Neutral Citation Number: [2011] IEHC 426

THE HIGH COURT

2009 2280 S

BETWEEN

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

PLAINTIFF

AND

ROCKRIDGE DEVELOPMENTS LIMITED, MICHAEL KEAVENEY AND

BRIDGET DUNNE-KEAVENEY

DEFENDANTS

JUDGMENT of Mr. Justice Roderick Murphy dated the 17th day of November 2011

1. Pleadings
The summary summons issued on the 8th June, 2009. The plaintiff claimed the sum of €9,467,817.95, for money lent and advanced by the plaintiff to the first defendant and for money, including interest, now found to be due to the plaintiff on foot of the loan account and current account of the said first defendant with the plaintiff.

Two motions now before the court relate to monies were due by the second and third named defendants on foot of their guarantee in writing in relation to the debts due by the first defendant within the previous six years.

A previous motion on behalf of the plaintiff pursuant to notice of motion dated the 12th March, 2010, sought liberty to enter final judgment. By consent order of Laffoy J. dated the 27th July, 2010, the court ordered and adjudged that the plaintiff recover against Rockridge Developments Limited and Michael Keaveney the first and second named defendants, the said sum together with interest at current bank rates from the 22nd May, 2009, to the 26th July, 2010, together with the costs of the proceedings including any reserved costs when taxed and ascertained.

Execution on foot of the said judgment was stayed for a period of six months from the date of that order that is until the 26th January, 2011.

The notice of motion as against Bridget Dunne-Keaveney was to stand adjourned to the 12th January, 2011, by consent.

2. Loan Facility
By letter dated the 27th July, 2006, the plaintiff Bank had offered to place a bridging loan facility of €7.9 million at the disposal of Rockridge Developments Limited for the purpose of acquiring a 1.8 acre site at Glenamuck Road, Carrickmines, Co. Dublin, subject to the terms and conditions as set out in that letter. As security for the said facility, the plaintiff Bank required that clause 5(c) of the said letter: "Guarantee from Bridget Keaveney (also known as Bridget Dunne) supported by First Legal Mortgage over her investment property at 1 Hillcrest Heights, Lucan, Co. Dublin". A further facility was made available to Rockridge Development Limited under a facility letter dated the 20th July, 2007. Both facilities were accepted by Rockridge on the 1st August, 2006 and the 27th July, 2007.

3. Guarantee and Indemnity
The statement of claim delivered on the 3rd June, 2011, particularised the contract of guarantee and indemnity by the second and third named defendants as guarantors.

Notwithstanding the consent to judgment as against the second named defendant no monies had been received in reduction of the debt from the second named defendant despite demand. In mitigation of loss to the plaintiff Bank obtained an order for possession as against the second named defendant with regard to property which had been mortgaged in favour of the Bank. A receiver was appointed over the property on the 7th March, 2011. In mitigation of loss the Bank pleaded that it would eventually sell the property pursuant to its powers of sale under the Indenture of Mortgage dated the 18th August, 2006, as made between the second named defendant and the plaintiff which was duly registered on the 13th September, 2007, and would apply any proceeds in the manner set out in the pleadings. Any monies received would not represent a release of any kind relating to the liability of the second named defendant under the contract of guarantee and indemnity.

4. Claim against the Third Named Defendant
The pleadings then dealt with the position of the third named defendant. In breach of contract and despite demand, the third named defendant, it was pleaded, failed to pay the monies or any monies as demanded. The plaintiff claimed as against the third named defendant damages for breach of contract together with interest pursuant to the terms of the guarantee and/or Courts Acts interest together with costs.

5. Defence: Limited Security
The defence and counterclaim delivered on behalf of the third named defendant the 24th June, 2011, stated that she was married to the second named defendant. She admitted that she was recorded as a director of the first named defendant but had not taken and/or did not take any active role in the day to day management of the affairs of the first named defendant, but rather was a director thereof in a non executive capacity. This was to facilitate her husband and did not reflect any managerial role on her part. The plaintiff was well aware that her husband was involved in all aspects of the management, control and operation of the business of the company Rockridge Developments Limited.

By reason of the matters pleaded it was denied that she entered into a contract of guarantee or indemnity in favour of the plaintiff on or about the 18th August, 2006. It was admitted that the plaintiff Bank purported to make a demand of her under the guarantee by way of letter dated the 28th April, 2009, but she denied that the demand was a proper effective demand, and made no admission as to the continuing indebtedness of the other defendants and did not accept that the contents of the statement of claim in relation to

the guarantee and indemnity (para. 5 thereof) properly reflected the terms and conditions of the guarantee and she made no admission in respect of same.

At all material times it was represented to the third named defendant by the plaintiff and by the second named defendant and it was understood by her and by the plaintiff Bank that the security required of her in respect of a loan facility to Rockridge Developments was by way of mortgage of the investment property held in her sole name at 1 Hillcrest Heights, Lucan, Co. Dublin and that the guarantee sought by the plaintiff was required solely to support the said mortgage and not otherwise such that the liabilities due by her to the plaintiff Bank pursuant to the guarantees were confined solely to the said investment property.

On the basis of that understanding and the truth and accuracy of the representations made in that regard, she was induced to and did in fact sign the guarantee dated the 18th August, 2006. At no time prior to the signing of the said guarantee neither the plaintiff Bank nor the second named defendant give any indication to her that contrary to her understanding and the representations already made to her as to the limited nature of her exposure to the Bank, the guarantee purported to impose a liability upon her, jointly and severally with the second named defendant, in respect of the whole of the first named defendant's indebtedness to the plaintiff. Moreover, in signing the guarantee this defendant did not have the benefit of independent legal advice.

In any event she contended that the guarantee signed by her was signed in the belief and understanding that it embodied a form of agreement that limited her liability to the plaintiff Bank to the value of the investment property registered. The purported terms of the guarantee did not contain or embody the said agreement as concluded by her. She contended that the plaintiff Bank knew and/or ought to have known of the precise terms of the agreement so concluded.

She admitted refusing to pay the plaintiff Bank the monies or any monies demanded of her under the guarantee and pleaded that she had no obligation to pay the said or any sums to the plaintiff Bank. She was not in breach of contract. She consented to an order for possession with immediate effect in respect of an investment property as security agreed in the facility letter. There were no further obligations or liabilities due or owing by her to the plaintiff Bank.

6. Defence of Mistake: Counterclaim
Particulars of the guarantee of the 18th August, 2006, were drawn up and signed under a mutual mistake of fact which is particularised in her defence. As a result of the unilateral mistake of the third named defendant it would be grossly inequitable for the plaintiff Bank to press her for judgment in the terms sought.

The third named defendant contended that the provisions of the charged property to the plaintiff Bank fully and effectively discharged all and any of her obligations to the Bank. She submitted that it would be inequitable for the plaintiff Bank to be entitled to rely upon the terms of the guarantee to seek judgment as against her having regard to the dealings between the parties. The plaintiff was estopped from placing reliance upon the same, insofar as the third named defendant was concerned. Alternatively, she entered into the guarantee under a mutual, or in the alternative, a unilateral mistake, and by reason of the representations of the plaintiff Bank and had no independent legal advice.

The third named defendant counterclaimed for a declaration that the guarantee of the 18th August, was entered into by virtue of the mutual mistake of the parties; was limited in recourse to the mortgage held by the plaintiff Bank over the third named defendant's property at 1 Hillcrest Heights, Lucan, Co. Dublin and a declaration that the guarantee was unenforceable and of no legal effect insofar as she was concerned and did not reflect the common intention of the parties.

She claimed for damages for unlawful infliction of emotional distress.

7. Particulars Sought
By notice of particulars dated the 21st July, 2011, the plaintiff Bank sought particulars

> (1) Of her familiarity with the terms of the facility letter dated the 20th July, 2007. She replied that that was that was a matter for evidence.
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> No further particulars were sought in respect of (2) and (3).
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> (4) The third named defendant was asked to confirm who was present at the signing of the contract of guarantee and indemnity. The reply was that that did not arise from the pleadings.
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> (5) She was further asked to confirm that she remembered or witnessed the second named defendant signing the contract of guarantee of indemnity. It was replied that did not arise from the pleadings.
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> (6) The third named defendant was asked to confirm that Mr. Keith McConnell of Matheson Ormsby Prentice Solicitors had provided her with legal advice independent from the banks servants or agents. The reply was that did not arise from the proceedings.
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> (7) The third named defendant was asked to set out in detail and particularise all advices furnished by Mr. McConnell or any other solicitor at all material times regarding the contract of indemnity up to the end of August 2006. The reply was that that did not arise from the pleadings.
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> (8) The third named defendant was asked to confirm that the extent of the alleged mutual mistake of fact was that contained in para 15 of the defence. That paragraph of the defence referred to the facility letter of the 27th July 2006 which provided, *inter alia*: "first legal charge over into property in Lucan; value should be €5K; this property was purchased in the named Bridget Keaveney, so we will obtain her guarantee for €500K and charge the property and support". In contrast the same document described the position of the plaintiff viz a viz Michael Keaveaney the second named defendant, her husband, in the following terms, *inter alia*: "bank to a full recourse to MK by his guarantee".

The guarantee did not reflect the form of the agreement described in the plaintiff's own internal to credit application what was prepared in the mistaken understanding or belief that the plaintiff had sought and that the third named defendant had, jointly with her husband, the second named defendant, agreed to guarantee the entirety of the first named defendants indebtedness to the plaintiff when this was intended or in fact the case.

In reply the third named plaintiff referred to para 12 of the defence which reference to the guarantee being confined solely to the investment property at 1 Hillcrest Heights Lucan.

8. First Motion: Further and Better Particulars
The first motion sought an order compelling the third named defendant to further reply to the notice of particulars. The grounding affidavit of Niall O'Reilly, a manager of the plaintiff Bank, averred that, except for para. 2 and para. 8, the third named defendant had refused to reply to the particulars raised. He said and was advised that the particulars sought were necessary to clarify the issue so that the plaintiff could know the case that has to meet.

9. Second Motion: Discovery
The second notice of motion required the third named defendant to make discovery on notes of all documents relating to the matters of issue being:

> (i) Documentation relating to the retention of Matheson Ormsby Prentice Solicitors by the third named defendant and/or the second named defendant relating to the second and third defendants entering into a contract of guarantee and indemnity in favour of the plaintiff's bank with regard to the debts of the first named defendant to include all correspondence, advices, copy attendances as well as other documentation contained in the relevant file of Matheson Ormsby Prentice or otherwise.
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> (ii) Any and all documentation relating to the intention of the third named defendant with regard to her consent to provide a guarantee or special indemnity in favour of the plaintiff Bank in relation to the debts of the first named defendant.

The grounding affidavit of Niall O'Reilly in the discovery motion referred to the letter of loan offer of the 27th July 2006 and, of significant importance, the minutes of the board meeting and the copy resolution of the first named defendant. It was noted that the meeting was chaired by the third named defendant who as chairman, signed both the minutes of the meeting and the resolution with regard to entering into the loan agreement, the subject matter of the consent judgment.

The second letter of loan offer included minutes of the meeting and company resolution of the 20th July 2007, signed by the second named defendant acting as chairman.

Mr. O'Reilly averred that both the second and third named defendants entered into the contract of guarantee of indemnity dated the 18th August 2006.

He referred to the plaintiff's application to seek an order for liberty to enter final judgment on the 27th May 2011 where the Court directed that the matters between the plaintiff and the third named defendant be dealt with by way of plenary hearing. The Court gave direction for the exchange of pleadings. The statement of claim, defence and counterclaim were exchanged in June and July 2011. The reply to the defence to counterclaim was delivered on the 5th September 2011.

There was an exchange of letters seeking voluntary discovery. It was averred that the categories sought by both parties were relevant. The plaintiff did not hesitate in agreeing to the categories as sought and duly swore an affidavit of discovery. The request by the plaintiff to the third named defendant that she affected voluntary discovery was replied to in the letter of 5th September 2011. Where the third named defendant responded as follows:-

> (i) Our above named client objects to making any discovery in respect of any documentation relating to the retention of Matheson Ormsby Prentice solicitors or other solicitors/advisor by this second named defendant in circumstances were cases solely confined the assessment of the real issue and disputes in existence between the parties as between the plaintiff on the one part and the third named plaintiff on the other part. The third named defendant has always treated and maintained she is in an entirely different position to the first named defendant and/or the second named defendant and, in any event, proceedings up against these entities are already at an end in so far the plaintiff is concerned. Therefore, subject to this caveat and the issues of privilege which would arise in the ordinary course of events, our above named client will agree to make limited discovery in so far as the same relates to the third named defendant solely. Please further apart from any note that, apart form any documentation in possession of Matheson Ormsby and Prentice solicitors, the third named defendant has no other document in respect of this issue in circumstances were she was involved in any of the executive decisions and/or day to day running of the first named defendant. Therefore, the preparation of an affidavit of discovery can only commence when the documentation (if any) has been made available to our client, by Matheson Ormsby Prentice solicitors who are now seeking that documentation on behalf of our clients.
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> (ii) The above name client objects to making discovery of this brief documentation. The request for discovery was a category of documentation which seems to be in the nature of a fishing exercise. In any event, these matters are already within the knowledge of the plaintiff in that the plaintiff has, from his own documentation, distinguished the position of the third named defendant from the first and second named defendants in so far as the said documentation clearly indicates the limited recourse of the nature of the guarantee been given by the third named defendant as opposed to the nature of the guarantee given by the second named defendant.

It does not appear that the first category of documents require to be discovered, which, in a limited way, were agreed pending the receipt of those documents relating to the third named defendant only and were received from Matheson Ormsby Prentice.

The second category of discovery regarding the intention was denied as being a fishing exercise.

10. Rules of the Court
Order 19, r. 7 provides as follows:-

> "7(1) A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars may in all cases be ordered, upon such terms, as to costs or and otherwise as may be just.
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> (2) Before replying under this rule to the Court, a party must apply to the particulars by letter, a consultation letter and have particulars delivered pursuant thereto should be liable on taxation. In dealing with the costs of any application for particulars, the provisions of this paragraph should be taken in consideration by the Courts.
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> (3) Particulars should not be ordered under this rule to be delivered before defence will reply as the case may be unless the Court shall be of the opinion of the necessary desirable to enable the defendant to a plaintiff as a case may be to plead or for any other special reason to be so delivered."

11. Legal Position
In *McGee v. O'Reilly and The North Eastern Health Board* [1996] 2 I.R. 229 at 223, Kelly J. referred to and approved *Mahon v. Celbridge Spinning Company Limited* [1967] I.R. 1, where Fitzgerald J. stated:-

> "The whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties to confine the evidence of a trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party been taken to disadvantage by the introduction of matters not fairly to be ascertained from pleadings. In other words the party should know in advance in broadline, the case he will have to meet at the trial."

On that basis a Keane J. held that:-

> "In our system of civil litigation, the case is ultimately decided, having regard to the oral evidence adduced to the trial. The machinery of pleadings, and particulars, while of critical importance in ensuring that the parties know the case that has been advanced against them and matters extraneous to the issues thus defined will not be introduced at the trial, is not a substitute for the oral evidence of witnesses and their cross-examination before the trial judge".

Discovery Cannot be Oppressive
In Thomas Geaney and Others v. The Board of Management of Pobalscoil Chorca Dhuibhne and Others (Laffoy J. 27th April 2009) and (2009 IEHC 267) refused the application of the first and fourth named defendant in relation to some 390 queries which the plaintiffs regarded as oppressive.

Notwithstanding, where relevant, extensive discovery is permitted.

In *Framers Limited and Others v. CRH Plc and Others* [2004] 2 I.R. 20 the High Court ordered that the defendants make discovery of an extensive range of documents regarding communications between the defendants relating to the purchase and sale of pricing of concrete products related to the specific incidents or events that anti-competitive conduct expressly pleaded by the plaintiffs.

12. Decision Re: Particulars
Only replies to 1, 4, 5, 6, 7 and 9 are the subject of the application for further and better particulars.

The first whether the third named defendant was familiar with the details of the offer of the facilities, the subject matter of the resolution dated, to my mind, a matter for evidence and submissions on the knowledge of the third named defendant in signing the resolution of the matter of familiarity is not necessary and is, in any event, singularly a matter for evidence. The plaintiff is not entitled to further particulars.

The fourth particular requested was to confirm who is present at the signing of the contract of guarantee and indemnity was replied to as not arising from the pleadings. It seems that this does arise in the defence and counterclaim and is a proper request for particulars in relation to the witnessing of the contract of guarantee and indemnity.

The fifth matter to confirm that the third named defendant remembered and/or witnessed the second named defendant the signing of the contract of guarantee and indemnity is, however, more an interrogatory rather than a request for particulars. In any event it overlaps the fourth particular and is a matter for evidence at the trial. The plaintiff is not entitled to further particulars.

The sixth matter does rise from the pleadings in so far as it asks the third named defendant to confirm that Keith O'Connor of Matheson Ormsby Prentice solicitors was providing her with legal advice independent from the banks, its servants or agents. It arises out of the third named defendant's defence that she was not independently legal advised.

The seventh request is more problematic in so far as it asks for all advices furnished to the third named defendant by Mr. McConnell or any other solicitor with Matheson Ormsby Prentice up to the 18th August 2006, the date of signing of the contract of guarantee and indemnity. The claim for professional privilege however, cannot arise when there is no contemplation of litigation. Indeed it is a matter which arises from the sixth particular that the third named defendant was not independently advised. The plaintiff is entitled to an answer.

Paragraph 9 requests relates to para 15 of the defence which pleads alleged mutual mistake and fact. The request that the content of that paragraph is the extent of the alleged mutual mistake of fact is, in the courts view, a proper request for particulars in so far as it relates to the third named defendant's defence.

13. Decision Re: Discovery
In relation to the discovery motion there is an overlap with the request for an advice. The first of two paragraphs is for discovery of all documents relating to the matters in issue between the parties in relation to documentation, relating to the retention of Matheson Ormsby Prentice that the third and second named defendant relating to the contract of guarantee. The Court is of the view that this is not privileged and it is appropriate that discovery be made of that category.

The second category requesting all or any and the second request for particular discovery of all and any documentation relating to the intention of the third defendant with regard to her consent to provide a guarantee is distinct from documentation in relation to her and her husband's solicitors. It does seem to me appropriate that this be subject to an order for discovery. It would not be appropriate to refuse this order and to have an attempt made at the trial and to introduce documents relating to her intention.

14. Order
The Court will, accordingly, order discovery as per the notice of motion dated 21st November 2011 and will also make an order in relation to particulars 4, 6 and 7 as above.