Neutral Citation Number: [2011] IEHC 463

THE HIGH COURT

COMMERCIAL

2011 2892 S

BETWEEN

BANK OF SCOTLAND PLC.

PLAINTIFF

AND

JAMES MANSFIELD

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 21st day of December, 2011

The Claim

1. The plaintiff (the Bank) seeks summary judgment against the defendant in the sum of €206,396,577.74 and interest.

2. The claim is made on foot of guarantees given by the defendant to the Bank in respect of the liabilities of three companies of which the defendant was a director or shareholder.

3. The companies in question were HSS, Jeffel and Parke.

4. The defendant does not deny that the funds in question were advanced to those companies nor does he deny that the companies have defaulted in repaying the sums to the Bank.

5. No issue arises as to the validity of the guarantees executed by the defendant in favour of the Bank, nor on the demand made on the defendant to honour the guarantees. In each case, the guarantees were *"all sums due"* and the amount claimed in respect of each of them is as follows:-

> under the HSS guarantee the sum of €151,564,739.24;
>
> under the Jeffel guarantee the sum of €41,222,647.70; and
>
> under the Parke guarantee the sum of €13,609,191.30.

6. As no issue was raised by the defendant touching upon the liability of the three companies in question and their failure to discharge it or on the validity of the guarantees or the lawfulness of the demands made on foot of them, *prima facie* he is obliged to discharge the amounts due to the Bank.

7. On this application for summary judgment, however, he contends that he has a defence to this claim and I must now examine that proposition.

The Test

8. The test to be applied by this Court on an application for summary judgment is well established. It has been stated and restated by the Supreme Court and this Court on many occasions in particular in recent times where applications for summary judgment, very often in respect of large amounts, are a commonplace.

9. The most recent statement from the Supreme Court on the topic is to be found in the judgment of Denham J. (as she then was) in *Danske Bank A/S trading as National Irish Bank v. Durkan New Homes & Ors* [2010] IESC 22.

10. Having recited the provisions of O. 37, r. 7 of the Rules of the Superior Courts that judge when on as follows:-

> *"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 issued tried in the appropriate manner.'*
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> *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?'"*

11. At para. 22 of her judgment Denham J. stated as follows:-

"As stated in Banque de Paris v. de Naray [1984] Lloyd's Rep. 21, by Acker L.J. at p.23:-

> *'It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants having a real or bona fide defence.'"*

12. In *Bank of Ireland v. Walsh* [2009] IEHC 220, Finlay Geoghegan J. set out the principles applicable to the determination of an application such as this by reference to a decision of McKechnie J. in *Harrisgrange Limited v. Duncan* [2003] 4 I.R. 1. It is not necessary for me to repeat yet again the twelve considerations which he set out in that judgment but I do call attention to one of them where he said:-

> *"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."*

13. Finlay Geoghegan J. said in relation to this:-

> *"As appears from sub-paragraph (vii) above, the threshold is one of an arguable defence and is, in relative terms, a low threshold. However, in making that determination, the Court should have regard to whether what the defendant is saying is mere assertion and whether the proposed defence is credible in the sense explained by Hardiman J. in Aer Rianta c.p.t. v. Ryanair Ltd. [2001] 4 I.R. 607."*

14. In view of the nature of the defence which is sought to be relied upon here, I ought to address the principles applicable where a defence by way of set off or counterclaim is sought to be advanced. This whole question was considered by Clarke J. in *Moohan & Ors v. S&R Motors (Donegal) Limited* [2008] 3 I.R. 650. He summarised the principles applicable as follows:-

> *"4.1 The test to be applied in deciding whether a party should be given leave to defend a summary judgment application was most recently addressed by the Supreme Court in Aer Rianta Cpt v. Ryanair Limited, [2001] 4 I.R.607. In that case the court indicated that the test is as to whether, looking at the whole situation, the defendant has satisfied the court that there is a fair and reasonable probability that he has a real and bona fide defence. As pointed out by Hardiman J., the test does not mean that the party must establish that he has a defence which will probably succeed; rather he must establish that it is probable that he has a bona fide defence.*
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> *4.2 Where the nature of the defence put forward amounts to a form of cross claim slightly different considerations may apply. In those circumstances the court has a wider discretion. Where the defendant does not establish a bona fide defence to the claim as such, but maintains that he has a cross claim against the plaintiff, then the first question which needs to be determined is as to whether that cross claim would give rise to a defence in equity to the proceedings. It is clear from Prendergast v. Biddle (Unreported, Supreme Court, 21st July, 1957) that the test as to whether a cross claim gives rise to a defence in equity, depends on whether the cross claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross claim may be made out.*
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> *4.3 On the other hand if the cross claim arises from some independent set of circumstances then the claim (unless it can be defended on separate grounds) will have to be allowed, but the defendant may be able to establish a counter claim in due course, which may in whole or in part, be set against the claim. What the position is to be in the intervening period creates a difficulty as explained by Kingsmill Moore J., in Prendergast v. Biddle in the following terms at p. 24:-*
>
> > *'On the one hand it may be asked, why a plaintiff with a proved and perhaps uncontested claim should wait for a judgment or execution of judgment on this claim because the defendant asserts a plausible but unproved and contested counter claim. On the other hand it may equally be asked why a defendant should be required to pay the plaintiffs demand when he asserts and may be able to prove that the plaintiff owes him a larger amount'.*
>
> *4.4 The courts' discretion is to be exercised on the basis of the principles set out by Kingsmill Moore J. later in the course of the same judgment in the following terms:-*
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> > *'It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counter claim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant could show that the plaintiff was in embarrassed circumstances it might be considered a reason why the plaintiff should not be allowed to get judgment, or execute judgment on his claim, until after the counter claim had been heard, for the plaintiff having received payment may use the monies to pay his debts or otherwise dissipate it so the judgment on a counter claim would be fruitless. I mentioned earlier some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of this discretion'.*
>
> *4.5 It seems to me that it also follows that a court in determining whether a set off in equity may be available, so as to provide a defence to the claim itself, also has to have regard to the fact that the set off is equitable in nature and, it follows, a defendant seeking to assert such a set off must himself do equity*
>
> *4.6 On that basis the overall approach to a case such as this (involving, as it does, a cross claim) seems to me to be the following:-*
>
> > *(a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiff's claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendants case, it would not be inequitable to allow the asserted set*

off;

(b) If, and to the extent that, a prima facie case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);

(c) If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in Prendergast v. Biddle."

The Defence

15. The principal affidavit which is relied upon by the defendant is sworn by Richard Mahon, who is the former financial controller, "*of the group of companies referred to as the Mansfield Group and for the Mansfield family*".

16. At para. 3 of his affidavit sworn on 21st October, 2011, he set out the defence as follows:

> *"In simple terms, the plaintiff agreed, in early 2008, to advance substantial funding to the Mansfield Group for the completion of a very substantial new Convention Centre at Citywest, which had full planning permission from the local authority. In anticipation of that funding, the Mansfield Group committed its own funds towards the construction of the new Convention Centre. Some €10m was spent on the Convention Centre from a combination of Mansfield Group cashflows, monies personally borrowed by the Mansfield family and from the sale of Group assets. Subsequently, the plaintiff reneged on that agreement, causing considerable delays in the construction, and significant difficulties with both cashflow and working capital for the Mansfield Group. Had the plaintiff complied with its commitment and agreement to provide these funds, the Mansfield Group would not have collapsed in the manner in which it did, and the plaintiff would not now be maintaining these proceedings against the defendant."*

17. Paragraph 8 of the same affidavit fleshes the matter out in the following way:

> *"I say that in early August 2008, the defendant and his son, Jimmy Mansfield, travelled to the offices of Bank of Scotland (Ireland) Ltd., at Stephen's Green, where we (sic) met Mark Duffy and the Bank of Scotland (Ireland) Ltd. management team. At that meeting, the defendant sought funding for the construction of the Convention Centre and the plaintiff's Mark Duffy unequivocally agreed to provide such funding and assured the defendant this would be given. The agreement reached with Bank of Scotland (Ireland) Ltd. was that finance of €17-€20m would be made available to the hotel for the construction of the new Convention Centre. On foot of this agreement, the defendant was advised to go ahead and start construction as finance was forthcoming."*

18. At para. 4 of his affidavit sworn on 9th November, 2011, the defendant says, in respect of this topic, as follows:

> *"I say and believe that I, along with my son, Jimmy, attended at the offices of Bank of Scotland (Ireland) Ltd. in early August 2008. The purpose of this attendance was to meet with the then senior management team of the plaintiff that was dealing with the Mansfield Group, namely, Mr. Niall King, Ms. Niamh Cuneen and Mr. Simon English, to discuss the proposed Convention Centre and the financing thereof. On presenting ourselves at the plaintiff's offices, we met by chance the then CEO of the plaintiff, namely, Mr. Mark Duffy, in the covered car park of the plaintiff. He enquired as to the purpose of our attendance and enquired as to how things were going for the Mansfield Group. I outlined, in broad terms, the matter to hand. We proceeded to meet the management team, as arranged, and Mr. Duffy attended the meeting from its beginning. We discussed in detail our plans and financing requirement. At this stage, we advised that we would require €17-€20m to fund the new Convention Centre build. Mr. Duffy stated that this would not be a problem and that the required financing would be made available. He addressed the management team and requested that they speedily conclude matters to enable the financing to be released. In this regard, he advised that he would give a personal letter to expedite matters. As the meeting was breaking up, Mr. Duffy commented that we could go ahead and start the build as financing would be put in place."*

19. An affidavit was also sworn by James Mansfield Jnr. In his affidavit, he says, on this topic:

> *"I confirm that in early August 2008, the defendant and I travelled to the offices of Bank of Scotland (Ireland) Ltd., at St. Stephen's Green, where we met Mark Duffy and the Bank of Scotland (Ireland) Ltd. management team. I confirm that we sought funding for the construction of the Convention Centre and the plaintiff's Mark Duffy unequivocally agreed to provide such funding and assured us that this would be given. The agreement reached with Bank of Scotland (Ireland) Ltd. was that finance of €17-€20m would be made available to the hotel for the construction of the new Convention Centre. On foot of this agreement, we were advised to go ahead and start construction as finance was forthcoming."*

20. These are the facts which are relied upon to assert the existence of a contractual obligation on the part of the Bank to advance monies of between €17-€20m to some element of what is described as the Mansfield Group. There is no legal entity known as the Mansfield Group. The argument goes that this contractual obligation was breached by the Bank, thereby giving rise to a counterclaim by the Mansfield Group or some element of it, which would excuse in whole or in part the defendant's obligations as guarantor.

21. The Bank contends that even if one takes the defendant's affidavits at their height and ignores all of the Bank's evidence, the facts relied upon by the defendant could not give rise to a contractual obligation on the part of the Bank.

22. If the Bank is wrong in that assertion, the terms of such an alleged contract are, it is said, undermined by such documents as were generated (some of them by the defendant), so as to make this line of defence unstateable.

Is there evidence of a Contract?

23. A contract for a loan of money is defined in Chitty (29th Ed.), Vol. 2, paras. 38-223, as being, "a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at a fixed, determinable future time, or conditionally upon an event which is bound to happen, with or without interest".

24. It is a basic principle of contract law that an agreement which is so vague or uncertain may not give rise to binding obligations (Chitty, 29th Ed. Vol. 1, paras. 2-136.

25. As is clear from the authorities which I have already cited, mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend. I am obliged to look at the whole situation and decide whether the defendant has satisfied me that there is a fair or reasonable probability of him having a real or bona fide defence.

26. Taking the defendant's averments concerning this alleged contract as they stand, a number of questions fall to be answered.

27. First, what is the amount of money that the Bank was allegedly obliged to provide on foot of this loan contract? It is, apparently, between €17m and €20 million. The difference of €3m between the lower and upper limits of this alleged contractually binding obligation is a very substantial sum.

28. Second, it is to be noted that there are no terms in the alleged contract which address the circumstances in which the loan is to become repayable.

29. Third, the period or term of the loan is not addressed.

30. Fourth, the interest to be payable on the loan is not mentioned.

31. Fifth, the provision of security for a loan of such magnitude is not addressed.

32. Sixth, the entity to whom the loan is to be made is not identified.

33. These shortcomings are so many and so serious as to render the so called contract or agreement devoid of legal effect. The alleged contract is on its own terms incapable of amounting to a binding legal agreement. Thus, the whole foundation upon which the defendant's counterclaim is based is fundamentally flawed.

34. On this basis alone, I have come to the conclusion that the defendant has failed to demonstrate an arguable case or triable issue sufficient to warrant the plaintiff's application being refused.

The Contracting Party

35. Lest I am wrong in the conclusion which I have arrived at concerning the non-existence of the alleged contract, I proceed to consider some other aspects of the case.

36. The absence of an identified party with whom the Bank allegedly contracted was fairly acknowledged by counsel for the defendant as a difficulty which he faced in trying to assert the existence of a binding contract. When asked to identify the entity to whom the Bank allegedly owed this contractual obligation, he opted for HSS. He did so by reference to what he described as the Bank's own internal documentation.

37. If, therefore, there was a contractual obligation owed to HSS, it means that there was none owed to the other two entities namely Jeffel and Parke who were guaranteed by the defendant. It follows, therefore, that any counterclaim which might exist is at the suit of HSS. Thus there is no reason why the Bank should not have judgment in respect of those liabilities of Jeffel and Parke guaranteed by the defendant.

38. In order to identify HSS as the party to whom the contractual obligation was owed, counsel referred to the Bank's internal documents. There is no evidence in those documents that I can see evidencing support for the contract contended for by the defendant. On the contrary, there is evidence emanating from HSS itself which is totally inconsistent with the alleged contractual obligation of the plaintiff to it.

39. On 7th May, 2009, HSS wrote to Ms. Avril Deasy of the Bank. In the course of the letter the following was said:-

> *"I acknowledge the statement in your letter of 29th April last that interest payments and fees totalling €6,342,732.73 are currently overdue in respect of loan facilities to HSS, Jeffel and Parke Associates. I was nonetheless of the opinion that we had previously agreed that in December 2008 the Bank approved interest capitalisation facilities of €10,475,000 in order to meet 75% of the interest projected to fall due on the referenced accounts to 01 December 2009 and that some items of security in relation to same remained unsatisfied at the time of our meeting on Tuesday last.*
>
> *You will recall that I undertook to have Seán deal immediately with this matter. I am pleased to inform you that a meeting between our solicitors and the solicitors for Irish Nationwide has been confirmed for Monday 11th May next at 11am. I understand that the purposes of the meeting is to conclude the relevant documentation thereby ensuring your securities are in place as agreed.*
>
> *In respect of our request for you to consider further funding of €5m towards completion of the new Conference Centre at City West for which you require a full valuation of the secured assets (at City West, Finnstown and Palmerstown demesne) to be carried out. I hereby inform you of my agreement to same and I wish to confirm that Seán Whelan and Richard Mahon spent a considerable amount of the time on site yesterday with the CBRE valuers Olivia Farrell and Annemarie O'Byrne to facilitate this evaluation. CBRE confirmed to me before departing City West that their work will be completed in the next ten days or so. (My emphasis)*
>
> *In your letter of 29th April and our previous meeting you requested a comprehensive trading and operational review of the hotel operations at City West and Finnstown. Seán Whelan has furnished a detail pack re this matter to you and I am confident that when you have had the opportunity of studying same you will agree with me that the need for me to spend in the region of €37,500 plus VAT for BDO Simpson Xavier to complete this task for the Bank is not necessary at this point. Should you wish to pass on our documentation to BDO for their study is of course your prerogative and acceptable to me on the clear assumption of strict confidentiality and on the assumption that no cost will ensue to my companies for any such study.*
>
> *I very much welcomed to the opportunity of meeting with you and your colleagues yesterday. I would also welcome the*

opportunity of hosting a visit of your Chief Executive Mr. Joe Higgins to City West and our other facilities in the near future. Perhaps you might revert to me with a suggested date for his visit.

In conclusion I outline a summary of my proposals and request to the Bank at this time.

(1) I would appreciate if it can again look at reducing the current interest rates charged to our accounts.

(2) I would request that we defer interest payments until 1st January, 2010 as previously agreed.

(3) I would propose paying 50% of interest due on a monthly basis from January 2010 to June 2010 inclusive by means of monthly payments.

(4) I would propose making full monthly interest payments from 1st July, 2010 onwards.

(5) I would also propose that all proceeds from any asset disposals within the group would be lodged with Bank of Scotland against the principles (sic) outstanding on loan accounts at the Bank in moving forward.

(6) I would also request that the Bank confirm the sanction of €5m to complete the conference centre at City West.

I look forward to your favourable response.

Yours sincerely

Jim Mansfield."

40. That letter is completely at variance with the contract which is alleged to exist for the advancing of €17 - €20m. Far from having a firm contract with the Bank for €17 - €20m to be advanced, it demonstrates that in May 2009, Mr. Mansfield on behalf of HSS, was requesting sanction of a €5m loan to complete the Conference Centre at City West.

41. This letter is consistent with what appears in both internal bank documents and correspondence from the Bank to HSS and/or Mr. Mansfield all of which is demonstrative of nothing more than a request for €5m to be advanced. It was a request which was never acceded to by the Bank.

42. The defendant's own correspondence is completely at odds with the contract now sought to be advanced. Counsel for the defendant fairly accepted that throughout all of the correspondence exchanged prior to the action, the defendant never alleged the existence of the contract he now asserts. Indeed, this line of defence was advanced for the first time on the application to transfer this litigation to the Commercial List when counsel outlined it.

43. It is easy to understand why the line of defence now relied upon was not advanced prior to then because the correspondence emanating from HSS is completely inconsistent with the case which is now sought to be made.

44. I am, therefore, satisfied that the affidavits of the defendants contain nothing more than a mere assertion of the existence of a counterclaim by way of defence. On examination that assertion is found to be without substance.

45. Given my findings to date in this judgment it is not necessary to consider a number of other legal arguments made by the Bank to demonstrate the non-existence of any arguable defence on the part of the defendant.

Counterclaim

46. If I am wrong in all that I have dealt with to date and there is some form of enforceable agreement, it is clear that it justiciable only as between HSS and the Bank. Such a claim cannot give rise to a defence on the part of the defendant to the Bank's claim whether by way of equitable set off or otherwise.

47. In Donnelly on *The Law of Banks and Credit Institutions* (2000) the following is to be found under the heading *"Right to Raise the Principal's Defences"*:-

"A guarantor to whom a demand for payment has been made is entitled to raise any defences which would have been available to the principal debtor at the time the demand was made. These defences include the rights of counterclaim and set off acquired by the principal debtor against the creditor. However, this right does not extend to allow the guarantor to claim unliquidated damages, either by way of set off or a counterclaim, which arise from an action for breach of contract or any other unliquidated claim between the creditor and the principal debtor. This means that the guarantor may not rely on any action which the principal debtor has not yet taken against the creditor. The policy behind this restriction is that permitting a guarantor to rely on the principal debtor's defences in this situation would limit the ways in which the principal debtor could take his or her own action against the creditor. However, this limitation can be overcome by the guarantor joining the principal debtor to an action brought by the creditor against the guarantor and in this way forcing the principal debtor to rely on his or her defences."

48. It is thus clear that the defendant cannot seek to rely on a cross claim which any of the principal debtor companies may have against the Bank arising out of a transaction or transactions entirely separate and distinct from the ones in suit. The thrust of the defendant's case is that HSS has an unliquidated claim for damages against the plaintiff. Such a claim cannot be invoked by the defendant in these proceedings.

49. As it is clear that such counterclaim as may exist will be at the suit of HSS and arises from an entirely different transaction to the one in suit, the dictum of Clarke J. in *Moohan's* case applies where he said:-

"If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in Prendergast v. Biddle."

50. Applying those principles, the counterclaim which is mooted in these proceedings (such as it is) is not one which would persuade me that any stay should be placed upon the plaintiff's entitlement to execute and register the judgment to which it is entitled.

51. In this regard I bear in mind, amongst other things, the fact that the terms of the guarantees in suit constituted the defendant not merely a guarantor but a principal obligor in respect of the debt and the implausibility of the defence case made by him.

Disposal
52. It follows that the plaintiff is entitled to judgment for the full amount claimed with no restriction being placed upon the execution of that judgment by virtue of the alleged defence by way of counterclaim.