Neutral Citation [2015] IEHC 763

THE HIGH COURT

Record No. 2015 1976S

BETWEEN:

ALLIED IRISH BANKS P.L.C.

Plaintiff

–and –

SEAMUS O'MAHONY, TOM KINGSTON AND JOHN GAFFNEY, JEREMIAH GALVIN, CHRIS KAY AND MARINA KAY, BARRY HARTE, PJ FLYNN, TIM SMYTH, SAM RUSSELL, CONNOR PHELAN, BRENDAN O'SHEA, MARK O'SHEA, DONAL KELLEHER AND RAY REIDY

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 2nd December, 2015.

Part 1: Background.

1. The defendants to these proceedings are shareholders in Blagnac Investments Limited, an Irish company. Blagnac Investments holds the entire share capital of Blagnac Investments Sàrl, a Luxembourg company. BlagnacSàrl owns the entire share capital of 2 Rue DieudonnesCostes SAS (the 'Borrower'), a French company. The Borrower owns the Radisson Blu Hotel in Toulouse, France.

2. By way of a facilities agreement dated 25th September, 2008 (the '2008 Facility'), AIB granted loan facilities to the Borrower, in effect re-financing certain loan facilities that the borrower had previously held with KBC Bank. Repayment by the Borrower was guaranteed and indemnified by the defendants to the within proceedings pursuant to a guarantee and indemnity of the same date. The liability of each of the defendants under the guarantee is several, with each of the defendants being liable for different, defined amounts of money.

3. The 2008 Facility was due to be repaid by 29th September, 2013. At that time, the parties, following negotiations, entered into an Amendment and Restatement Deed dated 7th July 2014. The Amendment and Restatement Deed 'does as it says on the can': thus the Recitals to this later agreement state, *inter alia*, that "*The parties hereto have agreed to enter into this Deed for the purpose of amending and restating the terms and conditions of the* [2008 Facility]", and that the purpose of the Amendment and Restatement Deed "*is to restructure the terms of the Facility. The Facility has been fully drawn. No amounts of the Facility shall be increased or shall be available for withdrawing*".

4. The Borrower has defaulted on its repayment obligations to AIB. By letter of demand dated 15th July, 2015, the sum of €27,021,326.91, with continuing interest, was demanded from the Borrower by AIB. The Borrower did not meet this demand and, two days later, AIB demanded repayment of the same sum from the guarantors. Despite this latter demand, the defendants initially failed to repay the sums sought of them severally. These proceedings therefore ensued. Since they commenced, AIB has arrived at a compromise with Messrs. Flynn, Kelleher and Reidy. Thus it is only against the remaining defendants that these proceedings continue, and it is to them that the court means to refer in this judgment when it refers hereafter to the 'Surviving Guarantors'.

Part 2: Certain Key Elements of the Loan Documentation and the Guarantee.

5. The key provision of the Guarantee is cl.2. This contains the guarantee wording and states as follows:

> *"In consideration of the Lender [AIB] making or continuing advances or giving credit or otherwise affording banking facilities or granting time for as long and to the extent that it may think fit to the Debtors pursuant to the Facility Agreement**[1]**, the Guarantors HEREBY GUARANTEE to the Lender the payment to the Lender on demand of all monies due, owing or incurred by the Debtors to the Lender pursuant to the Facility Agreement….*
>
> *PROVIDED ALWAYS that the liabilities of the Guarantors and the Lender's recourse under this Guarantee and Indemnity shall, in respect of the principal amounts which now or hereafter from time to time becoming due, owing or incurred to the Lender by the Debtors whether under the Finance Documents or otherwise on a several basis, be limited to €31,700,000 in aggregate. Each Guarantor's individual liability in respect of principal amounts and the Lender's recourse against such Guarantor shall be limited to an amount equal to the product of €31,700,000 and the percentage amount set opposite such Guarantors name in Schedule 1 hereto….*
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> *For the further avoidance of doubt in all cases the Lender will first proceed[2] against the relevant Group Obligors before proceeding against any Guarantor hereunder".*
>
> ***[1].*** The term "*Facility Agreement*" is defined in cl.1.2 of the Guarantee as meaning "*the facility agreement dated on or about the date hereof made between (1) Blagnac Investments Limited (as Parent) (2) SAS 2 Rue Dieudonne Coste (as Borrower) and (3) Allied Irish Banks, p.l.c. (as lender)".* However, cl.1.3.4 of the Guarantee provides that *"Any reference in this Guarantee and Indemnity to an agreement or document shall be a reference to that agreement or document as it may be amended, extended, varied, supplemented or replaced from time to time"*. This allowance for amendments, replacements, *etc.* is also echoed in the Facilities Agreement of 2008, which provides, in cl.1.2, that references therein to a "*Finance Document*", which latter term includes, per cl.1.1.38, the Facilities Agreement, extend to such Document "*as amended, novated, supplemented, extended or restated*".
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> ***[2].*** The meaning of the word "*proceed*" has been the subject of some focus during the within proceedings. The Surviving Guarantors contend, in effect, that it means that AIB must exhaust its rights against the Group Obligors (*i.e.* Blagnac Investments and any subsidiary of same) before it can turn its attentions to the guarantors. However, a simple Google search of the word "*proceed*" suffices to prove the fallacy of the Surviving Guarantors' logic in this regard. The verb "*to proceed*" is defined as meaning "*begin a course of action*", "*do something after something else*", "*carry on or continue*" and (a legal meaning given) "*start a lawsuit against someone*". Etymologically, the word "*proceed*" is a late Middle English word that derives from the Old French verb "*proceder*", which in turn derives from the Latin verb "*procedere*", which in turn is a compound of the Latin words "*pro-*" ('forward') and "*cedere*" ('to go'). There is no suggestion in any of this that the word "*proceed*" means 'pursue matters to the bitter end against one party before looking for recourse from another'. Even if there was some ambiguity in the word (and there is not), an application of the *contra proferentem* principle of contractual construction (whereby if a term in an agreement is ambiguous, it should be accorded the meaning that works against the interests of the party who provided the wording) would not require that the court ascribe the word "*proceed*" a meaning which not only flies in the face of hundreds of years of usage but which would doubtless also come as a surprise were one now to step outside the courts, stop a so-called 'ordinary' woman who is proceeding from her house to her work place, or wherever else, and advise her that she could not be considered to be proceeding to her destination until she had fully arrived. So, has AIB proceeded against the Borrower? Here, it is useful to have regard to an affidavit sworn by Ms Olga Kusak, a manager with AIB. She avers, *inter alia*, as follows:

> "*By a letter of demand dated 15 July 2015* [AIB] *sought repayment of the loans by the Borrower…On 16 July 2015 formal demands were also made on the Parent* [Blagnac Investment] *and on Blagnac Investments Sarl. On foot of those lawful demands* [AIB] *executed a Deed of Appointment on 17 July 2015 appointing Mr Tom O'Brien as a receiver and Manager of all the property and assets of the Parent….Furthermore upon his appointment, the Receiver exercised the voting rights attaching to the shares in Blagnac Investments SARL so as to change the management of that company, thereby giving him control over its affairs. At his behest, the new management of Blagnac Investments Sarl then exercised the votes attaching to the shares in the Borrower to change the management and to appoint instead nominees of the Receiver….*
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> [AIB] *and the Receiver then became embroiled in various forms of rescue proceedings and insolvency proceedings which were instituted before the French Commercial Court in Toulouse by some of the Defendants in these proceedings, purporting to act on behalf of the 'Group Obligors', which sought to restrict the ability of* [AIB] *to enforce its entitlements pursuant to the loan facilities. All of those proceedings were successfully resisted by* [AIB] *and the Receiver….*
>
> *I say and believe and am advised by the Receiver that he is now taking preparatory steps with a view to putting the hotel in Toulouse onto the market. However, he continues to be impeded in relation to his ability to actually market the property because of the fact that…Mr Kingston has instituted proceedings against* [AIB] *and against the Receiver before the High Court seeking to challenge the validity of the Receiver's appointment."*

6. Can it truly be said in light of all of the foregoing that AIB "*first proceed*[ed] *against the relevant Group Obligors before proceeding against any Guarantor*"? Notwithstanding that the letter of demand against the guarantors issued but two days after the letter of demand against the Borrower, when matters are looked at in the round, when one has regard to the evidence just quoted, the court's answer to this question is an unhesitating and unequivocal 'yes'. No evidence other than that now before the court, and no plenary hearing, is required to answer this question.

Part 3: Does the Guarantee Extend to the post-July 2014 Arrangements?

7. Notwithstanding that (i) the July 2014 Agreement, to which all the parties to these proceedings are party, is described as an 'Amendment and Restatement Deed', and (ii) the recitals thereto provide, *inter alia*, that the purpose of the Deed "*is to restructure the terms of the Facility*", the Surviving Guarantors claim that in fact what happened was a settlement of an old debt and the establishment of a new one. They may be right in this, they may be wrong. Regrettably, however, it does not advance matters for the Surviving Guarantors whether they are right or wrong. This is because cl.1.3.4 of the Guarantee provides that "*Any reference in this Guarantee and Indemnity to an agreement or document shall be a reference to that agreement or document as it may be amended, extended, varied, supplemented or replaced from time to time"*. So when it refers to the "*Facility Agreement*", the Guarantee refers to the Facilities Agreement of 2008 "*as it may be amended, extended, varied, supplemented or replaced*". AIB contends that what happened in 2014 is that the "*Facility Agreement*" was "*amended, extended, varied, supplemented*". The Surviving Guarantors contend that it was "*replaced*". But whichever of them is right, the Guarantee continues to apply to the "*Facility Agreement*". Unfortunately for the Surviving Guarantors, it is not the case that the replacement of the Facility Agreement in 2014, if such it was, extinguishes any liability presenting under the Guarantee.

Part 4: The Test for Summary Relief.

8. The hurdle to be surmounted by the Surviving Guarantors as regards obtaining leave to defend is a low one. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, at 623:

> *"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?"*

9. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, at 7, McKechnie J. summarised the relevant principles when a court approaches the issue of whether to grant summary judgment or leave to defend:

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(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…*
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> *(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…*
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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;*
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> *(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;*
>
> *(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?'…*
>
> *(viii) this test is not the same as and should not be 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;*
>
> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(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 is 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."

10. In *McGrath v. O'Driscoll* [2007] 1 ILRM 203, Clarke J. offered, at 210, the following useful gloss when it comes to circumstances in which questions of law or construction arise in the course of summary proceedings:

"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."

Part 5: Conclusion.

11. Having regard to the low threshold propounded by Hardiman J. in *Aer Rianta*, conscious of the "*discernible caution*" and the other factors to which McKechnie J. makes reference in *Harrisrange*, but mindful too of the just-quoted observations of Clarke J. in *McGrath*, and also of the conclusions reached by the court regarding the issues touched upon elsewhere above, the court – though painfully conscious, on a human level, of the financial toll that its conclusion may bring – is regretfully coerced, as a matter of law, into granting the summary judgment now soughtby AIB.