

THE HIGH COURT

[2016 No. 566 S.]

BETWEEN

KEMPIS ROLLS LIMITED

PLAINTIFF

AND

MAURA HOGAN

DEFENDANT

JUDGMENT of Mr. Justice Eagar delivered on the 13th day of March, 2017

1. The plaintiff company supplied till rolls and the defendant is a sole trader that trades as M & M Advertising. The plaintiff's claim against the defendant is for the sum of €239,636.49 being monies due and owing since September 2014. The plaintiff is seeking summary judgment of this sum from this court. The application for summary judgment is grounded on the affidavit of Keith Molloy who is operations manager of the plaintiff company. He states that the plaintiff company is a supplier of office equipment and the defendant commenced purchasing rolls used in electronic tills for supermarkets from the plaintiff on or about February 2008. The transactions were executed on the basis of written or email or verbal orders from the defendant for products that were then as a result supplied by the plaintiff to the defendant. The defendant then generated an invoice within 30 days within the end of the month and the defendant discharged the sum on the invoice by various methods including cheque, bank transfer and cash within various periods of days which differed throughout the years in question from 35 days to 161 days at the discretion of the defendant but without permission from the plaintiff.
2. The defendant experienced a challenging economic environment in or around 2011 but this was not immediately evident to the plaintiff until 2015 when the plaintiff requested that the defendant attend a meeting with the plaintiff to review the defendant's accounts. He further says that since 2014 the plaintiff has given the defendant a reduction of approximately €107,683.10 in sums due and owing to the plaintiff by various means.
3. At the meeting in 2015 the defendant furnished the plaintiff with a copy of her accounts it was immediately evident that the defendant had not been making a profit for at least two years. The plaintiff agreed to accept a reduced figure in settlement of the arrears in order to assist the defendant and to facilitate their ongoing business relationship. The defendant agreed that the sum of €227,364.90 was at that time due and owing to the plaintiff and is reflected in the agreement by the plaintiff to accept a reduced sum in full and final settlement of all sums outstanding from the defendant to the plaintiff. He further states that he believes and is advised that the defendant has no legitimate or *bona fide* defence to the merits of the action.
4. The replying affidavit of the defendant was sworn on the 7th July 2016. He makes a number of preliminary points in relation to the sums sought but these were agreed not to be of any account in respect of the plaintiff's claim.
5. The defendant states that she intended to file a counterclaim in the proceedings in addition to filing a full defence. The counterclaim arises in the following circumstances: over the course of the past number of years the main portion of her business has been to supply subsidised printed and bank till rolls to Dunnes Stores and Supervalu. In a case of printed till rolls she sold advertising space on the rear of the till roll and generates revenue in that way.
6. She says that in or about July 2007 she won the contract to supply printer till rolls to Dunnes Stores which increased the volume of printed rolls in her business from approximately €92,000.00 up to €439,360.00 per annum. The plaintiff purchased a printing press and were chasing this business with her around that time and in or about October 2007 she commenced purchasing printed till rolls from the plaintiff having previously purchased blank till rolls from the plaintiff since 2005.
7. Since 2009 the plaintiff has charged her €0.975 cent per printed roll. The cost of the till rolls was a constant source of difficulty for her and one which she discussed on multiple occasions with the management of the plaintiff as the cost was too high. The response from the plaintiff was always that it was not possible for it to provide the printed rolls at a lower price than €0.975 cent per roll and she says it is now obvious to her that the reason why the plaintiff would not reduce his cost was due to an abuse by it of its dominant position in the Irish market as the main supplier of printed till rolls (and the only supplier capable of supplying the volume of till rolls required by her business). She said that instead of offering a more realistic price per roll Mr. Molloy indicated that she should seek a price increase from Dunnes Stores.
8. She said that she made enquiries to whether a comparable product could be purchased in the UK. In that regard, she discovered a number of viable alternatives at a considerably lower price and approached Mr. Molloy to discuss the matter. Mr. Molloy informed her that companies in the UK employed a printing system known as "Flexco" and Mr. Molloy further informed her that the quality of the product would not be sufficient for her purposes. By contrast Mr. Molloy said that the printing method adopted by the plaintiff (known as Litho) was required for the product that she needed and that this was a superior (and more expensive) process to that offered by the plaintiff's competitors in the United Kingdom.
9. In reliance on the representations made by the plaintiff including Mr. Molloy she continued to place orders with the plaintiff believing there be no other option available to her in order to fulfil her contractual obligations to Dunnes Stores and Supervalu. However, in or about 2014 the plaintiff began demanding payment of what it was claimed was too due to it and insisted on her creating charges in favour of her property.
10. In early 2015 she travelled to the UK to examine whether any other options were available at a reduced price. To her astonishment she found that the Presco Print offered by NCR (a UK company) were wholly suitable for the product she required and were available at a price of €0.77 cent per roll inclusive of all costs involved such as delivery etc. as opposed to the €0.975 cent charged by the plaintiff.
11. She discussed her findings with Mr. Molloy and he indicated that the price would be dropped by the plaintiff to €0.82 cent per roll. As a result of the foregoing she decided to source her product from NCR in the UK as opposed to the plaintiff. When she informed Mr. Molloy of this he asked her not to go as the plaintiff "bought in the paper already". The plaintiff indicated that it would implement a mechanism to park a portion of the debt it said was due and further reduce the price of the printing rolls to €0.76 cent per roll. She

states that it was important to note that the quality of the product offered by the plaintiff was no different between 2009 and 2015. If the plaintiff was able (despite the expressed representations made by Mr. Molloy in 2009 in contrary to reduce its price from €0.975 cent to €0.76 cent per roll). Since 2008 she has purchased approximately 3 million 556 thousand printed rolls from the plaintiff and she said that had the plaintiff not abused its dominant position in charge fairly no debt would have arisen. She said in January 2016 the plaintiff unilaterally changed the price from €0.82 cent up to €0.86 cent per roll and the plaintiff indicated that she should pass this cost on to Dunnes Stores and Dunnes Stores elected not to proceed with her as supplier subsequently.

12. She further says that in December 2014 the plaintiff changed from its existent delivery company and began using An Post. Arising from this change there were a number of complaints from customers regarding lost orders, goods delivered to the wrong stores, goods not delivered at all and on other occasions orders were simply returned back to her offices. This unreliability seriously damaged her relationship with customers and Dunnes Stores in particular. She believes that these problems with delivery when combined with the unilaterally increased price imposed by the plaintiff in January 2016 lead to Dunnes Stores making the decision not to continue the contract with her for printed rolls.

13. She further says that following the difficulties experienced by her business during the recession Mr. Molloy indicated by email dated 14th January 2015 that the plaintiff would reduce the price of a box of blank till rolls by €1.00 per box. This reduction would have had the effect of decreasing the cost of a box of 40 rolls by approximately 4% a saving of €2,839.00 per annum. However, she says that despite the said representation this reduction was never actually applied by the plaintiff. She states that she believes that she has a good defence to the merits of the plaintiff's claim.

14. The second affidavit of Keith Molloy was sworn on the 26th July 2016. He says that the defendant refers to a reduction of €107,683.10 which had been applied by the plaintiff in respect of the defendant's debts and complains that a substance of that reduction is not elaborated upon.

15. The defendant does not appear to deny that such a reduction of her debts has been applied and that resulted from the introduction in 2014 of cost saving measures was achieved by use of a mixed printed page system for their products, he confirms that.

16. The overall reduction of €107,683.10 of the defendant's liabilities was applied. He says that the defendant states that she intends signing a counterclaim but the nature of the counterclaim is not there in the contexts of any defence and are not specified in any manner and he notes that the defendant appears to allege that her counterclaim consists of a form of abuse of a dominant position on the part of the plaintiff.

17. He says that since 1982 there have been a number of companies supplying plain and printed till rolls in the Irish market. There is also a number of companies in the United Kingdom which offer similar products for sale to the defendant. He says that as a former employee and investor one of these Irish companies, the defendant would have a detailed knowledge of the suppliers of till rolls in Ireland and also the existence of those suppliers located in the United Kingdom. He says that he believes the cost of €0.975 cent per roll which the defendant made complaint is incorrect. Until March 2014 the plaintiff charged €0.90 cent per roll thereafter made purporting the price of €0.975 cent was agreed to enable the defendant to fulfil a contract with Dunnes Stores and was in part offered by the plaintiff for the purpose of ensuring the defendant could continue to do business with Dunnes Stores.

18. He also states that in setting its prices with the defendant the plaintiff had to take into account a number of factors and he referred to the price of €0.82 cent per roll referred to as being an arrangement worked out by the plaintiff in contemplating of the reality that the plaintiff owns business would be harmed if it could not expect payment from the defendant. He says on other occasions he increased in the cost of the till rolls supplied was attributable to an increase in global prices for thermal paper which the printer had no option to pass on to the defendant and these were circumstances beyond the control of the plaintiff.

19. The change to An Post for their delivery services were attributable to the fact that their existing supplier had increased the cost of their own distribution services (which would in any event have had to be passed on to the defendant). He said the defendant would always be notified of any disruptions in service of the supply of till rolls and on being so notified arranged the deliver for the till rolls. He notes that Dunnes Stores will only make payment on proof of delivery for goods ordered through the defendant's company and the proofs are always provided.

20. He says that the defendant does not specify in any way the nature of the losses from the deliveries by An Post and he says that it is incorrect to state that the defendant's contract with Dunnes Stores was discontinued because of problems with deliveries and price increases. Rather it was the plaintiff who decided he could not continue to work with the defendant in the light of the debts owed by her. He said that the plaintiff continued to supply rolls on behalf of the defendant to Dunnes Stores and Supervalu under March 2016. He also says that the plaintiff was free to charge the prices it had set and was not obliged to set prices purely for the convenience of the defendant. He also says that the defendant was always free to take her business elsewhere and that she was familiar with the range of products available from other competitors and he says that the business conducted between the plaintiff and the defendant was not unfair and he says that any allegation against the plaintiff that it engaged in an abuse of a dominant position were incorrect and had no credible factual basis.

21. The second replying affidavit of the defendant as sworn on the 20th October 2016 she states that the plaintiff was in a position to offer cost saving measures which would have resulted in a €0.06 saving per roll based on the supply of approximately three million five hundred thousand rolls. Such savings would have accumulated to €210,000.00. Furthermore, she states that the plaintiff's reduction of the cost per roll of €0.975 cent to €0.82 cent represented a savings of €735,000.00 illustrating the scale to which the plaintiff abused its dominant position. She says he offered to reduce the price by changing to the system only this system only came after threat to a different supplier. She says she was aware of the alternatives suppliers in the Irish market and she previously had experience Shop N Save who she left following the delivery of her first batch to Dunnes Stores. The quality of the print was poor and she was aware that many Irish suppliers were unable to provide the service she required due to the large number of adverts which were specific to different areas of Ireland. Many of these Irish companies would inevitably revert back to Kempis with these orders as they could not perform the requirements internally. She was aware of other providers in the UK however, Keith Molloy had advised that the companies in the UK were not capable of providing the quality required as they used Flexco rather than Litho.

22. She disagrees with Mr. Molloy in relation to the level of service offered to Dunnes Stores, she says that following the change to An Post goods were lost and not delivered, delivered to the wrong stores and occasionally returned to her office. She refers to various emails from An Post setting out the issues that occurred with An Post. She said that the plaintiff was aware that Dunnes Stores would not continue their business with her at the time she was informed in November 2015. She makes this assertion due to the fact that when Dunnes Stores informed her, they also asked for a quote for personalised Dunnes Stores rolls with their terms and conditions printed on it. She says that she accepts that she was free to go to the UK to source an alternative supplier but she

trusted Mr. Molloy when he told her the UK companies could not provide the quality required because he was an expert in his field and they had a good working relationship. She states that she believes that she has a good business sense.

23. The law is set out in the Supreme Court decision of the *Irish Bank Resolution Corporation Ltd. v. Gerard McCaughey* [2014] IESC 44 and by *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607. In *IBRC Ltd. v. McCaughey* Clarke J. in delivering the judgment of the Supreme Court stated:

"The underlining test as set out in the judgment of Hardiman J. in Aer Rianta c.p.t. v. Ryanair Limited was "the fundamental question to 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?"

He quoted a judgement which he delivered in the High Court in *McGrath v. O'Driscoll* [2007] ILRM 203:

"So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

He continued:

"It is important, therefore, to reemphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in Aer Rianta c.p.t. v. Ryanair Ltd. be clear that the defendant has no defence."

Insofar as at para. 23 he says:

"Insofar as facts are put forward, then subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta c.p.t. v. Ryanair judgment."

Judgment of the Court

24. The conflict of issues between the parties in relation to (a) the dominant position of the plaintiff, (b) the assertions by the defendant of the trust which she placed in the plaintiff company are issues which can in this Court only be resolved by plenary hearing. It is not a fanciful defence that has been put forward by the defendant but based on documentation and this Court will not determine those issues.

25. The court therefore directs that the statement of claim in this matter be served within four weeks of the perfection of the order of this Court and that the defence of the defendant be lodged within four further weeks. The court will also reserve the costs of this application to the trial of the issue.