Neutral Citation: [2015] IEHC 5

THE HIGH COURT

RECORD NO. 2014 No.23S

PANSEA LIMITED

Plaintiff

– and –

HOME APPLIANCES TRADING AS DID ELECTRICAL

Defendant

Judgment of Mr. Justice Max Barrett dated 13th January, 2015

1. The issue arising in this case is whether Pansea Limited should be allowed to recover, by way of summary judgment, certain monies from DID Electrical that Pansea claims are owing to it pursuant to a franchise agreement executed between the parties to these proceedings on or about 8th October, 2011. Any views expressed herein are tentative in terms of the strength or weakness of any case that might be made by either side at plenary hearing.

2. The key clauses in issue in the franchise agreement are clauses 4.1 and 6.1. They provide as follows:

> *"4.1 All sales of the Products[1] by the Franchisee[2] on behalf of FRANCHISOR[3] shall be at Franchisor's list prices as specified, provided that the Franchisee may in its absolute discretion provide or grant to customers any discounts or deductions on such list prices as it may see fit. Any discount on items quantum will be reflected at month end provided always that the Franchisee shall obtain a 21% guaranteed margin (excluding VAT)…*
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> *6.1 FRANCHISOR shall pay to the Franchisee a commission on sales of Products[4] and Services[5] with a guaranteed margin of 21% (excluding VAT). The manner in which the guaranteed margin is calculated is as set out in Schedule 1 to this Agreement."*
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> [1]. The term "*Products*" is defined in clause 1.1 of the Franchise Agreement as "*the products and services of the type and specification manufactured and/or sold by the Franchisor, together with any other products and services developed or from time to time distributed by FRANCHISOR and which FRANCHISOR may permit the Franchisee to promote and sell in the Territory*." The term "*Territory*" is defined in clause 1.1 as the area within a "*30 (thirty) mile radius of the town of Clonmel, South Tipperary including Thurles, County Tipperary."*
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> [2]. The term "*Franchisee*" is not defined in the Franchise Agreement but clearly is intended to mean Pansea Limited.
>
> [3]. Neither the term "*Franchisor*" nor "*FRANCHISOR*" is defined in the Franchise Agreement but both are clearly intended to mean DID Electrical.
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> [4]. The term "*Products*" is defined in clause 1.1 of the Franchise Agreement as "*the products and services of the type and specification manufactured and/or sold by the Franchisor, together with any other products and services developed or from time to time distributed by FRANCHISOR and which FRANCHISOR may permit the Franchisee to promote and sell in the Territory*".
>
> [5]. The term "*Services*" is defined in clause 1.1 of the Franchise Agreement as "*the various services which will or may be provided by FRANCHISOR to or for the Franchisee in connection with the Business from time to time during the term of this Agreement."* The term "*Business*" is defined in clause 1.1 as "*[t]he retail business in respect of which the activities of the Franchisee authorised under this Agreement may be conducted*".

3. The dispute that now arises between the parties is simply put. Pansea Limited claims that, pursuant to clause 6.1 of the Franchise Agreement, it is entitled to a 21 per cent commission on sales of products and services by reference to the list price, regardless of the discount that it applies pursuant to clause 4.1. DID Electrical claims that it was always the commercial intention of the parties that the cost of any discount offered by Pansea would be borne by Pansea. For its part, Pansea points to the sample calculation in Schedule 1 of the Franchise Agreement. This shows Pansea earning €21k of commission on €100k of sales. No distinction is made in the sample calculation between discounted and non-discounted sales. DID contends that there is an air of commercial unreality to the construction of the Franchise Agreement for which Pansea contends. It maintains that it is not credible to suggest that Pansea was permitted to sell, at a discount, products in which DID retains title until the goods are marked 'taken', whilst always retaining the same amount of profit. Reducing all this to 'brass tacks', the court sets out a notional example below of how the differing contentions of the parties would apply in practice:

Pansea Calculation

Item has list price of €123.

After VAT is accounted for its list price is €100.

Pansea sells the item for €90.

Pansea gets €100 x 21% = €21.

DID gets €90 - €21 = €69.

DID Calculation

Item has list price of €123.

After VAT is accounted for its list price is €100.

Pansea sells the item for €90.

Pansea gets €90 x 21% = €18.90

DID gets €90 - €18.90 = €71.10

4. Clearly the competing interpretations of the Franchise Agreement have significant financial consequences for each of the parties. The court finds that there is sufficient ambiguity in the agreement to support the contentions of both parties. It is possible to read the last sentence of clause 4.1 as supporting DID's contention that the guaranteed 21 per cent commission is to be calculated on the discounted sale figure. However, it is also possible to read the Franchise Agreement in such a manner as to favour the interpretation argued for by Pansea.

Applicable law
5. In deciding whether or not to grant summary judgment, the court has had regard to the decision of the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 and the decision of the High Court in *Harrisrange Limited v. Michael Duncan* [2003] 4 I.R. 1. In the Aer Rianta case, Hardiman J. stated at p.623 of his judgment that:

> *"In my view, the 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?"*

6. The threshold established by Hardiman J. in *Aer Rianta* as to when a matter crosses from being something that can be treated summarily to one that merits plenary hearing is in truth so low that in practice it is only in the most straightforward cases that summary proceedings are appropriate. Insofar as something being 'arguable' is concerned, as Charleton J. notes in *Oltech Systems (Ltd.) v. Olivetti UK Limited* [2012] IEHC 512, at para. 8, albeit in a different context, "*[E]xperience demonstrates that there is little that cannot be argued*" – that, it might be added, includes by way of defence. Provided a defendant comes up with any arguable defence, a bid to recover monies from such defendant by way of summary summons is almost destined to fail, and plenary proceedings almost certain to be required, before the issues arising are adjudicated upon. Indeed the present unlikelihood of success for a plaintiff in summary proceedings, except in the most clear-cut and straightforward of cases, is an aspect of such proceedings that the well-advised client would do well to bear in mind before commencing same.

7. Applying the tests propounded by Hardiman J., it is not very clear in the present case that the defendant has no case; on the contrary it is clear that the defendant has an arguable defence. It is not the case that there is no issue to be tried; there are issues of contractual construction, such as whether there has been a breach of contract by DID and whether, in the context of the 'entire agreement' clause included in clause 15 of the Franchise Agreement, it is appropriate to have regard to the pre-contractual negotiations to which the defendant refers in its defence. The defendant's affidavits disclose an arguable defence.[1] Thus, having regard to decision of the Supreme Court in *Aer Rianta* and the tests propounded therein and referred to above, it is clear that the within case handsomely crosses the threshold from one that can be dealt with by way of summary proceedings to one that is more appropriate for plenary hearing.

8. In *Harrisrange Limited v. Michael Duncan* [2003] 4 I.R. 1 at 7, McKechnie J. summarised the principles that he considered to be relevant when a court approaches the issue of whether or not to grant summary judgment, *viz*:

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
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> *(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…*
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> *(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…*
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> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
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> *(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;*
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> *(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;*
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> *(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?'…*
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> *(viii) the 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;*
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> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
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> *(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 court is conscious of McKechnie J.'s observation in *Harrisrange* that the power to grant summary judgment should be exercised with discernible caution and considers that the achievement of a just result between the parties in this case requires that all of the issues that are the subject of the present proceedings ought to be adjudicated upon at plenary hearing. In doing so, it has looked to the entirety of the situation, gauged the cases of both plaintiff and defendant, and does not consider that there are no issues or issues only of simplicity arising. The court, moreover, is of the view that there are issues of fact that may require to be resolved, that there are issues of contractual construction that would benefit from a plenary hearing, and that DID has an arguable defence to the claim by reference to the terms of the Franchise Agreement.

Conclusion
10. The court considers that the achievement of a just result in the within proceedings requires that it refuse the application of Pansea for summary judgment and that the matter be remitted to plenary hearing.

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1. Clause 15 of the Franchise Agreement provides as follows:

> "15.1 This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous drafts, agreements, arrangements and understandings between them, whether written or oral, relating to the subject matter.
> 15.2 Nothing in this clause shall limited or exclude any liability for fraudulent misrepresentation"

Thus, having regard to decision of the Supreme Court in *Aer Rianta* and the tests propounded therein and referred to above, it is clear that the within case handsomely crosses the threshold from one that can be dealt with by way of summary proceedings to one that is more appropriate for plenary hearing.