THE HIGH COURT

COMMERCIAL

[2015 No. 2286 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

PATRICK TAYLOR AND GARECH MCGUINNESS

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 4th day of March, 2016.

1. The plaintiff ("*the bank*") seeks summary judgment against the defendants in the sum of €3,483,773.68, plus interest. The plaintiff claims that the defendants' liability arises on foot of monies due in the following sums and on the following accounts:-

(a) €76,810.92 on account no. 93-21-75-16377098;

(b) €3,397,870.13 on account no. 93-21-75-31285185; and

(c) €9,092.65 on account no. 93-21-75-31285268.

2. The loans were made pursuant to a facility letter dated 28th September, 2011, and were subject to the terms and conditions set out in that letter and also contained in the bank's General Terms and Conditions governing Business Lending. Each of the defendants accepted the terms and conditions set out in the facility letter. The first named defendant did so on 3rd October, 2011, and the second named defendant on 4th October, 2011. The loans were repayable "*on demand*" subject to review by 31st August, 2012.

3. The facility letter provided for three separate accounts; respectively, an overdraft facility, a loan account and an in-contract loan account.

4. The sums outstanding on the overdraft and loan facilities were demanded by letters of demand dated 21st July, 2015, and sent separately to each of the defendants.

5. The defendants contend that they have a defence to the proceedings on the grounds that the Letter of Sanction of 28th September, 2011, was supplanted by a further Letter of Sanction of 25th June, 2013, which became operative. At para. 30 of his replying affidavit sworn on 5th February, 2016, the second named defendant stated:-

> *"…the defendants' defence to the summary summons herein is that the 2013 loan facility was operable and the alleged default contained in the letter dated 30th June, 2014, is one completely manufactured by Ms. Tully. At all material times, the defendants were led to believe by the plaintiff bank that it was satisfied with obtaining security over the Barefield site."*

6. The "*Ms. Tully*" referred to is Ms. Marie Tully who, in March 2014, became the plaintiff's new relationship manager to the defendants. The "*Barefield site*" is a reference to two sites at Barefield, Ennis, Co. Clare, in respect of which a legal charge was to be granted to the bank together with other security as a condition precedent to the drawing down of the revised facilities set out in the Letter of Sanction of 25th June, 2013.

Legal principles applicable to an application for summary judgment

7. The appropriate test for the court to apply in an application for summary judgment is to be found in *Aer Rianta c.p.t. v. Ryanair Ltd.* (No. 1) [2001] 4 I.R. 607; *First National Commercial Bank p.l.c. v. Anglin* [1996] 1 I.R. 75; and, *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1. These principles are now so well established that it is unnecessary to repeat them here. They form the basis of my consideration of this application.

Do the defendants reach the threshold to remit this case to plenary hearing?

8. The Letter of Sanction of 2013 provided for three facilities; namely, an overdraft of €10,000; a loan account of €2,870,000; and a loan account of €940,000. It was to be a restructuring of the debt arising under the 2011 facility. The second defendant swore an affidavit on 5th February, 2016. He says, at para. 37, that the 2011 facility was replaced with the 2013 loan facility and goes on to state:-

> *"The said amounts are in dispute and the defendants intend to call a financial expert should this matter go to a plenary hearing…"*

9. Other than this mere assertion, the defendants have not sought to adduce any evidence that the figures claimed are incorrect. It is true that, if the 2013 facility is operable, the figures due to the plaintiff will be somewhat different to what is due under the 2011 facility letter. But the evidence available to the court at the application for summary judgment points to the fact that it is likely that the defendants' liability will be greater in the event that the 2013 facility applies. This evidence has not been challenged by the defendants. Be that as it may, the plaintiff grounds this application on foot of the 2011 agreement and, so far as this application is concerned, the issue of whether the matter should proceed to plenary hearing depends on whether the defendants' contention that the 2013 agreement supplanted the earlier agreement is credible.

10. It is not in dispute that the 2013 facility required a number of steps to be taken before it became operative. There were a number of special conditions and what are described as "*Next Steps"* to be taken before the defendants could drawdown the funds under the 2013 facility. Clause 7.2.1 of the general conditions, under the heading "*Drawdown Availability*", provides as follows:-

> "*When all pre-drawdown conditions set out in the Letter of Sanction had been complied with, then the facilities may be drawn down."*

11. The defendants were obliged to provide security as set out in the Letter of Sanction of 2013 and this included a "*legal charge from Garech McGuinness and Patrick Taylor over 2 sites at Barefield, Ennis, Co. Clare, comprising of c.0.709 hectares, registered in their names"*.

12. It is not in dispute that they failed to create a charge over the lands although the defendants assert that this condition was waived by Mr. Adrian Garvey (a bank official) on behalf of the plaintiff. They claim that this was done during an informal telephone conversation between Mr. Garvey and Mr. Jag Singh (an advisor of the defendants) on 20th December, 2013. The defendants lay some emphasis on the requirement to provide "*security to the bank's satisfaction"* and maintain that the bank was satisfied with the security position so far as the Barefield sites were concerned. They argue that the use of the words *"…to the Bank's satisfaction…"* meant that once Mr. Garvey waived the condition in his telephone conversation with Mr. Singh it followed that the bank was satisfied and that the condition was met. The plaintiff denies that Mr. Garvey gave any such waiver and it would not normally be possible to resolve such a dispute in an application for summary judgment; however, the plaintiff raises two issues on this point.

13. First, the plaintiff refers to a letter of 29th January, 2014, from the defendants' solicitor to the plaintiff's solicitor in which he said:-

> *"I am awaiting my clients to return all security documentation as required whereupon I will return it to you".*

The heading of the letter makes it clear that it concerns the lands at Barefield, Ennis, Co. Clare. This correspondence was after the alleged waiver of the requirement to furnish such security and the defendants have not produced any further correspondence with their solicitor to indicate that he was in error in making that statement nor has the solicitor, himself, resiled from what was stated in that letter.

14. Secondly, the plaintiff relies on the parol evidence rule which does not permit oral evidence to be admitted if it is introduced in an attempt to contradict the terms of a written agreement between the parties. I do not accept the defendants' construction of the clause requiring security to be provided to the Bank's satisfaction. That clause also encompassed *"all pre-drawdown conditions"*, one of which was to provide a charge over the Barefield lands.

15. In *Ulster Bank Ireland Ltd v. Deane* [2012] IEHC 248, I stated, at para. 6 of the judgment:-

> *"It appears, therefore, that [the defendants] are seeking to alter the terms of the facility letters which are clear on their face by means of parol evidence. This is not permissible. For reasons of public policy, the courts have not permitted oral evidence to be admissible if it is introduced in an attempt to contradict the terms of a written agreement between the parties."*

16. The facility of 2013 contained a section bearing the title "*Next Steps*", as indicated at para. 10 above, and provided that certain steps had to be taken before the loan could be drawn down. Some of these steps were taken by the defendants. For example, the Letter of Sanction was signed and accepted by the defendants and a direct debit was set up in accordance with the mandate. But other conditions precedent and required steps were not taken. There is no doubt that after June 2013, bank statements showed a monthly direct debit of €24,418.80, which was provided for under the new arrangement. The previous monthly debit had been €30,947.13. Clearly, that was in ease of the defendants. But it is clear that the provisions of the new facility had not come into effect because the restructured amounts/balances never appeared on the bank statements as they would have done if the 2013 agreement had become operable. The defendants have not explained how the pre-existing debit balance under the 2011 facility continued to appear in the bank statements rather than the restructured debt provided for in the 2013 arrangement.

17. In short, the facility of 2013 was not implemented because the defendants' accounts were not split or altered in accordance with that agreement, security was not provided as required under the agreement and a statement of affairs was not provided as required under the agreement.

18. It is also worth noting that under both the 2011 and 2013 agreements, the loans were repayable "*on demand*". Furthermore, the defendants have been unable to show any prejudice to them in circumstances where the plaintiff brings these proceedings on foot of the 2011 agreement because the sums due (including interest) under the 2013 agreement would be greater. This has not been refuted by the defendants.

Decision

19. There is ample evidence to show that the 2013 agreement never came into effect. Furthermore, as a matter of law, the defendants cannot rely on the purported waiver of the requirement to provide security by means of a charge over the Barefield sites in Ennis, Co. Clare, as this would offend the parol evidence rule.

20. No meaningful attempt has been made by the defendants to engage with figures showing the extent of the defendants' debt other than the statement in para. 37 of the second defendant's affidavit of 5th February, 2016, where he states "*the said amounts are in dispute and the defendants intend to call a financial expert should this matter go to a plenary hearing*". Such a bare assertion goes nowhere near meeting the test required to establish a defence to an application for summary judgment. See *First National Commercial Bank p.l.c. v. Anglin* [1996] 1 I.R. 75, where Murphy J. cited with approval at p. 79, the following summary of the tests set out in *Banque de Paris v. Naray* [1984] 1 Lloyd's Law Rep. 21:-

> "*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."*

21. There is undisputed evidence that, prior to March 2015, the defendants had fallen into arrears with their monthly payments and since March 2015, no repayments have been made on foot of the loans advanced to the defendants. No satisfactory explanation has been offered to the court as to why this is so.

22. I am satisfied that the defendants have not met the threshold required to establish a credible or *bona fide* defence such as to require this case to be remitted for plenary hearing. The plaintiff is entitled to summary judgment.