[2018] IEHC 240

THE HIGH COURT

2015 No. 1206 S

Between:

FEXCO ASSET FINANCE

Plaintiff

– and –
KIERAN MARTIN

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 4th May, 2018.

I

Background

1. Fexco is an unlimited company registered in Ireland. Mr Martin is a businessman and company director resident in Limerick. He was formerly a shareholder and director of MGK Investment Holdings Limited, a company that was incorporated in Ireland and which was dissolved on 8th October, 2014. By guarantees in writing dated 10th June 2010, Mr Martin guaranteed all liabilities of MGK to Fexco that were incurred pursuant to a hire-purchase agreement and business lease agreement, both dated 10th June, 2010 and made between Fexco and MGK. Arising from the hire purchase agreement and business lease agreement, there remains due and owing to Fexco from MGK a current balance of €71,974.00 and €54,031.08, due allowance having been made for the sale of the goods the subject-matter of the hire-purchase and lease agreements. By letter dated 26th November, 2014, Fexco made demand on Mr Martin under the terms of the guarantees. Mr Martin has failed to make payment of the amount demanded and Fexco now comes to court claiming summary judgment for the amount owing (plus interest and costs).

II

Arguments Raised by Mr Martin

(i) *Co-guarantors*.

2. Mr Martin complains that there are two other co-guarantors who are not being sued in respect of the above-mentioned liabilities. This is permissible under the guarantee which states that "*If this guarantee is given by two or more persons, their obligations and liabilities hereunder shall be joint and several*".

(ii) '*Sleeping Director*'.

3. Mr Martin claims in effect that he was a so-called 'sleeping director' in MGK. With respect, whether he was a 'sleeping director' or not is an irrelevance to his liability under the guarantee.

(iii) *The Form of the Documents*.

4. Mr Martin avers as follows:

> "*I say that the purported agreements…while carrying my signature do not represent the agreements as I remember them entered into by me as a director of the Company. I find it highly unusual and irregular [that] the entirety of the documents were not typed. It is my contention that I would not have signed the Agreements exhibited owing to the inordinately unusual amount of handwriting therein. I say that this would not normally be how such agreements would be dealt with when dealing with a Financial Institution. I say that any agreement that was furnished to me would normally be typed with instructions to execute same, if I was satisfied with the contents thereof. Further I say that it is inconceivable that I would sign a Business Lease which incorporated a personal Guarantee where the purported Assets/Goods covered under the Guarantee included assets under the heading 'Any other equipment'.*"

5. What is striking about the just-quoted text is that Mr Martin acknowledges that the agreements carry his signature but then contends that he would not have signed them and even that it is inconceivable that he would have signed them. The fact is that he did append his signature and that, on the facts of this case, is the end of matters. Whether the agreements include more handwritten text than he has typically seen or that it would not be his wont to sign a particular form of guarantee is, with respect, neither here nor there. He is bound by the documentation that he has signed, and he has signed the documentation.

(iv) *Storage of Leased Property*.

6. Mr Martin refers to difficulties that arose with the owner of the premises on which the leased equipment was stored and related difficulties in recovering the equipment that was the subject of the agreements. It was open to Mr Martin to seek to join a third party to these proceedings. He has not done so.

(v) *Amount Being Sought*.

7. Mr Martin contests the amount now being sought of him, saying, inter alia, that it could/should have been sold for more and querying whether full allowance has been made for all amounts sought. As to the last point, it appears that due allowance has been made. However, these contentions cannot in any event get around (i) the provision in cl.12(j) of the hire-purchase agreement that "*A certificate of the Owner for any amount which is due or payable under the Agreement shall, in the absence of manifest error, be conclusive proof thereof*", and (ii) the provision in cl.14(j) of the business lease agreement that "A certificate of the Owner for any amount which is due or payable under the Agreement shall, in the absence of manifest error, be conclusive proof thereof." Two statements of account dated 10th June 2010 and addressed to MGK have been exhibited before the court and (i) on the statement pertaining to the hire-purchase agreement the amount of €71.974.00 is certified as being owing, and (ii) on the statement pertaining to the business lease agreement the amount of €54,031.08 is certified as being owing. There is no manifest error in either statement. Each statement is therefore conclusive proof of the total amount referred to as owing in same.

III

Applicable Legal Principle

8. The hurdle to be surmounted by Mr Martin as regards having this matter sent to plenary hearing is notably low, though, if the court might observe, rightly so, given what can be at stake for, *inter alia*, defendant guarantors. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 623:

> *"[T]he 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?"*

9. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, at 7, McKechnie J. summarised as follows the relevant principles applicable 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."*

IV

Conclusion

10. Having regard to all of the foregoing, the court must respectfully conclude that (i) it is very clear that Mr Martin has no case when it comes to the application now made, (ii) to the extent that issues fall to be tried, they are simple and easily determined, and (iii) Mr Martin's affidavit evidence fails to disclose any arguable defence. Mindful of that "*discernible caution*" which McKechnie J. indicates in *Harrisrange* falls to be brought to bear when it comes to exercising the power to grant summary judgment, the court is nonetheless coerced as a matter of law into concluding that this is an application in which the summary judgment sought should be granted, and will so order.