Neutral Citation Number [2012] IEHC 197

THE HIGH COURT

[2011 No. 1059 S.]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

JOHN FLANAGAN AND GERARD LILLIS

DEFENDANTS

JUDGMENT of Mr Justice Sean Ryan dated the 14th May 2012

The Claim
This is a motion for summary judgment brought by the Bank to recover €1,743,896.15 plus accruing interest in respect of two loan accounts held by the defendants. The Bank claims that the money was advanced to the defendants pursuant to a series of facility letters, as follows:

1. 20th March, 2006 issued in respect of a loan of €1,500,000 by way of commercial mortgage. The letter was accepted by the defendants on the 22nd March, 2006. The loan was on terms and conditions set out in the letter.

2. 31st May, 2007 for €230,000 by way of bridging loan on terms and conditions as contained in the letter which was accepted by the defendants on the same date as the letter.

3. 2nd January, 2008 was a restructuring of the bridging loan and it was accepted by the defendants on the 22nd February, 2008.

4. 4th March, 2009 was intended to restructure the loans that had previously been advanced by way of commercial mortgage and bridging loan respectively and this letter was accepted by the defendants on the 24th March, 2009. This fourth facility letter is the relevant one for the purpose of this application but the Bank takes the position that if for any reason this letter is found to be defective it is entitled to rely on the previous letters.

In fact the Bank has sued on the basis of two loans accounts that arose by virtue of the advances that the Bank made for the commercial mortgage of €1,500,000 and the bridging loan of €230,000.

At para. 7 of the grounding affidavit Mr. Derek O'Neill sets out the default on which the Bank relies. He says that the defendants failed to pay the bridging loan in accordance with the terms of facility letter No.4 and they also failed to repay the commercial mortgage. The defendants' failure to make payments in accordance with the terms and conditions of that facility letter amounted to an event of default.

By letter of the 19th August, 2010 the Bank wrote to the defendants notifying them that their loan repayments were significantly in arrears and by letter of the 10th November, 2010 the Bank demanded payment of the balances due on the two loans. The Bank's solicitors wrote on the 1st February, 2011, formally demanding payment of the amount outstanding as of the 31st January, 2011, which was €1,752,257.28.

It is not in dispute that the defendants borrowed the money and have not kept up their repayments as they fell due.

The Defendants' Response
The first defendant, Mr. Flanagan filed affidavits on his own behalf and on behalf of the other defendant Mr. Lillis. At the hearing of this motion for summary judgment, Mr. Flanagan represented himself and his co-defendant.

The defences put forward by Mr. Flanagan on his and Mr. Lillis's behalf may be summarised as follows:-

1. Each facility letter had as one of its terms that security consisting of a deed of covenant in respect of an intoxicating liquor licence for the premises whose purchase was being funded by the loans was to be put in place.

2. Following the execution by signing of facility letter No. 4, by the defendants, discussions continued in regard to the loan terms between the defendants and the Bank and this invalidates the Bank's reliance on that letter as a completed contract.

3. Facility letter No.4 is an unenforceable contract because money was never actually drawn down and there was also no consideration.

4. The Bank misrepresented these loans for regulation purposes to make them look like performing loans and this again furnishes a defence.

5. The Bank is limited to trading profits from the hotel premises only.

6. In addition, Mr. Flanagan argued at the hearing that there was not a formal event of default or, alternatively, that the Bank had not notified him and his co-defendant of same.

The Test
In *Aer Rianta v Ryanair* [2001]4 I.R. 607, the Supreme Court endorsed two tests from the English jurisprudence that the Court had previously adopted in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75. In the latter case, Murphy J delivering the judgment of the Court said:

> "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 (see *Irish Dunlop Co. Ltd. v. Ralph* (1958) 95 I.L.T.R. 70).
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> "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 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the headnote thereto in the following terms:-
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> > '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.'
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> "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:-
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> > '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.'"

In *Aer Rianta*, McGuinness J. identified the issue "whether the proposed defence is so far fetched or so self contradictory as not to be credible." Hardiman J asked: "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?"

The Court took the nature and context of the dispute into account. Hardiman J referred to the facts of the cases in the authorities cited and observed that in *First National Commercial Bank v. Anglin* [1996]1 I.R. 75, "the indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the defendant quite untenable."

The plaintiff must establish a clear case befire it can get judgment. But that is not enough. Even in the face of an apparently strong *prima facie* case, the defendant will be allowed to defend and the matter will be sent for plenary hearing if he is able to demonstrate a basis of defence in law or fact that achieves a minimum level of arguability and /or credibility.

The jurisdiction in summary judgment is not limited to a case in which no ground of defence is to be found in the papers. The procedure exists for a plaintiff to recover judgment if no *bona fide* basis of resisting the claim is shown, albeit that the threshold is high where the facts are put in issue.

Discussion
It is not in dispute that the defendants defaulted in payments on the fourth facility letter. Mr. Flanagan complains that the Bank did not actually specify the precise extent of the non-payment at the time when it sent letters of default to the defendants. It is clear, however, that the account was indeed in default and significantly so. The defendants were not making the agreed payments and such payments as they were making went nowhere near what was agreed. In the circumstances, therefore, the defendants could have been under no illusion as to their failure to meet their liabilities and a glance at their statements of account would have revealed the extent to their failures if they were not otherwise apprised of that simple fact. The Bank was entitled to call in the loans in full on default by the defendants. There is no doubt that the defendants are in default and that the Bank was entitled under the terms of the facility letter to call in the loans.

The first point of defence raised by Mr. Flanagan in his affidavits is breach of the terms and conditions of the facility letter, as he alleges. He says that each of the loans was conditional on the provision of security in the form, *inter alia*, of a deed of covenant in respect of an intoxicating liquor licence in the premises whose purchase was funded by the loans. He says that the Bank did not see to it that this security was in place and this he raises as a defence. He points out correctly that this term was a condition of each of the loans and it is described in the facility letters as a condition precedent.

Clearly, the Bank would have been entitled to withhold advancing the loans until that security was in place. In fact, it appears that it proved to be impossible to have the licence attached to the relevant premises and so that element of the security was not actually put in place. But the fact that the loan was nevertheless advanced was in ease of the borrowers and represented a waiver by the lender of its right to require that piece of security. It is quite illogical and frankly makes no sense to suggest that because the Bank agreed to waive this element it is thereby prevented from recovering its loan. That amounts to absurdity, in my view, and it is equally illogical to suggest that even if the Bank is not prevented from recovering or claiming the recovery of the money it lent, there is nevertheless some reduction of the Bank's entitlement.

Mr. Flanagan cited the case of *Bauer v. Bank of Montreal* [1980] 2 S.C.R. 102, a decision of the Supreme Court of Canada, in a case concerning the liability of a guarantor to a creditor where the creditor had failed to preserve the security for the loan that the creditor guaranteed. The case has no application to the facts of the present application. There is no question here of the Bank having damaged or diminished the security. What happened was that the Bank agreed implicitly to forgo this part of the security that it would otherwise have been entitled to insist upon. Neither is there any question of the defendants being in the position of a guarantor where the lender has actually imperilled or diminish the value of the security.

Mr. Doherty, counsel for the Bank cited *China and South Sea Bank Limited v. Tan Soon Gin (Alias George Tan)* [1990] 1 A.C. 536. The case is not directly in point but has some potential relevance by way of analogy. Again, this case concerned a surety and the Privy Council held that the creditor owed no duty to the surety to exercise its power of sale over the mortgaged securities and could decide in its own interest whether to sell and when to do so.

This point does not have any legal validity.

The second point that Mr. Flanagan makes also does not have merit. This is that the defendants continued to make representations to the Bank after they signed facility letter No. 4; therefore, there was no concluded contract in existence because negotiations were continuing. In fact, on the correspondence it is hard to see how this factual proposition can be justified. The defendants signed and returned the facility letter and made suggestions or proposals as to how they might make the payments to which they had just agreed. The Bank corresponded in return. There is nothing to stop parties entering into an agreement and then making and considering proposals which would have the effect of altering the agreement that they previously reached. They can renegotiate as much as they like. The only time it becomes relevant is if they reach a new agreement that is to replace or alter the previous contract. Mr. Flanagan does not suggest that that ever happened and there is nothing in the affidavits and exhibits to warrant such a conclusion or inference. Therefore, the mere fact that the defendants made suggestions to the Bank has no legal significance in undermining the Bank's entitlement to recover.

The third point is that there was no actual drawdown of funds as stated in the facility letter in question- number 4. But drawdown refers to the new basis of the loans and not a further advance by the Bank of more money to the defendants. The facility letter put in place a new arrangement between the parties which replaced the earlier provisions and this was done by agreement between them. In return for the agreement by the defendants to make the payments as now scheduled in the facility letter, the Bank agreed to give up its entitlement to enforce the agreements that were previously in place. The submission that there was no actual transfer of cash, either from the Bank to the defendants or internally from one place to another in the Bank, is a misunderstanding of what happened as a matter of contract between the parties when this last facility was agreed.

The fourth point that Mr. Flanagan makes is that the Bank misrepresented this loan facility as a performing loan when it reported to the regulatory authorities and that it sought to "window dress" the facility. I do not see how this proposition can be of any assistance to the borrowers. Even if what Mr. Flanagan says is for the purpose of argument accepted in its entirety, and it is only fair to point out that this matter is wholly disputed by the Bank, it is of no assistance to Mr. Flanagan and his colleague and does not furnish a defence. How could it? It is nothing to do with the defendants; they are not involved in the process; their liability is not increased or diminished; they are not in any way prejudiced or indeed affected. This point also is a misunderstanding.

The final point that Mr. Flanagan makes is that the Bank is limited in its recourse on foot of the loans to the trading profits from the hotel premises that were the purpose of the loan and to those profits only. This matter is mentioned for the first time in Mr. Flanagan's supplemental affidavit of the 26th January, 2012, para. 8, that is as follows:-

> "I say and believe that it was at all times understood and expressly agreed between the parties that the trading profits from the Tir Gan Ean House Hotel was the only available income to service the interest on the loan facility and ultimately repay the debt and I say that the plaintiff was never relying on any other income and/or assets of the defendants or any performance of these loans facilities."

There is no reference in correspondence or in the earlier affidavit or in any pre-trial exchanges between solicitors - at the time the defendants were represented by solicitors -to this suggested restriction on the Bank's capacity for recourse.

Counsel for the Bank points out that this matter was denied in a further affidavit filed on behalf of the Bank and that in his last affidavit Mr. Flanagan did not return to the topic and challenge the Bank's rebuttal.

It seems to me that this suggested factual issue was raised for the first time in the course of the proceedings - in fact in January of this year - without any explanation for its omission from previous exchanges. It is moreover wholly inconsistent with the course of conduct of the defendants previously and with the documents and transactions between the parties. There is nothing in the circumstances of the case, including the documents, the correspondence or the affidavits to demonstrate any basis for this suggested factual issue. It is clear to me therefore, that there is no genuine or credible issue of fact to be decided in order to determine this application.

I am also satisfied that there is no arguable legal proposition that would constitute a defence.

Conclusion
In the circumstances, therefore, applying the legal tests set out by the Supreme Court and which are summarised above, there must be judgment for the plaintiff in the amount claimed.