Neutral Citation Number: [2011] IEHC 470

THE HIGH COURT

COMMERCIAL

2011 4513 S

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED

PLAINTIFF

AND

SEÁN QUINN AND PATRICIA QUINN

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 16th day of December, 2011

Introduction

1. This is an application for summary judgment against the second defendant (Mrs. Quinn) for a sum in excess of €3m. The claim is made on foot of a facility letter of 17th November, 2006, a credit agreement of the same date and the then prevailing general conditions for personal loans of the plaintiff (the bank).

2. The amount of the facility was €3m and the purpose was identified as being to provide the borrowers with a personal loan facility. The defendants were the borrowers and judgment has already been recovered against the first defendant, Seán Quinn. The facility was repayable on demand and no issue has been raised in these proceedings concerning the demand which was made.

Terms

3. Under the heading *"Borrowers Acceptance"* on the letter of facility, Mrs. Quinn appended her signature no fewer than five times. The first and second time related to consent being given to written and telephonic communications being had between the borrowers and the bank.

4. The third signature was appended under the legend *"contracts negotiated away from the business premises of the bank"*. I am satisfied that a signature was not in fact required at that point, but I will return to this later.

5. The fourth signature was an acknowledgement that Mrs. Quinn was waiving a right to a ten day period to reconsider her commitment to the agreement.

6. The final signature was an acknowledgement that she had read the conditions set out in the letter of facility and the general conditions of the credit agreement which formed part of the overall agreement and that she agreed to be bound by the provisions of the agreement.

7. Mrs. Quinn acknowledged that she was:-

> *"fully aware of, and understood the nature of the agreement and had been advised to take and had been given the opportunity to take separate independent legal advice on the effect of the agreement".*

She did not, however, indicate whether she had taken or waived that opportunity.

8. The credit agreement of the same date indicated to her that she might withdraw from the agreement at any time within ten days of receiving it and advised her to take legal advice before it was signed.

9. A number of the general conditions of the bank are of relevance having regard to the lines of defence which have been outlined.

10. This borrowing was a joint borrowing by the defendants, who are husband and wife. Under clause 16 of the general conditions dealing with personal loans, it is expressly provided that:-

> *"Where there are two or more parties to the agreement as borrowers, their liabilities hereunder shall be joint and several and references to the borrower shall be deemed to be references to any one or more of such persons".*

11. General condition 1(4) provided that the borrower instructed the bank that:-

> *"In connection with the operation of any account in the name of the borrower, the bank is authorised to act on instructions given by the borrower by telephone, telex, facsimile or email or by electronic, microwave, magnetic or digital means".*

12. The following clause provided that in consideration of the bank agreeing, at the request of the borrower, to act on instructions received by those methods, the borrower agreed and covenanted with the bank that the bank might act on such instruction. Such instructions could include instructions to pay money or otherwise to debit or credit any account of the borrower with any amount or relate to the disposition of any money or purport to bind the borrower to any agreement with the bank or with any other person. Furthermore, the borrowers accepted that they should at all times accept the debit or the credit by the bank of any of the borrowers' accounts in respect of any such transaction as conclusive evidence of any such instruction sent by telephone or any of the other methods described.

13. Under clause 9, bearing the heading *"Representations and Warranties"*, the borrower represented that he or she had made full disclosure of all facts in relation to the financial affairs of the borrower which would have a material effect on the ability of the borrower to meet the obligations undertaken.

14. Under clause 14, the borrower indemnified and agreed to keep indemnified the bank against all claims, demands, liabilities, losses *etc*. as provided for in that clause.

15. Finally, the general conditions provided that a certificate by any director of the bank as to the amount due from the borrower was to be conclusive evidence of what was stated save for any manifest error.

The Test
16. Three lines of defence are advanced by Mrs. Quinn which I will consider in turn. Before doing so, I ought to identify the test which I have to apply on this application.

17. There is now a wealth of jurisprudence, both in this Court and in the Supreme Court as to the approach to be taken on an application for summary judgment.

18. The threshold of proof which has to be achieved by a defendant is low. The test as identified by Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607, is this:-

> *"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?"*

19. The most recent statement of the law from the Supreme Court is contained in *Danske Bank v. Durkan New Homes* [2010] IESC 22. There Denham J. (as she then was) cited with approval the views of Ackner L.J. where he 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 a 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."*

My Approach
20. For the purpose of this exercise, I propose to take the affidavit evidence sworn by Mrs. Quinn entirely at face value. Both in replying affidavits and in submissions, substantial criticism was made as to the credibility of a number of sworn statements made by Mrs. Quinn. For example, she took issue at being described as a "business lady". She said that she is, in fact, a homemaker and has been such for the past 36 years or more. She says that her only role since the time of her marriage at 21 years of age was as a wife and mother, rearing her family and taking care of her husband and children. She said that she was never involved in any business or financial dealings beyond deciding upon the weekly groceries and providing for household expenses. She said that the description of her as a business lady is wholly incorrect.

21. In response, the plaintiff adduced evidence that Mrs. Quinn held directorships of in excess of 60 Irish companies. She was also company secretary of more than ten companies. She also held directorships in 28 companies registered in the United Kingdom and Northern Ireland.

22. Mrs. Quinn says that although she was appointed a company director, she did not possess any sophistication or even basic knowledge on business matters. She said she was never involved in any of the day-to-day decision making processes and was not employed by the Quinn Group of companies.

23. I leave to one side all questions of credibility concerning this and indeed other areas of dispute. I will deal with Mrs. Quinn's sworn defence at its high watermark. I accept for the purpose of this application that everything said by Mrs. Quinn, pertinent to the lines of defence sought to be advanced on her behalf are accurate and true.

Non Est Factum
24. The first line of defence is that of *non est factum*. This is a defence which is only rarely invoked successfully. The law, both in England and in this jurisdiction on the topic is clear.

25. The leading case is that of *Saunders v. Anglia Building Society* [1971] AC 1004, which was followed by Morris J. (as he then was) in this country in *Tedcastle McCormick and Company Limited v. McCrystal* (15th March, 1999) and by me in *Allied Irish Banks Plc v. Higgins & Ors*. [2010] IEHC 219.

26. Morris J. said as follows:-

> *"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."*

27. In his speech in the *Saunders* 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 advisors 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."

28. Lord Hodson in his speech 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."*

29. I have already pointed out what is said by Mrs. Quinn concerning what she describes as her lack of basic knowledge in business matters. She went on to say in her affidavit:-

> *"I do accept that over the course of very many years, my practice has been to sign documents when requested to do so by my husband, Seán Quinn Snr., the first named defendant, or by his former colleagues within the Quinn Group. However, I say that these documents were never explained to me nor was I ever consulted or provided with any explanations or legal advice informing me as to the nature or impact of the documents I was being asked to sign. This is embarrassing to admit, but it is the truth."*

30. She told me in the affidavits that she had no recollection of ever seeing the facility letter or of actually signing it. However, she does accept that it is her signature which appears on the facility letter. She said that she first became aware of the existence of a personal loan facility only after these proceedings were instituted. Up until then she said that she has no appreciation of even the letter of demand which was sent to her and her husband at their home at Ballyconnell, Co. Cavan.

31. Mrs. Quinn's practice when any bank statements or documents generally to do with Quinn companies arrived at her home was to simply put them in a forwarding envelop to the Quinn Headquarters at Derrylin or to give them to her husband. She said that she had no appreciation of the existence of the facility, the provision of funds, or whether they had been purportedly lodged. She said that she did not even know that she was a customer of Anglo Irish Bank, the plaintiff bank as it then was.

32. Mrs. Quinn says that she had no recollection of signing the document or the contents or nature of the document ever being brought to her attention. She went on to say in her affidavits that prior to the receipt of the demands from the bank she did not believe that she had received any direct communication or contact from the bank or any official acting on its behalf.

33. On 19th December, 2006, Mrs. Quinn executed a further document, namely a joint account mandate by signing it on two occasions. She also provided a copy of her passport to the bank and that copy passport has been exhibited in affidavit evidence before me.

34. Even the most cursory of glances at the documents which bear her signature would alert any but the illiterate to the fact that this was some form or borrowing transaction. But it would appear that even such information was lost on Mrs. Quinn because she apparently simply signed documents as part of a course of conduct without giving the matter a second thought. That is the height of the case which she makes. I am satisfied that it is one which falls far short of providing even a statable defence on the basis of *non est factum*.

35. Mrs. Quinn has been unable to demonstrate even arguably the existence of the first of the three ingredients said forth by Morris J. in the *Tedcastle McCormick* case. She has to be able to demonstrate an argument that there was a radical or fundamental difference between what she signed and what she thought she was signing. The truth is, she gave no thought to what she was signing and, therefore, could not know whether there was any difference between what she was signing and what she thought she was signing. To use the words of Lord Reid, *"she could not have such a belief unless she had taken steps or being given information which gave some grounds for that belief".*

36. Second, in order to establish an entitlement to rely on this defence, there has to be a lack of negligence on the part of the person seeking to set it up. What could more negligent than willy-nilly signing formal legal documents without giving any thought as to their effect? Mrs. Quinn has failed to provide any evidence of the existence of the third ingredient identified by Morris J. On this topic, I agree fully with the observations made by Clarke J. in *ACC Bank v. Kelly*, where he said:-

> *"By signing a commercial banking arrangement, a borrower agrees to be bound by the terms of that arrangement and if the borrower has not taken the trouble to adequately read the document or be adequately informed as to its meaning then the borrower must accept the consequences of having signed a commercially binding agreement in those circumstances."*

37. I am satisfied that under this line of defence of *non est factum* that it is very clear that Mrs. Quinn has no case. She has failed to adduce any evidence which would satisfy the existence of an arguable case in respect of two of the three ingredients of the defence of *non est factum* as demonstrated in the case law.

Undue Influence

38. The second line of defence is an attempt to say that everything which Mrs. Quinn did occurred under the undue influence of her husband.

39. It was argued during the course of the hearing that there is at law a presumption of undue influence between husband and wife. There is not. That much is clear from case law going back to the middle of the eighteenth century. In Halbury's *Laws of England* (4th Ed.) para. 40, vol. 18, one finds on this topic the following under the heading *"No presumption between husband and wife" – 'it is noticeable that the relation of husband and wife is not one which gives rise to the presumption that undue influence was exercised'"*.

40. In support of that statement, there is a line of cases which begins with that of *Rigby v. Cox* in 1750 going right through the nineteenth century and up until the twentieth century. So it is a principle that has been well established in law. Its effect was eloquently articulated in this jurisdiction by Carroll J. in *In Re Hunting Lodges Limited* [1985] ILRM 85. Now admittedly, Carroll J. was dealing with a different situation to what I am dealing with here. In her case, a wife sought to avoid personal liability for the debts of a miscreant company in circumstances where she acted as a director of that company. As part of her defence, she alleged that she was in fact a housewife and mother and that she really took no part in the running of the company and therefore should be able to avoid liability. This is what Carroll J. had to say:-

"In relation to Mrs. Porrit, the case has been made on her behalf that she played no part in the running of the company. The day has long since passed since married women were classified with infants and persons of unsound mind as suffering from a disability so far as responsibility for their acts was concerned, or since a married woman could escape criminal responsibility on the grounds that she acted under the influence of her husband. Mrs. Porrit cannot evade liability by claiming that she was only concerned with minding her house and looking after her children. If that was the limit of the responsibilities she wanted, she should not have become a director of the company, or having become one she should have resigned."

41. Whilst the circumstances are different, it seems to me that that is an accurate articulation of the legal position.

42. I am satisfied that there is no presumption of undue influence at law arising simply because of the relationship of husband and wife. That has been clear since at least 1750.

43. The lack of any presumption of undue influence is not, however, the end of the matter. The absence of the presumption does not mean that there could not be actual undue influence. But if there was such actual undue influence, there would have to be, at least, some evidence demonstrative of such impropriety. There is no evidence of any sort to support such a contention. There is no suggestion of Mrs. Quinn suffering from any intellectual disability, mental illness, feebleness of mind or cognitive impairment. Neither is there any evidence of any threats of bullying or such behaviour towards her by Mr. Quinn. There is not the slightest evidence to suggest any allegation of actual undue influence could be sustained. Accordingly, I am of the view that there is here neither a presumption of undue influence or evidence of any undue influence to make such an argument possible. Accordingly, this line of defence fails.

Total Failure of Consideration

44. The last line of defence is on the basis that there was in the present case, a total failure of consideration. The gist of this argument is that the monies in question did not benefit Mrs. Quinn.

45. It is quite clear on the documentary evidence that the monies were, at the direction of her husband, transferred into one of the Quinn companies. But it is equally clear that Mr. and Mrs. Quinn were joint borrowers. Under the terms and conditions, which I have already alluded to, Mr. Quinn was entitled to give the direction which he did which is binding upon Mrs. Quinn. The bank was entitled to act on foot of that direction. It was no concern of the banks as to what happened to the monies thereafter. The monies were described as a personal loan facility. Whether the €3m was used to complete the decoration of the Quinn dwelling house or for some other purpose was a matter for the borrowers.

46. The plain fact in this case is that the loan was drawn down at the direction of Mr. Quinn and was utilised. It is also clear from the material that has been adduced before me that interest on the loan was serviced on a number of occasions, the loan being held in the joint names of the defendants.

47. Joint borrowings always give rise to the possibility that one of the borrowers may utilise the funds with no appreciable value being seen by the other borrower. That is the case with joint borrowings which are governed by terms and conditions such as apply here. If Mrs. Quinn does not consider that she got value for the borrowings then her complaint is against Mr. Quinn and not the bank.

48. I am satisfied that that no arguable defence has been demonstrated under this heading either.

Final Comment

49. I should finally deal with the criticism which was made, late in the day, concerning one of the signatures which were appended by Mrs. Quinn to the facility letter. It is that one which was appended under the heading *"Contracts negotiated away from the business premises of the bank"*. What is said is that there should be a signature and a witness to the signature where the contract is negotiated away from the business premises of the bank. What is actually said in the letter is that there should be a signature and a witness to the signature, where the contract is negotiated away from the business premises of the bank and where this is done in the presence of a representative of the bank.

50. I am satisfied that there was no necessity for Mrs. Quinn to sign that part of the letter at all because this agreement was not signed in the presence of a representative of the bank. That is what is sought to be addressed by this provision. I am also satisfied that this provision is contained in the facility letter so as to comply with obligations imposed under Statutory Instrument 224/1989 entitled European Communities (Cancellation of Contracts Negotiated Away From Business Premises) Regulations. As there was no representative of the bank present, there was no necessity for this to be signed. It was in fact signed by Mrs. Quinn and witnessed. I am satisfied that there is no point by way of defence which can be raised in respect of this matter which arose only late yesterday afternoon when Mr. Shipsey was on his feet.

Conclusion

51. The view I take, therefore, is that putting aside all of the criticisms that were made of Mrs. Quinn's evidence and taking them at face value as being accurate and truthful in every respect, she has failed to demonstrate an arguable defence under any of the three headings which were identified by counsel on her behalf. That being so, the plaintiff is entitled to summary judgment against her for the amount outstanding.