

THE HIGH COURT

[RECORD NO. 2016 2280 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND
 MONKSTOWN BAY MARINA COMPANY LTD,
 AND
 JAMES O'BRIEN
 AND
 PETER DE ROBERTS

DEFENDANTS

JUDGMENT of Mr. Justice Robert Eagar delivered on the 12th day of December 2018

1. This case involves the application by the plaintiffs for summary judgment against the first named defendant which was a limited liability company, and the second and third named defendants being guarantors of the loan to the company. The parties had no disagreement about the amounts sought in the summary summons.

2. The first defendant is a limited liability company. By letter of sanction dated 22nd March 2013, the bank offered to make available to the first named defendant a facility in the sum of €89,467 subject to the plaintiff's general terms and conditions.

3. The company accepted the letter of sanction in writing and drew down the monies advanced and continued to have the availability of loan funds.

4. This facility was a renewal of a previous facility made available to the company by the plaintiff.

5. The security to be provided in respect of the aforementioned facility was as follows: -

A letter of guarantee from Mr. O'Brien and Mr. De Roberts, and a third letter of guarantee, which is not relevant to these proceedings. By letters dated the 6th February 2015 and the 27th May 2016, the plaintiff demanded repayment of the principal sum due and owing in respect of the above accounts, together with interest within a period of seven days and the summary summons indicated that the company is indebted to the plaintiff in the sum of €86,8059.70 on the above loan account plus continuing interest accrued.

6. The summons claimed that at various times since the advancement of monies by the plaintiff to the company, the company had defaulted in payment obligations to the plaintiff. At the date of this judgment the amount owing to the bank was the sum of €80,220.15. What became clear in the course of the hearing was that from the 23rd December 2014, €1,000 was paid towards the loan per month up to the 20th March 2015.

7. Further, by letter of sanction dated the 4th February 2010 the bank approved the continued use of an overdraft facility in the name of the company in respect of current account ending 189. This loan was a continuation of an existing overdraft facility on the account and was subject to a credit limit of €10,000. The security to be provided in respect of the facility was a letter of guarantee from the second named defendant and a letter of guarantee from the third named defendant in the sum of €90,800, and from a third person who is not relevant to these proceedings. The company failed to maintain the current account within the overdraft limit provided by the bank and it was accepted by the parties that there was no disagreement about the amounts sought in the summary summons, save for what the court outlines below. By letter dated the 6th February 2015 the bank wrote to the company referring to various requests made to discharge the excess balance. The claim made in respect of current account ending 189 was €14,021.31.

Defence

8. The defendant put forward the following grounds of defence. In his affidavit, James O'Brien, who describes himself as a director of the Monkstown Bay Marina Company Ltd. and who is one of the guarantors, states that in or around November 2014, the plaintiff agreed to a modification of the terms of the loan, which are the subject of these proceedings, to the effect that the loans would be serviced by repayment of €1,000 per month. He says that on that basis, the company has fulfilled its modified obligations in respect of the loan to date and he says that the plaintiff bank has no entitlement to summary judgment.

9. The court notes that Mr. O'Brien does not identify any named bank official with whom the defendants came to this agreement, nor the actual date of the agreement, just generally being "November 2014". No documentary evidence was tendered nor was there any documentation indicating that this was in writing. There were no names of the members of the bank who had come to this agreement with the company.

10. Brian McGuinness, senior manager of Allied Irish Banks plc., stated that in or around the 29th October 2014, the company had proposed payment in the sum of €1,000 per month in discharge of monthly liabilities to the plaintiff. He said that any purported agreement of the plaintiff in respect of the sum of €1,000 constituting adequate discharge of the defendant's liability to the plaintiff was subject to Credit Committee approval and, more particularly, the provisions by the defendants together, and/or individually, of details in respect of queries arising out of the first named defendant's accounts for the period of eighteen months prior to the 31st December 2013, as had been provided by P.F. Lynch & Co. Accountants.

11. He also makes the point that despite this request, the plaintiff's minutes of a meeting of the 29th October 2014 indicated it was resolved by the company that payment in the sum of €1,000 per month would be made to the plaintiff.

12. He further states that following the presentation of the lenders' report to the Credit Committee, the plaintiff wrote to the second and third named defendants as guarantors of the plaintiff on the 8th December 2014, noting the failure of the defendants to engage with the bank and to provide the information required to assess the debt and restructure the borrower's facilities. He said that in such circumstances, no modification of the terms of the loan, which are the subject matter of these proceedings, ever took place.

The test to be applied

13. The test to be applied in an application such as this is well established. In *First National Commercial Bank plc. v. Anglin* [1996] IR 75, Murphy J. stated at pp. 78 - 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.

In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's 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]. The principle laid down in the *Banque de Paris* case is summarised in the headnote thereto in the following terms: —

"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."

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:—

"I think it right to ask, using the words of Ackner L.J. in the *Banque de Paris* case, at p. 23, '[i]s there a fair or reasonable probability of the defendants having a real or bona fide defence?'"

14. I am satisfied that the issues raised by the defendant herein are relatively straightforward and within the terms of the decision of Clarke J. (as he was then) in *McGrath v. O'Driscoll* [2007] 1 ILRM at p. 210, which stated: -

"... there is no real risk of an injustice being done by determining those arguments put forward by the defendant in a motion to enter final judgment."

Consideration of defences

15. In his affidavit on the 2nd February 2018 sworn on the 18th October 2017, the defendant makes the following points: he said that in November 2014, while acknowledging that the borrower's marina project at Monkstown, Co. Cork had been adversely affected by the plaintiff's own inability to fund its completion, the plaintiff agreed to a modification of the terms of the loan, which are the subject of these proceedings, to the effect that the loan would be serviced by repayments of €1,000 per month. He says the company has fulfilled its modified obligations in respect of the loan to date, and says the loan is not due. In response, the supplemental affidavit of Brian McGuinness, senior manager of AIB Bank plc. sworn on the 29th January 2018 makes the following points: he puts the date of the proposal by the company as the 29th October 2014. He says that the company proposed payment in the sum of €1,000 per month in discharge of monthly liabilities to the plaintiff and he said that any purported agreement, any agreement of which is denied, of the plaintiff in respect of €1,000 constituting adequate discharge of the defendants' liability to the plaintiff, was subject to Credit Committee approval and, more particularly, to the provision by the defendants together and/or individually of details in respect of queries arising out of the first named defendant's accounts for the period of 18 months prior to the 31st December 2013, which were provided by P.F. Lynch & Co. Accountants. He said notwithstanding the queries raised by the plaintiff and the request for supporting documentation, the company forwarded to the plaintiff minutes of a meeting of the 29th October in which it was resolved by the company, *inter alia*, that payment of €1,000 per month would be made to the plaintiff. He continues that following the presentation of the lender's report to the Credit Committee, the plaintiff wrote to the second and third named defendants as guarantors of the first named party on the 8th December 2014, noting the failure of the defendants to engage with the bank and provide the information required to assess the debt and any restructuring of the borrowers' facility. He said that the bank afforded a period of seven days within which the required information should be furnished and failing which the plaintiff noted that it would have been no alternative but to take "whatever steps are deemed necessary" in respect of the loans. He said notwithstanding the issue of these letters, the defendants together and individually failed to provide the information required to allow the plaintiff to consider any possibility in respect of the restructure of the loan facilities and in those circumstances no modification of the terms of the loan, the subject matter of the present proceedings, ever took place.

16. Counsel on behalf of the defendant said that a bank did not exist purely on paper but was active in discussing the issues of accounts with customers.

17. Counsel for the plaintiff indicated that there was no date of agreement with the bank, no documentation of an agreement with the bank, and no correspondence relating to the agreement with the bank, apart from the correspondence of the 8th December 2014.

18. Counsel for the plaintiff referred to *IBRC Ltd. v. McCaughey* [2014] IESC 44 where Clarke J. discussed the issue of the declarability of a defence. He stated: -

"A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607, be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence."

He further stated: -

"Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be."

19. In applying the jurisprudence as laid down by *IBRC v. McCaughey*, this court is of the view that the defendant has failed to assert a defence to these proceedings. It is clear that the company resolved to pay the sum of €1,000 per month and continued to do so. There is no mention of any person with whom the defendants say they agreed to this proposal and there is an onus, in this Court's view, on the defendant to identify either the names of bank officials, or any correspondence or agreements, to sustain the argument of Mr. O'Brien.

Conclusion

20. By reason of the foregoing, I am not satisfied that the defendant has established a defence as would oblige me to refer these proceedings to plenary hearing. Therefore, the plaintiff is entitled to judgment in the sum of €80,220.15, taking into account the part

repayments of the loan by way of the payment of €1,000 per month.