Neutral Citation: [2017] IEHC 116

THE HIGH COURT

[2016 No. 57 S]

BETWEEN

H.K.C. LIMITED

PLAINTIFF

AND

BORSATEC LIMITED

AND

JOHN MULRANE

DEFENDANTS

JUDGMENT of Mr. Justice Eagar delivered on the 27th day of February, 2017

1. By way of notice of motion, the plaintiff sought liberty to enter final judgment against the second named defendant in the sum of €50,000 together with continuing interest at the rate of 8% per annum from the 13th January 2016 until the judgment of prior payments.

2. The affidavit of Nicolas Quigley company director of H.K.C. Ltd. stated that he was a director in the plaintiff company and that the plaintiff's claim as set out in the endorsement of claim as against the second named defendant is for €50,000 in respect of a personal guarantee provided by the second named defendant to the plaintiff whereby the second named defendant agreed to personally discharge all sums due and owing by the first named defendant to the plaintiff up to maximum €50,000 together with further interest therefrom from the date of demand.

3. He states that the first named defendant remains indebted to the plaintiff in the sum of €144,983.30 and he is also advised that the first named defendant has recently entered into the liquidation process. He exhibits the guarantee dated the 21st April 2015 which is signed by the second named defendant and which reads:

> "In consideration of the creditor providing goods on credit or other services to Borastec Ltd. the company incorporated under the laws of Ireland, the guarantor (the second named defendant) irrevocably and unconditionally guaranteed to the creditor (H.K.C. Ltd.) the payment on demand and provided that the total amount recoverable under the guarantee should not exceed shall not exceed €50,000.00."

4. On the 8th January 2016 the solicitors on behalf of the plaintiff sought payment of the sum of €50,000.00 on foot of this personal guarantee by letter addressed to the second named defendant.

5. On the 28th April 2016 the second named defendant swore an affidavit stating that he had a *bona fide* defence to the proceedings. He said that for a period of approximately ten years the first defendant (of which he was a director at all material times) had a commercial relationship with the plaintiff whereby the first named defendant purchased equipment from the plaintiff. Over this ten year period the first defendant purchased approximately €7,000,000.00 worth of equipment from the plaintiff. As part of this commercial relationship the plaintiff afforded credit terms to the first named defendant whereby the first defendant could purchase equipment from the plaintiff up to the limit of these credit terms. As of January 2015 the credit limit of the first defendant with the plaintiff was €200,000.00.

6. For several months prior to January 2015 the plaintiff refused to increase the credit terms afforded to the first defendant. After the first defendant posted it's 2014/2015 accounts in December 2015, Nicholas Quigley contacted the second named defendant and informed him that the plaintiff intended to reduce the first named defendant's credit limit by €15,000.00 per month until the first defendant's credit limit was reduced to €150,000.00. This would have created major difficulties for the first defendant and trading as the first defendant's cash flow would not have been sufficient to enable the first defendant to keep up with trading levels and turnover and to enable the first defendant to withstand the reduction by the plaintiff of the first defendant's credit limit. The second defendant said that he attended a meeting on the 29th January 2015 with Nicholas Quigley. Nicholas Quigley stated to him that the plaintiff would apply the reduction of €15,000.00 per month to the first defendant's credit limit until the first defendant's credit limit was reduced to €150,000.00, unless the second named defendant himself signed a personal guarantee in the sum of €50,000.00. As the first defendant had continuing obligations to its customers, he was left with no option but to sign a personal guarantee in the sum of €50,000.00. When he signed the personal guarantee, the plaintiff maintained the first defendant's credit facility at a level of €200,000.00. He says that at all times material to these proceedings he was lead to believe by the plaintiff and its servants and agents that the personal guarantee signed by him was a personal guarantee for the difference between the first defendants original credit facility in the sum of €200,000.00 and a reduced credit facility in the sum of €150,000.00 only. He says that was his understanding of the purpose, effect and scope of the personal guarantee and that this was the basis upon which he signed the personal guarantee. He said that he was given no reason to believe otherwise. He did not believe or understand that the personal guarantee signed by him was a personal guarantee for the indebtedness of the first defendant to the plaintiff.

7. He says that his belief and understanding that the personal guarantee was a personal guarantee for the difference between the first defendants original credit facility in the sum of €200,000.00 and the reduced credit facility in the sum of €150,000.00 was confirmed by the conversation that he had with Gerry Kelly the managing director of the plaintiff company. Mr. Kelly stated and confirmed to him that as soon as the first defendant's account with the plaintiff was regularised the plaintiff would tear up the personal guarantee. He therefore says that the plaintiff's contention as to the effect of the personal guarantee is incorrect.

8. The supplement affidavit of Nicholas Quigley swears that the second named defendant's claims in relation to the reduction of his credit limit were entirely inaccurate and in fact a reduction of the credit limit to around €185,000.00 was sought by the plaintiff in or around January 2015. He says that this reduction was to introduced to the first named defendant making payments of €5,000.00 per month to the plaintiff, and he refers to an email which he sent to the second named defendant on the 25th November 2014 which says:

> "Hi John,

> Good to catch up last week – this is the article I mentioned to you which I think you will find interesting.
>
> As per our discussion I would ideally like to have the balance of the account closer to €185k and would ask you to consider making an additional payment of €5k-p-m at the end of January, February and March to reduce it from the current operating level of €200k to €185k by the 31st March 2015.
>
> Let me know when you have a chance to review this in line with your good extra cash flow."

Mr. Quigley also exhibits a series of emails between himself and the second named defendant, and this series of emails are relevant. It commences with an email from the second named defendant to Nick Quigley of the plaintiff.

9. The relevant portions of it are discussed as follows:

> "I discussed the new arrangement with Noeline. As far as we can see the new arrangement will not work. I don't quite see the logic in reducing down our credit limit by €30k per month as it will mean that we will be forced to seek an alternative supplier for alarm equipment and switch cell against H.K.C. We have already been approached by another manufacturer to take on their range of intruder products. We have held off on this up to now but you may have left us with no alternative but to make the move. It would appear to me that you are making a financial decision rather than a commercial one."

And then a response by Nick Quigley dated 26th March 2015:

> "Hi John,
>
> I am disappointed with the tone of your email giving the fact that all seemed well when I left you yesterday. The threat of 'switch selling' our product is not one I take likely and indeed believe me to consider the viability of continuing our long standing relationship with Borsatec. As I have explained in my mail back in February we were reducing the credit limit by €5k per month commencing this month. A total of €15k over three months. We will review the situation at that point (you will recall I initially wanted to do this from January but you asked me to hold off till March which I did). You have as you acknowledged yesterday continue to support you on the planned reduction in credit limit was well forecasted. By way of an example of our support – in January and February we raised roughly sixty invoices per month on your account – three per day based on a twenty day working month!"

The response from the second named defendant dated the 26th March 2015 said:

> "Hi Nick,
>
> I have been in contact with Gerry this afternoon in a meeting with him on Saturday morning to discuss the situation as regards John."

Then on the following that on the 26th March Nick Quigley emailed to the second named defendant:

> "John,
>
> I understand you have agreed to give H.K.C. a personal guarantee for €50,000.00. I have requested our legal advisors to arrange the necessary paperwork for this and once it is completed and signed by you, the credit limit will be restored to €200,000.00. In the meantime, the account will operate as per my email of 5th February 2015.
>
> With regards."

And then a response from the first named defendant dated the 2nd April to Nick Quigley:

> "Nick,
>
> I have not seen any paperwork from you and it is now almost a week since my last email. Perhaps you could sort it out as the new credit limit is causing me problems.
>
> With regards"

Then a response from Nick Quigley on the same date to the second named defendant:

> "Hi John,
>
> Let me follow this up, I requested the paperwork on the 26th after I emailed you last."

And then a further email from Nick Quigley to the second named defendant:

> "Re: Credit Limit
>
> John,
>
> The paperwork is not ready at this point so I suggest to speed this up, if you confirm by return email that you will sign a personal guarantee for €50,000.00. Once it is presented to you we can move on that."

Then a response from the second named defendant to Nick Quigley:

> "Nick,
>
> I can confirm those sign and personal guarantee in favour of H.K.C. against Borsatec Ltd. account in the amount of €50,000.00."

And Nick Quigley says in response on the 2nd April:

"Okay John,

We can proceed on this basis."

10. On this affidavit is a letter from the second named defendant to Gerry Kelly MD of H.K.C. Ltd. dated the 14th September 2015:

"Dear Gerry,

Further to our meeting this morning I can confirm that Borsatec Ltd. will pay down its debt to H.K.C. at a rate of €35,000.00 per month commencing October 2015. We will continue to see what H.K.C. product we have on the shelf and will provide a return service for our customers during this period.

Yours Sincerely."

Further exhibited an email from the second named defendant to Nick Quigley:

"Hi Nick,

I can confirm that we have transferred €5,000.00 today to the H.K.C. account. Due to the fact that we over estimated our ability to repay the debt at the rate of €35,000.00 per month we are short of €15,000.00 on the November payment. I would like to meet to discuss the rescheduling of the repayment of the balance outstanding."

11. The final affidavit was the supplemental replying affidavit of the second named defendant. He said that he stands over the following: that the personal guarantee signed by him at the plaintiff's request was a personal guarantee for the difference between the first defendants original credit facility with the plaintiff in the sum of €200,000.00 and the first defendants intended reduction of the plaintiff's credit facility to the sum of €150,000.00 only and was not a personal guarantee for the indebtedness of the first named defendant to the plaintiff generally. He indicates that the plaintiff had sought a reduction in the first named defendants credit facility to €185,000.00 with the reduction of the first named credit facility to achieve by monthly payments of €5,000.00 to the plaintiff. However, subsequent to November 2014 Mr. Quigley made it clear to him that the plaintiff would require an overall reduction in the first defendants credit limit from €200,000.00 to €150,000.00.

12. The first defendant agreed to this and said that contrary to what is alleged the first defendant did not default in the payment of a significant number of invoices. There was delay in the part of the first defendant in meeting payments for a number of invoices but he said that this did not constitute a default as alleged by the plaintiff. He also referred to Mr. Quigley's supplemental affidavit where he said the "comfort" referred to therein was for the difference between the first defendant's original credit facility in the sum of €200,000.00 and the reduced credit facility in the sum of €50,000.00 only.

13. The legal principles applying to applications for a summary judgment which is opposed follows the well-known decision of the Supreme Court in *Aer Rianta Cpt. v. Ryanair Ltd.* [2001] 4 I.R. 607. McGuinness J. stated at p. 614 in relation to the law and conclusions:

"It is accepted by both parties that the correct test to be applied in deciding whether to grant summary judgment in this case is that established by this Court in the First National Commercial Bank plc. v. Anglin [1996] 1 I.R 75. In that case Murphy J. speaking for the court said at pp. 78 and 79:-

"For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action (see Irish Dunlop Co. Ltd. v. Ralph (1958) 95 I.L.T.R. 70).

In my view the test to be applied is that laid down in Banque de Paris v. de Naray [1984] 1 Lloyd's Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in National Westminster Bank plc. v. Daniel [1993] 1 W.L.R. 1453. The principle laid down in the Banque de Paris case is summarised in the headnote thereto in the following terms:-

"The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend. The court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of the defendant's having a real or bona fide defence."

14. In the *Aer Rianta* case Hardiman J. stated:

"More recent Irish authority, in my view, supports the impression gleaned from authorities from the early days of the summary judgment jurisdiction, that the defendant's hurdle on a motion such as this is a low one and that the jurisdiction is one to be used with great care."

He then refers to the *Bank of Ireland v. Educational Building Society* [1999] 1 I.R. and *ACC Bank Plc. v. Malocco* [2003] 3 I.R. 191 and says:

"In light of these authorities, I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the late nineteenth and early twentieth centuries. The formulation used in the First National Commercial Bank plc. v. Anglin previously cited and the cases cited in that judgment are useful and enlightening expressions of the test, but I do not believe that the formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. The "fair and reasonable probability of the defendants having a real or bona fide defence", is not the same thing as a defence which will probably succeed, or even a defence whose success is not improbable."

15. An analysis of the papers in the case suggest that there is a dispute as to whether or not the guarantee for €50,000.00 was owed as a result of the plaintiff's desire to reduce the overdraft limit from the sum of €200,000.00 to €150,000.00 and once the second named defendant had signed the guarantee, the overdraft limit was increased to €200,000.00. It is notable that the first named defendant remains indebted to the plaintiff in the sum of €144,983.30 which is less than the €150,000.00 overdraft limit.

16. In these circumstances the court proposes to direct that this case proceed by way of plenary hearing.