[2017] IEHC 572

THE HIGH COURT

2016 No. 1094S

BETWEEN/

HAVBELL LIMITED

PLAINTIFF

– AND –

JAMES WALSH (AUTO ELECTRICAL) LIMITED

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 10th October, 2017.

I. Overview

1. This is an application to overturn an order of the Master granting Havbell liberty to enter final judgment in the amount of €967,275.63, it being contended by the defendant that the debt that is the subject of the within application ought to be sent to plenary hearing.

II. Havbell's Evidence

(i) Establishing Entitlement.

2. Despite Havbell having repeatedly been pressed by the defendant in the within application to establish its legal title to press suit and claim the reliefs sought in the within application, an officer of Havbell has only belatedly sworn an affidavit which purports to explain same. Unfortunately for Havbell, that affidavit leaves questions unanswered. If, for example, the court looks to the recitals and cl. 1 of the 'Irish Law Deed of Transfer (Excluding Property) (Main Pool)' exhibited to that affidavit, cl.1 being the clause that purports to effect the relevant transfer, they state as follows:

> *"BACKGROUND*
>
> *A. By a mortgage sale agreement originally dated 10 March 2015 and as amended and restated on 17 June 2015 (the 'Mortgage Sale Agreement') the Seller has agreed to sell and the Buyer agreed to purchase the security interests and the contractual rights of the Seller under the Finance Documents more particularly described in Schedule 1 hereto.*
>
> *B. In consideration for the Parties accepting their rights and obligations pursuant to the Mortgage Sale Agreement, the Parties have agreed to enter into this Deed pursuant to the terms and conditions of the Mortgage Sale Agreement.*
>
> *C. Terms defined in the Mortgage Sale Agreement shall have the same meanings in this Deed, save where otherwise specified or where the context requires otherwise.*
>
> *NOW THIS DEED WITNESSETH as follows*
>
> *1. It is agreed that for the consideration expressed in the Mortgage Sale Agreement (the receipt of which is hereby acknowledged), the Seller as beneficial owner free from Encumbrances and as the registered owner or, as applicable, the party entitled to be registered as owner, hereby grants, conveys, assigns, confirms, transfers and assures onto the Buyer absolutely, subject to the subsisting rights of redemption of the Borrowers and any Obligor and to the extent capable of assignment, all its right, title, interest, estate, benefit and entitlement (past, present and future) in and under each Security, Underlying Loans, and each of the Finance Documents and the Seller's right, title and interest in and to the Ancillary Rights and Claims and including, without prejudice [to the foregoing?]:*
>
> *1.1 all right, title, interest, benefit, estate and entitlement of the Seller in the mortgages, charges, security assignments and other security interests constituted by the documents listed in Schedule 1…*
>
> *1.2 the benefit of and the right to sue on all covenants with and undertakings to the Seller in each Security and the other Finance Documents and the right to exercise all powers of the Seller in relation to each Security and the other Finance Documents at the Completion Date…"*

2. The court has not been provided with the Mortgage Sale Agreement (including its various definitions). So it has no idea what the bulk of the defined terms in the above-quoted text mean (apart from the terms 'Seller', 'Buyer', 'Party', 'Parties', 'Mortgage Sale Agreement' and 'Dispute' which are defined in the Deed of Transfer, as furnished to the court). All the court can take from the above-quoted text is this. Having regard to:

> – Recital A, what the parties seek to achieve by way of the Deed of Transfer is the sale and purchase of certain interests and rights under the 'Finance Documents' (but not other documents, it would seem) referred to in Schedule 1;
>
> – cl.1, certain interests and rights have been granted "*subject to the subsisting rights of redemption of the Borrowers and any Obligor* [it is not clear that this is of any relevance to the within application] *and to the extent capable of assignment* [whatever that means in the context presenting]";
>
> – cl.1.1, those certain interests and rights (which remain "subject to the subsisting rights of redemption of the Borrowers and any Obligor [it is not clear that this is of any relevance to the within application] and to the extent capable of assignment [whatever that means in the context presenting]") include various security rights;
>
> – cl.1.2, those certain interests and rights (which remain "*subject to the subsisting rights of redemption of the Borrowers and any Obligor* [it is not clear that this is of any relevance to the within application] *and to the extent capable of assignment* [whatever that means in the context presenting]")

3. Schedule 1 (headed "*Loan Agreements*") to the Schedule 1 referenced in Recital A (and headed, confusingly, "*Mortgage Assets*" – and a loan agreement is not a mortgage asset unless 'Mortgage Asset' is another defined term (though whether it is or not is unknown

to the court because it has never seen the Mortgage Sale Agreement where the bulk of defined terms are defined) – references the loan agreement that is now being sued upon by Havbell.

4. Havbell bears the burden of proof in the within summary proceedings and, with respect, it does not suffice, in the context of the foregoing for an officer of Havbell

> (a) to aver that:
>
> *"I say that on the 19th June, 2015, Permanent TSB plc of the one part and the Plaintiff on the other part did, in exchange for the provision of valuable consideration by the Plaintiff to the Bank, agree to transfer, transmit to and assign unto the Plaintiff, inter alia, all estate, rights, title, interest, benefit and obligations (whether past, present or future) of the Bank in the Loan Facilities, the subject matter of the within proceedings. In that regard I beg to refer to a copy deed of transfer…"*

and merely

> (b) to exhibit a deed of transfer that (I) refers the court to a document that contains definitions within a Mortgage Sale Agreement of which the court has not had sight, and (II) does not take the court through the detail of how Havbell, in light of the nuances within the above-quoted clauses of the deed of transfer, comes to be enforcing particular rights against the defendant.

5. The reason why it is so important that a successor in title to a financial institution treats comprehensively in its evidence with how it is that (i) it is the party suing on a particular loan agreement, and (ii) it has the right to the benefit being sought (and that that right it is not subject to the right of someone else), is because the threshold for sending matters to plenary hearing is set (rightly, if the court might respectfully so observe) at a notably low level in, inter alia, *Aer Rianta cpt v. Ryanair Limited* [2001] 4 IR 607, 623 – and disputes as to a party's entitlement to sue can quickly become an arguable defence requiring that a matter be sent to plenary hearing.

(ii) 'Blanked Out' Details.

6. The court notes too that for reasons of commercial and/or customer confidentiality, it is sometimes, as here, provided by a financial institution (or its successor in title) with documents that contain 'blanked-out' details. If parties are going to exhibit documents which for *bona fide* reasons contain such blanked-out detail (and the court accepts that there can be and often is good reason why this is done, e.g., customer confidentiality), it would seem desirable (it is not mandatory) that the affidavit which accompanies that exhibit should contain an averment that (1) certain detail in the exhibit has been blanked out for [reason], and (2) that nothing in the blanked-out section is of relevance to, or would impact upon, the relief/s being sought of the court in respect of the particular defendant/s.

III. Some Contentions Made by the Defendant

7. The defendant complains that the Master ought to have adjourned the application before him so as to allow the defendant's then newly-appointed legal team to read themselves into the case. So far as this point ever had merit, it has been overtaken by the time it has taken for this matter to come from the Master's Court to this Court.

8. The defendant complains that the grounding affidavit is sworn by an employee of Capita Asset Services and not an employee of the plaintiff or Permanent TSB plc. The person who swore the grounding affidavit expressly avers that he is an employee of Capita Asset Services, the agent employed by Havbell to do its loan management and administration services. The court sees no difficulty presenting in this regard but notes, in any event, that it now has before it affidavit evidence sworn by a director of Havbell concerning the debt and the basis on which it is being sought.

9. The defendant complains that certain guarantees and security arrangements referenced in the loan agreement were never put in place. The execution of such documentation was not a condition precedent to liability on the loan agreement. It is not therefore a matter for complaint and it is to the defendant's advantage that such guarantee and security arrangements were not eventually insisted upon.

10. The defendant complains that the Master did not refer the within application to the Judges' List. It is before the court now.

11. The defendant complains about the substance of the demand letter. There is no especial magic to a demand letter. It usually identifies who the party making the demand is, what agreement(s) is (or are) being sued upon, and then sets out the demand. It is true that the demand letter of 19th January, 2016, could be read by a stranger to the defendant's affairs as though issuing from the acting solicitors as agents for Permanent TSB (because (a) the loan agreement is (properly) referenced as a loan agreement to which Permanent TSB was party and (b) Havbell is not mentioned). But however matters might appear to a stranger to the defendant's affairs, the letter reads rather differently when viewed in the context of the fact, well-known to the defendant, and expressly advised to it in what was referred to at the hearing of the within application as a 'hello letter' of 23rd June, 2015, that Irish Permanent had for all intents and purposes been supplanted by Havbell. Who else could the defendant think was making demand when it got a demand letter from a firm of solicitors referencing the Irish Permanent loan? It would have known that it was Havbell and if, for some reason, it did not recall the letter of 23rd June, 2015 (and any want of recollection is a matter for the defendant, not Havbell) it would doubtless on approaching Irish Permanent (if, for some reason, it approached Irish Permanent rather than the solicitors who issued the letter of demand) have been pointed in the direction of Havbell and/or the solicitors making demand as its agents.

12. The defendant complains that reference was apparently made before the Master of the desirability to Havbell of getting its judgment 'ahead of the posse' with reference being made to a judgment that was claimed to have been made in England. Counsel often know more about the minutiae of a case than appears in the affidavit evidence and, with even the most careful of counsel, that knowledge inevitably will sometimes inform what they say in oral submissions, matters being mentioned that have not been sworn to. To expect otherwise would be to demand a level of exactness in speaking that no person, be she or he a professional advocate or otherwise, could invariably attain. But the Master and the courts decide matters by the evidence before them, and there is nothing to suggest that the Master did otherwise in this case.

13. The defendant complains that it has not received adequate evidence of the transfer. The court has touched upon this issue above and references it again below in the context of the order it intends now to make.

14. The defendant complains that the validity of the transfer aforesaid is the subject of separate proceedings and that the within

application ought to be stayed pending resolution of same.

IV. Applicable Law

15. The defendant contends that in all the circumstances arising, adjudication on its debt ought to follow a plenary hearing. The hurdle that it must cross to succeed in having matters sent to plenary hearing is notably low. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 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?"*

16. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, 7, McKechnie J. summarised as follows the relevant principles to be brought to bear when a court approaches the issue of whether to grant summary judgment or leave to defend:

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case…*
>
> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff…*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where, however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
>
> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?'…*
>
> *(viii) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
>
> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(xi) leave should not be granted where the only relevant averment is the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*
>
> *(xii) 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."*

V. Conclusion

17. It is a consequence of our adversarial system of justice that it is for a plaintiff seeking summary judgment to place sufficient and suitable evidence before the court as establishes, on the balance of probabilities, that it is entitled to the judgment sought. It may be that, in an inquisitorial system, a conclusion could be arrived at that would be different to that which the court considers itself compelled, in the within application, to reach on the evidence now before it. Be that as it may, ours is not an inquisitorial system of justice. Having regard to the deficiencies in the evidence which the court has touched upon in particular in Part II above, the court does not consider that this is a case in which it would be proper to conclude that Havbell is entitled to the summary judgment that it now seeks. Mindful, in particular, of that "*discernible caution*" which McKechnie J. indicates ought to be brought to the power to grant summary judgment, the court respectfully considers that this is a case which must go to plenary hearing, and will so order.