Neutral Citation Number: [2012] IEHC 381

THE HIGH COURT

[2009 No. 1951 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

MARK SMITH

DEFENDANT

JUDGMENT of Mr. Justice Sean Ryan delivered the 5th October 2012

This is a claim for summary judgment. The bank's claim is first for €230,000 on foot of a guarantee and secondly for sums due on personal accounts of the defendant amounting to €78,479 at the date of the summons. The total less credits amounts to over €300,000 and continuing interest is also claimed.

The background to the claim is set out in the grounding affidavit of Mr Tom O'Reilly, who describes how the defendant personally and his company, Harmark Developments Ltd, now in liquidation had accounts at the bank's Rathgar branch. Mr Smith executed a guarantee of the company's liability to the bank. He also had personal accounts at the same branch.

The proposed defence is that (a) the defendant did not execute the guarantee; (b) the bank was in breach of the Consumer Credit Act, 1979 and the consumer code and (c) the personal accounts were to the bank's knowledge operated for the purposes of the limited company and not for Mr Smith's benefit.

The guarantee document is headed "guarantee" and is dated the 9th July 2007 and it covers debts up to €230,000. Clause 22 is a certificate that the guarantor has read the document and has received a copy for his own use. It appears to be signed by Mark Smith and witnessed.

The defendant's first replying affidavit is dated 3rd February 2011. He says that in or around July 2007 the bank contacted him by phone requesting that he enter into a personal guarantee for the credit facilities afforded to the company. He was preoccupied at the time due to illness of his wife and son but he agreed to discuss the matter with the bank as he wished to continue the company's credit line. On or around the 9th July 2007 he was requested by phone to attend the Main Street, Bray branch of the bank to sign some banking documents relating to the proposed personal guarantee for the company. He usually dealt for his personal banking and that of the company with the Rathgar branch.

Mr Smith says that he was presented with a single page for signing and he duly did so. It was not attached to any other document or pages. He says that he did not believe that he was entering into a finalised personal guarantee for the company because he had not yet been presented with the terms and conditions or the limit and had not been given an opportunity to obtain legal advice. Also, he did not get a copy of the guarantee. Mr Smith says that when he finally got to see the guarantee, on the 20th March 2009, he noted that it did not have the mandatory warning to seek independent legal advice, as he says is required by the consumer protection code of 2006.

As to the claim for €78,000 the defendant says that he never received those monies and that the loan was not a personal loan but was paid to the company and not him personally and that no original loan agreement exists that is signed by him.

The bank's response is in an affidavit sworn on the 25th November 2011 by Mr Kieran Walsh, lending manager who was formerly a branch manager at the plaintiff's branch. He says that Mr Smith was acting as owner and director of the company and not as a consumer for the purpose of the 2006 consumer protection code. Referring to the guarantee, he says that the reason it was signed by the defendant at the Bray branch was to facilitate Mr Smith who lives in Wicklow. It would have been easier for the bank to have done it at Rathgar. On the 2nd July, a week before the guarantee was executed, the bank wrote a letter of sanction to the company offering loan facilities subject to security that included a guarantee by Mr Smith, who signed the company's acceptance and the company's resolution on the 5th July 2007. The sanction letter made clear that security in the form of a personal guarantee from Mr Smith was required.

As to the balance of the money claimed, Mr Walsh gives particulars of the transfer of funds between Mr Smith's personal accounts and exhibits signed debit and lodgment dockets and extracts from the bank statements for the relevant personal accounts.

Another affidavit in support of the bank's claim is sworn by Ms Jennifer Smith, a bank official employed at the Bray branch. She says that she witnessed Mr Smith's execution of the guarantee. She says that Mr Smith was not and could not have been presented with a single sheet which was subsequently attached to other documents to make up the guarantee document. The guarantee form comes from the printers in the form of pages which are stapled prior to delivery and it would be obvious if there had been any interference. The original document was produced in court and this statement appears to be correct and counsel for Mr Smith did not suggest the contrary. Ms Smith goes on to say that the bank's guarantees are light yellow in colour and each one has a white copy which is given to the customer and that is what happened in this instance. On the reverse of the page signed by the defendant it is stated in bold print: "I/we certify that I/we have read the within guarantee and have received a copy/copies thereof for my/our use". She says that the only reason Mr Smith called at that branch was to execute the guarantee and it was done there to facilitate him.

The defendant Mr Smith replies in another affidavit dated February 23rd, 2012. He repeats his claims about the execution of the guarantee. In regard to the point Ms Jennifer Smith makes about the form of the document, namely, that it was stapled together by the printers who supplied it to the bank and that it would have been obvious if it had been interfered with, Mr Smith says that if the alleged guarantee was complete when he executed it, "only the signatory page was presented to me and I was not shown, nor was I

afforded an opportunity to examine, the other folios of the document." This is a different assertion to paragraph 7 of the previous affidavit where he says that he was presented with a single page for signing which was not attached to any other document or pages.

Mr Smith says that the terms and conditions of the guarantee had not been negotiated and that he had not had the opportunity to obtain legal advice. He was of course aware that the bank required the guarantee and he had prepared and signed and returned to the bank the company documentation agreeing to the terms. And he agrees that his visit to the bank was to sign some banking documents relating to the proposed personal guarantee for Harmak Developments Ltd.

He accepts that he received and signed the letter of sanction of the advance to the company but claims that he did not believe it to be a finalised negotiation. He does not, however, say what remained to be discussed or in what way he was misled or was mistaken as to the nature and effect of the guarantee.

He argues that he was acting as a consumer within the meaning of the Consumer Credit Act, 1995 and the consumer protection code and that the bank was in breach of both of those protection schemes.

In response to the information provided by Mr Walshe about Mr Smith's personal accounts, he says that he used those accounts for the purpose of the business of the company and that the bank knew this. He says that the bank set up an account "without proper discussion beforehand" and he believed that money credited to the personal accounts was to settle the debts of the company.

The law on summary judgment

The Law
In *Aer Rianta v Ryanair* [2001] 4 I.R. 607, the Supreme Court endorsed two tests from the English jurisprudence that the Court had previously adopted in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75. In the latter case, Murphy J delivering the judgment of the Court said:

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

In *Aer Rianta*, McGuinness J. identified the issue "whether the proposed defence is so far fetched or so self contradictory as not to be credible." Hardiman J asked: "Is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?" The Court took the nature and context of the dispute into account. Hardiman J referred to the facts of the cases in the authorities cited and observed that in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, "the indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the defendant quite untenable."

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

> the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
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> leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;
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> the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be.

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

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

The guarantee
Morris J., as he then was, in *Tedcastle McCormack and Company Limited v. McCrystle* (unreported, 15th March, 1999) and Kelly J. in *AIB v. Higgins and Others* (unreported 3rd June, 2010) applied "the authoritative modern authority on the topic" of *non est factum*, namely, the decision at the House of Lords in *Saunders v. Anglia Building Society* [1971] A.C. 1004. 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 lack of negligence ie. that he took all reasonable precautions in the circumstances to find out what the document was. Lord Reid said that "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." Lord Hodson said that 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.

The guarantee was produced in court and it is all of a piece and does not consist of single separate sheets. It specifies the amount of money representing the limit and it certifies that the guarantor has received a copy. The circumstance of Mr Smith's attending the Bray branch was for the purpose of signing documents relating to the guarantee, according to his own affidavit. He knew from an earlier conversation that the bank wanted him to enter into a personal guarantee to cover the liability of his company. It is impossible for a person in business not to be aware that banks look for personal guarantees to cover limited liability company borrowings. He knew that. The letter of sanction made clear what was required in the way of security for the credit that was being offered to the company and Mr Smith was satisfied to agree to that.

It is not credible that Mr Smith signed sanction documents specifying security in the form of a personal guarantee by him and attended a different branch of the bank for the purpose of signing documents relating to the guarantee without knowing what he was doing. And a businessman would know what it meant to be asked to sign a guarantee on behalf of a limited company of which he was a director. He would not need to be told what the implications were.

It is also not credible that Mr Smith would have gone into another branch of the bank for a specific purpose and would have been satisfied to sign a document or rather a single page of a document without seeing the complete document. He had expressly agreed to execute a guarantee. That was a condition of giving credit to his company.

What possible point would there be in the bank presenting him with only one page of a multi-page agreement when there was no issue or question as to his willingness to sign the full guarantee?

The guarantee is clear in its terms, it is not an unusual transaction, it is signed by the defendant and he has not established a basis for a plea of *non est factum*.

Consumer Credit Act 1995
The next matter to be considered is the application of the Consumer Credit Act 1995. The defendant argues that there was breach of this legislation which rendered the guarantee that he signed, if he signed it as a guarantee, invalid. His case is that s. 38 applies, which provides that a creditor is not entitled to enforce a credit agreement or a contract of guarantee relating thereto unless the requirements of Part III of the Act have been complied with and in particular section 30. The defendant says that there was breach of section 30. His case is that he was not given a copy of the contract of guarantee and that means that the agreement is unenforceable. Although this allegation is denied by Ms Jennifer Smith in her affidavit, there is an issue of fact if the Act is applicable.

Section 30(1) of the Act applies to a credit agreement and any contract of guarantee relating thereto. This is clearly a contract of guarantee so the question is whether it relates to a credit agreement within the meaning of the Consumer Credit Act 1995. "Credit agreement" is defined in the Act to mean "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". This is a loan or similar financial accommodation granted to the company, so the question then becomes whether the accommodation was granted to a consumer. In a word, was the company that got the facility from the plaintiff bank a consumer? "Consumer" "means a natural person acting outside his trade, business or profession". This company is not a natural person and was not acting outside his trade, business or profession. Accordingly, the company that got the financial accommodation was not a consumer within the meaning of the Act. That is the fundamental point which means that the contract of guarantee is not within the statutory definition. These definitions are contained in s. 2 of the Act and in the result it is clear and irresistible in my view that s. 30 does not apply.

In respect of the defendant's own personal accounts, it seems obvious that a person who has a bank account and gets loans from the bank or overdraft facilities is not acting outside his trade, business or profession. That means that he is not a consumer within the meaning of the 1995 legislation.

I am also of the view that Mr. Smith was indeed acting within his trade, business or profession in running, operating and managing the company and he was also doing so when he guaranteed the loan facilities that were advanced to the company by the bank.

It is clear that the company cannot be considered a consumer because it is not an natural person and it was not acting outside its trade, business or profession when it borrowed money.

In *Allied Irish Banks Plc v. Higgins, Kavanagh, Mansfield and O'Callaghan* (Unreported, High Court 3rd June, 2010), Kelly J. reviewed the law concerning consumers in the 1995 Act and the Council directive that the legislation was implementing and I adopt the reasoning of Kelly J. in that case.

The defendant also cites the Consumer Protection Code 2006. Because I do not think that the defendant is a consumer, the code does not apply. Moreover, if the code did apply and if there was a breach of it, that would not of itself invalidate the contract of guarantee.

Defendant's personal debt
In regard to the defendant's claim about his personal debt, the affidavit of Kieran Walsh of the 25th November, 2011 exhibits the debit docket signed by the defendant and the signed lodgment docket by which he transferred the money from one account to another. There is nothing in fact to support the proposition that Mr Smith operated his personal accounts and allowed the bank to reorganise them so as to facilitate company activity in a manner that would not involve liability on his part but without any shred of documentation to support that. Not only that, the illogical proposition is that the bank was advancing this money to Mr Smith for company purposes without imposing any liability on him and was doing so at a time when it was demanding a personal guarantee for the company's borrowings. And if Mr Smith used his money to finance the company's operations, that was his choice and does not

extinguish his personal liability.

Conclusion
In the result, the defendant has not made out an arguable defence on any of the bases put forward by him or on his behalf. The bank is accordingly entitled to judgment.