Neutral Citation: [2015] IEHC 819

THE HIGH COURT

COMMERCIAL

[2015 No. 2006 S.]

BETWEEN

GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

MICHAEL CURRAN AND MAUREEN CURRAN

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 21st day of December, 2015

1. This is an application for summary judgment against the second named defendant (*"the defendant")* on foot of a personal guarantee executed by her in favour of the plaintiff on 28th May, 2008. Under this guarantee, the defendant guaranteed and indemnified the aggregate liabilities of XL Fuels Group (*"the company")* to the plaintiff to the full extent of all and every sum or sums of money remaining due and unpaid to the plaintiff subject to a maximum principle liability under the guarantee of €1m plus interest, fees, charges and expenses.

2. The company defaulted on its obligations under a number of loan facilities and the plaintiff now seeks summary judgment against the defendant in the sum of €1m pursuant to the guarantee. Judgment has been obtained against the first defendant in the sum of €2,266,323.28 on 9th November, 2015, as he did not contest the application for summary judgment.

3. There is no disagreement between the parties as to the appropriate test for summary judgment. The principles set out in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607; *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75; and *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, represent the established jurisprudence on the topic and in considering this application, I do so by reference to the principles to be found in those decisions.

4. The defendant maintains that she has a bona fide defence to the claim and that the guarantee is unenforceable on the grounds of:-

(i) undue influence;

(ii) unconscionable bargain; and

(iii) *non est factum.*

5. The defendant relies on the following facts. The guarantee was signed at a meeting in the defendant's home, at a time when the defendant was a 73 year old widow who lived alone. The meeting took place between the defendant and a bank official. The plaintiff knew at the time of the signing of the agreement that the defendant had previously retained a solicitor to provide the necessary independent legal advice concerning the execution of other security documents. The defendant states that she was advised by an official from the plaintiff that the presence of a solicitor was not required.

6. The guarantee was collateral for a number of loan facilities provided by the plaintiff to the company. The defendant states that she took no active part in the day to day running of the business, that she was not a shareholder in the company and did not derive any benefit from either the company or any of the transactions entered into between the company and the plaintiff. The execution of the guarantee was not a commercial transaction between the first and second named defendants.

7. The reality was somewhat different. It is undoubtedly true that the guarantee was signed in the defendant's home. But insofar as anything turns on this, it seems clear that the meeting took place at the defendant's home because it was more convenient for her. In an affidavit sworn on 2nd December, 2015, Ms. Vivien Rowntree of the plaintiff bank, said that the defendant requested that the meeting take place in her house in Oldcastle. The defendant had been asked if she would meet Ms. Rowntree in the business centre in Navan or the Bank of Ireland premises in Oldcastle but her preference was to meet in her own home as it was more convenient. The defendant does not deny that.

8. While it appears to be the case that the defendant had retained a solicitor to provide independent legal advice when she entered into a number of mortgage agreements in 2008, she did not have legal advice when she signed the guarantee. The solicitor who acted for her in 2008 was Mr. Michael Ryan who swore an affidavit on 23rd November, 2015, in which he said that he recalled having a discussion about various matters and the question arose of the defendant giving personal guarantees to the bank. The solicitor did not have any specific documentation in relation to this but he stated:-

> *"I strongly cautioned her not to get involved in any such guarantees or to become embroiled in any such guarantee, not least, having regard to her advanced years, she being a widow, living alone, and a pensioner."*

The mortgages were entered into by the defendant in February and March 2008, only a short time before she entered into the guarantee so it seems that the advice from her solicitor against giving a personal guarantee was offered around that time.

9. The defendant's claim that she was advised by the bank official at her home that a solicitor was not required is disputed by the plaintiff, for the purpose of this application for summary judgment, I cannot resolve that dispute and must proceed on the basis that the defendant will be able to establish this fact.

10. The defendant does not repudiate the statement (in para. 8 above) made by her solicitor, Mr. Ryan. From this, it can be assumed, that the defendant did get legal advice on whether or not she should sign a guarantee and the advice was against doing so. She has not made the case (nor could she) that if she had received legal advice, she would have acted differently. It is clear that she did receive advice, albeit at an earlier date, and decided not to accept that advice.

11. Assuming for the purpose of this application that she was told that she did not need a solicitor's advice in order to enter into the guarantee that would represent no more than the correct legal position. In *Ulster Bank v. Walter deKrester* [2015] IEHC 359, Hedigan J. held:-

> *"…that absent some clear evidence of the need to insist upon customers obtaining, it there is no obligation on a bank to insist on customers obtaining legal advice before entering into contracts with them. See Ulster Bank Ltd v. Roche and Buttimer [2012] IEHC 166."*

It will be necessary, therefore, to consider in due course whether or not the bank was aware of any facts which suggested or ought to suggest that there may be a non-commercial element to the guarantee or that a defendant was not a free agent when she signed the guarantee.

12. The defendant maintains that the bank knew or ought to have known that she took no active part in the day to day running of the business. She was not a shareholder in the company and did not derive any benefit from either the company or any of the transactions entered into between the company and the plaintiff and this was not a commercial transaction between the first and second named defendants. This claim by the defendant seems to come within the category of a *"mere assertion"* in an affidavit of a given situation which is expressed to be the basis of a defence and as such it does not, of itself, provide leave to defend as *"…the court [has] to look at the whole situation to see whether the defendant [has] satisfied the court that there is a fair or reasonable probability of the defendant[s] having a real or bona fide defence."* See *Banque de Paris v. de Naray* [1984] 1 Lloyds Rep. 21; and *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75.

13. In *Aer Rianta v. Ryanair,* Hardiman J. noted that in *First National Commercial Bank v. Anglin* Murphy J., giving the unanimous decision of the Supreme Court, stated :-

> *"the indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the defendant quite untenable."*

14. In that context, it is necessary to look at some of the assertions made by the defendant about her connections with the company. The following facts are not in dispute and are established by documentary evidence:-

> (a) The defendant was, at all material times a director and company secretary of XL Fuels Group Limited. She was a director from the time of its incorporation in 2007 and was company secretary since 2008. She signed every set of financial statements that was filed by the company in the CRO since its incorporation and all other documents registered in the CRO, including a special resolution in 2009 and a form C1 on 31st October, 2012.
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> (b) The defendant said on affidavit that her late husband ran a garage and oil distribution business at Oldcastle, Co. Meath, which, following his death, has been carried on by her sons, Michael (the first named defendant) and Joseph. She stated that on her husband's death she inherited the buildings and lands from which the company's business operated.
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> (c) She borrowed €1,700,000, jointly and severally with her son, Joseph Curran, by way of facility letter dated 14th April, 2008, some six weeks prior to the execution of the guarantee and indemnity which is the subject matter of these proceedings. That borrowing was to finance the construction of a garage, showroom and vehicle test centre on the premises.
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> (d) On 28th May, 2008, the defendant signed and accepted a facility letter from the plaintiff in her capacity as a director of the company. The facility letter provided that in order to advance the money sought by the company, the bank required additional security described as:-
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> *"…the letter of guarantee from Ms. Maureen Curran guaranteeing the borrower's liabilities in the amount of €1m in respect of principle together with interest and costs accrued thereon.*
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> *Supported by:*
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> *First Legal Mortgage/Charge over the property at Oldcastle Motors, Oldcastle, Co. Meath, registered in the name of Ms. Maureen Curran." [Emphasis added].*
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> (e) On the same date, the defendant executed the guarantee which is the subject matter of these proceedings and which was limited to the principal amount of €1m. The guarantee was executed at her own home in the presence of two bank witnesses namely Ms. Vivian Rowntree and Ms. Lorraine Kavanagh. The guarantee covered existing future advances to the company.
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> (f) The guarantee and indemnity is signed by her in three different places on the execution page and it contained in capital letters a clear warning that on executing it she would liable to the plaintiff for the present of future debts and obligations of the company up to a principal amount of €1m. This warning also stated that:-
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> "BEFORE YOU SIGN THIS GUARANTEE YOU SHOULD OBTAIN INDEPENDENT LEGAL ADVICE."
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> There is a dispute as to whether she was told by a representative of the bank that she did not require legal advice and it is not possible to resolve that issue on affidavit. So, for the purpose of this application I am assuming that the plaintiff was told she did not require legal advice. But as I have already indicated she had, at an earlier date, obtained legal advice on the question of signing personal guarantees and she declined to accept that advice. So it seems to me that nothing turns on that point.
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> (g) The defendant also signed a *"CERTIFICATE CONCERNING INDEPENDENT LEGAL ADVICE"* in which she wrote, in her own hand, *"I understand the nature of the liability incurred and I have no wish to be independently advised by a solicitor".* The evidence suggests that the words were dictated to her by a bank official who was present. On the day following the

execution of the guarantee, the bank sent her a copy of it for her records.

(h) On 22nd September, 2008, the plaintiff wrote to the defendant asking her to confirm that she was amenable to allowing the bank to continue to rely on the guarantee as security for the renewed facilities and the defendant signed an acceptance dated 27th September, 2008, stating:-

"I confirm it is in order for the bank to continue to rely on my Guarantee €1m, executed on 28th/05/08 in favour of XL Fuels Group Limited."

(i) On three subsequent occasions after executing the guarantee, the defendant signed facility letters on behalf of the company in her capacity as director and company secretary and all three facility letters specifically referred to the security underlying the facility as including the guarantee of 28th May, 2008.

15. None of these facts are disputed by the defendant other than making an assertion that she was accustomed to signing company documents at the request of the first defendant without understanding them but she could not recall the circumstances in which she signed many of the documents.

16. In the light of this evidence, it is simply untenable for the defendant to maintain that she was not significantly involved and connected to the business of the company. It does not appear to be disputed by the plaintiff that the defendant was not involved in the day to day running of the business and did not make executive decisions. But that does not alter the fact that she has a significant connection to the company and an interest in the fortunes of the company as she had personally borrowed a substantial sum of money jointly and severally with one of her sons for the purpose of developing a garage, showroom and vehicle test centre associated with the business of the company and she owned the lands and buildings from which the company operated. She also accepted that she obtains a small payment from the company, the extent to which was not outlined to the court.

17. The defendant has not adduced any credible evidence to support her claim of undue influence. There were no facts which should have put the bank on notice to take further steps to satisfy it that the defendant was openly and freely agreeing to provide the requested security.

18. So far as the defence of unconscionable bargain is concerned, the defendant has also adduced no credible evidence to support such a finding. Having regard to her extensive connections with the company, it cannot be said that the signing of the guarantee amounted to an unconscionable bargain.

19. A final ground of defence contended for by the defendant is based on *non est factum*. In a replying affidavit, the defendant says that she *"did not agree to provide any 'open-ended' personal guarantee for present and future borrowings".* She thought the guarantee was limited in recourse to secure properties that she had already pledged to the bank. The wording of the guarantee is clear in its terms. In *Ulster Bank v. Roche and Buttimer* [2012] 1 I.R. 765 at 771 (para. 13), Clarke J. said:-

> *"…in the ordinary way (and as I pointed out in ACC Bank plc v. Kelly [2011] IEHC 7, (Unreported, High Court, Clarke J., 10th January, 2011), and as Kelly J. adopted in Irish Bank Resolution Corporation Ltd. v. Quinn [2011] IEHC 470, (Unreported, High Court, Kelly J., 16th December, 2011), a person who signs a document which may well have significant legal effect and does so, either without reading the document or without applying themselves to the content of the document, 'must accept the consequences of having signed a commercially binding agreement in those circumstances' and will, prima facie , be bound by what they have signed. The fact is that Ms. Buttimer signed a document without making any attempt to ascertain what it was or what its consequences might be. In the ordinary way, she has to bear responsibility for her own actions in so doing."*

20. The defendant does not deny that the guarantee and indemnity cover future advances to the company but says that she was not aware that any document being executed by her involved an open ended guarantee for any and all advances made by the plaintiff to the company. If she signed a document which was clear and unambiguous on its face it is not a defence to the bank's claim to say that she did not understand the meaning of the document when she appended her signature to the document which contained the words *"I understand the nature of the liability incurred and have no wish to be independently advised by a solicitor".*

21. The defendant's averment in para. 56 of her affidavit dated 23rd November, 2015, *"I say that your Deponent did not agree to enter into any personal guarantee in favour of the plaintiff in the amount of €1m"* is a quite extraordinary statement having regard to the documentary evidence exhibited in this application for summary judgment. It is a completely untenable assertion and simply not credible in the light of the uncontested facts already referred to in this judgment.

22. *Non est factum* arises where somebody signs a document believing it to be essentially different from that which he or she has in fact signed. In *Allied Irish Banks Plc v. Higgins & Ors* [2010] IEHC 219, Kelly J. relied on the following dicta from the decision in *Saunders v. Anglia Building Society* [1971] A.C. 1004:-

> *"The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief…"*

23. Even the most cursory glance at the guarantee would have alerted the defendant to the fact that it was what it purported to be. She acknowledged by her signature that she knew what it was and did not require legal advice. She was not acting under any disability and there was nothing to prevent her getting legal advice from her solicitor if she was unsure as to the nature of the documents he was signing. That is so even if she was told by a representative of the bank that she did not have to have the advice of a solicitor. It is clear from the affidavit of Mr. Ryan that on an earlier occasion she was advised by him in relation to the perils of signing a guarantee that she appears to have ignored that advice. Fraud and a misrepresentation are often ingredients in a defence based on *non est factum.* But there is not a scintilla of evidence adduced by the defendant to suggest that there was fraud or misrepresentation by the plaintiff or its servants or agents. On several occasions, the defendant had accepted facilities on behalf of the company by signing facility letters which provided, inter alia, for a letter of guarantee from her guaranteeing the borrower's liabilities, so it could not have come as a surprise to her to find that she would be asked for a guarantee, as indeed turned out to be the case.

24. The defendant has not, on any view of the facts met the requirements of a statable or arguable defence based on *non est factum.*

25. The threshold which a defendant has to meet in order to avoid a summary judgment and to have a case remitted for plenary hearing is a low one. If a defendant cannot show a credible or *bona fide* defence to a claim for summary judgment there are good public policy reasons for dealing with the matter in a summary fashion. Otherwise, valuable and scarce court time and resources would be spent on hearing an action over an extended period of time when it is unnecessary to do so. Furthermore, the litigants would incur substantial, and wholly unnecessary, costs which will be which might not be recoverable by a successful plaintiff.

26. The defendant has not established a *bona fide* credible or arguable defence to the plaintiff's claim and the plaintiff is entitled to judgment in the sum claimed.