Judgment Title: Allied Irish Banks Plc -v- Tobin

Neutral Citation: 2013 IEHC 7

High Court Record Number: 2011 735 S

Date of Delivery: 17/01/2013

Court: High Court

Composition of Court:

Judgment by: Ryan J.

Status of Judgment: Approved

NEUTRAL CITATION 2013 [IEHC] 7

THE HIGH COURT

[2011 No. 735 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFFS

AND

JOHN TOBIN

DEFENDANT

[Approved] JUDGMENT of Mr Justice Ryan delivered the 17th January 2013

This is an application by the bank for summary judgment. The summons lists six different accounts in respect of which the claim is brought and amounting in total to some €4.2 million. The issue that arises at this stage is whether the defendant has established a sufficient basis of defence that entitles him to have the matter referred to plenary hearing. The relevant law is in *Aer Rianta v. Ryanair* [2001] 4 IR 607, where the Supreme Court laid down the principles that I have to apply.

In respect of three accounts, which comprise the bulk of the funds advanced by the bank to the defendant, issues arise that do not apply to the other loans. I propose to deal with them first.

By letter of the 10th December 2008, headed "Letter of Sanction" the bank offered three facilities which the defendant accepted. They are respectively for €2.751 million, €780,000 and €170,000. As to the first loan account, for €2.751 million, the

repayment terms specified in the letter is as follows:-

> "Interest only for 4 months to 30/03/2009, pending full review at that stage with capital reduction from the nett sale proceeds at The Paddocks, Newcastlewest, Co. Limerick, during that period. Full borrowing to be restructured/refinanced at that stage."

In respect of the loan for €780,000, the corresponding terms says:-

> "Interest only for twelve months with full review/refinance at that stage".

The third loan, for €170,000, says:

> "Interest only for three months with full review/refinance at that stage".

Each of the loans also has an express provision that the instalments will not be adjusted for changes in the interest rate, which means that the instalments may not actually be sufficient to meet the actual rate of interest applicable at that particular time. Nothing turns on this term.

The bank wrote to the defendant on the 23rd December 2009, and this letter and the sanction letter are crucial documents for this application, at least in regard to the three loans that were sanctioned in December 2008. Confusingly, this letter is captioned by a reference to the letter of offer dated the 10111 December 2008 but it actually refers to six loans rather than the three that were comprised in the letter of sanction of that date. The letter is as follows:-

> "Dear Mr. Tobin,
>
> We refer to the above letter of offer, pursuant to which the bank has agreed to make the facilities therein available to you.
>
> Without prejudice of the terms and conditions contained in the letter of offer, the bank has agreed as follows:-
>
> (i) To extend the level of facilities to incorporate the above quoted balances, and
>
> (ii) To extend the term applicable to the facilities detailed therein on and subject to the existing terms and conditions contained in the letter of offer. The facilities shall be deemed to have been extended by the bank, and shall now expire on the 28th February 2010, whereupon, the facilities, together with all other outstanding amounts then due and owing under the letter of offer, shall become immediately repayable by you in full.

Please note that this letter is supplemental to and not in replacement of the letter of offer dated the 10th December 2008, and save as varied by the terms of this supplemental letter, all other terms and conditions applicable to the facilities remain unchanged.

Should you require any additional information in connection with this please contact the undersigned.

Yours sincerely."

By letter of the 7th February 2011, the bank's solicitors demanded payment on foot of the six accounts, including the three that were covered by the sanction letter of

the 12th December 2008.

The defendant claims to have made out a sufficient case to warrant reference to plenary hearing. Mr Tuite, SC submits that the money is not now due and has not been validly demanded. The repayment terms in the three agreements are no more than agreements to reach agreement and are accordingly ineffective. He cited authorities to establish the proposition that an agreement to reach an agreement is of no legal impact. If there was ambiguity in the terms that applied to each of the three loans, oral evidence would be required to establish the factual circumstances in which the agreements were made. That process would give rise to findings as to the meaning and effect of the agreements. It was clear, on any basis as counsel submitted, that the loans did not and could not have become payable immediately on the expiration of the interest-free periods. It followed that the letter of the 23rd December 2010 was not able to alter the terms of the 2008 agreement in the manner in which it purported to do so or at all and that letter was accordingly ineffective.

Counsel for the bank, Mr Lewis, argued that no reasonable basis had been put forward by way of defence. He submitted that the letter of the 23rd December 2009 was effective to fix a new date for repayment, the 28th February 2010, for each of the three loans and that the defendant failed to repay and was accordingly indebted to the bank from that date in the full amount of the various loans. He referred to the the bank's general conditions which provided that, subject to any specific agreement in a loan, any facility advanced was payable on demand. His point was not that that overrode the provisions in the loans as contained in the letter of sanction of December 2008, but rather that immediate payment was the default arrangement. In circumstances where the terms of the loan as to repayment were absent or ineffective, then the general conditions came into operation. If the defendant was successful in his contention that the agreement was no more than an ineffective agreement to make an agreement, then the general conditions became operative and the bank was accordingly entitled.

The test is laid down by the Supreme Court in *Aer Rianta v. Ryanair*. Has the defendant made out some rational and credible basis of defence on which he might succeed? Obviously, I do not have to be satisfied that the defendant has an answer to the claim, but merely that he has some grounds for contending that he might successfully resist the bank's claim.

In respect to these accounts, the defendant may be able to make out a defence. He does not have to establish that he might have a case on the merits in the sense of not owing any money to the bank. It is sufficient if he is in a position to argue that the bank was not entitled to make its demand through its solicitors in the letter of the 7th February 2011, because the money was not then due. He can argue that the letter of the 23rd December 2009 did not and could not validly establish a deadline of the 28th February 2010, for the full discharge of all outstanding amounts by the defendant to the bank including all liabilities under the three loans in question that arose from the December 2008 letter of sanction.

The defendant can argue that it was not envisaged that the three loans would become repayable in full at the end of the interest free period. Something was going to happen at the end of those periods but the precise nature of that something was not specified and may be a matter of debate. The purpose of the new arrangement that was to come into effect at the end of the interest-free periods of months was to refinance the loans. It is probably obvious that the bank was going to do that refinancing, assuming agreement could be reached between the parties. The question is on what terms the money to refinance the loans was going to be

provided. One way or another, it is clear that the letter of sanction envisaged that there would be a further arrangement made between the parties at the end of the periods.

It seems to me it is at least arguable that the parties envisaged that there would be negotiations at the end of the interest free period to deal with the arrangement that would then be put in place. But without more, the loans did not thereupon become repayable. The process that was envisaged might lead to agreement or it might be that the bank and the customer failed to agree. What was to happen in that situation? Did the loan become immediately repayable? Or would a term be implied as to a reasonable period for repayment or refinancing by another lender. I do not know. It is not necessary to know the answer at this stage. I think the defendant is right is saying that there is an issue to be determined or a question to be answered as to whether the bank was entitled to declare the loans to be repayable as of a particular date as the bank did in its letter of December 2010.

I am also of the view that oral evidence may be required although I am certainly not saying that such is the case. The defendant has alluded to facts and circumstances in his third affidavit which may be considered relevant to the issues in the case. The extent to which evidence of the parties is admissible in the circumstances of an agreement like this is of course a matter of debate in many cases. I do not want to indicate any particular view on that question. The point I make is that I cannot out rule at this stage the possibility that such evidence might be relevant. That is another reason for refusing summary judgment on these three accounts.

The three accounts that were not included in the letter of sanction dated the 10th December 2008 are as follows:-

> 1. Account No. 79876047, 15th December 2003, overdraft facility to limit of €125,000.
>
> 2. Account No. 79877797, 24th December 1004, letter of sanction re loan €200,000. The purpose of this loan was to purchase property and as I understand the loan was to be paid off on the maturity of a pension policy on the 30th August 2022; premiums of €2,000 per month were to be paid over a period of 18 years (2004 to 2022) plus interest which was to be funded quarterly at €2,375 per quarter.
>
> 3. Account No. 79877011, 23rd February 2007, overdraft facility credit limit €100,000.

In respect of loan No. 2 above, the defendant deposes in his third affidavit dated the 16th November, 2012, that he has cleared this loan in full. That is a clear statement of fact and given the information provided by the defendant at para. 4 of that affidavit and the terms as to repayment and the absence of any specific basis of claim arising out of alleged default in payment of interest or insurance premiums, it would not be possible for the plaintiff to obtain judgment on that account. In his affidavit of the 3rd December, 2012 Mr David Ryan provides details of outstanding amounts in five accounts, not including 7797, which is implicit confirmation of repayment. Whatever about that understanding, there is a proposed defence with some particulars of payment and the least it does is to raise a defence and thereby prevent judgment on a summary application.

I turn to loan No. 6047, which was the subject of a letter of the 15th December 2003, authorising an overdraft up to a maximum of €125,000. The defendant refers

to this at para. 6 of his third affidavit. He claims that the bank has not particularised its calculations in regard to how it arrived at the total amount of some €120,000 that is due on foot of this account as claimed by the bank. However, in a previous affidavit Mr. David Ryan for the bank exhibited the statements of this current account, which would of course have gone to the defendant. Even if they had not, these account sheets set out the amount due from February 2011 and how the interest was added. Mr. Tobin says that "Whereas I acknowledge an indebtedness to the plaintiff in respect of this account, I say that it is not possible for me to examine the figures presented by the plaintiff when they have failed to particularise the balance that it alleges I owe". I do not think that this amounts to a denial of the debt or that it sets up a possible defence. If the plaintiff had any doubt or confusion about the account he could have raised it with the bank and instead of setting out any particular query he has simply chosen to express doubt as to the correctness of the amount claimed. I am not satisfied that he has any reasonable possibility of making a defence on his part of the claim and I propose to give judgment accordingly. I do not think that the general statements by the defendant that he disputes the amounts claimed are sufficient to deprive the bank of judgment.

There remains Account No. 7011, in respect of this account no basis of defence was put forward by the defendant. There is no reference in any of his affidavits to this account or to any defence that he might have. He does say in general in his second affidavit that he accepts that he owes the bank some money but he queries the exact amounts. However, no specific answer is proposed to the bank's claim on this account and the bank is entitled to judgment thereon.

I will therefore give judgment in favour of the plaintiff in respect of Account Nos. 6047 and 7011 in the amounts due and owing, namely, €499,963.01 and refer the balance of the bank's claim to plenary hearing.