Neutral Citation [2013] IEHC 201

The High Court

[2012 No. 990S]

Commercial

2012 127 Com

Between

Friends First Finance Limited

Plaintiff

And

Charlotte Lavelle

Defendant

[2012 No. 989S]

Commercial

2012 128 Com

Between

Friends First Finance Limited

Plaintiff

And

Peter Lavelle

Defendant

Judgment of Mr. Justice Charleton delivered on the 9th day of May 2013.

1. These two cases were heard together because they are related. The defendants are also related; they are husband and wife. The defendant Charlotte Lavelle is claimed by the plaintiff financial institution to have borrowed approximately €1.75 million. The defendant Peter Lavelle is claimed by the plaintiff financial institution to have guaranteed that sum. In essence, the defence of Charlotte Lavelle is that she never borrowed the money which was allegedly loaned to her pursuant to written contracts of loan; raising the *non est factum* defence, which so very rarely succeeds. The defence of Peter Lavelle is that his guarantee is dependent upon the validity of the principal contract and that without an enforceable contract the guarantee is without consideration. There is also a point under the Consumer Credit Act 1995.

Basic facts

2. The plaintiff financial institution alleges that Charlotte Lavelle by a revolving credit facility agreement made in writing on the 20th December, 2007, agreed to repay to the plaintiff the capital sum advanced. This was on foot of a facility limited to the sum of €1.75 million together with an arrangement fee of €8,750 and interest on the said capital sum as calculated therein by way of 60 monthly instalments of €10,184.12 followed by what is called a balloon payment of €1,758,750, which was the capital sum advanced on the 2nd January, 2012, in the amount of the borrowing and the arrangement fee. The interest rate applicable was a very high 7.12%. The plaintiff financial institution considered that Charlotte Lavelle defaulted on the payments due under the agreement and, by notice dated the 21st February, 2012, the plaintiff terminated the agreement, thus calling in the loan.

3. As against Peter Lavelle, the plaintiff financial institution pleads that by a guarantee and indemnity in writing made on the 20th December, 2007, he agreed that in consideration of the plaintiff financial institution granting or continuing accommodation or other banking facilities to Charlotte Lavelle, he would guarantee the payment on demand of any sums when any such became due by her. It is consequently alleged that due to the default set out in the previous paragraph, the guarantee is now operative.

4. The facility letter was dated the 19th December, 2007, and offered Charlotte Lavelle borrowing in the sum alleged for a term of 60 months, specifying over four pages relevant provisions as to amount, term, interest rate, repayment date, conditions precedent, arrangement fee, security, expenses, financial information, representations and warranties, and events of default. The detail of the terms indicates of itself that this borrowing is an extremely serious matter. It is accepted that on the fifth page the signature of Charlotte Lavelle appears as apparently witnessed by one Jennifer Lawson. In evidence, Charlotte Lavelle told me that she had not signed this document in front of Jennifer Lawson and did not know her either at the address there given, or at all. That evidence of Charlotte Lavelle is convincing. This circumstance casts into relief the unfortunate approach of the plaintiff financial institution to this loan. The pivotal fact in the extraordinary saga which follows is stated on the first page of the document as being the purpose of the facility: equity investment in various Quinlan Private Investments.

5. As to the guarantee of Peter Lavelle, this was entered into in consideration of the loan specified.

Consideration

6. It is accepted in argument, and rightly so, by counsel on behalf of the plaintiff financial institution, that a contract of guarantee

must be supported by consideration. For this proposition there is ample authority. Any contract must be supported by consideration: either some detriment to the promisee, for instance by giving value, or some benefit to the promisor. However many parties there are to a contract, this principle can be looked at in a mirrored way from the point of view of each party *vis-à-vis* the other. The principle is that one party gets something by giving or promising to give something to the other party on the expectation of that benefit at the same time promising or delivering a value which the other wants in return. If the loan on which the contract of guarantee is based was not entered into by Charlotte Lavelle, then it is clear that the guarantee is empty of the essential characteristic of consideration. I therefore turn to the central issue of the alleged contract of loan. In doing so, a preliminary observation on the evidence is necessary, together with a brief chronology.

Quinlan Private

7. This Court has not dealt directly with cases involving the entity once known as Quinlan Private Investments. What is extraordinary about this case is that from the point of view of the plaintiff financial institution, their commercial duty to ensure that a loan is subject to the detailed terms set out in the 19th December, 2007, letter was entirely abrogated in favour of unknown officials within that entity. That situation is clear from the evidence and I so find as a fact. It is also clear from the witnesses who testified on behalf of the plaintiff financial institution that prudence and attention to detail characterised their daily work in ensuring that loans were enforceable. It is equally clear that because of the arrival of this entity called Quinlan Private Investments on the scene, through an application by Peter Lavelle for finance to support an investment, that what would normally have been done within the bank by way of the checking of, witnessing of and personal signing of documents was handed over to a firm that was known only by reputation and in respect of which a less than prudent view was taken. In addition, the plaintiff financial institution apparently felt that a husband and wife, namely these two defendants, could suddenly for the purposes of tax planning form a partnership in the absence of any partnership deed for the purpose of investment. It was also considered to be appropriate that a loan which was in fact for Peter Lavelle would somehow be taken by Charlotte Lavelle, again for tax planning reasons. All that has consequently resulted in the circumstances of this case might prudently have been avoided had not these unreal twists in the relationship of banker and customer been allowed to happen. A gross departure from the plaintiff financial institution's normal approach of prudence was then compounded by a desire that an entity thought to represent household names would complete the paperwork that is essential to the security of any loan and guarantee agreement.

8. I might state immediately that I am far from favourably impressed by any financial institution approaching a loan on a fictitious basis. Even if not unreal, the idea that a wife could suddenly be a borrower when at all material times it was her husband who was seeking a loan undermines the reality of banking commerce. Worse is the apparent acceptance of a partnership as defined by law, and not by the convention of people living together, as an entity to which money could be made available as in this case. Tax planning is not a reason to unthinkingly accept stratagems that run contrary to a proper exploration of the facts before a loan is given. Every transaction is, as a matter of law, entitled to be defined not by empty documents that pretend to a situation that may avoid tax, but by reference to the underlying reality that defines the true nature of a transaction. What matters here, however, is the facts whereby the loan is sought to be recovered and the defences raised by the defendants. I therefore leave that observation aside.

Chronology

9. I wish to make brief reference to some of the correspondence that led to the situation at issue while making it clear that this is a case which has depended upon the evidence that was given orally during the hearing.

10. What is apparent from the relevant documents is the close involvement of Quinlan Private Investments. That impression was also enforced by the oral evidence. On the 26th October, 2007, Jennifer Lawson of Quinlan Private Investments seeks to arrange a loan of €2.25 million with the plaintiff financial institution for Peter Lavelle. What is described as a "client profile" is sent to the plaintiff financial institution. Relevant tax advice is also furnished. A "cash flow" is exchanged with the plaintiff financial institution together with residency plans and the residency status of Peter Lavelle. After the exchange of more documents that are clearly seen in hindsight to not be real, Eoin Bastible of Quinlan Private Investments made a formal request for a facility to invest in what was called the "Central European Residential Development Programme II". Then what is called a "Proposal for a High Net Worth Client" was made by that entity on behalf of what was called "The Lavelle Partnership". That document, however, is all about Peter Lavelle; referring to his profession, his cash, his investments, his tax status, and what he is seeking. No one in the plaintiff financial institution seems to have questioned the lawfulness of what was supposed to be a partnership, or what the partnership was supposed to be, or who was running the partnership, or to what ends it was formed, or if it ever had a legal inception, or what it had consisted of. Again, it seems that simply because the document was marked in the name of Quinlan Private Investments meant the plaintiff financial institution failed to follow through on their ordinary, and it seems generally very good and prudent, banking procedures. A "Client Profile: As at August 2007", while apparently relevant to the Lavelle Partnership, so-called, has the personal details of "Peter and Charlotte Lavelle" as being "Married to Charlotte" as the relevant "Marital Status". This abrogation of responsability is shocking.

11. On 20th November, 2007, Quinlan Private Investments suggested to the plaintiff financial institution that they should lend to an entity called "The Lavelle Trust" which transaction was to be backed by "a guarantee from Peter". On the 4th December, 2007, an official of Quinlan Private Investments advises a solicitor as to the investment strategy of Peter Lavelle. After apparently taking some advice, the entity called Quinlan Private Investments suggested to the plaintiff financial institution that "the proposed structure of Peter Lavelle's investment in the Central European Residential Development Programme II will NOT in fact work". Instead, on the 11th December, 2007, that entity wrote to the plaintiff financial institution:-

> A compromise solution being proposed for your consideration is where Friends First would lend directly to Charlotte Lavelle with a guarantee from Peter. I would appreciate if you could look at this possibility and revert.

12. Charlotte Lavelle's signature appears on a letter from Quinlan Private Investments dated the 19th December, 2007, to an official in the plaintiff financial institution giving apparent instructions to disburse "distributions of capital arising from the investment ... directly to the bank for the account of the borrower in or towards her indebtedness to the bank". And then, as previously noted, Charlotte Lavelle's signature also appears on the acceptance of the terms and conditions of the loan facility. On the 19th December, 2007, the signature of Charlotte Lavelle appears on a letter to the plaintiff financial institution advising them to draw down €1.25 million "from my recently approved loan" and to transfer this money to an account, which turned out to be an Anglo Irish Bank account. On the 26th February, 2008, the signature of Charlotte Lavelle again appears on instruction for the drawdown of €500,000.

13. On the 24th March, 2010, years later, the plaintiff financial institution wrote directly to Charlotte Lavelle, at the address where she and her husband were residing, referring to the investment and continuing:-

> In March 2008 we wrote to you enclosing two copies of the attached investor documents, a declaration of trust and services agreement, which reflects the terms and conditions on which your interest in the investment is managed by Quinlan Private and held on your behalf by Quinlan Nominees Ltd. At the time, Quinlan Private requested that the both documents were signed and one set returned to our offices, however there is no record of your signed documents being

returned to us. As these documents confirm your beneficial interest in the investment, and set as the basis on which investment will be managed, it is critical that these documents are signed, witnessed and returned to us. For your convenience, I have enclosed two additional copies of both documents and I would be grateful if you could arrange for them to be executed and one set returned to ... at our offices, as soon as possible. I trust you find the above to your satisfaction. However, if you have any queries with regard to the above, please do not hesitate to contact your client relationship manager.

14. That, however, is not all. Another matter which is important to put into the factual matrix is that on the 19th December, 2007, the plaintiff financial institution abrogated their responsibility under the relevant legislation in terms of the protection of borrowers by apparently allowing Quinlan Private Investments to write to Peter Lavelle confirming that the plaintiff financial institution had "approved a term loan facility in Charlotte's name with regard to The Trusts (sic) proposed investment in the Central European Residential Development II ..." This extraordinary letter advises Peter Lavelle of the loan documentation and advises that "one be kept for your records". Why this happens was not explained satisfactorily in court. Everyone seems to have forgotten that the plaintiff was making the loan and no one seems to show respect to the entitlement of Charlotte Lavelle as the supposed borrower to her statutory rights, never mind an entitlement to simply engaged in the process. Peter Lavelle is asked to nominate the bank from which the payments are to be made; he is asked to have the loan documentation in respect of the plaintiff financial institution signed; and he is asked to get a copy of his wife's passport and a recent utility bill in her name. The letter ends by stating "I trust that this is satisfactory". In terms of the administration of banking and the proof that is necessary for the recovery of loans, in fact this is most unsatisfactory. Unmistakably, it is deeply disturbing that any financial institution would take this kind of approach to what could be a life-altering monetary transaction.

15. During the spring prior to this series of unorthodox events, Peter Lavelle and his wife Charlotte Lavelle signed a large number of documents setting up a trust in the Channel Islands in respect of the family finances. This, by the way, was not the vaunted 'Lavelle Partnership'. Charlotte Lavelle was fully informed as to these investment arrangements through that trust and was required from time to time to append her signature to ensure that they worked. She approached that task honestly and developed an understandable dependence on her husband in the direction of their financial affairs and in the explanation of financial documents. She trusted in his prudence, and more importantly, in his honesty. She was therefore habituated to signing trust documents on the explanation of her husband and with a view to the fulfilment of a specific purpose which she and he had worked out and in respect of which she not only trusted him but fully approved of this financial strategy.

Non est factum

16. For the correct legal application of the defence whereby a defendant in general is able to plead successfully in answer to a written contract that it is not his deed, I need go no further than the judgment of Kelly J. in *Allied Irish Bank plc v. Higgins and Others* [2010] IEHC 219 (Unreported, High Court, Kelly J. 3rd June, 2010). The issue in that case was whether a Mr. Mansfield was entitled to escape liability for a debt on the basis of a reading age appropriate to a seven year old and an alleged complete lack of understanding of the relevant documents. The person in question was a seasoned businessman who could pilot a helicopter and who at one stage controlled a vast financial empire very successfully. The following treatment of the law is set out at pp. 40 - 41:-

> The defence of *non est factum* is one which has been considered in the context of an application for summary judgment by Morris J. (as he then was) in *Tedcastle McCormack & Company Limited v. McCrystal* (15th March, 1999). There that judge considered the decision of the House of Lords in *Saunders v. Anglia Building Society* [1971] AC 1004 which is the authoritative modern authority on the topic. He said:-
>
> 'I am satisfied that a person seeking to raise the defence of *non est factum* must prove:
>
> (a) That there was a radical or fundamental difference between what he signed and what he thought he was signing;
>
> (b) That the mistake was as to the general character of the document as opposed to the legal effect; and
>
> (c) That there was a lack of negligence i.e. that he took all reasonable precautions in the circumstances to find out what the document was.'
>
> In the course of his speech in *Saunder's* case, Lord Reid having pointed out that there is a heavy burden of proof on the person who seeks to invoke this remedy went on to say:-
>
> 'The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief…'
>
> Lord Hodson in the same case said:-
>
> 'Want of care on the part of the person who signs a document which he afterwards seeks to disown is relevant. The burden of proving non est factum is on the party disowning his signature; this includes proof that he or she took care. There is no burden on the opposite party to prove want of care.'
>
> AIB contend that they knew nothing of Mr. Mansfield's reading difficulties until they met Mr. Sutcliffe in August 2009. Mr. Sutcliffe informed them of the difficulties of his client Mr. Mansfield.
>
> Mr. Mansfield himself did not tell AIB about his difficulties. He said in his affidavits that he was not aware as to whether the plaintiff was specifically made aware of these difficulties. He said it may have been known to them at the local branch where he had dealings. He went on:-
>
> 'Certainly no member of the plaintiff's staff ever spoke to me about it in relation to the borrowing. I have never emphasised my difficulties with strangers and there was no reason, as far as I was concerned, to notify the AIB.'
>
> Mr. Mansfield has wide business experience given his company directorships. He is of at least average intelligence where non-verbal reasoning is concerned.

He ought to have taken steps to find out what the letter of 19th January, 2009 was or told the bank of his problems. He did neither. He cannot be said to have taken any, still less 'all reasonable precautions to find out what the document was' (per Morris J.)

Thus, one of the three ingredients required for a defence of non est factum is absent.

17. This judgment is based on sound authority and of its origin is in itself firm precedent. I base my decision on the principles therein set out. The facts of that case, nonetheless, occurred in circumstances which are particular to it. Another case, obviously, may be different.

18. There are strong policy reasons underpinning the requirement for care in signing legal documents. The stringency of the test whereby liability may be resiled from reflects the proposition that those who enter into contractual relations on the basis of documents must take care as to what they are signing. I accept the commercial sense of the propositions which underpin the defence and note that chaos might be the result were defendants held to a less stringent circumscription of the defence.

19. On the very particular circumstances of this case, however, a situation arises which has rarely, if ever, been seen before and that is that a financial institution in seeking to make someone bound by a loan agreement should not see fit to meet with the borrower face-to-face, explore what requirements they have and ensure that they sign the documents establishing the mutuality of obligations of borrower and lender. Those basic steps of the ordinary establishment of a proper relationship of borrower and lender did not happen here. The plaintiff financial institution has accepted in evidence that they do not know the circumstances under which Charlotte Lavelle signed any of the relevant documents; that they never met her; that they do not know whether she received any of the letters in relation to the borrowing that was in her name; that they could not comment whether these letters which habitually came from Quinlan Private Investments were distinctively marked with the entity of the logo on the envelope (a large embossed golden 'Q' apparently); that they did not witness the relevant documents within their premises or even through their own personnel; and that they trusted Quinlan Private Investments to do all which they normally would have done as a matter of prudence. This constitutes a radical departure from the procedures of the plaintiff financial institution.

Charlotte Lavelle

20. I have carefully considered the demeanour of Charlotte Lavelle in giving evidence and the background of the documents quoted and all the other documents cited in the case in attempting to assess her credibility. I have assessed her evidence as against all the other evidence in the case. I fully accept that she is a credible witness. In respect of any contradiction as to her evidence and that of any other witness, including her husband and co-defendant Peter Lavelle, I accept her evidence. There is no case made that she has any substantial deficit of understanding. She is, however, a German national and is someone who since her marriage has devoted herself to her family. She has a reasonable educational level of two years of language training but she has not dealt with financial matters and in terms of her involvement in the running of the income of her family the background is that she trusted totally in the expertise, competence and honesty of her husband Peter Lavelle.

21. She told the Court that she came to Ireland in 2004. In 2007 she became aware that a family trust was being set up for her and for her children. In April, 2007 she was given documents to sign in order to settle monies into a trust. She remembers signing these documents for that purpose. When the documents that are relevant to the loan in this case were signed by her, it was in the context of this background. She had no specific recollection of signing the documents relevant to this transaction but accepts that signatures appear as previously indicated. She said that she was given documents by her husband and that these were presented in the context of the family trust and the documents already signed by her in that regard and that she trusted him that he was doing this for her family as he was then in charge. Whereas now, in the context of this case, she would question matters more closely, she then completely trusted her husband. In making a concession of lack of care with the benefit of hindsight, it was within that context. I am satisfied that it does not destroy or undermine the defence raised; relying on a husband who states that documents have a character and effect in accord with a settled family strategy is not negligence because of the circumstances that surround the signature in that context of these documents. Furthermore, that defence must also be seen in the context of the abrogation of duty of the plaintiff financial institution in arranging a loan for someone whom they had never met and in circumstances where the relevant contract, which is supposed to be a meeting of minds, was entrusted through other parties, namely her husband Peter Lavelle, and Quinlan Private Investments. In terms of finding want of care, the balance comes down firmly against the plaintiff financial institution. In contrast, the trusting nature of Charlotte Lavelle was built up in a legitimate context and then used as what was presented to be a continuation of trust administration by her husband. Having heard her evidence, I can not legitimately make a finding of negligence against her. As each letter came in, those which were relevant would be marked with the name of Quinlan Private Investments through "a big golden Q" that would be passed to her husband. It was he who dealt with that institution and, it must be remembered, so did the plaintiff financial institution. She did not have the opportunities which they had and, as regards the plaintiff financial institution, misused. Since Peter Lavelle worked at home, he had management of the post. It is clear that he used that control. There is nothing in the evidence which would suggest deception on her part. All of what she signed that is relevant to this case was on the basis of what her husband put before her with a plausible explanation that it was the settlement of monies into the family trust. As far as she was then concerned, her husband made money and he was able to spend it as he wished. As he wanted to settle money into a trust, and as this process was ongoing, all that she had to sign was marked at the appropriate place and was signed by her on that basis. Her husband said to her that she was to sign these documents in order to settle the relevant finances into the trust.

22. I accept that the first time Charlotte Lavelle became aware that she had borrowed money from the plaintiff financial institution was in 2011 when her husband began talking to her about this case. The situation then came as a shock to her. She had never drafted any documents and nor had she participated in any relevant discussions either with the plaintiff financial institution or Quinlan Private Investments; she signed what she was given on the basis of the explanation proffered to her.

23. Even if the relevant defence of *non est factum* were not to succeed in this case, I would regard it as repellent that a financial institution could hold someone to a bargain in the borrowing of a huge amount of money when there was never any meeting of mind, never mind any meeting in person, whereby that individual could truly be called a borrower as a matter of contract. The stringency of the relevant *non est factum* defence intrudes for policy reasons into the analysis that is normally conducted in this contract law context whereby nobody is kept to a bargain unless they have in the first instance entered into the agreement which supports it on the basis of a mutuality of understanding as to their obligations. It is too easy to pass around forms for signature. It is also too easy to say: ah yes, I signed that but I had no idea what it was. Equally, it might be commented that it is not an insurmountable difficulty if a bank or financial institution wants to lend money to someone, that they attend its offices, that their requirements be discussed and that they actually agree that they want the money in the context of the basic requirement of a loan that it be paid back. The stringencies of the defence that a document is not the deed of the defendant where there are detailed loan documents demand proper prudence before a court will be minded to accept it. Ultimately, however, a witness while plausible is not to be seen in isolation from the surrounding facts. Obviously, the plaintiff financial institution has emphasised those facts which support their case and have done so with great persuasiveness through their counsel. In the context of the entirety of the evidence, my assessment of the

reliability of all of the witnesses and my view of the character of Charlotte Lavelle, the defence that the loan agreement is not her deed is clearly made out.

Consumer Credit Act
24. A subsidiary point arises under the Consumer Credit Act 1995 as amended. Section 38 of the Act provides that a creditor:-

> …shall not be entitled to enforce a credit agreement or any contract of guarantee relating thereto, and no security given by the consumer in respect of money payable under the credit agreement or given by a guarantor in respect of money payable under such contract of guarantee as aforesaid shall be enforceable against the consumer or guarantor by any holder thereof, unless the requirements specified in this Part have been complied with:
>
> Provided that if a court is satisfied in any action that a failure to comply with any of the aforesaid requirements, other than section 30, was not deliberate and has not prejudiced the consumer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be enforceable.

25. The background to the Act was explained by Kelly J. in *Allied Irish Bank plc v. Higgins and Others* in this way:-

> The Act (which was amended by Part 12 of the Central Bank and Financial Services Authority of Ireland Act 2004) insofar as it is relevant defines 'consumer' as meaning 'a natural person acting outside the person's business'.
>
> The term 'business' is defined as including 'trade and profession'. The term 'borrower' means a consumer acting as a borrower. A credit agreement is defined as 'an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a cash loan or other similar financial accommodation'.
>
> Section 30 of the Act contains mandatory provisions concerning a credit agreement or contract of guarantee entered into by a consumer. Such an agreement has to be made in writing and signed by the consumer. A copy of it must be given personally to the consumer or delivered to him within ten days of the making of the agreement. A credit agreement must contain a statement in respect of a cooling off period which gives the consumer a right to withdraw from the agreement without penalty if he gives written notice to this effect within a period of ten days of receipt of the agreement. Alternatively, he may indicate that he does not wish to exercise that right by signing a statement to that effect under certain conditions. A credit agreement must contain a statement of the names and addresses of all of the parties to it and all of the costs or penalties to which the consumer may become liable for any failure to comply with its terms.

26. His analysis as to the effect of the section is also important:-

> Thus, although s. 38 confers a discretion on the court to excuse non-compliance and thereby enable a credit agreement which would be otherwise unenforceable to be enforced, it may not do so in respect of a breach of Section 30.

27. It is clear to me that Charlotte Lavelle was not dealing with the plaintiff financial institution at all and in any event she has already established the defence of non est factum. However, even had she failed to establish that defence and the Court was required to consider the issue under this Consumer Credit Act point, it is clear that she was not dealing with the plaintiff in the context of a business, which would constitute a circumstance wherein s. 38 would not operate. She does not have the financial wherewithal or interest in financial business to deal with a bank as a business investor for the purpose of engaging in volatile markets as a property speculator. That was left to her husband. No inquiry at all was made by the plaintiff financial institution into any of this. Entire trust was reposed in Quinlan Private Investments to make any such enquiries. This is an abrogation of responsibility. I accept that she did not get the relevant documents until well into 2011. Therefore that had it been necessary to decide the case on this point, this defence would have been established. It necessarily follows from the view that I have taken as to the approach of the plaintiff financial institution, as set out in the previous paragraphs, that the discretion of the Court must be exercised against any condoning or excusing of this disturbing and imprudent state of affairs.

Result
28. Both claims are dismissed.