Neutral Citation: [2013] IEHC 376

THE HIGH COURT

[2012 No. 4564 S.]

BETWEEN

BT BUSINESS DIRECT LIMITED TRADING AS DABS4WORK.IE

PLAINTIFF

AND

MONTARA LIMITED TRADING AS TOTAL IMPORT SOLUTIONS

DEFENDANT

JUDGMENT of Mr Justice Ryan delivered the 31st July 2013

This case came before me as a motion for summary judgment. The plaintiffs claim is that it supplied 770 laptop computers to the defendant. The question is whether the defendant has set up a defence. More particularly, has the defendant established that it has a reasonable, rational basis for defending the case. The legal principles to be applied were set out by the Supreme Court most recently in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607.

The plaintiffs case as stated in the affidavit of Gaynor Phillips dated the 10th January, 2013, is as follows. The plaintiff and the defendant made an agreement on the 5th July, 2011, for the supply by the plaintiff of 770 laptop computers to the defendant company. There was an instant messaging link between Mr Teddy Daly, who is the deponent who has put forward the company's defence and Mr Lee Williams, who was then an employee of the plaintiff. The conversation went forwards and backwards on the 5th July, 2011. Mr Williams and Mr Daly were also in contact at the same time by email. They were engaged in instant messaging and using email.

The messages begin with Mr Williams greeting Mr Daly and saying that he is going to send an email with an offer and Mr Daly agreeing to examine it. It is not immediately apparent what they are talking about, because the instant messages do not have details of what Mr Williams is offering Mr Daly for sale. It becomes clear that there are three products or lines and Mr Daly is happy on the first two, but he wants some adjustment on the price of the third. He then becomes more specific and says that he "would do the full deal with an immediate PO [meaning purchase order] if you can do £220 on the 550 units, the other prices are fine". Then there is further talk about the offer, in which Mr Williams agrees to hold the stock to meet Mr Daly's wishes. There is discussion about shipping it and how quickly the order can be despatched from England, where the plaintiff company is located. After further exchanges Mr Daly says that Mr Williams should have the purchase order any second and he then asks Mr Williams to confirm receipt of the order. Mr Williams responds "got it mate". Mr Daly is very keen to receive delivery of the goods as soon as possible.

One then turns to the purchase order from the defendant, headed Montara Limited T/A TIS and this lists three categories of items, different specification numbers of Samsung products and they relate to 150, 70 and 550 units. It will be recalled that in the instant messaging Mr Daly and Mr Williams were talking about 550 units and Mr Daly said that he would be happy to do the deal if they could be got for £220 per unit. This purchase order represents confirmation therefore that the matter being discussed was what was comprised in the purchase order.

The instant message communication between Mr Daly and Mr Williams resumes on the 6th July, 2011, and in one message Mr Williams says that that "stock left 9.00 am on overnight for delivery tomorrow with DHL". On the 14th July, 2011, further messages were exchanged in relation to another product that was on offer from the plaintiff for sale to the defendant and agreement was reached as to the supply of the goods and that the plaintiff would retain part of the consignment. In accordance with that agreement, two purchase orders were dispatched. Mr Williams confirmed that he had got the purchase orders.

In the course of that exchange, Mr Williams says "take it the laptops turned up in good time on last order?" Mr Daly responds "yes perfect".

The next document is a copy of a delivery docket recording a delivery on the 7th July, 2011 to Montara T/A Total Import Solutions, Doughcloyne Industrial Estate, Cork. It records DABS.Com of Direct House, Lancaster Way, Bolton. It says that they are machine parts, "Heyck Brennan, 3024113" that there are eleven pieces and it gives the weight. The delivery docket appears to be signed. It says "Bill to 6787- DHL Express (UK) Limited".

The grounding affidavit avers at para. 7 that the delivery of the goods was acknowledged by a signature on the delivery docket by a servant or agent of the defendant and that is exhibit "C" in the affidavit.

The next relevant documents are emails in which the plaintiff claims there is confirmation that the defendant received the laptops, because it says there is a record from Samsung of claims having come through on warranty from customers who bought the computers from the defendant. In respect of warranty claims made to Samsung, the deponent says at para. 9 that:

> "It has been confirmed by Samsung Electronic (UK) Limited and by their Warranties Department that claims have been made against the warranties in respect of some of the computers contained in the batch sold to the defendant. It was also confirmed that the receipt showed that the computer was purchased from the defendant. It can also be seen from the confirmation email that several other of the computers were purchased in July/August 2011."

The relevant exhibit is "E". The exhibit contains a copy email from Tracy Maynard, extended Warranty Administrator, whose email address is tracy.m@,samsung.com and it is addressed to Carl Dobson described as Sector Manager. Ms. Maynard says that she can confirm that of the list of 810 serial numbers relating to Samsung RV 510 laptops that he had sent her:-

> "1) Three laptops have had claims made against them and receipts show them as being supplied by Total Import Solutions t/a Montara, the serial numbers of these are as follows:-"

Three series of letters and numbers follow. She goes on to say that there are a further ten laptops now on records with Samsung as having had claims under warranty made against them in The Republic of Ireland, purchase dates for these were given as either July or August 2011, and she supplies the serial numbers.

When the plaintiffs invoice for the payment remained unpaid, there followed, on the 14th February, 2012, a letter from Napier and Sons acting on the instructions of the plaintiff. The letter acknowledges that the defendant disputed that the laptops were ever received, but went on to reject that contention and set out the reasons. They were as follows:-

> "1. ARAMEX, as subcontractor to DHL say that they delivered the items to you, Montara t/a Total Import Solutions at Doughcloyne Industrial Estate, Cork on the 7th July, 2011.
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> 2. The proof of delivery (POD) is attached. It describes 11 pallets weighing 2,640kgs - exactly the number of pallets and precise weight of the consignment. While it is described as "machine parts" this is simply for security reasons. The POD has been signed as received.
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> 3. ARAMEX also delivered another pallet, from an unknown supplier, to Total Import solutions on the 7th July, 2011. ARAMEX were at your premises on the ih July, 2011.
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> 4. The MSM feed between Teddy Daly of Montara and Lee Williams of BT Business Direct Limited is attached. It reveals entries on the 5th July, suggesting an element of urgency with the delivery. Ted Daly was keen to have the items shipped immediately. One feed from Ted Daly reads: "It 's important I get these ASAP".
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> 5. On the 14th July 2011, Lee Williams asks: "Take it the laptops turned up in good time on last order?" There is no reference to their being any other delivered order. Indeed from the 6th July, 2011, to the 14th July, 2011, there is no communication between the two. Ted Daly replies: "Yes perfect". That is an explicit acknowledgment of receipt. Given Ted Daly's urgency to get the laptops, why did he not raise any query after the 6th July? He did not do so because they had been delivered. There is not other logical explanation."

The replying affidavit by Mr Ted Daly is dated the 6th February, 2013. In his affidavit, he denies that the defendant received the computers or any of them on the 7th July, 2011, or any approximate date thereafter. He says that the defendants have comprehensive systems and that order No. 005918 was not received by the defendant.

Referring to the delivery docket, he points out that it does not refer to laptops, but to machine parts. Neither does it bear the signature or mark of the defendant to its servants or agents. It does not have the full address of the defendant company on it.

Mr Daly says that neither of the only two authorised signatories signed the deliver docket and such signatures "will always accompany a printed version of the name of the signatory".

Referring to the instant messaging exchange between Mr Daly and Mr Williams, Mr Daly says that he "did use instant messages in the past and on other occasions to make orders with the plaintiff, but not on this occasion, indeed such a large order would require and generate more comprehensive paperwork and also be accompanied by an email confirmation". There is of course a purchase order in this case which was sent by email. Indeed, the instant messages actually refer to the purchase order and confirm its dispatch and receipt.

> Mr Daly says at para. 12:
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> "It is your deponent's understanding that instant messages may be created, altered and edited by a recipient. I say that although the defendant did receive deliveries from the courier ARAMEX in the past, the industrial estate in which the defendant company operates is vast and other computer delivery companies also operate in the same estate."

The deponent draws attention to the fact that Mr Lee Williams is no longer working with the plaintiff and he says that the plaintiff ordinarily invoiced the defendant within 48 hours, but here there was a delay of some two months.

Accordingly, Mr Daly asserts that a conflict exists and that the matter is not capable of being dealt with summarily. He has a bona fide defence.

When the matter came on before me, it was not at all clear to me what the company's proposed defence as put forward by Mr Daly's really was. He had of course denied on behalf of his company receipt of the laptops. But he had not made clear what he was saying about the instant messages that discussed purchase and supply of the laptops, the purchase order that was sent and the confirmation of receipt, which happened subsequently. He had announced an understanding that it was possible for a recipient of an instant message or instant messages to alter the contents, but he did not say that that is what had happened and he did not say that he had not sent those messages to Mr Williams. As to the point about delivery, that again seemed extremely vague and Mr Daly did not make any reference to the information from Samsung.

The case had been laid out very clearly in the solicitor's letter and now in the grounding affidavit. In view of the uncertainty about the defence and the lack of clarity in it as to what the defence case was, I gave the defendant an opportunity to file a supplemental affidavit dealing with the defence more specifically, including the question whether Mr Daly was alleging that there was fraud on the part of the plaintiff in making its case by misrepresenting the content of the instant messages.

A supplemental affidavit was sworn on the 181h July, 2013. I now turn to consider this deposition. Mr Daly reiterates the defendant 's contention that it has a bona fide defence and that no such delivery of Samsung laptops was received by the defendant. He then turns to the exchange of messages on the instant messaging system and says:

> "I acknowledge that on the face of it the documentation relied on by the plaintiff suggests an Instant Message by me confirming receipt of the products. Since these proceedings were first instituted and I was first given sight of the affidavit of Gaynor Phillips, I understood that the matter would have to go to plenary hearing as long as it could be shown that there was bona fide dispute as to the true facts of the situation. Since then, my solicitors have indicated to me that I should be in a position to verify my contention that the goods were not received by the defendant company, or acknowledged by me personally. I have managed to make contact with Mr Lee Williams to whom I am supposed to have acknowledged receipt. I spoke to Mr Williams by telephone. He indicated that he did not recall that I had confirmed delivery of any Samsung laptops. In the course of our telephone conversation Mr Williams relayed to me that difficulties

had arisen concerning theses laptops, difficulties which did not pertain to the defendant company, but to a different customer, as he recalled the situation."

Mr Daly exhibits the email from Mr Lee Williams. In the email, Mr Williams says: "I do not recall that you confirmed delivery of the Samsung laptops to me verbally or via MSM messenger in July 2011". That is of course perfectly understandable as of the 51h July, 2013, the date of the email. He says that he did remember having conversations about whether the laptops were delivered or not and being asked by the finance department to check for confirmation "months and months later". Mr Williams goes on to say:

> "I remember this stock being a huge mess internally at Dabs and it did not know what was going on with it!! It was wrongly invoiced without a PO to a different customer by management before month end by the team leader . .. probably to hit a month end target!!"

Mr Daly then describes the efforts that his solicitors have made to engage computer experts to confirm the situation about the instant messages. Unfortunately, however, the computer that he was using at the time is no longer available for examination because the company moved premises in October 2012, and updated computer system and the one that he was using was reformatted for security reasons and cannot now be identified. He was of course aware of the Napier letter of the 12th February, 2012.

The experts suggested some other avenues of inquiry including examination of the computer that was used at the time by Mr Williams.

Mr Daly deals with the contention that the defendant did not follow up on non delivery of relevant products. In other words, if he had ordered the goods as appears to be accepted, why did he not follow up if they were not delivered. The explanation for this is that an opportunity such as came up on this occasion was not part of the normal conventional business, but was something that would happen spontaneously and in those circumstances non-delivery of something that had been ordered would be quite unremarkable. This is of course in total contrast to the picture that is presented in the instant messages.

As regards delivery of the goods and the signature on the delivery docket, Mr Daly says that two employees Declan Sorenson and Robbie O'Sullivan were at the time the only people who could sign for goods, they would do so using the full name and he exhibits some delivery dockets that fulfil those conditions. By contrast, the delivery docket in this case, he says, does not conform. Also, the address on the proof of delivery is Doughcloyne Industrial Estate, "while the address of the defendant company at the time of the alleged delivery was Unit 2, Westend Business Park". Both addresses relate to the same large industrial estate located at Sarsfield Road, Wilton, Co. Cork, which encompasses a considerable number of businesses, offices, factories and warehouses.

In regard to the information from Samsung Electronics (UK) Limited, he again relies on information supplied by Mr Williams. It is his recollection that the plaintiff did not take account of serial numbers of products in the course of its business. He points out that in the affidavit of Gaynor Phillips grounding the application for summary judgment there is no reference to the source of the information about the serial numbers. He goes on to say:

> "Moreover, the defendant company purchased Samsung products from the plaintiff, on at least one other occasion, as evidenced by order of the 22nd October, 2010, and it is conceivable that the warrant he claims made to Samsung Electronics (UK) Limited relate in fact to those products."

He also says that the defendant has purchased hundreds of other Samsung RV 510 laptops from other suppliers.

Finally, Mr Daly says that the claims by the plaintiff includes VAT which it should no do.

The law on summary judgment
I want to turn now to the legal tests that are appropriate and then to assess the material to decide whether the plaintiff is entitled to judgment or the matter has to go to plenary hearing.

In *Aer Rianta v Ryanair* [200 I] 4 I.R. 607, the Supreme Court endorsed two tests from the English jurisprudence that the Court had previously adopted in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75. In the latter case, delivering the judgment of the Court, Murphy J said:

> "For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action (see *Irish Dunlop Co. Ltd. v. Ralph* (1958) 95 I.L.T.R. 70).
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> "In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep. 21 , which was referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Pic v. Daniel* [1993] 1 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the headnote thereto in the following terms:-
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> > 'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or *bona fide* defence.'
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> > "In the *National Westminster Bank* case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-
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> > > 'I think it right to ask, using the words of Ackner L.J. in the *Banque de Paris* case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or *bona fide* defence?' The test posed by Lloyd L.J. in the *Standard Chartered Bank* case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.'"
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> In *Aer Rianta*, McGuinness J. identified the issue
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> "whether the proposed defence is so far fetched or so self-contradictory as not to be credible."

Hardiman J asked: "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?"

The Court took the nature and context of the dispute into account. Hardiman J referred to the facts of the cases in the authorities cited and observed that in *First National Commercial Bank v. Anglin [*1996] 1 I.R. 75, "the indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the defendant quite untenable."

I also adopt the helpful summary by McKechnie J in *Harrisrange Ltd v Duncan* [2003] 4 IR 1 of the courts' approach to summary judgment. Among the points highlighted in that judgment are the following:

> 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, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
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> Leave should not be granted where the only relevant averment in the totality of the evidence is a mere assertion of a given situation which is to form the basis of a defence;
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> 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.

The Court's task is not simply to examine the affidavits and exhibits to discover whether there is a conflict of fact on a decisive point. Neither is it to weigh conflicting depositions in the balance to decide which is more probable. The issue of credibility does not invariably arise in a summary judgment application but when it does, the Court has to apply the above credibility test to the proposed defence. That is what the Courts did in *First National Commercial Bank v. Anglin*, *Aer Rianta v Ryanair* and the other Irish and English authorities. In *Banque de Paris v. de Naray* Lord Ackner said:

> "It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of the defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence."

From this it must follow that the standard of proof for a defendant on the issue of credibility at this stage must as a matter of principle be a low one. At the same time, it is an injustice to deprive a plaintiff of a deserved judgment if there is not a fair or reasonable probability of the defendant's having a real or *bona fide* defence.

Applying the tests
It is of course clear that there is hearsay evidence in the plaintiff's case. The evidence of delivery of the computers to the defendant's premises in Cork is not given by the persons who made the delivery, nor even by anybody in the company that performed that function. The evidence from Samsung about warranty claims from customers who had bought computers from the defendant in Ireland that fitted the description of the goods the subject of the contract or some small number of them is also hearsay. Having said that, Mr Daly's affidavit for the defendant company responded specifically to that evidence.

The evidence that seems to me to be most cogent and to put the defendant at real risk of judgment is the combination of instant messages and the e-mailed purchase order. The exchanges that took place in the conversation between Mr Daly and Mr Williams are convincing enough in themselves but I think the position is strengthened and confirmed from the plaintiff's viewpoint when the purchase order is interwoven into the instant messages. What then appears is a conversation between the two men in which the computers are mentioned with not all details but including the important mention of a batch of 550 laptops and the price at which they were being offered. When one then goes to the purchase order, the need for which was emphasised and understood by them and the confirmation in the course of the instant messages that the purchase order was sent and that it was received, all that seems to me to constitute clear convincing evidence of the making of an agreement. Then there is the delivery docket. But much more damaging for the defendant is the fact that in the instant message conversation that took place on the 14th Mr Daly, responded to Mr Williams' query, confirming that he had received the computers.

It is true that Mr Daly denies receiving the computers but what specifically does he aver in response to the evidence that is put forward by the plaintiff? Mr Daly says the following: --

> (i) I acknowledge that on the face of it the documentation relied on by the plaintiff suggests an Instant Message by me confirming receipt of the products.
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> (ii) He did use instant messages in the past and on other occasions to make orders with the plaintiff, but not on this occasion.
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> (iii) Such a large order would require and generate more comprehensive paperwork and also be accompanied by an email confirmation. There is of course a purchase order in this case which was sent by email. Indeed, the instant messages actually refer to the purchase order and confirm its dispatch and receipt.
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> (iv) Instant messages may be created, altered and edited by a recipient. (v) Mr Lee Williams is no longer working with the plaintiff and he says that the plaintiff ordinarily invoiced the defendant within 48 hours, but here there was a delay of some two months.
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> (vi) Mr Williams indicated in a phone call that he did not recall that Mr Daly had confirmed delivery of any Samsung laptops. Mr Williams relayed to him that difficulties had arisen concerning theses laptops, difficulties which did not pertain to the defendant company, but to a different customer, as he recalled the situation.
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> (vii) His solicitors have made efforts to engage computer experts to confirm the situation about the instant messages. Unfortunately, however, the computer that he was using at the time is no longer available for examination because the company moved premises in October, 2012 and updated its computer system and the one that he was using was reformatted for security reasons and cannot now be identified. [The solicitors' letter from Napier is dated 14-2-2012] The experts suggested some other avenues of inquiry including examination of the computer that was used at the time by Mr Williams.

Discussion
The question that must be considered is whether Mr Daly has actually set up a defence, as opposed to a simple contradiction of receipt of the goods. Has he established that there is a fair or reasonable probability that the defendant has a real or *bona fide* defence?

It is not sufficient merely to deny the claim. Saying in addition that a defendant wants to verify the evidence put forward by the plaintiff does not add to the substance of its proposed resistance. It is possible but not more that the plaintiff may be shown to lack some proof and thus enable the defendant to avoid liability but that is not the rule.

It is very unusual to give judgment in a contested application, even where the court is dubious about the credibility of the proposed defence. A court must be careful not to take a view about the merits. However, the position here is different. The plaintiff's case has as its core allegations clear and cogent evidence of the ordering, despatch, delivery and above all acknowledgment of receipt of the goods, to which the response is not a denial of the communications but an intention to pursue inquiries to ascertain whether the messages can be confirmed. And in that regard, the defendant had it in its power to to extract the record from its own computer but made that impossible by changing them at a time when it knew that the messages were being relied on by the plaintiff to establish its case.

In the circumstances, the defendant's response to plaintiffs case amounts to no more than bare denial and does not set up a basis in accordance with the authorities on which it might defeat the claim. There will be judgment accordingly on foot of the plaintiff's claim.