[2018] IEHC 825

THE HIGH COURT

Record No. 2016/838S

BETWEEN

DANSKE BANK A/S (TRADING AS DANSKE BANK)

PLAINTIFF

AND

MICHAEL DANIELS, HAROLD (OTHERWISE HARRY) ROGERS,

MAURA DANIELS AND TONY CANTWELL

DEFENDANTS

JUDGMENT of Mr. Justice Hunt delivered on the 23rd day of March, 2018

1. This is a summary judgment application by the plaintiff against the fourth- named defendant, Tony Cantwell. The claim is on foot of a guarantee executed by him in favour of the plaintiff on 1st August, 2006, which was limited to the sum of €700,000, and given in respect of banking facilities and advances in favour of Adelphi Distributors Limited ("*the company*"). Mr. Gerry McGovern provided the grounding affidavit and a replying affidavit on behalf of the plaintiff. Mr. Michael Crowley also provided a replying affidavit. Mr. Cantwell provided two replying affidavits.

2. The essential facts of the matter are not in issue. Mr. Cantwell does not deny that the company entered into the four facilities set out in the summary summons, or that the company drew down the various amounts set out in respect of these facilities, or that it subsequently failed to repay the loan monies in question. Therefore, there is no dispute about the company's debt which is the sum now claimed by the plaintiff from Mr. Cantwell on foot of his guarantee, which he does not dispute signing in favour of the bank on 1st August, 2006, as security for the debts of the company. In this regard, he also concedes that he separately initialled the monetary amount of the guarantee on the second page thereof.

3. In summary, Mr. Cantwell puts forward the following defences:-

(i) He received no benefit from the loan facilities, and any guarantee was not supported by any true consideration.

(ii) Any consideration was past consideration.

(iii) He did not receive any independent legal advice.

(iv) He was not allowed an opportunity to obtain independent legal advice.

(v) Untrue representations were made to him as to the effect of the guarantee.

(vi) Pressure was put upon him to sign the guarantee, amounting to duress, whether economic or otherwise.

(vii) In all the circumstances, the guarantee represented an unconscionable bargain which is unenforceable in equity.

(viii) The provisions of the Statute of Limitations applied so as to bar the claim. (This was asserted in argument, but not in the written submissions).

4. The principles applicable to an application of this type have been set out many times and I do not propose to repeat them in detail in this case. It is sufficient to refer to the formulation adopted by the late Hardiman J. in *Aer Rianta CPT v. Ryanair Limited* (No. 1) [2001] 4 I.R. 607 where he held, at page 623, that the test to be applied on an application for summary judgment involved the court asking itself the answer to one simple question, which he framed in the following terms:

> *"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?"*

5. The observations of the Court of Appeal in *Close Invoice Finance Limited v. Matthews* [2015] IECA 132 are also relevant. The Court of Appeal emphasised that the mere assertion in an affidavit of a given situation which is to form the basis of an intended defence does not of itself constitute a ground for granting leave to defend. Whether or not there is a fair and reasonable probability of the defendant having a real or *bona fide* defence has to be ascertained by looking at the situation as a whole, and assertions must be supported by some meaningful evidence such that a court could conclude that there is a fair or reasonable probability that the defendant has a *bona fide* defence based upon such assertions.

6. The defence posited on the basis of the absence or insufficiency of consideration for the guarantee is not made out. The position is that the first monetary facility was in place and drawn down before the execution of the guarantee. Further facilities were accepted and drawn down subsequent to that date. It is clear from the guarantee that the consideration for the guarantee was the bank "*from time to time making or continuing advances or otherwise giving credit or affording banking facilities for as long as the bank may think fit to (the company)"*. In *Northern Bank Limited t/a Danske Bank v. Quinn* [2014] IEHC 310, Hedigan J. held that this is good and valuable consideration, stating as follows at para. 8 of his judgment:-

> *"As the guarantee itself recites at its beginning, the consideration advanced by the plaintiff was the making or continuing of advances or otherwise giving credit or affording banking facilities. This is good and valuable consideration."*

7. I am also satisfied that there is no merit in the defences raised concerning the absence of legal advice. As far as I can ascertain from the affidavits, Mr. Cantwell was the financial controller of the company at the time when he executed the guarantee, and had

held this position for some time previously. He was subsequently appointed as a director and the secretary of the company. It also appears that he has significant financial qualifications and experience. It is unfortunate that his affidavits do not provide anything approaching a full account of these qualifications, experience or the history of his employment and office holder with the company.

8. In the *Quinn* case referred to above, Hedigan J. stated as follows:-

> *"The defendants suffer from no disability or infirmity and are adults. Even if they did not have independent legal advice, that does not provide even an arguable defence, see AIB v. McKenna, Birmingham J. 12th March, 2014, citing with approval at para. 9 the judgment of Harmon J. in O'Hara v. AIB [1985] BSCLC at p. 52."*

9. I am satisfied that a person of the position and experience of Mr. Cantwell as of the date of signature of this guarantee did not require independent legal advice as to either the general nature or the contents of the document that he signed on that day. The main assertion made by Mr. Cantwell in this respect is that his signature was procured on a date upon which the company's solicitor was away on holidays. If there was a genuine concern as to the absence of legal advice, one might have expected to see consultation with or correspondence from the company's solicitor when he returned from holidays. I am satisfied that there is no meaningful evidence to back up any concern as to the absence of independent legal advice in or about the signature of this document.

10. The next matter relied upon by Mr. Cantwell by way of defence is that he was put under pressure to sign the guarantee sufficient to constitute duress, and that the guarantee thereby represents an unconscionable bargain. Once again, I do not see that these assertions are backed up by any meaningful evidence indicating a fair or reasonable probability of a defence arising in this regard. I refer once more to Mr. Cantwell's position as the financial controller of the company at the time, which must, of necessity, have put him in frequent contact with the plaintiff as the company bankers, and equipped him with a good working knowledge of the financial position and requirements of the company at the time. It seems to me that the situation is that the plaintiff required further guarantees to underpin the future requirements of the company for finance, having regard to the existence of indebtedness at that time. This situation does not fall within the type of duress that is constituted of unlawful or improper commercial pressure.

11. The next defence relied upon by Mr. Cantwell is that the guarantee was procured on foot of reliance upon representations that were made to him by bank officials as to the effect of the guarantee. In this regard, he states that he was assured by Mr. Crowley that "*there was nothing to worry about*" and that the guarantee was a "*mere formality*". Insofar as Mr. Cantwell raises the defence of *non est factum*, I am satisfied that this defence does not arise by reference to the contents of the affidavits. I refer to the summary of the law in this respect by McDermott J. in *Danske Bank A/S v. Connotes Limited & McElvaney* [2016] IEHC 183, where he stated as follows:-

> *"The first point raised is that of non est factum. Three conditions need to be satisfied in order that this defence be successfully raised. Firstly, there must be a radical or fundamental difference between what the defendant signed and what he thought he was signing. Secondly, this mistake must be as to the general character of the document as opposed to its legal effect. Thirdly, there must be a lack of negligence i.e. the defendant must have taken all reasonable precautions in the circumstances to discover what the document was."*

12. I have no doubt but that Mr. Cantwell signed a contract of guarantee, and that he knew exactly the nature of the document when he signed it. I am satisfied that there is nothing in the affidavits which gives rise to a fair or reasonable probability that this defence is open to Mr. Cantwell. The fact that he specifically signed or initialled the precise monetary limit of the said guarantee is also of significance in this respect.

13. The main area of concern in this case is the assertion that, in effect, Mr. Crowley assured Mr. Cantwell prior to signature that execution of the guarantee was a formality required by the bank which would never be subsequently enforced. In the ordinary course of events, I would treat such assertions with a considerable degree of scepticism. However, in this case, there are two evidential reasons to believe that the bare assertions are backed by a fair or reasonable probability that Mr. Cantwell has a statable defence to the effect that the guarantee was procured by such misrepresentations.

14. Firstly, as was identified by Mr. Counihan, S.C. in his oral argument, neither of the plaintiff's deponents deals specifically with this assertion. In particular, the affidavit of Mr. Crowley alludes to Mr. Cantwell's assertions in this respect, but does not specifically deny that such things were said at the time. Secondly, and perhaps more significantly, there is extrinsic evidence to support an argument that the plaintiff never intended, in fact, to rely upon the guarantee in question. From the documents exhibits in the affidavit evidence, it appears that three facility arrangements were entered into between the plaintiff and the company subsequent to the execution of the guarantee in question.

15. The first of these was a loan facility accepted by the company on 10th January, 2007, in circumstances where the acceptance was co-signed by Mr. Cantwell. Two further facilities were offered and accepted by the company on 27th June, 2008. Mr. Cantwell did not signify acceptance of these facilities on behalf of the company, for the apparent reason that he had ceased to have involvement with the company in March of that year. The relevant and significant feature of each of these three facility letters is that they stipulate that part of the security for each of these advances was the existing guarantees executed by Mr. Harry Rogers, Mr. Michael Daniels Senior and Ms. Maura Daniels. None of the facility letters makes any reference to reliance upon the guarantee previously executed by Mr. Cantwell.

16. In these circumstances, I am satisfied that there is sufficient evidence to support a fair and reasonable probability that Mr. Cantwell has a defence based on the assertion that the guarantee was procured by misrepresentation. I am satisfied that the evidence of an absence of express reliance upon his guarantee in connection with subsequent advances is capable of supporting his assertions in this respect.

17. Having regard to the low threshold to be established by the defendant in meeting the test for remittal of the dispute for plenary hearing, I am satisfied that on the facts so far disclosed in relation to this case, and having regard to the issues which have been canvassed, that this is not an appropriate case in which to give summary judgment. It is my view that it cannot be said that the point raised by Mr. Counihan S.C. on the misrepresentation point is not at least arguable. This suggested ground of defence is not a mere assertion, and neither can it be concluded that it is very clear that there is no such defence.

18. So far as the Statute of Limitation point is concerned, this may also be arguable, having regard to the timeline of events referred to above. In this respect, the case of *Parr's Banking Company Ltd v. Yates* [1898] 2 Q.B. 460 at 464 may be relevant. This case was considered recently by MacGrath J. in the context of a similar application in *Stapleford Finance D.A.C. v. McEvoy & Butler* [2018] IEHC 99. As this argument was raised at a late stage, and as I am refusing the application for summary judgment on other grounds, I do

not propose to elaborate on this aspect of the matter.

19. I therefore refuse the application for summary judgment and direct that the matter be remitted to plenary hearing.