Neutral Citation: [2014] IEHC 95

THE HIGH COURT

[2012 No. 715 S]

BETWEEN

AGM LONDIS PUBLIC LIMITED COMPANY

PLAINTIFF

AND

GORMAN'S SUPERMARKET LIMITED

AND

PATRICK KERRIGAN

DEFENDANTS

JUDGMENT of Mr. Justice Barrett delivered on the 28th day of February 2014.

1. The issue arising in this case is whether the plaintiff, AGM Londis plc, should be allowed to recover various debts by way of summary proceedings or whether the matter should go to plenary hearing. Any views expressed in this judgment are therefore tentative in terms of the strength or weakness of the case that either party might make at a plenary hearing.

Facts

2. Londis has demanded certain monies of the second named defendant, Mr. Kerrigan. His alleged liability to pay those monies arises out of his operation of a Londis-branded shop in Athboy, initially through the medium of the first named defendant, Gorman's Supermarket Limited and latterly in a personal capacity. Londis has already obtained judgment against Gorman's Supermarket. Now it is demanding money of Mr. Kerrigan pursuant to a personal guarantee that he allegedly gave in respect of the liabilities of Gorman's Supermarket on 28th May, 2002. Londis is also demanding monies owed pursuant to a franchise agreement of 21st July, 2010, and a product purchase agreement of 21st July, 2010, both executed directly with Mr. Kerrigan after Gorman's Supermarket found itself in financial difficulties.

Principles to be Applied

3. The hurdle to be surmounted by Mr. Kerrigan as regards obtaining leave to defend is a low one. 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:

> "In my view, the 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?"

4. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 at p. 7, McKechnie J. summarised the relevant principles when a court approaches the issue of whether to grant summary judgment or leave to defend:

> "(i) the power to grant summary judgment should be exercised with discernible caution;
>
> (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case…
>
> (iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff…
>
> (iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;
>
> (v) where, however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;
>
> (vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;
>
> (vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as it is sometimes put, 'is what the defendant says credible?'…
>
> (viii) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;
>
> (ix) leave to defend should be granted unless it is very clear that there is no defence;
>
> (x) leave to defend should not be refused only because the court has reason to doubt the *bona fides* of the defendant or has reason to doubt whether he has a genuine cause of action;
>
> (xi) leave should not be granted where the only relevant averment is the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

> (xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

Guarantee of 28th May, 2002

5. Mr. Kerrigan in his affidavit evidence denies that he ever signed the personal guarantee of 28th May, 2002, stating that "this is borne out by a comparison of the other agreements…which I did sign". A superficial consideration of the guarantee and the other contracts exhibited in evidence suggests that the signature on the guarantee is rather different, though the court is neither competent to, and does not, offer a view as to who signed the guarantee. The court considers, having due regard to the *Aer Rianta and Harrisrange* tests, that whether Mr. Kerrigan signed and is liable under the guarantee of 28th May, 2002, is a factual issue that will require determination at a plenary hearing.

Franchise Agreement of 21st July, 2010, and Product Purchase Agreement of 21st July, 2010

6. Mr. Kerrigan avers that the signatures on the two agreements of 21st July, 2010, "appear to be" his, then describes how he came to sign them. The court concludes on the basis of Mr. Kerrigan's own affidavit evidence that the two agreements were in fact signed by Mr. Kerrigan. What is less clear is whether Mr. Kerrigan knew what he was signing. He avers that:

> "[A Londis representative] came to Navan…and produced the two Agreements to me while I was sitting in his car. I say that [he]…did not explain the nature of the Agreements to me and I completed these and signed them in his presence. As far as I was concerned I was simply signing Agreements to extend the credit limit of the first named Defendant. I say that I was not aware until my solicitor explained the nature of these Agreements to me, that I was in effect from that date, trading in my personal capacity with the Plaintiff until such time as it ceased trading."

7. Londis contends that Mr. Kerrigan signed the agreements and thus he is bound by them. Counsel for Londis referred the court to a number of cases in this regard. The first was *L'Estrange v. F. Graucob Limited* [1934] 2 K.B. 394. In that case the buyer of a slot machine brought an action against the sellers claiming, *inter alia*, breach of an implied warranty. On this point the sellers pleaded that the contract with the buyer expressly provided for the exclusion of all warranties. The buyer contended that she had not read and understood the contract documentation. The King's Bench Division was not receptive to this argument. Scrutton L.J. at p. 404 stated that:

> "… [T]he plaintiff has signed a document headed 'Sales Agreement,' which she admits had to do with an intended purchase, and which contained a clause excluding all conditions and warranties. That being so, the plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them."

8. In a similar vein, Maugham L.J., at p. 406, stated it to be a true rendering of the law that:

> "[W]here a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents."

9. However, Maugham L.J. goes on in his judgment to indicate that there are limits to the apparently steely rule that he had just propounded. Later case-law has borne this out. In the course of argument before the court, reference was made by the plaintiff to the recent case of *Noreside Construction Limited v. Irish Asphalt Limited [*2011] IEHC 364, in which Finlay Geoghegan J., confronted with a 'battle of the forms' between a construction company and one of its suppliers quoted, at para. 31, with approval from the English case of *Curtis v. Chemical Cleaning and Dyeing Company* [1951] 1 K.B. 805 at p. 808 in which Denning L.J. stated that:

> "If the party affected signs a written document, knowing it to be a contract which governs the relations between them, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation…"

10. Notably, in *Curtis*, which was another case concerned with an exclusion clause, an entirely innocent misrepresentation by a shop assistant as to the effect of the terms embodied in a receipt and containing an exclusion clause was held to preclude reliance by the assistant's employers on that exclusion clause. So, to the extent that the 'signature rule' is forged in steel, it seems often to founder on fact.

11. Irish case-law suggests that there are limits in Ireland as to the extent to which the 'signature rule' will be applied. The cases of *Regan v. Irish Automobile Club Ltd.* [1990] 1 I.R. 278 and *O'Connor v. First National Building Society and Others* [1991] I.L.R.M. 208, which were both concerned with the effectiveness of exemption clauses, suggest that a signature will not necessarily suffice to incorporate such a clause. The case of *Western Meats Limited v. National Ice and Cold Storage Co. and Another [*1982] I.L.R.M. 99 indicates that similar reasoning will apply in non-consumer cases. The case now before the court is not of course concerned with an exclusion clause. However, to the extent that the plaintiff seeks to rely on *L'Estrange* and *Curtis* as establishing or affirming the all but unvarying potency of a signature, a closer consideration of both those cases and of Irish precedents such as *Regan*, *O'Connor*, and *Western Meats*, suggests that a more nuanced approach has historically pertained.

12. Mr. Kerrigan asserts in his affidavit evidence that he thought, even after the agreements of 21st July, 2010, were signed, that Gorman's Supermarket was the party with which Londis continued to trade. It could perhaps be contended that he had good reason for doing so. In Mr. Kerrigan's affidavit evidence he avers as follows:

> "I further say that I believed that the First Named Defendant was continuing to trade with the Plaintiff as opposed to me personally because no new accounts were opened, or requested to be opened in my name personally….I say that I received no confirmation of the termination of the First Named Defendant's trading account with the Plaintiff and I further say that I received no request for new trading bank account details or other documentation for opening a new trading account with the Plaintiff. Therefore I say at all times it was the situation that the Plaintiff continued to trade with and be paid by the First named Defendant."

13. Londis, in its affidavit evidence, acknowledges that the calculation of the sums due by Gorman's Supermarket and Mr. Kerrigan is "complicated" because of the failure to close the existing running accounts and open new running accounts when Mr. Kerrigan took over the franchise personally. It asserted, at least initially, that this complication was academic because the total liability owed by the defendants to Londis fell to Mr. Kerrigan to discharge because of his purported personal guarantee of Gorman's Supermarket and

his obligations as a personal franchisee. However, this no longer remains the case because the issue as to whether Mr. Kerrigan in fact signed the guarantee is a matter that will have to go to plenary hearing. Londis contends in its later affidavit evidence, in effect, that there was an express or implicit acknowledgement in Mr. Kerrigan's affidavit evidence that he knew himself to be trading in a personal capacity following the execution of the agreements of 21st July, 2010. The court considers that a scrutiny of the affidavit evidence suggests this contention to be arguable.

14. It could perhaps be contended that there was a considerable imbalance in the relative commercial sophistication of Londis on the one part and Mr. Kerrigan on the other, an imbalance akin to that which pertains in consumer transactions where there is a strong commercial entity on the one part and a vulnerable consumer on the other. Mr. Kerrigan was not a vulnerable consumer in his dealings with Londis. However, in instances where a significant degree of uncertainty arises in the dealings between parties and that uncertainty is accentuated by the actions of a stronger party, it seems consistent with basic principles of fairness and justice, with the approach implicit in Irish cases such as *Regan*, *O'Connor* and *Western Meats*, and the broad thrust of the English case-law to which the court was referred, to acknowledge that circumstances can arise in which a less than rigorous application of the 'signature rule' is merited. This does not mean that a person must be allowed to resile from the consequences of his signature, merely that it can be argued that a signature cannot be treated ipso facto in all instances and every circumstance, and without further consideration, to bind a significantly weaker party to every detail of contractual dealings which he genuinely purports not to understand and which the stronger counterparty admits were complicated by its own actions.

15. Mr. Kerrigan additionally contends that, among the monies sought of him, is an amount for goods that he allegedly bought from direct delivery suppliers whose invoices were settled in the first instance by Londis. Londis contends that Mr. Kerrigan should have reconciled goods received against invoices sent to him. Mr. Kerrigan appears to consider that Londis itself should have done a reconciliation of invoices and delivery documents before paying the monies it now claims from him. Mr. Kerrigan also contends that he was not given credit for stock on the premises when a successor entity took over the running over the premises; this is denied by Londis. There is also a dispute between the parties as to Mr. Kerrigan's entitlements under a lease arrangement that arose in respect of the supermarket premises after a new occupant took over the running of same.

16. Having regard to the above and to the criteria propounded by Hardiman J. in *Aer Rianta v. Ryanair*, it is not clear that Mr. Kerrigan has no case as regards disputing the amounts which Londis claims are owed by him personally. There are issues to be tried and they are not simply and easily determined; oral evidence is required. Mr. Kerrigan's affidavits do not fail to disclose even an arguable defence to the amounts claimed. The court is conscious of McKechnie J.'s observation in *Harrisrange* that the power to grant summary judgment should be exercised with discernible caution and considers that the achievement of a just result between the parties requires that all of the sums which are the subject of the present proceedings be adjudicated upon at plenary hearing.

Order

17. The court refuses the application of Londis for summary judgment and grants Mr. Kerrigan leave to defend all of the amounts claimed in the present proceedings at plenary hearing.