THE HIGH COURT

[2020] IEHC 530

[2018 No. 1418 S.]

BETWEEN

ROC VISIONTECH LTD

PLAINTIFF

AND

DERMOT MOONEY AND DEIRDRE MOONEY

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered ex tempore on the 21st day of October, 2020

Background

1. Mr. Rory O'Connor is the owner of the plaintiff company. He uses the company as his investment vehicle. In or about 2012/2013, Mr. O'Connor was introduced to the first defendant, who was a director and shareholder in an Irish company called L. Trade Team Global Ltd. That company was involved in the provision of the following services: identification of potential export pre-shipment financing opportunities, in the form of exporters actively seeking export transaction based financing and pre-export trade finance involving documentary letters of credit and assignments of proceeds.

2. According to Mr. O'Connor, on an unspecified date, he invested the sum of €50,000 with the company and some 45 days later, he received back the sum of €52,000.

3. On 8th November, 2013 the plaintiff company, entered into a contract with L. Trade Team Global Ltd. The contract was stated to be governed by the laws of the Isle of Man. Sometime thereafter, Mr. O'Connor was contacted by the first defendant, who offered him the opportunity to invest in a farm business being run by two Irish men in France.

4. On 12th November, 2013 the plaintiff transferred €200,000 to a company called Haven Trade Administration Ltd, which was registered in the Isle of Man. The payment was made to the company's bank account with HSBC in Douglas on the Isle of Man. This sum was paid for investment in the farming business in France. According to the first defendant, the plaintiff's money, along with some other funds, was invested by Haven in a company called Transway Freight and Logistics Ltd. This investment was secured by personal guarantees given by the two Irish gentlemen who were involved in the business.

5. According to the first defendant, the French investment began operation in or about September 2014. However, no funds were ever transferred back to Haven. The first defendant states that the Irishmen involved in the French transaction told him that there was a problem with their cattle, which had a condition called "*blue tongue*". The Irishmen apparently represented to him that they could not get paid due to the cattle having this condition. However, he went on to state that they had in fact got paid for the cattle, but wrongfully withheld repayment of the funds to Haven. As a result, it is common case between the parties that the plaintiff did not get a return of its capital, nor any interest. In short, the plaintiff company lost its investment of €200,000.

6. Arising out of this state of affairs two things happened. On 1st November, 2018, the plaintiff issued a summary summons against the defendants seeking repayment of the

sum of €263,000. On 16th January, 2019, L. Trade Team Global Ltd was put into liquidation by the High Court on the petition of the plaintiff. The petition was not opposed by the company.

7. In these proceedings, the plaintiff claims that the defendants and each of them, owe it the sum of €200,000. This is based on the content of an email sent by a Mr. Paul Deighton, a director of Haven, on 11th January 2018, to Mr O'Connor. In the course of that email, Mr. Deighton stated as follows:-

> *"We, the partners of Haven Trade Administration Ltd, have assumed the moral obligation to return the investment that was made in the subject of the [names redacted] transaction.[…] We have planned for and we will manage transactions in 2018 and 2019 that will generate the revenue to support the moral obligation. All the revenue will flow into HTA. Each of the partners will forego an income which will remain in HTA for disbursement by me under the moral obligation as outlined."*

8. Although not pleaded in the summons, the plaintiff also relies on a letter that was sent on notepaper headed Haven Trade Administration Ltd, dated 20th October, 2016, which was signed by the first defendant. In that letter it was noted that total funds had been lent to the Irishmen in France in the sum of €342,000. The letter acknowledged that the principal sum of €200,000 was owed to Mr O'Connor. It noted that there had been returned to Mr O'Connor up to that date the sum of €14,753. The final paragraphs of that letter were in the following terms:-

> *"In the meantime, we acknowledge the moral obligation to you personally. Dermot, John and Paul will pay some of our income, when earned, in the coming months to your account.*
>
> *Paul, John and I are signing this letter to demonstrate our personal promise and commitment to you."*

9. The letter appears to have been signed in person by the first defendant and was signed by means of electronic signatures by Mr. Deighton and Mr. Dunlop.

Submissions of Counsel

10. Mr. Duff BL submitted on behalf of the plaintiff, that the letter and email were sufficient to establish liability on the part of the first defendant to repay the sum claimed in the summary summons to the plaintiff. In this regard the plaintiff relied on the decision of the Court of Appeal in New Zealand in *Paulger v. Butland Industries Ltd* (Unreported Court of Appeal 58/89). In that case the chief executive and director of a company had written to the company's creditors asking them to hold off taking any action in respect of the debts due to them by the company for a period of 90 days. The letter stated "*the writer personally guarantees that all due payments will be made".* The Court of Appeal held that the content of the letter sent by the chief executive and director of the company, was clear enough to establish a personal liability on his part to guarantee repayment of the company's debts to its creditors. The court noted that the plaintiff in that case had

refrained from taking action for the requested period of 90 days and therefore there was consideration to support the promise that had been made by the appellant.

11. Counsel submitted that the present case was on all fours with the New Zealand decision. In particular, it was submitted that a combination of the letter dated 20th October, 2016 and the email dated 11th January, 2018, were sufficient to establish a personal liability on the part of the first defendant to repay the debt as guarantor of the indebtedness of Haven to the plaintiff.

12. In respect of the second defendant, it was submitted that as she was a director and shareholder in L. Trade Team Global Ltd, she must have been aware what was going on at the relevant time and it was submitted that that was sufficient to make her personally liable for return of the monies to the plaintiff.

13. It should be noted that at the outset of the hearing, an application had been made by the plaintiff to amend the sum claimed in its summary summons from €263,000 to €200,000, on the basis that the sum of €63,000 had in fact been invested by third party via the plaintiff company with Haven and it was no longer proposed to seek recovery of that sum on behalf of the third party. The court acceded to that application; hence the sum in respect of which summary judgment was now sought was the sum of €200,000.

14. In resisting the application, Mr. Naidoo BL submitted firstly, that the money had been invested by the plaintiff with Haven. That company was the primary debtor. There was no evidence that the first or second defendants had ever given any guarantee in respect of any indebtedness which that company may have to the plaintiff. Secondly, it was submitted that there was no evidence that Haven was contractually bound to return the sum claimed, or any sum, to the plaintiff. The plaintiff had made an investment in a particular venture; that had gone badly for the plaintiff, but that did not mean that Haven was contractually obliged to return the principle sum invested to the plaintiff. It was submitted that no contract had been exhibited to that effect. In fact, no contract at all had been exhibited between the plaintiff and Haven.

15. In respect of the alleged contract of guarantee, it was pointed out that in the summons the plaintiff had only pleaded that same arose as a result of the email sent by Mr. Deighton in January 2018. There was no evidence that the first defendant had had any part in the drafting or production of that email. It was submitted that in these circumstances the email was not sufficient to give rise to a contract of guarantee on the part of the first defendant for the benefit of the plaintiff.

16. It was further submitted that even if the court were to consider that the letter and email could be considered together, it was submitted that they were not sufficient to establish a contract of guarantee by the first defendant to be liable for any debt allegedly owed by Haven to the plaintiff. It was submitted that the terms of the letter and the email were simply too vague to establish any such contractual obligation. Furthermore, there was no consideration for any promise that may have been given by the first defendant to enter into any such guarantee.

17. It was submitted that at their height, the letter and the email merely amounted to a promise to assume some unspecified "*moral obligation*" to repay the money. It was submitted that that was not sufficient at law to establish a contract of guarantee. It was pointed out that the email of 11th January, 2018 had not been signed by the first defendant, but had been signed by Mr. Deighton, a director of Haven.

18. Counsel submitted that the *Paulger* decision was distinguishable from the present case, because there was consideration for the very clear promise that had been made by the director of the company, that if the creditors held off for the period requested, he would assume the primary debts of the company. It was submitted that there was no such clear promise, nor any consideration to support same, in this case.

19. In relation to the second defendant, it was submitted that in her affidavits she had stated that she had never met Mr. O'Connor, nor had any communications with him, or his company. Furthermore, she had ceased to be a director of the Irish company as and from September 2016, which was before both the letter and the email. There was no reference in either document to her. Accordingly it was submitted that there was no basis on which she could be held personally liable to the plaintiff.

Conclusions

20. Summary judgment procedure is only suitable when there is a clear *prima facie* legal entitlement on the part of the plaintiff to the sum claimed. Usually when such applications are being moved, the plaintiff has a very strong case that money is owed to him by the defendant and the real question before the court is whether the defendant has established sufficient evidence in his affidavit to cross the threshold that he has at least an arguable defence to the plaintiff's claim, such that he should be allowed to resist judgment being marked against him in a summary manner and should be allowed to have the matter remitted to plenary hearing.

21. The approach which the court should take to an application such as this, is well settled in law. The relevant test was set down by the Supreme Court as far back as 1996 in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75. In that case Murphy J., giving the judgment of the court, endorsed the following test laid down in B*anque de Paris v. DeNaray* [1984] 1 Lloyd's Law Rep 21, which had been referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank PLC v. Daniel* [1993] 1 WLR 1453:-

> *"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."*

22. The test set down in the *Anglin* case has been applied in a number of cases in the intervening years. The appropriate test was more recently set out in *Aer Rianta CPT v.*

Ryanair Limited [2001] 4 I.R. 607 in which case Hardiman J. stated as follows at page 623:-

> *"In my view the fundamental questions to be posed on an application such as this remain: 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 defendants affidavits fail to disclose even an arguable case?"*

23. In *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, McKechnie J. having analysed the relevant case law, set out a helpful summary of the relevant principles. It is not necessary to set these out in this judgment, as they are very well known. The court has had regard to all of these cases and to the principles set out in Harrisrange in reaching its determination herein.

24. The court has also had regard to the dicta of Moriarty J. in *Allied Irish Banks v. Killoran* [2015] IEHC 850, where he warned that the court should not accord substantive relief to defendants in summary judgment motions who raise spurious, fanciful or conjectural contentions to resist judgment. He advised that courts must be alert to defendants who seek merely to defer the evil day on the basis of arguments that do not pass muster, and must remain mindful of the de minimis rule in assessing summary judgment applications, see paragraph 56 of the judgment.

25. In this case, the plaintiff does not sue on a clear contractual basis between the parties, but on the basis of an alleged personal guarantee given by the first defendant in respect of the indebtedness of Haven to the plaintiff. However, as pointed out by counsel for the defendants, there is no evidence before the court that Haven was contractually bound to return the sum of €200,000, or any sum, to the plaintiff. No contract between the plaintiff and Haven was exhibited. Nor was there any evidence given of a verbal agreement between them to the effect that at the very minimum the plaintiff would get a return of the sum that it had initially invested with the company. Thus, there is no evidence before the court of a primary liability on the part of Haven to the plaintiff in respect of which the first defendant could be liable on part of a personal guarantee.

26. Turning to the letter of 20th October 2016, the terms thereof do not demonstrate a clear assumption of a legal liability on the part of the first defendant to the plaintiff. What there was, was a vague promise to pay "*some of our income*" when earned in the following months into the plaintiff's account. There was no statement how much income would be transferred to the plaintiff, or exactly when such transfer would take place. In truth, it was a pleasant sounding but useless platitude.

27. The email of 11th January, 2018 from Mr. Deighton made certain statements on behalf of of *"we"* the partners of Haven. Again, there was a vague promise that when fee income would be generated in 2018 and 2019 and that it would be used to support "*the moral obligation"*. The letter stated that all fee revenue would flow into Haven and that each of the partners would forego income, which would remain in the company for disbursement by Mr. Deighton under the moral obligation as outlined. This was a very vague promise

and could not be seen as giving rise to a contract of guarantee on the part of the first defendant.

28. Insofar as promises were made in the letter and in the email, they were unsupported by any consideration. In order for a promise to have contractual force, it has to be supported by consideration . In the *Paulger* case the promise made by the chief executive to repay the company's debts, was made in clear terms and the consideration requested and given by the creditor, was for the creditor to hold off taking action for a given period. As that had been done by the creditor, they were held entitled to sue on the promise. The terms of the alleged guarantee in this case is very far removed from the clear terms of the letter in the *Paulger* case. No consideration was requested for the alleged promise, nor was any given to support such promise. In such circumstances it is arguable that the letter and the email did not create any enforceable contractual obligation on the part of the first or second defendants in favour of the plaintiff.

29. In the circumstances, the court is not satisfied that the plaintiff has established a strong case that either defendant is personally liable to it in the sum claimed, or for any sum. The court is satisfied that the first defendant has raised an arguable defence in his affidavits and accordingly the court refuses the plaintiff's application to mark summary judgment against him.

30. In relation to the second defendant, there is no evidence that she ever met Mr. O'Connor, or communicated with him or his company. Her evidence that she was not a director of L. Trade Team Global Ltd at the time that the letter was sent or when the email was sent, has not been contradicted. There is no evidence before the court on which it could hold that she is indebted to the plaintiff in the sum claimed. Accordingly, the court dismisses the plaintiff's action against the second defendant.

31. Not without considerable reluctance, the court will remit the plaintiff's claim against the first defendant to plenary hearing. However, the court would caution the plaintiff to consider its options carefully before proceeding further. The costs of being unsuccessful at a full plenary hearing would be quite considerable. In the event that the plaintiff elects to proceed with the action, the court directs that pleadings and other matters are dealt with in accordance with the schedule agreed between the parties.