Neutral Citation [2015] IEHC 314

THE HIGH COURT

COMMERICAL

[2014 No. 9409 P]

[2014 No. 163 COM]

BETWEEN

KOMADY LIMITED AND MICHAEL O'REILLY

PLAINTIFFS

AND

ULSTER BANK IRELAND LIMITED, KIERAN WALLACE AND

SHANE MCCARTHY

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 23rd day of January, 2015

1. By notice of motion issued on 6th November 2014, the plaintiffs sought a number of reliefs but, at the hearing of the motion confined their application to seeking an order restraining the second and third defendants from acting in their capacity as joint receivers of the property known as Belgard Retail Park, Tallaght, Dublin 24, having been appointed to so act by deed of appointment dated 24th October, 2014.

2. On 6th November, 2014, the plaintiffs sought and obtained from the High Court (Gilligan J.) an interim order on an *ex parte* application in terms set out above. This judgment is given following the hearing of the application for an interlocutory injunction.

3. The proceedings arise out of a dispute between the parties in relation to two loan offer letters dated 28th June, 2005, (the *"2005 loan offer letters"*) and two loan offer letters dated 19th June, 2006 (the *"2006 loan offer letters"*). The loans made pursuant to the said loan offer letters will be referred to hereinafter as the *"2005 loans"* and the *"2006 loans"* respectively. The amount borrowed under the 2005 loan offer letters amounted to €24,440,000 and the amount borrowed under the 2006 loan offer letters was €2,500,000.

4. The principle form of security required by the bank for both the 2005 loans and the 2006 loans was a mortgage of the plaintiffs' respective interest in Belgard Retail Park. Separate deeds of guarantee mortgage and charge were executed by each of the plaintiffs on 27th September, 2005.

5. In a statement of claim delivered on 25th November, 2014, the plaintiffs referred to the above loan offer letters and security agreements and pleaded:-

> *"The plaintiffs will rely on the terms of those documents…at the trial of the within action for their meaning and effect."*

It follows therefore that, not only do the plaintiffs not take issue with the contents of those documents but they rely on their terms.

6. The defendants contend that there were a series of events of default on the part of the plaintiffs which entitled them to demand repayment and put in receivers over the property.

7. The plaintiffs for their part claim there was a course of dealing between the parties of such a nature as to give rise to an estoppel on the bank from relying on its strict entitlements under the loan agreements. The plaintiffs also claim that the bank acted on foot of an ulterior motive which was to enhance the value of an adjoining property in respect of which the bank has an interest. There are a number of subsidiary points raised by the plaintiffs which I will consider in due course when dealing with the question as to whether there is a fair or *bona fide* or serious question to be tried.

8. There is no dispute between the parties on the legal principles which apply. The test for an interlocutory injunction has been set out by the Supreme Court in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88, which requires the plaintiff to demonstrate:-

> *(a) that there is a serious issue to be tried;*
>
> *(b) that damages would be an inadequate remedy; and*
>
> *(c) that the balance of convenience favours the granting of the injunction.*

The parties also agreed that the restatement of the law in *Okunade v. Minister for Justice* [2012] 3 I.R. 152, is also relevant.

9. The plaintiffs claim that the following are the fair or *bona fide* or serious questions to be tried:-

> *(i) whether an "event of default" existed or other situation arose which would give the bank the entitlement to demand repayment of the facilities extended to the plaintiffs;*
>
> *(ii) whether the bank is estopped from relying on its strict entitlements under the loan agreements by acquiescing*

and/or by agreeing by conduct or through the maintenance of a course of dealing with the plaintiffs, and by attempting to revive an entitlement under its security documents which it never previously relied on in relation to specific/fixed security over the rent;

(iii) whether the bank has sought to exercise such enforcement rights as it is entitled to in good faith and for proper purposes; and

(iv) whether the bank has the right to appropriate and/or set off the monies standing to the credit of Belgard Retail Park Limited against loan accounts held by the plaintiffs.

10. When the plaintiffs made the *ex parte* application for an interim injunction, they did not exhibit the security documents. These documents are important in determining the rights and obligations of the parties and have to be considered with the 2005 and 2006 loan offer letters. The reason offered by the plaintiffs for not referring to the security documents was that they did not have the documents readily available. This is not a satisfactory explanation. The documents were clearly relevant to the issues the court had to determine since the plaintiffs were obliged by virtue of the mortgage and charge to set up a rental account, and they had refused to do so.

11. In deciding whether or not to grant an interlocutory injunction to the plaintiffs, the first question I have to decide is whether there is a serious issue to be tried. In approaching that task, I first have to see whether there are any facts or documents in this case which are not in dispute. I have already referred at para. 5 above to the fact that in the statement of claim, the plaintiffs rely on the terms of the loan offer letters and security agreements for their meaning and effect. Their meaning and effect is quite clear. The 2005 loan offer letter states:-

> *"The loan is repayable on demand. In the absence of demand, this loan facility is repayable over twenty years."* [Emphasis added]

The 2006 loan offer letter states:-

> *"The loan is repayable on demand. In the absence of demand, this loan facility is repayable by 1 June 2010."* [Emphasis added]

12. Under the 2005 and 2006 loan offer letters, the plaintiffs agreed to accept the first defendant's loan conditions which provided that in an event of default as defined in the conditions, the loans would be repayable on demand and the first named defendant could exercise its rights under any security which it holds.

13. Clause 6 of the Standard Conditions provided:-

> *"Any delay by the bank in giving notice or in exercising its rights hereunder shall not be construed as a waiver by the bank of its rights…"*

14. Clause 13 of the Standard Conditions provides, *inter alia*:-

> *"All items of security detailed in the Loan Offer or obtained at any future time will be required as a continuing security for the discharge of all indebtedness and other liabilities of the borrower to the bank now or in the future."*

15. The principal form of security required by the first named defendant for both loans was a mortgage of the plaintiffs' respective interests in Belgard Retail Park and separate deeds of guarantee, mortgage and charge were executed by each of the plaintiffs on 27th September, 2005. Clause 2.1 of the mortgage provided:-

> *"Subject always to the Limited Recourse Provisions, the Chargor hereby covenants with the bank that it will on demand pay and discharge the Secured Liabilities when the same are due. The Chargor acknowledges that the Secured Liabilities shall, in the absence of express written agreement to the contrary, be due and payable to the bank on demand."*

16. *"Secured Liabilities"* is defined so as to include all monies whatsoever due from the plaintiffs to the first defendant. The security documents require the plaintiffs to set up accounts to the first defendant in the name of the borrowers and the guarantors into which all of the rents will be paid and the first defendant was given a clear and express right to appropriate the rental proceeds.

17. The terms of the 2005 and 2006 loan offer letters, the first defendant's Standard Conditions and the security documents are all clear and unambiguous on their face. The affidavits before the court established that the plaintiffs are very experienced in the business of property development which would include entering into transactions to finance such a business. There is no suggestion, anywhere in the affidavits or in the exhibits, that the plaintiffs were unaware of what they were signing and indeed it would be surprising if that were so since, in the statement of claim delivered after the granting of the interim injunction, they rely on the loan agreements and security documents themselves for their meaning and effect (see paras. 7, 8 and 9 of statement of claim). Therefore, it seems to me there is no issue, let alone a substantial issue, to be tried on the contractual basis upon which these loans were made by the first defendant to the plaintiffs or the terms of the loan agreements and security documents.

18. The issues raised by the plaintiffs in this application for an interlocutory injunction are:-

> (a) an issue of estoppel said to arise by virtue of a course of dealing between the parties, and, specifically a failure on the part of the first defendant to rely on its strict entitlements under the loan agreements; and
>
> (b) an alleged ulterior motive, namely, enhancing the value of an adjoining site in which it has an interest by disposing of Belgard Retail Park.

19. While the plaintiffs claim that the bank is estopped by virtue of a *"course of dealing"* from exercising its rights under the facility letters, Standard Conditions, and security documents that is the height of the plaintiffs' case. Not a single letter or email or reference to a meeting or telephone conversation was made by the plaintiff wherein it is alleged that the first named defendant waived its legal entitlements under the documents. On the other hand there is a series of letters from the first defendant informing the plaintiffs that it was continuing to reserve its rights and these letters were never challenged in any way. Such evidence as is before the court establishes clearly that the first named defendant was continuing to reserve its position and, if necessary, rely on its legal entitlement to act on foot of the loan and security documents. There is no authority that I know of which says that merely because a bank

decides not to exercise its legal entitlement to proceed against a defaulting borrower that this of itself gives rise to an estoppel. In my view, the evidence in this case falls far short of establishing that the plaintiffs have raised a serious issue to be tried on the questions of estoppel. Indeed, such evidence as is before the court points to the fact that the first defendant at all times reserved its position and in more recent times made it clear that it was relying on its rights under the loan documents and security. There is nothing in my view which gives rise to an estoppel in this case. The plaintiffs themselves rely on the terms of the loan offer letters and security agreements. The loan offer letters include the first named defendant's Standard Conditions, clause 6 of which states:-

> *"Any delay by the bank in giving notice or in exercising its rights hereunder shall not be construed as a waiver by the bank of its rights…"*

20. If there is no estoppel then the provisions of the 2005 and 2006 loan offer letters, the Standard Conditions and security documents all apply, and govern the contractual relationship between the parties.

21. At the hearing of a motion for an interlocutory injunction, the court does not generally make a final determination of contested facts. However, where relevant facts are uncontested or clear from the evidence available, it is permissible for the court to take those into account. The court is also entitled to make a judgment at interlocutory stage in respect of a matter put in issue in the pleadings which is clearly not true. For example, in para. 18 of the statement of claim, the plaintiffs alleged that *"at no stage did the bank ever seek to correspond with the plaintiffs on terms that their failure to mandate the rental income to an account in their names held with the first defendant was treated as an event of default or other breach of either the loan or security agreements"*. This is quite simply untrue, as can be seen from the letter of 12th August, 2014, from the first defendant to the plaintiffs. In para. 9 of his affidavit sworn on 5th November, 2014, Mr. James Flynn admitted that the plaintiff *"had refused"* to pay over the sums into an account held with the first defendant in the plaintiffs' name. So there is no issue of fact to be tried on that point. There was nothing to prevent the plaintiffs paying the rent into such an account but they appear to have taken a deliberate decision not to do so. In my view, apart from being a clear breach of the agreements giving rise to an event of default this also amounts to a failure to come to the court with *"clean hands"*. Another clear example of an event of default relates to the loan on foot of the facility letter of 19th June, 2006 which was payable on demand or by 1st June, 2010. It is not disputed that the loan has still not been repaid. While there may be a dispute about other alleged events of default, it is clear that either of the proven events of default already referred to give rise to an *"enforcement event". "Enforcement event"* is defined in expansive terms in Clause 11.2 of the mortgage and includes (11.2.1) circumstances where *"any of the Secured Liabilities are not paid or discharged when due"* and (11.2.2) where there is *"a breach by the Borrower of any of the terms and conditions of this Indenture, the Facility Letter [or] any other security documents executed by the Borrower…"*. The mortgages also provide that the first named defendant has the power to appoint a receiver at any time after the security has become enforceable. The Standard Conditions of the first defendant which were accepted by the plaintiffs enumerate *"events of default"* which entitle the first defendant to treat the loans as being repayable on demand. The categories of default include *"any breach by the Borrower of any term or condition of the loan(s)"* [emphasis added].

22. The plaintiffs have not sought to put in issue the terms of the loan offer letters, Standard Conditions or security documents. In the absence of an estoppel, the defendants are entitled to rely on those documents and they clearly provide a legal basis for the defendants taking the actions which are challenged in this application.

23. The other basis of challenge is that in calling in the loans and appointing receivers, the first named defendant had an ulterior motive namely to enhance adjoining lands referred to as the *"Uniphar lands"* over which they also have control. This is a serious allegation and one which has not been established. While the disposal of Belgard Retail Park may well have that effect, there is no evidence to show that the first defendant acted against the plaintiffs in order to enhance the value of the adjoining lands. Evidence that the defendants' actions may have the effect of enhancing the value of the adjoining lands falls way short of establishing an improper motive and I reject that claim. In Paget's *"Law of Banking"* (14th Ed., Lexis Nexis, 2014), the authors state:-

> *"a mortgagee is entitled to look to his own interests in deciding to exercise or not exercise, his powers, and only risks liability if he acts in bad faith. It is extremely unlikely that there can be implied into a debenture term that the Bank shall be under a duty to consider all relevant matters before exercising that power, and in the absence of such a term, it has been held that no wider duty exists in tort."*

See *Shamji & Ors v. Johnson Matthey Bankers Limited & Ors* [1986] B.C.L.C. 278. That statement of the law was adopted by Baker J. in *Ryan v. Danske Bank A/S* [2014] IEHC 236, in which she said (at page 17):-

> *"I adopt this analysis and I am not persuaded that the plaintiff can show that a duty of care arises in the choice by the Bank to appoint a receiver."*

There is no evidence of bad faith on the part of the first defendant in this case.

24. The plaintiffs have failed to establish the first and essential test in the *Campus Oil* decision, namely that there is a serious issue to be tried. As they have failed on that issue, it is not necessary for me to consider whether damages would be an adequate remedy or to consider the balance of convenience.

25. I refuse the application for an interlocutory injunction.