Neutral Citation: [2015} IEHC 555

THE HIGH COURT

[2014 No. 1349 S]

BETWEEN

SRI APPAREL LIMITED

PLAINTIFF

AND

PAUL BOND

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on 14th day of July, 2015

1. The plaintiff company seeks judgment against the defendant in the amount of €76,480.52 as an amount due and owing pursuant to the provisions of a "settlement agreement" made between the parties and dated the 22nd June, 2011. The defendant appeared in person and denies the plaintiff's claim. He submits that he has an arguable defence and seeks to have the case sent for trial by way of plenary hearing. A number of affidavits have been sworn on behalf of the plaintiff by Sean Gallinger a director of the company and the defendant.

2. The plaintiff claims that a settlement agreement was reached between the parties concerning a sum said to be due and owing by the defendant to the plaintiff company arising from unauthorised cheque and credit card payments made by the defendant for his personal benefit and using the plaintiff company's funds while the defendant was a director of the plaintiff. The relevant terms of the agreement are *inter alia*:

> "1. Subject to paragraph 2 below, the Debtor shall pay SRIA (the plaintiff) the following amounts in full and final settlement of the debt that it hereby acknowledges to be owing by the debtor to SRIA;
>
> (a) €10,000 on or before the 31st December, 2011.
>
> (b) €25,000 on or before the 31st December, 2012 payable by eleven equal monthly instalments in the amount of €2,083 and the twelfth payment of €2,087 on or before the last business day of each month.
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> (c) €15,000 on or before the 31st December, 2013 payable by equal monthly instalments in the amount of €1,250 on or before the last business day of each month.
>
> Unless otherwise specified the said payments will be made by credit transfer to the account details of which are provided hereunder …
>
> 2. The debtor irrevocably acknowledges and undertakes that in the event of any of the following occur (each an "Event of Default") he consents to judgment against him in respect of the full amount of the Debt less all payments made by him to SRIA up to the default date; …
>
> (a) if the Debtor fails to pay on the due date any monies payable by him pursuant to paragraph 1 above, or fails to discharge or perform any obligation or liability to SRIA pursuant to this agreement. … or term or condition of this agreement …
>
> 4. The debtor hereby agrees to indemnify SRIA on demand for any loss, cost or expense which may be incurred by SRIA as a result of any default by the debtor in complying with any of its obligations under this agreement.
>
> 5. The debtor acknowledges that this agreement has been entered into for good consideration, in particular but not limited to, the forebearance by SRIA from seeking a Judgement against him at the present time".

The agreement was signed on behalf of the plaintiff and by the defendant.

3. The defendant did not make any payments to the plaintiff pursuant to the terms of clauses 1(a), (b), or (c).

4. By letter dated 16th December, 2013 the plaintiff's solicitors wrote to the defendant's solicitors who were on record for the defendant in respect of other separate proceedings. His solicitors were informed that the plaintiff had instructed its solicitors to seek the recovery of the sum of €76,480.52 together with interest and costs pursuant to the terms of the settlement agreement by reason of the defendant's default in payment. An email response was received dated 17th December, 2013 advising that Mr. Bond had not given an authority to his solicitors to accept service on his behalf.

5. On 6th January, 2014 the defendant wrote to the plaintiff's solicitors acknowledging that he understood their intention to serve papers in respect of the amount outstanding but indicating that he proposed to send to the plaintiff's solicitors correspondence which he claimed "superceded the signed agreement that you have in your possession and which clearly shows that your client rejected that agreement and subsequent agreement in August 2011". He also claimed that the plaintiff involved the defendant in a case against a different firm Donal O'Sullivan and Revolution Work Wear in December 2011 which caused him to incur legal costs. I am satisfied that this matter is entirely irrelevant to the issues in this case. Furthermore he pointed out that the plaintiff requested that the defendant sign a lease on it's behalf for a showroom in Sutton Quays, England, but that the plaintiff company broke the terms of the lease as a result of which the defendant was pursued by the landlord personally.

6. In affidavits sworn on the 27th November, 2014 and the 22nd May, 2015 the defendant outlined the basis of his proposed defence. He provided the background to the relationship between the parties and his family company JP Bond & Co. Ltd. He states that

between 2006 and 2009 JP Bond & Co. Ltd. was the largest customer of Summit Resource Imports LLC a company based in Montana in the United States which had the global licence for "caterpillar" clothing. The plaintiff was incorporated on the 28th February, 2008 and from that date until the 17th February, 2010 the defendant remained a Director of the company. Mr. Gallinger is a Director of the plaintiff company. It is a wholly owned subsidiary of JD Divver Holdings Co. Ltd. which is in turned owned by JPD LLC and Summit Resource Imports LLC. He states that the plaintiff was incorporated as a trading company. He described how he was issued with a credit card and made a signatory for the plaintiff's bank account. He was the sole employee of the plaintiff company in Ireland. He was encouraged to use both facilities "to support the non-resident tax purposes of JP Divver Ltd." as "the non-resident can only be treated as a non-resident for income tax purposes if the related company carries on a trade". In this instance the trading company in Ireland was said to be the plaintiff which was intimately "related to the non-resident JP Divver Ltd". Mr. Gallinger for the plaintiff states that this suggestion is "complete nonsense".

7. Whatever about that view, the defendant accepted that as a director of the plaintiff he used the bank account and credit card throughout 2008 and 2009 but furnished receipts and credit card statements at all times to the plaintiff's parent company in Montana which at all material times controlled the finances and accounts of the Irish company.

8. The defendant states that he received no salary from the plaintiff during this period but that the plaintiff amassed a reserve profit of €420,171.00 during his tenure. The defendant claimed that in the initial three years Mr. Gallinger approved all of the expenditure made by the defendant. He alleges that this expenditure was only questioned when his family company JP Bond & Co. Ltd. ceased to be the distributor for the American company "as a result of a credit crisis". Importantly, Mr. Bond does not dispute that he agreed that he owed a sum of money to the plaintiff and signed an agreement to that effect on the 22nd June, 2011. However, he claimed initially that the terms of this agreement were "superceded" by subsequent events and have no legal effect.

9. Mr. Bond claims that subsequent developments negated this agreement which was effectively set aside on the basis that the terms of a new agreement were under negotiation between him and the plaintiff.

10. On or about the 1st July, 2007 the defendant's family company JP Bond & Co. Ltd. (also referred to as Bond Safety) signed a lease agreement with an English partnership of Michael Hughes, John Punt, Michael Farwell and Michael Vickers trading as Prime Property Partnership in respect of the rental of Unit 2, South Quays Business Park, Clifton Road, Sutton Weaver, England, for a term from the 1st July, 2007 to 31st October, 2013 with a tenant option break on 31st October, 2010. It appears that the premises were occupied until October 2009 at which stage, for reasons and in a manner which is in dispute, the tenancy agreement was repudiated.

11. It is claimed by the defendant that Mr. Gallinger required that he sign the lease on behalf of the plaintiff in 2007 as the plaintiff had no trading history at that time in the United Kingdom. It is alleged that the plaintiff was at all material times to occupy the premises and would indemnify JP Bond & Co. Ltd. in respect of the rent and any liabilities arising on foot of the lease.

12. The landlords have pursued JP Bond & Co. Ltd. in the English Courts for rent due under the terms of the lease. It is claimed that the defendant and his company have been left exposed to a claim of STG£126,645 (UK). It is clear from the papers that the lease was entered into by the company but the defendant is not joined as a party English proceedings issued claiming that sum against the tenant company. He is not exposed and does not have personal liability for the rent due on foot of the lease to the landlords.

13. The defendant exhibits a number of emails in which it is claimed that Mr. Gallinger requested that the lease be signed. Initially, the defendant claims that the plaintiff was to occupy 25% of the unit. However, in August 2009 the trading element of the plaintiffs United Kingdom business was sold without notice to the landlord or the defendant or the tenant company. It led to an inquiry from Mr. Gallinger to Mr. Bond as to how any liability under the lease might be avoided. The English court proceedings note that the tenant option break in October 2010 was not relied upon by the tenant company.

14. Mr. Bond claims that negotiations followed between Mr. Gallinger and Mr. Hughes of the landlord partnership. Matters were not resolved and JP Bond & Co. Ltd. was pursued by the landlords for outstanding rent owed under the lease. He claims that Mr. Gallinger instructed him not to pay any additional rent in order to strengthen the hand of his employee a Mr. Michael Hayles in negotiations with Mr. Hughes. He further claims, in his second affidavit, that Mr. Gallinger was aware that he and his family company were exposed to this liability and used that fact to exert pressure upon him in relation to the agreement now in issue. He states that he was assured verbally and by email by Mr. Gallinger that he would honour his commitment to settle the South Quays lease. He adds that "reluctantly and under considerable and unrelenting pressure from him, I signed an agreement with him to repay the credit card charges". He claims that various emails refer to this linkage of the two matters. He claims that he signed the agreement to repay the credit card charges despite the fact that they were not in fact due to the plaintiff in order to protect himself and his family company from a much greater liability to which they had become exposed having facilitated Mr. Gallinger by entering the lease agreement in respect of the South Quay property. He said that the plaintiff and Mr. Gallinger reneged on the promise which they made to resolve the liability issue with the English partnership as a *quid pro quo* to the plaintiff signing the agreement.

15. Mr. Gallinger disputes this version of events. In a further affidavit of the 8th June, 2015 he states that the English lease was entered into by the company JP Bond & Co. Ltd. and that the defendant has no personal liability whatsoever arising from that agreement. He avers that JP Bond & Co. Ltd. at the time held the Irish distribution rights for the plaintiff's work-wear caterpillar branded clothing products. The defendant approached the plaintiff with regard to JP Bond & Co. Ltd. acquiring the distribution rights for branded work-wear clothing in the United Kingdom and an agreement was entered into between the plaintiff and JP Bond & Co. Ltd. in this regard. The plaintiff retained the right to distribute life style branded clothing products in the United Kingdom and as a result it was agreed that the plaintiff would contribute to the rent and other costs of a property to be leased by JP Bond & Co. Ltd. for the purpose of its then new UK distribution business. It was agreed that the plaintiff would operate its lifestyle clothing distribution business from this property and that JP Bond & Co. Ltd. would operate its work-wear clothing distribution business from the same property. The plaintiff's contribution to the rent and other costs were remitted by it directly to JP Bond & Co. Ltd. However, Mr. Gallinger states that unbeknownst to the plaintiff it later transpired that JP Bond & Co. Ltd., under the direction of the defendant, ceased to make rental and other payments to the landlord, notwithstanding that it had been put in funds for the plaintiff's share of the rent. It is alleged that JP Bond & Co. Ltd. misappropriated that money for its own use and benefit.

16. It emerged in this affidavit that a further agreement was under negotiation between JP Bond & Co. Ltd. (Bond Safety) concerning its discharge of a debt admitted to be due and owing to the plaintiff in the amount of US$114,000.00. The draft terms and conditions of a proposed agreement were exhibited in the affidavit known as the "Bond Safety Agreement".

17. The draft agreement between the plaintiff and JP Bond & Co. Ltd. (Bond Safety) requires that the company make staged payments to the plaintiff in full and final settlement of its debt to the plaintiff which it acknowledged to be due and owing. It was proposed that Bond Safety would pay:

(a) US$12,500 on or before 1st December, 2011

(b) US$22,500 on or before the 31st December, 2012 payable by equal monthly instalments in the amount of US$1,875 on or before the last business day of each month.

(c) US$15,000 on or before the 31st December, 2013 payable by equal monthly instalments in the amount of US$1,250 on or before the last business day of each month.

18. Bond Safety irrevocably acknowledged and undertook that in the event of failure to pay any of the instalments due it would consent to judgement against it in respect of the full amount of the debt less all payments made by Bond Safety up to the default date. Paragraph 8 of the proposed agreement stated that:

> "subject to Bond Safety having complied with its obligations pursuant to this agreement, SIRA agrees that it will enter into discussions with Bond Safety in relation to achieving a satisfactory resolution of any claim against it in connection with rental liabilities due to the landlord of the United Kingdom "Sutton Quays" lease and the discharge of any sums agreed in respect of such liabilities (including through the provision of credits in respect of Bond Safety financial obligations pursuant to this agreement and/or further revised agreement on those financial obligations). However, the parties acknowledge and agree that nothing contained in this clause should be deemed or construed to constitute or imply a commitment or obligation on the part of SIRA in connection with any such liabilities in the absence of a written binding agreement being reached between the parties in connection with same and subject thereto this clause shall not in any manner affect the rights and obligations of the parties otherwise provided for by this agreement".

19. JP Bond & Co. Ltd. did not execute the agreement nor has any of the indebtedness referred to in that draft agreement been discharged by Bond Safety to the plaintiff. The plaintiff rejects any connection between the liabilities set out in the draft agreement between Bond Safety and the plaintiff and the agreement the subject matter of these proceedings. It claims that attempts by the defendant to rely upon correspondence in the form of emails to link the agreement of the 22nd June, 2011 to the letting agreement is a deliberate attempt to confuse two entirely separate issues. In particular, it is clear that no reference whatsoever was made by Mr. Bond in either of his affidavits to the liabilities of Bond Safety which are clearly the subject of a number of the emails upon which he relied. He did not refer to the draft agreement, or the proposal that the plaintiff would negotiate with the landlord to reduce Bond Safety's liability under the lease, if Bond Safety's liability to the plaintiff were discharged. I am satisfied that Mr. Bond's use of the emails exhibited and his failure to disclose the existence of Bond Safety's liabilities and the negotiations and draft agreement to the Court were selective and demonstrated a lack of candour and an attempt to obfuscate the nature and purpose of some of this correspondence.

20. In particular, Mr. Bond sought to rely upon extracts from emails quoted at paragraphs 9, 10 and 12 of the second affidavit. In his first affidavit Mr. Bond stated defence was that the original agreement had been "superceded" by events which involved a forebearance to enforce the first agreement based on continuing negotiations related to a second agreement which lasted until August/September 2011. This second agreement was to take account of the plaintiff's liability to the English landlords in respect of the lease. The lease was only mentioned in the first affidavit in the context of the alleged personal liability of the defendant and "Bond Safety" because of the repudiation of the lease which was said to far exceed the amount due to the plaintiff under the agreement of the 22nd June. This suggested that the defendant proposed to rely upon some form of counterclaim or set off. However, the second affidavit raised for the first time the allegation that the agreement of the 22nd June was entered into by the defendant under some form of pressure or duress. The defendant now alleged that the plaintiff would not address the personal liability of the defendant to the English landlord or "Bond Safety" unless he signed the agreement of 22nd June. It is in this context that Mr. Bond sought to rely on the emails set out at paragraph 9, 10 and 12. He did not inform the Court of the active negotiations that were continuing in relation to the liabilities of "Bond Safety" to the plaintiff which were a separate matter to the agreement of the 22nd June or the alleged linkage of that agreement to Bond Safety's liability to the English landlord under the lease as evidenced in the draft paragraph 8 of the proposed agreement.

21. It is clear from the emails exhibited by Mr. Gallinger that Bond Safety declined to sign the draft agreement when invited to do on the 22nd July, 2011. The emails indicate that the plaintiff required Bond Safety to sign the agreement by 8th August. Contact continued until 12th August when Mr. Bond indicated that he was trying to get the matter sorted with his fellow directors, but the agreement was never signed. There is no suggestion in this correspondence of any pressure or any objection by the defendant to the terms of this proposed agreement on the basis that they were unfair, oppressive or in any way procured by means of pressure upon the defendant or the company. Indeed, in an exchange of emails on the 15th March, 2011 between Mr. Gallinger and Mr. Bond, Mr. Bond sought to include a reference to the Sutton Quays lease in the draft settlement terms because otherwise "we're left a bit exposed on it". Mr. Gallinger replies that the plaintiff would not increase its exposure to Sutton Quays until the Bond Safety matter was resolved and stated "so it's probably more of a timing issue of getting our deal done then go into discussions with Mike (one of the landlords) on the settlement". The plaintiff was nevertheless, satisfied to include the reference requested in the draft paragraph 8. No clause similar to clause 8 appears in the agreement of the 22nd June. This is not surprising having regard to the fact that the defendant bore no personal liability arising out of the repudiation of the lease which was clearly understood by the plaintiff and Bond Safety to lie with Bond Safety.

22. I am satisfied having reviewed the affidavits and the exhibits set out therein that there is a lack of consistency and cogency in the evidence presented by the defendant and said to support the proposed defence which seeks to link the agreement of the 22nd June to Bond Safety's liabilities under the English lease. No evidence exists to support a credible defence on this point in the affidavits submitted.

23. The plaintiff rejects the defendant's evidence that the amount claimed in these proceedings was never due and owing and adduced evidence which confirms that the defendant took responsibility for unauthorised credit card payments and cheque transactions as set out in a spreadsheet of 21st January, 2011 and 4th February, 2011. A number of emails were exchanged between the defendant and the plaintiff in which the defendant claimed to have transferred money in discharge of his liability which the Plaintiff claims is untrue. In an email of 21st January the defendant refers to a reconciliation of figures in the spreadsheet and acknowledges that he is responsible for all credit card bills from January 2009 to May 2010 and for specific cheques giving rise to a total liability of €49,850, in respect of which he indicated that he had already paid a sum of €10,000. A claim to have paid the €10,000 was not accepted by the plaintiff. Following further negotiations a final figure was agreed in the amount set out in the agreement of 22nd June, of €76,480.52. The payment of the instalments set out in the agreement would have reduced the liability to €50,000 but these were never paid. At paragraph 6 of his first affidavit the defendant accepted "I agreed to a sum of money owed to SRIA (the Plaintiff) and I signed the said agreement".

24. The principles applicable to the granting of summary judgment are summarised by McKechnie J. in *Harrisrange Ltd. v. Duncan*

[2003] 4 I.R. 1 as follows:

> (i) the power to grant summary judgment should be exercised with discernible caution;
>
> (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
>
> (iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
>
> (iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;
>
> (v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;
>
> (vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;
>
> (vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;
>
> (viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;
>
> (ix) leave to defend should be granted unless it is very clear that there is no defence;
>
> (x) leave to defend should not be refused only because the court has reason to doubt the *bona fides* of the defendant or has reason to doubt whether he has a genuine cause of action;
>
> (xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;
>
> (xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

25. The Court must consider if it is satisfied that the defendant has established that there is a fair and reasonable probability that he has a real and *bona fide* defence. This does not mean that he must establish that the defence will probably succeed; rather that it is probable that he has a *bona fide* defence (see *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 and *Allied Irish Banks Plc. v. Farrell* [2014] IEHC 395).

26. The Court must grant leave to defend unless it is very clear that there is no defence. In determining that matter I have considered all of the evidence adduced on affidavit and the exhibits relied upon by both parties. The defendant seeks to rely upon issues urged late in the case and not raised at all in his first affidavit namely, whether he was induced to enter the agreement of the 22nd June because of pressure or duress exerted upon him by the plaintiff who would not assume or deal with the liability of Bond Safety under the terms of the lease set out above. There is no evidence in the correspondence of any complaint by the defendant to the plaintiff that he was treated oppressively or unfairly in the course of dealings between them. There is a complete acceptance in the agreement and in the correspondence leading up to the agreement of the 22nd June that he owes the money which he now claims not to owe at all. There is a lack of candour in the affidavits advanced in support of his proposed defence in that the Court was not informed of the parallel negotiations concerning Bond Safety's liability under the English lease and the willingness of the plaintiff to conduct negotiations in reduction of that company's liability to the English landlord as expressed in paragraph 8 of the proposed second agreement. The defendant has advanced two different grounds of defence in his first and second affidavits. In the first affidavit there was a suggestion or implied assertion of some form of potential counterclaim or set off by reason of the personal liability of the defendant arising out of the English lease. In the second, the allegation was made of oppression or duress. I am satisfied having regard to the manner in which these two defences emerged and the lack of cogency in the evidence adduced in support of either, that what the defendant states in relation to these proposed defences does not give rise to a fair or reasonable probability that he has a real or *bona fide* defence.

27. I am satisfied that the evidence in respect of the correspondence and dealing between the parties is entirely contrary to the interpretation now sought to be placed upon them by the defendant and that he does not have an arguable or credible defence. I do not consider this to be a case in which there is a simple clash in relation to the facts of the case. The agreement and the draft agreement are not seriously in dispute. The late introduction of the issue of pressure or undue influence does not bear any realistic relationship to the contents of the correspondence and in my view stands at this stage as little more than an assertion: it is somewhat contrived.

28. I am therefore satisfied that the plaintiff on the affidavits furnished to the Court has established its claim and is entitled to summary judgment in the amount claimed.