Neutral Citation [2013] IEHC 197

THE HIGH COURT

[2010 No. 5390 S]

BETWEEN/

TENNANTS BUILDING PRODUCTS LIMITED

PLAINTIFF

AND

DENNIS O'CONNELL

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 17th April, 2013

1. In these proceedings the plaintiff company, Tennants Building Products Ltd. ("Tennants") claims the sum of €293,841 on foot of a personal guarantee given by the defendant, Mr. O'Connell, in October, 2008 in respect of (admitted) obligations incurred by O'Connell Dry Lining Ltd ("Dry Lining") to that plaintiff. The defendant was the effective owner of Dry Lining and this company is now in voluntary liquidation. The defendant maintains that he only give the guarantee on foot of a representation by the plaintiff's agent that it was simply for presentational purposes and that it would never be used. The essential question, therefore, is whether this guarantee binds the defendant.

2. The plaintiff is a distribution company for building materials such as suspended ceilings, partitions, fire protection insulation and external cladding. Up to the commencement of these proceedings, the plaintiff had an excellent business relationship with Dry Lining, a company owned by the defendant and of which he was the director. Indeed, Dry Lining was one of the plaintiff's biggest customers. But by 2008 the downturn in the construction business was affecting Dry Lining. It was experiencing difficulties in securing payment from its own customers and, indeed, as Mr. O'Connell explained in evidence, it was obliged to write off some of this debt. All of this was in turn was affecting its ability to pay Tennants. Tennants had insurance cover on the account, but because of late payments, this was cover was withdrawn.

3. At this stage Dry Lining was indebted to Tennants for significant sums which were not insured. It was at this point that Tennants made clear that some further security was required if the existing trading terms were to continue since the capacity of Dry Lining to discharge these sums was by then in doubt. There is equally no doubt but that Mr. O'Connell was most reluctant to execute a personal guarantee in respect of the trading debts of Dry Lining, as indeed he had been since the very start of the trading relationship between the parties. Yet it is not disputed but that he did so at some stage in early October, 2008 in consideration of Tennants "supplying goods and services to [Dry Lining] on credit both prior to the date of this guarantee and from here on…"

4. The guarantee is, in fact, undated. It is, however, date-stamped as having been received by Tennants on 8th October, 2009. I think that this is more likely to have been a secretarial slip and that it was actually received on 8th October, 2008.

5. It would seem that Mr. O'Connell executed the guarantee to some degree against his better judgment. It may be that he perhaps felt under pressure to do so if he wanted the business relationship to continue. Mr. O'Connell maintains, however, that he was personally asked at a meeting in Galway on 8th October, 2008, by Mr. Cullen, the general sales manager of Tennants, to sign the guarantee on the basis that it would not be enforced. He said that Mr. Cullen told him that the purpose of the guarantee was to re-assure the London head office and that it would be simply "put into the drawer."

6. In this respect Mr. O'Connell's evidence was re-inforced to some degree by Mr. Ronan Coffey. Mr. Coffey was at the time a director of the company, but he negotiated a severance package at some stage in 2009. At the time, however, he was Mr. Cullen's immediate superior.

7. Mr. Coffey acknowledged that the company was under pressure to secure some additional comfort in respect of Dry Lining's debt exposure. He had discussions with Mr. O'Connell in that regard in September, 2008 with regard to a personal guarantee, as otherwise all credit facilities would thereafter be withdrawn. He indicated to Mr. O'Driscoll that he hoped that it would never be activated and he may even have hinted that it most was most unlikely that the personal guarantee would ever be activated. To that end he sent Mr. Cullen to Galway (where Mr. O'Connell was based) at the end of September or early October, 2008 in order to have the personal guarantee signed. Mr. Coffey said that Mr. Cullen was unsuccessful in that regard, but that the guarantee had arrived by post about one week later. As it happens, Mr. Coffey placed the guarantee in a drawer and did not distribute it.

8. For his part Mr. Cullen emphatically denied that he had visited Galway for this purpose. He contended that Mr. O'Connell had in fact sent him a text message by mobile phone on 6th October, 2008 (i.e., two days before any meeting on October 8th) confirming that he had just signed the personal guarantee. Although the actual text message was (understandably) no longer to hand, counsel for the plaintiff, Ms. Geoghegan, then sought to tender an email which Mr. Cullen sent to his credit controller, Ms. McCausland, on that day following receipt of the text message. This email stated, *inter alia*, stated that "he has signed the personal guarantee on his account and is putting it in the post today!"

9. Counsel for the defendant, Mr. Buckely, sought to object to the admissibility of the email as violating the rule against self-corroboration. Of course, the entire object of the rule against narrative is to ensure that litigants do not seek to re-inforce the credibility of their evidence by invoking self-serving statements and correspondence which were conveniently created by them after the events the subject of the dispute. It is clear, however, that where the credibility of a witness is impugned, he may way of exception to the rule against narrative re-inforce his own testimony by reference to documents created *before* the actual happening of the event which might be otherwise thought to taint his objectivity qua witness, even if as Gibson J. put it in *R. v. Coll* (1889) 24 L.R.Ir. 522, 529-530, any attempt at definition "of the conditions necessary to justify the reception of such evidence [would be] a difficult, perhaps impossible, task."

10. It is true that there are passages in the judgment of Gibson J. in *Coll* (which were approved by the former Irish Court of Appeal in

Flanagan v. Fahy [1918] 2 I.R. 361) which might suggest that such evidence may be tendered only to rebut a cross-examination along the lines that the witnesses' account of certain facts is a recent invention. Yet I think that this should be regarded only as a specific example of the court's more general jurisdiction to admit such evidence.

11. In the present case I disallowed Mr. Buckley's objection to the admission of the email in response to a specific question asked of Mr. Cullen in evidence in chief by Ms. Geoghegan, since I considered that the present case provides almost a textbook example of both the reason for the rule and the reason for the exception to it. Had a witness in the position of Mr. Cullen become aware that the question of whether he was physically present when the personal guarantee was executed was to become an issue in later litigation, then the temptation to create a self-serving record of these events might be considerable. This is in effect why the common law precludes the tendering of such evidence by reason of the rule against narrative.

12. It is, however, different where the record is created *before* the event giving rise to the controversy. Leaving aside the fact that Mr. Cullen (like the other witness who gave evidence before me) is a witness of integrity, the critical fact is that this email was created before any question of the circumstances in which the personal guarantee was created could possibly come into controversy. The email, in other words, is plainly an authentic and spontaneous contemporary record, created in circumstances where Mr. Cullen could not possibly have anticipated that the issue of the personal guarantee would later become an issue in litigation. It was inherently probative and it would be wholly artificial to confine its admission in evidence to circumstances where the credibility of the witness's account had first been challenged in cross-examination, not least when it was obvious that the credibility of Mr. Cullen (in the wider legal sense of that term) on this point would be challenged by the defendant.

13. At all events, from October 2008 onwards, however, Tennants would only supply Dry Lining on a cash basis so far as new orders were concerned. No action was, however, taken by Tennants against the company in respect of the existing debt because, as Mr. Cullen, in evidence, the personal guarantee supplied by Mr. O'Connell covered the debt due by Dry Lining. These difficulties notwithstanding, the relationship between the parties remained commendably amicable and it is clear that within Tennants, Mr. O'Connell was (and is) regarded as an accomplished businessman

14. Both parties accordingly sought an accommodation whereby the Dry Lining's debt could be reduced. To this end Mr. O'Connell had two meetings concerning this debt with Mr. Peden, the new managing director of Tennants in both March, 2009 and April, 2010. At the latter meeting, Mr. O'Connell and Mr. Peden had informally agreed on an arrangement whereby the debt would be reduced by sixteen staggered payments of €12,000. This agreement ultimately broke down, in part because Tennants were, for their own understandable commercial reasons, unwilling to reduce this agreement to writing. Mr. Peden.

15. Significantly, however, Mr. Peden was emphatic that at these meetings no issue had been raised by Mr. O'Connell regarding the enforceability of the personal guarantee. Quite the contrary: Mr. Peden maintained that at the April, 2010 he had raised the guarantee with Mr. O'Connell and indicated that it would be invoked if no satisfactory arrangement could be reached with regard to the outstanding debt.

16. In the wake of the March, 2009 meeting no further payments were made with regard to the outstanding debt. It is accordingly not disputed but that Dry Lining ultimately defaulted on its obligations. Mr. O'Connell did ultimately offer a voluntary scheme of arrangement offering 20% of the debt, but this was rejected by Tennants on the basis that it had a personal guarantee. This, accordingly, is the backdrop to the present proceedings.

17. In view of the acknowledged failure of Dry Lining to honour its contractual obligations and given that these were personally guaranteed, it follows, therefore, that Mr. O'Connell is accordingly prima facie liable on foot of that guarantee.

18. This brings us directly to the heart of the legal and factual issues which I cam now required to consider. Mr. O'Connell maintains that he only signed the guarantee on foot of an explicit assurance that the guarantee was simply for presentational purposes and so that the plaintiff's head office in London would be placated. This immediately presents the question of whether a claim along these lines is permissible and, assuming that it is, whether such an explicit assurance was actually given.

The parol evidence rule, oral representations and collateral contracts

19. The defendant's contention is in effect that he executed the contract following an assurance or representation that the guarantee would be not be unilaterally enforced without his consent. If we assume for a moment that this is what actually happened, could the defendant escape liability on foot of the guarantee? The traditional argument against a defence of this kind is that to do otherwise would be inconsistent with the parol evidence rule. By virtue of this rule, the parties to a written contract are presumed to have reduced the entirety of their agreement to writing and that to permit one party to introduce new oral evidence which in effect contradicts the terms of the written agreement would be destructive of legal certainty.

20. It is certainly true that a party cannot be allowed to lead evidence as to what he or she subjectively believed the contract to mean: see, *e.g.*, the Supreme Court's decision in *Macklin v. Graecen & Co.* [1983] I.R. 61. Yet the full rigour of the parol evidence rule has been consistently diluted by doctrines such as *non est factum*, misrepresentation and the collateral contract rule. If the parol evidence rule were to be applied with remorseless and unbending logic, it might create a form of immunity for those who would carelessly, recklessly and perhaps even falsely misrepresent the terms of the written agreement, often to the disadvantage of the weaker party, thus undermining the very public policy on which the very existence of the parol evidence rule rests. While perfect consistency is impossible, the courts have nonetheless sought to strike a balance between the certainty of the written word on the one hand and guarding against the possible injustice which would be visited on those who entered into written agreements on the basis of an incorrect and even deliberately false representation on the other. This would be especially true where (as here) the written document has been prepared by one side for execution by the other.

21. This very principle is re-inforced by the Supreme Court's decision in *ICDL GCC Foundation FZ-LLC v. European Computer Driving Licence Foundation Ltd.* [2012] IESC 55 where Fennelly J. observed:

> "This passage, particularly paragraph 4, should not be misunderstood as advocating a loose and unpredictable path to interpretation. A court will always commence with an examination of the words used in the contract. Moreover, words will, as Lord Hoffman emphasises, normally be interpreted in accordance with their 'natural and ordinary meaning....' Business people will be assumed to know what they are doing and will normally be bound by what they have signed. The exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract. Keane J, as he then was, summarised the law briefly but comprehensively in his still unreported judgment in the High Court in *Lac Minerals Ltd. v Chevron Mineral Corporation* (High Court, unreported 6th August 1993).

> Evidence of the surrounding circumstances, but not of subjective intentions, may be admitted to explain the subject-matter and even what particular words used should be understood as referring to. Such evidence will not normally be allowed to alter the plain meaning of words. In truth, there is no real issue in the present case concerning background or surrounding circumstances."

22. In that respect, therefore, it is plain that evidence can be given of the surrounding circumstances which led up to the execution of the guarantee. If Mr. O'Connell could establish that he only executed that agreement on the express assurance of the plaintiff's agent that the guarantee was merely an empty formula designed to placate his head office, then in such circumstances he could obtain relief either for misrepresentation or by reason of the existence of a collateral contract or, for that matter, on the basis that the parties had not actually intended to create legal relations.

23. This point is well illustrated by the judgment of Finlay Geoghegan J. in *AIB v. Galvin* [2011] IEHC 314. Here preliminary contractual documents (known as the "Heads of Terms") prepared by the bank indicated that the recourse to the borrowers was to be limited to 50% of the loan actually drawn down, yet the personal guarantees subsequently given by the defendants were not limited in this fashion. Finlay Geoghegan J. nevertheless found that there existed a collateral contract according to which AIB agreed to limit its right of recourse to 50% of the drawn debt:

24. She continued:

> " I am using 'collateral contract' in the sense explained by Cooke J., in the Supreme Court of New Zealand in *Industrial Steel Plant Ltd. v. Smith* [1980] 1 N.Z.L.R. 545, at p. 555, quoting with approval from Cheshire and Fifoot on Contracts (5th N.Z. Ed. 1979, 53-54):
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> > "The name is not, perhaps, altogether fortunate. The word 'collateral' suggests something that stands side by side with the main contract, springing out of it and fortifying it. But, as will be seen from the examples that follow, the purpose of the device usually is to enforce a promise given prior to the main contract and but for which this main contract would not have been made. It is rather a preliminary than a collateral contract. But it would be pedantic to quarrel with the name if the invention itself is salutary and successful."
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> .....It is clear that not every statement or promise made in the course of negotiations for a contract may give rise to a finding that a collateral contract exists. To be so treated, a statement must be intended to have contractual effect, see '*Chitty on Contracts'*, 29th Ed., para. 12-004 and cases referred to therein."

Finlay Geoghegan J. then stated:

> "On the facts herein, the statement relied upon by GDK and the Galvin Brothers is that reduced to writing in the Heads of Terms in relation to recourse, to the effect that AIB would have joint and several recourse to the Galvin Brothers for 50% of the drawn debt and to Mr. Shee and Mr. Hanrahan for 50% of the drawn debt. The first question is whether or not this was a statement intended to have contractual effect. The Heads of Terms is a commercial agreement and must be construed objectively in accordance with the principles in *Analog Devices B.V. .* The Heads of Terms were not intended to constitute an unconditonal binding agreement between the parties to make available or take the facilities referred to therein. Neither, however, construing them in accordance with their terms in the relevant factual matrix were they intended to be devoid of contractual effect. AIB were aware at the time that the Heads of Terms were being sought for the purpose of the Galvin Brothers taking further steps to enter into a co-ownership agreement with Mr. Shee and Mr. Hanrahan and for the purpose of permitting the joint venture parties enter into an agreement to purchase the lands in question. The joint venture parties needed to know that facilities would be made available. Each of those steps took place prior to the issue of letters of sanction. The final paragraph of the Heads of Terms states:
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> > "The facilities, and Terms and Conditions attaching, as outlined in this Term Sheet, are subject to formal approval by the Bank and the issuance of a Formal Letter, including the Bank's standard Terms and Conditions, for acceptance by the Borrower."
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> The Heads of Terms, in my judgment, were a representation by AIB that subject to two conditions, it would make facilities available, on the terms and conditions indicated or any variation agreed to the five named persons as joint venturers in the Coolegrean project for purchase and development. The two conditions were formal approval by AIB and the issuance of a formal letter of sanction. The representations were intended to induce the potential borrowers to continue in negotiations with AIB to obtain the facilities referred to therein. In particular, as already stated, the proposal for funding was sought on the basis of a 50/50 recourse to the parties to the joint venture. The representation made by AIB in the Heads of Terms that it was prepared to make facilities available with a limited 50% recourse to each party to the joint venture was intended to and did induce the parties to continue in negotiations with AIB. This was known to AIB to be a fundamental term as far as the Galvin Brothers were concerned. On the evidence, I find that if AIB, in its Heads of Terms, had not represented a willingness to restrict recourse to each side of the joint venture to 50% of the drawn debt, that the Galvin Brothers, as a matter of probability, would have sought facilities for the Coolegrean project elsewhere.

25. It is clear that in *Galvin* the relevant pre-contractual documents formed part of the surrounding circumstances in the sense later explained by Fennelly J. in *ICDL GCC Foundation*. In effect, AIB had represented to the defendants that if they entered into the contract that their recourse exposure would be limited to 50% of the debt actually drawn down. By contrast in *Ulster Bank v. Deane* [2012] IEHC 248 McGovern J. would not accept that generalised assertions said to have been made by bank officials made in the course of negotiations could be relied for the purposes of qualifying the terms of facility letters governing a loan. He stressed that by contrast with the situation in *Galvin*:

> "The defendants have offered no evidence other than verbal discussions which they say altered the terms of the facility letters, but such evidence is inadmissible, being in breach of the parol evidence rule and is a long way short of what was held to constitute a collateral agreement in *City and Westminster Properties* [1934] Ltd. [*v. Mudd* [1958] 2 All E.R. 733.]"

26. In *Mudd* the pre-contractual documents showed clearly that the tenant intended to use a business premises as a private dwelling. It was found that the tenant was induced to enter into a different lease which made no reference to this matter following assurances by the landlord that this clause would not be enforced. This was held to amount to a collateral contract which bound the landlord.

27. The effect of this case-law may be said to be that while the courts will permit a party to set up a collateral contract to vary the

terms of a written contract, this can only be done by means of cogent evidence, often itself involving (as in *Mudd* and in *Galvin*) written pre-contractual documents which, it can be shown, were intended to induce the other party into entering the contract. By contrast, generalised assertions regarding verbal assurances given in the course of the contractual negotiations will often fall foul of the parol evidence rule for all the reasons offered by McGovern J. in *Deane*.

Application of these principles

28. It remains then to apply these principles to the present case. As ever, faced with a conflict of evidence between otherwise credible witnesses, all of whom who evidently doing their best to give fair and truthful evidence, the court's task is not an easy one. What, then, are the objective indicators which can assist in the resolution of these evidential conflicts?

29. It may first be noted that unlike cases such as *Mudd* and *Galvin*, Mr. O'Connell can adduce no *written evidence* of any kind to suggest that an assurance of this kind regarding the non-enforceability of the personal guarantee was ever in contemplation. While not fatal to an otherwise compelling case, the absence of such written pre-contractual documents of this kind must nevertheless be regarded objectively as weakening that case.

30. Second, if the general background to the guarantee clearly shows that if Mr. O'Connell was reluctant to give such a guarantee, then by the same token Tennants were unwilling to supply Dry Lining without some further letter of comfort such as a personal guarantee. Mr. Peden acknowledged that the personal guarantee may well have been intended for the benefit of the London office, but he also stressed – correctly, in my view – that this was not the same thing as a commitment to the effect that the guarantee would never be activated.

31. Third, with the exception of Mr. O'Connell's own evidence, no witness has actually stated in express terms that an assurance of this kind was given. Mr. Cullen denied that such was given and as I interpret Mr. Coffey's evidence he did not quite go so far as to say that Mr. O'Connell was given such an unequivocal commitment that the guarantee would never be used.

32. Fourth, the contemporary record supplied by Mr. Cullen's email strongly suggests that Mr. O'Connell signed the personal guarantee without Mr. Cullen being physically present and that this occurred on 6th October, 2008. This is re-inforced by the fact that Tennants's date stamp on the personal guarantee suggests that it was received by post by them on Friday, 8th October, 2008.

33. Fifth, I accept the evidence given by Mr. Peden that he did raise the issue of the personal guarantee with Mr. O'Connell at the meeting in April 2010 and that there was, in fact, no suggestion that the guarantee was not enforceable.

Conclusions

34. In conclusion, therefore, I would summarise my principal findings as follows:

> A. The guarantee was signed and duly executed by Mr. O'Connell. It is, therefore, *prima facie* binding.
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> B. If Mr. O'Connell could have shown by cogent evidence that it had been represented to him that the guarantee was not intended to be binding, it would have been open to him to establish the existence of a collateral contract to this effect or even, indeed, that there was no intention to create legal relations. To do this, however, it is often in practice necessary to point to some documentary material or perhaps other unequivocal evidence which demonstrates the existence of such a representation.
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> C. Viewed objectively, the evidence does not support this claim, as there was, at most, pre-contractual representations that it was unlikely that the personal guarantee would have to be called upon. Critically, however, the email sent by Mr. Cullen to Ms. McCausland on 6th October, 2008, bears out the plaintiff's contention that the guarantee was signed by Mr. O'Connell on that day. This evidence accordingly undermines the defendant's contention that the guarantee was signed two days later at a meeting in Galway. It also further undermines the contention that at such a meeting there was a representation by Mr. Cullen to the effect the guarantee would not be enforced and that its execution was required simply for presentational reasons.

34. For these reasons, therefore, I find myself compelled to the conclusion that the guarantee binds the defendant. In these circumstances, I must accordingly give judgment for the plaintiff in the sum of €293,841.