Neutral Citation [2015] IEHC 483

THE HIGH COURT

[2012 No. 944 S]

BETWEEN:

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND

ELENA MOYNE AND ALAN MOYNE

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered the 21st day of July, 2015.

1. The defendants ("Mr. and Mrs. Moyne") were shareholders and directors of a company called Take Stock Ltd. ("the company") which was founded by Mr. Moyne in 1998. In mid-2007, Mr. Moyne negotiated certain facilities with the plaintiff ("the bank") on behalf of the company. A facility letter was issued by the bank on the 23rd of May, 2007, which was signed on the 18th of June, 2007 by Mr. and Mrs. Moyne on behalf of the company in their capacity as directors. The facility letter provided for two separate facilities in favour of the company, the first described as an overdraft facility with a limit of €50,000 for the purpose of working capital and the second, a demand loan in the sum of €100,000 for the purpose of a stocking loan. Both facilities were unlimited as to time but payable on demand. The facilities were subject to terms and conditions set out in the letter. One of these was that the security required for the facility included, *inter alia*, the execution of a guarantee by Mr. and Mrs. Moyne in the sum of €150,000. This guarantee was duly signed on the 18th of June, 2007.

2. Various sums were drawn down on foot of these facilities by the company and there is no dispute but that on the 22nd of November, 2011, the sum of €114,976.22 was due by the company on foot of the facility.

3. Unfortunately, the business began to experience difficulty in or around 2009 and effectively ceased trading in early 2010. It would appear that the company was dissolved on the 25th of February, 2011. Letters of demand were issued by the bank to Mr. and Mrs. Moyne on the 24th of November, 2011 seeking payment of the above mentioned sum on foot of the guarantee. A summary summons was issued on the 12th of March, 2012, which was renewed on the 1st of July, 2013 and for a second time on the 9th of April, 2014. Following service of the summons, a motion for summary judgment issued on the 2nd of July, 2014 which came before the Master of the High Court and was subsequently transferred into the Judge's list for hearing.

4. The bank's application for judgment is grounded on an affidavit sworn by Eoin O'Shea, a senior manager in the bank's group centre in Georges Quay, Dublin 2. He makes the usual averments as to his means of knowledge and that the sum claimed is due and he exhibits the guarantee and letters of demand.

5. A replying affidavit was sworn by Mr. Moyne, who appeared in person, on the 24th of September, 2014. He makes a number of averments and submissions which he claims disclose a *bona fide* defence to the bank's claim. He suggests that the summary summons procedure is the incorrect mode of proceeding in this case. He alleges that the company was caused to default on the loan by the breach of contract of the bank in withholding the remainder of the loan. He alleges that the bank owed a duty of care to the defendants and he complains of the fact that documents relating to the company's dealings with the bank were sought and not furnished.

6. A supplemental affidavit in response was sworn by Mr. O'Shea on the 13th of March, 2015 taking issue with the various averments made by Mr. Moyne. This was in turn replied to by Mr. Moyne in a further affidavit sworn on the 28th of May, 2015.

7. In his second affidavit, Mr. Moyne again alleges that the company failed because of the bank's breach of contract. The breach complained of is alleged to have been a failure on the part of the bank to permit the company to draw down funds on presentation of an invoice. The invoice in question was from a creditor of the company called Secant, apparently a Canadian concern that supplied raw materials to the company to enable it to manufacture and produce its products for onward sale to customers. The invoice is dated the 24th of June, 2008 and is in the total amount of €44,350. It is a rather unusual document insofar as it does not identify the source from which it emanates and is simply produced on a blank piece of paper without any heading. It does not have the appearance of what one might expect in a normal commercial invoice.

8. Mr. Moyne alleges that the bank refused to permit a draw down of funds to pay this invoice with the result that the company could no longer supply its customers with its products leading to its ultimate failure. The underlying suggestion appears to be that had the company not failed as a result of the bank's alleged breach of contract, it would have been in a position to repay the loans and thus the liability of the guarantors would never have arisen.

9. Mr. Moyne further alleges that instead of permitting the drawdown against this invoice, a sum of €10,000 was advanced on the 18th of March, 2009 which was not referable to any invoice. Mr. Moyne says that this constituted a breach of the terms of the agreement which permitted draw downs against invoices and consequently required ratification by the board of the company. Furthermore, he argued that the fact that this drawdown was permitted outside of the terms of the loan facility was done without notice to or the agreement of the guarantors and this had the effect of invalidating the guarantee in circumstances where the bank were not unilaterally entitled to increase the guarantors' exposure in a manner not authorised by the contract. The relevant conditions precedent in the facility letter are stated to be as follows:

> "The facilities shall not be available for drawdown unless the conditions precedent set out in the general conditions are satisfied, and in addition, the bank has received, in form and content satisfactory to it, the following: -
>
> 1. Audited accounts for the year ending 31/08/2006 to be forwarded to the bank prior to drawdown of facility.
>
> 2. Stocking loan to be drawn down against invoices.
>
> 3. Quarterly management accounts to be submitted to the bank.

> Unless the bank shall otherwise agree, all conditions precedent must be satisfied otherwise the facilities shall lapse and the banks shall have no further commitments of any kind to the borrower."

10. Mr. Neuman BL on behalf of the bank submits that insofar as Mr. Moyne alleges that the bank was under an obligation to permit the drawdown of funds against the alleged Secant invoice, the conditions precedent made clear that the bank has a discretion to refuse to permit such drawdown unless the form and content of the relevant document, in this case an invoice, was satisfactory to it. He submits that the bank were perfectly entitled to take the view that the Secant invoice was as a minimum unusual and was thus in form and content not satisfactory to the bank and this was entirely within its discretion. Even if that were not the case and there was any alleged breach of contract, which the bank strongly refuted, that was a matter between the bank and the company. The guarantee is separate and distinct and stands alone. Furthermore, there is no dispute but that the money is due by the company.

11. He further submitted that even if it could be said that the €10,000 advance which was not against an invoice was in some manner an unauthorised departure from the strict terms of the facility letter, which again was refuted, that could not avail the guarantors having regard to the explicit terms of the guarantee. Thus, clause 3.1 of the guarantee provides as follows:

> "The bank may without the guarantor's consent and without releasing or reducing the guarantor's liability to the bank under this deed do any of the following…
>
> > (b) Enter into renew vary or end any arrangement with the debtor…
> >
> > (e) Consent to or waive any breach of or any act omission or default under any agreement between the debtor and the bank or any one or more of them or otherwise amend any such agreement.
> >
> > (f) Do or omit to do anything which might but for this provision operate to exonerate or discharge the guarantor from any of their obligations."

12. The bank further relies upon clause 6 of the guarantee:

> "This deed shall not be discharged nor shall the liability of the guarantor hereunder be affected by reason of any change in the constitution or name of the debtor or any of them or any failure by the bank to take any security or by any invalidity of any security taken or by any existing or future agreement by the bank as to the application of any advances made or to be made to the debtor or any of them nor by any legal limitation disability incapacity or want of any borrowing powers of or by the debtor or any of them or want of authority of any director manager official or other person appearing to be acting for the debtor or any of them in any manner in respect of those liabilities." (emphasis supplied)

13. Finally, the bank relies upon clause 11.3 of the guarantee:

> "Should any monies, liabilities, interest or other sum hereby covenanted to be paid not be recoverable from the debtor or any of them for any reason whatsoever (including, without prejudice to the generality of the foregoing, any limitation) then whether any such reason or circumstances shall have been made known to the bank or not before the liabilities were incurred, such monies and liabilities shall be recoverable from and payable by the guarantor on demand in accordance with the terms hereof as principle debtor. The guarantor hereby waives all or any of his rights as surety which may at any time by inconsistent with any of the provisions of these presents."

14. Accordingly, the bank submits that even if there was any basis for the allegation that the failure of the company was in some way attributable to an alleged breach of the terms of the facility letter by the bank, again strongly disputed, this would at best give rise to a claim for damages at the suit of the company but could not be relied upon by the guarantors as a defence to a claim on the guarantee having regard to the foregoing provisions and to the fact that there is no dispute but that the sums referred to were advanced by the bank to the company.

15. The bank further submits in reliance on *IBRC v. Cambourne Investments* [2012] IEHC 262 that even if it could be said that the condition precedent in the facility letter to the company was not satisfied, that could not avail the guarantors because the guarantee was not contained within the facility letter and was thus not subject to the condition precedent.

16. The test to be applied in applications for summary judgment is well settled since *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 and *Harrisrange v. Duncan* [2003] 4 I.R. 1. In *Aer Rianta*, McGuinness J. said (at p. 615):

> "Thus it is for this Court to decide whether in the instant case the defence set out in the affidavits of Mr O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the Defendant having a real or *bona fide* defence."

17. In the same case, Hardiman J. said (at p. 623):

> "In my view, the fundamental question be posed on an application such as this remains: 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?"

18. Applying these principles to the facts of this case, Mr. Moyne says that his fundamental defence is that the bank was obliged by the facility letter to honour the invoice in question and the bank's failure to do so resulted in damage to the company, and in turn the guarantors. It seems to me that there is no basis for that assertion for a number of reasons. First, the facility letter itself makes it clear that the bank have a discretion as to whether or not to permit a drawdown against any particular invoice. It would appear therefore that they were perfectly within their rights in declining a drawdown in respect of the Secant invoice having regard to its apparent irregularity. Of course, the fact remains that the loans were payable on demand, which demand could have issued at any time by the bank without further obligation to advance further monies.

19. Secondly, even if there were any substance in the argument that there had been a breach in the condition precedent contained in the facility letter, which I do not believe there is, that is a matter as between the bank and the company and not one of which the guarantors can make complaint. That is clear from the terms of the guarantee itself and also from the judgment of Charleton J. in *IBRC v. Cambourne* Investments.

20. Thirdly, for the same reasons, the suggestion that the advance of €10,000 by the bank which was not against any particular invoice constituted a breach of the terms of the facility and a variation of same not authorised by the company, even if that were so, and again I do not believe it is, is not something of which the guarantors can complain as the terms of the guarantee itself make plain.

21. Fourthly, the suggestion that a duty of care was owed by the bank to the company which was breached is unsupported by any evidence and is again for the same reasons entirely immaterial to the terms of the guarantee. Finally, there is clearly no basis for the assertion that the summary summons procedure is inappropriate here.

22. The fundamental fact remains that the amount claimed was advanced to the company, has not been repaid and those facts are undisputed.

23. Accordingly, it seems to me that there is no basis upon which I could come to the conclusion that there is a fair or reasonable probability of Mr. and Mrs. Moyne having a real or *bona fide* defence to this claim. It is, to paraphrase Hardiman J., very clear that the defendants have no case.

24. In those circumstances, I must accede to the bank's application for summary judgment in the amount claimed.