Neutral Citation Number: [2010] IEHC 432

THE HIGH COURT

2009 2353 S

BETWEEN

ADM LONDIS PLC

PLAINTIFF

AND

STEPHEN GIBSON AND TANYA GIBSON

DEFENDANTS

Judgment of Mr. Justice Hedigan delivered on the 7th day of December, 2010.

1. This is an application by the plaintiff for summary judgment in the amount of €171,399.94 together with Courts Act interest from the 29th May, 2009. The plaintiff's claim is on foot of a guarantee.

2. The defendants seek leave to defend upon the five following grounds;

(a) They did not know they were signing a guarantee. It was not explained to them that it was a guarantee and they did not have any independent legal advice on same. Although they do not rely entirely on being "innocents abroad" as it was put, this was their first business venture. They thought they were signing an account opening form. They had already posted a cash bond in the amount of €40,000 with their bank in favour of the plaintiff – ADM. They note that Tanya Gibson's name is not printed in block letters though it is agreed the signatures are theirs.

For all these reasons they argue the guarantee is not a valid one and does not bind them.

(b) The defendants claim that after the account was closed on cessation of trade, certain amounts included in the claim were added. This aspect of the defence was not pursued in the oral submissions made by Mr. Gibson but was not specifically abandoned.

(c) The company was not given the benefit of rebates. This also was not pursued in oral submission but also not specifically abandoned.

(d) Goods in stock were re-possessed after closure and the company did not get allowed the full value of that stock.

(e) The defendants claim they have a counter-claim. It is based on an allegation of negligent misrepresentation by ADM as to the turnover prospects for the shop. These it is alleged were made during preliminary negotiations before business commenced. It is alleged that ADM, its servants or agents represented that the shop could turn over between €25,000 to €40,000 per week. It is alleged that it was as a result of these representations that the defendants were induced into investing in this business.

3. The legal principles
These are well set out by Clarke J. in *ADM v. Arman Retail Ltd*. [2006] IEHC 309;

> *"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 I.R. 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 paragraph 3.4 and 3.5;*
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> > *'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.'*
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> *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?"*

I gratefully adopt this statement of principle. Assertion, no matter how strongly made, is no defence. It is to the facts which are brought before it that the Court must look. If evidence of those facts could arguably give rise to a defence then leave to defend

should be given. Questions of law or construction of documents may be resolved by the Court where relatively straightforward provided the limited framework of a motion for summary judgment does not involve a real risk of an injustice.

4. Turning to the case herein, I will come first to the main ground upon which the defendants seek leave to defend, *i.e*. the claim on the guarantee. The defendants claim they were unaware it was a guarantee they were signing. This is a claim of "*non est factum*". This same claim was made, and it is a frequent one, in the same case cited above. As was pointed out in that case, the law in relation to a claim of non est factum is set out in the judgment of Morris P. in *Tedcastle McCormack and Co. Ltd. v. McCrystal* (High Court, 15th March, 1999.) The following matters need to be established;

> (a) That there was a radical or fundamental difference between what was signed and what it was thought was being signed;
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> (b) That the mistake was as to the general character of the document as opposed to its legal effect; and
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> (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.

Applying those principles to an essentially identical set of circumstances in *ADM v. Arman*, (cited above) Clarke J. stated;

> *"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."*

The same applies here. There is no conceivable way that a person could sign the guarantee document relied on herein without knowing it was a guarantee. It says so repeatedly throughout and is headed "Guarantee". To sign such a document without discovering it was a guarantee, fails utterly the third test set out above even were the first two met by the defendants. The defendants did not press too hard the claim they were "innocents abroad" so-called. They were right not to do so. As the CV of the first named defendant which is exhibited herein shows, he is a very experienced and well qualified businessman. In the endless stream of cases based upon a guarantee that have come before the Court over many years, it is always a sorry thing to see people's personal liability being attached to pay a company debt. It is also sad to trace through the documents exhibited herein the desperate efforts of the defendants to save the business. Yet if guarantees were not enforced a whole range of credit that enables business to be set up would disappear. This would be to the great disadvantage of the small business community in particular and notably to people just like the defendants herein.

Moreover the defendants in entering this contract of guarantee were acting as business people capable of contracting on their own without independent legal advice or any cooling off period. The guarantee was signed by both as directors of the company and they were free to contract or not as they wished. The fact that Mrs. Gibson's name did not appear in block letters opposite her admitted signature is of no substance.

5. Turning to the second ground which relates to post-cessation invoicing; in paragraphs 9, 10 and 11 of her second affidavit, Elaine Tracey gives full and detailed particulars in relation to these items. No reference is made to these matters in his subsequent affidavits and in the absence of any questioning of her detailed and on its face, full answer by Elaine Tracey, I must accept the plaintiff's claim in this regard.

6. The third ground raised seems comprehensively answered by the plaintiff. Rebates are only payable where the purchaser, here the defendants, pay in full by the due date. It is common case the company did not pay the invoices by the due date. Furthermore, as appears in the standard terms and conditions of the plaintiff at paragraph 7(b) such rebates are discretionary.

7. The fourth ground alleged the company did not get full credit for the stock repossessed after closure. This matter is addressed by Elaine Tracey in her second affidavit at paragraphs 14 and 15. This shows the company representatives and the liquidator made no objection at the time of the stocktaking. She exhibits the stock sheets which on their face show how the sum allowed of €9,532.58 is made up. No evidence is proffered by the liquidator who now controls the company expressing any concern with this amount. As the guarantors can only raise by way of defence any legitimate claim the company might have had to reduce the liability to the plaintiff, I think there is something of a shot in the dark surrounding this aspect of the defendants' defence. It is unsupported by any hard evidence.

8. The fifth and final ground relates to a possible counter-claim raised by the defendants. In the first place it is very late in the day to raise such a matter. Even setting such reservations aside, the grounds of such counter-claim as outlined by the defendants are to a large extent very vague. Where the grounds are clear they are that the plaintiff's negligently made representations that the turnover of the business would be in the region of €25,000 to €40,000 per week after five years. The commencement date for this projection would have been August 2005. In the first place it is obvious that such projections are and can be no more than just projections. No guarantee could be found therein. However, any claim thus based is comprehensively negated by the defendants' own evidence. In his e-mail sent the 1st July, 2008 to David Williams and Mary-Helen O'Dea and exhibited at SG10, the first defendant states the turnover that week, with the help of the Lotto sales, had reached €29,000 per week for the first time. In short, on his own evidence, the first named defendant acknowledged the business had gone almost exactly three quarters of the way towards the top of the projected range in only three years. Indeed, as appears also from the first defendant's own evidence, i.e. his business rescue plan, the shop was turning over €26,000 per week and it was the other businesses of his which were dependant on the shop that were dragging the shop down. On his own evidence therefore, the first named defendant has laid no credible basis for a counter-claim.

9. I have carefully examined and considered the five grounds upon which the defendants seek leave to defend the plaintiff's claim herein. I have great sympathy for the defendants who clearly struggled mightily to save their business in the grave economic climate that descended upon us in 2008. I am afraid however that careful analysis of their grounds does not reveal any arguable basis upon which they could successfully defend the plaintiff's claim.

There will be judgment therefore against the defendants in the sum of €171,399.94 plus Courts Act interest to date from the 29th May, 2009.