Neutral Citation [2012] IEHC 400

THE HIGH COURT

[2011 No. 3507 S]

BETWEEN

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

PLAINTIFF

AND

ANTHONY KIRWAN, JOSEPH GALLAGHER, BRIAN ELLIOT, DARAGH MCEVOY

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered the 19th September 2012

The plaintiffs claim is for 242,451.17 alleged to be due and owing under a guarantee dated the 8th June 2006.

This is an application for summary judgment. The claim arises out of joint and several guarantees executed by the defendants to cover the liabilities of the company, Beocare Ltd, now in liquidation, of which they were directors. The defendants have filed affidavits in which they propose a defence to the bank's claim. The question on this motion is whether there is anything in the case put forward by the defendants that would if established amount to a defence. To use one of the approved formulations: is it very clear that there is no defence?

The background to the claim is that the company had an overdraft facility with the bank which the defendants jointly and severally guaranteed up to a total liability of €250,000. The four guarantees were in the same terms, each one constituting a continuing security. They are dated the 8th June 2006.

A new loan facility for the company was put in place in the terms of a letter of offer dated the 3rd August 2007. That was a term loan to the company of €250,000 to "restructure and amortise the Borrower's current account". Paragraph 6 of the letter of offer is headed "security" and is as follows: --

> "a) A Floating Charge over the assets and undertaking of Beocare Limited
>
> b) A Joint and Several Letter of Guarantee signed by the directors.... for the sum of €250,000...
>
> c) A letter of Postponement over Director's loan to [the 1st defendant] for the sum of €250,000

Any security held now or at any future time shall be security for all the Borrower's liabilities to the bank (actual or contingent) and whether as principal or surety."

The new guarantees envisaged by paragraph 6 b) were never executed. And, according to a supplemental affidavit sworn by the the third defendant Mr Elliott, the arrangements mentioned at a) and c) were also not put in place.

The case the defendants put forward is that the company took out the term loan to replace and redeem the overdraft that was guaranteed in 2006. The loan provided for new guarantees which were not put in place. In the result, the old guarantees were extinguished and were not replaced. The defendants' case, essentially, is that the overdraft was paid off by the term loan and that meant that the overdraft guarantees carne to an end.

The bank contends that the 2006 guarantees are a continuing obligation, in accordance with their express terms, covering the company's liability notwithstanding the alteration of the facilities. And the final sentence of paragraph 6 of the offer letter in 2007 kept the previous guarantees in force.

The question for the court is whether the defendants have raised an arguable case. If they have done so, it is not for the court to determine the issue; the matter must be sent for plenary hearing. If the position is clear that no arguable defence has been advanced, then there must be judgment for the plaintiff.

In *Aer Rianta v Ryanair* [2001] 4 I.R. 607, the Supreme Court endorsed two tests from the English jurisprudence that the Court had previously adopted in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75. In the latter case, Murphy J delivering the judgment of the Court said:

> "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).
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> "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:-
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> > '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:-
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> '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?' The test posed by Lloyd L.J. in the *Standard Chartered Bank* case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.'"

In *Aer Rianta*, McGuinness J. identified the issue "whether the proposed defence is so far fetched or so self contradictory as not to be credible." Hardiman J asked: "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?" The Court took the nature and context of the dispute into account.

In *Harrisrange Ltd v Duncan* [2003] 4 IR 1 McKechnie J summarised the Courts' approach to summary judgment and concluded that the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be.

It seems to me that the questions that arise in the case do not consist of clear factual disputes but are more in the nature of inferences to be drawn from facts and documents and points of legal consequence. If a borrower pays off a loan that is guaranteed, it follows in my view that the guarantor is freed of any further obligation under the guarantee, unless the circumstances or the agreement give rise to a different implication. In this case, the issues are (1) did the loan advanced as a result of the 2007 agreement pay off the overdraft? and (2) if so, did that extinguish the 2006 guarantees?

In *Danske Bank t/a National Irish Bank v Durcan New Homes and others* [2010] IESC 22, the Supreme Court decided that, while it was open to this court to decide questions of law that arose on a motion for summary judgment, it does not follow that the court is obliged in all cases to do so. The test is whether the defendants have established an arguable defence. In that case, the Supreme Court was so satisfied in relation to the construction of documents, in addition to a factual issue and its application. There was of course a factual matrix to the agreement between the parties that was relevant to the determination of liability.

Similarly, in this case I am satisfied that the defendants have raised a sufficient arguable case to warrant plenary hearing because of the inferences to be drawn from the facts and the legal consequences that follow. If the term loan in 2007 paid off the overdraft and constituted a new arrangement, did the final paragraph of paragraph 6 as quoted above preserve the defendants' undertakings in place? The answers to the questions raised are by no means obvious or clear on the papers and at this stage.

It may be that factual issues arise as to the matrix of the 2007 arrangement which materially affect the interpretation of the transactions but that is a separate question for consideration at a full hearing.

I therefore refuse this application for summary judgment and order that the case should be heard and determined at plenary hearing.