

THE HIGH COURT

[2022] IEHC 365

[Record No. 2019/386/S]

BETWEEN

PRIMELINE VNE LIMITED

APPLICANT

AND

CENTZ RETAIL HOLDINGS LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Bolger delivered on the 15th day of June 2022

1. This is the plaintiff's application to enter summary judgement. For the reasons set out below I refuse this application and allow the defendant leave to defend.
2. The plaintiff issued a summary summons dated 25 April 2019 seeking judgment in the amount of €140,986.14 plus interest. The claim arises from monies the plaintiff claims are due and owing by the defendant in consideration of services provided on foot of invoices issued between 1 February 2017 and 31 December 2019 pursuant to the agreement made between the parties for goods and services supplied by the plaintiff to the defendant.
3. The parties agree that the test for deciding whether liberty to enter judgment or leave to defend should be granted is whether it is very clear that the defendant has no case, as espoused by Hardiman J. in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 IR 607. Hardiman J. in that case identified the fundamental questions to be posed in applications such as this as: -

“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?” (At 623).

Background

4. The plaintiff's grounding affidavit asserts that the parties entered into a contract on 14 February 2017 for the supply of transport, storage and delivery of goods for the defendant, and that the defendant failed to discharge all of their debts due from then to December 2018. The plaintiff concedes that the defendant has claimed that the plaintiff overcharged for certain services and improperly retained goods in breach of the contract but that, despite those issues raised by the defendant, there is no bona fide defence and the defendant's appearance has been entered solely for the purpose of delay. The defendant in its replying affidavit sought to dispute the debt and referred to its solicitor's letter of 4 November, 2019 (prior to the institution of the proceedings) which expressly disputed the debt and set out its reasons for doing so referring to, inter alia, overpayments made by the defendant. The defendant's deponent also referred to proceedings issued by the defendant against the plaintiff on 29 January, 2020 which plead, inter alia, that the plaintiff and the defendant agreed, after the contract was signed, to provide delivery service at what was referred to as a 'Dublin rate' of €15 per

pallet but that from the outset, Dublin pallet deliveries were charged at €20 and that was disputed by the plaintiff. The defendant also claims that there were other charges incorrectly calculated.

5. The defendant swore a further affidavit claiming that it had overpaid the plaintiff in the amount of €18,653.07 between June 2017 and November 2018, and criticised the plaintiff for not exhibiting the contemporaneous correspondence. The defendant's deponent, Mr. Naniar, exhibited correspondence in which he says issues with the invoices and business relationship were raised. The defendant also raised the plaintiff's unilateral termination of the contract and its failure to invoke the mandatory dispute resolution procedure contained therein.
6. The plaintiff replied to both affidavits and claimed that the defendant failed to invoke the contractual provisions in place to address any such disputes and therefore could not seek to raise those issues at this stage. In relation to the defendant's claim that the Dublin pallet rate was agreed at €15 rather than €20, he pointed out that the rate of €20 was set out in schedule six to the contract. He confirmed that the plaintiff and defendant did discuss the potential for a lower rate of €15 on condition that the defendant would provide the plaintiff with keys, alarm and access codes to facilitate early morning deliveries. He claimed the defendant did not elect to make the required provision for the plaintiff, and therefore the rate as set out in the contracts remained the operative rate between them. The defendant then filed a further affidavit sworn by a different deponent, Ms. Oluwatoyin Idowu, disputing the plaintiff's deponent's averments that the plaintiff had taken no issue with the invoices before a demand was made for the total balance. Ms. Idowu averred that disputes were raised on the invoices throughout 2017, 2018 and 2019 and refers to a selection of emails in which those disputes are set out, and says they represent only a snapshot of the total emails passing between the parties in relation to the disputed invoices.

The plaintiff's case

7. Counsel for the plaintiff makes the case that it is very clear that the defendant has no defence and lays heavy emphasis on the eleventh of the twelve-point synopsis of the principles to be applied in such a case, set out by McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 IR 1 (at pp. 7 to 8). All twelve points are as follows: -
 - (i) the power to grant summary judgment should be exercised with discernible caution;
 - (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
 - (iii) in so doing 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;

- (iv) where truly there are no issue or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;
- (v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;
- (vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;
- (vii) the test to be applied, as now formulated, is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;
- (viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;
- (ix) leave to defend should be granted unless it is very clear that there is no defence;
- (x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;
- (xi) 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;
- (xii) 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.

8. On the basis of (xi), counsel for the plaintiff submitted that the court must have positive sworn evidence of the existence of a defence that is backed up by evidence, and that where a defendant claims to have a bona fide defence, they must set that defence out on affidavit. Failure to do so means that the plaintiff is entitled to be granted summary judgment. The sole basis for this proposition identified by counsel was point (ix) of McKechnie J.'s judgement. Counsel did not seek to rely on any other authority other than to accept the test developed by Hardiman J. as set out at paragraph 2 above.

9. Counsel for the plaintiff also sought to distinguish Baker J. in *ACC Loan Management Limited v. Dolan* [2016] IEHC 69, where she held that while the court cannot resolve a dispute of fact, it can access the evidence including the documentation exhibited to the affidavits, and come to a view as to whether the defendants have made out a bona fide or credible defence. Counsel suggested that the court could assume the deponent in the ACC Loan Management gave evidence and exhibited documentation. Counsel claimed that the defendant's deponent did not make any positive averment of a defence, and their reliance on the correspondence in which overpayments by the defendant are claimed is inadequate, in particular because the correspondence post-dated the institution of the proceedings and was a retrospective challenge to the invoices. Counsel submitted that challenges posed to invoices in various emails between the plaintiff and defendant prior to the institution of the proceedings, and dating back to shortly after the commencement of the contract and continuing regularly thereafter, were not validly disputed within the terms of the contract. Whilst he accepted that the defendant criticised the plaintiff for not charging the €15 Dublin rate, he claimed that the defendant had not challenged the plaintiff's justification of charging the higher rate of €20 per pallet (namely that it was because of the defendant's failure to provide keys etc to facilitate early morning access). He disputed that the plaintiff had failed to comply with the contractual dispute resolution procedure. He submitted that the "entire agreement" clause in the contract precluded the defendant from arguing that the delivery rate had been changed by agreement after the contract was signed, and that the parties were therefore bound by the higher rate of €20 as specified in the schedule to the contract. He accepted that the defendant had taken issue with some invoices (as set out in the defendant's affidavit of Ms. Idowu and in the emails exhibited thereto) but that the disputes were simply about the amount charged (€20 as versus €15 per pallet), and that the plaintiff was entitled to charge €20 as the terms of the contract had never been amended, and the conditions under which the plaintiff had agreed to a lesser charge had never been satisfied.
10. The plaintiff's counsel submitted that the defendant's deponent did not point to a specific invoice that was disputed within the terms of the contract. Even if she did, the plaintiff's counsel contended that this was nothing more than the mere assertion envisaged by point (xi) of McKechnie J's synopsis in *Harrisrange*, and could not permit a defendant leave to defend the proceedings.
11. In relation to the defendant's proceedings against the plaintiff, counsel for the plaintiff submitted that they are irrelevant to the plaintiff's entitlement to enter summary judgment, as they relate to events which occurred after the defendant incurred the debt the subject matter of the plaintiff's claim, when the plaintiff chose to cease providing services to the plaintiff and to retain the plaintiff's goods, which the defendant claimed was in breach of the express terms of the contract.

The defendant's submissions

12. The defendant has set out its defence in its replying affidavits, the contemporaneous correspondence between the parties at the time the disputed invoices arose, and the facts grounding its statement of claim against the defendant which it exhibits to its affidavit.

The defendant condemns the plaintiff's approach as overly technical, avoiding the contemporaneous email correspondence it exhibited, and inconsistent with the well-established jurisprudence. The defendant's counsel took the court through the detail of the email correspondence and the contents of the statement of claim, where the defendant disputed the plaintiff's invoices both at the time the invoices were issued and retrospectively after the plaintiff had instituted these proceedings. The question, according to the defendant's counsel, was whether those issues gave it a bona fide defence regardless of whether the court believes the defendant or not.

13. The defendant relies on the decision of the Supreme Court in *IRBC v. McCaughey* [2014] 1 IR 749 where Clarke J. stated:-

"It is important, therefore, to re-emphasise 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 Lingus c.p.t. v Ryanair Ltd* ... be clear that the defendant has no defence.

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 Ltd* ... It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant".

14. That decision has been cited subsequently both by this Court and by the Court of Appeal. In *ACC Loan Management Ltd v. Dolan* [2016] IEHC 69, Baker J. held that, while the court cannot resolve any dispute of fact, it can assess the evidence including the documentation exhibited to the affidavits and come to the view as to whether the defendants have made out a bona fide or credible defence. She said that, where a case is based on documents, "a defendant must be in a position to show that the defence which they seek to make is not totally undermined by the correspondence between the parties".
15. Counsel highlighted the fact that the contract exhibited by the plaintiff was not signed, and referred to emails, postdating the date of the contract, which referred to ongoing discussions relating to the terms of the contract and to the parties having signed the contract at an earlier date. This, he submitted, all pointed to ongoing discussions in relation to the terms of the contract and that, therefore, the terms of the contract that was signed would be a matter for the trial.

16. Counsel argued that the plaintiff had ignored the dispute resolution procedure in the contract and the defendant's attempt to invoke it after the plaintiff had instituted its proceedings.

Decision

17. The court must be satisfied that it is very clear that there is no defence. The court accepts the principles espoused by McKechnie J. in *Harrisrange Ltd v. Duncan* [2003] 4 IR 1. The court has also had regard to the analysis of the Supreme Court of what is meant by the credibility of a defence, as set out by Clarke J. in *IBRC v. McCaughey*.
18. The relevant legal principles include (xi) of McKechnie J.'s synopsis but this is not the only factor and is, in any event, subject to the overriding consideration McKechnie J. identified at (xii), namely to achieve a just result while taking account of a person's right of access to justice.
19. The plaintiff emphasised its right not to have to engage in a lengthy and expensive trial which it claims the defendant could not and would not win. If the plaintiff's confidence in the outcome of a trial in its favour turns out to be well placed, the trial judge can deal with the unnecessary expense to which the plaintiff was put by way of an appropriate costs order. The plaintiff has never suggested that the defendant might not be a mark for any such costs.
20. The plaintiff claims that the defendant's affidavits make no positive averment of a defence, in spite of the content of the communications between the plaintiff and the defendant exhibited thereto. The plaintiff claims that this denies the defendant the right to proceed to a plenary hearing. Even if the plaintiff is correct in relation to the content of the defendant's affidavits (to which I return below), such a consequence seems to me to be an overly restrictive and technical approach to a test that requires all of these circumstances to be considered in seeking to achieve a just result. Baker J. in *ACC Loan Management v. Dolan* referred to the documents exhibited to the affidavit as part of the evidence to be assessed by a court in determining whether a defendant had made out a bona fide or credible defence.
21. In any event, having examined the defendant's affidavits, I am satisfied that the averments and the exhibits set out the defence on which the defendant relies in seeking to have the matter referred to plenary hearing. Mr. Maniar's first affidavit claims the debt is disputed and refers to the contents of a letter from the defendant of 15 January 2019 responding to the plaintiff's letter of claim. That letter includes a detailed breakdown of what the defendant claims were overpayments it made to the plaintiff, as well as a detailed narrative about the disputed charges imposed by the plaintiff for delivery (at €20 per pallet when the defendant claims the rate agreed was €15 per pallet) and for office space (which the defendant claims was never payable). Mr. Maniar's second affidavit avers, again, to the defendant's claim that it overpaid the plaintiff and refers again to its letter of 15 January 2019. He also exhibits extensive inter partes correspondence in which he says issues with the invoices and business relationship were raised. An examination of that correspondence confirms that the defendant was challenging monies charged by the

plaintiff, in particular, the rate of €20 per pallet rather than the €15 the defendant claims was agreed, and the charging of rent for office space. The challenges made in that correspondence was contemporaneous rather than being claimed after the plaintiff threatened to, or did actually, institute its proceedings. A further affidavit was sworn by Ms. Idowu on behalf of the defendant in which she states that disputes were raised on the invoices throughout 2017, 2018 and 2019 after services were suspended, and she exhibits emails evidencing those disputes. As a result, she avers that the defendant submits that there are significant disputes of fact between the parties.

22. In those circumstances, I am satisfied that the defendant's affidavits do aver to its defence and seek to provide an evidential basis for same by reference to the correspondence exhibited thereto. I do not consider those averments to be a mere assertion of a given situation which is to form the basis of a defence such that the court should proceed to grant summary judgment.
23. If I am wrong in that conclusion, I consider the contents of the defendant's affidavits, including the exhibits thereto, are such that allowing the defendant leave to defend the proceedings is a better way to achieve a just result and draws the appropriate balance between the plaintiff's right to access to justice (including to such costs orders as may be made by the trial judge in the event that they find the defendant has no defence) and the defendant's right to respond to the plaintiff's claim. Included within these contents are contemporaneous accounts of the disputes between them viz-a-viz the correct charges for the delivery of the plaintiff's services, and the correct interpretation and application of whatever the terms of the agreement entered between them are found to be.
24. It is not necessary (nor appropriate) to determine whether the plaintiff properly complied with the contractual dispute resolution procedure or whether it was entitled to cease providing services to the defendant and retain the defendant's goods as it did, other than to note that those issues remain issues of contention between the parties for which it will be necessary to adduce evidence and make legal submissions on the correct interpretation of what the terms of the agreement between them was.
25. I refuse the plaintiff's application for summary judgment. I direct that the matter should proceed to plenary hearing.

Indicative view on costs

26. The defendant urges me to apply the decision of Clarke J. in *ACC Bank Plc v. Hanrahan* [2014] 1 IR 1, where he observed that where the court remitted the matter to plenary hearing and was satisfied that a plaintiff had acted in a particularly reasonable manner in not agreeing to that court of action, the court should consider whether the justice of the case requires that some or all of the costs of the summary judgment motion should be borne by the plaintiff. I also note that, in that decision, Clarke J. said that in the majority of these cases, "the costs of a summary judgment motion as a result of which the proceedings are remitted to plenary hearing should either be reserved or become costs in the cause".

27. In the circumstances of this case, whilst I note the defendant did invite the plaintiff to remit the matter to plenary hearing which the plaintiff declined to do, I do not consider the plaintiff's conduct to come within the concept of particularly unreasonable behaviour as referred to by Clarke J. The plaintiff believes that the defendant has no defence to its claim. Ultimately, this will be a matter for the trial judge. In those circumstances, my indicative view on costs is that costs of this motion should be treated as costs in the cause.

28. I will list the matter for mention before me at 10:00am on 5 July to allow the parties to make such further submissions on costs as they wish to make and to hear whatever submissions the parties wish to make on the final orders to be made. I am not requiring written submissions but if the parties do wish to make them they should be lodged with the court at least 24 hours before the matter is back before me.