[2018] IEHC 71

THE HIGH COURT

2014 No. 163 S

Between:

Allied Irish Banks plc

Plaintiff

– and –

Seamus O'Keeffe, Junior

Defendant

JUDGMENT of Mr Justice Max Barrett on 5th February, 2018.

1. Can a guarantor successfully be sued summarily on a guarantee which on its face (i) purports to have been signed by that guarantor in Ireland on a date when that guarantor may well not have been in Ireland, and (ii) is witnessed as having been signed in the presence of a person whom the guarantor claims never to have met with or encountered?

2. Allied Irish Banks plc has come to court to sue on a continuing guarantee. The guarantee is dated 11th August, 2011, ostensibly signed by Mr O'Keeffe, and witnessed by an AIB bank official as having been signed by Mr O'Keeffe in his presence on 11th August, 2011, it appears at Cashel, County Tipperary. Yet Mr O'Keefe has exhibited credit card records before the court which appear to show that on 11th August, 2011, he was in England buying tyres in Barking, Essex. Mr O'Keeffe also avers, *inter alia*, that he "*never met with or encountered*" the bank official who witnessed his guarantee. There is no affidavit before the court sworn by that purported witness.

3. Curiously perhaps, given the substance of the submissions now made on his behalf, Mr O'Keeffe's first response, following demand being made of him on 21st August, 2012, pursuant to the guarantee, was not to ask 'What guarantee?' or to raise any of the difficulties that he has since flagged and which are the focus of the within application. Instead, he went to a financial advisor who contacted AIB, on Mr O'Keeffe's instructions, by way of letter dated 12th November, 2012, and indicated not that there was any doubt or confusion on Mr O'Keeffe's part concerning the existence or substance of the guarantee, but that "[F]*rom the initial information I have he will not be in a position to satisfy the guarantee as it stands*." In his affidavit evidence, Mr O'Keeffe explains his since-altered approach to turn on the fact that he has had more time to consider matters and was in some confusion when dealing with his financial advisor. Thus he avers, *inter alia*: "[N]*o inferences ought properly to be drawn from the content of Mr Counihan's letter* [*i.e*. the letter of the financial advisor]…*as same was prepared pursuant to a very brief conversation…at a time when I did not appreciate the basis of the Plaintiff's claim as against me."*

4. AIB contends that a striking feature of Mr O'Keeffe's affidavit evidence is that he has never once denied, simpliciter, that he signed the guarantee, but consistently denies having signed it on 11th August 2011. What then does Mr O'Keeffe aver? Over the course of his four affidavits now before the court, Mr O'Keeffe avers as follows:

> *"I did not nor could I have executed the Guarantee on the 11th August, 2011"*
> (Affidavit of 2nd April, 2015),
> *"I again say, confirm and am utterly satisfied that I did not sign the Guarantee on the 11th August, 2011"*
> (Affidavit of 2nd October, 2015),
> *"I did not sign the guarantee in the manner alleged by the Plaintiff"*
> (Affidavit of 19th February, 2016),

and

> *"I did not sign the Guarantee on the 11th August, 2011"*
> (Affidavit of 22nd June, 2017).

5. The court must admit to finding it odd that AIB would issue a summary summons claiming, *inter alia*, "*the sum of €91,000 which…is due and owing by the Defendant to the Plaintiff on foot of a Letter of Guarantee dated the 11th day of August, 2011*" and then complain that it is repeatedly met with a denial that the defendant in question could have signed that very letter of guarantee when the guarantee states itself on its face to have been signed and witnessed in a place where, it appears, the defendant may well not have been on the relevant date. Mr O'Keeffe has sought to meet the case that is made against him; he is not required to assist AIB in making out its case by swearing up affidavits that AIB might find more helpful in terms of bringing its action to a successful conclusion. Moreover, however AIB may wish to characterise the wording of the just-quoted averments, they are capable of being read as (in fairness to Mr O'Keeffe) a complete or (in fairness to AIB) a narrow denial of liability of the type alleged, depending on how one chooses to read them.

6. The confusion concerning how Mr O'Keeffe could have signed, and been witnessed as having signed, a guarantee in Cashel, on a day when it appears that he may well have been in Barking has drawn some notable averments from AIB in its affidavit evidence, including that

> "[W]*hile the Guarantee the subject of the within proceedings is dated the 11th of August 2014 it may very well have been executed by the Defendant subsequent to that date",*

and

> *"For completeness I can confirm that the 11th of August 2011 was a Thursday so it is quite conceivable that Mr O'Keeffe executed the Guarantee on the following day…when he had returned to Ireland".*

7. So AIB's case, in essence is, 'We are suing on a guarantee that states itself to have been executed and witnessed in Ireland on a date when the (putative) guarantor appears to have been in England. Here is an alternative date from many on which we speculate the guarantee might conceivably have been executed. Notwithstanding that the (putative) guarantor denies having executed the guarantee as alleged in the summons (as opposed to addressing the ungrounded speculations in our affidavit evidence) this is a case in which, *inter alia*, it is very clear that the (putative) guarantor has no case and in which summary relief ought therefore to be

granted.' Is this a case for the summary relief for which AIB contends? The hurdle to be surmounted by Mr O'Keeffe as regards having this matter sent to plenary hearing is notably low, though, if the court might respectfully observe, rightly so, given what can be at stake for defendant debtors. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 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?"*

8. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, at 7-8, McKechnie J. summarised as follows the relevant principles applicable when a court approaches the issue of whether to grant summary judgment or leave to defend:

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case…*
>
> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff…*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where, however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
>
> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?'…*
>
> *(viii) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
>
> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(xi) leave should not be granted where the only relevant averment is the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*
>
> *(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."*

9. The within matter, on the evidence now before the court, is patently one that cannot fairly be adjudicated upon by the court in a summary application. The affidavit evidence raises clear conflicts of fact in respect of the circumstances surrounding the alleged guarantee. Mr O'Keeffe's affidavit evidence is worded as it is; and the burden of proof rests not with him but with AIB. Mr O'Keeffe denies having signed a guarantee at Cashel on 11th August, 2011, on the basis that he was in England on that day – and it is a guarantee ostensibly signed by Mr O'Keeffe at Cashel on 11th August 2011, on which AIB has brought the within claim. Notably, Mr O'Keeffe also avers that he "*never met with or encountered*" the bank official who signed his guarantee. These are the kinds of issues which the court suspects may readily be resolved at plenary hearing; but, whether or not that is so, they are certainly not matters that can fairly and properly be resolved in a summary application. Mindful of that "*discernible caution*" to which McKechnie J. refers in *Harrisrange*, and returning to the wording of Hardiman J. in *Aer Rianta*, it is not very clear that Mr O'Keeffe has no case, there are issues to be tried, those issues are not simple and easily determined, and his affidavit evidence does not fail to disclose an arguable defence, the intended defence being, as the court understands matters, that AIB is unable to establish its case by reference to the usual standard of proof.

10. So, can a guarantor successfully be sued summarily on a guarantee which on its face (i) purports to have been signed by that guarantor in Ireland on a date when that guarantor may well not have been in Ireland, and (ii) is witnessed as having been signed in the presence of a person whom the guarantor claims never to have met with or encountered? To that question, the court's answer is 'not in the circumstances presenting'. For the various reasons aforesaid, the court declines to grant the summary relief sought and will refer this matter to plenary hearing.