Schwartz v Barclays Bank Plc [1995] Lexis Citation 2066

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COURT OF APPEAL (CIVIL DIVISION)

SIMON BROWN, MILLETT LJJ

21 JUNE 1995

21 June 1995

E Cousin for the Applicant; M Sullivan for the Respondents

Harry I Alkin & Co; Maurice Hackenbroch & Co

SIMON BROWN LJ

This is an application for an extension of time and leave to appeal in respect of an order of His Honour Judge Gareth Edwards QC, sitting as a judge of the High Court on 4 October 1994, dismissing the applicant's appeal from the judgment given under Ord 14 by Master Murray on 22June 1994, in the sum of #536,158.99 and costs assessed at #3,000. The plaintiffs' claim arose out of a series of personal guarantees signed by the applicant in and between 1983 and 1988. By these instruments he guaranteed the debts of a group of property companies which he himself had acquired and of which he was the principal director and guiding light.

On the face of things, his liability was plain. What does he seek to advance by way of defence?The first answer to this is nothing whatever until after the plaintiffs issued their writ in October 1992, despite demands having first been made upon him some two years earlier in October l990. Now, however, in its latest manifestation, as it appears in the draft amended defence and counterclaim, the following argument is sought to be raised:

"5. The defendant is entitled in equity to have the guarantees set aside on the grounds that the defendant suffered from a special disability that was apparent to the plaintiff and of which the plaintiff took unconscionable advantage.

Particulars:

(a) The defendant was born in Rumania on 1 July 1948 and has never received any secular education having studied in a Talmudical college in the United States of America....."

where in the 1960's he became an American citizen:

"....and then from 1970 until the early 1980's at Rabbinical College in London. In the early 1980's he was advised by his father-in-law that he should buy properties. The defendant's spoken English was very poor and he found it hard to read and understand the language and had received no education in it.

(b) The defendant was introduced to the plaintiff by his said father-in-law. It would have been clear to any official of the plaintiff that the defendant's command of English was so poor that he could not understand without an explanation the nature of any legal document that was put before him to sign.

(c) The defendant understood that the officials of the plaintiff, and in particular one Ronald William Oliver Monksfield and one Philip Michael Wilcox, that he was borrowing money as director of various companies, that the bank would require some security from those companies. At no time was it explained to the defendant nor did he understand that he was being asked to sign documents which would render him personally liable for the debts of those companies.

(d) The said transactions were to the disadvantage of the defendant as he was undertaking a personal liability as guarantor for the debts of the various companies.

(e) The defendant was in a position of special disadvantage with regard to the plaintiff, as the plaintiff was a powerful financial institution and the defendant was a person with little knowledge or understanding of the English language."

On the face of it, that appears to me a fairly remarkable defence, that a man running a string of property companies can assert that his understanding of the elements of the English language, and the nuts and bolts of ordinary commercial life, is so deficient that he can thereby escape the consequences of signing routine legal instruments.

I turn to what Mr Monksfield has to say on the factual allegations involved in this purported defence. He is the retired manager of the plaintiffs' Hertford branch where, in 1983, the applicant opened an account. I quote:

"He speaks and writes English. He has an Eastern European accent. There was no difficulty in communication between him and me or him and Mr Wilcox. I understood him and he understood me. His affidavit evidence is simply untrue, as is patent from the documents exhibited to this affidavit."

Amongst those many exhibited documents are a number of letters, which are not merely in good English but display some obvious measure of business sophistication, and also attendance notes recording conversations between bank officials and the applicant. One of the latter is dated 24 June 1988 and records as follows:

"I speak to Mr Schwartz with regards to the general situation. He has one more flat to sell on Bishopsthorpe Road under the name of Dorvila Limited which should produce about #60,000. There is also the other flat that he has planning permission for in the roof space. I tackled him on his personal account and also that of Countyside. He tells me that he will gradually reduce these balances through the medium of Sprigborough Limited. Sprigborough has no money at the present time but he has suggested to me that he will gradually put monies in over the next 3

weeks. I have asked him to ensure that the balances are cleared by, say, the end of July so that as far as the account of Sprigborough is concerned, we still have a charge over a flat at Marsden Road which is occupied. Even occupied it must have a value of between #20,000 or #30,000 on today's market."

That attendance note, to my mind, tells its own clear story.

As to the correspondence, the applicant in his affidavit of 21 June 1994 says:

"I realise it must look rather strange that business letters in English were being sent out from my office signed by me. The explanation for this is that the correspondence in my office was dealt with by two secretaries...."

and he names them.

"They were in attendance during normal office hours whereas I was often not there much during the day. They were competent and dealt with all administrative matters on my behalf and had access to all my business documents. The Bank Manager spoke directly to my secretaries when I was not in the office and I imagine he advised them how to deal with the formalities involved in our dealings. I had great confidence in the ladies involved and would sign correspondence which they had drafted relying on them to do things property."

The suggestion that they were not merely rendering imperfect English into fluent English, but, in effect, actually running his substantial business enterprise is nothing short of ludicrous. I turn to the judgment of Judge Gareth Edwards which is certainly couched in trenchant and emphatic terms. At various stages in the judgment, Judge Edwards speaks of it being:

"....quite preposterous for this defendant to claim that his command of English is so poor that he did not understand that he was successively signing a number of guarantees to the bank."

and:

"....he put in a defence which, as I mentioned in argument, seems to me to come straight from the book of feeble excuses with which every judge is so familiar."

and:

"I cannot see any court beginning to swallow a story like that."

It is sought today to put before the court certain further evidence in support of this defence. That consists of two affidavits. First from a gentleman who speaks as an accredited representative before the US Immigration and Naturalisation Service and who deposes that, albeit US Government Regulations state that knowledge of English must be of a "reasonable standard in order to qualify for United States citizenship", in his experience such examiners interpret the phrase "reasonable standard" quite liberally, allowing individuals with limited understanding of the English language to pass. I repeat, this applicant became an American national as long ago as the 1960's. Since 1970 he has lived in this country. It is difficult to suppose that that affidavit has the least bearing on the overall factual issue raised here.

The second affirmation is from a Mr Benhamu who asserts that he has known Mr Schwartz for 15 years and that when he first met him his command of spoken and written English was virtually non existent. Mr Benhamu says he was away from the United Kingdom throughout most of 1994 which explains the difficulty which the defendant would have had in adducing this evidence before the judge below. Putting aside entirely the obvious hurdles confronting this applicant arising from Ladd v Marshall, I have to say that this evidence seems to me worth scarcely a row of beans in the overall context of the present dispute. I regard this defendant with no less profound scepticism than did the judge and Master below. In order 14 proceedings the court must no doubt be prepared to be credulous. It ought not, however, to be gullible. Anyone giving credence to the defendant's case here would need to be in the highest degree gullible, even assuming (and it is to my mind a very considerable assumption) that, were the facts to be made good, he would be provided with a defence in law. I go further and add this. This sort of defence, to my mind, does a grave dis-service to the immigrant population of this country. Inevitably, were such defences readily to be accepted as a basis for defeating claims of this character, then lending institutions and other such bodies would be discouraged and dissuaded from affording to those seeking to make their way here, such as this applicant, the general financial and commercial cooperation which they must win if they are to enjoy the full and equal opportunities which, no doubt, were the reason they came to the United Kingdom in the first place. I regard this as a pernicious as well as a wholly hollow defence.

I would refuse this application.

MILLETT LJ

Mr Schwartz asked his bank to advance monies to a number of his companies. Mr Schwartz was required to sign a series of bank guarantees in favour of the bank to secure the advances. The guarantees were in standard form. Mr Schwartz clearly realised that the advances would not have been made if he had not signed them. He now seeks to escape liability by pleading unfamiliarity with the English language. He claims that his understanding of the English language was poor; the bank knew that; that he did not understand what he was signing and that the bank must have realised that. In my opinion that is, in itself, no defence.

Illiteracy and unfamiliarity with the English language are not to be equated with disabilities like mental incapacity or drunkenness. All four conditions are disabilities which may prevent the sufferer from possessing a full understanding of a transaction into which he enters. They differ in this respect, that mental incapacity and drunkenness may not only deprive the sufferer from understanding the transaction, but also deprive him of the awareness that he does not understand it.

Illiteracy and unfamiliarity with the English language are quite different. An illiterate knows that he cannot read; a man who is unfamiliar with English is aware of this fact. If he signs a document which he does not understand he has only himself to blame. A man who signs a document in a language with which he is insufficiently familiar to understand can be in no better position than the man who signs a document which he does not read because he is too busy. Accordingly, mental incapacity and drunkenness provide defences to a claim in contract if the other party was aware of the defendant's condition. But illiteracy and unfamiliarity with the English language do not. These latter disabilities, if such they can properly be called, do not by

themselves provide a defence to an action in contract, even if the other contracting party was aware of their existence. They may, however, found a claim in equity to set the transaction aside as a harsh and unconscionable bargain. That is a doctrine of equity by which it protects the weak against exploitation by the strong. It is not enough, however, in order to invoke the doctrine, that the defendant should establish that he was the weaker of the parties. He must establish that there was a substantial unfairness in the transaction itself. It is not enough that he was in a weak bargaining position or that he suffered from some disability of which the other party was aware, nor is it enough that the resulting bargain was hard or unreasonable. There must be a real unfairness in the transaction so that there has been an unfair advantage gained by the unconscientious use of power by the stronger party against the weaker.

It is a principal function of a court of equity to protect the weak from exploitation by the strong, but the doctrine of the harsh and unconscionable bargain, which has been developed for that purpose, needs careful confinement if it is not itself to become an instrument of oppression. By that I mean not oppression to the strong, but to the weak. As my Lord has pointed out, it would do a grave dis-service to the immigrant community if the defence were to become readily available to anyone who could prove that he or she had a poor command of the English language. They would be unable to obtain finance without facing much greater difficulties than are faced by those whose command of English is good.

More generally, perhaps, it would do a grave dis-service to anyone who actually needed finance. Those in desperate financial straits often have little alternative but to accept the terms on which it is offered to them. They are, undoubtedly, in a weak bargaining position. If that fact alone allowed them to escape liability, then those with the greater need of help will be unable to obtain it.

In the present case, the judge did not accept that MrSchwartz was lacking in his command of English. He considered that it was a lying defence. Mr Schwartz had run a very substantial business for many years. He clearly knew enough English to enable him to do so. He enforced contracts when it suited him, but when it was sought to enforce a contract against him he pleaded unfamiliarity with the language. The judge said that the defence was "straight out of the book of feeble excuses". I agree. So that there may be no misunderstanding, I would ask those who represent Mr Schwartz before us to tell him that my own personal view of his defence is that it is a perfect example of chutzpah.

I would refuse leave.

Application dismissed with costs. Legal Aid taxation.

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