[2017] IEHC 316

THE HIGH COURT

2013 No. 4217S

Between:

ALLIED IRISH BANKS plc

Plaintiff

– and –

ANTHONY BURKE & PATRICK CUSACK

Defendant

JUDGMENT of Mr Justice Max Barrett dated 19th May, 2017.

I: Overview

1. By written guarantee dated 23rd August, 2007, and signed by the defendants (who were at the time directors of Powerhaus Technologies Limited), the defendants jointly and severally guaranteed, *inter alia*, payment by Powerhaus of all sums due and owing by it to AIB plc or for which Powerhaus might in any way be liable to AIB plc, subject to a cap in liability of €150k plus interest thereon. The guarantee was executed for good consideration. By letter of 26th July, 2011, AIB plc made demand of just over €81k from Powerhaus. Powerhaus defaulted in the repayment of same and demands in writing were thereafter made on the defendants as guarantors. The bank now comes to court seeking to enforce its guarantee by way of the within summary application for relief.

II: The Respective Positions of the Defendants

i. Mr Cusack

2. In his affidavit evidence, Mr Cusack complains, *inter alia*, that he was not aware when he signed the guarantee that it was a joint and several guarantee, potentially rendering him entirely liable for all the amounts owing thereunder. He also complains that he was not advised to seek independent legal advice. He claims to have had some difficulty in arriving at a negotiated solution with the banks. And he appears, at least for a time, though this may continue to be so, to be aggrieved that some of the liabilities in respect of which demand is being made appear to have arisen after he believes himself to have ceased to be a director of Powerhaus. All of these defences appear now to have been abandoned, at least insofar as they have any effect vis-à-vis AIB plc. Instead, Mr Cusack appears to have decided that, so far as AIB plc is concerned, he would prefer to have judgment issue against him and to move on with the balance of his life.

3. Before proceeding further, the court would make a number of observations arising from Mr Cusack's affidavit evidence:

> (1) There appears to be no evidence available (certainly there was none placed before the court) that Mr Cusack ever formally resigned as a director of Powerhaus. Instead he appears, sometime around 2008, simply to have ceased his involvement with Powerhaus. In this regard, the court would but note that although the question whether a company has notice of the resignation of a director is a question of fact, a court will be assisted in finding the fact of resignation if a director seeking to end his relationship as director has sent a formal note of resignation to the company c/o the company secretary (even a suitable e-mail will suffice) and retained proof that such note was sent. No particular formalities require to be met in terms of the substance of such a note, though an express indication that one is resigning as a director and from what date in time is typically encountered in practice. It has been clear since at least the time of the decision in *POW Services Ltd and anor v. Clare et al* [1995] 2 BCLC 435 that notification to the Companies Registration Office is not necessary to effect a valid resignation: the relationship of director and company is one that exists between director and company and falls to be terminated between director and company.
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> (2) Mr Cusack indicates in his affidavit evidence that he thought he was signing a joint guarantee where his liability was capped at half the full amount of the guarantee. With respect, no reading of the guarantee documentation could justify such a construction; there is no ambiguity arising from the express text of the guarantee as to the joint and several nature of the guarantee. Mr Cusack's evidence in this respect merely brought home to the court, not for the first time, how very important it is that people treat lending and guarantee documents with the utmost of seriousness, that they read them most carefully before signing them, and if they are in any doubt as to what a document means or the general prudence of what they are doing, especially where the amounts involved could yield personal difficulty if prompt (re)payment is ever sought, that they consult with a practising solicitor, if only to get an objective legal 'sense check' of whatever course of action is proposed. The cost of one or two consultations with a solicitor should typically be marginal compared to the expense and angst that can arise in borrowing/guarantee transactions of any substance when and if a default scenario presents.

ii. Mr Burke

4. Mr Burke raises a variety of points of objection in his affidavit evidence to the granting of summary judgment. Although only a couple of points were touched upon in detail at the hearing of the within application, the court treats with each of his points of objection hereafter.

a. Non-provision of loan particulars.

5. Mr Burke claims in his affidavit evidence, though this point was not raised at hearing, that he has not been provided with various financial particulars. The court does not accept this as correct. The relevant details were contained in statements addressed to the address that is recited by Mr Burke as the address at which he swore the affidavits filed by him in the within proceedings.

b. Non-service of amended summary summons.

6. Mr Burke complains, though this point was not raised at hearing, that he was not served with an amended summary summons. However, the Master of the High Court affirmed in a ruling of 29th November last (though the point seems clear from his initial order) that re-service was not required as the amendment made was minor and did not prejudice the defendants.

c. Calculations.

7. Mr Burke complains that the figures as alleged in the grounding affidavit and the exhibited statements do not reconcile. He is, with respect, wrong in this; they do reconcile.

d. Lack of knowledge of transactions; calculation of sum due.

8. Various issues are raised by the defendants (albeit that they appear to have been abandoned by Mr Cusack) as to lack of knowledge of the transactions pursuant to which the claimed liability arises and the manner in which the sum due has been calculated. Because of this, AIB plc has latterly filed a further affidavit to clarify matters, to the extent that such clarification might be perceived as required. Mr Burke complains that this last-mentioned affidavit was filed belatedly and without leave of the court and that it was really done to ensure that there was full compliance by AIB plc with the observations of Charleton J. in *Ulster Bank Ireland Limited v. O'Brien* [2015] IESC 96. Two points might be made in this regard. First, AIB's last-filed affidavit entirely dispels the purported confusion arising. Even so, had an adjournment been requested to allow Mr Burke to file a still-further affidavit in response to that filed by AIB plc, the court would have acquiesced to that request; tellingly perhaps, no such adjournment was sought. The court is satisfied to admit and rely upon the last affidavit filed by AIB plc. Second, the court respectfully does not consider to be well-founded the reliance that Mr Burke has sought to place upon the decision of the Supreme Court in *O'Brien* as offering some basis on which to impugn the evidence offered by AIB plc in the within proceedings. The whole thrust of *O'Brien* is that the strict criteria of the Bankers' Books Evidence Acts are not invariably a necessary proof for banker debt claims commenced by way of summary summons. It seems almost to turn that decision on its head, as regards the general liberty of action for banker-claimants which it countenances, to contend that a summary claim brought is not in compliance with the 'requirements' of *O'Brien*. Of course, the provisions of the said Acts may be applied with some stringency where summary proceedings are adjourned to plenary hearing and/or there is a serious challenge to such bank records as are furnished in evidence, but neither such circumstance presents here.

e. Discovery.

9. Mr Burke wishes to seek discovery of various documents, *inter alia*, to determine what engagement has been ongoing between AIB plc and Mr Cusack, which discovery he contends would be necessary to enable him to defend himself at (and further justifies matters going to) plenary hearing. The court sees no basis on the facts before it, or in the law applicable to the determination of applications such as that is now before it, for sending this case to plenary hearing. And a desire for discovery, of itself, does not provide a justification for sending matters to plenary hearing: discovery is a means to an end, not an end in itself; it facilitates the proper determination of proceedings, albeit too often at great expense; it is not the foundation-stone on which proceedings are, or ought to be, constructed. Nor in any event, save in instances where there would be a breach of the equal status legislation (and no such breach has been alleged here), does the court see that the joint and several nature of a guarantee means that a lending institution acting upon or pursuant to such guarantee cannot generally, absent contrary contractual agreement (and there is no such contrary agreement here) treat differently, meet separately, talk confidentially, and ultimately resolve matters contrarily, with the different persons bound by same.

III: Conclusion

10. Having regard to all of the foregoing and to the terms of the guarantee and the evidence before the court, there is no doubt but that (a) the guarantee has been properly invoked, (b) the amount sought of the defendants is jointly and severally outstanding, (c) the only issues to be tried are simple and easily determined, and (d) the affidavit evidence before the court fails to disclose even an arguable defence on the part of either and both of the defendants. Neither the low threshold identified by the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 for sending a matter to plenary hearing, nor that discernible caution which the court, mindful of the observations of McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, must bring to its decision-making in summary applications, require that the within application now be sent to plenary hearing. The court is coerced as a matter of law into granting the summary judgment as sought.