THE COURT OF APPEAL

Irvine J.
Hogan J.
Cregan J.

2015/380

BETWEEN

DANSKE BANK A/S TRADING AS DANSKE BANK

PLAINTIFF/RESPONDENT

- AND -

DAVID COLEMAN AND DERMOT CRINION

DEFENDANTS/APPELLANTS

JUDGMENT of Ms. Justice Irvine delivered on the 4th day of March 2016

1. This is the first named defendant's appeal against an order of the High Court (McDermott J.) of the 7th July, 2015, whereby he granted summary judgment to Danske Bank ("the Bank") in the sum of €367,467.12.

2. It is the first named defendant's contention on this appeal, that the trial judge, inter alia, erred in law in his construction of the terms of a loan agreement contained in a facility letter dated the 19th August, 2011, and that, on the arguments advanced, he ought to have referred the proceedings to plenary hearing.

Background facts
3. By summary summon dated the 15th August, 2013, the plaintiff instituted proceedings seeking summary judgment against the defendants for a sum of €729,500 on foot of a guarantee dated the 27th July, 2011. The Bank later compromised its claim against the second named defendant. Further, as a result of the realisation by the Bank of certain assets, the sum in respect of which it ultimately sought to enter judgment against Mr. Coleman was €367,467.12.

4. Clause 1 of the guarantee provides as follows:-

> "1. In consideration of Danske Bank A/S (hereinafter called "the bank") from time to time making or continuing advances or otherwise giving credit or affording banking facilities or granting time for as long as the bank may think fit to Elstonwood Limited . . .
>
> WE THE UNDERSIGNED
>
> Dermot Crinion and David Coleman
>
> JOINTLY AND SEVERALLY HEREBY AGREE to pay and satisfy to the bank on demand all and every the sum and sums of money which are now or shall at any time be owing to the bank anywhere on any account whatsoever whether from the principal solely or from the principal jointly with any other person or persons or from any firm in which the principal may be a partner including the amounts of notes or bills discounted or paid and other loans , credits or advances made to or for the accommodation or at the request either of the principal solely or jointly . . .
>
> PROVIDED ALWAYS that total liability ultimately enforceable against us jointly or against each of us separately under this guarantee shall not exceed the sum of €729,500 together with interest thereon from the date of demand by the bank . . ."

5. By letter of loan offer date the 19th August, 2011, the Bank offered a structured term loan to Elstonwood in the sum of €735,500. That offer was accepted by the defendants on their own behalf and on behalf of Elstonwood on 8th September, 2011. The relevant provisions of the letter of loan offer were as follows:-

> "6. Security
>
> 6.1 Any security already provided by the borrower to the bank shall be security for the borrowers' liabilities under this agreement, unless such security expressly provides otherwise.
>
> 6.2 Without prejudice to the generality of clause 6.1 and for the avoidance of doubt, the bank currently holds and relies on the following security:
>
> (b) Joint and several guarantee in the amount of €622,200 signed by Dermot Crinion and David Coleman.
>
> 6.3 In addition, the following security is to be put in place in conjunction with this agreement:
>
> (a) Joint and several letter of guarantee in the amount of €729,500 signed by Dermot Crinion and David Coleman. This replaces and is not in addition to clause 6.2(b) above."

6. Following the issue of a motion for liberty to enter final judgment on the 9th July, 2014, an exchange of affidavits took place between the parties. Mr. Coleman swore affidavits dated the 15th January, 2015 and the 20th April, 2015. His accountant, Mr. Michael Kinsella, also swore two affidavits; the first being that dated 15th January, 2015, and the second that of the 20th April, 2015. In those affidavits Mr. Coleman sought the court's indulgence to enable him discharge the sums outstanding to the Bank. Mr. Kinsella and Mr. Coleman maintained that they were in the process of putting a scheme together whereby Mr. Coleman might come to an accommodation with the bank concerning his outstanding liabilities. The only other matter of any substance raised in those affidavits was a claim made that Mr. Coleman was unclear as to how interest had been calculated up to the 24th April, 2013. However, his assertion no longer appears to be relied upon by Mr. Coleman. The affidavits did not seek to maintain that the guarantee of 27th July 2011, did not cover the liabilities of Elstonwood Limited arising from the loan agreement of the 19th August, 2011.

7. Somewhat out of the blue, almost two years after the proceedings had issued, Ms. Siobhan Marray, Mr Coleman's solicitor, in an affidavit sworn on the 3rd July, 2015, sought to introduce an argument upon which her client might rely to defend the proceedings. She pointed to the fact that the guarantee upon which the proceedings were based predated the letter of loan offer and argued that the guarantee provided for therein was one which was to come into being subsequent thereto. Thus, she maintained that Mr. Coleman might argue that the guarantee of 27th July 2011 could not be relied upon to recover the monies later loaned to Elstonwood. The only guarantee that could support those monies was, she urged, a guarantee executed post the date of the letter of loan offer. In that regard, Ms. Marray also deposed to the fact that she had taken her client's instructions and that he had no recollection of signing any guarantee post the 19th August, 2011.

Decision of the High Court
8. In the High Court, McDermott J. in his judgment of the 7th July, 2015, concluded that the defendant had not established an arguable defence to the proceedings. He was satisfied that the guarantee of the 27th July 2011 was likely put in place to support the intended facility of the 19th August, 2011. He saw no reason to treat the guarantee and loan facility as divorced or separate from each other. Further, the fact that the guarantee had been put in place prior to the acceptance of the loan facility did nothing, he concluded, to negate its efficacy in terms of securing the monies owed to the bank by Elstonwood.

Appeal
9. There is no dispute between the parties as to the principles to be applied by the court on an application for summary judgment. To the forefront of the court's mind must be the test laid down by Hardiman J. in Aer Rianta v. Ryanair Limited [2001] 4 I.R. 607. where he described the test in the following terms:-

> "In my view the fundamental question to be posed on an application such as this remains; is it "very clear" that the defendant had 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?"

10. Of importance also, in the context of the matters of construction raised for the court's determination on this appeal is the decision of Clarke J. in *McGrath v. O'Driscoll* [2007] 1 ILRM 203, where he stated, in the context of a summary judgment application:-

> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents) but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

Submissions
11. Mr. Ross Maguire S.C. on Mr. Coleman's behalf submits that it cannot be stated that it is clear that his client does not have an arguable defence to the proceedings. He maintains that the trial judge erred in law in the manner in which he construed clause 6.3 of the facility letter. He relies upon the fact that clause 6.3 provides that: "in addition, the following security is to be put in place in conjunction with this Agreement" and that the guarantee referred to in that clause was intended to replace the earlier guarantee in the sum of €622,000. Thus, he argues that the guarantee intended to support the loan agreement was one which had to post date the letter of a loan offer and Mr. Coleman did not recollect having executing any such a guarantee. It was, he submitted, conceivable that such a guarantee existed and that if it did, its terms and conditions were unknown. For these reasons he maintains it is arguable that the guarantee of 27th July 2011 cannot be relied upon by the Bank as it was never intended that a guarantee which pre dated 19th August, 2011 would secure the later loan to Elstonwood.

12. Counsel for the bank submits that the argument advanced on behalf of Mr. Coleman is contrived and artificial. He submits that the loan agreement does not bear the interpretation proposed by Mr. Maguire. The loan offer required no more than that a guarantee in the sum of €729,000 would be in place before the draw down of the loan. In other words, it was irrelevant that the guarantee had been executed prior to the date of the loan offer. In any event, Counsel submits that, regardless of the terms of the loan offer, the guarantee of the 27th July, 2011 is sufficiently broad in its terms to capture Elstonwood's outstanding liabilities.

Decision
13. While the threshold for a defendant who seeks to have summary summons proceedings referred to a plenary hearing is low, I am not satisfied that Mr. Coleman has demonstrated the possibility that he has a *bona fide* and credible defence to these proceedings. There are a number of difficulties with the submissions made on his behalf which I view as hypothetical, contrived and without merit.

14. Firstly, Mr. Coleman, against whom the bank seeks to recover the liabilities of Elstonwood, has chosen not to depose to the circumstances in which he executed the guarantee of the 27th July, 2011. Thus he does not deny :

> (i) that he executed that guarantee.
>
> (ii) that the provisions of clause 1 thereof, prima facie, cover the liabilities of Elstonwood, regardless of the terms of the loan agreement,
>
> (iii) that it was a term and condition of the loan agreement that he execute a guarantee in such terms, and
>
> (iv) that Elstonwood received the sum specified in the loan agreement after he executed a guarantee to cover the sum required by the terms of the guarantee provided for at clause 6.3 of the letter of loan offer.

15. Secondly, in his affidavits Mr Coleman did not dispute his liability for the sums claimed by the Bank on foot of the guarantee. The only matters raised by him were:-

(i) his entitlement to a period of time to afford him an opportunity to put a reasonable proposal before the court in answer to the plaintiff's claim, itself an admission of his liability on foot of the guarantee and

(ii) whether interest had been calculated appropriately up to 23 April 2014.

How, one might ask, in the context of these facts, can it realistically be contended that Mr Coleman has demonstrated the possibility that he has a bona fide and credible defence to the proceedings?

16. Thirdly, leaving aside altogether any possible potential defence based upon what Mr Maguire maintains is an "incongruity" in dates stemming from the fact that the guarantee predates the letter of loan offer which he submits provided for an "in futuro" guarantee, I am satisfied that the outcome of this appeal can be determined solely by reference to the four corners of the guarantee itself. In my view, any reliance upon the terms of the letter of loan offer as the basis for providing an arguable defence is simply misplaced.

17. The Bank has not sued on foot of the loan agreement. It has sued upon the terms of the guarantee of 27th July, 2011. Mr. Coleman does not deny executing that guarantee and its terms clearly capture the monies later loaned to Elstonwood. He does not argue otherwise. Clause 1 provides that guarantors are to be liable in respect of "any or all sums that might thereafter become due and owing to the Bank by Elstonwood Limited". The sums claimed in the present proceedings fall fairly and squarely within that clause and it was on this basis that the Bank by letters dated 23 April, 2013 called upon each of the guarantors to meet their obligations thereunder.

18. Fourthly, regardless of the submissions made on behalf of Mr. Coleman based upon the provisions of clause 6.2 of letter of loan offer, clause 6.1 thereof provides that "any security already provided by the borrower to the bank shall be security for the borrower's liabilities under this Agreement, unless such security expressly provides otherwise". As of the date of the loan offer the guarantee of 27 July, 2011 had been executed and as such was "security" held by the bank on the date of the loan offer. There is nothing in the guarantee which expressly excludes the bank's entitlement to rely upon that security to recover the monies advanced to Elstonwood. Accordingly, apart from the bank's rights to pursue Mr. Coleman based upon the provisions of the guarantee, clause 6.1 of the letter of loan offer similarly entitles the bank to act on that security in respect of the monies advanced to Elstonwood.

19. Fifthly, and for completeness, I should say that I reject the construction placed upon the wording of clause 6.3 by Mr Maguire in the course of this appeal. The letter of loan offer required that, prior to the Bank advancing the proposed term loan to Elstonwood, the defendants put in place "in conjunction with this agreement" a joint and several guarantee in the sum of €729,500. The words used in the clause are in the present tense insofar as they provide that the guarantee "is to be put in place". That phrase cannot, in my view, be construed so as to render unenforceable the guarantee of 27 July, 2011, executed in advance of the letter of loan offer and which Mr Coleman does not deny was executed by him, as required, "in conjunction with this agreement". It is unstateable, I believe, to maintain as a matter of construction that the guarantee of 27th July, 2011 is unenforceable in respect of Elstonwood's liabilities by reason only of the fact that it does not postdate the letter of loan offer.

20. The loan agreement was concluded on 8 September, 2011 that being the date upon which the Bank's offer was accepted by the defendants on their own behalf and on behalf of Elstonwood. As a matter of construction, clause 6.3 rendered the Bank liable to make available to Elstonwood the sum of €729,500 once the terms of the letter of loan offer were complied with. These included the requirement that the defendants provide a guarantee to cover the liabilities of Elstonwood to the extent of €729,500 and which guarantee, once executed, would extinguish their earlier guarantee for €622,200. The clear intention of the contract was that the intended facility could not be drawn down until the Bank had in its possession a guarantee executed by Mr. Crinion and Mr. Coleman to cover the intended loan monies.

21. Finally, as to Mr. Maguire's submission, based on the wording of the letter of loan offer, that there may be another guarantee in existence the terms of which are unknown and which was executed to support the letter of loan offer, I consider that submission to be both hypothetical and contrived. Why would there be another guarantee in existence when there is a guarantee in existence which conforms entirely with the letter of loan offer? Further, Mr. Coleman had not denied executing the guarantee of 27th July, 2011 to enable Elstonwood obtain the monies the subject matter of the loan agreement. In the light of his sworn affidavits which advance no suggestion of the existence of any such guarantee there is no basis upon which the court should engage with what I consider to be an unmeritorious, hypothetical and spurious submission.

22. For my part, I am quite satisfied that the first named defendant has not met the threshold as outlined in *Aer Rianta v. Ryanair* and accordingly, I would dismiss the appeal.