no doubt whatever but that the plaintiff was fully aware of the purposes for which the loan was to be used and that it knew full well that the defendant intended to use the funds to give a loan to Danucci. This was, for example, made absolutely plain by the defendant's letter of 22nd May, 2008, to the plaintiff:-

> "We understand that you have sanctioned a loan in the sum of €90,000 in favour of our above named client, Mark Lowth. We confirm that this firm acts both for Mark Lowth in his personal capacity and for his company, Danucci Ltd. We confirm that Mark's company has been sanctioned a grant from Enterprise Ireland in the sum of €90,000 which we hope to draw in the next four to six months. We understand that our respective client have given you verbal assurances that the advance in the sum of €90,000 to Mark Lowth will be paid back in full from the proceeds of the facility from Enterprise Ireland. We confirm that this firm undertakes to assist in whatever way possible to ensure that the loan of €90,000 is refunded in full from the proceeds of the Enterprise Ireland grant."

6. On the following day a special meeting took place in the plaintiff's office to approve what was described as a "bridging loan" to the defendant, as the following extracts from the minutes show:-

> "it was decided with the letters of guarantee from both his solicitor and Enterprise Ireland Board that [the defendant] would be granted this loan for his personal use only."

7. For reasons which are probably unnecessary to explore, the moneys which the defendant had sought from Enterprise Ireland did not materialise. Unfortunately, as is all too common in these dismal times, Danucci went into examinership in June, 2009 and when this was unavailing, it went into liquidation in September, 2009.

8. Given that there is no significant dispute on the facts, the plaintiff is entitled to summary judgment unless the defendant can establish an arguable defence by reference to one or other of the two legal points thus advanced. It is plain from the Supreme Court's decision in *Danske Bank v. Durcan New Homes* [2010] IESC 22 that the court hearing an application for summary judgment may resolve such questions, although it is not obliged to do so. In her judgment for the Court in *Danske Bank* Denham J. approved the following passage from the judgment of Clarke J. in *McGrath v. O'Driscoll* [2007] 1 ILRM 203, 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."

9. It is in that vein that I propose to address the defences raised. It is worth noting, however, that the mere fact that the point is novel does not mean that it cannot be relatively straightforward and otherwise suitable for adjudication in the course of a motion for

summary judgment.

The *Ultra Vires* Defence
10. Section 35(1) of the 1997 Act provides:-

> "(1) Subject to the following provisions of this Part, a credit union may make a loan to a member for a provident or productive purpose, upon such security (or without security) and terms as the rules of the credit union may provide; but no loan shall be made to a member who is under the age of 18 and neither is nor has been married unless an indemnity is provided by the member's parent or guardian or by a person approved by the board of directors."

11. It follows from this provision and from s. 36 that a credit union may not generally make a loan to a non-member, save in the circumstances expressly contemplated by s. 36 of the 1997 Act in which a special vote of either the board of directors or the credit committee is required. This is in keeping with the mutual nature of credit unions, membership of which is confined to persons who share common bonds such as occupation, common employer or residence in a particular locality: see s. 6(1)(b) and s. 6(3) of the 1997 Act. This restriction on the category of potential borrower is, of course, one of the particular factors which serve to distinguish credit unions from other forms of credit institutions such as banks.

12. Section 35(1) provides, however, that the loan must be for a "provident or productive purpose". It is unnecessary for me to consider the limits - if any - which these words place on the lending capacity of a credit union, but it is plain that a loan to a member which is designed to enable that member in turn to supply liquidity to a family based business comes squarely within this rubric. Such a loan would clearly be for a productive purpose since it is designed to ensure the survival of a small business, even if the credit union could not make a loan directly to the company concerned. It follows that a loan of this kind to a member is plainly *intra vires* s. 35(1).

13. Of course, the objection here is that in reality the loan was made to the company and not to the member. This is perhaps true if one has regard to the ultimate destination of the loan. But if this were indeed the test, then s. 35(1) would be rendered unduly complex, almost to the point of unworkability. Suppose, for example, that a member needs a loan to discharge the invoice of a building company which has recently built an extension to the member's private dwelling. Is it to be said that a credit union in such circumstances has breached the terms of s. 35(1) in that the ultimate destination of the loan monies is to the (non member) building company in question? Surely not.

14. Not only would such an "ultimate destination" test introduce a new level of complexity, such a construction would also be at odds with the declared object of the section and, indeed, one of the purposes of the Act itself. As we have seen, s. 35 envisages that a credit union may lend for provident or productive purposes. It thus clearly envisages that the member will use the loan monies productively so as, for example, to purchase goods and services which, it is hoped, will thereby not only benefit the member, but also indeed the public at large by spreading the benefits of liquidity throughout the wider economy. Certainly, the Oireachtas cannot be said thereby to have intended to encourage credit union members to emulate the conduct of the third servant in the biblical Parable of the Talents who, being afraid of the possible consequences, simply hid the talent he had been loaned by the master in the ground: see Matthew 25:24-30. Yet if the ultimate destination test were to be applied, then the vast majority of such loans would be *ultra vires* s. 35(1), since the credit union concerned would have actual or constructive knowledge of the fact that the members concerned would apply the monies so as to benefit third parties.

15. For these reasons, I cannot agree that s. 35(1) should be interpreted in such a fashion. In the present case the loan was made to a member - namely, Mr. Lowth - and it was he who was and is personally responsible for that loan vis-à-vis the plaintiff, both *de facto* and, just as importantly, *de jure.* It is clear that Mr. Lowth was fully aware of this fact and he assumed responsibility for that loan on that basis. In this context such factual disputes as remain concerning, for example, whether the plaintiff sought to scrutinise the affairs of the company prior to making the loan are irrelevant.

16. For good measure, one might also draw attention to the fact that the correspondence between the parties also shows that the defendant acknowledged that the loan was his personal responsibility and not that of the company. Mr. Lowth now says that these expressions of opinion by him "were formed without the benefit of legal advice". Here it must be recalled that Mr. Lowth is a qualified accountant who has considerable experience of financial affairs.

17. In this regard, the well known comments of Ackner L.J. for the English Court of Appeal in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 21 are apposite. In this case two very experienced businessmen who had negotiated large loans for their company from the plaintiff bank contended that there was a collateral agreement that the personal guarantees would never be enforced and these guarantees existed simply for cosmetic purposes. This particular defence was, however, only raised once legal proceedings had been commenced.

18. Ackner L.J. reacted with some bemusement to the argument that these businessmen required independent legal advice before they could conclude that these guarantees were unenforceable. He observed ([1984] 1 Lloyd's Rep. 21 at 23):

> "A businessman of the experience of the defendants, faced with a demand under a guarantee…knowing that he had only signed the guarantee on the assurance that it did not render him under any obligation at all would not have waited for his lawyers to express his indignation, let alone his appreciation of the substance of the defence which he must have."

19. While the credit arrangements at issue here were not conducted in the gilded world of international finance - which was the backdrop to *de Naray* - I am nonetheless quite sure that Mr. Lowth does not have to take legal advice on the question of whether the loan was advanced to him personally or to his company.

20. In these circumstances I must conclude that the defence based on arguments alleging that the loan was *ultra vires* s. 35(1) of the 1997 Act is unsustainable in law.

The Rules of the Irish League of Credit Unions
21. The second ground of defence is that the plaintiff did not comply with Rule 46D of the rules of the Irish League of Credit Unions of which the plaintiff is a member. The defendant contends that the plaintiff failed to comply with the mandatory requirements of Rule 46D because it failed to provide him with a notice of the approval of the loan and the information required to be contained therein.

22. It must be said that these rules are in the nature of a contractual agreement between the plaintiff and the League and it is far from clear that a member of the plaintiff, not being a party to that contract, has any standing to enforce these contractual

obligations.

23. But even if it is assumed in the defendant's favour that he does, qua member, have the entitlement to enforce these obligations, this cannot avail him. It is true that Rule 46A(1) provides:-

> "On approving a loan in accordance with Rule 45 or 46, the credit union shall, in writing, notify the member who applied for the loan of the approved and of any time limit within which the approval will expire."

24. Rule 46A(2) provides:-

> "A notice under paragraph (1) may be in the form that, when endorsed by the member on accepting a loan offered by the credit union, constitutes as credit agreement for the purposes of Rule 46B and 46C."

25. The credit agreement, however, contain all the relevant details of the loan and the repayment terms. The agreement also provides:-

> "Whereas the member applied to Credit Union for loan facilities and such application has been approved by the Credit Union and the Credit Union agrees to advance to the member credit in the amount set out below ("loan") subject to the terms and conditions of this credit agreement and the Rules of the Credit Union."

26. It further provides:-

> "In order to reserve the loan you must return to the credit union all signed copies of the credit agreement within 7 days. If the loan is not drawn down within one month of the date upon which the credit agreement is signed by the member the loan will automatically lapse."

27. It is thus perfectly plain that the credit agreement itself constitutes the requisite notice in writing envisaged in Rule 46A. As I have indicated, it contains all the necessary details regarding the terms and duration of the loan.

28. In these circumstances, I cannot accept the defendant has made out any arguable defence on this ground either. Naturally, one must sympathise with the defendant given the difficulties that confront him - along with many other struggling small businesses - in an exceptionally challenging business environment. But sympathy alone cannot be allowed to deflect the Court from the enforcement of the plaintiff's legal rights.

Conclusions

29. It follows, therefore, that I must enter summary judgment in favour of the plaintiff in the sum of €94,584.62.