THE COURT OF APPEAL
CIVIL

Haughton J.
Murray J.
Binchy J.

Neutral Citation Number [2020] IECA 221
High Court Record No. 2017/663 Sp.

Court of Appeal Record No. 2018/443

BETWEEN:

ALLIED IRISH BANK PLC

PLAINTIFF/RESPONDENT

- AND -

GERARD GRIFFIN

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 4th day of August 2020

1. In May 2006 the defendant, Michael O'Sullivan and Sean Walsh agreed to purchase 6.5 acres of land in Abbeydorney, County Kerry. It was their intention to develop the site, for which they required planning permission. The development was to be called '*Abbeydorney Village*'.

2. The purchase price was €600,000. The acquisition was financed by a loan from the plaintiff in the amount of €606,000. The terms of that loan were recorded in a letter of sanction dated 1 June 2006. The advance, for which the purchasers were jointly and severally liable, was secured on the property purchased by means of a legal charge from the defendant and his two partners. The terms recorded that interest only was to be provided on a quarterly basis for two years. It stated that the account was to be reviewed at that stage with a view to capital and interest repayments if planning permission was not to hand. The defendant says that in the event that planning permission was not obtained within two years the plaintiff would give the partners a long-term loan which would incorporate interest and capital over a fixed period. He claims that the plaintiff subsequently reneged on that proposal and never offered such a facility.

3. On 21 April 2008, the amount outstanding on foot of this facility was €657,117.70. The defendant says that on that date he attended the branch of the plaintiff at Denny Street, Tralee where he was advised that the figure required in order to discharge his liability in full in respect of his one third share of Abbeydorney Village was €220,195.56. He says that he duly paid that sum to the plaintiff on that date. The fact of that payment is not

disputed, although the making of any prior representation is. It is the defendant's evidence that he made this payment in a context where the planning prospects for the property were not hopeful, and in which he wished to discharge all his outstanding loans with lending institutions.

4. The defendant says that under no circumstances would he have discharged this amount in exactly one third of the sum due in respect of the facility if he had not received assurances and representations from the plaintiff that in doing so he would be fully discharging his liability in relation to the facility. He says that he believes that the officers of the plaintiff with whom he dealt were clear as to his understanding and intentions in this regard.

5. On 25 November 2010, the plaintiff issued a Letter of Loan Sanction to the defendant, Mr. O'Sullivan and Mr. Walsh. The letter offered a facility by way of loan account in the amount of €465,000, at a varying base lending rate plus 3.2% per annum. It made provision for repayment on demand but, without prejudice to that, recorded the loan as repayable over twelve months from the date of drawdown by a single payment. It specifically stated (at para. 7.5) that each party to a facility on a joint account was jointly and severally liable to the bank for repayment of the facility and was subject to all of the applicable terms and conditions. The special conditions provided that outstanding interest payments on the loan were to be made to bring the account back within the sanctioned limit of €485,000. The security was recorded as an all sums mortgage over the property at Abbeydorney. The purpose of the loan was stated as follows:

> *'Renewal of existing facility originally sanctioned to purchase 6.5 acres of zoned residential land in Abbeydorney Village Co. Kerry.'*

6. On or after 6 December 2010, that letter appears to have been signed by the defendant. He thereby accepted the terms and conditions of the advance. He did not, however, repay the loan and neither did Messrs. O'Sullivan or Walsh.

7. On 10 May 2016, the plaintiff made a demand in writing of the defendant for repayment of the sum of €537,658.80, then said by it to be due in respect of this facility. The property was thereafter sold, and on 10 February 2017 the proceeds of that sale in the amount of €98,683.65 were lodged to the account. These proceedings, in which judgment was sought in the sum of €457,047.97, were instituted on 12 April 2017. On 4 August, a motion seeking liberty to enter final judgment was issued, grounded on an affidavit of Tim Crowley.

8. The defendant's first affidavit explains the fact, and his understanding of the effect, of his lodging of one third of the monies outstanding on the 2006 facility. In particular, he says that once he paid one third of the amounts outstanding on that facility he believed that his '*liability in relation to Abbeydorney Village had been discharged in full'*. He relates that understanding to what he describes as:

'… assurances and representations from the Plaintiff that in doing so, I would fully be discharging my liability in relation to it.'

9. Of the 2010 facility letter, he says that the context for signing this was that his partners had issues with the plaintiff in relation to their own facilities. He avers:

> *'It was my understanding that a new Letter of Sanction could not issue to my Partners, Sean Walsh and Michael O'Sullivan, in relation to Abbeydorney Village and the 2006 Loan Facility, because of their existing difficulties with the Plaintiff, with whom they were continuing to negotiate.'*
>
> *For that reason, and for the benefit of Abbeydorney Village, I entered into the 2010 Loan Facility on the strict understanding that no liability applicable thereon attached to me.'*

10. Noting that it is not alleged by the plaintiff that any monies were drawn down by him personally on foot of the 2010 facility, that at the time that facility was granted he was a joint owner of the Abbeydorney property and thus willing to assist his partners, and repeating that he has discharged his liabilities to the plaintiff in respect of that property, he says:

> *'I entered into the 2010 Loan Facility purely to facilitate the ongoing negotiations between my Partners and the Plaintiff in the interests of Abbeydorney Village. Under no circumstances would I have entered into the 2010 Loan Facility if I had believed that it created a liability on my personal behalf.'*

11. He stresses that he obtained no legal advice in relation to the signing of the 2010 letter of sanction, and that he suffered considerable losses by acquiescing in the sale of the property at Abbeydorney which, he says, was done in order to facilitate the requirements of the plaintiff. He concludes:

> *'In short, the Plaintiff expressly and tacitly represented to me on 21st April 2008 that I had discharged all of my liability in relation to Abbeydorney Village. I relied on this representation, and paid € 222,195.56 to the Plaintiff in 2008. I say and am advised that the Plaintiff is estopped (either by promissory estoppel, estoppel by representation or estoppel by convention) from resiling from its representations, and pursuing judgment against me for what it claims is the balance of the loan connected with Abbeydorney Village.'*

12. The deponent of the affidavit tendered in response by the plaintiff, Ms. Madeline Murray, does not appear to have been personally involved in the exchanges in the course of which the defendant contends his liability under the 2006 facility was released. She objects that the defendant's evidence in relation to the alleged extinguishment of his liability is vague, and observes that the alleged representations are said to have been made *'by unnamed officers of the Plaintiff at undisclosed locations*'. However, she deposes that no assurances or representations were made to the defendant that the 2006 agreement

would be varied so as to allow the defendant to escape from his joint liability. She observes that it is not credible that the defendant would have believed his liability to have been discharged in full in 2008, and for him to proceed to renew the loan to cover the remainder of the debt in 2010. In any event, she says, the application for judgment relates to the debt alleged to be due under the 2010 Agreement, and she contends that it was a clear and express term of that agreement that the defendant was liable to discharge the debt of the partnership.

13. In his replying affidavit, the defendant refers to the absence of any averment by Ms. Murray that she was in attendance at the meeting in April 2008, disputes the contention that his original affidavit was vague, emphasises that he has identified the location and date of the meeting, and notes that it would have made no economic sense for him to discharge a liability when he did, were he not being given due credit for the entire sum due. He contends that because the entire purpose of the 2010 facility was to renew the 2006 facility, that the plaintiff cannot maintain that the 2006 facility is irrelevant to the reliefs the plaintiff seeks. He says:

> *'I acquiesced in the execution of the ongoing Letters of Sanction, purely on the basis that this facilitated the ongoing discussions which were taking place between my former partners and the Plaintiff. It did not in any way detract from my understanding and agreement with the Plaintiff as of the 21st April 2008, that my personal liability in respect of these facilities had been discharged in full.'*

14. The matter came for hearing before Simons J. on November 19 2018. In his ex tempore judgment delivered on that date, he referred to the low standard applicable to the assessment of a defence tendered in response to an application for summary judgment, and continued:

> *'However, even allowing for the fact that it is a very low standard and very low threshold which the defendant has to meet in order to be granted liberty to defend, I am also required to consider the background circumstances including the factual documentation and, in particular, the judgment of the Supreme Court in the Irish Bank Resolution Corporation v. McCaughey and the earlier judgment of Finlay Geoghegan J in the High Court in Bank of Ireland v. Walsh indicate that one of the matters to be considered is whether the proposed defence relies on facts which are inconsistent with the uncontested documentation. It is not a case where it said that he didn't understand the terms of the loan agreement or that it wasn't his signature, but rather it is said that because of a separate agreement he alleges was reached some two years earlier he must have no liability. And, with respect, even applying the narrow test of credibility as according to the authorities, it is simply not a credible defence, and in the circumstances I therefore enter judgment in favour of the plaintiff.'*

15. The test to be applied by the Court is not in controversy. The power to grant summary judgment should be exercised with caution. The focus is upon whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide*

defence to the claim. In addressing that question, it will not be sufficient for the defendant to merely assert a given situation as forming the basis of a defence. At the same time, judgment ought not be entered where there are credible issues of fact between the parties which, if resolved in favour of the defendant, will disclose a fair and reasonable probability of a defence. Such a defence may be constituted by either a clear and defined legal principle, or a proposition of law contended for by the defendant which cannot be resolved without fuller argument and greater thought: the procedure is properly limited in its application to those cases in which there are no issues or issues that are easily determinable (*Harrisgrange Ltd. v. Duncan* [2003] 4 IR 1, pp.7-8). In many cases, the process can be reduced to a single question: is it clear that the defendant has no case? (*Aer Rianta v. Ryanair Ltd.* [2001] 4 IR 607). In resolving that issue, it should be emphasised, the Court must assess the overall credibility of the case advanced by the defendant having regard *inter alia* to any uncontested documentary evidence tendered in support of the plaintiff's application.

16. Here, that question is best resolved in two stages. The first arises from the dealings alleged by the defendant in April 2008. This, it will be noted, was within the two year period provided for in the facility letter of June 2006. The evidence in that regard discloses one undisputed fact (that at that time the defendant paid a sum reflecting precisely one third of the sum then outstanding on the first facility extended to the partners), and one contested proposition (that the defendant was led to believe by officers of the plaintiff that upon payment of that sum his liability under the facility was discharged).

17. As I have noted, the defendant avers to '*assurances and representations*' that in paying the sum on 21 April 2008 he would be fully discharging his liability in relation to it. As I have also noted, he avers in his second affidavit that it was '*expressly and tacitly*' represented to him that if he paid the monies he would have no further liability. These averments are – in all the circumstances – sufficient to allow the defendant to contend that such a representation was in fact made to him.

18. This is particularly so in a context in which the plaintiff has tendered no evidence from any deponent to displace these averments other than the comments of, and denial by, Ms. Murray who was not party to the exchanges and does not disclose the basis of her belief. It follows that the Court must approach this application on the basis that the defendant has established an arguable factual basis for his account that on 21 April 2008 he paid one third of the first facility on foot of an assurance from the plaintiff that if he did this, he would have no further liability in respect of it.

19. As a matter of law, the part discharge of a debt does not generally extinguish the entire liability unless effected under seal. However, it is clear from the judgment of Laffoy J. in *Barge Inn v. Quinn Hospitality* [2013] IEHC 387 at para. 62 that the introduction of a new element into the relationship of debtor and creditor such as a collateral advantage to the creditor, may remove that relationship from the scope of the rule. This could arise, for example, in the event that the debt paid was not in fact due at the date of alleged

discharge. Moreover, where the discharge is made on foot of an express representation that part payment is in discharge of the whole, it may generate an estoppel – provided the representee can establish the requisite elements of *inter alia* unambiguous representation, and reliance (see *Barge Inn v. Quinn Hospitality* [2013] IEHC 387 at para. 68).

20. This leads to the second relevant aspect of the factual background. It is the defendant's case that the act of reliance which completes the estoppel asserted by him arose when he was presented with the letter of loan sanction of 6 December 2010. It is his case as explained in his legal submissions that he relied on the representations he alleges were made to him on April 21 2008 by '*signing further loan facility documents for the benefit of his partners and Abbeydorney on the strict understanding that no liability would attach to him*'.

21. The plaintiff challenges the credibility of this case, and the High Court Judge agreed with it. The plaintiff notes that the defendant has advanced no claim of *non est factum* or of mistake. It also – correctly – observes the paucity of evidence around the signing by the defendant of the December 2010 letter of loan sanction. The defendant does not state when or in what circumstances he came to do this, and not only identifies no agent of the Bank who made any specific representation to him at this time but fails to even aver that any such representation was actually made. The furthest his affidavit goes is to suggest that the representations he alleges were made to him in April 2008 in some sense carried over to December 2010.

22. Thus, the case seems to be that having been told that he had no liability on foot of the Abbeydorney Village facility in 2008, he could in 2010 sign a new letter of loan sanction which contained a clear stipulation that by his signature he assumed liability for the advance, without actually assuming such a liability at all. It is very difficult to see how in most cases he could credibly advance a case that the apparent liability assumed by him was in fact unenforceable without evidence grounding either a claim of *non est factum* or a claim that some specific representation was made to him at the time he signed the second facility letter that it would not be enforced.

23. That said, it is an undisputed fact that the defendant paid one third of the liability outstanding as of April 2008, and – for the reasons I have explained earlier – the Court must assume for the purposes of this application that the defendant was advised that in discharging that liability his exposure in respect of Abbeydorney Village was at an end. While I believe that the essential contention of the plaintiff - that by signing the December 2010 loan facility and thus accepting in writing liability for the refinanced loan the defendant lost any right to rely on such pre-existing representation that might have been made to him - would in most circumstances be well placed, this case is, on the evidence before this Court, potentially different.

24. The reason this is so depends on some very particular features of the case. For a start, the letter of loan sanction was a refinance of the existing facility. The circumstances surrounding the execution of each facility cannot thus be completely separated. It is not

entirely implausible that the defendant, having been told that he had discharged his liability in respect of that facility (if that is ultimately found to have occurred) believed that the liability would not be revived and signed the December 2010 facility while continuing to hold that belief.

25. I must emphasise here that that subjective belief would not in itself present a credible defence in law. The defendant has by signing the second facility letter acknowledged a liability and unless he successfully, and exceptionally, can advance a case of *non est factum* or of actionable misrepresentation made at the time of the signing of the second facility letter that is the end of the matter. Even where monies were not drawn down on foot of a refinanced facility, the new agreement will be enforceable, the consideration for the fresh arrangement coming in the form of the forbearance of the lender in agreeing not to enforce the original loan (*Bank of Ireland v. Flanagan* [2015] IECA 56 at para. 17).

26. Here, however, if the defendant establishes that he had in fact no liability on foot of the original facility as of the date of the second letter of loan sanction, the consideration may not be quite so easily identified. The plaintiff cannot say that the consideration for the second facility letter was its forbearance in enforcing the liability of the defendant on foot of the first, because (on one possible construct) the defendant had no liability under the first facility at the time of the second.

27. Of course, the plaintiff may well say in that circumstance that the consideration for the second facility came in the form not merely of its forbearing on the enforcement of the original debt against the defendant, but also in forbearing on the enforcement of its security. On this basis it might be said that there was consideration moving from the plaintiff to the defendant insofar as the defendant had an interest in the Abbeydorney property.

28. However, this presents a number of difficulties for the plaintiff insofar as this application is concerned. It has approached this application on the basis that no representation of the kind alleged by the defendant to have been made to him in 2008 was made at all. It has not directed its evidence as to what the position would be if in fact such representation were made and the liability were extinguished. Thus, there is no evidential foundation for a case based upon consideration comprising forbearance before the Court. The Court knows little of the security in place prior to the second facility letter, and indeed does not know if the security envisaged by that facility letter was executed at all.

29. To that extent, the situation bears some resemblance to that recently presenting itself in *AIB Mortgage Bank v. O'Brien* [2020] IECA 191. There, the plaintiff similarly sought to enforce a loan afforded by way of re-financing of an existing facility. The defendants contended inter alia that there was no consideration for the second facility. This Court upheld the decision of the High Court that the plaintiff had failed to lay a foundation in their pleadings or evidence for consideration by way of forbearance, observing (at para. 77):

'As far as the within case is concerned, in circumstances where no monies were in fact advanced in 2010 and there being no immediate suggestion in the pleadings or evidence that the plaintiffs had relinquished their entitlements under the prior borrowings, I accept the defendants' contention that in the absence of a more expansive pleading as to what was the consideration for the 2010 facilities (and where forbearance to sue was not pleaded) the defendants are entitled to make the case at plenary hearing that their circumstances are distinguishable from Flanagan.'

30. In this case if the defendant makes out his contention that he discharged his share of the monies outstanding on the 2006 facility in the belief that he thereafter owed no monies on that facility and that he is in a position to take the facts outside *Pinnell's case* [1602] 5 Co Rep 117 (whether because he relied upon that representation in such a way as to as to generate an estoppel at law, or otherwise) the starting point in the legal analysis of the 2010 facility will be that the defendant was by that facility assuming a fresh liability to discharge a debt. To enforce that debt, the plaintiff will have to establish a distinct consideration underpinning the 2010 facility, whether in the form of forbearance on the enforcement of the security or otherwise. The Court does not know if this is the case the plaintiff will in fact make as there is little information before the Court in respect of the securities provided for under either facility, and it has simply no evidence that would allow it to conclude that there was valid consideration.

31. The Court cannot therefore be satisfied that, as a matter of fact and of law, the defendant would have no defence to this claim. While the defendant does not appear to have expressly raised the issue of consideration in his submissions to the High Court and while he did not do so before this Court, the issue was raised by the Court with counsel for the Bank in the course of hearing and is so inextricably linked with the defence of estoppel in respect of the first facility letter as to be properly within the scope of the appeal. Consideration is, of course, a precondition to the enforcement of a contract and it is a matter for the plaintiff in seeking summary judgment to identify that consideration and to lay an evidential foundation for its claim by establishing it.

32. I note that in *O'Brien*, the plaintiff suggested to the Court that consideration comprising forbearance to sue could be implied or imputed without evidence. The Court declined to adjudicate upon that contention because it had not been raised in the High Court. Whatever about the merits of that argument where the forbearance involves desisting from suing to recover the underlying debt, I do not believe it could be said that such consideration could, based upon the evidence before this Court, be assumed where it took the form of desisting from enforcing the underlying security.

33. Accordingly I have concluded that this is a case in which the defendant should be allowed to defend the proceedings at a plenary hearing. I do not believe that this is a case in which the plaintiff acted unreasonably in either seeking judgment against the defendant or in defending this appeal and it is my provisional view that this is a case in which – subject to the right of either party to submit otherwise – it is appropriate that the costs of

this application and appeal should be costs in the cause (see *ACC Bank v. Hanrahan* [2014] IESC 40, [2014] 1 IR 1).

34. Therefore, I would allow this appeal and substitute for the Order of the High Court Judge an Order refusing the application for summary judgment and making in its stead an Order remitting this case to plenary hearing. The Order made by the High Court Judge granting the plaintiff its costs of the summary judgment application should be vacated, and it is my provisional view that an Order should be made that the costs of that application in the High Court and of this appeal should be costs in the cause. I would also propose directing the delivery of pleadings – the Statement of Claim by 5 pm on Monday September 7, any particulars on that to be raised within three weeks and replied to within three weeks, and the Defence to be delivered three weeks thereafter.

35. If either party wishes to submit that a different order should be made as to costs or as to delivery of pleading they must do so within ten days of the date of this judgment, accompanying their request with a submission not exceeding 1,500 words in length. In default of such a submission being received from either party within that period, an Order to the above effect shall issue.

36. In these circumstances, it is not necessary for the Court to adjudicate upon the defendant's application to amend his notice of appeal. As with any application rendered moot the default position is that no order for costs should be made in respect of it. That application will accordingly be dismissed, and no order made in respect of the costs thereof (subject, again, to the right of either party to submit otherwise within the timeframe I have identified.)

37. Haughton J. and Binchy J. agree with this judgment and the order I propose.