Neutral Citation Number [2009] IEHC 278

THE HIGH COURT

2009 915 & 1501 S

BETWEEN

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

PLAINTIFF

AND

DURKAN NEW HOMES, DON CASEY, MARIAN CASEY

AND TULLYCROSS DEVELOPMENTS LIMITED

DEFENDANTS

Judgment of Mr. Justice Charleton delivered on the 26th day of June 2009

1. The plaintiff claims summary judgment against each of the defendants for the repayment of two loans of €29,460,000 and €7,640,000 together with interest. The liability of some of the defendants is dependent upon guarantees for the repayment of those amounts. These guarantees are not in dispute. Instead, both parties are agreed that the guarantees are dependant upon the correct interpretation of the main contract of loan advanced by two similar letters dated 22nd February, 2006. Each letter offered one of the loans and each of them was accepted on the terms therein set out. If these primary contracts establish liability to repay the amounts, then the guarantees are operative. Although there were two separate loan offers advanced by the plaintiff to Durkan New Homes and to Tullycross Developments Limited respectively, the contract terms were identical. Hence, two separate sets of proceedings have been consolidated. It is only necessary in this judgment to refer to one set of documents as the other duplicates this.

2. The plaintiff argues an entitlement to summary judgment, contending that the terms of the contract are clear and that none of the defendants have any defence to these primary contracts on which the guarantee liability of the other defendants are dependant.

Facts

3. Under a letter of 22nd February, 2006, the plaintiff offered the first, second and third named defendants a loan of €29,460,000. This happened in the context of existing loans on land which were to be refinanced, and in order to facilitate the purchase of additional houses, whereby a large site could be made up at Beech Park, Cabinteely, County Dublin. Some eleven or twelve individual suburban houses were to be bought and these were to be knocked, a large site was then to be assembled, and planning permission was to be sought for some hundreds of dwellings. There was a moratorium put on interest and capital payments but full repayment was to be effected on date scheduled as being two years and six months after the date of the first drawdown. A separate letter of loan offer dated the same date, as the first letter, offered the fourth named defendant the sum of €7,640,000 on the same terms. Then, by separate guarantees, the defendants accepted liability conditional upon these loans for the repayment of the relevant sums. In addition, a claim is made for interest by the plaintiff as and from the 30th September, 2008. On that date, it is agreed, two years and six months had expired from the date of the first drawdown of the relevant tranche of finance. When that date is over is in dispute: was it at midnight, as would be usual, or when office work had customarily ceased? On that date, within office hours, the defendants had paid such interest as was due to the plaintiff over the term of two years and six months from the date of the first drawdown. If there is liability under this judgment, then they must also pay interest from that date to the date hereof.

4. The defendant claims that they are not liable to pay interest after that date. They further claim that the terms of the contract entered into between the parties allowed the plaintiff bank recourse only to certain secured properties and to no more than that. The defendants are willing to hand over these properties to the plaintiff bank which, they say, is not entitled to any judgment against them for the return of the loans advanced.

5. A loan to the first, second and third named defendants was secured by a guarantee provided by the fourth named defendant and that in turn was supported by a legal charge executed by the fourth named defendant over its interest in certain specified properties. These were, in essence, the various pieces of property that were individually purchased and which were to be gathered together into one large site for development. The loan offered to the fourth named defendant was conditional on a guarantee by the first second and third named defendants and this in turn was supported by a first legal charge to be executed by them over and in respect of their interests in certain of the specified properties. These, in turn, were portions of the large agglomerated site.

6. I will, in due course, quote the relevant documents in this case as they are and without putting in (sic) or making any comment as to grammar. For precision I will need later to quote the precise terms of the loan offer letter of 22nd February, 2006. In summary, however, the condition which gives rise to a claim by the defendants that there is no liability for summary judgment in this case, and in fact no liability at all, is one whereby the value of the property securing the loan was to be at least 70% of the loan. When the amounts of the two offers are added together, and when that figure is looked at as being 70% of the sum necessary to secure the loan, it meant that the value of the property could not drop below the sum of €53,000,000.

7. As a matter of fact, no one disputes that as of the repayment date of the 30th September, 2008, the value of these properties had declined below that figure. As of that date, the agglomeration of properties was worth €45,000,000. If the plaintiff bank's recourse against the defendants is limited to their respective interests in those properties, then the bank is entitled to possess these properties, to realise whatever it can from them and, in the event of shortfall, which in the current market is more than probable, they have no recourse against the defendants. The plaintiff bank does not agree

with this. Their argument is that the terms of the contract are clear in establishing that this limitation on liability by the defendants is not operative.

8. The date when the first drawdown of the loan facilities was made, clearly establishes 30th September, 2008 as the repayment date. There is no dispute that during the summer of that year, concerns began to arise as to the value of the secured property. In consequence, howsoever it came about, a valuation firm called CB Richard Ellis conducted a detailed study of the properties and gave comparative valuations with a view to arriving at an overall figure. This exercise was done in July. Some dispute arose to the accuracy of the valuation. The defendants suggested that an initial valuation of €40,000,000 was incorrect. They submitted a figure which was, in itself, below the value of €53,000,000 required for limitation of recourse under the contracts. The valuer revised his estimate upwards, whereby on 24th September, 2008 the defendants were advised that the final valuation was €45,000,000. The plaintiff bank was notified some few days later. Then followed a flurry of activity centred on the 30th September.

9. As there are two separate loan contracts, two separate letters were written in respect of each issue. I need only refer to one and to one of the similar sets of letters whereby the alleged dispute on limitation of recourse arose. By letter delivered by hand on 30th September, 2008, the defendants wrote to the bank enclosing a cheque for all the interest due under the loans over its two and half year duration up to that date and saying:

> "We refer to the Facility Letter and wish to advise that in accordance with clause 5 we have today discharged all interest due up to and including the "Repayment Date". Accordingly the provisions of clause 11 apply and your right of recourse is limited to the properties specified in paragraph 6".

10. This interest payment was made, and this letter was delivered, during what has been described in court as "normal office hours". I presume that means after 09.00 and before 18.00 on that day. After this communication was received, the plaintiff bank shot back a reply which, all agree, was received on that day but at some time after 18.00 or, as it is put "outside normal office hours". This letter read:

> "We refer to facility letter dated 22nd February 2006 and in particular Clause 10. As you are aware from recent discussions with the Bank, a valuation of the property held as security under Clause 6 has been undertaken on our behalf by CB Richard Ellis dated 2nd July 2008. The final valuation report was received by the Bank yesterday and dated the 26th September 2008.
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> This valuation gives a market value of EURO 45,000,000 and in accordance with Clause 10 of the facility letter we formally request the Borrowers to reduce the current aggregate indebtedness of Tullycross Developments Limited [and the other liabilities of the other defendants] and the Borrowers to EURO 31,500,000.
>
> In addition we further advise that this facility is due for repayment in full under Clause 4 on 30th September 2008."

11. That letter, and other correspondence, makes reference to subsequent negotiations which are irrelevant for these purposes. In a further letter, dated 1st October, 2008, the plaintiff bank sought repayment of the loan in full. The defendants, calling themselves "members of the Tullycross Co-ownership" replied, referring to the letter dated 30th September, 2008 in the following terms:-

> "We note that the letter referred to above was sent to us following the delivery by hand of our letter at 4.30 p.m. on 30th September 2008 and after close of business on 30th September 2008 and received by us on 1st October.
>
> As your request under clause 10(b) was sent after the expiry of the term of the Facility Letter above we have complied with the requirements of clause 11 (limited recourse) at the expiry of the term and we continue to rely on the provisions of clause 11.
>
> Please note we did not receive the revised facility letter, which was sent with your letter referred to above, until 1st October 2008 and consequently could not have accepted it prior to your letter."

It has subsequently been accepted on affidavit that the letter was received, not on the 1st October, 2008, but after close of business on the previous day.

Facility Letter

12. I now need to refer to the contract, in the form of the facility letter, in detail. The letter of offer accepted by the defendants described the facility as "a structured term loan". It states that its purpose is to assist with refinancing existing loans and to allow the purchase of additional houses and sites at Beech Park, Cabinteely, County Dublin. Repayment is specified as being two years and six months after the date of first drawdown of the loan funds. During that time, no interest was payable but, instead, there was to be a capital repayment on that rollover, the operative date being, as I have said, the 30th September, 2008. Interest was to be calculated in accordance with a scheme set out in an appendix to the letter. It was payable without deduction quarterly in arrears on the last business day of each quarter, provided that the aggregate of the monies drawn down, including interest capitalised thereon, did not exceed the maximum amount of the facility, then the interest was to be treated as additional drawdown and added to the total principal amount outstanding. Thus, in repaying the capital, interest would also be repaid. Clause 5 puts it in this way:- "Any interest outstanding on the date of Repayment shall be paid on such date." The security in respect of which the limitation of recourse to the defendants is said by the defendants to be constrained was set out in clause 6. These comprise, in the main, references to individual properties in Dublin 18, parts of the agglomerated site. Reference is made to insurance, requiring the defendants to insure the properties. Since these are no longer insured by the defendants, the

plaintiff bank's claims for reimbursement in respect of these insurance sums are correct, if the plaintiff bank succeeds in this application. Events of default are set out in appendix B to the letter. These include failing to pay the principal or interest on the due date and "default in the performance of any other term, condition or covenant" in the agreement, where that default continues unremedied "for ten days after written notice shall have been given" by the plaintiff bank to the defendant.

13. Clauses 4, 10 and 11 require to be read together. I will set them out:-

> **"Repayment**:
>
> 4. Following a 2 year and 6 month moratorium from the date of the first drawdown, capital repayment will be effected by a bullet repayment on that date…
>
> Notwithstanding anything before contained herein, the Loan Facility and interest accrued thereon shall become immediately due and payable on demand by the Bank made following the occurrence and during the continuance of any events (each an 'Event of Default') set forth in 'Events of Default Relating to Structured Term Loans Facilities" attached at Appendix B. hereto. In addition, the Loan Facility will also become payable if Tullycross Developments Limited defaults in the repayment on demand of the facility offered to it by the Bank pursuant to the Bank's letter of even date herewith ("the Company Facility Letter").
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> "**Financial Covenants**:
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> 10 (a) Throughout the term of the loan, the Borrowers' indebtedness to the Bank pursuant to this Facility Letter together with the indebtedness of Tullycross Developments Limited pursuant to the Company Facility Letter shall not exceed 70% of the combined value of the properties ("the Specified Percentage") detailed at paragraph 6 hereof.
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> (b) In the event that there is a breach of the Bank's requirements as set out at subclause (a) hereof, the Borrowers shall either:-
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> (i) Within four weeks of being called upon by the Bank to do so pay (or procure payment) to the Bank such amount as would result in the total of such indebtedness not exceeding the Specified Percentage or
>
> (ii) Furnish to the Bank as soon as possible after they are requested to do so but in any event no later than 4 weeks from the date of such request such additional security acceptable to the Bank and its Solicitors (acting reasonably) as may be required by the Bank to ensure that the total amount of such indebtedness does not exceed the Specified Percentage.
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> (iii) The Borrowers further agree to provide evidence of title to the Bank which is satisfactory to the Bank's Solicitors (acting reasonably) in relation to such additional security.
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> (c) For the avoidance of any doubt the Borrowers acknowledge that the Bank will be entitled to call for valuations of the said properties at any time throughout the term of this loan as often as it may choose for the purposes of determining whether or not there has been a breach of the Bank's requirements as set out at sub clause (a) hereof. The Bank shall be entitled to call for not more than four such valuations to be carried out at the Borrowers' expense. All (if any) further such valuations shall be carried out at the Bank's expense. Each such valuation shall be carried out by a reputable valuer…written valuation of such valuer shall (save in the case of manifest error) be conclusive and binding on both the Bank and the Borrowers."
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> "**Recourse**
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> 11. The Bank has agreed with the Borrowers that provided the Borrowers comply with their obligations as set out at paragraph 10 (b) hereof and pay all interest due to the Bank pursuant to this Facility Letter the Bank's recourse will be limited to the respective interests in the properties detailed in paragraph 6 hereof. Accordingly:-
>
> (a) Notwithstanding any other provision of this Facility Letter or any of the Security Documents and save as expressly provided in sub clauses (b) and (c) hereof of this paragraph, the Bank's recourse to the Borrowers in respect of the Borrowers' obligations hereunder and under the Security Documents and/or any judgment arising therefrom shall be limited to the respective interests in the properties detailed in paragraph 6 hereof and the Bank shall not otherwise take or pursue any judicial or other steps or proceedings or exercise any other right or remedy that it may have against the Borrowers for the discharge of any outstanding indebtedness in respect of the Loan or otherwise under this Facility Letter or the Security Documents and no action, proceedings, claim, levy, judgment or other process shall be taken or levied against the Borrowers save to the extent reasonably required by the Bank in connection with any enforcement or realisation of the security given pursuant to this Facility Letter.
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> (b) The Borrowers shall be jointly and severely liable to make payments to the Bank in respect of all interests due to the Bank pursuant to the Facility Letter.
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> (c) In addition, the Borrowers shall be jointly and severely liable to the Bank for all the indebtedness of

the Borrower to the Bank pursuant to this Facility Letter if and so often as there is a breach of the covenant set out in paragraph 10 (a) hereof, unless the Borrowers have complied with their obligations as set out in paragraph 10(b) hereof."

Contended Defence

14. It has been skilfully argued on behalf of the defendants that this contract was a term loan. As such it is said that it was loan that existed for a limited term, in other words two years and six months after the first drawdown. The loan does not continue thereafter, it is contended, because the term will have expired. That clause, it is said, is clearly set out in clause 4 and in the provision as to interest and capital requiring single repayment. The repayment date, it is argued, might be accelerated at any time during the currency of the two year and six month term of the loan on the occurrence of any of the events set out in the second appendix to the facility letter but, it is claimed, this did not occur in accordance with the contracts between the parties. As of 30th September, it is argued, the plaintiff bank had not demanded further security so as to bring the 70% debt to security ratio back into balance: nor had they made a demand to decrease the debt. In fact, the defendants argue, any such demand was made after the close of business and was, therefore, inoperative. As of the operative date, 30th September 2008, the defendants had complied with their obligations by paying, under clause 11(b), all of the interest due. Thereafter, the sole recourse of the plaintiff bank was to the security set out in clause 6 of the agreement, for whatever it might then be worth. That would then not be the problem of the defendants, who claim that they have provided precisely in the contract for default. Having paid the interest, it is argued, the defendants had simply to make the property available to complete their contract. Thus, it is contended, the defendants had, as 30th September, 2008, a choice. First, they could make the properties available and pay the interest. This they did as to the interest over the two year and six month term; regarding the properties, they never objected to the plaintiff bank taking them through a receiver or howsoever they choose. Secondly, they could repay the total amount of capital (including rolled over interest) in accordance with clause 4. They chose the former, rather than the latter, and this, it is argued, is a complete performance of the contract. An "event" under clause 4 means a default and a failure to rectify this over ten days. However, the defendants say, that the longer time limit of four weeks in clause 10 requires that margin of appreciation under the contract, hence, if the valuation took a few days, the last date on which the plaintiff bank could have acted was not the 30th September, 2008 during business hours, as they would say, but instead the plaintiff bank would have had to call for a valuation sometime in August, receive that valuation at the latest as of 2nd September, 2008 and then, presumably during business hours, make a demand for further security or for the repayment of some of the debt so that the 70% loan to security ratio would be restored. Since, it is contended, the valuation report remained a draft report up to the 26th September, any action taken by the bank was too late. Further, it is argued, in an overall sense this was a term loan with a repayment date and, therefore, none of the obligations arising under the contract as to limited recourse could possibly continue beyond the close of business on 30th September, 2008.

Summary Judgment

15. Any summary summons, the form usually used for the repayment of liquidated debt, is returned before the Master of the High Court. His function is to deal with the matter summarily where the case is uncontested. He may give liberty to enter judgment, which thereafter becomes an order of the High Court once it is entered in the Central Office. Under O. 37, r. 6, of the Rules of the Superior Courts, in contested cases, the Master is required to transfer the case to the High Court for hearing at the first opportunity. If there is consent, the Master may adjourn a case for plenary hearing with directions as to pleadings, discovery, and the settlement of issues, as may be appropriate. Since this is a contested case, the argument on behalf of the plaintiff bank is that judgment should be entered on the documents before the court. The argument of the defendants is that the case is clear enough for the court to dismiss the claim, leaving the plaintiff bank to realise its security, it having been already repaid the interest. In the alternative, it is contended that the matter should go for plenary hearing. O.37, r. 7 provides:-

> "7. Upon the hearing of any such motion by the Court, the Court may give judgement for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just".

16. In exercising this jurisdiction, I am obliged to proceed with great care. I have affidavit evidence in front of me and I have considered it. There is nothing in it, however, which gives rise to a controversy whereby, on the hearing of evidence, any issue of fact likely to be necessary for the resolution of the dispute might emerge. I feel that this is the test that the authorities indicate that I should first apply. If a question of law then arises, I feel that I am obliged to decide it. This is not a case in which there is counterclaim whereby the value of the plaintiff's claim may be diminished. I adopt as correct the analysis by Clarke J. at paras. 3.3 to 3.5 of his judgment in *McGrath v. O'Driscoll* IEHC 195 (Unreported, 14th June, 2006):

> "3.3 It is first necessary to turn to the principles applicable to giving leave to defend on an application for summary judgment. In *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 Hardiman J., having reviewed recent Irish authority, noted that those authorities supported the view that 'the defendants hurdle on a motion such as this is a low one, and the jurisdiction is one to be used with great care' (at p. 621).
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> 3.3 Having noted the formulation of the test for summary judgment in *Banc de Paris v. de Naray* [1984] 1 Lloyds Law Rep. 21 (as adopted by the Supreme Court in *First National Commercial Bank -v- Anglin* [1996] 1 I.R. 75 at 79) Hardiman J. noted that:
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> > '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.'
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> In summary, Hardiman J. concluded (at p. 623):
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> > '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 defendants' affidavits fail to disclose even an arguable defence?'

3.4 So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require leave to defend be given so that issue of fact can be resolved.

3.5 So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

17. To the last paragraph of the judgment of Clarke J. just quoted I would add this qualification. If the addition of evidence can assist in any material way in the construction of a document then, I agree, the matter should be put for plenary hearing. If, on the other hand the question of law arising on affidavit evidence can be as well considered on a motion for summary judgment as at a plenary hearing, then I feel it is the obligation of the court to resolve it on hearing that motion. In *Cow v. Casey*, [1949] 1 KB 474, the issue before the Court of Appeal was whether the High Court ought to have given summary judgment where a complex issue arose concerning the statutory rights of a tenant. Lord Greene M.R. in accordance with the approach in our jurisdiction has emphasised a very cautious line in entering summary judgment in any case. As to a controversy of law, he had this say, with which I agree:-

> "The only point is, that, as everybody knows the Rent Restriction Acts are complicated acts. They contain a number of difficult matters and there are a number of authorities decided upon them. But is not sufficient under an O. 14 case to flourish the title of the Increase of Rent Restrictions Acts in the face of the court and say that is enough to leave to defend. If a point taken under the Rent Restriction Act is quite obviously an unarguable point, the court has precisely the same duty under O. 14 as it has in any other case. It may take a little longer to understand the point and to be quite sure that one has seen all around it in a case under the Rent Restriction Acts than in other cases, but when the point is understood and the court is satisfied that it is really unarguable, the court has the duty to apply the rule…"

There is nothing involved in the legal issues in this case which necessitates a plenary hearing. There is no issue of law that has not already been argued in full.

Construction

18. The intention of the parties is to be discerned from the language of the facility letter dated the 22nd February, 2006. There is nothing in the construction of the guarantee contracts or in the mortgage documents which changes my view of the intentions of the party as expressed therein. In particular, clause 7 detailing the covenants between the mortgagor and the mortgagee of the mortgage document dated the 31st March, 2006, between the first three defendants and the plaintiff bank may be regarded as relevant. However, it does not change anything at all.

19. The principles of construction of a contract were set out in the Supreme Court decision of *Igote Limited v. Badsey Limited* [2001] 4 I.R. 511. To these I have nothing to add. It is merely necessary to quote the relevant part of the judgment of Murphy J. at pp. 513 and 514. He stated:-

> "The issue between the parties concerns the proper construction of the share subscription agreement. The purpose of construing a document entered into between two or more persons is to ascertain their common intention. What 'intention' in that context means and how it is ascertained has been the subject matter of much judicial authority in respect of which no real controversy arises in the present case. Perhaps a convenient explanation of the word 'intention' in this context was provided by Lord Shaw in *Great Western Railway v. Bristol Corporation* (1918) 87 L.J. Ch. 414 when he said at p. 424:-
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> > '. . . one hears much use made of the word 'intention', but courts of law when on the work of interpretation are not engaged upon the task or study of what parties intended to do, but of what the language which they employed shows that they did: in other words, they are not constructing a contract on the lines of what may be thought to have been what the parties intended, but they are construing the words and expressions used by the parties themselves. What do these mean? That, when ascertained, is the meaning to be given effect to, the meaning of the contract by which the parties are bound. The suggestion of an intention of parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion.'
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> Lord Wright expressed the same view in not dissimilar terms in *Inland Revenue Commissioners v. Raphael* [1935] A.C. 96 when he said at p. 142:-
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> > 'It must be remembered at the outset that the court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used. There is often an ambiguity in the use of the word 'intention' in cases of this character. The word is constantly used as meaning motive, purpose, desire, as a state of mind, and not as meaning intention as expressed.'"

At p. 516 Murphy J. added

> "At the end of the day the rule as to construction and the context in which it is to be achieved is most succinctly expressed in the judgment of Keane J. (as he then was) in *Kramer v Arnold* [1997] 3 I.R. 43 at p. 55 when he said:-
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> > 'In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances.'"

20. Where the court is called upon to construe a will, one of the primary rules is that the terms of the will should be seen, as it were, from the armchair of the testator. That, however, does not enable the court to change any intention that is plainly expressed in the language of a will, a trust document or a contract; *National Tourism Development Authority v. Coughlan* [2009] I.E.H.C. 53. Rather, the will is seen within its proper context. Similarly, a contract should be seen within its proper context. As Lord Wilberforce said in *Reardon Smith Line Limited v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989 at 995:-

> "No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the 'surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

21. Placing myself within, as Lord Wilberforce put it "the same factual matrix as that in which the parties were", it is clear that negotiations took place at arms length between the plaintiff bank and the defendants, whereby a carefully drafted contract was agreed. This happened against the background of serious borrowing for development purposes on the part of the defendants. The recourse of the plaintiff bank to the defendants was to be limited. As it turns out, that limit was clearly expressed upon express conditions set out in the facility letter of the 22nd February, 2006. Once the ratio of borrowing to security did not breach the 70% limit, recourse was to be had only to the security set out in the contract. Once that was breached, the plaintiff bank had an option to call for either the reduction of the debt or the provision of additional security. The choice in re-instigating the 70% balance rested with the defendants as borrowers. It is impossible for me to construe the agreement any other way. The crux of the argument advanced by the defendants related to time.

22. I must reject the argument that the borrowing of the defendants was by way of a term loan. Insofar as it is suggested that a term loan ends on a particular day, this argument may be correct. There is nothing in this agreement, however, to suggest that there is a cut-off date as of the 30th September, 2008, whereby the obligation, as clause 10 indicates, to keep the 70% ratio "throughout the term of the loan" ends. More importantly, however, there is nothing about a term loan which excludes events being defined within it whereby during its term the loan may be recalled. In Burgess, *Law of Loans and Borrowing* (London, 2006), the following passage occurs at para 3.25:-

> "A term loan, as its name implies, is a loan for a specified period requiring payment at or by the end of the period; such repayment may be of the entire sum borrowed or, and more usually in practice, according to an agreed repayment schedule."

23. This, in as far as it goes, is unexceptionable, Burgess, however, discusses the authorities which now establish that a term loan may contain a condition as apparently contradictory as immediate repayment being required within the term of the loan upon notice being given. As Lawrence Collins J. stated in *Bank of Ireland v. AMCD (Property Holdings) Limited* [2001] 2 All E.R. (Comm.) 894, the parties to a contract are at liberty to determine for themselves what obligations they will accept. Once there is a clear statement that repayment may be called for within the currency of a term loan, then the court is obliged to give effect to it. That term may require payment on demand, or payment in the event of the occurrence, as in this case, of an event of default. There was a clear breach within the term of this loan, accepting for this purpose the argument of the defendants that a term loan defines obligations only within the term and not thereafter, to maintain the 70% ratio of borrowing to security. Had the plaintiff bank sat on its hands and done nothing by way of valuation, it could not argue that the relevant provisions of the contract had been invoked. It is unarguable, however, that the covenant within the agreement was breached on the part of the defendants always was to keep up that ratio. This is made clear by the wording at para. 10(a) and (c) which clearly refers to the continuation of that obligation at all times during the term of the loan.

24. The limit on recourse, whereby the properties in clause 6 alone were to be the plaintiff bank's security for the borrowing is contingent, under clause 11, on the defendants as borrowers complying with their obligations as to debt to security ratio. Had they met that obligation, it would have been arguable that their only additional contractual duty was to pay the interest due to the bank under the facility letter; clause 11(c).

25. In construing the other arguments of the defendants, it is hardly necessary for me to give a business construction to this contract. As Lord Diplock warned in *Antaios Compania Naviera SA v. Salan Rederiena AB* [1985] A.C. 191 at 201:-

> "[I]f detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

26. Even without applying this principle, which was quoted with approval by Geoghegan J. in *Analogue Devices v. Zurich Insurance* [2005] 2 I.L.R.M. 131, the argument of the defendants as to the alleged time issue is bound to fail. There is no principle of law whereby the plaintiff bank could have argued that if the defendants had repaid this loan by midnight on the 30th September, 2008, that they would not have fulfilled their obligations under the contract because the money was received after 18.00 hours on that day. Such a construction, if argued for on the part of the plaintiff would be untenable.

27. The law of contract is concerned with mutual obligations. The parties to a business contract are to be taken as behaving reasonably in making requirements under a contract and as expecting a rational construction of their mutual agreement. I do not think that a loan contract is any different to any other contract in that respect. It is equally untenable now, when argued, albeit with great skill, on behalf of the defendant that the plaintiff bank was late in demanding after business hours of 30 September, 2008 that the debt to security ratio be restored. It would require me to re-write the terms of this agreement to allow this argument to succeed. It would mean that a date ceases to have validity. If the parties had wished to put in a clause referring to a date for the end of the term of the loan by specifying, for instance, the next nearest business day, so as to exclude weekends and bank holidays, or if the parties had wished to refer to their obligations being somehow crystallised by close of business on a particular day, this could have been done. Instead, the general law regards a date as continuing up to the stroke of midnight on that day. The obligation as to security to debt ratio undertaken by the defendants continued, it is clear to me, throughout the term of the loan. The bank was entitled to call for a valuation "at any time throughout the term of this loan". Once there was a breach of the banks requirements as to debt to security ratio, they were obliged under clause 10(b) to make a requirement that the debt should decrease or that further security should be proffered by the defendants.

28. It would upset the clear wording of the contract were I to hold that the entitlement of the plaintiff bank was dependent on them giving four weeks notice prior to the 30 September, 2008 whereby the obligation might be fulfilled on the last day, as the defendants would put it, of the term of the loan. Would they argue that they could not fulfil any of their obligations except within business hours? I would regard that argument as unattractive too. The obligation of the

defendants continued "throughout the term of the loan". The entitlement of the plaintiff bank to the debt to security ratio, so carefully set out in the contract, did not end at a period four weeks prior to that term. Moreover, in addition to that, it is argued that the plaintiff bank would have been obliged to take the time to obtain a valuation and then to give four weeks notice of their requirements on the debt to security ratio. There is nothing in the agreement which would allow for such a construction. If the wording were as unclear as to allow such an interpretation, it might be an instance where the requirement of business efficacy would suggest a different interpretation. There is no need, in my view, for me to apply that cannon of construction.

Result

29. In the result, the plaintiff bank is entitled to a judgment jointly and severally for the amounts stated in the summary summons as against all of the defendants. In the event of any disagreement as to interest as and from 30 September 2008, I will hear the parties further in the event that agreement cannot be reached on a figure.