Neutral Citation: [2014] IEHC 122

THE HIGH COURT

[2011 No. 2997S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

KARL MCKENNA, DAMIAN DONLON AND PAUL COPELAND

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered the 12th day of March 2014

1. In this case the plaintiff is now seeking summary judgment against the second and third named defendants, judgment having been obtained previously against the first named defendant, on foot of a guarantee entered into by all three defendants dated the 11th December, 2007, by virtue of which the liabilities of a company known as Kapada Limited, of which all the defendants were directors and shareholders, to the plaintiff bank were guaranteed to a limit of €250,000. The amount sought in the present proceedings against both defendants is €168,345.

2. The application for a summary judgment is resisted both by the second named defendant, who appears as a litigant in person, and by the third named defendant who is represented by solicitor and counsel.

3. The principles applicable to a request for summary judgment have been considered by the Superior Courts in a number of cases in recent years, and are now well known. In the seminal case of *Aer Rianta c.p.t. v. Ryanair (No. 1)* [2001] 4 I.R. 607, Hardiman J. commented as follows at 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?"

Earlier, at p. 621 Hardiman J. pointed out:-

> "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."

4. In *Zurich Bank v. McConnon* [2011] IEHC 75, (Unreported, High Court, Birmingham J., 4th March, 2011), I commented that while the jurisdiction to refuse leave to defend and to grant summary judgment undoubtedly existed, that it was a jurisdiction to be exercised sparingly. I remain firmly of that view.

5. Accordingly, the test I will apply is that referred to by Hardiman J. Unless it is very clear that a particular defendant has no defence then leave to defend will be granted to him, only if it is very clear that one or other defendant has no defence will summary judgment be granted.

6. The factual background to the present application is that as I have indicated all three defendants were directors and shareholders of Kapada Limited, a company involved in project management in the construction sector. By letter of sanction dated the 2nd May, 2007, the plaintiff agreed to extend to Kapada Limited an overdraft facility of €50,000 and a loan facility of €140,500. The security for those facilities was a joint and several letter of guarantee from all three defendants limited to €190,500. The defendants all signed the letter of sanction to indicate Kapada Limited's acceptance of the facilities and ratified that acceptance at a meeting of the directors on the 15th May, 2007. The defendants all executed the agreed joint and several guarantee on the 2nd May, 2007.

7. By letter of sanction dated the 5th December, 2007, the plaintiff agreed to extend to Kapada Limited a further loan facility of €191,671. The plaintiff also continued to provide Kapada Limited with an existing overdraft facility of €50,000. The security for these facilities was a further joint and several letter of guarantee from all three defendants, this time limited to €250,000. The defendants all accepted these facilities by way of a form of acceptance signed on the 10th December, 2007. The plaintiff now seeks to rely on the joint and several guarantee dated the 11th December, 2007, which was executed and signed by all three defendants.

The Second named Defendant

8. The second named defendant has sworn a number of affidavits in which he raises quite a number of issues. He says that he did not have independent legal advice in relation to the guarantee, that—despite what appears on the face of the documentation—his signature to the guarantee was not witnessed, that the guarantee was not under seal, that the plaintiff bank had breached the provisions of the Consumer Protection Code 2006 and finally that he "may well have a counterclaim".

Independent Legal Advice

9. So far as independent legal advice or more specifically, the alleged lack of it is concerned, there is no requirement in law that an adult entering into a guarantee on behalf of a company of which he is a director and shareholder should have independent legal advice. In *O'Hara v. Allied Irish Banks* [1985] B.C.L.C. 52, Harman J. was dealing with an application by Ms. O'Hara to amend her defence so as to plead that there was a duty of care owed by the bank to her, in a situation where she was a director of a company, was not herself a customer of the bank and where she had signed a guarantee in relation to an overdraft provided to the company without the bank giving her any advice. He commented at 53:-

> "I cannot see that a stranger, invited to sign a guarantee (in respect of some matter in which the stranger has a commercial interest) by a third party – perhaps a bank – who has advanced money to the person whose account is to be guaranteed, is owed any duty whatever at that point of time. It seems to me that at that point they are mere

prospective contracting parties."

He then went on to refuse the application to amend.

10. The fact that Mr. Donlon did not have independent advice, assuming in his favour that was indeed the situation, does not provide even an arguable defence.

Signature not witnessed
11. The signature on its face indicates that it was signed by all three defendants and that each signature was witnessed by the same solicitor. Mr. Donlon says that when he signed the guarantee it had already been signed by this solicitor and that all that remained was a gap for him to fill with his signature.

12. Quite simply there is no requirement as a matter of law for a guarantee to be witnessed. This issue cannot provide even an arguable defence.

The Guarantee is not under Seal
13. Factually Mr. Donlon is correct that the guarantee is not under seal. However, in a situation where the plaintiff bank provided consideration for the guarantee by way of loan and overdraft facilities there was no requirement that it should be under seal and again, no arguable defence was made out.

Consumer Protection Code 2006
14. This was a loan to a commercial entity which was guaranteed by its directors / shareholders. In providing the guarantee for Kapada Limited, Mr. Donlon was not dealing with the bank in the capacity of a consumer so again no arguable defence was made out.

Possible Counterclaim
15. Mr. Donlon asserts that he may well have a counterclaim. Little detail is provided, but the suggestion seems to be that he may have a counterclaim in relation to the manner with which the bank account of Kapada Limited was operated. A mere comment or assertion that one may have a counterclaim does not provide a basis for being given liberty to defend.

16. The threshold to be crossed before leave to defend would be granted is low. However, low as it is, it has not been crossed by Mr. Donlon. To use the language of Hardiman J. it is in my view "very clear" that Mr. Donlon has no defence and that the plaintiff is entitled to judgment.

The Third named Defendant
17. So far as the third named defendant is concerned while the affidavits sworn by him seemed to be raising a number of issues, in fact the only defence now pointed to is one of *non est factum.* In essence the point made by and on behalf of Mr. Copeland is that he did not realise that the guarantee that he signed was a joint and several one and that he believed that the guarantee he was providing was for only one third of Kapada's debt or put slightly differently, that his exposure was confined to €83,333.33.

18. In the case of *Tedcastle McCormack and Company v. McCrysta,l (*Unreported, High Court, Morris J., 15th March, 1999), Morris J. having considered the House of Lords decision in *Saunders v. Anglia Building Society* [1971] A.C. 1039, concluded that a person seeking to raise a defence of *non est factum* must establish:-

> "(a) That there was a radical or fundamental difference between what he signed and what he thought he was signing;
>
> (b) That the mistake was as to the general character of the document as opposed to the legal effect;
>
> (c) That there was a lack of negligence i.e. that he took all reasonable precautions in the circumstances to find out what the document was."

19. Mr. Copeland has indicated that he understood that the essential nature of the document that he had signed was that it was a guarantee. He says that he took it that Karl McKenna, Damian Donlon and himself had each guaranteed one third of Kapada's borrowing and that it never occurred to him that he could be liable for anything other than one third of the borrowings of Kapada.

20. In the supplemental affidavit, he refers to the fact that he suffers from depression and that he doubts the extent to which he fully understood what he was signing. He says that he looked through the guarantee and understood the essential nature of the document and that it was a guarantee. He says that he saw the phrase "joint and several" and understood that there were three separate guarantees by Damian Donlon, Karl McKenna and by himself and that he understood that the word "joint" referred to the fact that there were three individuals involved. He says that he cannot remember whether or not he read paragraph 20 of the guarantee at the time, but that since the commencement of the proceedings, he has read the whole guarantee repeatedly and that he is confident that without an explanation he would have understood that he was guaranteeing only a third of Kapada's borrowing.

21. It seems to me, that at this stage of the proceedings it is proper to take the affidavits sworn by Mr. Copeland entirely at face value, and to approach Mr. Copeland's defence at its high water mark and this I will do. However, even on that basis and reminding myself that there is only a low threshold to be crossed, it seems to me that the difficulties facing Mr. Copeland are formidable. He realised that he was signing a guarantee, that was the general character of the document. It seems to be that whether the guarantee was a joint guarantee or a joint and several guarantee fell within the ambit of the legal effect of the document.

22. Reminding myself that it is not sufficient for liberty to defend to be withheld that the success of the defence suggested is improbable and on that basis being prepared to concede the possibility that it is arguable that there was a radical or fundamental difference between what he signed and what he thought he was signing then it still seems to me that there was such a degree of carelessness on the part of Mr. Copeland in signing the document that he cannot now repudiate what he signed. He was a director of a company, he says that he looked through the document, but that he cannot say whether he read paragraph 20. However, on his behalf, it is said that whether he read paragraph 20 or not is not of any great significance because he had sworn that if he did read it, he would have misunderstood it.

23. Paragraph 20 is in these terms:

> "Where this guarantee is executed by more than one individual, the agreements and obligations on the guarantor's part herein contained shall take effect as joint and several agreements and obligations and none of the guarantors shall be released from liability hereunder by reason of this guarantee ceasing (by any means whatsoever) to be binding as a

> continuing security on any other guarantor(s) and generally, this guarantee shall operate not only as a joint and several guarantee by all of the Guarantors, but also a separate guarantee by each of them."

24. While I recognise that the clause would not receive an award from the Campaign for Plain English I do not believe the language is exceptionally technical and I would have expected that its meaning would have been apparent to any businessman. At an absolute minimum any businessman who had any difficulty with the language, would likely have realised that on one interpretation there was an exposure to €250,000, which was after all the only figure mentioned in the guarantee and that there was a need to take advice. If someone called on to sign had any difficulty with the interpretation of the clause, then it is incumbent on such a person to take advice. In this case a source of advice was readily available as all three signatures were witnessed by a solicitor, albeit that an issue has been raised as to whether the solicitor was physically present when each individual signature was appended and that solicitor would presumably have been in a position to advise if requested to do so.

25. In *ACC Bank plc v. Kelly* [2011] IEHC 7, (Unreported, High Court, Clarke J., 10th January, 2011), Clarke J. commented at para. 7.3:

> "I am not satisfied that any person taking the trouble to read the clause in question could have any difficulty in understanding what it meant. Even if someone had such difficulty then it is incumbent on such a person to take advice."

Later in the judgment he commented at para. 7.5:-

> "If they sign it without adequately reading it then they must accept the consequences. If having read it there are terms or provisions which they do not properly understand then again they should not sign it unless and until they have taken advice. If they do sign a document whose terms they do not fully understand without taking advice then again they must accept the consequences."

26. The point is made that the present case is distinguishable in that Mr. Copeland is saying that if he had read the clause that he would have understood the document to mean that he was guaranteeing only one third of the borrowing and would have believed that to have been a correct understanding and would not have realised that he was misunderstanding the situation. It seems to me that if a businessman signs documents of a legal and technical nature without fully understanding their meaning and without taking advice that he must accept the consequences. It also seems to me that the position extends to the situation where the document is such that it would be widely understood by businessmen, if the individual called on to sign is for one reason or another, in a position where unlike the generality of businessmen he would fail to understand the document or is at risk of misunderstanding the nature of the document. If that is the situation, then he must take advice or suffer the consequences of not doing so.

27. The plea of *non est factum* is only rarely invoked successfully. Why this is so was explained by Donovan L.J. in *Muskham Finance Limited v. Howard* [1963] 1 Q.B. 904. There he observed at 912:-

> "The plea of *non est factum* is a plea which must necessarily be kept within narrow limits. Much confusion and uncertainty would result in the field of contract and elsewhere if a man were permitted to try to disown his signature simply by asserting that he did not understand that which he had signed."

28. I am not persuaded that the defence, even on an arguable basis can extend to a situation where a businessman says I do not know whether I read the relevant portions of the guarantee or not, but if I did I would have misunderstood. In conclusion, I am of the view that Mr. Copeland has failed to make out even an arguable case based on the *non est factum* defence and that accordingly the plaintiff is entitled to the judgment that it seeks.