Neutral Citation Number: [2011] IEHC 234

THE HIGH COURT

COMMERCIAL

2010 1491 P

BETWEEN

DANSKE BANK A/S

PLAINTIFF

AND

SÉAMUS COYNE

DEFENDANT

Judgment of Mr. Justice Charleton delivered on the 25th day of May 2011

1. At issue here is whether a guarantee dated 9th April 2008 is enforceable. That guarantee was entered into as security in respect of a primary liability for substantial borrowings by T.C. Coyne Limited. The defence is that the guarantee is unreliable because it was signed at a disputed time and in disputed circumstances; that it is expressed to be operative in respect of National Irish Bank Limited, an entity which did not then exist; and that its terms are not operative over the liabilities of the principal debtor.

2. As with many similar cases, the guarantee was entered into against primary liability stretching back some years. The details of this are not relevant. It suffices to record that an earlier loan to the primary debtor with limited security was superseded by a loan of €4 million dated 19th December 2006. The security for that loan was adjusted for later loans to include a guarantee from the defendant. That first form of guarantee, relevant for historical purposes only, was signed on 8th January 2007 by Séamus Coyne and was witnessed. It was made out in favour of National Irish Bank Limited. The cover sheet contains a later note date 9th April 2008 indicating that it was replaced.

3. I take nothing from the matrix of documents within which the contract of guarantee in dispute was formed apart from the obvious fact that the bank was determined to have a guarantee to support its loan. I do not need to proceed further into the background.

4. On 2nd April 2008, the principal debtor, T.C. Coyne Limited, was loaned €8.15 million based upon security expressed as a floating charge over the assets and undertakings of T.C. Coyne Limited and a letter of guarantee for €8 million from Séamus Coyne, the defendant herein, supported by legal mortgages over development sites in Mullingar and Killucan, County Westmeath and the sale proceeds of seven residential units in Dromod, County Leitrim. The letter to the directors of T.C. Coyne Limited on 2nd April 2008 states that the security is to be:-

> "Any security now held or at any future time shall be security for all the borrower's liabilities to the bank (actual or contingent) and whether as principal or surety. If this guarantee secures this credit facility, the Consumer Protection Code or future statutory requirements may require us to inform the guarantor about the facility and about any future change in the terms of this agreement. As a result, it is a condition of this agreement that the borrower can consent to this."

5. On 9th April 2008 a form of guarantee was entered into by the defendant in order to fulfil a condition of the proposed loan to the principal debtor. This is where the issues in this case have their origin. This guarantee was drafted by Mr. Declan Cox, the relevant bank manager, from an old template. The document was drawn up by him from a word-processing package containing precedents of documents on his personal computer. By that stage, the name of the bank for which Mr. Cox works had undergone a change. The limited liability indication had been dropped. By later changes, the plaintiff herein, Danske Bank A/S, became the successor in title to the rights and liabilities of National Irish Bank. At all times, however, it was either the same entity or was an entity that had lawfully succeeded to the rights and liabilities of that entity. The drafting of the guarantee by Mr. Cox from an old template is, in essence, the defence to these proceedings. By way of complication, a further issue arose as to when, where, and in the presence of whom, the guarantee was signed. Mr. Cox said that it was signed in his office on 9th April 2008. A conflict on the evidence has arisen: the defence case is that it was signed on 21st July 2008.

6. A great portion of the hearing was devoted to this issue as to when the guarantee was entered into, and in what circumstances, with whom present and at what location. The terms of the guarantee, if enforceable, make it clear that it effects the security for personal repayment by the defendant in respect of any sums of money which were as of the date of the guarantee, or which would at any time in the future become, owing to the bank from T.C. Coyne Limited. Another issue was whether or not the defendant intended to contract with the predecessor in title to the plaintiff (i.e. National Irish Bank). The commendably honest evidence of the defendant did not establish any contrary case in law that he did not intend to contract with the predecessor in title to the plaintiff. His evidence was to the effect that he did not know why he signed the guarantee. His evidence did not establish and, in the circumstances outlined in his evidence, could not establish that in entering into the guarantee he was intending to contract with an entity different to National Irish Bank. Even were it to the contrary, the absence of any other entity with whom he might genuinely have thought he was contracting limits the prospect of this defence succeeding.

7. I now turn to the relevant contract. The operative clause of the guarantee reads as follows:-

> "In consideration of National Irish Bank Limited (hereinafter called the "Bank") from time to time making or continuing advances or otherwise giving credit or affording banking facilities or granting time for as long as the bank may think fit to T.C. Coyne Limited of Milltownpass, County Westmeath (hereinafter called "the principal") I the undersigned Séamus Coyle hereby agree to pay and satisfy to the bank on demand all and every sum and sums of money which are now or shall at any time be owing to the bank anywhere on any account whatsoever whether from the principal solely or from the principal jointly with any other person or persons or from any firm in which the principal may be a creditor, including the

> amount of notes or bills discounted or paid and other loan credits or advances made to or for the accommodation whereat the request either of the principals solely or jointly or if any such firm as aforesaid or for any monies for which the principal may be liable as surety or in any other way whatsoever together with in all the cases aforesaid. All interest discount and other banker's charges including legal charges occasioned by or incidental to this or any other security held by or offered to the bank for the same indebtedness or to the enforcement of any such security. Provided always the total liability ultimately enforceable against me under this guarantee shall not exceed the sum of EUR€8,000,000 (€8M) together with interest thereon (as well as after as before any judgment) from the date of demand by the bank upon me for payment…"

8. The borrowings of the principal debtor were made against a background of loans for property development in the way that I have touched on earlier.

9. National Irish Bank Limited, the party to whom the guarantee was given, had by that date ceased as a trading name for the plaintiff. Going back to the 2006 documents, it was then the appropriate name in respect of the advance of monies accepted by T. C. Coyne Limited, the principal debtor, and the later guarantee entered into by the defendant. By the time of this document, unwisely called up for word-processing by Mr. Cox and never altered, the change of name which I have noted had been effected. I am satisfied that this change of name has been properly proven. I am satisfied that it is beyond doubt that the relevant entity under the new name is the predecessor in title to the plaintiff in these proceedings. At a later stage in the events with which the Court was concerned, another form of document was drawn up by Mr. Cox for the plaintiff, with the correct party to whom the guarantee applied accurately stated therein, in the hope that the defendant might sign it. That never happened as the defendant, understandably in human terms, declined.

10. By letter dated 27th October 2009, on National Irish Bank headed notepaper, the nature of the error was explained to the defendant in the following terms:-

> "In accordance with the requirements of the April 2008 facility letter, the guarantee letter, of 9th April 2008… provided by you provides for payment by you, on demand, of all sums owing by T.C. Coyne Limited up to the limit of €8M plus interest from the date of demand. It is the intention of the bank to shortly issue a demand for this sum, the exact amount of which will be set out in that demand letter. However it has come to the attention of the bank that the guarantee letter was addressed, in error, to "National Irish Bank Limited" as opposed to "National Irish Bank", which is and was at the time the trading name of the bank. We thought it preferable to address this matter in advance of issuing a demand on the guarantee and do so below. By virtue of the addition of the word "limited" to the bank's name, the obligations undertaken by you by way of guarantee to the bank in respect of the liabilities of T.C. Coyne Limited to the bank were recorded in the guarantee letter as being undertaken by reference to "National Irish Bank Limited". This is clearly an error in that the guarantee was required under the April 2008 facility letter to put in place for the benefit of the bank to secure the amounts to be advanced by the bank to T.C. Coyne Limited. Satisfactory completion of the guarantee was, among other things, made a precondition to draw down at the loan by Clause 12 of the facility letter, which was accepted by you on behalf of T.C. Coyne Limited. In the circumstances it was the common intention of the parties that you would give the guarantee to the bank to secure the loan for T.C. Coyne Limited. Further, at the date of the guarantee letter, there was no commercial entity known as National Irish Bank Limited, the company formally of that name, having changed its name to Nibdan Limited. In addition, no credit facility had been, at the date of the guarantee, advanced by Nibdan Limited and none such was anticipated. In these circumstances a guarantee in favour of Nibdan Limited was only not indicated in the terms of the guarantee itself, but would have made no commercial sense whatsoever. Having regard to the circumstances in which the guarantee was granted, the identity of the provider of the loan facility which comprised the consideration for the guarantee and indeed to the fact that the only entity in Ireland, having the right to do business under the name "National Irish Bank" at the date of the guarantee was the bank, it is the position of the bank that the only reasonable way to construe the guarantee letter is that it was indeed given, as intended, to "National Irish Bank", the then Irish registered trading name of Danske Bank A/S and to that the addition of the word "Limited was simple error."

11. All of the above has been sufficiently proven in evidence. By formal demand made on 24th November 2009 on the defendant, repayment under the guarantee was sought. The up to date figure is not disputed as between the parties and will be mentioned at the end of this judgment.

12. The pleadings for the plaintiff include a statement of claim which asserts that it was the common intention of National Irish Bank and the defendant that the guarantee was to be given by the defendant to and for the benefit of the bank in order to secure the loan offered under the terms of the facility letter by the bank to the principal debtor. It is pleaded that the designation "National Irish Bank Limited" in the guarantee, as the beneficiary of the defendant's obligations thereunder, was a mistake which did not give effect to the common intention of the parties in respect of the guarantee to be given. The enforcement of the guarantee is therefore sought by the plaintiff on the basis that the parties to the contract should be kept to their bargain, and that it is not necessary to effect any change to the written instrument in order to enforce it. In the alternative, rectification of the document to effect the intention of the parties is sought. In the defence, it is denied that the common intention of National Irish Bank and the defendant was that a guarantee was to be given by the defendant to the bank. It is further denied that an error occurred giving effect to the alleged common intention of the parties to the contract in the manner pleaded in the statement of claim. Further, it is pleaded that the lands held by deed of mortgage to the bank, the subject of the loan, were secured by that mortgage and, in the absence of a proper guarantee, by nothing else.

13. The proper approach to the construction of a written contract is set out in *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R 274. This contract of guarantee is no different. The meaning of the guarantee is the sense which reasonable persons would give to it by construing it against the relevant background of fact which led to it being agreed. By enforcing the guarantee, the Court would not be entitled to attribute to the parties an intention which they could not have held as evidenced from its written terms. The precise circumstances of negotiation of a written document are, in the ordinary course, irrelevant. The Court is entitled, in construing a written contract, however, to see it in the context which led the parties to draw it up as an agreement. In the context of inheritance, this is sometimes described as the judge placing himself or herself in the testator's armchair at the time of the drafting of the will ("the armchair principle"): see generally *National Tourism Development Authority v. Coughlan* [2009] 3 I.R 549 referring to O'Connell v. Bank of Ireland [1998] 2 I.R. 596. The matrix of fact against which a contract is entered into is relevant because such evidence requires the Court to be informed as to the background knowledge which was as a matter of fact, and not which merely could have been, available to the parties as reasonable people in entering into the contract.

14. In *Moorview Developments Limited v. First Active Plc*. [2010] IEHC 275, (Unreported, High Court, Clarke J., 9th July, 2010) an issue arose as to whether a guarantee made to Moorview Properties Ltd. should be enforced as if is was made to Moorview Developments Ltd. Moorview Properties Ltd. did not, as a matter of fact, exist and never had existed. Commenting on the evidence,

Clarke J. found that it was inconceivable that there could have been any other intention of the parties but that the liabilities of the principal debtor were to be guaranteed by Moorview Developments Ltd. This approach to the construction of a contract, with a view to its enforcement, does not require that the contract should first be subjected to rectification. At paras 3.5 to 3.6, Clarke J. stated:-

> "3.5 This aspect of the case concerns what has, in some of the case law, (see for example *East v. Pantiles (Plant Hire) Ltd* (1981) 263 E.G. 61) been described as "correction of mistakes by construction". As is clear from East and from the speech of Lord Hoffman in *Investors Compensation Scheme Ltd v. Bromwich Building Society* [1998] 1 W.L.R. 896, two conditions must be satisfied in order for such a correction to occur. First, there must be a clear mistake. Second, it must be clear what the correction ought to be.
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> 3.6 It is also clear from the speech of Lord Hoffman in *Investors Compensation* that a correction of the type with which I am concerned is not a separate branch of the law, but rather an application of the general principle that contractual documents should be construed according to their text but in their context. That context may make it clear that the words used in the text are a mistake. Thus, a reasonable and informed person may conclude that the words used are an obvious mistake and may also be able to conclude what words ought to have been used. In those circumstances, as a matter of construction, the court will, as it were, construe the contract as if it had been corrected for the obvious mistake. The reason for so construing the contract in that way is that the proper principles for the construction of contracts lead to that construction in any event. I am satisfied that those cases, most recently restated by the House of Lords in *Chartbrook v. Persimmon Homes Ltd* [2009] 1 A.C. 1101, represent the law in this jurisdiction."

15. These cases, where a party is misdescribed by title, are sometimes referred to as misnomer cases. Such instances of mistake in a written contract do not involve the rewriting of the contract by the court enforcing it. Instead, an enquiry may be made in evidence as to what the plaintiff and defendant must have intended as the parties to the contract. This enquiry is more easily embarked upon and resolved where there is no legal entity other than the contended for parties to the contract with whom either of the contracting sides may reasonably have intended to contract. This approach to construing a contract, where one of the parties has been misnamed, has been on occasion described as a doctrine of construction. It does not seem necessary to go that far. It is precisely to give a contract the business efficacy which the parties contracting within a commercial sense must have intended that the correction is made. The law has moved on from such cases as *Gastronome (U.K.) Limited v. Anglo Dutch Meats (U.K.) Limited* [2006] 2 Lloyd's L.R. 587 and it is no longer necessary to establish from the four corners of the document that the parties must have intended to refer to one entity rather than the other entity. The admissibility of evidence as to the context within which the contract was made does not depend on the availability of only one possible entity as the misdescribed party and nor does it depend solely upon the evidence available within the written terms of the contract.

16. In *Chartbrook v. Persimmon Homes Ltd* [2009] 1 A.C. 1101 at 1112 Lord Hoffmann stated:-

> "It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The House emphasised that "we do not easily accept that people have made linguistic mistakes, particularly in formal documents"… but said that in some cases the context and background drove a court to the conclusion that "something must have gone wrong with the language". In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had."

17. The purpose of the court in construing any contract is to get to as close as possible to the meaning which the parties intended. This exercise could never confine the court to reading the document without regard to its background. It is well established that the context within which an agreement is made will inform both the manner of performance of the contract and the parties by whom the obligations set out therein by written agreement are required to be performed.

18. Were I wrong in that conclusion, I would rectify the document. The legal principles applicable to rectification of a contract were set out by Kelly J. in Irish Pensions Trust Limited v. Central Remedial Clinic [2006] 2 I.R. 126 at 150 to 151. For the sake only of completeness it is necessary to quote these:-

> "Rectification permits the court to correct an instrument which has failed to record the actual intentions of the parties to an agreement. It is a discretionary equitable remedy.

The circumstances in which rectification is available was authoritatively considered by the Supreme Court in *Irish Life Assurance Co. Ltd. v. Dublin Land Securities Ltd.* [1989] I.R. 253. In that case Griffin J. speaking for the Supreme Court adopted the principles outlined by Lord Lowry L.C.J. in *Rooney and McParland Ltd. v. Carlin* [1981] N.I. 138 at p. 146 where he said:-

> "1. There must be a concluded agreement antecedent to the instrument which is sought to be rectified; but
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> 2. The antecedent agreement need not be binding in law (for example, it need not be under seal if made by a public authority or in writing and signed by the party if relating to a sale of land) nor need it be in writing: such incidents merely help to discharge the heavy burden of proof;
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> 3. A complete antecedent concluded contract is not required, so long as there was prior accord on a term of a proposed agreement, outwardly expressed and communicated between the parties, as in *Joscelyne v. Nissen* [1970] 2 Q.B. 86."

Commenting on these principles Griffin J. said at p. 263:-

> "Applying those principles to the facts of this case, and bearing in mind the heavy burden of proof that lies on those seeking rectification, the question to be addressed is whether there was convincing proof, reflected in some outward expression of accord, that the contract in writing did not represent the common continuing intention of the parties on which the court can act, and whether the plaintiff can positively show what that common intention was in relation to the [relevant] provisions [of the contract].""

19. Rectification allows the court to correct or rectify a written instrument, usually as to one particular point, so that it accurately reflects the true agreement or contract of the parties. The jurisdiction of the court does not extend to rectifying the actual contract of the parties: it is only the written record of the contract that may be rectified. Once an agreement has been expressed between the parties, a misstatement in the contract may be rectified so that neither party may move away from what is established as the accord of the parties. The party seeking rectification bears a heavy burden of proof. As to the principles which will inform the court's

approach, Costello J. put the matter helpfully in *O'Neill v. Ryan* [1992] 1 I.R. 166 at 185:-

> "The court will… grant relief by way of rectification where the parties have reached an agreement but where an error is made in giving effect to the parties' common intention in a written agreement. The general rule is that where there is a common shared mistake in that the written agreement fails to record the intention of both parties the court will order its rectification. Rectification may also be ordered when a party who has entered into a written agreement by mistake, if he establishes that the other party with knowledge of the mistake concluded that agreement..."

20. The situation in this case involved an agreement which when written down establishes clearly a shared or common mistake made by both parties. The agreement in writing was designed to give effect to a prior oral agreement, which was then evidenced by an exchange of correspondence. The principles of rectification apply to that situation as the same principles apply to a situation, which is not applicable here, where one party sees a mistake in a written agreement and, aware that the other party has not realised that mistake, signs that agreement knowing that it contains a mistake.

21. In the circumstances of this case I would have been obliged, because of the common mistake of the parties, to order a rectification. Because of the misnomer principle, however, the application of the jurisdiction of the Court to rectify a written contract is not necessary.

22. There will therefore be judgment for the plaintiff in the amount of:

> 1. €7,794,621.55 under the guarantee, being the amount owed by the principal debtor under the loan facility of 2 April 2008;
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> 2. €425,125.35 being the amount of interest accrued on the loan facility debt of the principal debtor since demand by letter of 24 November 2009;
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> 3. €30,289 in respect of a separate overdraft facility made available to the principal debtor, the liability of the defendant for which has not been disputed;
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> 4. interest of €5,146.58;

23. The correct final amount is thus judgment for €8,225,171.84. I will also make an order that interest be payable under section 22 of the Courts Act 1981 from the date of perfection of this judgment, 23 June 2011, to date of payment of the judgment sum. Having heard an application for a stay pending an appeal to the Supreme Court, I decline to make that order. There are no reasonably arguable grounds on which this judgment can be appealed. Having also heard an application for costs from the plaintiff bank, I decline in the exercise of my discretion to award any costs. This litigation arose out of a mistake that was easily avoided. That error betokens, as best construed, a failure of ordinary care. I also take into account that whereas I am bound to implement the law as to the obligations of debtors, and have done so, the discretionary nature of the order as to costs following on judgment can encompass the general lack of diligence in lending by banks at the relevant period and the terrible consequences of that failure in proper management for the people of Ireland. The costs order against the plaintiff bank by Kelly J. of 18 January 2011 on a separate procedural matter stands.