[2017] IEHC 573

THE HIGH COURT

2016 No. 2378S

Between:

ENNIS PROPERTY FINANCE DAC

Plaintiff

AND

RAYMOND MURPHY

Defendant

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

I. Background

1. These are summary proceedings for debt.

2. In or about December, 2004, Bank of Scotland (Ireland) ('BOSI'), the predecessor in interest to Ennis Property and Mr Murphy entered into an agreement, pursuant to which BOSI agreed to provide Mr Murphy with a loan facility in the amount of €855k (the 'First Agreement'). The terms of the First Agreement were contained in a facility letter dated 17th December, 2004, executed by Mr Murphy on or about 20th December, 2004, and subject, *inter alia*, to BOSI's general terms and conditions. The terms of the said facility were amended by the parties by facility letters dated 15th May, 2008, and 19th July, 2010. The purpose of the loan facility was to fund the purchase of certain properties respectively in County Wicklow and the United Kingdom, and to fund related legal and professional fees arising.

3. The terms of the First Agreement provided, *inter alia*, that BOSI was entitled (1) to interest at a rate provided for in the First Agreement, (2) without the consent of Mr Murphy, to assign any of its rights and benefits under the First Agreement to any third party, (3) upon an event of default, to call for the immediate repayment of all monies payable and due plus accrued interest thereon.

4. In or about April 2006, BOSI and Mr Murphy entered into another agreement, pursuant to which BOSI agreed to provide Mr Murphy with a loan facility in the amount of UK £630k (the 'Second Agreement'). The terms of the Second Agreement were contained in a facility letter dated 25th April, 2006, executed by Mr Murphy on or about 5th May 2006, and subject, *inter alia*, to BOSI's general terms and conditions. The terms of the said facility were amended by the parties by a facility letter dated 19th July, 2010. The purpose of the loan facility was to fund the purchase of a property in the United Kingdom, and to fund related arrangement and legal fees arising.

5. The terms of the Second Agreement provided, *inter alia*, that BOSI was entitled (1) to interest at a rate provided for in the Second Agreement, (2) without the consent of Mr Murphy, to assign any of its rights and benefits under the Second Agreement to any third party, (3) upon an event of default, (a) to call for the immediate repayment of all monies payable and due plus accrued interest thereon, (b) at its sole discretion, pending receipt of all monies due (including accrued interest), to convert all or part of the outstanding loan balance to a euro denominated amount.

6. In breach of the First Agreement and the Second Agreement, the loan periods under which expired on 31st December, 2010, Mr Murphy failed to make required quarterly interest payments and has failed to repay the principal sum owing. As a consequence of the failures aforesaid, letters of demand issued to Mr Murphy on 3rd June, 2016. A receiver was appointed over certain assets of Mr Murphy on 17th June, 2016. Following the appointment of the receiver, the defendant engaged in 'without prejudice' correspondence with Mr Murphy. However, no agreement could be reached and fresh letters of demand issued on 23rd November, 2016. Despite the said demands, the amounts demanded have not been repaid and the defendant therefore commenced the within proceedings on 7th December, 2016.

II. Some General Legal Principles

7. Mr Murphy contends that in all the circumstances arising, adjudication on his debt ought to follow a plenary hearing. The hurdle that he 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?"*

8. 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."

9. Worth mentioning also in this regard, in light of the various contentions averred to, and referred to in submission, by Mr Murphy, is the nature of the assertions that a defendant must bring to bear in order that a matter will be sent to plenary hearing. As Charleton J. noted in *National Asset Loan Management Ltd v. Barden* [2013] IEHC 32, "*The mere assertion on affidavit of a defence is insufficient. A defence must, if the matter is to be remitted to plenary hearing, have some reasonable foundation*." As Clarke J., as he then was, observed when speaking for the Supreme Court in *Irish Bank Resolution Corporation (in special liquidation) v. McCaughey* [2014] IESC 44, observed, para. 5.5, "*The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic assertion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances…*". So it does not suffice simply to raise an abundance of allegations unsupported by evidence or any realistic assertion that evidence might be available and to expect that a plenary hearing will follow. Yet that, with every respect, is all that Mr Murphy has done.

III. Some Contentions Made by the Defendant

(i) The Alleged Agreement as to Residual Debt.

10. Mr Murphy contends that the actions of BOSI from February, 2012 led him to believe that BOSI had accepted a proposal whereby, following the sale of the assets that were the subject of the loan agreement, he would not be liable for the residual balance. However, his affidavit evidence, with respect, does not support this contention. When it comes to a critical meeting of 6th February, 2012, all that Mr Murphy can aver to is what seems to be a polite observation on the part of the relevant bank official who "*informed me* [Mr Murphy] *that he believe*[d]*…the Bank to be reasonable and fair and that this* [the non-availability of other assets to meet Mr Murphy's liabilities] *would be taken into full consideration and with my full co-operation a mutually beneficial outcome would be achieved*."

11. This expression by a bank official of his personal belief as to the likely treatment of Mr Murphy by his employer, if given as Mr Murphy avers, contains no representation as to any waiver of debt. And even if BOSI or its successor in title were slow in coming to demand their full contractual entitlements (and the court does not see that either was), cl.25.4 of BOSI's general terms and conditions (of which there is no evidence between the court that it has been altered as between the parties to the within application) provides that "*No failure to exercise and no delay in exercising on the part of the Bank any right, power or privilege… shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege, preclude any other or further exercise thereof…*". Nor does the court, relying in this regard on the judgment of Clarke J. in *ACC Bank plc v. Kelly* [2011] IEHC 7, para. 7.9, see that any concluded arrangement (even if short of a contract) came to exist between the parties to the within proceedings such as would have grounded a case in promissory estoppel.

12. The court, with respect, also does not see how Mr Murphy can argue on the one hand that there was an agreement of the type contended for dating from February, 2012, yet aver on the other (as he does) that BOSI asked him to, and he did, come up with fresh (and rejected) proposals in 2014. It does not appear in any event that the actions which Mr Murphy suggests that he took on the basis of the perceived understanding between him and BOSI went beyond his existing obligations in respect of the secured debt.

13. As to the suggestion that the *contra proferentem* rule ought now to be applied by the court in such a way as to read against BOSI its failure (as Mr Murphy perceives matters) to refer expressly in its dealings with Mr Murphy to its non-acceptance of the purported residual debt arrangement, that would be for the court to stray into error. The *contra proferentem* rule is concerned with the interpretation of ambiguous contractual clauses. It is not an interpretative tool capable of being used to construe the acts or omissions of a particular party in a manner more favourable to one litigant over another. (See further *Allied Irish Banks plc v. Pollock and ors* [2016] IEHC 581, para. 54).

(ii) Non-Receipt of Statements.

14. Mr Murphy maintains that he did not receive any bank statements after April, 2015. This may or may not be so. (The court has in the evidence before it one statement which does appear to have issued after that date). While the court does not wish to diminish the importance of a financial institution providing regular statements to an accountholder, even (perhaps especially) a borrower-accountholder in default, there is no indication that any (if any) non-receipt by Mr Murphy of certain statements has impacted in any way as regards the repayment of the debt presenting or his ability to meet same. In fact it is not even clear that Mr Murphy beyond pointing to the alleged non-receipt of statements as an error, contends for any such impact.

(iii) Alleged Deficiencies in Appointment and Actions of the Receiver.

15. Mr Murphy points to deficiencies in the appointment and actions of the receiver, whom he avers did not account to him for sales proceeds and, in truth, acted as the agent of Ennis Property and not as his agent. There is nothing in the evidence, beyond Mr Murphy's bare averment, to suggest that the receiver acted as the agent of the plaintiff. As to the validity of the receiver's appointment, it is striking that Mr Murphy did not seek to challenge the appointment of the receiver while the receivership was extant. The court does not see that such a challenge would now serve much practical purpose given that the receivership has concluded and the funds raised by the receiver through the disposal of secured assets have been applied against Mr Murphy's liabilities to Ennis Property. But such a challenge, even if it were to proceed, could not amount to a defence to Ennis Property's

present claim for judgment in respect of loan facilities which Mr Murphy has expressly accepted in his affidavit evidence that he obtained. (See *Allied Irish Banks plc v. Killoran* [2015] IEHC 850, para. 49, and *ACC Loan Management Ltd v. Dolan and ors* [2016] IEHC 69, para. 42).

16. As to Mr Murphy's mooted claim against the receiver for allegedly not obtaining the best price for the secured properties, that is a line of potential action that exists between Mr Murphy and the receiver; it is not a defence to the within summary application that Mr Murphy might be entitled to an indemnity from a non-party were that non-party to be joined to the within proceedings if the within application was to be referred to plenary hearing.

(iv) Data Protection Acts.

17. It is a surprisingly regular feature of proceedings involving financial institutions and like bodies that a defendant debtor makes complaint that a data access request under the Data Protection Acts has not been complied with swiftly or at all, which is, to put matters at their mildest, a disappointing state of affairs, if in fact it pertains. However, to the extent that there has been a failure to satisfy a data access request in conformity with those Acts, a complaint may be made to the Data Protection Commissioner. At this time, that complaint runs on a separate track to any default-debt recovery train of proceedings that arrive in court.

18. Mr Murphy complains that he made data access requests but that the cheques for the administrative fees were returned to him without explanation. If this is so, the court would respectfully urge Ennis Property to ensure that it or its agents, when returning such a cheque, explain why it is being returned. Regardless of this, it does not appear from the affidavit evidence that Ennis Property has acted otherwise than in accordance with the Data Protection Acts, and even if it had that does not affect the recoverability of the debt now sought and owing at law.

19. Mr Murphy contends that such information that will be or has been disclosed to him may relate to the validity of the appointment of the receiver. It may, but so far as the validity of that appointment does not afford a defence to the instant application, the court respectfully refers the parties to the previous section of the within judgment.

(v) Default/Penalty Interest.

20. Mr Murphy claims that he has been charged default/penalty interest. This, with respect, is not so: interest has been applied at the agreed interest loan rate. And, on a related note, the court does not accept that expert banking evidence requires to be tendered to calculate the true amount now outstanding. The calculations required are straightforward and represent but the 'bread and butter' of basic banking.

(vi) Counterclaim.

21. Though the possibility of a counterclaim for damages arising from stress, inconvenience and financial loss occasioned by BOSI's actions, is tentatively touched upon in Mr Murphy's evidence and submissions, the mooted counterclaim, as articulated by Mr Murphy, regrettably lacks any arguable substance.

22. Even if Mr Murphy could point to a specific vouched loss and substantiate a claim against Ennis Property in this regard, he would face the additional hurdle, in the context of seeking leave to defend on the strength of such counterclaim, that he would need to establish an entitlement to equitable set-off against the judgment debt in relation to any award which might be made in his favour.

23. The principles to be applied on an application for summary judgment when the defence advanced is one to set off a counterclaim or cross-claim were identified by Clarke J. in *Moohan v. S&R Motors (Donegal) Ltd* [2008] 3 IR 650, 656 (and recently approved by the Court of Appeal in *NAMA v. Kelleher* [2016] IECA 118), Finlay Geoghegan J. observing as follows in her judgment in *Kelleher*, para. 31:

> "[W]*hen as in these proceedings a defendant contends for a bona fide defence which is to set off a counterclaim or cross claim there are two separate questions which the court must address in considering whether the defence meets the*Aer Rianta *threshold. A court must consider both whether the connection between the plaintiff's claim and the counterclaim or cross-claim of the defendant is such as to establish a*prima facie *entitlement of the defendant to set off in equity the amount recoverable on the counterclaim and also whether or not the substance of the counterclaim itself reaches the arguable or*bona fide *threshold. Both questions must be answered in favour of the defendant to establish a* bona fide *defence. Unless the counterclaim or cross-claim itself meets the* Aer Rianta *threshold irrespective of the position in relation to set off it cannot constitute a prima facie defence*."

24. Neither limb of the test as identified in *Kelleher* can be said to have been met by Mr Murphy in circumstances where it is not clear that his asserted losses give rise to any stateable claim against Ennis Property and the tentatively mooted counterclaim does not reach the applicable arguable or *bona fide* threshold.

IV. Conclusion

25. Mr Murphy represented himself at the hearing of the within application. He is, if the court might respectfully observe, a well-spoken and softly-spoken gentleman who sought in the past, through what doubtless seemed to him to be savvy financial investments, to improve his financial standing and so better to provide for his family. There is nothing wrong, and much to be applauded, in that. Unfortunately, it seems that the market went against Mr Murphy and that, in consequence, he now finds himself heavily indebted to Ennis Property. Yet, whatever the motivations for his indebtedness and the cause of his inability to pay, he is indebted and the monies sought do fall to be repaid. Conscious of the low threshold identified by the Supreme Court in *Aer Rianta* for sending a matter to plenary hearing, and mindful also of that "*discernible caution*" which the court, recalling the observations of McKechnie J. in *Harrisrange*, must bring to its decision-making in summary applications, the court considers itself nonetheless to be coerced as a matter of law, and for the reasons aforesaid, into: (a) declining to send the within application to plenary hearing; and (b) granting the summary judgment now sought.