Neutral Citation [2013] IEHC 606

THE HIGH COURT

[2013 No. 1997 S]

[2013 No. 155 COM]

BETWEEN

NATIONAL ASSET LOAN MANAGEMENT LIMITED

PLAINTIFF

AND

TOM COYLE

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 19th day of December 2013

1. This is an application for summary judgment against the defendant in the sum of €51,818,991.51 and Stg. £10,567,723 which sums include interest up to 12th December, 2013. The sums are claimed on foot of a facility letter of 20th July, 2010 ("the facility letter") issued by Anglo Irish Bank Corporation Ltd. and accepted by the defendant on 5th August, 2010. The sums referred to in the facility letter were a renewal of two earlier facilities of 15th July, 2008, and 17th July, 2009. The facilities in question were offered to fund various UK and Irish commercial investment ventures engaged in by the defendant.

2. The plaintiff is a subsidiary of the National Asset Management Agency ("NAMA") and was established pursuant to the National Asset Management Agency Act 2009 (the "2009 Act") for the purpose of the acquisition, holding and management of loan assets from, amongst others, Anglo Irish Bank Corporation Ltd. ("Anglo"). By special resolution dated 14th October, 2011, Anglo became the Irish Bank Resolution Corporation Ltd. ("IBRC") pursuant to a change of name duly registered with the Companies Registration Office.

3. The facility was repayable on demand and, without prejudice to the demand nature of the facility, was to be repaid on or before 31st December, 2010. The facility was acquired by the plaintiff on 1st November, 2010, in accordance with Part 6 of the 2009 Act. After the facility was acquired, the plaintiff appointed IBRC to manage the facility on its behalf and NAMA subsequently appointed Capita Asset Services (Ireland) Ltd. to manage the facilities on its behalf on 12th August, 2013.

4. By letter dated 30th January, 2013, the plaintiff demanded payment of the sums due on foot of the facility granted plus additional interest accruing in accordance with the facility to the date of payment at the rate provided for in the facility. The defendant has not paid the sums due and owing on foot of the facility despite the said demand.

5. As this is an application for summary judgment, I will set out briefly the legal principles which apply. In *Danske Bank v. Durkan New Homes* [2010] IESC 22, Denham J. (as she then was) distilled the relevant law as follows:

> *"13. Order 37 r.7 of the Rules of the Superior Courts, 1986 provides:-*
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> *'Upon the hearing of any such motion by the Court, the Court may give judgement for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just'.*
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> *14. Several cases were opened before the Court which have addressed this jurisdiction. These included Bank of Ireland v. Educational Building Society [1999] 1 I.R. 220 where Murphy J. emphasised that it was appropriate to remit a matter for plenary hearing to determine an issue which is primarily one of law where a defendant identified issues of fact which required to be explored and clarified before the issues of law could be dealt with properly. He stated at p.231:-*
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> *'Even if the position was otherwise, once the learned High Court Judge was satisfied that the defendant had 'a real or bona fide defence', whether based on fact or on law, he was bound to afford them an opportunity of having the issue tried in the appropriate manner'.*
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> *15. In Aer Rianta c.p.t. v. Ryanair Limited [2001] 4 I.R. 607, Hardiman J. reviewed Irish cases and concluded at p. 623:-*
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> *'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?'*
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> *16. In McGrath v. O' Driscoll [2007] 1 ILRM 203, Clarke J. described the law as follows, at p. 210:-*
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> *'So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment'."*

6. In *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75, Murphy J. cited with approval at p. 76, the following summary of the test set out in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 21:

> *"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 that court that there was a fair or reasonable probability of the defendants having a real or bona fide defence."

7. The defendant raises four points in opposition to this application. The first is an estoppel point. He claims that the facility of 20th July, 2010, was agreed in circumstances where his existing facilities were non-performing but that Mr. Evin Cusack of Anglo informed him that his facility would not be called in as he was actively cooperating with that institution. He claims he was also informed that he would be given time if at some time in the future he could arrange to refinance the facility with other institutions.

8. There are a number of problems with the defendant's position on this point. In the first place, the representation he relies on was made after the granting of the facility so he cannot claim that it amounted to a representation on foot of which he entered into the agreement. It seems that he was raising a form of promissory estoppel. There was no evidence on affidavit from Mr. Cusack who, I was told, no longer works for Anglo or its successors. But in any event, for the purpose of this application, I have to take the plaintiff's assertions on affidavit as being true. Counsel for the plaintiff argues that the representation relied on was too vague and uncertain so as to amount to a legally binding representation. I accept that submission. There was no evidence as to what was to happen if the cooperation of the defendant with Anglo stopped or what was the time period that would apply to this agreement. The terms contended for by the defendant are inconsistent with the written agreement set out in the facility letter and a further agreement entered into between IBRC and the defendant on 20th October, 2011, which was signed and accepted by the defendant on 14th February, 2012.

9. The correspondence exhibited in the affidavits sworn on behalf of the plaintiff establishes that the defendant was deemed to be a non-cooperating borrower since June 2011. Significantly, as the defendant moved from a position of cooperating debtor to non-cooperating debtor and at a time that he was engaged in an extensive exchange of correspondence with the plaintiff or its predecessors, the defendant never raised the estoppel point. In any case, events were overtaken by a subsequent agreement signed by the defendant on 2nd February, 2012, in which he clearly acknowledged the right of the plaintiff to enforce any agreements or security that it held.

10. In an affidavit sworn on 17th October, 2013, the defendant accepted that the Bank was entitled to bring the proceedings against him when he was raising an issue of delay on the part of the plaintiff. He said at para 12 of that affidavit:

". . . the Plaintiff could have issued proceedings in 2009 and indeed at any time during 2010, 2011 and 2012, and elected not to do so. I say this because the facilities which I had with Anglo Irish Bank were in default and yet the plaintiff elected to deal with that default in a particular manner when it was clearly open to it to issue proceedings."

11. Taking the defendant's case at its strongest, he has not met the "arguable defence" threshold on the estoppel point.

12. The next point raised by the defendant is that Anglo acted without authority in consolidating various loan accounts into a smaller number of loan accounts. Mr. John McDonnell on behalf of the plaintiff explained how the defendant's accounts were streamlined and allocated new numbers and consolidated under a new computerised system introduced on 23rd January, 2009. All loan accounts held with Anglo were transferred to this new system, including the defendant's accounts. His evidence was that this change did not affect the performance of the defendant's loan in any way and that, in the case of the defendant, 21 accounts were streamlined into six new loan accounts with the same terms and conditions. While the defendant challenges the right of the plaintiff or its predecessors to do this, he does not challenge the plaintiff's assertion that the reorganisation of the accounts did not in any way alter the level of his indebtedness or impose any more onerous conditions on him.

13. I am satisfied on the evidence that the reorganisation of the defendant's accounts was a bookkeeping exercise which did not in any way alter the terms or conditions of the defendant's loans or the amount due on foot of them. If the plaintiff did reorganise or consolidate the defendant's accounts in the manner complained of, he has not suffered any prejudice. In any event it does not alter the defendant's liability to repay the sums due. In those circumstances, the defendant has not raised a *bona fide* defence to the plaintiff's claim by raising this point in argument.

14. The third issue concerns a claim by the defendant that there was a conflict of interest on the part of Anglo in respect of a facility advanced in 2009 for the acquisition by the defendant of certain sites known as "the Clarion Suites" in a development in Sligo. This facility was subsumed in the facility letter at issue in these proceedings. The defendant states that, notwithstanding the fact that his loans were not performing from 2008, Anglo advanced him a further €10m by way of a fresh loan in February 2009, and this related to 54 hotel suites in the grounds of the Clarion Hotel in Sligo. He said that in 2004 and 2005, he had been involved in developing and leasing the Clarion Hotel in Sligo which was then sold to a partnership to avail of capital allowances for a period of seven years, after which time he would have the option to buy the hotel back. The hotel suites were developed by the Fitzgerald Group which was based in Galway. The operator of the hotel was a company called Casserly Ltd., which had an option to lease the suites. By 2009, Casserly Ltd. was in difficulty repaying rent on the hotel and was not in a position to lease the suites.

15. The defendant claims that he was then asked by Mr. Pat McHugh of Anglo whether he would consider acquiring the 54 suites from the Fitzgerald Group at a discount. The defendant was advised by Mr. McHugh that the Group was a major client of Anglo. The defendant was informed that Anglo would finance the purchase and while the defendant claims that initially he was not enthusiastic about the proposal, he ultimately agreed to purchase the suites for a sum of €10m.

16. The essence of the defendant's defence on this point relates to an alleged conflict of interest on the part of Anglo and its breach of duty to the defendant as a customer. However, this advance was made in February 2009 and before the loan was consolidated into a further facility accepted by the defendant in July 2010. That agreement replaced the 2009 agreement. The documents relating to this agreement indicate quite clearly that the defendant was legally represented at the time since his solicitor gave an undertaking in relation to the transaction. Whether he sought legal advice on the transaction or not is not clear, but he was certainly free to obtain legal advice if he wished to do so.

17. The relationship between Anglo and the defendant was a straightforward relationship of a banker and a customer. What appears to have happened is that Anglo gave the defendant an opportunity to buy out the Fitzgerald interest in the Clarion Hotel Suites at a significant discount in circumstances where the defendant was an experienced businessman who had a solicitor from whom he could seek advice if he wished to do so. There is simply no evidence to show that the defendant was coerced into that agreement or that he entered into it in circumstances other than with his eyes wide open and of his own free will. Furthermore, as I have indicated earlier, this agreement was subsumed into a later agreement which was accepted by the defendant. In my view, the defendant has raised no arguable point on this issue.

18. This brings me to the defendant's final point, which is the question of the interest claimed on the loans. The defendant claims

that he was overcharged for interest and his claim is supported by an accountant, Mr. George Gannon, who set out the position in an affidavit sworn by him on 18th November, 2013. While Mr. Gannon's allegation of overcharging of interest is refuted by the plaintiff, he does raise an issue which appears to meet the test outlined in *Danske Bank v. Durkan New Homes* and *First National Commercial Bank plc. v. Anglin* referred to at paras. 5 and 6 supra. There is a conflict of fact on the affidavits that cannot be resolved in an application of this nature. Accordingly, I would allow the question of the appropriate interest to be charged to go to a plenary hearing if agreement cannot be reached on that point having regard to my decision in respect of the remaining issues.

19. So far as those other issues are concerned, it is worth noting that the defendant has not denied that he received the monies on foot of the facility letter or that those monies are repayable.

20. Finally, I wish to deal with one matter that was raised in the affidavits; namely, the discussions had between the defendant and GDP Partnership concerning what the defendant refers to as *". . . the purchase of my loans from the special liquidator . . ."* The defendant is not competent to sell these loans because he no longer owns them as they have passed to the plaintiff. Any decision about selling on the loans is a matter for the plaintiff and not the defendant.

21. For the reasons set out above, I have concluded that the plaintiff is entitled to summary judgment in respect of the principal sums lent on foot of the facility letter and I will remit for plenary hearing the issue as to the amount of interest which is payable.