Neutral Citation: [2014] IEHC 166

THE HIGH COURT

[2011 No. 4471 S.]

BETWEEN

ACC BANK

PLAINTIFF

AND

MARGARET HANRAHAN AND MICHELLE SHEEHAN

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered the 6th day of March, 2014

1. The plaintiff is a limited liability company, which carries on the business of banking within the State. It has its registered office at Charlemont Place, Dublin 2. The first named defendant is a widow who resides at Burncourt Farm, Cahir, Co. Tipperary. The second named defendant is the daughter of the first named defendant; she is also a widow and resides at 5 Cartur Mor, Clybaun Road, Co. Galway. In this action, the plaintiff seeks to recover the sum of €1,839,108.06. The plaintiff commenced these proceedings by way of summary summons issued on 28th October, 2011. In this application, the plaintiff seeks summary judgment against the defendants. The defendants have filed a number of affidavits in opposition to the plaintiff's motion; they wish to have the matter remitted to plenary hearing.

Background to the Proceedings

2. These proceedings arise out of the purchase of Burncourt Farm, Cahir, Co. Tipperary. In or about April 2007, the first named defendant became aware that Burncourt Farm was on the market for sale. She thought that it would be suitable for use as an equestrian centre. Her intention was to have the farm put into the name of her daughter, the second named defendant, so that she would have it after the death of the first named defendant. In addition, there would be a saving of stamp duty, because by putting the farm into the name of the second named defendant, they would avoid the payment of stamp duty as the second named defendant was a young farmer and was therefore in a position to claim this relief. The first named defendant was unsure if she could afford to purchase the property. She only had a widow's pension and number of investment properties. She knew that Burncourt Farm would have to be purchased from the sale of other assets owned by the first named defendant. In particular, she would have to sell her farm at Kilcoran Farm and also other property at 5 Morton Street, Clonmel, and a property at 114 Irishtown, Clonmel.

3. The first named defendant states that she did not have experience of purchasing property in this manner. She says that she met with a senior bank official of the plaintiff, Mr. Willie Kennedy. She states that he said to her that the plaintiff bank was very experienced in putting together this kind of transaction, where a farm was being purchased from the proceeds of other farm assets. She states that Mr. Kennedy undertook to advise her as she went along. To that end, Mr. Kennedy inspected the property at Burncourt Farm and the first named defendant's property at Kilcoran Farm. The first named defendant had converted a number of buildings on this farm into self contained apartments. One of these was in the course of construction on the day that Mr. Kennedy inspected the farm. The first named defendant had mistakenly thought that she did not require planning permission for any of the apartments. She states that Mr. Kennedy never raised the topic of planning permission when he inspected the property. However, internal bank documentation reveals that the apartments were excluded from the loan application.

4. The first named defendant states that Mr. Kennedy related to her that Burncourt Farm represented a very good deal. He encouraged her to proceed with the acquisition. She states that Mr. Kennedy advised her that the best way to finance the purchase of Burncourt Farm was by bridging finance for a period of two years, while she sold Kilcoran Farm and the other properties. He was of the view that she would have no difficulties selling Kilcoran Farm and the other properties. He stated that the proceeds of sale would be sufficient to repay the plaintiff.

5. In addition to repayment of the loan, the loan agreement as evidenced in the facility letter dated 31st July, 2007 provided:

> *" ...the facility (including all rolled up and capitalised interest) will be repayable when the secured property is sold, or when the term of the loan expires, whichever is earlier. "*

6. The first named defendant states that the term in the loan agreement which includes the words "*or when the terms of the loan expires, whichever is earlier*", did not reflect the agreement that she had reached with Mr. Kennedy. She states that he had led her to believe that the plaintiff would only seek repayment of the loan from the proceeds of sale of her other property. The security for the Burncourt loan was to comprise first legal charges against Burncourt Farm, Kilcoran Farm, the Irishtown property and the Morton Street property in Clonmel.

7. It was a condition precedent of the Burncourt loan agreement that the plaintiff would obtain a valuation of the Irishtown property of €1m. No such valuation was obtained by the plaintiff. The highest valuation obtained was a valuation for €950,000. The first named defendant states that she had placed reliance on the fact that the Irishtown property was worth €1m. She says that this was a source of comfort to her, that she would be able to repay the loan with the sale of the Irishtown property. It was submitted on behalf of the first named defendant that as this condition precedent was not fulfilled, the contract never came into existence and hence the plaintiff is not entitled to claim interest on the amount loaned to the first named defendant.

8. The first named defendant purchased Burncourt Farm in August, 2007. She took steps to sell some of her other properties. However, by early 2008, she realised that she would have difficulty in achieving the projected sale prices for the properties.

9. At the time of the sale of the property, Messrs. Nash and McDermott, Solicitors, who had acted for the first and second named defendants also acted for the plaintiff. The first named defendant has a number of complaints as to how they dealt with the matter on the closing of the sale. Acting as agent for the plaintiff, they should have ensured that the entire farm was in the name of the second named defendant. Instead, they split ownership of the farm such that the first named defendant got the farmhouse, with the

remainder vested in the second named defendant. It is claimed that this was done without the knowledge of the first named defendant. When it was discovered, it caused a breakdown in the relationship between the first and second named defendants. In addition, the defendants thought that they were purchasing a farm of 84 acres. Instead, they only got 77 acres, as 7 acres had been sold by the vendor to a third party. The first named defendant states that this should have been spotted by the solicitors acting as agent for the plaintiff.

10. The solicitors also represented that there was "*good and marketable title*" to the secured property. They failed to highlight any issue in relation to the apartments on Kilcoran Farm.

11. The first named defendant makes the case that the plaintiff owed her a duty of care in relation to the transaction, due to the conduct of Mr. Kennedy, by holding himself out as someone who would guide and advise the first named defendant at the various stages of the transaction. The first named defendant alleges that Mr. Kennedy gave her negligent advice in relation to the transaction. In particular, she cites his advice to proceed with bridging finance so that she would complete the purchase of Burncourt Farm and then seek to sell some of her other properties so as to repay the plaintiff. The first named defendant makes the case that this was a high risk method of going about the purchase of Burncourt Farm, which was to take place before she sold any of her other properties. She was left in the situation where there had to be an increase in property values, or at least the maintenance of those values, so that she would find a purchaser in the two year period of the bridging finance. The first named defendant submitted an affidavit from a Mr. Currid, who was put forward as a banking expert due to the fact that he worked in banking for 27 years. He has expressed the opinion that the first named defendant was not a suitable candidate for this type of financial package, as she had no substantial source of income to meet her liabilities in the event of difficulties selling her property.

12. The first named defendant makes the case that in considering the loan application, the plaintiff manipulated the information which was forthcoming in relation to her financial situation. In particular, the first named defendant states that she had submitted figures from her accountant, Agnes Keane. Instead of relying on these, the plaintiff obtained a set of figures prepared by Anthony & Associates in relation to her financial projections. The first named defendant states that she did not instruct Anthony & Associates to prepare any such figures, or to submit them to the plaintiff.

13. In addition, the first named defendant states that from internal documentation it would appear that the plaintiff took into account certain monies that the first named defendant received by way of a CPO compensation and compensation money which was due to the second named defendant due to the death of her husband. The first named defendant states that neither of these funds were offered to the plaintiff as sources of repayment of the loan. Their inclusion was a particular source of distress to the second named defendant who thought that the first named defendant had disclosed such source of funding to the plaintiff.

14. The sum claimed includes the sum of €235,687 as default interest. The first named defendant has submitted that this is in effect a penalty interest. She states that this interest is not a genuine pre-estimate of probable loss, and is in fact a penalty and, as such, is not recoverable. The plaintiff denies that the interest is a penalty interest, but states that it is a genuine pre-estimate by the plaintiff of its loss and/or the additional cost to it of providing capital in the event that there was a default. The plaintiff further submits that whether or not this Court finds that the sum may constitute penalty interest, would not impact on the plaintiff's entitlement to judgment in the balance of the sum claimed. It is only necessary at this point to note that there is a dispute between the parties in relation to the interest claimed herein.

15. The first named defendant also makes complaint that certain of the lands which had been charged as security for the loan, have been sold, but it is not clear if the sale price has been credited against her indebtedness to he plaintiff. The second affidavit sworn by Mr. Ian Dwyer on behalf of the plaintiff on 16th October, 2012, states that sales of certain of the properties provided as security for the loan have concluded. He goes on to state that none of the relevant sale proceeds had, as of the date of swearing of that affidavit, been applied against the amount due by the defendants under the loan agreement. He states that credit would be given to the defendants as appropriate, when the sales proceeds have been so applied. There is no reference in the plaintiff's further affidavits to any such credits being allowed in respect of the sale of such properties. If the properties were sold, the first named defendant would be entitled to have the proceeds of sale thereof set against her indebtedness to the plaintiff.

16. At this juncture, it is necessary to point out that the plaintiff has submitted strong affidavit evidence in response to each of the first named defendant's allegations. In relation to the alleged duty of care, it is denied that any such duty arose in the circumstances. It is denied that Mr. Kennedy held himself out as an adviser to the first named defendant or that he gave her any such advice as alleged.

17. Insofar as it is alleged by the first named defendant that the plaintiff was negligent in assessing her for the Burncourt loan, it is denied that there was any such failure on the part of the plaintiff. They state that even if it were true that the plaintiff failed to properly assess the first named defendant's repayment capacity, there is no valid legal basis for suggesting that this would be sufficient to release the first named defendant from her obligation to repay the loan in accordance with the terms of the facility.

18. The plaintiff points out that on the 'acceptance of loan offered' document, the following notice features prominently:

> *"This letter is an important legal document and the bank strongly recommends that you take independent advice from an appropriate professional before accepting this letter. "*

19. They also point out that condition 4.17 of the general conditions applying to the facility states, inter alia:-

> *"... the bank makes no warranty ...as to whether the acquisition price for any [secured asset} is reasonable. Such are matters upon which the borrower should satisfy himself "*

20. In relation to the allegation that the plaintiff manipulated the first named defendant's loan application by obtaining exaggerated figures from Anthony & Associates, the plaintiff states that they had no connection with the firm of Anthony & Associates and did not seek information directly from that firm. The plaintiff assumes that it was the first named defendant who sought the figures from that firm of accountants.

21. As regards the CPO monies, the plaintiff states that it did at one time seek to have security over these funds. However, when the plaintiff objected to this course, the requirement for such security was abandoned and the CPO moneys do not form part of the security for the loan.

22. In relation to the alleged conflict of interest of the defendant's solicitors, Nash and McDermott, the plaintiff states that that firm of solicitors were always acting on behalf of the first named defendant. They note that this is borne out by the documentary

evidence in which Nash and McDermott refer to the defendants as "*our clients*". They refer to the solicitor's undertaking which is exhibited at MH9 to the affidavit sworn by the first named defendant on 23rd August, 2013, wherein it is abundantly clear that the solicitors were acting on behalf of the defendants in furnishing the undertakings therein. In relation to the firm of Nash and McDermott acting for both the plaintiff and the defendants at the closing of the sale, the plaintiff states that this was done at the request of the first named defendant, who did not want to have to pay for a second firm of solicitors at the closing of the sale.

23. Insofar as there was an allegation that Messrs. Nash and McDermott wrongfully split ownership of Burncourt Farm between the defendants whereby the first named defendant got the farmhouse and the second named defendant became the owner of the rest of the farm, the plaintiff points out that the dwelling house does not form part of the security for the loan. The plaintiff states that it had no input whatsoever into the question as to ownership of the dwelling house. This was a matter to be dealt with by the borrower's solicitor, Nash and McDermott, on the instructions of the borrowers.

24. In relation to the first named defendant's allegations as regards her principal residence, the plaintiff points out that it has no security over her principal residence. They are not entitled to seek possession of the house and have not done so. Insofar as an email dated 30th December, 2010, refers to "*a proposal in relation to her staying at the premises at Burncourt for a short term period*", they state that this is a reference to the farm at Burncourt rather than to the dwelling. They state that it is disingenuous of the first named defendant to seek to characterise the said email as a threat to repossess her principal residence.

25. In relation to the affidavit sworn by the first named defendant's banking expert, Mr. Currid, the plaintiff questions his expertise in relation to the matters at issue between the parties. They note that he had ceased employment as a bank manager some years before the time of the transaction, the subject of the proceedings herein. They note that Mr. Currid's main allegation is that the plaintiff failed to properly assess the first named defendant's loan application and failed to ensure that the first named defendant was a good mark for the repayment of the loan. The plaintiff denied that it failed to properly assess the first named defendant's loan application or the security offered at the time of the making of the loan. They go on to state that even if it were true that the plaintiff failed to properly assess the first named defendant's repayment capacity and/or security offered, there is no legal basis whatsoever for suggesting that this would be sufficient to release the first named defendant from her obligation to repay the loan in accordance with the terms of the facility.

The Second Named Defendant

26. In her sworn affidavit of 13th November, 2012, the second named defendant states that she never spoke with any servant or agent of the plaintiff in acquiring the said loan. She states that she was not aware that Nash and McDermott were acting for the plaintiff until the present proceedings opened. She states that it had been represented to her, presumably by the solicitors acting as agent for the bank, that the liability which would attach to her, should the first named defendant default, would be limited to a sale of her share of Burncourt Farm. The second named defendant was used by the first named defendant for the sole purpose of avoiding stamp duty pursuant to s. 112 of the Finance Act 1994. The second named defendant was a trainee farmer under the age of 35 years and hence qualified for the relief. The second named defendant also relies on breach of the condition precedent. She says that it was always represented to her that there was adequate security in place for the Burncourt loan. She thought that the entire of the Burncourt property was put into her name. She was very upset when she discovered that ownership of the farm had been split. She states that this was done by Nash and McDermott acting as agent for the bank, such as would give rise to an action in deceit against the plaintiff.

27. The second named defendant states that she never offered to repay the loan with the proceeds of any personal injury claim. She said that the claim was based on a road traffic accident in which she received injuries and in which her husband was fatally injured. She was very upset to see reference to such compensation in the plaintiff's internal documentation. She states that any such suggestion could only have come from the plaintiff's dealings with the first named defendant.

28. The second named defendant states that it was unknown to her that the security over Burncourt Farm excluded the farmhouse, which had been put into the name of the first named defendant. The second named defendant has instituted proceedings against Nash and McDermott arising out of this state of affairs. She states that it was only when a servant or agent of the plaintiff, Mr. Tim Rafter, telephoned her inquiring as to when the insurance settlement funds would be received that she became aware that she was to be made liable for the repayment of the said loan.

29. The plaintiff, in its replying affidavit, states that it was up to the second named defendant to get her own legal advice in the matter. If there was any shortcomings in relation to the advice received, that was a matter between the second named defendant and her solicitor. It is noted that the second named defendant has commenced legal proceedings against her former solicitors.

30. The plaintiff points out that the second named defendant signed the letter of loan offer. They state that it was a matter for the second named defendant, in conjunction with whatever professional advisor she chose to engage, to decide whether the loan agreement was a good bargain from her perspective. The plaintiff did not undertake the responsibility of advising her in this regard.

31. The plaintiff states that insofar as there is an allegation by the second named defendant that it was represented to her that this was a limited recourse loan, this would appear to be an allegation against her former solicitors, which is not a defence to the proceedings herein. The plaintiff states that it was clear from the loan agreement that it was not a limited recourse loan. They state that it was a matter for the second named defendant and her advisers to read and consider the relevant documents. It was not for the plaintiff to advise them of their meaning.

32. The plaintiff states that insofar as the second named defendant claims she was involved in the transaction to enable the first named defendant to claim a tax benefit by having the farm vested in a "*young farmer*", either she was *bona fide* going to take the farm, or it was a sham and an attempt to defraud the Revenue Commissioners. If it was the latter, the second named defendant would be admitting to perpetrating a serious criminal offence, but it is not something which would constitute a defence to the proceedings herein. They state that in such circumstances the maxim *ex turpi causa non oritur actio* would apply.

The Law

33. The law in this area has been well settled for quite some time. The following *dicta* from the judgment of Murphy J. in *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75 has been cited with approval in a number of subsequent cases:

> *"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] 1 WL.R. 1453. 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, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?' The test posed by Lloyd L.J in the Standard Chartered Bank case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence. '"

34. The formulation of the test in the *Anglin* case was adopted by the Supreme Court in *Aer Rianta cpt v. Ryanair Limited* [2001] 4 I.R 607. In the course of her judgment, McGuinness J. accepted the test as laid down in the *Anglin* case. Hardiman J., at pp. 621-623 of the report, stated:

"More recent Irish authority, in my view, supports the impression gleaned from authorities from the early days of the summary judgment jurisdiction, that the defendant's hurdle on a motion such as this is a low one and that the jurisdiction is one to be used with great care ...

In light of these authorities, I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the late nineteenth and early twentieth centuries. The formulation used in First National Commercial Bank plc. v. Anglin [1996] 1 IR. 75 and the cases cited in that judgment are useful and enlightening expressions of the test, but 1 do not believe that this formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. 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 ...

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?"

Conclusions

35. Applying the tests as laid down in *First National Commercial Bank Plc v. Anglin and Aer Rianta v. Ryanair Limited* cases, it seems to me that the first named defendant has cleared the low threshold which has to be established in order to defeat an application for summary judgment. There is a clear conflict on a wide range of matters, as referred to herein. In particular, the role played by Mr. Kennedy and whether he held himself out as being the defendants' adviser in relation to the transaction and, if so, whether this gave rise to a duty of care owed by the plaintiff to the first named defendant. If there was such a duty, whether there was a breach of that duty by Mr. Kennedy and/or by the plaintiff. There is, furthermore, a dispute as to whether the default interest was in fact a penalty interest. There is the question of the proceeds of sale of some of the properties and whether these have been applied to reduce the indebtedness of the first named defendant to the plaintiff. There is also the question as to whether there was a valid waiver by the plaintiff of the condition precedent concerning the value of the Irishtown premises. If not, what is the effect of the breach of this term?

36. In the circumstances, I think that it is necessary to remit the action to plenary hearing, where both sides will have an opportunity to put their respective cases before the court. While it is less clear that the second named defendant may have a defence to the plaintiffs claim, given that the cases of the first and second named defendants and the plaintiff are inextricably connected, I think that the fair course is to send the whole case including the case against the second named defendant for plenary hearing. Accordingly, I refuse the plaintiffs application for summary judgment against the first and second named defendants. I remit the action for plenary hearing and I allow four weeks for a statement of claim, four weeks for a defence and counterclaim (if any) and four weeks for service of a notice for particulars if necessary. I allow four weeks thereafter for the replies to the notice for particulars.