Neutral Citation [2015] IEHC 359

THE HIGH COURT

[2009 3199 S]

BETWEEN

ULSTER BANK LIMITED

PLAINTIFF

AND

WALTER de KRETSER AND GILLIAN FOX

DEFENDANTS

JUDGMENT of Mr. Justice Hedigan delivered on the 10th of June 2015

1. The plaintiff applies herein for liberty to enter final judgment against the defendants in the amount of €98,952 together with further interest on the principle sum of €89,350.95 from the 19th of August, 2010 which now amounts to €126,077.06. The claim is on foot of a joint and several guarantee dated the 5th of July, 2007 over the obligations of a company of which both defendants were directors named Stones Finishes Supply Limited.

2. In return for this guarantee the plaintiff granted an overdraft facility to the company. The guarantee was limited to €100,000 plus interest. The company defaulted on its debts under this facility as a result of which on the 7th of January, 2009 the plaintiff sent a letter of demand of that date, in which it called in the guarantee although it referred mistakenly to the date of the guarantee as the 5th of July, 2008.

3. The defendants resist this application and seek to have the matter put to plenary hearing. They also seek to enforce what they say was an agreement by the plaintiff to accept, in settlement of their claim, the proceeds of an Ark Life Assurance policy (valued at €55,011.68 on the 25th of August, 2009).

4. The defendants put forward by way of their intended defence the following:

(a) They did not have any proper chance to review or understand the guarantee they signed.

(b) The second defendant signed under duress or the undue influence of her husband.

(c) They had no independent legal advice.

(d) The consideration was past.

(e) The guarantee was not a continuing one.

5. The plaintiffs respond in the affidavit of Damien Devlin to these proposed defences as follows:

(a) The facility was addressed to both defendants two weeks before they signed the guarantee. Both defendants had previously on at least four occasions each provided guarantees in respect of respectively the second defendants own company and the company herein.

(b) No evidence of undue pressure or duress is put forward. There is only an assertion.

(c) The defendants had plenty of time to obtain legal advice.

(d) The document of guarantee was one under seal and in any event the continuing overdraft facility was sufficient consideration and

(e) The issue of a continuing guarantee does not arise. The plaintiffs move upon a guarantee entered into in relation to the transaction in respect of which the demand was made.

6. In relation to the claim about the assurance policy the plaintiffs state the offer to accept this was conditioned on payment being made within 28 days. This was not done and so their acceptance of the offer lapsed.

7. The principles applicable to this type of application are well established. To proceed to plenary hearing a legally statable defence must be identified. Assertion of a ground for defence is not enough. See *Harrisrange Limited v. Duncan* [2002] IEHC 14 McKechnie J. Is there a fair or reasonable probability of the defence having a real or bona fide defence? See *Banque de Paris et des Pays-Bas (Suisse) SA v. de Naray* [1984] Lloyds' Rep. 21 approved by the Supreme Court Denham J. in *Danske Bank AS trading as National Irish Bank v. Durcan Homes* [2010] IESC 22 at page 9. Taking the points in order

a) The defendants are both experienced business people with a track record of multiple guarantees provided to the bank. It is entirely unreal to suggest that they did not know what they were doing. Even were this not so, between the letter of facility and the signing of the guarantee two weeks later, they had every opportunity to acquaint themselves with all they needed to know. During this time they also had every opportunity to obtain legal advice. It should be noted in passing that absent some clear evidence of the need to insist upon customers obtaining, it there is no obligation on a bank to insist on customers obtaining legal advice before entering into contracts with them. See *Ulster Bank Ltd v. Roche and Buttimer* [2012] IEHC 166.

b) There is no evidence of any duress or undue influence. There is simply an assertion. That assertion flies in the face of

the evidence. This is, as noted above, that both defendants were experienced business people. Moreover, it was in fact the second defendant who introduced the bank to the company Stone Finishes. Also the second defendant was in receipt of a monthly salary of €2,000 from the company. Far from there existing any evidence to show duress or undue influence, in fact the evidence shows the opposite.

c) This is already dealt with at (a) above.

d) The guarantee is an instrument executed under seal and thus the issue of consideration does not arise.

e) This issue does not arise also and is clearly pleaded in error. This guarantee is in respect of the specific transaction in question. The continuing guarantee issue does not arise.

f) Finally, as to the claim made concerning the offer of an assurance policy in full and final settlement; that acceptance of the offer was made in a letter sent by the plaintiff bank and dated the 18th of the September 2009. See exhibit B first affidavit of Walter de Kretser. It is explicitly conditioned upon payment being received within 28 days. The bank was not obliged to agree. It did so and could impose any condition it wished on its acceptance of the offer. Its fundamental and indeed its only condition was not met and therefore the acceptance lapsed.

8. The final point made in a draft defence which has been treated by the court as the submission is that of the invalidity of the letter of demand. This letter of the 7th of January 2009 by the plaintiff to the defendants called upon them to honour their guarantee dated the 5th of July 2008. This of course was in error. The correct date was the 5th of July 2007. However the defendants, as is clear from their affidavits, were never in doubt as to the guarantee that was being called in. They were only too well aware of the reality of the situation. The dating error caused no prejudice to them in trying to defend the plaintiff's claim. The error may be dealt with on the *de minimis* principle.

9. Regrettably, notwithstanding Mr. Kretser's valiant efforts to defend himself and Ms. Fox against this application I am unable to identify any fair or reasonable probability of a real or bona fide defence herein. There must therefore be summary judgment in the amount of Euro 126,077.36