[2019] IEHC 689

THE HIGH COURT

[2017 No. 55 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

SEAN KILLEEN AND JIM HUDSON

DEFENDANTS

JUDGMENT of Mr Justice Barr delivered on the 22nd day of October, 2019

1. In this action, the plaintiff seeks summary judgment against the defendants in the sum of €194,454.97. It is alleged that this sum is due jointly and severally by the defendants on foot of contracts of guarantee signed by the first defendant on 2nd February, 2009, and by the second defendant on 27th of February, 2009, in respect of the present and future indebtedness of a company called Hudson Killeen Ltd. (hereinafter referred to as "the company").

2. The plaintiff's application for summary judgment is based on the affidavit sworn by Mr. Brian McGuinness on 4th April, 2018. Mr. McGuiness is a manager employed by the plaintiff at Bank Centre, Ballsbridge, Dublin 4. In his affidavit, Mr. McGuinness avers that pursuant to a Letter of Sanction dated 26th January, 2009 the bank offered an overdraft facility to the company up to a limit of €200,000. This was for the purpose of providing working capital for the company. It was subject to interest which was going to be charged at the *"AA overdraft rate varying*", which was then standing at 9.2% per annum. Security for the overdraft facility was stated to be a mortgage debenture over all fixed and floating assets of the company, and a letter of guarantee from each of the defendants for the sum of €200,000. That Letter of Sanction was signed by two managers on behalf of the plaintiff and by each of the defendants on behalf of the company.

3. Mr. McGuinness went on to state that the company drew down the overdraft. By letter dated 14th April, 2015 the plaintiff furnished a letter of demand addressed to the liquidator of the company, the company having gone into liquidation in 2014. In that letter the plaintiff bank demanded payment of €160,072.80, together with further interest which may accrue. By letters of the same date, the bank called on each of the defendants to pay the sum of €160,072.80 on foot of the guarantees furnished by them.

4. By further letter dated 11th October, 2016 from the plaintiff's solicitor addressed to each of the defendants, they were again called upon to make payment under the contracts of guarantee, this time in the sum of €200,000. Mr. McGuinness exhibited all of the above mentioned correspondence in his affidavit.

5. When payment was not made by either the company or the defendants, the plaintiff issued a summary summons against the defendants on 13th January, 2017 seeking judgment on foot of the contracts of guarantee in the sum of €194,354.21. An appearance was entered on behalf of the defendants on 8th June, 2017. By Notice of Motion dated 4th October, 2017 the plaintiff sought an order from the Master of the High Court for liberty to enter final judgment against the defendants in the sum claimed in the

summary summons. That motion was grounded upon an affidavit sworn by Mr. McGuinness on 28th August, 2017. In that affidavit he incorrectly stated that the plaintiff had advanced an overdraft facility to the defendants and that the defendants had signed the loan facility agreement by way of acceptance of its terms. A replying affidavit was sworn by the second defendant on 24th January, 2018 which, among other things, pointed out the errors in the affidavit sworn by Mr. McGuinness.

6. The matter was adjourned when it came on for hearing before the Master of the High Court to enable Mr. McGuinness to file a corrected affidavit. This he did by way of his second affidavit sworn on 4th April, 2018. When the matter came back before the Master of the High Court on 26th July, 2018, he struck out the plaintiff's summary summons and awarded costs to the defendants. In a previous ruling, this Court has allowed the plaintiff's appeal against the order made by the Master of the High Court. Hence the only issue before the court, is whether the plaintiff is entitled to judgment against the defendants in the amount claimed.

7. The defendants have sought to resist having judgment entered against them at this stage on a number of grounds. Firstly, it was submitted on behalf of the defendants that the proceedings were flawed because the plaintiff had never stated when there was a breach or default by the company which allowed the plaintiff to call in the debt owed to it. They further submitted that this was a relevant consideration because if the default arose when the company went into liquidation in 2014, this meant that there was a delay of approximately three years before the summons was issued in January 2017. This had the result that the defendants were exposed to an extra accrual of three years of interest from the time when the default may have arisen and the time when the proceedings were issued. Alternatively, if the default arose at the time when the letter of demand was sent to the company on 14th April, 2015, this meant that there was almost two years delay before the summons was issued and during which time interest accrued. It was pointed out by the defendants that the sums allegedly due at the date of the letters of demand, which were sent to the company and to the defendants in April 2015, was €160,072.08, which had grown to €194,354.21 by the time the summary summons was issued in January 2017.

8. The defendants also submitted that there was a discrepancy between the rate of interest charged according to the statements of account at 7.85% and the rate of interest stated in the Letter of Sanction of 9.2%. There was also a discrepancy between the amount claimed in the summary summons, the original Notice of Motion and in the first affidavit sworn by Mr. McGuinness, wherein the sum claimed was €194,354.21 and the amount sought in the second affidavit sworn by Mr. McGuinness of €194,454.97.

9. The defendants further submitted that there was a lack of detail in relation to the sums claimed by the plaintiff. While the defendants had statements of account in respect of the overdraft facility from its inception to 31st May, 2017, there were no details as to what part of the sum claimed was due for principal and what part was due for interest, nor

were the calculations given, which gave rise to the interest payments which appeared on the various statements.

10. Finally, counsel for the defendants submitted that it was significant that there was no mention by Mr. McGuinness in his affidavits of the other security provided under the Letter of Sanction, being the mortgage debenture over the company's assets. It was submitted that having regard to the errors made in the first affidavit sworn by Mr. McGuinness, having regard to the lack of clarity on the matters referred to above and the absence of any mention of the mortgage debenture, the Court could not be certain that the plaintiff was entitled to judgment in the sum claimed. In such circumstances it was appropriate for the court to remit the matter to plenary hearing.

11. In response, counsel for the plaintiff stated that there was no specific date of breach or default by the company. This was an overdraft facility which was provided further to the Letter of Sanction, which made it clear that the overdraft was being provided subject to the banks General Terms and Conditions Governing Business Lending, which terms were furnished with the Letter of Sanction and which clearly stated at clause 2.1.1 that the overdraft facility was repayable on demand. In these circumstances the bank was entitled to call in the debt whenever it chose. It called in the debt from the company by the letter of demand issued on 14th April, 2015.

12. In relation to the submission that the bank ought to have allowed the company some time to pay the money which had been demanded by virtue of the letter dated 14th April, 2015, before making a similar demand of the guarantors, counsel pointed out that there was no such obligation contained in the contracts of guarantee which had been signed by the defendants. Having regard to the fact that the company had been in liquidation for a year prior to April 2015, it was reasonable for the bank to presume that they were unlikely to obtain payment from the principal debtor and to make a demand on the same date for payment from the guarantors. It could not be argued that a valid demand had not been made for payment from the defendants pursuant to the contracts of guarantee. This had been done by the letters issued to the defendants on 14th April, 2015. Even if there was some merit in the point made by the defendants, no payment was in fact made by the company and a further letter of demand issued to the defendants from the plaintiff's solicitor on 11th October, 2016, so the company had in fact been given time to pay before the second letter of demand issued to the defendants.

13. In relation to the delay point raised on behalf of the defendants, counsel submitted that the bank was entitled to call in the debt from the company at any time, which it had done by the letter that issued in April 2015. At the same time it had also sought payment from the defendants pursuant to the contracts of guarantee. There was no obligation on the plaintiff bank to issue proceedings at any particular time when payment was not forthcoming either from the company or the guarantors. If the defendants had wished to avoid exposure to interest leading to the larger amount they ultimately owed, they could have made payment when initially demanded of them in April 2015. However, as is

clearly stated in the affidavit sworn by Mr. McGuinness, no payments have been made by either the company or the defendants.

14. In relation to the interest rate issue, counsel pointed out that the overdraft facility was subject to interest at the AA Overdraft rate, which was a variable rate. As such, the rate varied from time to time. The rate of 9.2% mentioned in the Letter of Sanction dated 26th January, 2009 was only a statement of the variable rate applicable at that time. The fact that the company was charged the lower rate of 7.85% on the overdraft, was merely due to the fact that that was the applicable variable rate at the relevant time.

15. In relation to the allegation that sufficient details of the debt hasve not been given, counsel for the plaintiff submitted that the usual practice was for an appropriate official in the bank to swear an affidavit that from his perusal of the bank's books and records a certain amount was due, and to exhibit the statements of account showing how that sum had arisen over the relevant period of time. The defendants had possession of all the relevant statements of account. It was unnecessary and unreasonable to expect that the plaintiff should set out the background calculations which showed how the interest rate was calculated on a day-to-day basis during the periods between the dates on which the statements of account were issued.

16. Counsel accepted that there was an overstatement in the letter of demand issued by the plaintiff's solicitors in October 2016, wherein the demand had been for the total sum allowable under the overdraft of €200,000. It was submitted that this was not fatal to the plaintiff's application for final judgment in the sum claimed in the affidavit sworn by Mr. McGuinness on 4th April, 2018. In support of that proposition counsel referred to the decision of Cregan J. in *Flynn v. National Asset Loan Management Ltd* [2014] IEHC 408, where, having referred to English and Australian authorities, the learned judge stated as follows at paragraph 233:

> *"Applying those principles to the facts of this case it seems clear that the letter of demand, even if it did overstate the amount due from the defendants to NALM it is still a valid letter of demand. In the circumstances, the submission of the defendants that the letter of demand is invalid is not well founded."*

17. In relation to the point that there was no mention in the grounding affidavit of the mortgage debenture, counsel submitted that it was totally irrelevant what other security the bank may have had in respect of the overdraft facility afforded by it to the company. The bank was entitled to enforce any or all of its securities as it saw fit. In conclusion, counsel submitted that the bank's case had been clearly set out in the Special Indorsement of Claim and in the corrective affidavit sworn by Mr. McGuinness. There had been no prejudice to the defendants caused by the fact that his first affidavit had been incorrect. In these circumstances it was submitted that there was no lack of clarity and the plaintiff had clearly established a right to judgment in the sum claimed.

Conclusions

18. The test which the court must apply where a defendant seeks to resist summary judgment and have the matter remitted to plenary hearing has been long established in Irish law. The relevant principles were set out with clarity by Hardiman J. in *Aer Rianta cpt v. Ryanair (No.1*) [2001] 4 IR 607, where he set out the test in the following terms:

> *"Was it 'very clear' that the defendant had no case? Was there either no issue to be tried or only issues which were simple and easily determined? Did the defendant's affidavits fail to disclose even an arguable defence?"*

19. In *Harrisrange Ltd v. Duncan* [2003] 4 IR 1, McKechnie J. also set down a number of relevant principles, of which the following are the most pertinent in this case:

> *"(7) 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;*
>
> *(8) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence would probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
>
> *(9) leave to defend should be granted unless it is very clear that there is no defence."*

20. In the present case a number of things are clear: the defendants do not dispute that an overdraft facility was given to the company; nor that they signed the contracts of guarantee in respect of the indebtedness of the company with the plaintiff. They accept that letters of demand were sent to the company and to them on 14th April, 2015. They also received the further letters of demand from the plaintiff's solicitor dated 11th October, 2016. They do not allege that the company does not owe money to the bank on foot of the overdraft, nor do they assert that the company or they, have paid anything on foot of the demands made of the company, or of them.

21. Turning to the specific issues raised by the defendants, I do not see that there is any substance to the assertion that the plaintiff has not specified when there was a breach or default by the company. This was an overdraft facility to provide working capital for the company up to a maximum amount of €200,000. Under the terms and conditions attached to that facility, the bank was entitled to seek repayment on demand. This it did of both the company and of the defendants pursuant to the contracts of guarantee by letters dated 14th April, 2015. There was no specific date of default by the company and even if there was, the plaintiff was not obliged to specify same before making a valid demand for payment of either the company or the guarantors.

22. In relation to the point that the plaintiff did not allow any time to the company to make a payment on foot of the letter of demand issued on 14th April, 2015 before they called in payment from the defendants pursuant to the contracts of guarantee, there is no

substance to this point either. Under the contracts of guarantee the bank was entitled to call in payment from the guarantors on demand. Furthermore, given that there was no payment made by the company after the letter of demand in April 2015 and prior to the second letter of demand sent to the guarantors by the plaintiff's solicitor in October 2016, the fact that the letters of demand to the guarantors issued simultaneously with the initial letter of demand to the company is irrelevant.

23. In relation to the delay point, the fact that the company had been in liquidation since 2014, may or may not have had a bearing on the decision made by the bank to call in the debt in April 2015. Be that as it may, under the terms of the overdraft facility the debt was repayable on demand. The bank was entitled to call in the debt whenever it chose to do so. They cannot be criticised, nor were they in breach of contract by calling in the debt when they did in April 2015. The fact that there was a delay between the letters of demand sent in April 2015 and the issuance of the summary summons in January 2017, does not affect the entitlement of the plaintiff to seek repayment of the debt through legal means when both the company and the guarantors failed to make payment on foot of the letters of demand which had issued from the plaintiff. It is undoubtedly true that the sum due increased from the date of the initial demand to the time when the summary summons was issued. If the defendants had wished to avoid the accrual of interest on the amount which had been due in April 2015, they could have made payment on foot of their obligations under the contracts of guarantee. They chose not to do so, so they cannot complain that interest accrued in the intervening period.

24. In relation to the allegation that the bank has not provided sufficient detail in relation to how the sum claimed is computed, I accept the submission made by counsel on behalf of the bank that the averments contained in the affidavit sworn by Mr. McGuinness, together with the statements of account which have been exhibited to his affidavits and in the affidavit sworn by the second defendant, constitute the usual method of proof of debt which is acceptable before the courts. I am satisfied that there is sufficient proof that the sum claimed in the second affidavit sworn by Mr. McGuinness in the sum of €194,454.97 is adequately particularised. That sum is clearly set out in the statements of account furnished with his grounding affidavit sworn on 4th April, 2018. While there is a slight discrepancy between the sum claimed in the summary summons, in the original Notice of Motion and in the original grounding affidavit and the sum claimed in his second affidavit, the later sum is supported by the statements of account and is only very slightly greater than the sums claimed earlier, such that this discrepancy is not of any consequence.

25. In relation to the point that there was a variation between the interest charged at the rate of 7.85% and the rate specified in the Letter of Sanction of 9.2%, I am satisfied that the reference in the Letter of Sanction was merely a statement of what the then current rate of variable interest was. As it was a variable rate it would fluctuate over time. I am satisfied that the rate of 7.85% is explicable as being the variable rate of interest applicable at the relevant time.

26. Finally, in relation to the point that a greater sum was claimed in the letter of demand sent by the plaintiff's solicitor in October 2016, than was actually due by the defendants as set out in the summary summons issued in January 2017, I accept the submission made by counsel on behalf of the plaintiff, that having regard to the decision in *Flynn v National Asset Loan Management Ltd,* that that state of affairs is not fatal to the plaintiff's claim herein. I am satisfied that the sum which has been claimed in the affidavit sworn by Mr. McGuinness on 4th April, 2018 is the correct sum lawfully due and owing by the defendants to the plaintiff on foot of the contracts of guarantee. There was no prejudice or injustice caused to the defendants by virtue of the incorrect sum having been sought in the letter of demand issued by the plaintiff's solicitor in October 2016.

27. Having regard to the findings made by me herein, I am not satisfied that the defendants have crossed the admittedly low threshold provided for in the *Aer Rianta and Harrisrange* cases. Accordingly, I refuse to remit the matter to plenary hearing. I am satisfied having regard to the matters set out in the affidavit sworn by Mr. McGuinness on 4th April, 2018 and having regard to the exhibits referred to therein, that the plaintiff is entitled to judgment against the defendants in the sum of €194,454.97. I award the plaintiff judgment in that sum jointly and severally against the defendants.