THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 93

Record Number: 51/2017

Peart J.
Whelan J.
Gilligan J.

BETWEEN:

AIB

PLAINTIFF/RESPONDENT

- AND -

LAURENCE O'TOOLE, DONAL O'TOOLE AND JAMES O'TOOLE

DEFENDANTS/APPELLANTS

Record Number: 52/2017

BETWEEN:

AIB MORTGAGE BANK

PLAINTIFF/RESPONDENT

- AND -

LAURENCE O'TOOLE, DONAL O'TOOLE AND JAMES O'TOOLE

DEFENDANTS/APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 22ND DAY OF MARCH 2018

1. There are two appeals before the Court for determination. In each case an order of the High Court (Noonan J.) each being dated the 20th January 2017 was made whereby summary judgment was granted against the defendants on foot of a summary summons. In Appeal No. 51/2017 the amount of that judgment is €12,043,075. In Appeal No. 52/2017, the amount of the judgment is €776,159.64. The summary summons in each case sought judgment in respect of sums alleged to have been borrowed by the defendants on foot of certain loan offers which were duly accepted by the defendants, and were not repaid following the issuing of letters of demand by the bank.

2. Following service of these summary summonses on the defendants, and the entry of an appearance, the bank sought summary judgment on foot of notices of motion each dated the 18th September 2015 which eventually came before Mr Justice Noonan for hearing on the 20th January 2017.

3. The defendants sought to have each case adjourned to a full plenary hearing on the basis that in their replying affidavits they had raised *bona fide* and arguable defences to the bank's claims such that a plenary hearing was required to fairly determine the issues. The bank resisted that application and sought judgment in each case on the basis that the defendants had not raised any arguable defence for determination. The trial judge was satisfied that no arguable defence had been raised to the bank's claims and granted summary judgment in the amounts shown above. The defendants now appeal to this Court.

4. The issues sought to be raised by the defendants by way of defence to the bank's claims are the same in each of the proceedings. The appeals can therefore be conveniently dealt with together.

5. At the heart of these appeals is the defendants' contention, which was rejected in the High Court as an arguable defence, that the loans in respect of which the bank seeks to recover judgment were at all times intended by the bank, and understood by the defendants to be, limited recourse loans, meaning that any recourse by the bank in the event of a default would be limited to the security given to the bank as a condition of the loans. In circumstances where the bank has already taken possession of those secured properties, the defendants contend that the bank has no further recourse against them.

6. In the High Court, the defendants had sought to make that argument on the basis firstly of a misrepresentation by the bank. Counsel for the defendants has helpfully indicated at the outset of these appeals that misrepresentation as such is not being pressed in oral argument upon on this appeal, and neither is argument also advanced and rejected in the High Court based on an alleged infringement of rights under the Data Protection Acts.

The non-recourse argument

7. It is accepted that the loan offer letters underlying the loans which the bank seeks to recover make no reference to them being given on a limited recourse basis. But the defendants have sought to argue that the terms of these letters do not represent the entire of their agreement with the bank, and seek to rely on discussions and assurances which they say were given to them by the bank at certain meetings that any recourse would be limited to the security given. The bank deny that any such assurances were given, and say that the defendants are confusing these particular loans, which were loans to the defendants personally, with earlier loans to their company, Burgrove Limited where the loan offer letter specifically stated that there was to be limited recourse. The bank submits that the defendants' assertions are no more than bald assertions, uncorroborated or unsupported in any way by the clear documentary evidence in this case, and in fact are in conflict with and inconsistent with the documentary evidence available.

The collateral contract/parol evidence ground of defence

8. In his *ex tempore* judgment delivered on the 20th January 2917, having addressed other arguments raised by the defendants, the trial judge addressed what he described as "the main point in the case" as follows:

> "12. The main point in the case, it seems to me, is that all of these loans according to the defendant's case were non-recourse loans. In other words recourse could only be had by the bank to the underlying securities but not to the defendants personally and the defendants have sworn that oral agreements to that effect were made in the course of discussions and meetings between the defendants and the bank, in or around the middle of 2008. It is said on behalf of the defendants that there is contemporaneous correspondence which bears out their case in this regard. That correspondence which I have had the opportunity of reading, is correspondence between their solicitors and also their accountants and financial advisers, and the bank.
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> 13. It is certainly true to say that the question of non-recourse was discussed in this correspondence, but it seems to me absolutely clear, and it was sworn to by the bank that the nonrecourse issue arose in the context of entirely unrelated loans to the O'Tooles' company Burgrove which were indeed, as the documents show, limited recourse loans to the defendants in respect of the Burgrove debt, which as I say, is entirely separate and distinct from the claims that are the subject matter of these proceedings.
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> 14. Having said all that however, it seems to me that the cardinal point in this regard is that subsequent to this correspondence, as I say which dates from the middle of 2008, each of the defendants executed the sanction letters, and the sanction letters themselves are entirely inconsistent with the case they now seek to make. They contain no proviso of any kind in relation to the loans being non-recourse in significant contrast to the loan documentation with regard to Burgrove which expressly limits the recourse which is available to the bank.
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> 15. It is important I think to note in this connection this was a sophisticated and complex business transaction freely entered to by intelligent businessmen with the benefit of both legal and accounting advice. There is no suggestion nor could there be that they did not understand the nature of the documents they were signing or that they thought they were signing something different from that which was actually signed, defences that are frequently raised in this court by parties to resist claims for summary judgement by the bank. None of that, as I say, arises nor could it arise in circumstances where the defendants were fully and comprehensively professionally advised at all times, up to and including the signing of the relevant contractual documents that are the subject matter of these proceedings.
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> 16. The courts have repeatedly said, and Mr Beatty SC [counsel for the bank] has referred to the judgement of Clarke J. in *ACC Bank Plc v Kelly* [2011] IEHC 7 which I think is a precursor of that, the courts have repeatedly said that business people such as the defendants are bound by documents they sign whether they read them or not, and it is hardly necessary to say that were it otherwise the whole foundation of business and commerce would cease.
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> 17. People have to take responsibility for what they sign and they may with the benefit of hindsight consider their decision to have been unwise, but that does not as a matter of law provide a defence. It seems to me in addition to all of that, the evidence of the kind the defendants seek to rely on in this case by way of parol evidence of the alleged either collateral agreement or indeed the underlying agreement really is not something that can be admitted, as McGovern J. pointed out in the case that was opened to me earlier by Mr Beatty."

9. Having so stated, the trial judge went on to conclude that the defendants had not met the test stated by the Supreme Court in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607, not having shown a fair and reasonable probability of having a bona fide defence to the claim. He stated:

> "Mere assertions appear to me to be what arises in this case. Not only are those assertions not supported, in my view, by any corroborative evidence but they are entirely contradicted by the documentary evidence that is before the court."

10. The defendants have sought on this appeal to argue that the trial judge ought not to have shut them out from adducing oral evidence of discussions with bank officials which they say support their argument that these loans were limited recourse loans, especially in the light of the correspondence exhibited which referred to non-recourse, albeit in the context of the earlier facilities to Burgrove Limited. It was their assertion that the nature of the loans to Burgrove supports their contention that the loans to the defendants personally were also intended to be non-recourse, even though this does not appear in the loan facility letters that they accepted.

11. It has been argued that the parol evidence rule should not be applied in the circumstances of the present case. The defendants seek to rely on the fact that there is no entire agreement clause in the loan agreements, and that they ought therefore to be permitted to adduce evidence of discussions at meetings with the bank at which, they say, assurances were given that these particular loans would be of limited recourse as were the loans to Burgrove.

12. It is significant in the present cases that when the defendants asserted that the bank had agreed orally during discussions that the loans would be limited recourse they sought to rely on certain correspondence in order to corroborate what they were asserting. But the problem with that reliance is that it is manifest from the correspondence on which they rely that it relates to the earlier facilities to Burgrove and not to the loans on which the bank is relying in these proceedings. The defendants have sought support from the judgment of Finlay Geoghegan J. in *Allied Irish Banks Plc. v. Galvin Developments (Killarney) Limited & ors* [2011] IEHC 314 where a "collateral contract" was found to exist alongside the main contract, and which arose out of a promise made in the context of the main contract, and but for which the main contract would not have been entered into. In her judgment in *AIB Mortgage Bank v. Hayes* [2016] IEHC 280, Baker J. considered that judgment and others opened to her, such as that of McGovern J. in *Ulster Bank v. Deane* [2012] IEHC 248, and of Hogan J. in *Tennants Building Products Ltd v. O'Connell* [2013] IEHC 197 on the question of whether pre-contract assurances can be relied upon to vary or supplement a loan agreement. In *Ulster Bank v. Deane*, McGovern J, as noted by Baker J, refused to permit the defendants to defend summary proceedings when they sought to advance evidence which contradicted the terms of a written facility letter which the bank had asserted contained the agreement between the parties. She noted that McGovern J. had rejected that evidence as inadmissible as being "an impermissible breach of the parol evidence rule".

13. Referring to the judgment of Hogan J. in *Tennants Building Products Ltd v. O'Connell*, Baker J. stated at para. 33:

> "I consider the analysis of Hogan J. of the relationship between the pure parol evidence rule as explained by McGovern J. in *Ulster Bank Ireland Ltd v. Deane*, and the finding of a collateral contract as was done by Finlay Geoghegan J. in *Allied Irish Banks Plc v. Galvin Developments (Killarney) Ltd & ors* to point to the power of the court to recognise the existence of a collateral or preliminary contract arising from a promise intended to have contractual effect made in the course of

> negotiations. The written contra may not always contain the whole of the evidence of the terms on which the parties have contracted, albeit this may arise in exceptional cases and only where the evidence is clear. As Hogan J. stated in *Tennants Building Products Ltd v. O'Connell*, the finding of such a collateral contract is not the norm, *and will require cogent evidence*, often found in pre-contract documents."[Emphasis provided]

14. In the present case there is no cogent evidence to which the defendants can refer. The documents to which they have referred do not refer to these loans at all. There is nothing of a documentary nature in the background to indicate that something of the nature of a collateral or side agreement exists in tandem with the main agreement, and without which the defendants would not have entered into the loan agreements which they accepted. In my view this results in the defendants not being in a position to argue that there is a *bona fide* ground of defence exists based on their assertion that these loans were intended by the bank and understood by them, to be non-recourse.

15. I am satisfied that the trial judge was correct to reject this ground of defence and to refuse to adjourn the matter to a plenary hearing. The ground does not meet the threshold stated in *Aer Rianta v. Ryanair*, and other cases which address the level of arguability that must be shown by a defendant who seeks to have a summary judgment application adjourned to a full plenary hearing.

The transfer of securities ground of defence

16. It will be recalled that the loan offer letter in respect of Appeal No. 51/2017 was from AIB Bank plc, and that the loan offer in respect of appeal No. 52/2017 was from AIB Mortgage Bank, hence the different entities named as plaintiff in each summary summons. The basis for this ground of defence is that it has come to the attention of the defendants that, without notice having been given to them, the loans by AIB Bank plc. and the underlying securities were the subject of a loan and securities transfer to AIB Mortgage Bank in or about January 2015, and in fact that at some later date in April 2015 the securities had been transferred back again by AIB Mortgage bank to AIB Banks plc. The defendants say that they are entitled to see the underlying transfer instruments, but also that it calls into question which corporate entity was entitled to sue for the recovery of the loans on the 1st April 2015 which is the date on which each summary summons was issued. In appeal 51/2017 (AIB Bank plc) the letters of demand were issued by AIB Bank plc on the 14th December 2014. In Appeal No. 52/2017 (AIB Mortgage Bank) letters of demand were issued by AIB Mortgage Bank) on the 14th December 2014.

17. The trial judge rejected this issue as a basis for adjourning the case to a plenary hearing. He addressed this asserted defence quite briefly at para. 8 of his judgment as follows:

> "8. Another point is made by the defendants that there was a transfer of security of some description in 2015 between the plaintiff banks and again it seems to me from what I have that this really is not germane to the issues I have to decide because that concerns the underlying securities. This case is not concerned with securities but rather with a claim personal to the defendants, against them in respect of their contractual liabilities under the letters of sanction that they executed."

18. This issue had been raised in these proceedings in a fourth affidavit of James O'Toole sworn as late as the 19th January 2017 which was the day before the motions for judgment were due to be heard by Mr Justice Noonan. This ground was supported by an affidavit sworn by the defendants' solicitor, Patrick Cunningham, on the following day, the 20th January 2017, being the day of the hearing itself before Noonan J. in which he avers:

> "2. I say that it has come to my notice that there was a deed of assignment executed between Allied Irish Banks plc and AIB Mortgage Bank executed on 13th January 2015 which concerns loans and mortgages which are the subject matter of these proceedings. The property descriptions are contemporaneous to the loans the subject matter of the within proceedings.
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> 3. I say that this material has not been disclosed nor pleaded by the plaintiff and is material to the question of the right of the plaintiff to claim an entitlement to pursue the defendants in the within proceedings."

19. On this appeal the defendants contend that the trial judge erred in concluding that the transfer related only to the securities and therefore was not germane to the issues that he needed to decide. They contend that the information they had was that not only the securities had been the subject of the assignment but also the underlying loans themselves, and accordingly it was not established by the bank in these proceedings as to who the proper plaintiff was in respect of the loans being sued upon. They submit that in the absence of clarification on that issue, the trial judge ought to have considered that a bona fide and arguable defence was raised such that a plenary hearing should be directed so as to determine if the entity properly entitled to seek judgment. It is also submitted that this issue would also speak to the question of whether letters of demand which issued in December 2014 had been issued by the correct entity.

20. The bank clearly had no opportunity to file an affidavit in response to the fourth affidavit of Mr O'Toole or the affidavit of Mr Cunningham. They did however respond to this issue to some extent in an affidavit sworn for the purpose of resisting the defendants' application to this Court for a stay on the orders of Noonan J. pending the determination of these appeals. In her affidavit sworn on the 26th April 2017, Orlaith Tierney deposed as follows:

> "6. I say that as regards the issue of transfer of assets or debts or loans from one institution to another raised at paragraph 4 of the grounding affidavit, Mr Justice Noonan had no doubt but that this technicality raised no defence; documentary evidence of such internal AIB transfers is not a pre-requisite to obtaining summary judgement. The High Court addressed the issue of underlying securities and correctly stated that neither case related to the transfer of securities but to the liabilities of the appellants under the loan contracts."

21. In response to that averment, Mr O'Toole swore his sixth affidavit on the 9th June 2017, and, *inter alia*, referred to the affidavit of Patrick Cunningham above. Having referred to the fact that the assignment from AIB Bank plc to AIB Mortgage Bank was dated the 13th January 2015 (one month following the issue of the letters of demand herein) he then deposed:

> "8. Part and parcel of the argument advanced on behalf of those seeking leave to defend was that the "debt" travelled with the mortgage, and assignment of the mortgage was assignment of the debt. However entitlement to call in the loan in the first place on the 15 December 2014, by the requisite creditor, and entitlement to sue thereafter by the requisite plaintiff, each being legally discrete from the other, was simply another issue evidentially omitted or obscured or left hanging in the air by each and either plaintiff. Counsel for those bank plaintiffs on his feet past this lacuna, and arguably material lacuna, off as merely some class of title-regularising, dotting the Is or crossing the Ts, labours of some back-

> office conveyancer, just a "cocktail mortgage", -- which respectfully begs the question. Mr Justice Newman in giving judgment as dexterously as he did, did not address, it would appear, and certainly did not notice in the words of his extempore judgment, the underlying debt assignment issue, nor its timing, categorising as he did the topic as being concerned only with "underlying securities", which he pronounced "irrelevant" to any summary judgment issue."

22. Ms. Tierney for the banks swore another affidavit on the 15th June 2017 which addressed, *inter alia*, the above averment by Mr O'Toole. She deposed as follows:

> "5. In response to paragraphs 7 and 8 of the supplemental affidavit I say that Mr Cunningham most likely noticed the transfers from AIBMB to AIB alone from a review of the folios where the AIB Mortgage Bank interest was deleted from the face of the folio. I beg to refer to copy folio relating to one of the secured assets and namely the 42 acre site at Rathoe, County Carlow upon which and marked with the letter "A" I have signed my name pro the swearing hereof.
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> 6. Assets provided as security by borrowers post 2006 were secured in favour of both banks by way of a dual charge or 'cocktail charge', and in that regard by way of example I beg to refer to 1 of the charges actually used to secure the subject matter debt herein, namely the charge over the 42 acre site at Rathoe referred to above, upon which and marked with the letter "B" I have signed my name prior to the swearing hereof. It became practice after the incorporation of AIB Mortgage Bank in 2006 to take all sums due cocktail charges as security in favour of banks. If the charge was subsequently enforced by Allied Irish Banks plc in circumstances where AIB Mortgage Bank were not seeking to rely upon it, then it was first necessary for AIB Mortgage Bank to transfer their interest in the charge to Allied Irish Banks plc.
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> 7. The Deed of Transfer and Assignment has nothing to do with these summary judgement applications but rather it relates solely to security and housekeeping in that regard. As Mr Justice Noonan correctly stated in his judgement, the proceedings herein relate solely to the liabilities of the appellants under the loan contracts and do not relate to the transfer of security.

23. Mr O'Toole responded in a further affidavit in the application for a stay on the orders being appealed. In that affidavit sworn the 13th July 2017 he exhibits another deed of transfer and assignment of security from AIB Mortgage Bank to AIB Bank plc, in respect of the security property underlying the loans in the present case. This deed is dated 13th January 2015, namely one month after letters of demand were issued to the defendants by AIB plc. The defendants say therefore that it is manifest that as of the date of those letters of demand AIB plc were not the owners of the loans (or the securities) and therefore had no entitlement to call in the loans and demand payment. It is submitted in such circumstances it is more than arguable that an issue arises as to the entitlement of the named plaintiff entities or either of them to sue for these monies, and therefore a *bona fide* issue arises by way of defence for the purpose of achieving a plenary hearing on the issue of the plaintiffs' entitlement to judgment.

24. Ms. Tierney swore a final affidavit on the stay application to address the issues raised by Mr O'Toole in the affidavit just referred to. In it she deposes that the transfer relied upon by Mr O'Toole is in respect of the AIB Mortgage Bank's interest in the mortgage only, and not the underlying loans. She states that the interest in the mortgage was held up to that point jointly by AIB Mortgage Bank and AIB Bank plc as tenants in common. The Recitals at the commencement of the document state at (C):

> "(C) AIB Mortgage Bank has agreed to transfer to AIB all of AIB Mortgage Bank's interest in the Relevant Mortgage(s) and all of its interest in the Mortgaged Property. Upon such transfer taking effect, AIB Mortgage Bank shall have no further interest in the Relevant Mortgages and AIB Mortgage Bank has agreed that, in respect of each Relevant Mortgage, the AIB Mortgage Bank Release Date shall have occurred, and any trust created in favour of AIB Mortgage Bank under the Relevant Mortgages shall be terminated."

25. Ms. Tierney goes on to state that there was no transfer of the loans themselves. She states also that Mr O'Toole is incorrect to state that by this deed of transfer and assignment AIB Mortgage Bank has asserted that it had rights under the mortgage and not AIB plc. She refers to Recital (D) of the document which states:

> "The interest of each of AIB Mortgage Bank and AIB in each Relevant Mortgage is held as tenant in common. Each of AIB Mortgage Bank and AIB is the registered owner, or the persons entitled to be registered as owner, as tenant in common in undivided shares, of the Relevant Mortgages in respect of the Registered Land the subject thereof."

26. She goes on to state:

> "Pursuant to the terms of the charge document the interest held by AIB Mortgage Bank ranked in priority over the interest held by AIB plc and it was for this reason that it was necessary to transfer the AIB Mortgage Bank interest to AIB plc. Again, I say while this represents the factual circumstances regarding the transfer of the security, it is irrelevant to the proceedings herein which sought and obtained judgment on foot of the loan facilities and the failure of the appellants to repay same. It is further of note that the demand for payment was made pursuant to the terms of the loan offer and not the charge."

27. When this issue was raised on the motion for judgment on the 20th January 2017 there was just the barest detail asserted on behalf of the defendants, and there was no opportunity for the banks to explain the matter, insofar as they needed to, as they have done before this Court in their affidavits sworn for the purpose of resisting the defendants' application for a stay on the orders of Mr Justice Noonan. In such circumstances there was no error in his conclusion that the issue had not been raised to the level of constituting a *bona fide* arguable defence to the plaintiff banks' claims for judgment. It was a mere assertion almost bereft of any substantiation beyond the contents of Mr Cunningham's brief affidavit.

28. In so far as this Court might consider the evidence adduced in the form of affidavits sworn for the purpose of the defendants' stay application, to be new evidence for the purpose of deciding whether there is now shown to be a *bona fide* defence such that a plenary hearing should be ordered, I am satisfied that the issue does not rise to the level required for the purpose of *Aer Rianta v. Ryanair*. It seems clear to me that the loans were not transferred whatever may be the position in relation to the securities themselves. There is no evidence adduced that these loans were transferred as part of whatever internal reorganisation was engaged in by AIB Mortgage Bank and AIB plc in relation to the holding of security against the loans.

29. The issue is raised by reference to documents. A plenary hearing is not required to determine whether the loans were transferred. This can be determined from the documents themselves, and in my view, in the words of Hardiman J. in *Aer Rianta*, it is clear that the defendants have no defence.

30. For these reasons I would dismiss these appeals.