Neutral Citation: [2013] IEHC 454

THE HIGH COURT

[2012 No. 1400 S.]

BETWEEN

A.C.C. BANK PLC

PLAINTIFF

AND

RUADHRI McELLIN, JOHN McELLIN AND EMER McELLIN

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered 18th the day of October 2013

1. This is an application by the plaintiff, ACC Bank plc ("the bank") for summary judgment against the three defendants in the proceedings, Ruadhri, John and Emer McEllin. When the matter came before me during the course of the Cork Non Jury List, the application for summary judgment was resisted by the second and third named defendants who argued that rather than having judgment given against them, that the matter should be referred to plenary hearing. The first named defendant did not appear, and took no part in proceedings. His solicitor had been given liberty to come off record on the 15th April, 2013. Until then the same solicitor had represented all three defendants. The first named defendant, I should explain, is the son of the second and third named defendants.

2. The background to the application is that the second and third named defendants had for many years owned and operated a general store/hardware store at Balla, Castlebar, Co. Mayo. Their property was adjoined by a vacant site referred to as "Wade's". The first named defendant identified that if the adjoining site could be acquired, that the enlarged site would be suitable for a mixed commercial/residential development involving houses, apartments and retail units, one of which would serve as a replacement for the existing hardware store.

3. He explained what he had in mind to his parents and they came on board. The expectation of the defendants was that this would be a successful venture, and in particular there was a belief that this development would provide financial security for the second and third named defendants in their retirement. ACC Bank was approached by the first named defendant acting, or purporting to act, on his own behalf and on behalf of the second and third named defendants. There is no doubt that at this stage the first named defendant was playing the lead role in developing the proposal.

4. On the 12th April, 2006, the plaintiff advanced the sum of €500,000 to facilitate the acquisition of the adjoining property. The term of the loan facility was eighteen months. Security comprised of a first legal mortgage and charge on the existing McEllin premises in Balla, and a first legal mortgage and charge on the adjoining property and there was also a requirement for the assignment of a mortgage protection policy on the life of Ruadhri McEllin, the first named defendant.

5. Developments in relation to obtaining planning permission and related matters took longer than was expected. Planning permission was not secured until the 27th June, 2007. A second loan facility was sought and was agreed to by letter of loan sanction of the 7th January, 2008. This time the loan was in the amount of €651,000. This was designed to repay the existing loan, and provide funding for professional fees. Initially this bridging facility was for a term of four months, however, by letter of variation of the facility letter dated 19th November, 2008, the bank agreed to a variation in the terms and conditions applicable to the loan, in particular the final due date of the bridging facility was extended out to 30th April, 2009, and there was also provision for an increase in the interest rate.

6. The defendants defaulted. It appears that there was only ever sporadic payments of €1,000 off the interest element. A letter of demand was issued on 4th October, 2011, and then on 17th April, 2012, a summary summons was issued, followed by a notice of motion dated 9th August, 2012.

7. A number of affidavits have been sworn by the defendants resisting judgment and seeking to have the matter referred to plenary hearing. In particular all three defendants swore affidavits dated 14th November, 2012, and supplemental affidavits were sworn by the second and third named defendants on 6th March, 2013, and further supplemental affidavits by each of them on 10th April, 2013.

8. I will refer in more detail to the case that is made by the second and third named defendants in resisting judgments and seeking a plenary hearing presently, but at this stage is it appropriate to refer to the principles that the court should apply in deciding whether to grant summary judgment or refer the matter to plenary hearing.

9. The tests that are to be applied have been considered by the Superior Courts in a number of cases in recent years. Indeed, I do not identify any significant disagreement between the parties as to the principles to be applied, rather what is between the parties and what they do disagree about is what the outcome is if the agreed principles are applied.

10. In first *National Commercial Bank plc v. Anglin* [1996] 1 I.R. 75, Murphy J. dealt with the approach to be taken in these terms at pp. 78 to 79:-

> "For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the *bona fides* of the defendant or to doubt whether the defendant has a genuine cause of action . . . In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v. Daniel* [1993] 1 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the head note thereto in the following terms:-

> 'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or *bona fide* defence.'

In the *National Westminster Bank* case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-

> 'I think it right to ask, using the words of Ackner L.J. in the *Banque de Paris* case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?' The test posed by Lloyd L.J. in the *Standard Chartered Bank* case, . . . 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.'"

11. The matter was again considered by the Supreme Court in the well known case of *Aer Rianta cpt v. Ryanair Limited* [2001] 4 I.R. 607, wherein the test laid down in *First National Commercial Bank v. Anglin* was endorsed by McGuinness J. at p. 615, where she commented:-

> "Thus it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr. O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. . . . The court does not ask whether Mr. O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr. Byrne's account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible.

12. The issue is also the subject of a judgment from Hardiman J. in the same case. In the course of his judgment he observed at pp, 621 – 622:-

> ". . . I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the late nineteenth and early twentieth centuries. The formulation used in *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75 and the cases cited in that judgment are useful and enlightening expressions of the test, but I do not believe that this formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. The 'fair and reasonable probability of the defendants having a real or *bona fide* defence', is not the same thing as a defence which will probably succeed, or even a defence whose success is not improbable."

13. Later Hardiman J. went on to say at p. 623:-

> "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?"

14. A particularly helpful and concise summary of the applicable principles was provided by McKechnie J. in *Harrisgrange Limited v. Duncan* [2003] 4 I.R. 1.

15. In the case of *Zurich Bank v. McConnan* [2011] IEHC 75 (Unreported, High Court, Birmingham J., 4th March, 2011), having reviewed the relevant case law, I commented (as I was reminded in the written and oral submissions of the defendants in the present case) that while the jurisdiction to refuse leave to defend and to proceed to judgment undoubtedly existed, that it was a jurisdiction to be exercised very sparingly indeed. I remain firmly of that view. In the *Aer Rianta v. Ryanair* case, Hardiman J., as I have just quoted, summarised the test as being "is it very clear that the defendant has no case". That is the test I will apply. If the answer is in the affirmative, I will accede to the motion. However, unless it is very clear that the defendants indeed have no case, the matter will go to Plenary Hearing.

16. By reference to the written submissions, oral arguments and the seven affidavits to which I have referred, a number of arguments that are made against judgment being given emerge and I will deal with these in turn.

The second and third named defendants were distant from the transaction

17. The affidavits and submissions served to distance the second named defendant and third named defendant from the transaction. It is said that it was the first named defendant who came up with the idea, that it was he who persuaded his parents to become involved and that it was the first named defendant who is the real beneficiary. At one stage in the course of oral submissions, counsel for the defendant went so far as to use the phrase "undue influence". The use of that phrase was somewhat surprising, as there is no reference whatsoever to undue influence in the course of the affidavits. Any suggestion of undue influence seems incompatible with the fact that all three defendants were represented by the same solicitor until the application to come off record. Nor does it sit easily with the fact that the initial response by way of affidavit to the application for judgment came by way of three affidavits, one from each of the three defendants and the position taken by the three deponents was closely aligned and each mirrored the others.

18. I can see no basis whatsoever for concluding that there was any question of undue influence or anything remotely approximating to that. In that context, it is not without significance that the first affidavit sworn by John McEllin includes a specific statement as follows:-

> "I say that I also believed from the planned outcome of the proposal that my wife and I would be secure in our retirement in regard to financial matters."

19. There is a similar averment in the affidavit of Emer McEllin:

> "We would also be secure in our retirement in regard to financial matters."

20. I do of course accept that it is clear that the project was the initiative of the first named defendant and that it is undoubtedly the case that he took the lead role in advancing the project, and was the point of contact so far as the plaintiff was concerned. However, it seems to me that there is nothing unusual, or still less anything untoward in that regard. It would very frequently be the case that when a group of people come together to cooperate and advance a project whether in the commercial context or in some other context, that frequently one individual will assume a lead role.

21. While the initiative was taken by the first named defendant, the project was intended to benefit all three defendants. The money was borrowed by all three defendants and there is an obligation on all three defendants to repay.

Capacity to repay linked to a successful outcome
22. On behalf of the second and third named defendants it is also argued that the shared understanding of all parties was that the capacity to repay was linked to the successful completion of the development project and that the plaintiff knew or certainly ought to have known that the capacity of the second and third named defendant to repay was heavily dependent on the completion of the development.

23. Now, it is beyond argument that there was an understanding that the loans and the repayment of those loans were linked to the development. That was put beyond doubt, if there could ever have been any doubt, by the heading of the loan letter of the 12th April, 2006, which was "letter of loan sanction and agreement for bridging finance". However, there would be many cases where there is an expectation on the part of a borrower, and indeed sometimes a shared expectation on the part of borrower and lender, as to how borrowing would be repaid. A simple but obvious example is someone applying for a car loan or a house mortgage in the expectation of remaining in good health and gainful employment. Sadly, sometimes that does not work out. However, that does not mean that the obligation to repay the loan disappears. No arguable case has been made out that there was no obligation to repay the loan here because the development project did not succeed to a successful conclusion.

The second and third named defendants acted as consumers
24. Arguments have also been advanced to the effect that the second and third named defendants were consumers and should have been treated as such for the purposes of the Consumer Credit Act 1995, as amended. It must be said that the arguments in this regard are somewhat inchoate in that there seems to be a reluctance to spell out what the precise consequences of reaching such a determination would be, but presumably the suggestion is that the loans were unenforceable.

25. However, it seems to me in any event, that the arguments in this regard face insuperable obstacles. The documentation in relation to both the original €500,000 loan and the subsequent €651,000 loan sees the borrowers represent and warrant that in entering into the loan agreement that the borrower is acting within the borrower's trade, profession or business and thereby not acting as a consumer within the meaning of s. 2 of the Consumer Credit Act 1995. The representation and warranties in the case of the later loan is to the same effect though couched in broader and more comprehensive terms.

26. The suggestion that the borrowers were consumers would, even absent the repeated warranties and representations to the contrary, have been surprising. This is a transaction that has all the hallmarks of a commercial transaction. That is so and remains the case notwithstanding that the second and third named defendants may never have been involved in property development previously, as I fully accept to be the position.

27. Similar arguments were considered by Kelly J. in *AIB v. Higgins, Kavanagh, Mansfield and O'Callaghan* [2010] IEHC 219 (Unreported, High Court, 3rd June, 2010). He deals with the issue at p. 20 and subsequent pages. At p. 26 he commented as follows:-

> "Third, I am satisfied that not alone does the interpretation urged upon me [essentially that a natural person can have only one business] fail to find support in the wording and content of the Act but it also runs counter to the observations of the European Court of Justice in the case of *Benincasa v. Dentalkit* (Case C-269/95).

In the course of its judgment that court said:-

> 'As far as the concept of 'consumer' is concerned, the first paragraph of Article 13 of the Convention defines a 'consumer' as a person acting 'for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law, it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities.
>
> It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. As the Advocate General rightly observed in point 38 of his Opinion, the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.
>
> Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character.'" [Emphasis provided by Kelly J.]

28. Having quoted from the decision of the ECJ, Kelly J. continued as follows:-

> "These observations fortify my view that the construction which is sought to be placed upon the Act by counsel for the defendants is unsustainable. The European Court of Justice clearly envisaged that the concept of the consumer was confined to a person acting in a private capacity and not engaged in trade or professional activities. The self same person can be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. Only contracts concluded for the purpose of satisfying an individual's needs in terms of private consumption are protected by the Directive. There is nothing in the Act suggesting that the legislature here sought to go further than the Directive, still less to confine the interpretation of the term 'business' in the definition of 'consumer' to a single business activity."

29. In my view, it is beyond argument that the second and third named defendants and indeed the first named defendant, when entering into this manifestly commercial transaction were not consumers, and accordingly no arguable case is made out that the defendants were consumers and that the provisions of the Consumer Credit Act were not complied with rendering the agreement unenforceable.

The absence of independent legal advice
30. It is argued on behalf of the second and third named defendants that they entered into the relationship with ACC without the benefit of independent legal advice and that there was an obligation on the part of ACC to draw to their attention the desirability and importance of obtaining such advice. It should be explained that the same solicitor was acting for all three defendants at this stage. It is necessary to appreciate the context in which the argument is formulated. This was not a situation of the second and third named defendants agreeing to guarantee the debts of another. This was a question of individuals coming together, putting a proposal together and borrowing funds to bring the proposal forward. If this was a situation of elderly parents becoming guarantors for an

offspring's commercial debts arising from a business enterprise with which they were not involved, the situation might be very different. In that situation cases such as *Ulster Bank Ireland Limited v. Roche and Buttimer* [2012] 1 I.R. 765, (a judgment of Clarke J.) and *Royal Bank of Scotland plc v. Etridge (No. 2)* [2002] 2 A.C 773 would be relevant. This however, is a situation where loans were advanced at the request of the three borrowers, the loans were for the purposes of the three borrowers and to advance the interests of the three borrowers. In these circumstances, I cannot see any arguable basis for suggesting that the second and third named defendants are absolved from the obligation to repay the loans that they had borrowed, because they had chosen to be represented by the same solicitor as was representing their son. Counsel for the second and third named defendants has repeatedly referred to the vulnerability of his clients and more particularly, the third named defendant, as very vulnerable people. Again, I could see the force of this argument if it was a case of Mr. and Mrs. McEllin having agreed to guarantee the debts of their children or indeed the debts of someone else. However, that is not what happened. Rather what happened is that they borrowed money to participate in property development, which it was hoped and expected would be successful and would leave them financially secure in their retirement. Sadly that did not work out for, as we now know, their first venture into property development could not have been more ill timed. However, the fact that their plans did not work out as they had hoped and expected does not provide a basis for absolving the obligation to repay loans.

Delay in calling the loans and appointing a receiver

31. One of the main arguments relied on is that the plaintiff delayed in calling the loans and appointing a receiver. It is said that if the bank had acted more promptly, the secured property could have been sold at a price which would have seen the debts of the second and third named defendants cleared. There are a number of difficulties with this argument. First of all the argument ignores the fact that the defendants as owners of the property were in a position to sell, if that is what they wished to do, but they did not do so. The argument also ignores the fact that the first named defendant, purporting to act on his own behalf and on behalf of the second and third named defendants was seeking time and leniency from the bank. It has not been suggested that the first named defendant was acting contrary to the wishes of the second and third named defendants or acting to their detriment in his dealings with the bank.

32. More fundamentally, this argument ignores the fact that there is no obligation to enforce rights at any particular time. It is for the bank to choose the time to act. That appears very clearly from the decision of the Court of Appeal in *Silven Properties Limited v. Royal Bank of Scotland plc* [2004] 1 W.L.R. 997. In that case, Lightman J. at para. 14, delivering the judgment of the court commented as follows:-

> "14. A mortgagee 'is not a trustee of the power of sale for the mortgagor'. This time-honoured expression can be traced back at least as far as Sir George Jessel M.R. in *Nash v . Eads* (1880) 25 SJ 95. In default of provision to the contrary in the mortgage, the power is conferred upon the mortgagee by way of bargain by the mortgagor for his own benefit and he has an unfettered discretion to sell when he likes to achieve repayment of the debt which he is owed: see *Cuckmere Brick Co v . Mutual Finance Limited* [1971] Ch 949, 969g. A mortgagee is at all times free to consult his own interests alone whether and when to exercise his power of sale. The most recent authoritative restatement of this principle is to be found in *Raja v . Austin Gray [*2002] 1 EGLR 91, 96 para. 29 per Peter Gibson L.J. The mortgagee's decision is not constrained by reason of the fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor: (see *China and South Sea Bank Limited v . Tan Soon Gin (alias George Tan)* [1990] 1 AC 536). It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained: he is not bound to postpone in the hope of obtaining a better price: see *Tse Kwong Lam v. Wong Chit Sen* [1983] 1 WLR 1349 at 1355b."

33. This issue was also considered by McKechnie J. in *Ruby Property Company Limited v. Raymond Kilty and Superquinn* (Unreported, High Court, 31st January, 2003). In paragraph 13 of his judgment he set out in concise form the conclusions that he felt could be deduced from the authorities. Particularly in point is his comment at subparagraph (d) which was as follows:-

> "If there is no duty to wait, logically, it would appear to follow that there is no duty to sell immediately so as to avoid a possible decrease in the value of the charged asset. See *China and South Sea Bank Ltd.* [[1990] 1 AC 536]."

34. In this case it has now emerged that matters would have worked out better for the defendants had the plaintiffs not afforded them time. However, that is with the benefit of hindsight. Arguments that banks and finance houses should move promptly and robustly lest matters get worse would have serious consequences if they were to carry the day and be universally applied. However, for my part, I am satisfied that the position is as indicated by McKechnie J. Accordingly, as far as this argument is concerned, I am satisfied that not even an arguable case is made out.

35. I have considered the contents of the affidavits and what is urged in the oral and written submissions, but considering all of the arguments that have been advanced individually and indeed considering the situation in the round, I am of the view that no arguable case has been made out. I made it clear at the outset that the threshold to be crossed before leave to defend would be given was a low one, but low as it is it has not been crossed. Rather, the position is that (to use the language of Hardiman J. in *Ryanair v. Aer Rianta*) it is very clear that the second and third named defendants have no case. Accordingly, the plaintiff is entitled to the orders that it seeks against all three defendants.