THE HIGH COURT

[2021] IEHC 360

[2017 No. 1637 S]

BETWEEN

CABOT FINANCIAL (IRELAND) LIMITED

PLAINTIFF

– AND –

BRIAN DUFFY AND DIANE DUFFY

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 14th April, 2021.

1. This is an application for summary judgment against Mr and Ms Duffy in respect of monies that Cabot Financial (Ireland) Ltd claim are owed to it as the purchaser of a portfolio of debts and related rights from the Ulster Bank Group. I conclude that summary judgment should not be granted and that this matter should proceed to plenary hearing subject to certain constraints.

2. Cabot is a limited liability company. Mr and Ms Duffy are business-people. In a facility letter of 5th November 2009 between Ulster Bank (Ireland) Ltd and AMT Properties Ltd, Ulster Bank/AMT agreed to lend/borrow close on €110,000. The facility letter provided for, amongst other matters, security in the form of a letter of guarantee from the Duffys. This requirement was treated as having been satisfied by a letter of guarantee which the Duffys executed on 21st December 2007, their liability under which is capped at €100,000.

3. AMT defaulted on its loan repayments and, on 26th June 2014, demand was made under the guarantee against Mr and Ms Duffy for €100,000. The sum demanded has gone unpaid. Cabot claims that, under a portfolio acquisition deed of 22nd January 2016, it is now the legal and beneficial owner of the debts and related rights established between Ulster Bank and the Duffys. Cabot claims summary judgment of €100,000 against Mr and Ms Duffy.

4. The Duffys maintain that Cabot is outside the six-year limitation period applicable to bringing its claim. It is not. The facility letter describes itself as concerned with a "*Demand Loan Facility*" and later states as follows:

> *"Full repayment of this facility to be made from sales proceeds of [Stated Property] within 12 months. If Facility has not been repaid within 12 months (i.e. by end July 2010), the position will be reviewed by the Bank with a view to commencing full Capital & Interest repayments".*

5. It is clear that what was agreed between Ulster Bank and AMT was a demand loan facility which, it was contemplated, would be repaid within a stated period. For some reason Ulster Bank refers to that stated period as being the eight-month period to end-July 2010 and also a 12-month period that would bring matters to November 2010. The court will give the benefit of the doubt to AMT and conclude that what was agreed was that the loan would be repaid within a year of the date of the facility letter. However, even if, at the end of that period, the full amount outstanding was not repaid, it was not a case of 'all

bets are off'. Rather, the position was then to be reviewed by Ulster Bank, with a view to commencing full capital and interest repayments. There is no proper way of reading the facility letter so as to arrive at the conclusion that it was a term loan. As of the date of demand, 25th June 2014, the on-demand loan (for such it is) continued to subsist between the parties and demand was made. The present proceedings were commenced by summary summons of 21st August 2017. So the proceedings were brought years within time.

6. The Duffys contend that the guarantee of 21st December 2007 falls to be viewed as past consideration. However, the guarantee states that it extends, amongst other matters to "*All…liabilities of the debtor to the bank (whether…**present or future** …)"* (Emphasis added). The guarantee clearly captures present or future obligations and liabilities of AMT to Ulster Bank, including the liabilities now claimed. There is no past consideration problem presenting.

7. The Duffys challenge the entitlement of Cabot to bring the within proceedings. The court concludes below that Cabot has not established on the balance of probabilities that it is entitled to bring the within proceedings. Before commencing its analysis, the court pauses briefly to reject respectfully the proposition made by Cabot that one indicator that it is entitled to bring the within proceedings is that when its solicitors wrote to the Duffys on 28th February 2018, indicating that Cabot had acquired the AMT loan, the Duffys did not write back and say, in effect, 'Cabot who? Our liabilities sit with Ulster Bank'. In life, a person is either my creditor or he is not. No-one can transform himself into my creditor simply by sending me a letter asserting that he is my creditor and pointing to a want of a challenge by reply post as supportive of that assertion. It is perfectly open to a supposed debtor to ignore such assertions and then plead in a later law-suit that he is not a debtor of the party suing, in effect requiring the putative creditor to prove its claimed standing.

8. Here Cabot has failed to establish on the balance of probabilities that it is the party entitled to bring the within proceedings. It has had a director of Cabot swear up an affidavit which so far as it purports to establish Cabot's entitlement to bring the within proceedings is comprised almost entirely, and to all relevant extents, of hearsay. Cabot sought to invoke in this regard Chapter 3 of Part 3 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, most especially s.14 thereof. Counsel for Mr and Ms Duffy pointed to a failure on Cabot's part to comply with the service requirements of s.15(1) of that Act. Those service requirements could, it is clear from s.15(1), be overcome with the leave of the court. Where Cabot, to use a colloquialism, 'comes a cropper' is under s.14(1) of the Act of 2020. Under that provision:

> *"Subject to this Chapter, information contained in a document shall be admissible in any civil proceedings as evidence of any fact in the document of which direct oral evidence would be admissible if the information…(b) was supplied by a person (whether or not he or she so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with".*

9. There is nothing in the admissible evidence before the court to show that the director of Cabot who swore up the affidavit of 15th June 2018 "*had or may reasonably be supposed to have had, personal knowledge of the matters dealt with"* in that affidavit, including the loan and ancillary rights transfer effected between the Ulster Bank Group and Cabot in January 2016 and, in particular, of the transfer of the AMT loan and any rights available to Ulster Bank under the guarantee of 21st December 2007.

10. In passing, Cabot sought to make play in its application of the fact that Ulster Bank has not come seeking the debts owing, so they must be debts owing to Cabot. It is a logical *non sequitur* to suggest that because debts have not been sought by Party A that necessarily points to them being owed by Party B.

11. Cabot urged on the court that if the court found a deficiency to present in its proofs, Cabot should be given an opportunity to mend its hand by way of further affidavit evidence. That possibility is rejected by the court for four reasons. First, this application was brought by Cabot and was its to win/lose. One cannot bring court applications, see how one fares, and then mend one's hand after judgment has issued so that one might fare better in the just-adjudged application. Second, there is good policy reason why the foregoing is so. Were matters otherwise the courts would quickly be presented (though the court does not suggest that it is here presented) with plaintiffs who were, to use a colloquialism, 'chancing their arm' to see how they might fare, mindful that if they fared reasonably well they would be allowed to mend their hand. Again, the court emphasises that it does not see that this is what is at play here, but still that policy concern presents. Third, what Cabot has, in effect, contended for is the invention of a hybrid form of proceeding that is neither a summary proceeding nor a plenary proceeding but a 'summary with bits on' form of proceeding that does not exist. Fourth, a plaintiff in summary proceedings is afforded the privilege of avoiding plenary proceedings where all its proofs are in order and it meets the legal threshold for success. That is a privilege which can only be won by a plaintiff having its proofs in order and showing that it meets the legal threshold for success. Here, Cabot has not done the necessary to win that privilege.

12. The hurdle to be surmounted by Mr and Ms Duffy as regards having this matter sent to plenary hearing is notably low. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, at p. 623:

> *"[T]he fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has 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?"*

12. For the reasons stated above, it is not very clear that, the defendant has no case, it is not the case that there is either no issue to be tried or only issues which are simple and easily determined, and it is not the case that the defendant's affidavits fail to disclose even an arguable defence.

13. Order 37(7) of the Rules of the Superior Courts provides that the court in sending a summary matter to plenary hearing "*generally may make such order for determination of the questions in issue in the action as may seem just*". In this, as McKechnie J. makes clear in *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1, a court must do that which best meets the justice of the situation. It seems to the court that when this matter goes to plenary hearing it is not necessary that the statute of limitations or past consideration points require to be addressed again.

PLAIN ENGLISH SUMMARY OF JUDGMENT

This is an application for summary judgment against Mr and Ms Duffy in respect of monies that Cabot Financial (Ireland) Ltd claims are owed to it as the purchaser of a portfolio of debts and related rights from the Ulster Bank Group. I do not accept that the application is time-barred. I accept that the guarantee of 21st December 2007 extends to the liabilities of AMT under the loan letter of 5th November 2009. I do not accept that Cabot has established on the balance of probabilities that it is entitled to bring these proceedings. I have decided to refuse the application for summary judgment and send this matter for full hearing. However, I have slightly limited the arguments that may be made (or will need to be met) at that hearing. This summary is a part of my judgment.