Neutral Citation: [2015] IEHC 632

THE HIGH COURT

COMMERCIAL

[RECORD NO. 2015/1149S]

BETWEEN:

ALLIED IRISH BANKS PLC AND AIB MORTGAGE BANK

PLAINTIFFS

AND

PETER FLANAGAN

DEFENDANT

JUDGMENT of Mr. Justice Hedigan delivered the 16th of October, 2015

1. In this application the plaintiff seeks summary judgment against the defendant in the sum of €7.2 million. This arises on foot of four loan agreements between the plaintiffs and the defendant. The plaintiff is a business man of considerable experience in relation to the restaurant business and property investment. He possesses a substantial investment property portfolio. He has been a customer of the bank since the 1970s. He has been provided by it with loans over these years in respect of his business and investment properties.

2. The principles to be applied by the court in an application for summary judgment are now well established. They were helpfully summarised by McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1 at pages 7 and 8 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;*
>
> *(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;*
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> *(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."*

3. It is accepted by the defendants that the loans in question were made and the amount due as at December 2013 is not in dispute. Demand has been made and has not been met.

4. The defendant seeks leave to defend the bank's claim on three grounds. These are:

> (a) The existence of a conflict of interest because the bank official with whom the defendant dealt was, in fact, a so called "silent partner" in the property investments in properties adjoining the defendant's restaurant in Malahide in 2005. The alleged partnership broke up in early 2008;
>
> (b) The 2008 and 2009 loan agreement were signed by the defendant under duress and in the absence of independent legal advice;

(c) At a meeting in early December 2013 it was agreed by the bank that in recognition of the conduct of the bank official with whom the defendant alleges he was in partnership, the debts due would be "parked permanently" meaning in effect it would be forgiven.

5. In applying the relevant principles herein the court must accept for the purposes of the application the facts of which the defendant gives evidence or where there is a credible basis for believing that evidence may be forthcoming, that those facts are as the defendant asserts them to be. Near assertion unsupported by evidence or by any realistic suggestion that evidence may become available will not provide an arguable defence. See *IBRCB v. McCaughey* [2014] IESC 44 at para. 5.5.

6. The existence of a conflict:

> The defendant may well not have had experience as a developer but he certainly was and is an experienced businessman, the proprietor of an extensive property portfolio and a long time customer of the bank experienced in commercial lending. Excepting for the purposes of this application the facts as presented by the defendant, the following is clear;
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> The defendant's application for finance in relation to the Gas Yard Lane site and the other property loans involved in these proceedings were all in his own name. No reference was made to a partnership involving his son and Mr. Furey the bank official. In fact in the loan agreements he represented himself as the sole borrower and owner of the relevant property. All properties involved were registered in his name alone. He alone undertook to repay the sums borrowed. The defendant did not make complaint of Mr. Furey's role in the partnership until February 2010, 23 months after the partnership allegedly broke up. Until then, the bank had no knowledge of the alleged role of Mr. Furey as partner in the defendant's property venture. It is agreed that if his account of Mr. Furey's role in this partnership is true, then Mr. Furey was acting in an improper manner inconsistent and in conflict with his role as a bank official. This situation would have been apparent to the defendant as an experienced businessman and previous borrower with the bank. He however chose to remain silent and did not inform the bank until February 2010 of the behaviour he alleges against Mr. Furey. It is clear that throughout all these dealings the defendant had the assistance of his solicitor because he witnessed all but one of mortgages of the eleven secured properties the exception being one dated the 9th of January 2004 which was witnessed by a trainee solicitor. He could have asked his advice at any time as to the role of Mr. Furey and his apparent conflicted relationship with his employer. On the presented facts the defendant was well aware of the alleged improper role of Mr. Furey. He chose to remain silent. When he did inform the bank of the alleged behaviour of its official, they inaugurated disciplinary proceedings. These concluded when Mr. Furey who denied any wrongdoing became ill and left the bank. The conflict if any was between Mr. Furey and his employer the bank. No conflict existed between the bank and the defendant. If the defendant's account of events is true, then his conduct does him no credit as he participated in that official's clearly improper conduct. In any event it does not release him from his obligation to repay the sums he borrowed and which he undertook solely to repay. No *bona fide* defence is revealed under this heading.

7. Duress and absence of legal advice:

As is apparent from the *Harrisrange* principles, mere assertion is not enough to form the basis upon which the court can refuse summary judgment. There must be some evidence or a credible basis for believing that evidence may be forthcoming. More recently this court expressed the principle very plainly in *Ulster Bank Limited v. De Kretser* [2015] IEHC 359 at page 3:

> *"There is no evidence of any duress or undue influence. There is simply an assertion. That assertion flies in the face of the evidence. This is, as noted above, that both defendants were experienced business people…"*

No evidence is proffered to back up the claim here. There is merely the assertion. No details of any kind are forthcoming upon which the court could conclude there was a fair or reasonable probability of having a real or bona fide defence on this ground. Moreover, if the court asks "is what the defendant says credible?". Then I am afraid the answer must be no. The defendant was and is an experienced businessman. He had considerable expertise experience in dealing with the bank. The allegation of duress is only made in respect of the 2008 and 2009 loan agreements. Yet these are loans that are merely a restructuring of his earlier ones. Moreover the duress is alleged after the break-up of the alleged partnership. The allegation of duress is not in the circumstances credible. As noted above the defendant had throughout his dealings with these loan agreements, the availability of his solicitor for advice and indeed in the 2008 loan agreement, he confirmed he had been advised to seek independent legal advice. In any event, short of some clear indication of a disability on the part of a borrower, there is no legal obligation on the bank to ensure a customer has independent legal advice. No bona fide defence appears under this heading either.

8. Debt forgiveness:

This claim is made at para. 26 of the defendant's replying affidivat. "A proposal was agreed which I and my adviser, Des Walsh understood to be that the debt would be 'parked permanently' on a without prejudice basis in recognition of the behaviour of Frank Furey". There is something rather vague and almost tentative about the way in which this claim is framed by the defendant. Again no evidence is proffered by the defendant to support such a defence. Nothing more than the bare assertion is made. No documents or correspondence are even referred to that might support the defendant's assertion. As can be seen from the grounding affidavit of Graham Kelly at para. 42, there was extensive engagement between the bank and the defendant from 2010, including between May 2014 and January 2015. Email correspondence was involved concerning *inter alia* proposed asset disposals and debt restructuring. These post dated the alleged agreement of December 2013. No emails or letters are proffered by the defendant or even referred to taking issue with what was contained in these engagements. If there was an agreement to "permanently park" the debt in question one would have thought at the least that there would have been a substantial number of replying emails at least questioning the relevance of asset disposals and debt restructuring. It is notable further that there is no affidavit of Des Walsh to support the defendant's claim. Thus no evidence is proffered nor is there a credible basis for believing it may be forthcoming. Moreover the entire proposition that the bank would forgive in excess of €7 million in debt due to the behaviour of an employee of which they were unaware and of which the defendant was clearly well aware, borders on the absurd. No credible defence arises here either.

9. Thus the three grounds of defence proposed fail the test set out above. There will be judgment in favour of the plaintiffs in the amount claimed.