Neutral Citation [2016] IEHC 562

THE HIGH COURT

Record No. 2014 No. 2784S

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

ADRIAN MEADE

IVOR MILLER

ALAN CAMPBELL

DEFENDANTS

JUDGMENT of Mr. Justice Hunt delivered on the 3rd day of October, 2016

1. The plaintiff's claim against each of the defendants is for the sum of €1,000,000 plus appropriate interest on foot of guarantees in writing dated 10th February 2011, referable to an advance of money to Unit 5 (Rosemount) Limited ("the borrower") on 7th February 2011. Each of the defendants entered an appearance in the action, and this was followed by the issue of a motion seeking liberty to enter final judgment by the plaintiff against the defendants. The affidavit grounding this motion exhibits copies of the facility letter, the guarantees in writing and subsequent letters of demand, and contains the customary assertion that the defendants have no bona fide defence to the proceedings, and that the appearances entered were solely for the purpose of delay. Each of the defendants delivered replying affidavits setting out matters relied upon by way of defence and generally disputing the plaintiff's entitlement to liberty to enter final judgment at this stage. The position of each defendant will be considered separately in due course.

2. The principles applicable to an application of this type have been set out many times and I do not propose to repeat them in detail in this case. It is sufficient to refer to the formulation adopted by the late Hardiman J. in *Aer Rianta CPT v. Ryanair Limited* (No. 1) [2001] 4 I.R. 607 where he held, at page 623, that the test to be applied on an application for summary judgment involved the court asking itself the answer to one simple question which he framed 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?"*

3. The observations of the Court of Appeal in *Close Invoice Finance Limited v. Matthews* [2015] IECA 132 are also relevant. The Court of Appeal emphasised that the mere assertion in an affidavit of a given situation which is to form the basis of an intended defence does not of itself constitute a ground for granting leave to defend. Whether or not there is a fair and reasonable probability of the defendant having a real or bona fide defence has to be ascertained by looking at the situation as a whole, and assertions must be supported by some meaningful evidence such that a court could conclude that there is a fair or reasonable probability that the defendants have a bona fide defence based upon such assertion. I will now deal with the position of each defendant in turn, by summarising the matters set out in their replying affidavits.

Mr. Meade

4. In his initial replying affidavit, Mr. Meade provides a further exposition of the history of the dealings between the parties. It appears that the loan referred to in the summary summons was originally drawn down by the borrower in 2007 to fund the purchase of Unit 5, Rosemount Industrial Estate, Ballycullen, Dublin 11. At the time of the drawdown, Mr. Meade states that he was "*having serious personal difficulties and was not in a position to conduct an independent evaluation in respect of signing the purported personal guarantees, the subject matter of the within proceedings*." He also states that he "*was not advised by an employee, servant or agent of the requirement, necessity or advisability to seek independent legal advice in respect of the purported obligations imposed or assumed under or on foot of such personal guarantees*."

5. Mr. Meade then states that repayment of the said loan had been extended by the plaintiff on a yearly basis since 2007 and that he required sight of all the documentation relating to this loan since 2007 in order to fully ascertain what, if any, liability the borrower had to the plaintiff. He also asserts that the letter of demand is "void for uncertainty" and points to a discrepancy between the claim in the letter of demand for payment of the sum of €1,000,000 plus interest on this amount at the rate of 3.49% per annum (variable) from 6th July 2011 until full repayment, contrasting that with para. 14 of the special endorsement of claim whereby the sum claimed on foot of the aforesaid letter of demand is the sum of €1,000,000 including interest as of the date of the said demand. The matters raised by Mr. Meade in his affidavit were dealt with in a replying affidavit on behalf of the plaintiff by Linda Bermingham. This supplied details of the amount owed as of the 15th July 2014, which had been omitted from the original grounding affidavit. She stated that she was aware of some personal difficulties that Mr. Meade had at the time of the original transaction between the plaintiff and Mr. Meade, but she did not get the impression that these were so serious as to affect his ability to conduct business with the plaintiff, or otherwise. In relation to the topic of legal advice, she referred to the top of the letter of guarantee signed by Mr. Meade which contains a box, with a paragraph in bold font, which states as follows:-

> "WARNING: - AS GUARANTOR OF THE CREDIT FACILITIES YOU WILL HAVE TO PAY OFF THE CREDIT FACILITIES, THE INTEREST AND ALL ASSOCIATED CHARGES IF THE BORROWER DOES NOT. BEFORE YOU SIGN THIS GUARANTEE YOU SHOULD GET INDEPENDENT LEGAL ADVICE."

6. Ms. Bermingham also stated that the letter of guarantee was accompanied by another letter which also advised him to obtain independent legal advice before signing the guarantee in 2011. Ms. Bermingham also referred to Mr. Meade's familiarity with guarantee documents, having signed similar documents in April 2007, October 2008 and December 2008, which were substantially similar to the document signed by Mr. Meade in 2011.

7. Mr. Meade subsequently delivered a supplemental replying affidavit in June 2016, adding that at the time he signed the letter of guarantee it was his understanding that the third named defendant (Mr. Campbell) had negotiated with the plaintiff that any potential liability on foot of the guarantee would be shared between the defendants in the same proportion as their shareholding in the borrower, which was 10% in the case of Mr. Meade. He also claimed that Mr. Campbell negotiated with the plaintiff to lower the guarantee sum to €1,000,000, and of his belief on the signing of the guarantee in 2011, that only one amount, a total of €1,000,000,

would be claimed on any default by the defendants and that liability, if any, would be shared between the defendants, with Mr. Meade's liability being capped in proportion to his shareholding. Lastly, Mr. Meade stated that he was advised by "*staff of the plaintiff*" that individual signatures were required on separate guarantee forms because "*having three signatures of one form gave the plaintiff problems in the past and that this was for administrative and compliance purposes and for no other reason*."

8. On an overall view of the matters raised by Mr. Meade in his affidavits, I am not satisfied that all or any of these matters reach the modest threshold required in order to grant him leave to defend these proceedings. The fact that Mr. Meade had certain unfortunate personal difficulties in 2007 cannot, of itself, provide any legal defence to the plaintiff's claim based on documents signed at that time or subsequently. It is a fact of life that people are obliged to conduct serious and important business against a range of personal issues of variable nature and magnitude. In the contractual context, the mere existence of such difficulties is clearly insufficient to affect issues of liability, in the absence of credible evidence that the consequences of such difficulties were such as to affect the capacity to contract in a material manner. The matters referred to by Mr. Meade are so tentative, vague and limited as to fall well short of establishing an issue to be tried in the circumstances of this case.

9. Likewise, the issues raised in relation to the absence of independent legal advice prior to the execution of the letter of guarantee do not establish a fair or reasonable probability of Mr. Meade having a real or bona fide defence in this respect. The documents in question were signed by Mr. Meade in a commercial context, and I am satisfied that in that context there is no duty of care on a lender to advise as to the necessity or desirability of obtaining independent legal advice before executing a personal guarantee in that context. In any event it appears to me that the plaintiff went further than anything that was required of it in these circumstances by adverting to the desirability of obtaining independent legal advice prior to the signature of the documents in question.

10. Similarly, the suggestion that the liability of Mr. Meade to the plaintiff on foot of the guarantees was limited or apportioned on the basis of an agreement between Mr. Campbell and the plaintiff does not reach the level required to establish the probability of a real or a bona fide defence, on the basis that there was a valid parol variation of the executed guarantee. Mr. Meade's assertion to this effect came very late in the exchange of affidavits in this case and, in my view, amounts simply to an assertion lacking in sufficient credibility or backed by meaningful evidence such as to provide a basis for leave to defend. If negotiations said to have been carried out by Mr. Campbell affected his position, giving rise to a defence of substance or relevance from Mr. Meade's point of view, one would have expected an issue of such importance to be contained in the first replying affidavit sworn in May 2015. These matters were first ventilated in a supplemental affidavit sworn on the morning of the hearing of this motion, being the 21st of June 2016. I also note that that Mr. Campbell in his affidavit did not go so far as to suggest that he negotiated an agreement with the plaintiff, either for himself or on behalf of others. He simply suggested that he had an understanding from Ms. Bermingham that liability was to be apportioned between the guarantors on the basis of the respective shareholdings.

Mr. Miller

11. In his replying affidavit, Mr. Miller also sets out aspects of history of this matter. He points out that the loan facilities originally advanced were secured by an all sums mortgage debenture over the property in question and also by way of joint and several personal letters of guarantee for €2,400,000 from each of the three defendants. In October 2008, the terms of the original guarantee were amended by the limit of liability of the guarantors being moved downwards to the sum of €1,750,000. In November 2008 this sum was again amended to €1,810,000. A further amended letter of loan sanction in relation to the property in question was issued, by virtue of which the security for the ongoing loan of €1,810,000 was to be the mortgage debenture over the property and letters of guarantee in the sum of €1,000,000 from each of the defendants.

12. Mr. Miller asserts that the new letter of loan offer was brought to him personally by Linda Bermingham on behalf of the bank on the 10th of February 2011. He alleges that he was not given any opportunity to discuss or examine the letter of loan offer or the letter of guarantee, but believes that the letter of guarantee and loan offer were amended "*due to issues raised by Alan Campbell in relation to the guarantees previously entered into*." He states his belief that Mr. Campbell is a man of considerable means, who did not want to be jointly and severally liable for a debt which he might ultimately have to discharge solely by himself from his assets. Mr. Campbell's affidavit is notably silent on such concerns or negotiations. Mr. Miller's first complaint is that the purported acceptance of the letter of loan offer by the company is based on a resolution which is said to emanate from a meeting that did not, in fact, take place on the date thereof. He then states that Adrian Meade "*who is deemed to be secretary of the said meeting for the purpose of the resolution passed by the borrower was not present with me on the date of the alleged passing of this purported resolution of the board by the borrower*." He states that Linda Bermingham was and is aware that no such board meeting took place and that no such resolution was properly passed by the borrower and on which the guarantee is based. On this basis, it is asserted that the plaintiff cannot now seek recovery of monies from the guarantors, the borrowing of which was not approved by the borrower in a correct and legal manner.

13. In addition, Mr. Miller asserts that the amount due and owing on foot of the guarantee was not certified by an officer of the bank. He further asserts that there is a lack of evidence that the David Nolan who issued a letter of demand and who swore an affidavit on behalf of the plaintiff is an officer of the bank, and that therefore there is no evidence of the amount actually due to the plaintiff. In response to these assertions, Linda Bermingham deposed in a further affidavit that the letter of sanction of the 7th of February 2011 was a restructure of existing loan facilities advanced by the plaintiff to the borrower, and as these facilities were executed by Mr. Miller on behalf of the borrower, the defendants were at all times familiar with the purpose of the said letter. She points to the fact that the letter of guarantee of February 2011 is identical for all intents and purposes to the previous letters of guarantee signed by Mr. Miller, and to the fact that any letters accompanying the said guarantees advised Mr. Miller to obtain independent legal advice in the manner set out above. Ms. Bermingham does not deal directly with Mr. Miller's assertion that she knew that there was no formal board meeting or resolution of the borrower on the date in question, but points to Article 19 of the Articles of Association of the borrower which expressly state that a resolution signed in writing by all of the directors entitled to receive notice of the meeting of the director shall be as valid as if it had been passed at a meeting of the directors duly convened and held. She asserts that Mr. Miller is not entitled to avoid liability as guarantor due to an alleged failure to comply with company law of which he was aware at the time of the alleged breach.

14. I am not satisfied that there is a reasonable probability that any defence arises on the basis of assertions in relation to matters pertaining the obtaining of legal advice, for the reason that the basic facts underlying the transaction had not changed, and were well known to Mr. Miller at the time that he signed the third guarantee, which is no different in substance to the guarantees previously signed by him. Similarly, I am satisfied that Mr. Miller was sufficiently experienced and informed by February 2011 to obtain independent legal advice in relation to the documents proffered for his signature if he felt that there was any reason so to do. Likewise, I am also satisfied that there is uncontradicted evidence that Mr. Nolan was at the time of the swearing of his affidavit a manager with the corporate and commercial litigation section of the plaintiff, who made his affidavit "*on behalf of and with the authority of the plaintiff*" and "*from a perusal of its books and records pertaining to the defendants from facts within his own knowledge save or otherwise appears and where it so otherwise appears*" he believed the same to be true and accurate. He further confirmed that the documents, copies of which are exhibited in his affidavit, were contained within the ordinary books of the plaintiff,

and were generated in the course of the ordinary business of the plaintiff. I am therefore satisfied that Mr. Nolan was in a position to provide evidence to the court on this application, and I am also satisfied that there is undisputed evidence that the borrower is indebted to the plaintiff in a sum well in excess of that now sought from the defendants on foot of the guarantee documents.

15. The only argument of potential substance raised by Mr. Miller is that concerning the circumstances in which the loan documentation was executed and completed by the borrower in 2007. On behalf of Mr. Miller, Ms. Sheehy-Skeffington submitted that the guarantee and the facility letter must be read together. As I understood her submission, it was to the effect that the facility letter contained certain preconditions which were not met, and that compliance by the borrower with such conditions was necessary for the guarantee to become effective. Specifically, she argued that the initial facility letter of 2007 required acceptance to be signified by a certified copy of the appropriate board resolution. However, in my opinion the absence of a formal resolution by the company signifying acceptance of the plaintiff's offer of loan facilities is of very little significance where the loan facility in question was subsequently advanced to and accepted by the borrower. Even if the absence of such a resolution was of significance, I consider that the point is adequately met by Ms. Gartlan's submission based on the provisions of Article 19 of the Articles of Association of the borrower. It appears that instead of ensuring that the borrower passed a separate resolution as required by the bank papers, Mr. Meade and Mr. Miller simply filled out the specimen resolution in the bank loan papers in lieu thereof. That signified that they wished the borrower to accept the funds subsequently drawn down. In those circumstances, they cannot now complain that the borrower did not subsequently provide the stipulated formal resolution.

16. As Ms. Sheehy-Skeffington conceded, the only change in the relationship between the parties brought about in 2011 was in relation to the manner in which the guarantee was operated. There was no shift in the position of the company which required to be dealt with by a fresh resolution. The change that was brought about in February 2011 was solely in relation to the terms upon which the company's indebtedness was guaranteed, and this change was a matter for consideration by the guarantors rather than the company. Ms. Sheehy-Skeffington argued that there was no consideration for the guarantee without formal acceptance of the facility by the borrower. In fact, the borrower had long since drawn down and utilised the loan advanced by the plaintiff. It was open to Mr. Miller to decline to alter his previous guarantee contract with the plaintiff, and leave the plaintiff to rely upon a security of the guarantee previously in place. Mr. Miller apparently decided to proceed to sign the new guarantee without demur or the taking of further legal advice, and this is unsurprising in view of his obvious experience and knowledge of such matters by February 2011.

17. In circumstances where the absence of a formal resolution on the part of the company signifying acceptance of the advance by the plaintiff to the borrower in 2007 has been supplanted by the actual acceptance of that sum of money, the liability of Mr. Miller on foot of the guarantee is not in any way contingent upon the production of such a formal resolution. As Ms. Gartlan pointed out, Mr. Miller was at all material times a director and shareholder of the borrower, and was in a position to insist upon adherence by it to any relevant statutory or internal regulation. He did not do so, and cannot now rely upon the non-observance of such formalities in circumstances where he was apparently content to accept that the company should receive and utilise the considerable sum offered by the plaintiff. His personal liability under the guarantee cannot be made contingent upon non-compliance with an internal company procedure which he was in a position to enforce. Accordingly, I am of the view that Mr. Miller's affidavit and submissions do not disclose any matter which is capable of giving rise to a reasonable possibility of a successful defence.

Mr. Campbell

18. The position of Mr. Campbell is potentially different to that of the first two defendants, in that the guarantee of February, 2011 is the only guarantee assigned by him in respect of the borrower's indebtedness, and he was not a director or shareholder or connected in any way with the borrower at the time of the initial advance in 2007. It appears from Mr. Campbell's replying affidavit that he only became a director of the borrower in October, 2012, replacing Mr. Meade after his resignation from that position. His account concerning the signature of that guarantee commences with a telephone call from Linda Bermingham on 11th February, 2011, in which she is said to have stated that she urgently required his signature on certain documentation in order to continue the provision of banking facilities to the company, and that in the absence thereof, the plaintiff would immediately withdraw the overdraft in banking facilities from the borrower. There is no further explanation of the background against which Ms. Bermingham saw fit to approach Mr. Campbell in relation to the affairs of the borrower at that juncture. It is clear that Mr. Campbell must have had a significant previous engagement with the affairs of the borrower by that time.

19. Mr. Campbell states that he informed Ms. Bermingham that he was travelling on holiday on the following day and asked her to e-mail the documentation for his consideration. However, he stated that Ms. Bermingham indicated that the signed documentation was required from Mr. Campbell prior to his departure, and that on the same day Ms. Bermingham arrived at his home in Belfast in order to obtain his signature. Mr. Campbell complains that he was not afforded an opportunity to consider this documentation prior to the meeting, and that Ms. Bermingham stated on her arrival at his home that it suited her to come to Belfast, and that she stressed the importance of "*getting the Company's paperwork in order*". She then produced a letter of guarantee capped at a sum of €1,000,000 and requested his signature to facilitate the provision of banking facilities to the borrower. She is alleged to have informed Mr. Campbell that the signature of a guarantee was standard procedure and she apologised for the urgency in procuring his signature. Furthermore, Ms. Bermingham is said to have informed Mr. Campbell in clear and unambiguous terms that the documentation was "*purely administrative and was required for file purposes only*." It is also asserted that Ms. Bermingham informed Mr. Campbell that the documentation "*would never be used by the bank*."

20. In essence, the defence asserted by Mr. Campbell on this aspect of the matter is that by virtue of Ms. Bermingham's conduct and her misrepresentations to him, his will was overborne, and that he signed the documentation presented to him by her in the absence of an opportunity to read or consider the guarantee documentation, and in the absence of independent legal advice. He states specifically that he did not receive a copy of the guarantee documentation until after the commencement of these proceedings in November, 2014.

21. Curiously, whilst asserting that the guarantee was in effect procured by misrepresentation, and by conduct overbearing his will, Mr. Campbell goes on to state a further understanding that he had arising from his discussion with Ms. Bermingham, to the effect that any potential liability on foot of the guarantee would be shared between the other shareholders of the Company in proportion to their shareholding. In that regard, Mr. Campbell believes that the respective shareholdings are 10% by the first named defendant and 45% each held by the second named defendant and by Mr. Campbell. By his calculation, and without prejudice to his foregoing assertions, as far as he was aware following his meeting with Ms. Bermingham his maximum potential liability was €450,000.

22. These matters are dealt with in a separate replying affidavit by Ms. Bermingham. She asserts that Mr. Campbell is entirely mistaken in his recollection of events surrounding a meeting with her in Belfast and the signing of a guarantee. Her position is that such a meeting and the signature of the guarantee were two separate and distinct events. She states that she left Mr. Campbell in Belfast on only one occasion, that being in June, 2010, which concerned the assembly of an application by Mr. Campbell to Ark Life for a particular form of insurance cover. In that respect, she refers to various follow-up e-mails between Ms. Bermingham, her colleague Pat Campbell and Mr. Campbell in August, 2010. It appears that this policy was necessitated at that earlier time by requirements of

the security offered by Mr. Campbell for the loan facilities afforded to the borrower. It certainly points to a longer and deeper involvement on the part of Mr. Campbell with the affairs of the borrower than is apparent from the affidavits exchanged on this motion. As to the 11th February, 2011, Ms. Bermingham states that it was not possible for her to have attended at the plaintiff's home in Belfast as she was working in Westmoreland Street in Dublin on that date.

23. Ms. Bermingham then proceeds to deal with the allegation that Mr. Campbell did not have sight of the guarantee documentation prior to the signature thereof. Contrary to the suggestion that Mr. Campbell did not see these documents prior to his signature being obtained by her, she deposes to sending two copies of the original guarantee to Mr. Campbell under cover of letter dated 1st February, 2011, one for him to sign and return to the bank, and the other for him to keep. This letter further advised Mr. Campbell to obtain independent legal advice in advance of the signature of the letter of guarantee. Her affidavit exhibits a copy of this letter, which requested Mr. Campbell to return the guarantee, duly signed and witnessed, to Ms. Bermingham at her address in Dublin. However, Ms. Bermingham's affidavit does not go on to set out her understanding of where or when the guarantee was signed by Mr. Campbell, or how it was returned to the custody of the plaintiff. The face of the guarantee document suggests that it was signed by Mr. Campbell in the presence of Ms. Bermingham on 11th February, 2011.

24. It is impossible for me to resolve all details of the conflict as to where and when this document was signed. The bare fact of a conflict of assertions does not of itself lead to leave to defend summary proceedings. The conflict must be assessed within the overall context, and the assertion of the defendant must be backed to a limited extent by meaningful evidence. In this case, Mr. Campbell asserts that his signature on the guarantee was, in effect, procured by improper misrepresentations and pressure emanating from Ms. Bermingham at a meeting at his residence on the 11th of February, 2011. On his account, this meeting occurred because Ms. Bermingham had phoned him on that day requesting his signature on a guarantee as a matter of urgency. When he indicated that he was going on holidays on the next day, Ms. Bermingham is said to have indicated that she would travel immediately to the north of Ireland, this being suitable to her because she happened to have other business in that jurisdiction on that day. I find that this account of her movements is inherently unlikely. As against that, by way of rebuttal of the suggestion that the guarantee was suddenly sprung upon Mr. Campbell on that day, Ms. Bermingham asserted that he had been provided with a copy of the putative guarantee approximately ten days earlier by post, and this assertion is evidenced by the exhibiting of a copy of the letter covering the copy of the guarantee. Ms. Bermingham's assertions in this respect have not been subsequently contradicted by Mr. Campbell.

25. In these circumstances, where the credibility of an important assertion made by Mr. Campbell has been undermined, it is necessary to treat his entire account with caution. I do not discount the possibility that a bank official is capable of behaving in the improper fashion described by Mr. Campbell, but an overall view of the circumstances and available evidence in this case does not suggest a fair and reasonable probability of the defendant having a real or bona fide defence on the basis of an overborne will procured by pressure or improper misrepresentations made by Ms. Bermingham. The force of the assertions made by Mr. Campbell in this respect is also considerably diluted by the alternative suggestion that there was a "*clear understanding from my discussion with Ms. Bermingham*" that his potential liability on foot of the guarantee was to be shared between the shareholders of the borrower in proportion to their shareholding. The two propositions do not sit comfortably together. In my view, in all the circumstances, Mr. Campbell has not put forward the makings of a credible defence that his signature on the guarantee was procured by improper pressure or misrepresentation by Ms. Bermingham.

26. Such issues as have been raised by each of the defendants are, in my opinion, simple and easily determined, and on an overall view the affidavits fail to disclose any arguable defence to the claim of the plaintiff. In the circumstances, the plaintiff will have liberty to enter final judgment against each of the defendants.