FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 17
CA105/19

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

PROMONTORIA (CHESTNUT) LIMITED

Pursuers and Respondents

against

THE FIRM OF BALLANTYNE PROPERTY SERVICES and others

Defenders and Reclaimers

Defenders and Reclaimers: GJ Walker QC, Tariq; MBM Commercial LLP
Pursuers and Respondents: Dean of Faculty (Dunlop QC), Welsh; Addleshaw Goddard LLP

18 February 2022

Introduction

[1] There are two methods of obtaining a decree for payment in a defended action without the necessity of hearing evidence. The conventional one is to table a plea to the relevancy of the defenders' averments and thereafter to persuade the court to sustain that plea in a debate on the Procedure Roll and to grant decree in terms of the conclusions of the

summons. The second is to enrol for a summary decree under RCS 21.2 on the ground that there is no defence to the action disclosed in the defences. This is usually sought well in advance of any hearing on the Procedure Roll; often soon after defences have been lodged. The motion for summary decree may, or may not, involve the sustaining of a plea, although it usually does.

[2] This case proceeded to a debate before the commercial judge on 11 December 2019 on the pursuers' first plea-in-law to the relevancy of the defences. At that debate, the pursuers also moved for summary decree. Although it is not entirely clear from the interlocutor of 26 May 2021, the commercial judge sustained the pursuers' plea to the relevancy of the defences. That would normally result in decree *de plano.* In this case, the judge instead granted summary decree; decerning against the defenders for payment to the pursuers of £1,758,544. This sum represents monies lent to the defenders and, admittedly, never repaid. The defenders maintain that they had, and have, a relevant defence whereby the Bank which had assigned the debt had agreed not to enforce the clauses in the loan facility letter in relation to the duration of the facilities (5 years) or the provisions for repayment on demand.

Facts

[3] The pursuers are in the business of acquiring and recovering debt. The defenders are a firm (and the partners thereof) which was established in 2005 as a buy-to-let property firm. It is admitted that, on 16 July 2007, the defenders entered into an agreement with the Clydesdale Bank for facilities to fund the purchase of new properties. This involved an initial overdraft facility of £2 million, interest only being debited, and then a 4 year loan, again interest only. According to the defenders, prior to agreeing to the terms of a facility

letter, they had emphasised to the Bank the long term nature of their requirements. The Bank had assured them that this coincided with their wish to be the defenders' long term funding partners.

[4] The parties discussed a draft of the facility letter, which had an express duration of 5 years. The defenders said that they required a 15-20 year term. The Bank's employee stated that:

> "the 5 year term was a standard clause and had to remain in the contract … [T]he clause would not be enforced at the end of the 5 year term …[T]he facility would be renewed at the end of the 5 year term …".

The defenders averred that the employee said that the Bank would never "pull in" their business loans. On the strength of this conversation, the defenders aver that the Bank had promised to "extend the facility at the end of the 5 year term" (Ans 2). The defenders accepted the terms of the facility letter in reliance of the promise. Otherwise, they would have obtained long term "mortgage financing" from a different lender. The facility was restructured and further facility letters agreed on various occasions between 2008 and 2011.

[5] The facility letters included, in bold, a caution that each was an important document on which legal advice should be obtained. The defenders had legal advice available to them. The letters all provided that:

> "3.1 All amounts outstanding … are repayable on demand. … The Bank may also, at any time, cancel all or any part of any Facility by notice to the Borrower.
>
> 3.2 Subject to clause 3.1, each Facility will be available until the expiry date for such Facility … when it will be cancelled in full unless the Bank has agreed in writing to extend or renew such Facility …
>
> …
>
> 10.2 … this letter will replace all previous letters, agreements or arrangements between the Bank and the Borrower in relation to the provision of the Facilities."

The defenders signed the facility letter.

[6] The facility was due to expire on 19 June 2012. No renewal was offered by the Bank. The defenders made partial repayments during 2013 but have made no repayments since December 2013. The interest was simply debited over time. No attempts to call up the loan were made.

[7] The Bank assigned its rights in the loan to the pursuers in November 2014. The pursuers issued demand letters to the defenders on 10 September 2015 seeking repayment.

[8] The pursuers raised this action for payment of the outstanding sums. The defenders disputed that the sums were presently due on the bases, *inter alia*, that: (1) the promise to renew the facility and the defenders' obligation to repay the debt were counterparts. The pursuers could not enforce the obligation to repay whilst the obligation to renew remained extant; (2) the pursuers were personally barred from enforcing the obligation as a result of the promise made by the Bank's employee.

The commercial judge's decision

[9] Taking the averments in the defences *pro veritate*, the commercial judge held that the defenders were not bound to fail to prove that the Bank had made them a promise that the facility would be renewed. However, all that the Bank's employee was averred to have said would not have bound the Bank to make an offer to renew the facility for more than 5 more years, as opposed to 15. It was possible that, if the defenders proved their averments, a reasonable person would consider that the promise was not an "arrangement" which was superseded by clause 10.2.

[10] The promise was not the counterpart of the defenders' repayment obligation. The latter obligation was the counterpart of the Bank's obligation to advance funds. It would be a startling outcome, which made no commercial sense, if the defenders' obligation to repay a

debt of £1.8 million could never be enforced because an offer to extend the facility by 5 years from 2012 had not been made. The defenders could not withhold performance of the repayment obligation in order to compel performance of the promise. The defenders might have claimed a right of retention in security of their claim for damages for the breach of promise, but they had not done so. It would not have been equitable to allow such retention, as the merits of the damages claim were uncertain and amounted to only a fraction of the repayment liability.

[11] The defenders' averments of personal bar were irrelevant. Even if it were established that the Bank's employee said what the defenders aver he had said, this was not a representation that, no matter what the circumstances, a demand for repayment would not be made before 2017.

Submissions

Defenders

[12] The defenders' averments of promise were suitable for inquiry. There were clear words which displayed an intention to create a legally binding engagement (*Regus (Maxim)* v *Bank of Scotland* 2013 SC 331, *Brits* v *Kilcoyne & Co* [2017] CSIH 47). This was a collateral promise similar to that in *Royal Bank of Scotland* v *Carlyle* 2015 SC (UKSC) 93. The defenders' averments should not be read strictly in a commercial case. It would be necessary to hear testimony on what the Bank's employee had said. The commercial judge erred in concluding that the defenders were unable to prove that the Bank had promised to renew the facility for at least 15 years. This error affected his finding that the defenders could not withhold performance of the repayment obligation in order to compel performance of the promise under the principle of mutuality retention. A reasonable person, having heard the

defenders' proof, might well conclude that the Bank had promised not to call up the facility for a period of 15 years unless the defenders were in default. For that same reason, the commercial judge erred in holding that the defenders' averments on personal bar were irrelevant.

[13] The commercial judge erred in concluding that the promise and the repayment obligation were not counterparts. The defenders offered to prove that they would not have contracted with the Bank at all, had it not been for the promise. The commercial judge rightly concluded that the promise and the facilities could be viewed as a package. In these circumstances, the obligations were one another's counterparts (*Macari* v *Celtic Football and Athletic Club* 1999 SC 628). It was accepted that the loan would be repayable in July 2022; less than 5 months hence. The commercial judge had correctly interpreted the effect of clause 10.2 in that the promise might not amount to an arrangement.

Pursuers

[14] The defenders had not pled a relevant case that the Bank had promised to renew the facility for at least 15 years. They would have had to have pled that there was an offer of successive renewals for 5 years within which time the debt could not be called up. There were no such averments. Taken at their highest, the defenders had averred only that there was a promise that the facility would be extended for another 5 years, ie until 2017. That was fatal to the defenders' case. Even if there was a renewal of any sort, the facility would still have been repayable on demand. Repayment had been demanded and had not been made.

[15] Not every obligation of one party in a contract was the counterpart of each and every obligation of the other party (*Bank of East Asia Ltd* v *Scottish Enterprise* 1997 SLT 1213 at 1217).

Although the mutual obligations under the contract were the Bank permitting the draw down of sums and the defenders repaying those sums upon expiry of the facility or on demand, this issue did not arise. If the promise were proved, the pursuers would be bound to renew the facility.

[16] The defenders did not aver that a promise was made whereby repayment would not be demanded. The only promise averred was to extend the facility term. The proper remedy for breach of such a promise was an action for damages. The defenders had already raised such an action. In any event, clause 10.2 meant that the promise, which must be regarded as an "arrangement", was superseded.

Decision

[17] Rule of Court 21.2 introduced the concept of a summary decree. This permits a pursuer to seek such a decree "on the ground that there is no defence to the action … disclosed in the defences". The wide scope of the rule is circumscribed by *Henderson* v *3052775 Nova Scotia* 2006 SC (HL) 85 which confines it (Lord Rodger at paras [19] and [35]) to cases in which the defender is, after a hypothetical proof, "bound to fail". On this approach, the highly implausible defence may well survive until proof.

[18] It is no doubt correct to say, as a generality, that a broad view should be taken to pleadings in a commercial action even if, as in this case, the pleading method used is expansive rather than abbreviated (cf Practice Note No. 6 of 2004 Commercial Actions paras 3(1) and 6(1)). It remains necessary for each party to give the other fair notice of the case to be advanced. The only promise which is averred is one to renew the facility at the end of the 5 year term. Even if the defenders were able to prove the promise, its effect would long since have expired. That in itself means that the defences are irrelevant and the

defence is bound to fail. On any view, after 16 July 2017, the pursuers were entitled to demand repayment in terms of clause 3.1. No element of personal bar could have survived beyond that date.

[19] The promise, or any collateral contract which flowed from its acceptance by the defenders, must be regarded either as an arrangement or an agreement in terms of clause 10.2. This clause provides in clear terms that any pre-existing arrangement or agreement is superseded by the terms of the facility letter. This is a complete answer to a defence based on events preceding the letter. This form of clause is intended to avoid precisely the type of argument such as the present. Especially in circumstances where the defenders had legal advice on the import of the facility letter, there is no reason not to enforce its terms (see Contract (Scotland) Act 1997, s 1(3)).

[20] Although there is no need to address the issue of mutuality of obligations, standing the defenders' concession on the effect of a proved promise, the court agrees broadly with the assessment of the commercial judge that the counterpart of the obligation to repay the loan, which is incumbent upon a borrower, is that of the lender to permit the drawdown of the capital and to permit its use for the agreed term. If there was a collateral promise or agreement not to call up the loan, a breach of that may sound in damages but could not bar recovery of the principal sum in due course.

[21] This loan facility of 5 years has now lasted for almost 15. Presumably, interest has continued to be debited to the defenders' account. Meantime, the defenders have been ingathering rents from the buy-to-let properties, which the facilities extended by the Bank have financed. The defenders have not paid any of the sums due for at least 8 years. Repayment was formally sought over 6 years ago. That should now be enforced.

[22] The reclaiming motion is refused. The court will adhere to the commercial judge's interlocutor of 26 May 2021.