Neutral Citation: [2013] IEHC 492

THE HIGH COURT

COMMERCIAL

[2012 No. 2559 S.]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED

PLAINTIFF

AND

PATRICK HALPIN

DEFENDANT

JUDGMENT of Mr. Justice Cooke delivered the 7th day of November 2013

1. In this action as commenced by summary summons the plaintiff sought to recover from the defendant a sum of €25,560,423.26 claimed to be owing for principal and interest on foot of a number of instruments of guarantee which he had given in respect of the borrowings of Crossplan Investments Limited, ("Crossplan") a company in which he was a director. There were three instruments of guarantee dated the 19th October, 2001, 27th June, 2003 and 21st December, 2005, which had been given by the defendant in favour of Irish Nationwide Building Society ("I.N.B.S.") by way of security for monies advanced by that Society to Crossplan under three facility letters or "commercial mortgage offers" dated the 29th July, 2005, 8th February, 2007 and 17th June, 2009. The maximum amounts agreed to be advanced by the Society on the three accounts were respectively €14.960m; €4.2m and €4 million. An initial amount drawn down under the first of those facility letters in the sum of €12.925m was applied to repay amounts then due and owing by Crossplan on five older accounts with the Society which were accordingly closed.

2. The loans in question were advanced by the Society for the purpose of financing the development of certain properties owned by Crossplan and an associated company as a hotel/guesthouse.

3. The plaintiff in the present action sues as statutory successor to INBS and as the transferee of all of the assets and entitlements of that Society by virtue of a Transfer Order dated the 1st July, 2011, made pursuant to the provisions of Part 5 of the Credit Institutions (Stabilisation) Act 2010.

4. In response to the plaintiff's application for summary judgment in the full amount of the claim, the defendant swore an affidavit in which it was sought to assert the existence of a bona fide defence to the claim upon number of grounds with a view to having the action remitted for plenary hearing. The application was heard by Kelly J. who gave an ex tempore judgment on it on the 4th October, 2012, in which the arguments raised in support of the existence of a bona fide defence were examined. In what was described as a "pragmatic approach" on the part of the plaintiff it was accepted that an allegation of overcharging made by the defendant did give rise to a triable issue, but that after giving credit for every conceivable charge or alleged miscalculation of interest there remained owing to the plaintiff a sum of at least €20 million. Claims made by the defendant to the effect that he was not a guarantor for the amounts in question; that there had been systematic dishonest and fraudulent schemes; or that Crossplan was in some way a consumer; were explicitly rejected as unfounded and Kelly J. ruled that no other triable issue had been raised by the defendant. On that basis he granted judgment against the defendant in favour of the plaintiff for the sum of €20m together with costs and ruled that there would be no stay other than in respect of the award of costs. The balance of the claim was accordingly remitted to a plenary hearing and in the order of the 4th October 2012, a series of directions by way of timetable for the delivery of pleadings, particulars and applications for discovery was set out.

5. An appeal was taken against the judgment and order of the High Court on the 4th October, 2012, and an application was made to the Supreme Court for a stay on execution of the judgment pending the outcome of the appeal. This application was rejected by the Supreme Court in an ex tempore judgment given on behalf of the Court by Fennelly J. on the 15th March, 2013. It is notable that upon the application for the stay in the Supreme Court, the defendant had attempted to raise a new argument to the effect that Kelly J. had misunderstood the argument that was being raised namely, that not only was there overcharging which ought to reduce the amount of the debt but also that the overcharging had the consequence of affecting the cash flow of Crossplan and its ability to repay its debts. This attempt was rejected by the Supreme Court. Fennelly J. said:-

> "If the appellant is to raise this point at all, it would have to be by way of evidence. At this stage there is no evidence that this was in evidence before the High Court. Kelly J. dealt with the matter on an ex tempore basis on the 4th October, 2012, but his judgment is careful and detailed. The idea that Kelly J. would have overlooked a major evidential point is implausible and there is no hint of it in his careful analysis of the evidence, the overcharging allegations and the credit given in respect of the point vastly is in excess of the overcharging claim."

He added that the point had not even made in the notice of appeal notwithstanding the attempt by counsel for the defendant to interpret the notice.

6. It is important to set out this aspect of the background to the present case because, when it was listed to be heard over a number of days on the 29th October, 2013, in the Commercial List, it was on the understanding of Kelly J. in dealing with a series of motions relating to adherence to the directions timetable including the non- delivery of the defendant's witness statements, that the sole issue to be tried was that of the alleged overcharging, in other words, the question as to whether the sum claimed as the balance due by the plaintiff had been correctly computed in accordance with the terms applicable to Crossplan's accounts. The defendant's explanation for the delay in furnishing witness statements and replies to an outstanding notice for particulars was in large part attributed to an inability to obtain the statement of an expert witness Mr. Eddie Fitzpatrick who was to testify as to the miscalculations or other inaccuracies in the bank accounts. It was not until the 11th October, 2013, that the defendant's solicitors provided replies to a notice for particulars which had been issued on the 25th January, 2013, and which had been directed particularly

at the pleas raised in paras. 8, 9, 10 and 17 of the defence. For the most part the particulars furnished were directed at identifying the manner in which the alleged overcharging had occurred.

7. When the hearing of the matter commenced accordingly, on the 29th October, 2013, it was the understanding of this Court and, apparently of counsel for the plaintiff, that the central issue to be tried was that of the alleged overcharging. When the case had been at hearing for approximately one hour, the Court was informed that counsel for the defendant no longer proposed to give evidence about or to argue the overcharging allegation and the ground in that regard was withdrawn. Instead, counsel proposed to advance a single ground to the effect that no sum was due by the defendant as guarantor because no valid demand had been made in accordance with the terms of the guarantee instrument due to the fact that while the letter of demand of the 15th February, 2012, served upon the defendant was signed by Ms. Mary Kelly on behalf of the plaintiff, she was not an "Officer" of the INBS in accordance with its statutes and rules and therefore not an "officer" of the plaintiff either.

8. Understandably, this sudden change of direction drew immediate objection from counsel for the plaintiff who submitted that leave to defend the balance of the claim had been granted upon the sole ground of the overcharging allegation and it was not now open to the defendant to seek to adopt an entirely different defence. Furthermore, the ground sought to be advanced was one which could well have been advanced in the hearing before Kelly J. on the 4th October, 2012, and he relied upon the authority of *Henderson v. Henderson* [1843] 3 Hare 100 and the judgment of Hardiman J. in the Supreme Court *F. McK. v T.H. (Proceeds of Crime)* [2007] 4 I.R. 186. He pointed out that the ground now sought to be relied upon was directed at the full amount of the debt claimed to be guaranteed and that it was therefore wholly inconsistent with the basis upon which the order of the 4th October, 2012, had been made to allow the ground to be argued in respect of the balance of the claim.

9. In response, counsel for the defendant pointed out that the order of the 4th October, 2012, simply remitted the balance of the claim for plenary hearing without any condition or restriction. He submitted that it would have been open to the Court to explicitly confine the plenary hearing to the overcharging defence but it did not do so. That being so, the defendant was entitled to raise additional defences and the ground now sought to be advanced was covered by paras. 5 and 6 of the defence as follows:-

> "5. If which is denied with any demand has been made by the plaintiff on the defendant as alleged or at all and the particulars of each and every demand allegedly made are denied.
>
> 6. It is denied that as of the 7th September, 2012, a duly authorised officer of the plaintiff certified that there was due and owing the sum of €25,672,534.04 together with continuing interest thereon, by the defendant to the plaintiff under the terms of the guarantees or at all."

10. In these circumstances the Court invited counsel for the plaintiff to adduce, without prejudice to his objection of inadmissibility of the new ground, the evidence relevant to the liability of the defendant on the guarantees and Ms. Mary Kelly was called as a witness. Having confirmed and adopted her witness statement as her evidence in the case, she testified that after working for many years with Ulster Bank she had joined I. N.B. S. in June 2010, as a "case manager" which involved dealing directly with borrowers, supervising their loans and repayments and reviewing their credit status. This was the role she had had in Ulster Bank and it was on that basis that she was recruited by INBS which was at the time looking for personnel with that particular experience. She was, as she described it, the "front person contact point" with the customers whose accounts were assigned to her. She worked as a member of a team. Her job was, as she described, at managerial level although probably described as "middle management" rather than senior management.

11. Following the transfer of the business of INBS to Anglo Irish Bank in July 2011, she continued working as a case manager on INBS accounts and similarly when those two institutions were absorbed into the present plaintiff. She also described how from a point subsequent to her joining the Society she became the case manager for the Crossplan accounts and from January 2011 onwards had direct personal dealings with Mr. Halpin.

12. Ms. Kelly also gave evidence as to the events of February 2012, when the plaintiff decided to proceed to recover the amounts owed to it by Crossplan and to appoint for that purpose a receiver over that company and make the demand on the defendant on foot of the guarantees. It was her responsibility as the relevant case manager to formulate a recovery strategy in relation to such in-default accounts. This was then taken by her as a proposal to the plaintiff's Credit Committee which at the time was situated in the former headquarters of Anglo Irish Bank in Stephens Green. The proposal was submitted to the committee some days in advance of its meeting with the case manager and, if the proposal was accepted, the form on which it had been submitted was returned to her with an authorisation to proceed with the necessary recovery steps. It was in that manner that she was authorised with another case manager a member of her team Ms. O'Malley to sign and deliver the letter of demand of the 15th February, 2012. No evidence was called on behalf of the defendant.

13. It is in those circumstances, therefore, that it is necessary to consider two issues. First, having regard to the basis upon which leave to defend the balance of the claim at plenary hearing was granted, is the defendant entitled to advance this particular ground? Secondly, is there any substance and legal validity to the proposition that no valid demand has been made of the defendant for the amount claimed due on foot of the guarantees?

14. In the judgment of the Court, the objection raised on the part of the plaintiff is fully justified. It is entirely clear from the note of the judgment given by Kelly J. that an explicit finding had been made on the application for summary judgment that no triable issue had been made out by the defendant other than that covered by the allegation of overcharging. It is to be noted that one of the arguments sought to be advanced at the time was that Mr. Halpin was not a guarantor of Crossplan. Kelly J. pointed out that the defendant had not only given the three guarantees but had expressly joined in the written acceptances of the facility letters both in his capacity as a director of the company and separately in his personal capacity as guarantor. It is to be noted that in the latter capacity he explicitly confirmed that "I have received and read a copy of the Society's memorandum and rules and agree to be bound by the same".

15. There is, accordingly, a finding made by the High Court that the defendant as guarantor of Crossplan was liable for the amount in respect of which judgment was entered against him on the 4th October, 2012. It would be wholly inconsistent for this Court now to permit the defendant to advance a ground which could have been raised at that point and which would now, if it had any basis, result in an incompatible order being made by this Court.

16. The Court is also satisfied that the reliance placed by the defendant on the judgment of Charleton J. in *Galvin v. Souter Enterprises* [2010] IEHC 215, in these circumstances is misplaced. It is true that in that case Charleton J. came to the conclusion that one of a number of possible defences to the application for summary judgment entitled the defendant to have the matter remitted to plenary hearing and said:

> "However, the law in relation to summary judgment requires me to simply make an order allowing for a plenary hearing. I am not entitled to confine the defendants to particular defences."

17. It is important to note that that is a judgment given in two separate cases and involved claims made for sums outstanding under building contracts in which the plaintiff had been both the building contractor and a co-owner of the development project with a defendant. They were also cases in which a series of grounds were put forward as the basis for remitting the claims to plenary hearing, some of which were found expressly by Charleton J to have been "sufficiently made out" on the basis that the disputed issue required oral evidence - see paragraph 7 of the judgment in the first case for example. Others were expressly rejected as unfounded – see paragraphs 8, 9 and 10 for example of the judgment on that case. It seems highly probable that any attempt to reopen such findings at a plenary hearing of the remitted issues would be forcefully met with a plea of *res judicata*. The bona fide defence to the first case related to a claim to set-off of a specific sum. The plaintiff was held entitled to judgment for the other amounts identified in paragraphs 9 and 13 of the judgment. In any event it was in relation to the claim for a sum outstanding in the second action based on the terms of the co-ownership agreement that the above passage now relied upon by counsel appears. It is in respect of the defence advanced in that action that Charleton J. held that: "This defence is made out as having a reasonable prospect of success". He then added however that he was not convinced that other arguments which had been advanced alleging breaches of the agreement were "sufficiently statable" to ground a defence but without making an express finding of the kind made first case in the paragraphs cited above. Thus the full amount of the claim in the second action was remitted to plenary hearing without any determination of the "other arguments". That authority is accordingly entirely consistent with the position in the present action.

18. In the present instance it was clearly on the basis that there was no triable issue by way of defence raised to the claim to the extent of €20m that judgment was entered for that sum and only the balance of the claim remitted. The balance in question was severed for that purpose upon the explicit basis that the one triable issue as to overcharging could not lead to a reduction in the amount due which exceeded the sum in question. It is also to be noted that O. 37, r. 10 of the Rules of the Superior Courts appears to be wide enough when read in conjunction with r. 7 to enable the Court to grant a plaintiff relief in part and to remit the matter for plenary hearing explicitly confined to a trial of the issue which has been identified as giving rise to a possible defence to part of a claim. Rule 10 provides that leave to defend may be given either unconditionally or subject to such terms "as the Court may think fit" and r. 7 provides that when adjourning a case for plenary hearing the Court is entitled to "generally make such order for the determination of the questions in issue in the action as may seem just".

19. In the judgment of the Court to permit this defendant now to advance a ground which is inconsistent with the basis upon which the overcharging issue was remitted for plenary hearing would be to countenance the situation condemned by Hardiman J. in the *F.McK.* case referred to above, namely to permit a litigant who has been successful in a claim to be "harassed by the other party reopening the subject of litigation". The plaintiff in this case has been successful in obtaining judgment for the major part of the present claim. To now permit a ground to be advanced to the effect that there was never any liability on the part of the defendant under the guarantees would be to permit an abuse of the summary judgment process. It would allow the defendant to put in question in this Court and independently of any appeal to the Supreme Court the specific finding of Kelly J. that no other triable issue existed which precluded a decree being granted in favour of the plaintiff for the sum in question.

20. Furthermore and in any event, the Court is satisfied that the argument sought to be advanced is unfounded and without legal basis. In brief, the argument is that Ms. Kelly as signatory of the demand letter of the 15th February, 2012, is not an "Officer" in the sense in which that term is used in the guarantees. The argument is as follows. Each of the guarantees contains a similarly worded provision as follows:-

> "Any demand hereunder should be made in writing signed by any Officer of the Society and may be delivered by hand, facsimile or post and if such demand is sent by post it may be addressed to the guarantor by name at the address or place of business last known to the Society and should be considered as having been duly made whether or not the same be returned undelivered and notwithstanding the debt of the guarantor."

21. It is submitted that the law requires a provision of this kind to be strictly construed and applied. In support of that argument, the judgments in three cases have been invoked, namely that of Fennelly J. in the Supreme Court in the *Wyse Finance Company Limited v. Lanigan* (Unreported, Supreme Court, 21st January, 2004); Gilligan J. in *The Merrow Limited v. Bank of Scotland and Another* (Unreported, High Court, 22nd March, 2013); and Laffoy J. in *G.E. Capital Woodchester Homeloans Limited v. Reade and Another* [2012] IEHC 363. It is to be noted however, that the first and third of those cases were concerned with claims for possession of property charged under deeds of charge pursuant to s. 62(7) of the Registration of Title Act 1964 and the second case with the appointment of a receiver of mortgaged property under a debenture.

22. In the present case, the defendant had undertaken in each of the guarantee instruments "as principal obligor and not merely as security" to "hereby irrevocably and unconditionally guarantee payment to the Society on demand of all present or future or actual or contingent liabilities of (Crossplan Investments Limited) to the Society . . .". It was submitted on behalf of the defendant that while the demand of the 15th February, 2012, was in writing it was not "signed by any officer of the Society" because the word "officer" had to be interpreted consistently with the use of that term in company law or in the Building Societies Act 1989. In the latter the term "officer" is defined in s. 2(1) as meaning a "director, chief executive or secretary, by whatever name called and, in relation to any offence, also includes any person who purports to act as an officer of the body". In the judgment of the Court, this argument is misconceived. In the standard clause contained in the guarantee as quoted above, the word "Officer" is not used in its statutory sense in the Act of 1989 (or of the Companies Acts,) but in the sense in which it is defined in the Rules of the INBS. Thus, rule 1 "Interpretation" includes the definition: ""officer" means any director, chief executive, or secretary and also senior management, officials and executives". While Ms. Kelly may have modestly described herself as a case manager at "middle management" level in the hierarchy, her clear evidence was that she had been expressly authorised by the Credit Committee to discharge the function of making a formal demand for repayment upon the guarantor in this case. Thus, the relevant clause falls to be read: "Any demand hereunder should be made in writing signed by any director, chief executive, secretary, senior management, official or executive …" of the Society. In the judgment of the Court, Ms. Kelly was clearly given authority to make the demand in question as an official and/or an executive in the employment of the plaintiff. So long as she was a manager in the employment of the Building Society she was clearly an "official" and an "officer" under its rules. Upon the making of the Transfer Order under Part 5 of the above Act of 2010, s. 39(4)(i) provided that references to the INBS (the "transferor"), "to any officer or employee of the transferor, in instruments or documents relating to the assets and liabilities transferred have the effect as if they were references to the transferee, or to any officer or employee of the transferee (as the case may be)" that is, of the Irish Bank Resolution Corporation Limited. Accordingly, the effect of the transfer order has been to require references in the demand clauses of these guarantees to any "Officer of the society" to be construed now as references to any officer of the plaintiff herein.

23. Accordingly, even if (*quod non*) it was permissible for the defendant to raise this new ground at this stage, it is a ground which cannot succeed. Judgment will accordingly be entered in favour of the plaintiff for the outstanding balance of its claim.