Neutral Citation: [2014] IEHC 45

THE HIGH COURT

[2012 79 S]

BETWEEN

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

PLAINTIFF

AND

KEN MULVANEY

DEFENDANT

JUDGMENT of Mr. Justice Birmingham delivered on the 5th day of February, 2014

1. In this case the plaintiff is seeking liberty to enter final judgment in the amount of €736,948.45, together with further interest on the principal sum of €697,391.65 at the rate of 5.216% per annum from 23rd November, 2011, until judgment or payment. The claim for summary judgment is resisted by the defendant who instead seeks to have the matter remitted to plenary hearing. Essentially the case made by the defendant is a simple one. He says that while money was lent to him by the bank and has not been repaid, that the loan in question was a "non-recourse" one.

2. The tests that are to be applied have been considered by the Superior Courts in a number of cases in recent years. Indeed, I do not identify any significant disagreement between the parties as to the principles to be applied, rather what is between the parties and what they do disagree about is what the outcome is if the agreed principles are applied.

3. In *First National Commercial Bank plc v. Anglin* [1996] 1 I.R. 75, Murphy J. dealt with the approach to be taken in these terms at pp. 78 to 79:-

> "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
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> . . . .
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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 Lloyds 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 defendant having a real or *bona fide* defence.'
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> 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, . . . '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.'"

4. The matter was again considered by the Supreme Court in the well known case of *Aer Rianta cpt v. Ryanair Limited* [2001] 4 I.R 607, wherein the test laid down in *First National Commercial Bank plc v. Anglin* was endorsed by McGuinness J. at p. 615, where she commented:-

> "Thus it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr. O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. . . . The court does not ask whether Mr. O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr. Byrne's account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible."

5. The issue is also the subject of a judgment from Hardiman J. in the same case. In the course of his judgment he observed at pp. 621 – 622:-

> ". . . I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the late nineteenth and early twentieth centuries. The formulation used in *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75 and the cases cited in that judgment are useful and enlightening expressions of the test, but I do not believe that this formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. The 'fair and reasonable probability of the defendants having a real or *bona fide* defence', is not the same thing as a defence which will probably succeed, or even a defence whose success is not improbable."

6. Later Hardiman J. went on to say 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?"

7. A particularly helpful and concise summary of the applicable principles was provided by McKechnie J. in *Harrisgrange Limited v. Duncan* [2003] 4 I.R. 1.

8. In the case of *Zurich Bank v. McConnon* [2011] IEHC 75, (Unreported, High Court, Birmingham J., 4th March, 2011), having reviewed the relevant case law, I commented that while the jurisdiction to refuse leave to defend and to proceed to summary judgment undoubtedly existed, that it was a jurisdiction to be exercised very sparingly indeed. I remain firmly of that view. In the *Aer Rianta v. Ryanair* case, Hardiman J., as I have just quoted, summarised the test as being "is it 'very clear' that the defendant has no case?". That is the test I will apply. If the answer is in the affirmative, I will accede to the motion. However, unless it is very clear that the defendant indeed has no case, the matter will go to plenary hearing.

9. On the basis then that unless it is very clear that the defendant has no defence that he ought at this stage be permitted leave to defend, I turn to examine the arguments made in relation to the alleged non-recourse nature of the loan. The circumstances in which the loan is stated to be non-recourse are set out in the affidavit of the defendant. It is very much a story of its time.

10. From the affidavit it emerges that the defendant is a business man who ran and had established a number of businesses principally in the hospitality sector. In 2005 or thereabouts, the defendant was contemplating making an investment with a view to supplementing his pension. It goes without saying that his interest was in a successful, profitable investment. In the spring of 2005 an acquaintance of his, who was aware of the fact that he was seeking an investment opportunity, recommended to the defendant that he invest in a project at the Sawgrass Marriott Resort in Florida, the home of the Players Championship or the so called "Fifth Major".

11. A few weeks later the same acquaintance rang to say that he had organised an all expenses paid trip to Sawgrass for potential investors timed to coincide with the Players Championship. One of those on the trip was a Mr. Barry Myler, who was introduced to the defendant as an executive of the plaintiff bank. According to Mr. Mulvaney the two hit it off and spent quite an amount of time in each other's company.

12. According to Mr. Mulvaney, while on a bus trip to the resort golf museum, he asked Mr. Myler whether the plaintiff would be prepared to provide a loan to him and to other investors to fund their investment and that Mr. Myler's response was positive.

13. Mr. Mulvaney has averred that on several occasions he turned the conversation to the question of personal recourse for any loan which the plaintiff might provide, and that he asked Mr. Myler specifically whether the bank would require any form of personal guarantee as responsibility from him with regard to the repayment of the loan.

14. Mr. Mulvaney states that he had understood that the loan would be repayable through realisation of the investment in the resort, but that he wanted to discuss the question of whether he would be personally liable to repay the loan out of his own funds in the event that the realised value of the investment was insufficient to meet the loan obligation. Mr. Mulvaney asserts that Mr. Myler told him that the plaintiff bank would require no commitment from him other than the provision of security over the shares in the resort that it was proposed would be purchased using loan money. I am bound to say that the impression I have formed is that the account of the conversation on the bus that has been offered by Mr. Mulvaney is more than a little coy. It is said that Mr. Myler was asked specifically whether the bank would require any form of personal guarantee or commitment. The reference to guarantee is hard to understand. Mr. Mulvaney was a mature businessman who had reached a stage in life where he had retired from full time activity in the workplace, so it is hard to see what role there would be for a guarantee. There was no question of him personally guaranteeing a loan advanced to a company with which he was associated. Nor does it make any sense that Mr. Mulvaney would be required to find a guarantor. If what Mr. Mulvaney was seeking to do was to ask for any loan to be on a non-recourse basis, it is hard to see why he did not simply ask for that.

15. By the same token there is a degree of vagueness and imprecision in the assertion by Mr. Mulvaney that Mr. Myler said that the plaintiff bank would require no commitment from the defendant other than the provision of security over the shares.

16. The defendant says that the plaintiff bank is fully aware that he simply would not have sought the loan had he known that the bank wished to be entitled to enforce the loan obligation personally.

17. Mr. Myler for his part, states in his affidavit that he denies in the strongest possible terms that he ever represented that borrowing would be on a non-recourse loan basis. He contends that such a suggestion is wholly unbelievable. He says that he absolutely refutes any such claim or suggestion, and absolutely denies that he ever told or hinted to the defendant that the loan would be non-recourse. He goes on to say that it was bank policy not to offer non-recourse loans. Providing such non-recourse loans would require the bank to accept all the downside risk of the underlying investment, while allowing the borrower all the upside investment potential, while the bank would only receive an interest margin of 2% on all the risk. Mr. Myler described this as a ludicrous proposition.

18. Certainly, it must be said, that what Mr. Mulvaney contends for is a surprising proposition. One is tempted to ask as Ryan J. somewhat wryly did in the case of *Irish Life and Permanent plc T/A Permanent TSB v. Hudson* [2012] IEHC 11 (Unreported, High Court, Ryan J., 13th January, 2012) whether all this is too good to be true and indeed why if such remarkably favourable terms were available to Mr. Mulvaney, he would confine himself to merely borrowing $1million. Why not borrow a multiple of that? There are some other factors present which make the suggestion even more unlikely. In the course of his replying affidavit Mr. Mulvaney comments as follows:-

> "I was not in a position to fund the repayment of the principal amount of the loan when demanded by the Plaintiff and by letter dated the 8th October, 2010, my solicitors informed the Plaintiff of the reason why I did not believe that the Plaintiff was entitled to take any steps to enforce the terms of the loan agreement as against me personally."

19. If it really was the case that the defendant had obtained a loan which meant that he was never going to have to pay back the principal amount of the loan, because the bank's recourse was confined to the shares purchased, then why would he be concerned about his ability to pay and the extent to which he was in a position to do so, because that was something that would simply never arise. The letter from the solicitor of the 8th October, 2010, referred to falls very significantly short of contending that Mr. Mulvaney was ever told that the loan was a non-recourse one. Rather, the comment is made that Mr. Mulvaney was adamant that had it been explained to him that any of his other assets could ever be at risk, he would not have made this borrowing, or indeed made this

particular investment.

20. While the account given by Mr. Mulvaney is improbable, indeed highly improbable, one must remember that at this stage, there has been no oral evidence and the accounts given by those on the bus have not been subjected to cross examination. Therefore, there can be no question of preferring one account to the other or deciding the case on the basis that one account is more probable than the other. However, we are not confined to two accounts of what transpired on the bus to the golf museum, and other sources of information are available. In that regard, the loan in question was the subject of two loan offer letters. This was because the loan was originally denominated in dollars, but was then converted to the euro equivalent. The first letter of the 23rd June, 2006, contained the following provision:-

> "At the end of the 48 month period, Loan will become repayable in full by way of lump sum payment. Notwithstanding anything before contained herein, the Loan and interest thereon shall become immediately due and payable on demand by the Bank (and the security shall become enforceable), on the occurrence of any events set forth in the Default Appendix attached."

Similar provisions are contained in the second letter.

21. It seems to me that the loan letters issued by the bank and accepted by the defendant are absolutely clear and unequivocal and are entirely inconsistent with any suggestion that the loan was a non-recourse one. If one was to take a view of the evidence particularly favourable to the defendant, then one might consider it possible that there was some confusion on his part between the issue of the security that he was being asked to provide and the question of whether the loan was non-recourse.

22. That there could be any such confusion on the part of an experienced and successful businessman would seem surprising, though it has to be said that there have been other cases before the courts which would suggest that such confusion has occurred in the past, see for example *Zurich Bank v. Coffey* [2011] IEHC 26 (Unreported, High Court, 28th January, 2011) where Finlay Geoghegan J. (at para. 21) accepted that there may have been confusion on the part of the first named defendant between the security which had to be provided and the term "non- recourse" as meaning the defendant had no personal liability to the plaintiff.

23. However, even if it is the situation – and I am prepared to make this assumption in his favour – that Mr. Mulvaney succeeded in confusing himself on the bus journey, what subsequently transpired is that he was offered a substantial commercial loan, the terms of which were clearly set out in writing and accepted by him and which amongst other things made clear that the terms could not be waived or modified verbally. Paragraph 15 of the first loan letter and paragraph 14 of the second loan letter both state in explicit and unambiguous terms that no person has authority on behalf of the bank orally to vary the terms of the letter, any variation of which must be in writing under the hand of a duly authorised signatory of the bank.

24. I have made clear that I take the view that the threshold that Mr. Mulvaney would have to cross before he would be given leave to defend the proceedings is a low one, but low as it is, it has not in fact been crossed. To use the language of *Aer Rianta v. Ryanair*, the suggested defence is so far-fetched and the suggested and asserted defence is so clearly contradicted by the documentation that it is very clear that Mr. Mulvaney has no defence. In those circumstances the plaintiff is entitled to enter judgment on foot of its notice of motion.