Neutral Citation [2013] IEHC 369

THE HIGH COURT

COMMERCIAL

[2012 1032 S]

[2012 76 COM]

BETWEEN

NATIONAL ASSET MANAGEMENT LIMITED

PLAINTIFF

AND

KEVIN MCNULTY, CONAL BYRNE, ASHBURTON CONSTRUCTION

AND P.A. BELLO LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 26th day of July, 2013

1. In these proceedings, the plaintiff has taken over the liabilities formerly owned by the Irish Bank Resolution Corporation ("IBRC") which in turn had taken over the liabilities of Anglo Irish Bank Corporation ("Anglo").

2. The plaintiff's claims against the first named defendant arises in part on foot of a facility agreement dated 5th October, 2009, in which the plaintiff agreed to provide and confirm the continuation of facilities to the first named defendant in the aggregate amount of €73,431,000. Funds available under the facility agreement were to be fully drawn down by 31st December, 2009, or such later day as determined by the Bank. The monies were repayable on demand. However, without prejudice to the Bank's right of demand, the date for repayment of the liabilities evidenced by that agreement was 31st December, 2009. The first named defendant also provided two "*all sums due*" guarantees to the Bank in respect of the borrowings of the third and fourth named defendants. Those guarantees are respectively dated 11th September, 1998, and 6th November, 2003.

3. The plaintiff's claim against the second named defendant arises on foot of an "*all sums due*" guarantee dated 21st August, 1998, in respect of the debts of the third named defendant.

4. The plaintiff's claim against the third named defendant arises on foot of a facility agreement dated 14th April, 2009, in which the Bank agreed to confirm the continuation of the facilities to the third named defendant in the aggregate amount of €3,848,000 ("the Ashburton facility"). The funds advanced under that facility agreement were repayable on demand. However, without prejudice to the Bank's right of demand, the date for repayment of the liabilities evidenced by that agreement was 30th June, 2009.

5. The plaintiff's claim against the fourth named defendant arises on foot of a facility agreement dated 6th January, 2009, in which the Bank agreed to confirm the continuation of the facilities to the fourth named defendant in the aggregate amount of €3,734,000 ("the P.A. Bello facility"). The funds advanced under that facility agreement were repayable on demand. However, without prejudice to the Bank's right of demand, the date for repayment of the liabilities evidenced by that agreement was 30th June, 2009.

6. Details of the figures claimed in each category were furnished to the court by Mr. Sean Tobin, a senior manager in the IBRC NAMA unit. Although the defendants do not accept that the amounts claimed in the proceedings are accurate, the parties did not challenge the fact that the figures given to the court by Mr. Tobin correctly represented the position as of 25th June, 2013. The sums outstanding (including interest) as of that date are:-

Mr. Kevin McNulty Personal Loans €82,243,145.16

Mr. Conal Byrne (as Guarantor of Ashburton) €4,259,849.43

Ashburton Construction Ltd. €4,259,849.43

P.A. Bello Ltd. €3,486,902.06

Mr. Kevin McNulty (as Guarantor of Ashburton) €4,259,849.43

Mr. Kevin McNulty (as Guarantor of P.A. Bello Ltd.) €3,486,902.06

Based on those figures, the total sum claimed by the Bank against the first named defendant as of that date is €89,989,896.65, while the total sum claimed against the second named defendant is €4,259,849.43.

7. These proceedings are taken by National Asset Loan Management Ltd. ("NALM"). The original loans were made and guarantees taken by Anglo whose business was subsequently transferred to IBRC. The Bank's liabilities were acquired by a bulk transfer on 1st November, 2010. In March 2011, the defendants were sent reservation of rights letters informing them that the plaintiff had taken over the management of their liabilities and reserving the plaintiff's rights in relation to whatever action it might take in respect of the defendants' liabilities.

8. In February 2012, demand letters were sent to each of the defendants and these proceedings commenced in March 2012. The matter was entered into the Commercial List on 21st May, 2012, and the plaintiff's application for summary judgment was refused by

Charleton J on 31st July, 2012.

9. The defendants raise a number of issues by way of defence. Most of these are technical in nature. Broadly speaking, the issues can be set out as follows. The plaintiff was put on proof that the amounts clamed in the proceedings are accurate. The defendants raise the issues of delay; mistake/*non-est factum*; the fact that there were material alterations to the letters of guarantee; breach of duty of care on the part of the plaintiff in purportedly failing to explain the nature and effect of the guarantee; breach of condition precedent; reliance on the *contra proferentum* rule and breaches of legislation on the part of the plaintiff.

10. The plaintiff served two letters of demand on the first named defendant. The first was dated 21st February, 2012, in respect of the first named defendant's facility agreement, while the second was dated 22nd February, 2012, in respect of the Personal Guarantees given by the first named defendant in respect of the Ashburton facilities and the P.A. Bello facilities.

11. On 21st February, 2012, letters of demand were served on the third and fourth named defendants in respect of the Ashburton facilities and the P.A. Bello facilities, respectively.

12. On 22nd February, 2012, a letter of demand was served on the second named defendant in respect of the Personal Guarantee given by him for the repayment of sums due under the Ashburton facility.

Execution of Documents by First and Second Named Defendants

13. The first and second named defendants freely admitted in their evidence that they signed the guarantees relied on by the plaintiff in this action and that they did so without having read the documents. In fact, they conceded that numerous facility letters and other documents of a formal nature relating to the loans in dispute were put before them and they signed them without reading them. At the time when they signed the relevant documents, they had the benefit of professional advice from an accountant. In the case of the first named defendant, he admitted that he could have consulted his accountant Mr. Hopkins or his solicitor if he had any reservations concerning the documents, but he declined to do so.

14. When the second named defendant signed the Personal Guarantee on which he is sued in these proceedings, he was accompanied to the offices of the Bank by his accountant and business advisor, Mr. Gerard Hopkins. The second named defendant had previously retained a Mr. Page as his accountant, and had been advised by a solicitor, Mr. Doherty. However, it is clear that once he went into business with the first named defendant, Mr. Hopkins represented both of them in their negotiations with the Bank, presented a business plan to the Bank on their behalf and on behalf of Ashburton, and advised both of them in their joint business venture which was carried on through Ashburton. Although the second named defendant claimed that he was unaware of the existence of a Personal Guarantee until he received a letter from Mr. Patrick Coen of the plaintiff dated 6th December, 2011, the evidence established that there were some 12 or 13 facility letters signed subsequent to the Guarantee where the Guarantee was acknowledged within the facility agreement as being in existence. All of these documents were signed by the second named defendant.

15. I am satisfied on the evidence that the first named defendant was an experienced businessman at the time when he took out the loans and gave the guarantees which are the subject matter of these proceedings. However, I do not accept that the second named defendant was as experienced. He was a retired member of An Garda Síochána and although Mr. Hopkins had provided a statement of net worth for the second named defendant to the Bank, indicating a net worth of approximately of €1m on 6th August, 1998, the evidence did not establish that he was an experienced businessman. Rather, it appears that he relied heavily on Mr. McNulty and hoped to make a profit out of their joint venture through Ashburton Construction Ltd.

16. The facility letters relied on by the plaintiff in these proceedings are those of 6th January, 2009, 14th April, 2009 and 5th October, 2009. The letters of guarantee relied on are:

> 11th September, 1998 (First named defendant in respect of the obligations of Ashburton)
>
> 21st August, 2008 (Second named defendant in respect of the obligations of Ashburton)
>
> 6th November 2003 (First named defendant in respect of the obligations of P.A. Bello Ltd.)

17. The first and second named defendants claim that the 1998 guarantees should have been called in by 2008 at the latest, and accordingly that the plaintiffs claim should be rejected by reason of this purported delay. The liability of the defendants was a continuing liability under the terms of the facility agreement. Facilities continued to be availed of by the third named defendant on foot of facility letters up to and including 14th April, 2009, and by the fourth named defendant up to and including 6th January, 2009.

18. The relationship between the Bank and the borrowers was fluid in its nature and continued up to the point where the Bank took the view that it would have to issue letters of demand in order to recover payment. Letters of demand were served on the first named defendant on 21st and 22nd February, 2012. On 21st February, 2012, letters of demand were served on the third and fourth named defendants. On 22nd February, 2012, a letter of demand was served on the second named defendant. The plaintiff argues that it was the failure to respond to those letters of demand which gave rise to the defendants' liability. These proceedings were commenced on 21st March, 2012. In my view, the delay point taken by the defendants in objection to the claim is not well founded and I reject it.

19. Detailed evidence was given concerning the balances on the accounts of the first, third and fourth named defendants as of 25th June, 2013. Apart from putting the plaintiffs on proof of the sums due and owing by the defendants, there was little dispute about the actual figures and I accept them. While the defendants raised issues as to whether or not the correct sum was claimed in the proceedings and what appeared to be discrepancies between the figures in the letter of demand and the figures in the summons and the affidavit of Mr. Coen, the evidence suggested that the discrepancy was due to the cost of funds refund that had been made to Ashburton. Having explained how this arose, both Mr. Coen and Mr. Sean Tobin stood over the actual figures due from the defendants as of 25th June, 2013. In fact, Mr. Tobin's cross-examination was postponed overnight at the end of Day 3 of the trial to enable him to further check the figures which he offered to the court in the light of matters raised in cross-examination by the solicitor for the first named defendant in circumstances where there was no advance notice given of the points being taken and where there was no witness statement before the court in which the figures were contradicted. Having made extensive enquiries overnight into the figures which he offered to the court on Day 3 of the trial, Mr. Tobin reiterated his view that the figures were correct and he saw no reason to alter them. Insofar as there may have been discrepancies raised by the defendants, these have been fully dealt with by Mr. Tobin and Mr. Coen and I accept their evidence.

20. The defendants also raise technicalities concerning the capacity of the plaintiff to claim in respect of the monies that were due to Anglo. Detailed evidence was given by witnesses for the plaintiff as to how it acquired the loans of the former Anglo Irish Bank. I

accept the evidence given on behalf of the plaintiff and the legal submissions made concerning the powers of the plaintiff to maintain these proceedings.

21. As I have already remarked in paragraph 17 of this judgment, the defendants offered no evidence to show that the figures stated to be due on the accounts were not correct. Mr. Tobin, on behalf of the plaintiff, produced a certificate in relation to the sums due, having examined the books and records of the company and having checked interest rates at the appropriate dates. The certificate was signed by two authorised signatories in NAMA as required under the National Asset Management Agency Act 2009. The general bank conditions under which the loans were made states at clause 15.2:

> *"A certificate by any directors, secretary or manager of the Bank as to the amount due from the borrower hereunder or pursuant to any of the security documents by the amount of any interest, commission or other sums owing hereunder or pursuant to any of the security documents shall, save for manifest error, be conclusive evidence thereof."*

The function of signing the certificate passed to NAMA after the demise of Anglo. There were no remaining directors of the Bank available to sign the certificate, so the plaintiff has produced a document which it says represents their best attempt to comply with the conditions where it is no longer possible to comply strictly with those conditions. It seems to me that since the certificate met the requirements of the 2009 Act it is in proper form and the plaintiff can rely on it.

22. Mr. Patrick Coen, an assets recovery manager with NAMA, gave detailed evidence as to how the plaintiff is entitled to maintain these proceedings being an entity within the meaning of the National Asset Management Agency Act 2009. He described how the first named defendant, as a director and shareholder of Ashburton, had been requested to submit a business plan and the steps that were taken leading up to the commencement of these proceedings. I am satisfied that Mr. Cowen's evidence can be relied on and I accept, on the basis of his evidence, that the plaintiff is entitled to maintain these proceedings against the defendants and has taken all proper and necessary steps to prove its claim.

23. So far as the letters of guarantee are concerned, the first and second named defendants raise issues of mistake, *non est factum* and breach of duty on the part of the plaintiff. There was no credible evidence to support a finding that the Bank was negligent in the manner in which it arranged for the facilities to be given to the companies or the first named defendant or in relation to the execution of the guarantees. In circumstances where the first and second named defendants candidly admit that they did not read the documents and signed them without reading them, they are not entitled to rely on the doctrine of *non est factum*. In *Friends First Finance Ltd. v. Lavelle & Anor.* [2013] IEHC 201, Charleton J. at para. 16 stated:

> *"For the correct legal application of the defence whereby a defendant in general is able to plead successfully in answer to a written contract that it is not his deed, I need go no further than the judgment of Kelly J. in Allied Irish Bank plc v. Higgins and Others [2010] IEHC 219 (Unreported, High Court, Kelly J. 3rd June, 2010). The issue in that case was whether a Mr. Mansfield was entitled to escape liability for a debt on the basis of a reading age appropriate to a seven year old and an alleged complete lack of understanding of the relevant documents. The person in question was a seasoned businessman who could pilot a helicopter and who at one stage controlled a vast financial empire very successfully. The following treatment of the law is set out at pp. 40 - 41:-*
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> *The defence of non est factum is one which has been considered in the context of an application for summary judgment by Morris J. (as he then was) in Tedcastle McCormack & Company Limited v. McCrystal (15th March, 1999). There that judge considered the decision of the House of Lords in Saunders v. Anglia Building Society [1971] AC 1004 which is the authoritative modern authority on the topic. He said:-*
>
> *'I am satisfied that a person seeking to raise the defence of non est factum must prove:*
>
> *(a) That there was a radical or fundamental difference between what he signed and what he thought he was signing;*
>
> *(b) That the mistake was as to the general character of the document as opposed to the legal effect; and*
>
> *(c) That there was a lack of negligence i.e. that he took all reasonable precautions in the circumstances to find out what the document was.'*
>
> *In the course of his speech in Saunders' case, Lord Reid having pointed out that there is a heavy burden of proof on the person who seeks to invoke this remedy went on to say:-*
>
> > *'The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief…'*
>
> *Lord Hodson in the same case said:-*
>
> > *'Want of care on the part of the person who signs a document which he afterwards seeks to disown is relevant. The burden of proving non est factum is on the party disowning his signature; this includes proof that he or she took care. There is no burden on the opposite party to prove want of care.'"*

24. While the first named defendant was more experienced in business than the second named defendant, both were adult men of reasonable intelligence who had agreed to embark on a venture to be conducted through the vehicle of a limited liability company. In the case of the first and second named defendants, this vehicle was the third named defendant. In the case of the first named defendant, he also used the fourth named defendant as the vehicle for his business purposes. Both the first and second named defendants allowed their accountant to make proposals to the Bank and to submit statements of affairs with a view to the third named defendant borrowing substantial sums of money to be used in a venture which the first and second named defendants hoped would make them a tidy profit.

25. All of this took place against a background of a property boom when banks were only too happy to lend money and borrowers were only too happy to borrow. That may explain the lack of care on the part of the first and second named defendants in studying

the documents which they signed and in seeking to understand the liabilities they were taking on. At the time when they signed the letters of guarantee, they had the benefit of professional advice. Insofar as there may have been some haste in getting some of the documents signed. I accept the evidence that this was because the first and second named defendants had misunderstood the closing date for an agreement until the last minute and they then had to have everything put in place as soon as possible. This was not the fault of the Bank.

26. There was no question of the first or second named defendant not having an opportunity to properly read the documents, had they chosen to do so. Having signed the documents without adequately reading them, or reading them at all, they must accept the consequences. If they signed the documents and they did not fully understand what they were signing, they must again accept the consequences as they had the benefit of professional advice available. It seems to me that unless the Bank was guilty of some wrongdoing in the manner in which it procured the signature of the first and second named defendants on the letter of guarantee, the defendants are bound by them. There is no evidence of wrongdoing on the part of the Bank in this case. While a suggestion was made by the first named defendant that there was a material alteration to the personal guarantee given in respect of P.A. Bello Ltd there was no evidence to support that claim. The first named plaintiff's solicitor raised the possibility that the guarantee may have contained a number of blank spaces which were filled in after the document was signed. The first named defendant gave no such evidence and, in any event, it would be difficult to see how he could have done so as he admitted signing the guarantee without reading it. The evidence suggests that the Bank was careful to ensure that all the security documents were properly completed. When they discovered that Mr. Hopkins had signed a guarantee on behalf of Mr. McNulty, they had the matter rectified because they realised Mr. Hopkins could not bind Mr. McNulty by way of a personal guarantee in respect of the debts of the company.

27. In *ACC Bank plc. v. Kelly* [2011] IEHC 7, Clarke J. held that a surety cannot avoid a contract simply on the basis that he did not understand what the contract terms meant or because he misunderstood the commercial consequences of the contract. At paras. 7.2 to 7.6 of his judgment, in considering whether the defendants were entitled to rely on a mistake as to the demand nature of a facility, Clarke J. made the following remarks:-

> *"7.2 The loan was expressed to be payable on demand. [The second defendant] indicated in evidence, and both of the [defendants] argued, that they were unaware that the loan was a demand facility. The loan is, however, clear in its terms. It says that it is repayable on demand and that the terms concerning payment of interest only for a period and interest and principal over an extended period are stated to be what is to happen in the absence of a demand. This is not exceptionally technical language. The ordinary meaning of the term demand in English is that a person insists on something happening. The ordinary meaning of a loan being repayable on demand is that a person who gives the loan is entitled to demand repayment. The terminology used in describing the other repayment terms is again clear. Those terms only applied where there is no demand. It is by no means unusual for commercial property lending facilities to be payable on demand.*
>
> *7.3 I am not satisfied that any person taking the trouble to read the clause in question could have any difficulty in understanding what it meant. Even if someone had such difficulty then it is incumbent on such a person to take advice. It must be remembered that these are not consumer transactions. The [defendants] were involved in quite a significant business and had borrowings in excess of €7m. This was, therefore, a commercial banking transaction. Many people in such circumstances do take professional advice whether from accountants of lawyers. There is no obligation, of course, so to do. But someone who signs commercial banking documents without taking advice on them runs a risk which they must accept. They will be bound by the terms which they sign up to."*

28. The second named defendant sought to argue that he was not an experienced businessman and that therefore those principles should not apply. I do not accept that argument. The second named defendant was not some "*innocent abroad*". He was a retired member of An Garda Síochána who had carried out other transactions involving land, the purchase and registration of a fishing trawler, and had dealt in accounts, bonds and shares. While I accept his evidence that these were largely family arrangements dealing with family property and, in the case of the trawler, buying an asset to support a brother, they show that the second named defendant was prepared to engage in a variety of business transactions which would suggest that he was competent in business affairs.

29. The defendants' arguments on the failure to ensure that conditions precedent to the granting of the loan were met, is, in my view, without merit. Insofar as there were a number of conditions precedent which may not have been met, they were all for the benefit of the Bank and to protect the Bank. They were to ensure that the facility would not be available for drawdown unless the conditions precedent set out in the General Conditions were satisfied. It was within the Bank's discretion to waive those conditions or not to insist on them.

30. The defendants argue that the Bank was insolvent in 2009 at the time the facilities were granted and appear to be raising an argument that there may have been fraudulent trading. There was no evidence offered to the court by the defendants that Anglo was insolvent in 2009, at which time various facilities were made available to the defendants. Even if it was, there is no evidence that the personnel sanctioning the loan knew or ought to have known that the Bank was insolvent. If the Bank was insolvent, this might give rise to issues for the directors. But it does not mean monies advanced by the Bank would not be repayable. The defendants offered no evidence to show that Anglo was insolvent in 2009, but in any case, the vast bulk of the money lent by the Bank to the first, third and fourth named defendants was lent at a time when there was no question in relation to the solvency of Anglo. The first named defendant agreed with that proposition when it was put to him in cross-examination.

31. While acknowledging that a tort of reckless lending has not been recognised in this jurisdiction (see the judgments of Charleton J. in *ICS Building Society v. Grant* [2010] IEHC 17 and of Kelly J in *McConnon v. The President of Ireland* [2012] 1 I.R. 449), the defendants seek to advance the proposition that a claim of reckless lending should be a good defence to a claim for judgment on foot of loan agreements and guarantees. I do not accept that such a defence exists, but in any case the defendants have failed to adduce sufficient evidence to ground a finding that there was recklessness on the part of the Bank.

32. Although the issue of the *contra proferentum* rule was raised by the defendants, no serious argument was advanced as to how and why that rule might apply in this case. There was nothing to suggest that there was any ambiguity in the terms of the facility agreements or the Bank's conditions which required them to be construed in such a way as would involve invoking the *contra preferentum* rule. As no good argument was made on that point, I reject the argument based on the rule.

33. The evidence in this case shows a course of dealing between the plaintiff and the defendants over a number of years. During that time, the first and second named defendants signed many documents acknowledging that they accepted the terms set out in the facility letters and the Bank's terms and conditions. They also signed correspondence acknowledging the existence of their guarantees. While the second named defendant sought to distance himself from the activities of the third named defendant by saying

that he "*. . . wasn't part of the company from 2005 . . .",* he conceded that as recently as November 2010, he was still signing documents on behalf of Ashburton.

34. Having reviewed the evidence in this case, I am satisfied that the third and fourth named defendants are liable to the plaintiff in respect of the sums advanced to them. The first named defendant is liable to the plaintiff in respect of the facilities granted to him personally and also in respect of the sums due by the third and fourth named defendants by virtue of his Personal Guarantees. The second named defendant is liable on foot of his guarantee for the sums due by the third named defendant to the plaintiff.

35. I accept the evidence given by Mr. Sean Tobin as to the figures due and owing by each of the defendants set out in paragraph 6 of this judgment. Those figures show the position as of 25th. June 2013. I will hear counsel on the figures due as of the date of this judgment.