Neutral Citation [2013] IEHC 154

THE HIGH COURT

2011 4592 S

BETWEEN

EBS LIMITED

PLAINTIFF

AND

WILLIAM CAMPBELL AND CHRISTINE CAMPBELL

DEFENDANTS

Judgment of Mr. Justice Birmingham delivered on 17th day of April, 2013.

1. The background to the matter which has now come before the Court is that, pursuant to three loan facility letters, the plaintiff agreed to advance to the defendants a very significant sum by way of loan, made up as €2,500,000 by reference to the first facility letter of the 16th November, 2006, €3,050,000 by reference to the second facility letter of the 14th December, 2006, and €3,525,000 by reference to the third facility letter. The defendants, it should be explained, were married to each other but are now estranged.

2. Difficulties developed in relation to the repayment of the loans, indeed it is not seriously disputed, subject to an issue raised by the second defendant, but that the defendants failed to meet their repayment obligations, with the result that a summary summons was issued dated the 9th November, 2011, claiming the sum of €8,824,152.85, being the amount alleged to have been due as of the date immediately prior to the commencement of the proceedings. Appearances were entered by both defendants and the matter came into the Master's List in the usual way.

3. On the 29th March, 2012, the Master refused a request for a further adjournment to the first named defendant, the matter having been adjourned on a previous occasion, and instead gave the plaintiff liberty to enter final judgment against the first named defendant in the sum of €8,865,784.10 and by consent adjourned the case as against the second named defendant to the 10th May, 2012. Subsequently, the case as against the second named defendant was transferred to the Judges' List.

4. The position, therefore, is that the cases as against both defendants have arrived by somewhat different routes and the defendants find themselves in somewhat different positions in that liberty to enter final judgment has been granted against the first named defendant, and he has appealed that order, but no comparable order has been made against the second named defendant. On behalf of the plaintiff it has been argued that this has practical consequences and that the first named defendant bears a positive onus to establish that the order of the Master should be vacated and that liberty to defend be given to him. It is argued that he finds himself at a greater disadvantage than his co-defendant. The case of *Ó Tuama v. Casey* [2008] IEHC 49, a judgment of Clarke J., of the 28th February, 2008, was relied on in support of the proposition that the first named defendant's position differed from other defendants, who are seeking liberty to defend, in that he was required to establish not just that he had an arguable defence to the proceedings, but to go further and establish that he had a defence which had a real prospect of success. In my view, the situation that Clarke J. was dealing with is entirely different to the current situation. There, judgment had been given obtained by default and, indeed, as Clarke J. held, had been obtained regularly by default. The proceedings had come to a conclusion in relation to liability until the defendant moved to set aside the judgment and re-open the issues. Here, the situation is quite different, the Master had given liberty to enter final judgment but from that order, as from all orders of the Master, there is a full and unqualified right of appeal. Appeals from the Master, just like appeals from the District Court to the Circuit Court, or from the Circuit Court to the High Court, are by way of re-hearing. Accordingly, I reject any suggestion that the first named defendant is to be regarded as being at any disadvantage. Accordingly, the plaintiff's claim for summary judgment against the first named defendant and the defendant's request to defend and have the case sent for plenary hearing, fall to be considered in accordance with the well established principles applicable to claims for summary judgment. I will address these principles presently, having referred to the arguments that have been advanced by both defendants.

5. However, before doing so, there is one procedural issue that has been raised to which I should refer. One element of the argument advanced by the first named defendant relates to the fact that the Master refused an application from for the first named defendant for a further adjournment of the proceedings while at the same time granting an adjournment to the second named defendant, which adjournment was on consent. It is said this was an unacceptable, indeed, impermissible procedure.

6. In my view, there is no substance in this complaint. The Master was perfectly entitled to differentiate between the defendants. In a situation where the motion for judgment had already been adjourned once, that a further adjournment would not readily be forthcoming was scarcely surprising. In a situation where, notwithstanding that the case had been previously listed, the plaintiff was consenting to an adjournment of the case against the second named defendant who was experiencing ill health, that the case against the two defendants would become separated is hardly at all surprising. Having appealed the decision of the Master, the first named defendant is, as I have already made clear, entitled to a complete re-hearing, a hearing *de novo*. He has had the opportunity to put the defence that he wishes to make on affidavit and has availed of that opportunity.

7. It is, perhaps, convenient to summarise briefly the case that each defendant advances which it is said is sufficient to see the case go to plenary hearing. I will then address each of the suggested defences in greater detail in the context of the principles that have been established in order to determine whether the case is one for summary judgment or whether these are cases where liberty to defend should be given.

8. The case on behalf of the first named defendant is that throughout 2011 he had, as he puts it, dealings with and reached agreement with the plaintiff, which saw the plaintiff agreeing not to take any further steps for a period of years if the defendants provided additional security in respect of their indebtedness. This agreement is alleged to have been reached with Mr. Philip Butler, who is a senior manager in the commercial department of the EBS Building Society. The first named defendant contends that in these circumstances the plaintiff is estopped from pursuing the present proceedings.

9. The second named defendant's suggested defence is that at all relevant times she was a very vulnerable person, in a fragile and vulnerable state acting under the undue influence of her husband, the first named defendant, and that there were factors present which should have put the plaintiff on inquiry as to whether the second named defendant was ever exercising any independent judgment or whether she was acting independently.

10. The approach to be taken to applications for summary judgment has been considered on a considerable number of occasions in the Superior Courts in recent years as emerges from cases such as *Aer Rianta v Ryanair* [2001] 4 I.R. 607 and *Danske Bank v. Durkan New Homes* [2010] IESC 22. In the case of *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, McKechnie J. reviewed the authorities and then helpfully drew together the principles that emerged from them. He did so in these terms:

> "(i) the power to grant summary judgment should be exercised with discernible caution;
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> (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, there being several ways in which this may best be done;
>
> (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, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
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> (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;
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> (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?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;
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> (viii) this test is not the same as and should be not 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;
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> (ix) leave to defend should be granted unless it is very clear that there is no defence;
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> (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 in 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."

11. I turn now to consider each of the defences that has been suggested. In doing so, I am very conscious that the jurisdiction to grant a summary judgment, is one to be exercised sparingly and I take the authorities as establishing that if there is any real doubt at all, that leave to defend should be given.

12. So far as the case advanced by the first named defendant is concerned that an agreement had been reached with the plaintiff so that the plaintiff is estopped from pursuing the present proceedings is concerned, there is no doubt but that there was contact between the plaintiff and the first named defendant in 2011. In that regard, there was a significant exchange of correspondence in May/June 2011.

13. A letter from Mr. Butler dated 16th May, 2011, contained the following paragraphs which, amongst others, are of significance:-

> "In terms of providing additional security to EBS for the three loan accounts I would propose the following…
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> 6. Borrowers to provide additional security to the value of €1.2m in unencumbered property from Ms. Kristina Campbell in support of the above loan accounts. The income from these properties would continue to accrue to Ms. Kristina Campbell for as long as any restructure of the loan accounts continues to perform within the agreed terms and conditions…this letter does not constitute a loan agreement but merely sets out the basis upon which EBS is willing to consider the restructure of the loan accounts. This letter should not be construed as a commitment on our part to agree to or to accept any proposal or commitment not to exercise our remedies in the period pending delivery of your response to this correspondence.
>
> This letter is merely a statement of our intention to consider your proposal subject to the above conditions. We reserve our right at our absolute discretion to reject or accept any such proposal subject to such modifications and/or amendments as we deem appropriate. Nothing in this letter shall be, or be construed as, a waiver compromise or settlement or otherwise prejudice in any way, any rights, power, remedies or discretions which we may have, whether under the relevant offer letters, security documents or otherwise, all of which are hereby reserved.
>
> Obviously the critical matter in order to move forward will be Mrs. Campbell's decision regarding the provision of additional security…"

14. Following a meeting which took place on 22nd June, 2011, in the offices of EBS, Mr. Campbell wrote to Mr. Butler on the following day. The letter included the following paragraphs:-

> "In terms of providing additional security to EBS for the three loan accounts I would propose the following:
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> 1. That an undertaking be provided to the satisfaction of EBS to lodge the proceeds of the legal action against [a named firm of solicitors] estimated at €1m in relation to Limerick Corporate Suites in reduction of the above loan account.
>
> 2. Borrowers to provide additional security to the value of €300,000.00 in unencumbered property from Mrs. Kristina Campbell in exchange for removing her name in full from the loans."

15. Certainly, on the basis of this exchange of correspondence there is nothing to indicate that any agreement was ever concluded or that there was ever any meeting of minds. What was described by Mr. Butler as the critical matter in order to move forward, Mrs. Campbell's decision to provide additional security to the value of €1.2m in unencumbered property was never tabled.

16. The correspondence to which I have referred is inconsistent with the existence of a concluded agreement. There is no correspondence or documentation which supports the existence of such an agreement. There is, however, correspondence which is consistent only with the absence of agreement, even if an agreement was wished for by Mr. Campbell. So, an email of 17th March, 2012, from Mr. Campbell to Mr. Butler asks:-

> "Further, to previous correspondence regarding the three loan facilities, would it be possible to set up a meeting so that we can discuss a possible resolution to the outstanding issues?"

Three days later Mr. Butler responded commenting:-

> "Because there are legal proceedings in being between the parties, which EBS understands will be defended, any negotiations at this stage should be conducted through the various legal representatives in the first instance."

17. While the correspondence of June, 2011 indicated that a key element of the plaintiff considering whether to accept a proposal would be that €1.2m be provided through Mrs. Campbell by way of additional security, which was never forthcoming, with Mr. Campbell instead offering €300,000.00 when expressing the view that he looked forward to a favourable response so as to bring matters to a satisfactory conclusion so that all could move forward and work together, Mr. Campbell, now nonetheless asserts, that an agreement was subsequently reached. However, he is vague in the extreme as to when, or where such an agreement was concluded, or what the actual terms of the agreement were. Taking his case at its highest the most that can be said is that the parties had identified the elements of a possible compromise but there is nothing whatever to support the view that an agreement was actually concluded and indeed all the evidence goes firmly the other way.

18. An affidavit from Mr. Patrick McEnroe, Solicitor, has been filed on behalf of the first named defendant. He exhibits extracts of notes taken by him at a without prejudice meeting held on 20th October, 2011. However, the notes far from establishing that an agreement was reached and put in place, indicate that the provision of additional security which would be satisfactory from the point of view of the plaintiff remained to be sorted out. The notes do indicate that if this aspect could be sorted out that the plaintiff would deal with the defendants on an interest only basis.

19. In my view the contention that an agreement had been reached such that the plaintiff is estopped from proceeding with the claim is unstateable. To use the language of *Aer Rianta v. Ryanair*, it is very clear that the first named defendant has no case, the proposed defence is to use the language of McGuinness J. "so far fetched and self-contradictory as not to be credible".

20. I turn now to the position of the second named defendant. In her affidavit she explains that in 2004 her marriage was in difficulties. She deals in some detail with issues which would seem likely to have been canvassed in family law proceedings. In deference to the entitlement to privacy enjoyed by both the first and second defendants and, indeed, their children, I will not go into further detail at this stage. Suffice to say that she says that around this time in 2004 the defendant requested her to sign documents saying "if you don't sign this we lose everything". She says that she felt she had no choice but to sign the documents believing that if she signed there was a chance that her husband might stay with her, whereas if she stood up to him and refused that their relationship and their marriage would be destroyed.

21. So far as the facility letter of 16th November, 2006, is concerned, she says she received no independent advice and that her husband had said to her "we'll lose our business, you have to sign this". Again, she had no independent legal advice in relation to the second facility letter. In her affidavit she states that this was a particularly improvident transaction as the funds were used for the purchase of property in Limerick, which she says were purchased in her husband's sole name, though she says that she understands that her husband may subsequently have executed a declaration of trust in relation to the properties, but she is not sure as to the timing or purpose of the declaration.

22. Despite the assertion, that this transaction was manifestly disadvantageous to the second named defendant, documentation that has been exhibited seems to make clear that she was a joint beneficial owner of the property. Dealing with the documentation in September 2008, she says that she harboured a suspicion that her husband resumed their relationship; the first and second named defendants had separated and lived apart for a period, in order to persuade her to sign the loan documentation. She then asserts that her involvement with the plaintiff was procured by the actual undue influence, misrepresentation and possible deceit of her husband and that the facility letters had been manifestly disadvantageous to the second named defendant.

23. The assertions made by the second named defendant are somewhat surprising. The references to being constantly told that if she did not sign they would lose everything and that she had to sign this or they would lose their business seem designed to paint a picture of the loans being taken out at a time of financial pressure amounting to desperation. However, the reality is quite different; a statement of net assets prepared by accountants showed that as of the 30th June, 2006, the defendants had net assets of over €77m. Searches conducted in the Land Registry and Registry of Deeds indicates that the defendants are joint owners of a great number of properties. There is nothing whatever to suggest that the second named defendant was coerced into going along with a situation where the financial affairs of the defendants were conducted in a way that was oppressive to the second named defendant. On the contrary, it appears that the second named defendant acquired extensive property interests as a result of the defendants' business activities.

24. In a supplemental affidavit dated 16th November, 2012, the second named defendant stated that reviewing documentation in advance of the plaintiff's application to enter final judgment, she realised that she had no memory of signing the documentation dated 16th November, 2006 and 14th December, 2006. She says that she raised this with her husband, explaining her belief that she did not sign the documentation in question, and his response was to say "Well what was I to do?". She now has the firm impression that her husband forged or procured the forging of her signature on these letters.

25. The assertion that she does not recall signing the November and December 2006 documentation does not sit easily with her first affidavit, where she had accepted signing the documentation but was critical of the circumstances in which she signed, without independent legal advice and while under pressure.

26. In my view, the second named defendant has failed to provide any evidential support for the assertion that she signed the documents as a result of undue influence, misrepresentation or deceit on the part of her husband. That remains a bare unsupported assertion.

27. This was not a case of one spouse guaranteeing the debts of the other. Nor is it a case of one spouse agreeing to a charge on the matrimonial home to support the business activities of the other – in such cases it might, in some circumstances, be possible to infer that one spouse was acting subject to the other's direction. Given the very low threshold to be crossed before leave to defend is granted, it may be that some such cases at least would not be appropriate for summary judgment. In that regard, I have been referred to the case of *Ulster Bank Ltd. v. Roche and Buttimer [*2012] IEHC 166. There, Clarke J. was dealing with two defendants who, though not married, were in a relationship. The second defendant, although a director of her boyfriend's motor business who took no part in the running of the business and was not a shareholder, had guaranteed the debts of the company. In a situation where the bank was aware that the defendants were in a relationship, and aware that the second defendant had no direct involvement in the company, other than being a director, Clarke J. concluded that the bank was put on inquiry and was obliged to take some steps to ensure that the security was openly and freely agreeing to provide the requested security. There are a number of factors present that distinguish this case from *Ulster Bank Ltd. v Roche and Buttimer*. This is not a guarantee case. Mrs. Campbell was a fifty per cent shareholder of the company, Kamar Construction Limited, through which the defendants carried on business, and Mrs. Campbell played a part in the business, albeit on a much limited scale than her husband.

28. I am of the view that there is no evidence of undue influence. Furthermore, I am of the view that there were no factors present which would have put the bank on inquiry. The situation might indeed, as I have indicated, be different if this was a case of one spouse guaranteeing the other's existing debts, but that is not the situation.

29. Low as the threshold is, the second named defendant has not crossed it. No arguable defence has been made out and, accordingly, the plaintiff is entitled to summary judgment against the second named defendant. In summary then, the plaintiff's claim against both defendants succeeds.