

THE HIGH COURT

[2012 No. 4728S]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED

PLAINTIFF

AND

TOMMY KELLY

DEFENDANT

JAGUAR CAPITAL LIMITED

THIRD PARTY

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

1. The primary matter before the court is an application by the plaintiff bank for summary judgment in the amount of €252,000 together with interest (the total amount standing at €255,050.29 as of the 17th October, 2012). The application for summary judgment is resisted by the defendant who instead seeks to have the matter remitted to plenary hearing. Also before the court is a second motion brought by the defendant seeking to join as a third party Jaguar Capital Limited.

2. The basic facts are that in May/June 2007, the defendant following contact with a Mr. Gerry Jennings, a director of the proposed third party, decided to participate in an investment which was being undertaken by Jaguar Capital Limited. The investment involves the acquisition of a property known as Beckett House, in Lambeth, London.

3. The project envisaged that would be investors would acquire shares in a special purpose investment vehicle, a Luxembourg company, Lambeth SA. It was also envisaged, and indeed the suggestion by the defendant is that this was a requirement that each investor was expected to structure their investment so that 50% of their investment came from their own funds while the remaining 50% would be borrowed by the individual investors from Anglo Irish Bank.

4. Anglo Irish Bank did in fact and this is not in dispute, offer to advance a loan facility in the amount of €252,000 by way of loan facility letter of the 13th July, 2009, that letter replacing an earlier facility of the 10th March, 2008, which in turn renewed a still earlier facility of the 14th June, 2007.

5. The facility was stated to be repayable on demand, but without prejudice to the demand nature of the facility, to be repaid on or before the 31st March, 2010. It was not. By letter dated the 17th October, 2012, the solicitors for the bank drew attention to the breach and requested that it be remedied within 21 days. A formal demand issued dated the 8th November, 2012, seeking repayment and that was followed by a summary summons which was issued on the 20th December, 2012.

6. The case which the defendant seeks to make and the basis on which he wishes to see the matter go to plenary hearing is that he contends that the loan provided by Anglo Irish Bank was a non recourse one. On behalf of the defendant it is said that it was represented by Jaguar Capital Limited and its director Gerry Jennings, (i), that the loan was non recourse; that there would be no personal recourse on the part of Anglo to investors and (ii), that the security for the loan portion of the investment was to be limited to shares held by each investor in the Luxembourg holding company. It is said that the plaintiff is disentitled from recovering against the defendant because of these representations which were made by Jaguar Capital Limited, it being, so it is contended, the agent of Anglo Irish Bank.

7. The legal principles applicable to proceedings in which summary judgment is sought have been considered on quite a number of occasions by the Superior Courts in recent years. That that should be so is not surprising for as is pointed out in the foreword to Barrett *On Summary Judgment in Ireland; Principles and Defences*, the downturn in the economy has seen a considerable increase in the number of applications for summary judgment.

8. In truth I do not detect any great disagreement between the parties as to the principles that are applicable, but rather the area of disagreement is as to how those principles are to be applied. The leading case in the area is *Aer Rianta cpt v. Ryanair Ltd.* [2001] 4 I.R. 607. McGuinness J. in the course of her judgment in that case at p. 615, commented:-

"In deciding whether the defendant may have a 'credible' defence, the court must concentrate its attention on the matters put forward in the defence itself. The court does not ask whether [the defendant's] account of events is probable or likely to be true; nor does it ask whether [the plaintiff's] account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible.

In the course of his judgment Hardiman J. commented as follows:-

"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?"

Later in his judgment he cautioned:-

"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."

9. The legal principles applicable to cases such as this were very helpfully and concisely summarised by McKechnie J. in *Harrisgrange v. Duncan* [2003] 4 I.R. 1 at p. 7, where he set out those principles in twelve numbered paragraphs.

10. In the case of *Zurich v. McConnon* [2011] IEHC 75 (Unreported, High Court, Birmingham J., 4th March, 2011), I commented that while the jurisdiction to enter summary judgment and to refuse leave to defend undoubtedly existed it was a jurisdiction to be exercised very sparingly. I remain firmly of that view. The test that I will apply therefore, is that indicated by Hardiman J. in *Aer Rianta cpt v. Ryanair Ltd.* Only if it is very clear that Mr. Kelly has no defence will judgment be granted at this stage and otherwise the matter will go to plenary hearing.

11. Cases where borrowers when sued have contended that the loan that they had obtained was a non recourse one have not been uncommon in recent times. In a judgment I gave recently in the case of *Danske Bank v. Mulvaney* [2014] IEHC 45 (Unreported, High Court, Birmingham J., 5th February, 2014) I referred to the wry observations of Ryan J. who in *Irish Life & Permanent plc T/A/ Permanent TSB v. Hudson* mused why someone who had access to borrowing on such remarkably favourable terms confined themselves to borrowing only the amount they did, why he wondered would someone not borrow multiples of what was actually borrowed. In fairness to Mr. Kelly, the way this particular transaction was structured with half of the investment coming from the investors funds and the other half borrowed from Anglo Irish Bank means that the questions posed in *Hudson* and echoed by me in *Danske v. Mulvaney* do not arise in the same way.

12. The language of the loan facility letter means that formidable obstacles face Mr. Kelly. The letter states specifically and without equivocation that the facility is repayable on demand and without prejudice to that, and that it is to be repaid on or before the 31st March, 2010. One cannot help thinking, if the defendant believed that this was a non recourse loan which was available to him then one would certainly expect the fortunate borrower would be very careful to see that the documentation accurately reflected that and that there was no ambiguity in that regard.

13. If this was a situation of asking whether the defence put forward was one that would probably succeed, there is very little doubt what the outcome of the case would be. However, that is not the test. The fair and reasonable probability of having a real or *bona fide* defence, we must remind ourselves, is not the same thing as a defence which would probably succeed or even a defence whose success is not improbable.

14. The defendant contends that oral and written representations were made. So far as the written representations are concerned, including representations in the form of a diagram, it is certainly not the case that the interpretation for which the defendant contends is the only one available.

15. The defendant attaches considerable importance to the "structure diagram" with its reference to Anglo Irish Bank non recourse funding, but another way of viewing the diagram is that it is showing two streams, one stream of investor funds and the other stream Anglo Irish Bank non recourse funding meaning that in effect, non recourse funding was available for senior debt as distinct from the individual investors. Again, the paragraphs of the Beckett House executive summary dealing with the financial aspects of the project read as a whole appear to offer as much comfort to the plaintiff as they do to the defendant who places heavy reliance on this document.

16. Even if the text of the document and diagram is interpreted as the defendant would wish and even if it was concluded that there were written or oral representations by Mr. Gerry Jennings/Jaguar Capital Limited it is not clear that that would avail Mr. Kelly, as it is not at all clear that there was a relationship between Anglo Irish Bank and Jaguar Capital Limited which would constitute Jaguar Capital Limited as the agent of Anglo Irish Bank. However, in a situation where Mr. Kelly contends that he never had any dealings with Anglo employees, I cannot at this stage exclude the possibility that an agency relationship will be established.

17. Formidable as the obstacles are facing the defendant and indeed will continue to face the defendant, and conscious of the fact that the threshold that the defendant has to cross is a low one, I cannot, I feel go so far as to say that it is very clear that he has no case. In these circumstances, I am not prepared to accede to the application for summary judgment and the matter will go to plenary hearing. If there is to be a plenary hearing, then given the allegations made by Mr. Kelly against Mr. Gerry Jennings and Jaguar Capital Limited, it is appropriate that Jaguar Capital Limited be joined as a third party and I will do that.