Neutral Citation: [2014] IEHC 605

THE HIGH COURT

[2013 No. 1306 S.]

BETWEEN

GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

DANIEL COCHRANE AND OLIVE COCHRANE

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 9th day of December, 2014

1. In this action, the plaintiff seeks summary judgment against the defendants jointly and severally in respect of guarantees furnished by the defendants in respect of two companies owned and managed by the defendants, being Cochrane and Co. (Drapers) Limited and Olivia Danielle Limited. The amounts claimed in the notice of motion come to a total of €571,952.63, comprising the following: (i) the principal sum of €221,180.86 together with continuing interest of an amount of €2,899.96 from 11th April, 2013 to 18th July, 2013, making together €224,080.82; and (ii) the principal sum of €343,369.80 together with continuing interest of an amount of €4,502.03, from 11th April, 2013 to 18th July, 2013 making together €347,871.81. The plaintiff also claims further interest on the said principal sums from 19th July, 2013, at the relevant rates of interest for the time being of the plaintiff to the date of payment or judgment, and the costs of the proceedings.

2. In the grounding affidavit, the plaintiff set out the history of the business relationship between the plaintiff and the defendants. It is common case that the parties had had a business relationship going back over 34 years. In respect of each company, the defendants executed two contracts of Guarantee and Indemnity. On 4th September, 2008, the defendants each furnished a guarantee in respect of Cochrane and Co. (Drapers) Limited in the sum of €241,000. On 16th July, 2010, the defendants executed a further contract of Guarantee and Indemnity in the sum of €217,000. Similar guarantees had been executed in respect of Olivia Danielle Limited in the sum of €320,000 on 4th September, 2008, and €341,000 on 16th July, 2010.

3. It is in relation to these latter guarantees that the dispute arises. In particular, there is a complete conflict between the parties as to the content and atmosphere at the meeting held on 16th July, 2010. The plaintiff states that by letter dated 5th July, 2010, the plaintiff's Moate branch offered to make available to Cochrane and Co. (Drapers) Limited, the sum of €206,000.00 by way of bridging term loan to assist with the restructuring of the existing facilities (accounts 95526725 and 95526944). The said offer was made on the terms and conditions as set out in the facility letter, as supplemented by the plaintiff's general terms and conditions which were appended thereto.

4. The plaintiff states that the facility letter dated 5th July, 2010, was accepted by the defendants on behalf of Cochrane and Co. on 16th July, 2010. Bridging loan No. 1 was duly restructured on 24th August, 2010. It was to have been repaid in full within a period of not more than six months from restructure.

5. By letter dated 5th July, 2010, the plaintiff's Athlone branch offered to make available to Olivia Danielle Limited the sum of €270,000.00 by way of bridging term loan to assist with the restructure of existing facilities (accounts 95524279 and 95524287). The said offer was made on the terms and conditions as set out in the facility letter and as supplemented by the plaintiff's general terms and conditions which were appended thereto. That facility letter dated 5th July, 2010, was accepted by the defendants on behalf of Olivia Danielle Limited on 16th July, 2010. Bridging Loan No. 2 was duly restructured on 23rd August, 2010. It was to have been repaid in full within a period of not more than six months from restructure.

6. The defendants accept that they signed the contracts of guarantee. However, they claim that the contracts are vitiated due to the fact that they were procured by undue influence on the part of the bank officials at the meeting held on 16th July, 2010. In a replying affidavit sworn on 16th February, 2014, the first named defendant stated that in 2010, the clothing business run by him and his wife, the second named defendant, was going through a very hard time financially. He described their situation as "*a perilous financial situation*". He stated that the full extent of their financial circumstances was well known to the bank. When his wife and he attended at the Bank of Ireland, Church Street, Athlone on 16th July, 2010, they understood that the purpose of the meeting was in connection with the draw down of a short term stocking loan facility in the sum of €50,000 in order to fulfil contracts for the purchase of stock for the businesses.

7. The first named defendant states that much to his astonishment, when he and his wife attended at the Athlone branch on 16th July, 2010, they found themselves in a most threatening and unsettling environment. He states that the bank officials knew well of the grave financial difficulties that their businesses were facing and the huge personal and professional impact this was having on his wife and himself. The first named defendant states that the bank officials, with whom they met, threatened that the bank would withdraw financial support for their businesses unless he and his wife would agree to sign and execute a range of documentation there and then in the bank. The first named defendant further submitted that despite a history of good relations between the parties, the tone and demeanour of the bank officials on this occasion was not only extremely unprofessional but was personally intimidating. In all his years in business, and engaging with the Bank of Ireland in particular, he had never been subjected to such severe pressure, intimidation and bullying.

8. The defendants stated that it was in these circumstances that they were effectively compelled by the relevant bank officials to sign a number of documents, including the contracts of Guarantee and Indemnity, including a waiver of independent legal advice. The nature and effect of this documentation was not explained to them. They were not given any opportunity to review the documentation. The bank officials dictated the terms of the waiver of independent legal advice to them, but as they were fully aware, they had no opportunity to obtain independent or indeed any legal advice. The first named defendant further stated that in these circumstances he had no real choice as to whether or not to sign the documentation presented to him by the bank officials on their premises and had no understanding of what he was signing or its implications for him. But for the threatening conduct of the bank

officials, he would not have signed the documentation and certainly would not have signed it there and then and without proper professional advice.

9. The same defendant further stated that by compelling the signature of the contracts of guarantee in this manner, the plaintiff's servants or agents had taken advantage of the relationship of trust and good will which had built up between the plaintiff and the defendants over the years. They did so in circumstances where they were fully aware of the vulnerability of both of the defendants and the professional and personal pressures they were labouring under.

10. Each of the contracts of guarantee had a waiver thereon which was signed by the defendants in the following terms:-

> *"I understand the nature of the liability incurred and I have no wish to be independently advised by a solicitor."*

11. The first named defendant stated as follows at para. 13 of his grounding affidavit:-

> *"However, having regard to the circumstances in which our signatures to the Guarantees were procured, I say and believe that the plaintiff cannot in these proceedings rely on the guarantees in order to pursue my wife and myself personally for our failed businesses debts. This is because the guarantees were signed without any informed consent and without the benefit of any independent legal advice on my part and must be considered, in the circumstances, to have been vitiated on the grounds of undue influence and unconscionability."*

12. The first named defendant stated that in the circumstances he has a bona fide defence to the plaintiff's claim herein. He submitted that the matter could not be disposed of by way of summary proceedings and he requested the court to refer the matter to plenary hearing.

13. The second named defendant has also provided a replying affidavit. It was in almost identical terms to that of the first named defendant as outlined above.

14. A replying affidavit was sworn on behalf of the plaintiff by Ms. Valerie Duncan who dealt with the defendants' accounts. She said that she had read the defendants' affidavits with "*dismay and shock*". The reasons for those reactions were that (a) she considered that what the defendants had said in their replying affidavits was a betrayal of her sincere attempts on behalf of the plaintiff over many years to support the defendants in both their personal and business activities, (b) the purported statements of facts contained in those affidavits failed (apparently deliberately) to set out the actual context and purpose of their meeting in July 2010, and (c) the defendants also wholly misrepresented the reality of what occurred on that occasion. She rejected the defendants' attempts, almost four years after the event and many years after their business relationship began, now to revise and reconstruct both facts and history.

15. Ms. Duncan stated that there had been a number of meetings between the parties prior to the meeting on 16th July, 2010. That meeting was the culmination of a lengthy communication process which had been ongoing between the parties for several months.

16. Ms. Duncan stated that the process had commenced as early as 18th February, 2010, when she met the first named defendant in an attempt to establish a full and accurate statement of the assets and liabilities of the defendants and their two companies. She stated that this meeting took place against a backdrop of decreasing turnover on the current account of Olivia Danielle Limited, unpaid items on the current accounts of both companies and arrears on the restructured loan facility of Cochrane and Co. In addition, she was concerned by the fact that she had become aware that a judgment of €10,447.00 against Olivia Danielle Limited had been published in late January 2010.

17. She stated that she again met with the first named defendant on 15th April, 2010, in order to progress the receipt of full and up to date financial information. Further meetings took place on 7th and 18th May, 2010. There were also meetings on 11th June, 2010 and 7th and 13th July, 2010. The matters discussed at these meetings included both the defendants' requests for extension of bridging facilities for their two companies and additional stocking facilities so that Olivia Danielle Limited could purchase stock for the coming season and thus continue to trade. She also had occasional telephone conversations with the first named defendant during this period.

18. Ms. Duncan stated that this extensive series of contacts demonstrated that the meeting which took place on 16th July, 2010, did not occur either in a vacuum or abruptly. At all times, the purpose of the extensive communications process was to work with the defendants so as to obtain a full understanding of their and their companies' financial situation with a view to working out a strategy to support them and their businesses through a difficult trading period. It was only during the course of the various meetings, and after repeated inquiries by her, that it became apparent in May 2010 that the financial position of the two companies was much worse than the defendants had previously disclosed to the plaintiff, particularly because of substantial personal indebtedness to other financial institutions and significant unpaid taxes.

19. Ms. Duncan went on to state that notwithstanding the concerns that these disclosures caused and because of both the good past relationship between the parties and the defendants' representations concerning their business plans (including proposals to dispose of their business premises in Moate and an apartment in Athlone), the plaintiff decided in early July 2010 to agree a further restructuring of the companies' bridging loans and to provide additional funding for stock purchases.

20. Ms. Duncan stated as follows in relation to the meeting held on 16th July, 2010:-

> *"I say that the specific purpose of the meeting on 16th day of July, 2010 was to finalise the documentation in relation to the restructuring of bridging loan facilities for the two companies. I also confirmed then to the defendants that the €50,000 stocking loan which they had sought for Olivia Danielle Limited had been approved by the plaintiff on the previous day. I note in that regard that in a joint statement which is attached to the first named defendant's affidavit, they acknowledged that they had actually pre-emptively contracted to purchase stock without having such approval in place. For the avoidance of doubt, however, I say that the stocking loan was not actually formalised and initially drawn down until early August 2010.*
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> *I say that, contrary to what the defendants now seek to assert, I recall that the meeting was conducted in a professional and business like manner and that the tone was both positive and cordial, as it had been during all previous discussions. At no time was the environment unsettling or intimidating, as they allege. I also say that no threat whatsoever was made either by me that the plaintiff would withdraw its financial support unless the defendants agreed 'there and then' to sign and execute a range of documentation."*

21. Ms. Duncan had the following to say in relation to the defendants' description of the atmosphere at the meeting on 16th July, 2010:-

> *"Concerning the defendants purported characterisation of the meeting, I say that they are both very experienced business people who had on numerous previous occasions availed of facilities from the plaintiff, had attended many similar meetings and knew full well that the purpose thereof was to complete the related loan documentation, including guarantees. They were, of course, already fully familiar with the guarantee process having, (for example) signed in September 2008 (and with similar waivers concerning legal advice) the guarantee with Roderick Scott as exhibited as 'RS1' and 'RS3'. On this occasion, as before, the terms of the proposed loans (including related guarantees) had been discussed in advance and were set out in the facility letters dated 5th day of July 2010 to which I have already referred in paragraph 6 hereof. I am satisfied that, contrary to what the defendants assert, they fully understood what they were signing and did so with informed consent and without complaint or demur. I object strongly to their assertions that they were effectively compelled to do so."*

22. Ms. Duncan stated that the meeting ended pleasantly. As she accompanied the defendants in the lift down to the Banking Hall, they inquired about her forthcoming holidays. Before they left the premises, she shook hands with the defendants, she thanked them for coming in and wished them well and said that she would be in touch with them after her return from leave.

23. Ms. Duncan further stated that the defendants' characterisation of the state of her relationship with them at the meeting on 16th July, 2010, was inconsistent with the content of a letter dated 2nd September, 2010, which Ms. Duncan had received from the defendants' solicitors, in which the solicitor referred in the penultimate paragraph to "*the amicable relations that our client has procured with the Bank of Ireland over the past years….".*

24. Ms. Duncan stated that she had further meetings with the first named defendant in August, October and November 2010 and January, February and April 2011. She stated that at no time during this period did either of the defendants make any complaints or allegations such as those which they have asserted in their affidavits. She believed that those belated assertions were baseless. She stated that she had a diary note of the telephone conversation with the first named defendant on 30th September, 2010, when he expressed his thanks for the plaintiff's financial support, noting that the recently drawn €50,000 stocking loan had been "*a massive help"* at a critical time. Further, Ms. Duncan recalled that at a meeting on 13th April, 2011, with the first named defendant and Mr. Tighe O'Donohue, which she attended with her colleague Ann Henry, to whom she was handing over responsibility for the files, the first named defendant was very complementary to her concerning the manner in which she had managed the account relationship with him, his wife and their companies.

25. Ms. Duncan strongly refuted the allegations made by the defendants in their replying affidavits. She stated as follows at para. 20 of her affidavit:-

> *"I say that for the reasons which I have set out above, I utterly reject and refute all of the wholly–unfounded allegations against both the plaintiff and me which the defendants have set out in their affidavits in an attempt to rewrite history (including, but not limited to, their assertions of supposed undue influence, lack of professionalism, intimidation, pressure, bullying, compunction, threatening behaviour, the taking of advantage and unconscionability) as if I had set each of them out here in full and denied them individually, as I do. None of those assertions has any basis in fact."*

26. Mr. Dermott Horan, a senior business manager in the Athlone branch of the plaintiff bank, swore an affidavit which dealt with the relationship with the defendants both prior to and subsequent to the meeting on 16th July, 2010. He did not attend the meeting on that date, where the contracts of guarantee were signed. However, he averred to the fact that subsequent to that meeting, the defendants did not make any complaint to him as manager of the Athlone branch in relation to what had transpired at the meeting. Apart from the fact that the defendants could have done so at any time thereafter, if they felt they had a grievance, there was not a hint at the meeting which he attended in February 2011 that the defendants had any difficulty in relation to either Ms. Duncan's previous interactions with them or her ongoing dealings with them. There was no record on the plaintiff's file of any complaint either verbal or written made by the defendants subsequent to that meeting. Mr. Horan stated that both of the meetings which he attended were conducted in an entirely courteous and professional manner. At no stage during either meeting did he see any inappropriate engagement by Ms. Duncan with the first named defendant nor was he aware of any tension or difficulty between them. He stated that Ms. Duncan did not seek to apply any pressure on the first named defendant during her dealings with him while he was present.

27. The first named defendant swore a further replying affidavit on 27th May, 2014. He denied that his account of the meeting on 16th July, 2010, was a misrepresentation of what had occurred at that meeting. He stated that it was his understanding that the purpose of the meeting was to address the possibility of the bank offering him a stocking loan which was essential to their businesses continuing to trade. Before going into the meeting, he did not anticipate, nor was he advised by the plaintiff, that this important stocking loan would be conditional on his wife and he providing personal guarantees to the plaintiff. However, that was the approach adopted by Ms. Duncan on behalf of the plaintiff, thereby placing him and his wife in an impossible position.

28. The first named defendant took issue with the description of the meeting on 16th July, 2010, as given in Ms. Duncan's affidavit. He stated as follows at para. 8 of his further replying affidavit:-

> *"I dispute Ms. Duncan's averment at paragraph 13 of her affidavit that the meeting of 16th July, 2010 was conducted in a professional and positive manner. We found the environment within the branch extremely intimidating on this occasion. Ms. Duncan was fully aware of our precarious and vulnerable financial position and the enormous personal and professional pressures under which my wife and I were labouring at that time. Notwithstanding this knowledge on the plaintiff's part, the plaintiff effectively compelled us to sign personal guarantees which were manifestly to our disadvantage at a time when our businesses were on the brink of failure. In all my years in business, I had never before been placed in such a position. Although I had previously signed guarantees, I was never provided with or received independent legal advice and I did not appreciate the legal implications of such guarantees for my personal financial position. On 16th July, 2010, there was never any real opportunity for my wife and I to obtain independent legal advice."*

29. The first named defendant stated that he did not deny signing either the loan offers or the personal guarantees at issue. However, as explained in his relying affidavit, he stated that the plaintiff, acting through Ms. Duncan, procured the personal guarantees by threatening not to provide the short term stocking loan facility of €50,000 and thereby compelling their businesses to close their doors. He stated that in circumstances where Ms. Duncan was well aware of their precarious and very vulnerable financial position and of the precarious position of their companies, this constituted actual undue influence.

30. The first named defendant stated that although he attended a number of further meetings with the plaintiff following the meeting

on 16th July, 2010, at that stage, he was still endeavouring to salvage what he could of his family businesses. During all of that period, he was labouring under personal and professional pressures. He stated that it was only after the businesses failed, and the plaintiff initiated the within proceedings, that he came to understand the full implications and significance of the documents signed by him on 16th July, 2010.

31. The first named defendant also dealt with the matters raised in the affidavit sworn by Mr. Horan. It is not necessary to go into the matters at length in this judgment.

32. A further affidavit was also sworn by the second named defendant. Insofar as it dealt with the averments in the affidavit of Ms. Duncan, it was in the same terms as the affidavit sworn by the first named defendant as referred to above. She did not attend any meetings with Mr. Horan and so did not comment on his replying affidavit.

The Law in Summary Judgment Applications

33. The law has been set out with clarity in a number of decisions. In *Aer Rianta cpt v. Ryanair Limited* [2001] 4 I.R. 607, Hardiman J. described the relevant test to be applied in the following terms:-

> *"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?"*

34. In *Irish Bank Resolution Corporation (In Special Liquidation) v. Gerard McCaughey* (Unreported, Supreme Court, 11th July, 2014), Clarke J. stated as follows in relation to the nature of the defence which must be disclosed by the defendant in resisting an application for summary judgment:-

> *"It is important, therefore, to reemphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in Aer Rianta, be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the Court can assess those issues to determine whether the propositions advanced are statable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in McGrath, the Court may come to a final resolution of such issues. That the Court is not obliged to resolve such issues is also clear from Danske Bank v. Durkan New Homes.*
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> *Insofar as facts are put forward, then, subject to a very narrow limitation, the Court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta. It needs to be emphasised again that it is no function of the Court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."*

35. Finally, Kelly J. in *IBRC Limited v. Quinn* [2011] IEHC 470, gave the following dicta in relation to the defence which must be established by a defendant in resisting an application for summary judgment:-

> *"The threshold of proof which has to be achieved by a defendant is low. The test as identified by Hardiman J. in Aer Rianta v. Ryanair [2001] 4 I.R. 607, is this:-*
>
> > *[Judge here sets out portion already cited]*
>
> *The most recent statement of the law from the Supreme Court is contained in Danske Bank v. Durkan New Homes [2010] IESC 22. There Denham J. (as she then was) cited with approval the views of Ackner L.J. where he said:-*
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> > *'It is of course trite law that O.14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants having a real or bona fide defence.'"*

Conclusions

36. Applying these principles to this case, I am satisfied that there is a fundamental dispute between the parties as to what occurred at the meeting on 16th July, 2010. The defendants accept they signed the two acceptances of the letters of loan offer dated 5th July, 2010. They also signed contracts of guarantee in respect of the indebtedness of both their companies. They both signed waivers stating that they did not want independent legal advice prior to incurring the liability under the contracts of guarantee.

37. There is a major dispute between the parties as to the atmosphere at the meeting. The defendants state that it was a very hostile and intimidatory atmosphere on the part of the bank officials who were present at the meeting. The defendants maintain that it was made clear to them that the provision of the stocking loan, which was essential to the survival of their businesses in the short term, was conditional upon the defendants agreeing to sign up to the personal guarantees in respect of the indebtedness of their companies. The defendants maintain that they were put under enormous pressure to sign the contracts of guarantee at that meeting and that in reality they had no opportunity to consider the matter, or to take independent legal advice thereon.

38. This account is hotly disputed by the plaintiff's officials and in particular by Ms. Duncan, who has stated that the meeting was conducted in a professional and business like manner. She denied that there was any pressure or undue influence exerted upon the defendants at that meeting.

39. While this Court has considerable doubt about the defendants' prospect of success in establishing that the contracts of guarantee are vitiated by undue influence, especially in view of the fact that the defendants were experienced business people, who had a long history of doing business with the bank, it nevertheless appears to the court that this is a case where the defendants

should be given the opportunity to have their claim decided on oral evidence. Where there is a stark conflict of fact in the affidavits sworn on either side, such as there is in relation to the meeting on 16th July, 2010, such conflict cannot be determined on affidavit evidence. In order to reach a decision as to where the truth lies, it is necessary to hear both parties in evidence in chief and to have such evidence tested in cross examination.

40. In the circumstances, I will remit the matter for plenary hearing. There were two contracts of guarantee signed on 4th September, 2008. It is not clear whether these are challenged on the same basis as the later guarantees. In view of the fact that there is not a separate breakdown as to what was owed to the plaintiff under these contracts, it is appropriate that the question of the liability under these contracts of guarantee should also be remitted to plenary hearing.

41. In the circumstances, I refuse the plaintiff's application for summary judgment. I remit the matter for plenary hearing. I will allow four weeks for a statement of claim and four weeks thereafter for a defence on behalf of the defendants.