Neutral Citation Number [2006] IEHC 309

THE HIGH COURT
DUBLIN

2005/1152S

ADM LONDIS PLC.

PLAINTIFFS

ARMAN RETAIL LTD., AZAZ ARMAN & MARY

DEFENDANTS

ARMAN (NEE McEVOY)

Approved Judgment of Mr. Justice Clarke delivered on Wednesday, 12th July 2006 The hearing resumed as follows on Wednesday, 12th July Judgment was delivered as follows

1. Mr. Justice Clarke: This matter comes before the court as an application for summary judgment as against the second and third-named Defendants on foot of guarantees relating to the liability of the first named Defendant.

2. The second and third-named Defendants were the proprietors of the first named Defendant company and judgment has already been obtained in relation to the first named Defendant company which, it is agreed, is insolvent, in the full sum claimed of €162,110.37. The liabilities arise from a course of trading between the Plaintiff and the first named Defendant company, which ran a retail outlet under the Londis banner in respect of which goods were supplied. The liability having been established as against the first named Defendant, the Plaintiff seeks judgment as against the second and third-named Defendants on foot of a guarantee.

3. Five separate issues are raised by the Defendants as suggesting that there are substantial grounds for defending the proceedings which should, it is said, allow the matter to go to plenary hearing. I will turn to those matters in early course, but it is necessary, firstly, to refer to the legal principles by reference to which an application such as this needs to be determined.

4. Firstly, it is well settled that the hurdle which a Defendant needs to meet in order to be given leave to defend is not a very high hurdle. The most recent decision of the Supreme Court is to be found in *Aer Rianta -v- Ryanair*, 2001, 4 IR 607 and the judgment of Hardiman J. in that case. In the recent case of *McGrath -v- O'Driscoll* (2006) IEHC, 195 I considered the judgment of the Supreme Court in *Aer Rianta -v-Ryanair* and other authority and expressed the following views at paragraphs 3.4 and 3.5:

> "So far as factual issues are concerned it is clear, therefore, that a mere assertion of a Defence is insufficient. But any evidence of fact which would, if true, arguably give rise to a Defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved.
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> So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions, including, where appropriate, questions of the construction of documents, but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

5. It seems to me that that is the appropriate test that I need to apply to the issues of defence raised. Can it be shown, insofar as the Defences raised are based on facts, that the Defendant has put forward facts which, if true, might arguably give rise to a Defence? And insofar as issues of law or construction are concerned, are those issues straightforward and capable of resolution on a motion such as this or are they complex and should await a full plenary hearing?

6. Five specific matters are relied upon by the Defendants. I propose dealing with each in turn. The first Defence put forward is a Defence of *non est factum*. The factual basis for such a Defence is a contention on the part of the Defendants that they were unaware of the contents of the guarantee, having signed a series of documents at the time when the contractual relations between the Plaintiffs and the various Defendants were entered into.

7. The law in relation to a Defence of *non est factum* is now, in my view, well settled and is to be found in *Tedcastle McCormack & Co Ltd -v- McCrystal*, a judgment of Morris J. of 15th March 1999 in which, relying on *Saunders -v- Anglia Building Society*, 1971 AC 1,004, itis stated that the following factual matters require to be established in order that the Defence be proven:

> A. That there was a radical or fundamental difference between what was signed and what it was thought was being signed.
>
> B. That the mistake was as to the general character of the document as opposed to its legal effect.
>
> C. That there was a lack of negligence. That is, that the person concerned took all reasonable precautions in the circumstances to find out what the document was.

8. On the facts of this case it is manifestly clear that the Defendants signed a document which is clearly, on its face, a guarantee. In those circumstances, even a cursory reading of the document would have brought to the Defendants' attention the fact that they were signing a guarantee. In those circumstances, it seems to me that the Defendants could not be said to have established any Defence under the *non est factum* doctrine. On that basis, it does not seem to me that that ground gives rise to any possible Defence or should lead to liberty to defend.

9. A second ground relied upon stems from a change in the legal nature of the Plaintiff company. However, I am satisfied that no change that has occurred is such as would give rise to any disentitlement to the now Plaintiff to pursue claims in respect of contracts and guarantees entered into by the same entity in its previous manifestation. In those circumstances, I am not satisfied that that issue gives rise to a Defence.

10. I will pass for a moment from the third ground, which concerns a potential counterclaim, as that is the issue which gives rise, in my view, to the greatest difficulty in this case.

11. Fourthly, certain specific items which question the amount of the principal liability are raised. It seems to me that it is reasonable to take the view on the evidence that the Defendants have established a potential Defence to the extent of the sum of €12,000 under those items. In those circumstances, it seems to me the Defendant is entitled to liberty to defend so far as €12,000 is concerned under those headings.

12. The fifth issue concerns the fact that there is undoubtedly in place a form of second guarantee through a financial institution

which might lead to an independent means (separate from these proceedings) of the Plaintiff recovering some of its liabilities which, in turn, might lead to liabilities being placed indirectly upon the second and third-named Defendant.

13. However, it seems to me that the fact that there may be a different basis upon which the Plaintiff might also recover the same sum of money does not disentitle the Plaintiff in principle to recovery against the Defendants if it is otherwise appropriate that the Plaintiff should so recover.

14. It is frequently the case that in appropriate circumstances the court grants judgment jointly and severally against two individuals. It is axiomatic in such circumstances that a Plaintiff cannot recover the full sum against both Defendants and it equally follows, therefore, that to the extent that the Plaintiff may recover against one Defendant in those circumstances, it is precluded from executing as against the other Defendant for a sum which would amount to double recovery.

15. But that fact does not prevent the Plaintiff from getting judgment against both Defendants jointly and severally for the full sum. By analogy, it seems to me, that the fact that the fact that the Plaintiff may have the ability to recover some of these monies from another source does not prevent the Plaintiff from being entitled to also obtain judgment against these Defendants. It is clearly the case that, to the extent that the Plaintiff may actually recover the same monies by some other route, it would be precluded from issuing execution as against these Defendants for the relevant sums.

16. Therefore, so far as those four matters are concerned, the only matter of defence which, it seems to me, has been established is a Defence to the extent of €12,000 in relation to the calculation of the principal sum due.

17. The final matter which arises is a contended for counterclaim. The circumstances surrounding the counterclaim are difficult from two points of view; firstly, there is a legal issue as to whether it is open to a surety such as the second and third-named Defendants to rely upon a counterclaim which, of course, is not their own claim but would be a claim which the principal debtor, the first named Defendant, would, if it be a good claim, have been entitled to maintain as against the Plaintiff.

18. I have been referred to limited United Kingdom and more detailed Australian authority on the issue. I have come to the view that the issue concerned raises important and difficult questions of law which, in the terms which I used in *McGrath -v- O'Driscoll*, are not capable of resolution on a motion for judgment without there being a real risk of an injustice. Therefore, for the purposes of this application I am prepared to accept that it is arguable that a surety is entitled to rely, at least in some circumstances, upon a counterclaim which might have been available to the principal debtor.

19. In particular, it seems to me that such an argument arises in circumstances where the counterclaim, if it had been pursued by the principal debtor, might have amounted to a Defence by way of set off in equity under the principles identified by the Supreme Court in *Prendergast -v- Biddel*, an unreported judgment of 31st July 1957, which establishes that where a counterclaim arises out of event which are closely connected to those giving rise to the amount claimed on foot of a summary application, the counterclaim can amount to a Defence in addition to being a counterclaim so as to justify the entinguishment in whole or in part of the claim.

20. That the counterclaim arises out of a closely connected series of transactions involving the business between the Plaintiff and the first named Defendant company is more than arguable. However, a number of other matters arise.

21. The two particular difficulties that arise are, firstly, that there appears to be evidence to suggest that the franchise agreement which, it is alleged, was breached and the breach of which, it is suggested, gives rise to the counterclaim seems to be with a different company within the group operating under the Londis banner. It may well be that that will cause difficulties for the Defendants in establishing that there is a sufficient counterclaim maintainable against the Plaintiff to extinguish the Plaintiff's claim in whole or in part so as to lead to the second and third-named Defendants escaping from liability.

22. However, I am not at this stage persuaded that that matter is clear. Firstly, it is arguable that where a group of companies choose to do their business in a manner whereby one company within the group sells products on foot of an arrangement and on foot of the same arrangement another company within the group enters into other commitments, that there is a sufficient connection between the set of contractual arrangements entered into so as to give rise to collateral obligations.

23. I should emphasise that I am by no means deciding that that is so, but merely indicating that there is an argument to that effect. In those circumstances, while undoubtedly the court at a plenary hearing would be required to deal with that difficult question, I am not prepared to hold that the Defendants could not succeed in persuading the court that some form of collateral arrangement must be impliedly taken to exist which would entitle them to rely on any breaches which they could establish of the franchise agreement to extinguish in whole or in part the claim of the Plaintiff in these proceedings.

24. The second matter concerns the fact that very limited evidence has been placed before the court to establish the possible quantum of any counterclaim that might be pursued. It is clear on the evidence of the second named Defendant that the underlying cause of the difficulties encountered by the business was the establishment of a competing outlet in very close proximity to that being operated by the first named Defendant.

25. In those circumstances, it does not seem to me to be credible to suggest that the entirety of the difficulties encountered by the first named Defendant could be attributable to wrongful actions on the part of the Plaintiffs or companies connected with the Plaintiffs.

26. The Defendants have not put forward any detailed evidence from which the court could reach a conclusion as to the highwater mark of any counterclaim that might be maintained. However, I am mindful of the fact that the only proceedings in which it would be open to the second and third-named Defendants to raise these issues are these proceedings. They clearly would not be able to maintain an independent counterclaim, not being the party who suffered damage, that party being the first named Defendant.

27. In those circumstances, notwithstanding the fact that there is no clear evidence as to the precise amount of the counterclaim that might, on a best case scenario from the Defendant's point of view, be established, it seems to me that the justice of this case would be met by making an approximate estimation of the extent to which a counterclaim might arise.

28. For the reasons which I have outlined, the claim is for €162,000 and there is an admitted arguable Defence so far as individual items are concerned of €12,000. That would leave a balance of €150,000. In the circumstances, it does not seem to me that even at its most optimistic, from the Defendant's point of view, the counterclaim could amount to more than 50% of that sum.

29. In those circumstances, I would propose giving judgment to the Plaintiff against the second and third-named Defendants in a sum

of €75,000 and giving the second and third-named Defendants liberty to defend, including defend by way of counterclaim, in respect of the balance.

30. THE JUDGMENT WAS CONCLUDED.