Neutral Citation [2015] IEHC 770

THE HIGH COURT

[2013 No. 1575 S]

BETWEEN

DANSKE BANK A/S

PLAINTIFF

AND

NIALL TINNEY

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 4th December, 2015

1. The plaintiff's claim is for summary judgment in the sum of €3,474,972.77 against the defendant due under a Deed of Guarantee and Indemnity dated 12th September, 2011 pursuant to which the defendant inter alia guaranteed to discharge in full all liabilities of Tinney Investment Services (the borrower) due on foot of a facility letter dated 20th January, 2011. By letter dated 29th May, 2012 the plaintiff wrote to the defendant and called upon him to pay the sum of €3,353,225.15 pursuant to the terms of the guarantee having written to the borrower on the same date to the same effect. An appearance was entered on the 12th June, 2013.

2. The Recital in the Guarantee states that the loan agreement provides that the bank would not be obliged to advance any monies to the borrower pursuant to the facility letter unless at the time of doing so it was satisfied that a guarantee in satisfactory terms had been given by the defendant to the bank and was duly executed and enforceable against him.

3. Under the heading "Guarantee" it states:-

> "Unconditionally and irrevocably
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> 2.1.1 Guarantees to the bank the payment and discharge in full of the guaranteed obligations; and
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> 2.1.2 Agrees as a primary obligation to indemnify the bank from time to time on demand from and against;
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> > (1) Any loss incurred by the bank as a result of any of the obligations of the borrower expressly guaranteed hereunder being or becoming void, voidable, unenforceable or ineffective as against the borrower for any reason whatsoever, whether or not known to the bank, the amount of such loss being the amount which the bank would otherwise have been entitled to recover from the borrower;
> >
> > (2) Any loss or damage which may be incurred or suffered by the bank as a result of the breach of any covenant, undertaking or agreement on the part of the guarantor….
>
> 2.3 All sums payable hereunder will become due forthwith on demand for them being made on the guarantor."

4. Paragraph 13 of the Guarantee states:

> "13.1 The Guarantor acknowledges that it has not relied on any warranty or representation made by or on behalf of the bank to induce it to enter into this Guarantee and that it has made and will continue to make, without reliance on the bank, its own independent investigation of the financial condition and affairs of the borrower and assessment of the credit worthiness of the borrower, and the Guarantor further acknowledges that the bank has no duty or responsibility either now or in future to provide the Guarantor with any information relating to the financial condition or other affairs of the borrower.
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> 13.2 The insolvency of the borrower or any judgment obtained against the borrower in respect of the guaranteed obligations will not affect or determine the liability of the Guarantor under this Guarantee, and such liability will continue in full force and effect and interest will continue to accrue until the bank has been repaid all sums due under this Guarantee and interest thereon."

5. The defendant signed the Guarantee and Indemnity which was executed as a Deed on 12th September, 2011.

6. Mr. Tinney signed the loan facility agreement in favour of the borrower on behalf of the borrower company which was an unlimited liability company owned by him. At page 14 of the loan facility letter he acknowledged as guarantor of this facility that he had read and understood the facility letter and its terms of conditions and that he was guaranteeing the performance by the borrower of its obligations to the bank under the agreement. He also indicated that he had been given the opportunity to take independent legal advice on the effect of the agreement and had "taken/waived" the opportunity to take such legal advice. On the first page of the Guarantee Mr. Tinney was advised that before he signed it he should get independent legal advice.

Background

7. Mr. Tinney was a partner in Bloxham Stockbrokers from 2006 until May 2012. Bloxham was a limited partnership within the meaning of the Limited Partnerships Act 1907 and until 25th May, 2012 carried on a business of stock-broking and the provision of investments services.

8. In or about 2011 Bloxham underwent a restructuring process involving the addition of seven unlimited corporate partners to the

partnership. The purpose of this restructuring included:

> (a) The extraction of profits from Bloxham in a more tax efficient manner through the unlimited corporate partners,
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> (b) To increase the debt repayment capacity of Bloxham and
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> (c) To give the partners a greater scope for funding pensions whilst ensuing that sufficient capital was retained within Bloxham to satisfy the requirements of the Central Bank.

9. Bloxham retained Delaney Locke & Thorpe to advise them on this restructuring. A presentation was made to Mr. Tadhg Gunnell, his fellow partner, which recommended that each partner should form an incorporated unlimited company to be owned and controlled by that partner. Each company would then join the partnership. Seven individual partners pursued this course. Each partner made an offer to sell his investment in the partnership to the newly formed company.

10. According to the affidavit of Kieran Wallace of KPMG (later appointed as official liquidator and administrator of Bloxham) each partner sold his asset investment in Bloxham to a separate company. Danske Bank A/S then trading as National Irish Bank confirmed that it was willing to advance a loan facility to the defendant to enable the purchase of his interest by the borrower Tinney Investment Services, the company vehicle created for this purpose. The purpose of the loan facility of the 20th January, 2011 is expressed to be:

> "to fund the acquisition by the borrower from Niall Tinney … of part of Mr. Tinney's interest in the Bloxham Partnership (including its successors the Bloxham Partnership) and to discharge in full the indebtedness of Mr. Tinney under loan reference numbers 52091 and 52039."

11. A partnership agreement was signed on the 9th August, 2011 which facilitates this restructuring and sets out the provisions governing the restructured partnership to which Mr. Tinney and Tinney Investment Securities were parties. The unlimited corporate partners (and FPBD Securities Ltd.) would derive the benefit from all profits earned by Bloxham which they could then extract.

12. On the 23rd May, 2012 the partners became aware that the capital position of Bloxham had been overstated by a sum in excess of €5 million. It appeared that based on financial returns previously prepared and submitted to the Central Bank of Ireland, Bloxham was obliged by the Central Bank to hold regulatory capital of €5,600,000.00. The circumstances uncovered on 23rd May, 2012 suggested that Bloxham was in breach of its obligations. By order of the High Court on 31st May, 2012 (Cross J.) Mr. Wallace was appointed as provisional liquidator of Bloxham pursuant to a petition presented by Bloxham and by further order made 25th June (Laffoy J.) Mr. Wallace was appointed as official liquidator and administrator.

13. It is clear that the plaintiff acted as banker for the purpose of the financing of this restructuring. Mr. Tinney in a series of four affidavits advanced a number of different propositions as the basis for his proposed defence to these proceedings. For the most part, the proposed defence focuses upon what he alleges the bank knew or ought to have known about alleged fraudulent behaviour by his partner Mr. Tadhg Gunnell.

14. Mr. Tinney deposes that Mr. Gunnell prepared the accounts of Bloxham upon which his decision to participate in the proposed restructuring was based. He claims to have signed the guarantee based "on these knowingly misstated accounts". Though he specifically disavows any allegation of dishonesty or fraud on the part of the plaintiff, he claimed that the plaintiff knew or ought to have known that the guarantee was entered into by him as a result of fraudulent misrepresentation contained in the accounts.

15. Mr. Tinney relies upon an Irish Times report dated 17th October, 2015 in which it is stated that the Central Bank of Ireland was concluding an investigation into the actions of Deloitte who were the auditors of Bloxham Stockbrokers, because they allegedly failed to make known errors in the accounts prepared by Mr. Gunnell. Furthermore, it is alleged that the Chartered Accountants Regulatory Board (CARB) intends to launch an investigation once the Central Bank investigation is concluded. Mr. Tinney also states in his affidavit that when initially appointed as liquidator, Mr. Wallace and a Mr. Shaun Murphy were of the opinion that "while the initial fraud of Mr. Gunnell was well hidden in the accounts, subsequent acts of fraud by Mr. Gunnell were quite obvious, and they were surprised Deloitte had not identified them". Mr. Tinney states that if the fraud was obvious from the accounts of Bloxham at the time when the plaintiff provided the financing to Tinney Investment Services this would make it more likely that the plaintiff could or should have known of such fraud at the time the finance was provided or at the time when the guarantee was procured. He emphasises that he was not involved in the process of establishing the financial arrangements entered into, the negotiations for which were conducted entirely, he alleges, between the plaintiff and Mr. Gunnell and presented to him as a "fait accompli" for signature. He states that he remains unaware of the due diligence process, if any, undertaken by the plaintiff on Bloxham Stockbrokers.

16. In his fourth affidavit he alleges that the events surrounding the financing arrangement the subject matter of these proceedings "clearly suggest that Mr. Gunnell was in fact acting as the agent of the plaintiff". He refers to an affidavit of Peter Costigan in proceedings entitled "Danske Bank A/S v. Peter Costigan 2013/1574S", in support of this proposition which was not produced.

17. The defendant also asserts that it is his "understanding" that the plaintiff gave investment advice through Mr. Gunnell, in relation to the restructuring including the related financial arrangements. He claims that this gave rise to a statutory and common law duty by the plaintiff to him concerning the risk associated with the restructuring and in particular, the giving of a personal guarantee. He maintains that the bank failed to advise him to carry out proper due diligence before providing the guarantee. In that regard, Mr. Wallace's affidavit (exhibited by the defendant) states that Bloxham retained the firm of Delaney, Locke & Thorpe to advise on the restructuring of the partnership and the advantages to each partner of the restructuring in a presentation made to Tadhg Gunnell and a letter dated 5th July, 2010 to the Financial Regulator.

18. The plaintiff for its part, rejects the allegation that it induced the defendant to enter the guarantee. Mr. O'Reilly on behalf of the bank states that neither the bank nor anyone acting on its behalf is a party to the misstatement in Bloxham's accounts. It had no knowledge of any fraudulent misrepresentation now alleged by the defendant in respect of Bloxham's accounts by Mr. Gunnell. There may have been wrongdoing by Mr. Gunnell or negligence and breach of duty as alleged against Deloitte concerning its auditing of the Bloxham's accounts, but I am not satisfied that sufficient evidence has been produced to enable the defendant to argue that the bank knew or ought to have known of any fraud or misrepresentation perpetrated by Mr. Gunnell, or negligence and breach of duty on the part of Deloitte in auditing Bloxham's accounts.

19. Mr. Tinney was for five years prior to the 2011 restructuring a partner in Bloxham Stockbrokers and was presented with a restructuring project for his benefit by Mr. Gunnell with the advice of Delaney, Locke & Thorpe. There is no evidence to support the proposition that the bank was in anyway a promoter of this scheme or did anything more than provide the finance sought by the

partners for this restructuring. The condition for the provision of this finance under loan facility agreement to the newly formed company was the furnishing of a Guarantee and Indemnity by the defendant. There is nothing to suggest that the bank was aware of any untoward behaviour on the part of Mr. Gunnell or as alleged against Deloitte. Fraud is not alleged against the bank. There is no evidence to suggest that the bank was aware of any such alleged fraud or misrepresentation and failed to reveal any such knowledge to the plaintiff.

20. The affidavits submitted by Mr. Tinney lack detail in a number of important respects. He provides little or no information as to how and why the restructuring was proposed; the dates, the times and circumstances of any meetings held by the partners concerning the proposals; a precise statement of the alleged fraud in Bloxham's accounts; the extent of the commercial and financial knowledge or information furnished to him before and at the time of the restructuring of the partnership by his accountants, or the auditors; the advice if any, he sought or obtained from his own solicitors, tax advisors or accountants in relation to the restructuring; the extent of his knowledge and engagement in the affairs of Bloxham Stockbrokers over this period and the correspondence, if any, concerning the restructuring with any relevant party. Furthermore, the Court has not been informed as to how or by whom the loss of €5 million or the failure to obey the Central Bank regulatory capital minimum requirement was discovered in or about 23rd May, 2012.

The Law

21. I am satisfied that the principles to be applied in this case are summarised in the judgment of McKechnie J. in *Harrisrange Ltd. v. Michael Duncan* [2003] 4 I.R. 1 as follows :

> "(i) the power to grant summary judgment should be exercised with discernible caution,
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> (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, there being several ways in which this may best be done,
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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, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence,
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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,
>
> (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?", which latter phrase I would take as having as against the former an equivalence of both meaning and result,
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> (viii) this test is not the same as and should be not 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,
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> (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 in 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."

22. These principles, of course, derive from a number of Supreme Court decisions including *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 in which it was emphasised that the standard of proof for a defendant at this stage must as a matter of principle be regarded as low and that the onus of proving lack of "credibility" is on the plaintiff (see also *Allied Irish Banks Plc. v. Farrell* [2014] IEHC 395).

Points of Defence

23. The defendant claims that on the 29th May, 2012 immediately after the fraud became public knowledge, the plaintiff demanded payment under the guarantee and unilaterally created a loan account in the name of the defendant. This liability was referred to in a letter of the 14th August, 2012 from National Irish Bank to the defendant as arising under loan account number 95182320016357 drawn down on 31st May, 2012. This is claimed to be a new liability not covered by the guarantee. It is clear from the affidavits that a demand was made on foot of the guarantee. The Plaintiff claims that when the defendant failed to answer this demand the plaintiff collapsed the loan and transferred it into its internal debt collection system. Mr.O'Reilly states that this was "purely a step in the internal accounting system of the plaintiff and in no way alters the defendant's liability to the plaintiff". The liability under the guarantee was created in September 2011. Money was advanced under the loan facility covered by the guarantee and has not been re-paid. I am not satisfied that the defendant has raised any point of substance in relation to this matter either by way of suggested conflict of evidence or any potential point of law.

24. The defendant also submits that he was "induced" to enter the guarantee by the plaintiff in some unspecified way. Apart for the assertion that he was so induced there is no evidence of any misrepresentation made by the bank to him of any matter of fact as a result of which the bank, its servants or agents caused him to enter a guarantee. It is clear from the terms of the loan facility that it would only be granted to the borrower if the guarantee was in place from the defendant. There is no evidence other than an assertion that Mr. Gunnell acted as an agent of the plaintiff bank in procuring the guarantee. This suggestion appears to be based on an allegation to the same effect by a Mr. Peter Costigan, another of the partners, in separate proceedings brought against him by the Plaintiff which were not produced. There is no credible evidence that the bank retained Mr. Gunnell as its agent. It is clear that Mr. Tinney was a businessman who entered into a very detailed restructuring of his partnership in Bloxham and its sale to a company owned by him which sought and obtained finance from the plaintiff. His affidavits contain very little detail on this aspect of the

proposed defence which lacks the particularity and cogency required to pass the low threshold of an arguable defence.

25. He then seeks to ascribe knowledge or constructive knowledge of the fraud he alleges against Mr.Gunnell and the professional negligence alleged against Deloitte, to the bank without any evidence whatsoever. I regard the propositions advanced as amounting to little more than assertions or opinions. There is no detail or description of the fraud allegedly perpetrated by Mr. Gunnell. There are no details of the alleged professional negligence against Deloitte. There are no details of how or what precisely the bank was or could have been on notice in respect of these matters. Furthermore, it is clear from the express terms of clause 13 of the guarantee that the defendant acknowledged that he had not relied on any inducement made by the bank to enter into the guarantee, had done so without reliance on the bank or its own independent investigation of the financial condition and affairs of the borrower and the assessment of the credit worthiness of the borrower. The defendant further acknowledged that the bank had no duty or responsibility to provide the guarantor with any information relating to the financial condition or other affairs of the borrower. I am satisfied that this does not provide the defendant with an arguable or credible basis for a defence.

26. The defendant also contends that in proceedings bearing record number 2012/291/COS the validity of the loan to the company and to the appointment of the receiver by the plaintiff over the company has been challenged by the liquidator. In those proceedings Mr Wallace states that on 6th November 2012 the receivers wrote to him claiming that certain assets may be owned by the unlimited companies now in receivership including Tinney Investment Services(in receivership) and may not be assets that fall within the Bloxham Partnership, including the goodwill of the Bloxham Partnership. Issues arose between the liquidator and the Irish Stock Exchange concerning the Bloxham Partnership's entitlement to a portion of the disbursement of the ISE's accumulated reserves under a scheme of re-organisation under heads of agreement dated 19th September, 2011 and the proposed revocation of the Partnership's membership of the ISE., as set out in a letter of the 13th December, 2011. Membership was revoked on the 19th December. The motive for the revocation was stated by Mr.Wallace to be "questionable". The liquidator made an application pursuant to section 231 of the Companies Act 1963 seeking sanction to issue judicial review and plenary proceedings against ISE in respect of these matters. Liberty was granted to do so but the court directed the liquidator to examine the overall position of Danske Bank A/S and the receivers relating to the asset being pursued in the main proceedings. The proceedings against the ISE were determined in favour of ISE and that matter is now on appeal to the Court of Appeal. The receivers claimed that any benefit from the demutualisation of the ISE and the value of the goodwill of the Partnership or the sale of its private client business were captured by the bank's security. The liquidator then applied for an order directing that the following legal issues be determined between the liquidator and the receivers as set out in Mr. Wallace's affidavit sworn 25th March, 2015 at paragraph 55. The relevant issues are stated to be:

> (a) Whether the debenture entered into by (inter alios) Tinney Investment Services (in receivership) in favour of Danske Bank A/S did not have the effect of charging any of the assets of Bloxham (in liquidation) in favour of Danske Bank A/S;
>
> (b) Whether the appointment by Danske Bank A/S on 24th October, 2012 of receivers to (inter alios) Tinney Investment Services (in receivership) had any effect upon the liquidation of Bloxham;
>
> and
>
> (c) Whether the receiver of (inter alios) Tinney Investment Services (in receivership) does not enjoy priority in respect of all or any of the assets under the control of the official liquidator.

27. I am satisfied that the discrete issues raised in those proceedings are completely separate from the issue raised in these proceedings which arises directly from a loan given to the borrower and a guarantee entered into personally by the defendant. I am not satisfied that these matters give rise to a credible or arguable defence to a claim made on foot of the guarantee.

28. I have considered all of the points advanced on behalf of the defendant in this matter and all facts set out in the affidavits submitted. I am not satisfied that there is any realistic or identifiable issue of fact which is material to the success or failure of these proceedings apparent from the affidavits. The defendant does not have a fair or reasonable probability of having a real or *bona fide* defence. There is a complete lack of cogency in the evidence and materials advanced such that I cannot be satisfied that the low threshold required has been reached in this case. I have considered the commercial background to the case and the paucity of first hand or primary evidence advanced by the defendant concerning his assumption of liability under the guarantee including meetings and correspondence, or any or any adequate explanation for the absence thereof and which normally might be expected in a matter of such complexity and value. I am mindful of the caution that must be exercised before granting summary judgment but it seems to me that the reliance placed upon conjecture and assertions, reports in a journalist's copy and the hearsay claim of the partner whose affidavit is not produced, does not provide a sufficient basis to conclude that there is a credible or arguable defence available to the defendant on any of the points raised.

29. I am satisfied that the Plaintiff has established an entitlement to an order for summary judgment in the amount claimed.