Neutral Citation: [2012] IEHC 474

An Ard-Chúirt

The High Court

Commercial

[2011 No.4128S]

Between

ACC Bank PLC

Plaintiff

And

Gerard Dillon, Patrick Corrigan and Cordill Construction Limited (In Receivership)

Defendants

Judgment of Mr. Justice Charleton delivered on the 12th day of November 2012

1.0 The plaintiff bank seeks judgment against the first defendant Gerard Dillon and the second defendant Patrick Corrigan for €1,493,181, representing personal loans to each of them, and also seeks judgment against the first defendant and the second defendant, jointly and severally, for €5,383,181 in respect of guarantees for the indebtedness of the third defendant Cordill Construction. That company as it is now in the receivership of the plaintiff bank through a fixed and floating charge over its assets. The appointment of a receiver was in May 2011. Any question as to its loans has already been dealt with, or is being dealt with, elsewhere in the commercial list.

1.1 The background to the case is a series of three loans to Cordill Construction to develop a site at The Claddagh in Galway City. The first was for €3,490,000 for a term of twelve months and is evidenced by a facility letter dated 23rd November, 2006; the second was for €750,000 for a term of twelve months to purchase an additional adjoining site and is evidenced by a facility letter dated 3rd January, 2007; and the third was for €1,000,000 for a term of nine months and is described as "additional development finance" in the relevant facility letter which is dated 6th September, 2007. Gerard Dillon and Patrick Corrigan were directors of Cordill Construction. These facility letters do not contain the usual personal guarantee by directors which is an almost standard obligation of bank loans at this time. Instead, in the first such facility letter reference is made to the "net worth statement" of Cordill Construction as borrower and a condition is inserted that should this drop below the level then disclosed to the plaintiff bank, the directors would each have to give a personal guarantee jointly and severally in the amount of €750,000 each. No such guarantee was ever given despite the net worth of the borrowing company falling markedly, as did the net worth of a great majority of construction companies in Ireland, from the autumn of 2008. Instead, in a series of meetings and telephone calls at that time, the plaintiff bank insisted on personal guarantees from the directors for the continuation of the then overdue loan facilities. These personal guarantees were given by the first and second defendants, who claim not to be bound by the same.

Defence

2.0 The defence of the first and second defendants is that prior to entry into the loan facilities, the plaintiff bank, through its relationship manager in Longford, Michael Dillon, the brother of the first defendant, represented that: (1) at no time in the future would the plaintiff bank require the furnishing of personal guarantees by either the first or second defendants in respect of monies loaned to Cordill Construction; (2) at no time in the future would the plaintiff bank require personal guarantees to be furnished by the first and second defendants in order to ensure that the loans granted to Cordill Construction were not called in and/or a receiver appointed; (3) it was the policy of the plaintiff bank at that time that such loans entered into by Cordill Construction would not then and would not at any future stage require to be backed by personal guarantees from the first and second defendants; (4) the policy of the plaintiff bank would not be subject to alteration in that regard; (5) the banking relationship in the present and in the future would always be non-recourse to the first and second defendants.

2.1 This is the core of the defence. In addition, a number of claims are made based upon a lack of consideration for the guarantees by the directors, the tort of misrepresentation and a collateral contract based on the claims made. These defences cannot succeed without the core defence being established by the first and second defendants and central to that defence is that the personal guarantees obtained in the autumn of 2008 were procured by duress.

2.2 Personal borrowings were also taken out by the first defendant. In evidence it has not been claimed that there is any basis for any defence to the claim for judgment on these loans. Instead, it is argued that since damage has been caused to the first and second defendants by duress, a counterclaim based on this tort is sustainable.

Key events

3.0 In a credit report dated 15th July, 2006, the plaintiff bank's relationship manager Michael Dillon introduced his brother and his brother's company Cordill Construction as suitable for a business relationship with the plaintiff bank. He noted that the directors would not give personal guarantees, as this was not their policy. In evidence for the defence he said that his brother, the first defendant, was adamant that this would not happen. The credit committee of the plaintiff bank noted this situation but there is nothing in the documentation either then or later to support the proposition that a representation was made by Michael Dillon that the bank were never to return and seek a personal guarantee. Instead, he made it clear that while he might introduce the business, the credit committee of the plaintiff bank would make all the decisions. That position, he said, was well known if not to the first and second defendants as businessmen then to Tom O'Callaghan, the financial controller of Cordill Construction, who did not give evidence. Insofar as contrary evidence has been given by the first defendant Gerard Dillon, it does not overcome the ordinary proposition that business prudence would have dictated proper analysis within the company as to any major financial commitment. Added to that, the facility letters of 23 November, 2006, 3 January, 2007 on 6 September, 2007 are clear as to their intent and purpose; all were signed by the first and second defendants as directors of Cordill Construction.

3.1 Throughout 2007, the market for residential property responded negatively to sales of houses and apartments; this market was overvalued by around 300%, with development land being overvalued by much more. The apartments at The Claddagh in Galway did not sell. A cash flow crisis was thus caused in Cordill Construction. It was hoped that in 2008 the market would return to the inflated values of 2006. That did not happen. Five years later, the true position as to the property values in Ireland is yet to be firmly established. As of 2008, the term of all of the loans had expired. On 20 August, 2008 a meeting was held in the plaintiff bank's premises at which Gerard Dillon and Tom O'Callaghan attended for Cordill Construction and the plaintiff bank was represented by senior credit managers. Most of these gave evidence, with the exception of Eric Gottenbos who could not attend as he was in Australia and an attempt to take video evidence from him was futile because of a breakdown in technology.

3.2 I take the case given by the first defendant at its highest. He says that he was told that if personal guarantees were not forthcoming from the directors, the first and second defendants, that the bank would exercise its rights under the loan agreement with Cordill Construction to call in a receiver. This, he said, would have the effect of undermining State contracts, as the company was then the second largest school builder in Ireland, would disrupt existing contracts and because receivers rarely carry on businesses as a going concern, would cause the 50 employees of the company and 200 or more site workers in various jobs to lose their employment. This was regarded by Gerard Dillon, a clearly decent person, as a horrible prospect which left him with no option but to furnish personal guarantees. At the meeting itself, no agreement was forthcoming from him. He claims that his will was overborne by that meeting and in particular by the threat made to appoint a receiver. On 5 September, 2008, the matter went to the credit committee of the plaintiff bank. It decided that personal guarantees were required from the directors. On 10 September, 2008, a spirited refusal was delivered from Cordill Construction to the plaintiff bank protesting against personal guarantees. On 1 October, 2008 the credit committee affirmed that personal guarantees were required in the event that the term of the loans were to be extended. On 6 October, 2008, a senior official in the bank, Eoin Gavigan, rang Gerard Dillon and told him of the decision of the credit committee. The next day the first and second defendants changed their minds and agreed to supply personal guarantees for the Cordill Construction loans. A report to that effect by Eoin Gavigan was sent to the credit committee on 13 October, 2008 and two days later it agreed that extending the term of the loans was the appropriate course to take, rather than the appointment of a receiver. The relevant guarantee documentation was sent to the first and second defendants and was returned signed on 8 December, 2008. A complaint was made in the course of the exchanges by letter, already referred to, that a penal rate of interest was being charged. This was treated by the plaintiff bank as a complaint and was dealt with by a refund which would be large in other circumstances but which made little difference to the level of indebtedness of all of the defendants by this stage. The relevant guarantees were headed with a black warning box, all too familiar in these cases, stating that if the debts were not repaid by the borrower the guarantors would be personally responsible and that legal advice of an independent variety should be sought.

Past consideration

4.0 A contract not under seal must be supported by consideration. This means that there is either some detriment to the promisee, for instance by giving value, or some benefit to the promisor. However many parties there are to a contract, this principle can be looked at in a mirrored away from the point of view of each party vis-à-vis the other. One party gets something by giving their promise to give something, while the other party has the expectation of that benefit and at the same time promises or delivers a value which the other wants in return. Rarely will courts condemn a bargain on the basis of the inadequacy of consideration as sometimes it is to the benefit of the parties to establish an underlying bargain by reference to the legality of a price that does not reflect the surface reality. Beneath the surface may be something which the parties to the contract want to happen and which they have pursued through fair negotiation. An example might be the sale to the State of a historic building where a family no longer have the means to restore it, the sale taking place in the expectation that public money will preserve part of Ireland's heritage for the benefit of its people. Such sales, for instance of Kilkenny Castle, have taken place for a nominal value. Similarly, a small rent, which does not reflect the relevant market rent may be agreed in order to ensure that a lease of premises is subject to the certainty of landlord and tenant law as opposed to the vagaries of an agreement among friends. A caretaker agreement might be chosen instead as another legal instrument that establishes certainty but with a very small return. Without such a substratum, an improvident bargain may be relieved in equity or the nature of the interaction between the parties to a contract may be scrutinised as to whether their relationship undermines the quality of their bargaining power with a view to analysing whether undue influence should result in a contract being avoided.

4.1 A bank loan is a promise to make money available for a particular time. The borrower promises to repay within that time. The lender is not obliged to extend the loan beyond the term bargained for. In some circumstances, the written terms of a collateral contract are subject to such a clear and express purpose by way of representation that the parties minds may be said to have met and agreed thereon. Such a collateral agreement, despite a written contract that does not seem to include it, may bind any attempt to step outside it. Such obligations cannot be open-ended; they must be precise. Rarely can a collateral bargain be resorted to so as to overturn what the parties have reduced to writing as their entire contract. But if there is proof that an underlying and express purpose in definite form was agreed, then there may be an enforceable contract that is collateral to the principal agreement. A representation by one of the parties that the written form is to be expressly overridden in respect of a particular term may also enable a contract to be construed outside the written form; *Curtis v Chemical Cleaning and Dying Co* [1951] 1 KB 805 and generally *Treitel – The Law of Contract* (13th ed, Peel, 2007, London) pp 260-262 as to overriding exemption clauses. The proof required for these forms of contractual alteration battles against the certainty of express written terms. Whilst a collateral contract is not impossible despite a written agreement, it is not proven in these circumstances.

4.2 The plaintiff bank did not give an open-ended assurance that, no matter what might happen, personal guarantees would never be required from the directors of the borrowing corporation. As a matter of ordinary sense, it must be remembered that such a company might collapse; it might be taken over by individuals less trustworthy than the first and second defendants; the buildings that were the subject of the loan might be so badly built as to be unsaleable; or the term of the loan might be so extended as to change any reasonable underlying expectation that might be proven by either party to the contract. What happened here was that because of the personal guarantees given by the first and second defendants, the loans were extended through renewals on 13 November, 2008 to 30 April 2009; on 14 April, 2009 to 30 October, 2009; and on 21 December, 2009 to 30 April, 2010. As noted, it was another year before a receiver was appointed by the plaintiff bank in May 2011. In each instance, there was a demand for repayment which could not be met and in each instance the original contract had terminated and required fresh consideration to support any new bargain.

4.3 *McKay and Another v. National Australia Bank Ltd* [1998] 1 V.R. 173 has been cited as supporting the defence of past consideration. It is not an authority which can relieve the first and second defendants of their personal guarantees for the debts of Cordill Construction. In that case, the bank held guarantees from two directors of a corporation. When the bank became concerned that their level of security might be inadequate, a fresh level of guarantee was sought and obtained from those directors. The consideration was expressed as being the provision of "banking accommodation" and was attractively dressed up as a forbearance "to enforce immediate payment". This was not sufficient. On appeal, the Supreme Court of Victoria overturned a decree in favour of the bank at first instance and reasoned that consideration was past: the loans had not been called in and the original guarantee of the directors was an existing bargain that had not been replaced by a new contract supported by anything additional to the existing arrangements. Such consideration as there had been was past and the new arrangements were not supported by any fresh

consideration from the defendant bank. The judgment of Winneke P. at pp. 177-178 sets out principles that also represent the law in this jurisdiction:

> It is, of course, well established that the contract of guarantee, if not under seal, must be supported by consideration and that the onus of proving that there is consideration to support it is on the party who seeks to rely upon it: J. O'Donovan and J. Phillips, *The Modern Law of Contract of Guarantee,* 3rd ed., [1966], pp. 52-3. The consideration relied upon to support the guarantee must be real and valuable and not illusory or a sham: *Reid Murray Holdings Ltd. v. David Murray Holdings Pty. Ltd.* [1972] 5 S.A.S.R. 386. Thus the mere recitation in a document of guarantee that the guarantee was given for consideration for "advances to be made" by the person to whom the guarantee was given will not, by itself be sufficient to support the guarantee if the evidence demonstrates that no such advances were, or were intended to be made: *Elder, Smith and Co. Ltd. v. McKellar* [1895] 21 V.L.R. 644 at 668, per Hood J.
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> Furthermore, "past" consideration is not sufficient consideration. A guarantee given to secure debt already incurred, but unsupported by any further consideration, will fail for want of valuable consideration:
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> > … if it is evident that the guarantee was intended to be limited to past transactions alone, for example, because the surety new that the principal debtor was already indebted to the creditor in an amount exceeding the limit of the surety's guarantee, the guarantee will be void as being given without consideration.

Chitty on Contracts, 27th ed., (1994), p. 1314: see also *Halsbury's Laws of England*, 4th ed., re-issue, vol. 20, para. 140.

> In this case the document of guarantee, executed by the appellants on 20 February 1987, was in the respondent bank's usual form. The consideration for the giving of guarantee was expressed as follows:
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> > IN CONSIDERATION of the Bank at the request of the Guarantor making loans and advances or providing banking accommodation to the customer whether alone or jointly or in conjunction with any other person and/or in consideration of the Bank at the request of the guarantor for daring to enforce immediate payment of money is (if any) now due and owing by the customer to the Bank ...
>
> It was not contended by the respondent, either before the learned judge or on appeal, as any consideration by way of "forbearance to sue" was given by the bank to support this guarantee. No demand had been made by the bank for repayment of the existing debt and no request had been made by the debtor or the appellants for any such forbearance. As the instrument of guarantee itself recognises, the mere fact of forbearance is not of itself sufficient consideration for a person becoming surety for an existing debt. There must be either an undertaking to forbear or an actual forbearance as the surety's request: *Halsbury's Laws of England*, 4th ed., re-issue, vol. 20, para. 142; Murphy v. *Timms* [1987] 2 Qd. R. 550 at 551, per Kneipp J.

4.4 In an analysis of whether consideration is past or current, the strict order of events is not necessarily decisive. The substance of a bargain may be what may seem to be different transactions that are, in fact, aspects of the one contract. The renewal of the loans in this case do not form part of the one contract; rather, what has been outlined involves a series of different transactions each of which could be supported by a continued promise by the company to pay back the loan within a new term. Such alterations could also be supported by a different rate of interest or could require some different form of security. Times have changed since 2008 and the era when the mass media were claiming that Ireland was one of the richest countries in the world. Regrettably, it is not within the power of the law to relieve guarantors of bargains entered into through a state of hope that the market might return to the inflated levels for property prices that were at their height in 2006. Instead, the courts are required to apply the law.

Duress

5.0 If the contract to guarantee the repayment of loans by Cordill Construction was made under duress then it is voidable. Seeking an underlying rationale for the doctrine of voidability on the grounds of duress informs an application of the defence to the facts of this case. Contracts are made on a rational basis between those who have negotiated, or who have held out goods and services generally, so as to achieve a mutually acceptable bargain. A contract is a meeting of minds as to the obligations of each party to it. Any contract which is not the free expression of one of the parties to an apparent agreement cannot properly be described as a meeting of minds. In bargaining with each other, the parties to any prospective contract are never entirely free. Either they will be driven by what they want to achieve, which is the purpose of their desire to enter into mutually acceptable commercial relations, or they may be motivated by needs. The purpose driving any party into a bargain may in some instances be so pressing that revealing why they wish to benefit from that which the other side may supply would skew the bargain markedly against any expectation for mutual advantage. Negotiation is therefore a process of careful interaction in order to achieve a consensus. A consensus is nonetheless achieved notwithstanding that one party may be sore at what it has had to give and the other jubilant at what has been achieved.

5.1 It is a principle of contract law that the law should not scrutinise the adequacy of consideration supporting a contract; absent undue influence and improvident bargain. Parties should be left to sort out the benefits and burdens of obligations that are to be crystallised in agreement. A contract, when made, is what the law enforces and the law enforces contracts in accordance with the express terms of that which the parties have expressed to be their bargain. In the rare instances where the law intervenes to supply terms that have not been expressed, the approach is always what is required in the context of the bargain already made, and not what the court might substitute as fair to ameliorate an agreement or to replace any apparent imbalance with what might be more acceptable. The doctrine of duress is not part of the law in order to interfere in the context of an imbalance in bargaining powers where that want in balance is merely the result of a difference in commercial bargaining power in negotiations conducted at arms length.

5.2 It also more than difficult to see that the defence of duress would ever be established simply because of an allegation that one side took apparent advantage of the weariness of the other at a stage in negotiation. The law must allow a measure of appreciation to the stresses of commercial negotiation. How, in any event, would such an application of the doctrine of relief from a contract entered into under duress, were it to be so extended, ever be proven? Duress as a defence in contract law had a similar origin to that defence as an answer to a criminal charge. The threat of violence is no longer necessary to establish that a contract was entered into under duress. Nor is it necessary that consent to bargain is negatived; rather that consent must have been so wrongfully obtained that it can properly be described as an illegitimate and significant cause of the party ostensibly contracting giving assent.

5.3 It seems to me that principles such as the availability of an alternative course of action, a protest at the term agreed or bargain extracted, the availability of time and space to think and recourse to independent advice are items of evidence within which the

illegitimacy of pressure may be analysed as constituting, or not amounting to, duress. The threat to do something unlawful, such as blackmail, will establish a sufficient degree of illegitimacy to enable the defence in most instances. This is notwithstanding that it can be the case that a threat to reveal a crime may be to adopt a lawful course of conduct. It is the failure to independently peruse that course from the point of view of public spirit and instead linking it to a commercial course of bargaining that is illegitimate. Even where a threat is wrong, it must be such as to wrongfully establish coercive effect on the mutuality which the law expects in the nature of the contract. Economic duress, far removed from the physical origins of the defence, can be sufficient as in *B & S Contracts and Design Ltd v. Victor Green Publications Ltd* [1984] I.C.R. 419. There a contract to exhibit at a show was altered by a threat from the organiser to cancel seeking additional payment from the exhibitor because the organiser had been made subject to additional payment demands by its workforce. That particular case would also be an example of past consideration being insufficient to support a contract for the new exhibition charge.

5.4 The first defendant Gerard Dillon gave a fair account of the meeting of 28 August, 2008. He is an honest person. It is appropriate in the context of the plea of duress to expand on the detail already given as to this meeting and how it fits into the sequence of events by quoting his account. He described thus how he was first asked to consent to the directors of Cordill Construction giving personal guarantees if the loans were to be extended:

> At the meeting Eric Gottenbos - the minute he opened his mouth - you were saying about terms, I didn't feel they were terms - it was as if a mad bomber had jumped on a bus full of kids and I was told everything is going to blow up or else you sign this. That's not what you'd call a choice. There was no choice. The repercussions were a huge. Leave me out of it and you take 60 staff, wives, kids, families, mortgages. You take all the suppliers and subcontractors, just save four, five, six hundred of them and loans, they were all going to get burned because of this. That's not a choice. If you think that's a choice - I don't know if you employ people, right, I don't know if you have your own company or whatever were you employ people but if you do ... what I would say to you is don't ever do it because it’s a massive, moral responsibility.

5.5 Absent from this vivid account was any allegation of overbearing conduct or of the directors being subjected to interrogation-type pressures. The plaintiff bank stood to lose, at the then apparently existing property prices, about €1 million. In the event, the probable loss to the bank would now be of the order of €4 million. The first and second defendants stood to lose their business and the hope of recovery from the position they were in. In the context of a difficult situation, the bargaining power of the plaintiff bank was stronger. It was lawful for the plaintiff bank to appoint a receiver over Cordill Construction and it was lawful to seek to bargain out that final step by the directors seeking further time to pay or by the bank giving further time in return for a personal guarantee that the directors. The circumstances of negotiation were certainly fraught but that does not of necessity always amount to illegitimate pressure. Further, the first and second defendants were advised by the financial controller of Cordill Construction, time was allowed to pass before a final decision was made and the decision was entered into on both sides in the expectation that the end not yet come for the overheated residential property market. All of that is within the level of appreciation that must be allowed in commercial bargaining. It is not duress.

Other issues

6.0 I propose to briefly deal with any other issues in the case. There is no evidence of representation by the bank that, into the future, personal guarantee would never be sought. Such representation might be established by silence in the face of an express requirement by the directors of Cordill Construction that no circumstances would ever change their relationship with the bank. Even was that to be so, once the term of any loan expired, if the money was not to be called in, then a new and separate contracts have to be negotiated. No defence to the personal indebtedness of the first defendant has been established. In terms of apparent authority, the evidence does not establish that the first and second defendants understood Michael Dillon to have authority to bind the bank. Instead, the balance of evidence shows that the credit committee alone had such authority and that everyone understood this. A legal analysis as to the effect of representations as to the future may be relevant to another case, but not this one. Consent to the personal guarantees was not improperly obtained. There is nothing in terms of a collateral contract based on representation or misrepresentation which could alter what the parties have agreed and have reduced to writing. The evidence in that regard is insufficient. There was adequate consideration for the guarantees. The destruction of the asset of the bargain by the creditor acting to the prejudice of the guarantor, as in *Black v. Ottoman Bank* [1862] 15 All E.R. 573, does not arise at all.

6.1 The second defendant did not appear at the trial. As to the personal indebtedness of that defendant and of the first defendant, this has been properly proven. There is no defence established.

Result

7.0 In all the circumstances, I am obliged to give a decree against the first and second defendants, jointly and severally, of €5,383,181. I am further required to give a decree against the first and second defendants for €1,493,181 in respect of their additional personal borrowings.