**THE COURT OF APPEAL**

Neutral Citation Number: [2015] IECA 23
**Appeal No. 2014/196**
**[Article 64 Transfer]**

**Finlay Geoghegan J.**
**Peart J.**
**Mahon J.**

**Between**

**Allied Irish Banks plc**

**Plaintiff**

**and**

**Brian Higgins, Seamus Kavanagh, James Mansfield and Glen O'Callaghan**

**Defendants**

**Judgment of the Court (Finlay Geoghegan, Peart and Mahon JJ.) delivered on the 19th day of February 2015,**

1. This judgment is given on an appeal brought by the third named defendant, James Mansfield ("Mr. Mansfield") against an order of the High Court (Kelly J.) made on the 3rd June, 2010 and perfected on the 17th June, 2010, granting summary judgment against Mr. Mansfield in the sum of €6,324,959.81.

2. A notice of appeal to the Supreme Court (204/2010) against the judgment of the High Court was filed on 25th June, 2010 on behalf of Mr. Mansfield. Prior to the establishment of the Court of Appeal on the 28th October, 2014, a hearing date had not been fixed. The appeal fell within the class of appeals transferred to the Court of Appeal pursuant to the Direction issued by the Chief Justice with the concurrence of the other judges of the Supreme Court pursuant to Article 64.3.1 of the Constitution on the 29th October, 2014. No objection was made by either party to the transfer of the appeal.

3. The Court reserved its judgment at the end of the hearing and now gives its decision. The Court is in agreement on the outcome of the appeal and the reasons therefore and hence has decided to deliver a single judgment of the Court.

4. In the High Court, at the date of issue of the summary summons, the plaintiff's claim against all four defendants was for a sum of €6,288, 437.13 for principal and interest allegedly due by the defendants jointly and severally in accordance with an agreement in writing evidenced in a letter of sanction dated the 19th January, 2009 and accepted by each of the defendants signing same on the 20th January, 2009.

5. The proceedings were entered into the Commercial List and upon the summary judgment application all four defendants sought to put forward an arguable defence upon the basis that the borrowings in question were made from the plaintiff ("AIB") as "consumers" within the meaning of the Consumer Credit Act 1995. The trial judge found that there was no arguable defence upon such a basis and no appeal has been pursued by Mr. Mansfield against that determination. The remaining three defendants did not appeal the order granting judgment against each of them.

6. Mr. Mansfield advanced two further defences. Firstly, in relation to the claim made by AIB that the facilities in question were advanced to the defendants as members of a partnership, namely the "Duleek Partnership" which they had formed for the purpose of acquiring certain lands in Duleek, Co. Meath and developing those lands for onward sale. Mr. Mansfield contended that he was not involved in the partnership. Rather that he was only involved in the purchase of the lands and only liable for one sixth of an initial borrowing of €673,000 for the purchase of a 1.1 acre site upon the basis that he was a one sixth co-owner of the said lands, but had nothing to do with subsequent borrowings in respect of the development of all the lands. The trial judge found upon the evidence before him that there was no arguable defence upon such a basis. There is no appeal by Mr. Mansfield against the rejection of that defence.

7. The second defence put forward was that of *non est factum* in relation to the alleged agreement in writing signed by Mr. Mansfield on 20th January, 2009. The trial judge found that there was no such arguable defence on the evidence before the High Court. The appeal is against that determination. Prior to considering the issues on the appeal it is necessary to set out in summary the relevant facts and evidence before the High Court.

**Facts and Evidence before the High Court**

8. The facts and evidence before the High Court relevant to the appeal were set out in two affidavits sworn on behalf of the plaintiff by Mr. Frank Dennehy and two affidavits of Mr. Mansfield sworn on the 29th March, 2010 and 26th April, 2010 respectively and the exhibits to those affidavits. There were also affidavits from the other defendants which are not germane to the appeal. The agreement comprised in the letter of sanction dated the 19th January, 2009, allegedly accepted by the defendants on the 20th January, 2009, upon which AIB sought judgment against all four defendants was the fifth letter of sanction relevant to the two facilities referred to therein.

9. The background to the facilities granted by AIB to the four defendants was the purchase by the four defendants of a property of 4.5 acres in Duleek, Co. Meath. That was purchased with funds of the four defendants in differing amounts. Subsequently it was decided by the four defendants to purchase an adjoining site of 1.1 acres. On the 19th April, 2004, all four defendants accepted a facility of €673,000 offered by AIB in a letter of sanction dated the 3rd March, 2003. It is not in dispute that all four defendants signed and accepted the facility which was subsequently drawn down, security having been given by way of legal charge over each site.

10. By letter of sanction of the 15th August, 2006, AIB offered to the four defendants a further facility of €3,461,000 to fund the development of two 2.5 story blocks containing 23 apartments, 6 commercial/retail units, crèche and underground car parking on the site in Duleek, Co. Meath. It is not in dispute that the facility was drawn down. The defendants other than Mr. Mansfield did not dispute that they signed and accepted the letter of sanction. The acceptance is dated the 21st September, 2006. Mr. Mansfield in his affidavit accepts that the signature on the acceptance is his, but states in his affidavit sworn on the 29th March, 2010:

> "To the best of my recollection, I signed the back sheet of a letter, which was given to me by the fourth named

> defendant on the bonnet of a car. My recollection is that it was just the plain back sheet with a place for signatures although it is a number of years ago, it may have been the whole letter, but I would have been unable to read same."

11. He also states that at that stage he had no particular involvement in the ongoing development of the site and never met with anybody from AIB. The third facility was an additional €500,000 making €3,800,000 in total by way of loan account in a letter of sanction dated the 3rd April, 2007. The purpose of the additional funds was expressed to cover contributions, an archaeology survey and additional costs not accounted for in the previous loan. It was not in dispute that the funds were drawn down, but AIB did not adduce evidence that the letter of sanction dated the 3rd April, 2007, was accepted in writing by any of the defendants.

12. The fourth facility was offered in a letter of sanction dated the 17th January, 2008. It was for an additional sum of €1,300,000 and stated that the loan account was then €5,170,000 in total. The draw down of the additional €1,300,000 was to be against €1,500,000 net irrecoverable contracts for the sale of units at Duleek. It was to be payable on demand and at the pleasure of AIB subject to capital and interest moratorium until the 31st March, 2008, with clearance on full at that stage from 100% net site fines per completed unit at the site in Duleek. The letter of sanction was accepted in writing on the 24th January, 2008, with purported signatures of all four defendants. Mr. Mansfield disputes that the signature on the document exhibited is his signature. The other three defendants did not dispute that they signed the acceptance of that facility.

13. On the affidavit evidence, it is common case that the facilities offered in the final letter of sanction dated 19th January, 2009, were offered in the course of a meeting held between representatives of AIB and the four defendants and an accountant acting on behalf of some or all of them. The 2009 letter of sanction refers to two separate facilities:

> 1. Facility 1: Term Loan Account 1; amount €772,187; purpose – originally sanctioned towards funding the purchase of 1.1 acre site zoned residential and commercial in Duleek, Co. Meath.
>
> 2. Facility 2: Term Loan Account 2; amount €5,331,229; purpose – originally sanctioned towards funding the development and completion of 2 – 2.5 story blocks containing 23 apartments, 6 commercial/retail units, crèche and underground car parking on site in Duleek, Co. Meath.

Both facilities were stated to be "repayable on demand and at the pleasure of the Bank subject to clearance in full by 28/02/2009 by way of refinance or otherwise."

14. The letter of sanction was signed by all four defendants on the 20th January, 2009. The defendants other than Mr. Mansfield do not dispute that they accepted the facilities upon the terms set out in writing.

15. The affidavit evidence of Mr. Mansfield before the High Court, insofar as relevant to the issue in the appeal, was firstly that he is unable to read properly; he believes he suffers from dyslexia, has had reading difficulties from an early age and left school early due to this. He exhibited in support of his evidence in that respect, a report prepared by Mr. Trevor James an educational psychologist with Éirim, the National Assessment Agency Limited following an assessment carried out on the 10th March, 2010. In it Mr. James concluded that Mr. Mansfield has a reading ability typical of a seven year old and also that he exhibited cognitive difficulties which are characteristics of dyslexia. The assessment also stated that "intellectually, Mr. Mansfield is of at least average intelligence when non verbal reasoning is required but his verbal reasoning abilities are well below average."

16. In relation to the first letter of sanction Mr. Mansfield's affidavit evidence is:

> "It was clearly explained to me that I was borrowing €673,000 for the purchase of the site and I have no difficulty with same, I would not have been able to read it. I am unable to read properly, I believe that I suffer from dyslexia although I have had reading difficulties from an early age and left school early due to this. I do not recall this specific incident, but I knew what I was signing and why I was signing it."

17. Whilst Mr. Mansfield accepts that the signature on the second facility of €3,461,000 in August, 2006 is his, he states his recollection is that he signed a plain back sheet and deposes that at that stage nobody explained to him that this was a letter of sanction to borrow €3,461,000. He disputes signing the third and fourth letters.

18. In relation to the meeting on the 20th January, 2009, at which it is accepted by Mr. Mansfield that he signed an acceptance of the facility letter of the 19th January, 2009, Mr. Mansfield deposed in his first affidavit:-

> "26. I do not have a great recollection of that meeting. I know I signed some papers which were to extend the time limit for repayment of the loans and I acknowledge that I signed same. However, I could not read same due to my dyslexia and my understanding was that I was extending the time on my loan which I had borrowed from the bank with the other Defendants and dealing with the fact that the land clearly had to be sold to pay off the bank. I did not understand that by signing this letter I was taking on any additional borrowing or that I was making myself liable for the €5.5 million that had been borrowed to build out the development.
>
> 27. I am advised that the Plaintiff relies heavily on this final letter of extension but again I would say that nobody advised me that I was actually increasing my liability. As far as I was concerned, I was getting an extension on the first loan account and the other Defendants were getting an extension on whatever borrowing had additionally been obtained to carry out the build out. I knew this was more significant and a larger amount and I did not think it related to me, save in so far as I was always aware that the properties would have to be sold in order to pay off this borrowing. I was equally aware, at this point in 2009, that I was quite likely to lose my initial IRP£225,000.00. Owing to the dispute which had arisen between the second Defendant and the first and third named Defendant there discussions about his getting out of the co-ownership and our dealing with the matter but there was no agreement on how it should be dealt with. The representatives of AIB kept saying that we were all fully liable at that stage despite the fact that it was explained to them that the liabilities were not supposed to be divided that way."

19. In his second affidavit Mr. Mansfield responds to evidence put by AIB through its deponent Mr. Dennehy that Mr. Mansfield was then listed as a director of 25 different companies in the Companies Registration Office and had signed company registration office forms and annual returns on behalf of a number of the companies confirming the particulars contained therein to be correct. At para. 3 of his second affidavit, he confirmed that he was a director and employee of various family businesses established by his father and deposed "I do receive professional advice in relation to their activities, and documents are read and explained to me as necessary but most of my work involves meeting people". However, he also deposes that in this instance, he was investing his own personal money and borrowing a limited sum and did not receive any professional advice.

**High Court Judgment**
20. The trial judge having recited the relevant facts from the affidavits, identified at p. 19 of his judgment, the test he proposed applying in the application for summary judgment. It was the test postulated by Hardiman J. in *Aer Rianta cpt v. Ryanair Limited* [2001] 4 I.R. 607 "Is it very clear that the defendant has no case?". The trial judge then stated "If the answer is in the affirmative, the motion succeeds. If not it does not".

21. In relation to the proposed defence of *non est factum* having reviewed the evidence in relation to Mr. Mansfield's ability to read, the trial judge indicated that for the purposes of the application, he accepted "that Mr. Mansfield is indeed under the considerable disability of having the reading age of a seven year old".

22. He then stated at p. 40:

> "The defence of *non est factum* is one which has been considered in the context of an application for summary judgment by Morris J. (as he then was) in *Tedcastle McCormack & Company Limited v. McCrystal* (15th March, 1999). There that judge considered the decision of the House of Lords in Saunders v. Anglia Building Society [1971] AC 1004 which is the authoritative modern authority on the topic. He said:-
>
> 'I am satisfied that a person seeking to raise the defence of *non est factum* must prove:
>
> (a) That there was a radical or fundamental difference between what he signed and what he thought he was signing;
>
> (b) That the mistake was as to the general character of the document as opposed to the legal effect; and
>
> (c) That there was a lack of negligence i.e. that he took all reasonable precautions in the circumstances to find out what the document was'."

23. The trial judge went on to consider certain extracts from the speeches of Lord Reid and Lord Hodson in the *Saunders* case and ultimately concluded that on the evidence before him, Mr. Mansfield had not demonstrated an arguable defence of *non est factum* as on the evidence he could not be said to have taken "all reasonable precautions to find out what the document was" and hence evidence as to one of the three ingredients required for a defence of *non est factum* was absent.

**Submissions on Appeal**
24. The submissions made on behalf of Mr. Mansfield on appeal were laudably focused. The primary submission was that the trial judge erred in the circumstances of this case in requiring evidence upon which it could be determined that it was arguable that Mr. Mansfield could meet the third indent of the requirement of a defence of *non est factum* as set out by the House of Lords in *Saunders* and followed in this jurisdiction in *Tedcastle McCormack & Company Limited v. McCrystal* [1999] (Unreported, High Court, Morris J., 15th March, 1999). Counsel for Mr. Mansfield submitted that as there was before the court evidence to satisfy the first two limbs of the test that it was incumbent on the court to remit the matter for plenary hearing in order that Mr. Mansfield's ability to meet the third indent be considered and determined at a full plenary hearing. In making this submission he relied in particular upon the approach taken by Morris J. in *Tedcastle McCormack*. In that case the defendant had adduced medical evidence of kidney failure and the fact that he suffered from anxiety and depression and that he was on some occasions at the relevant time psychotic. On those facts, Morris J. at the hearing of the application for summary judgment, having held that the first two indents of the Saunders test were met stated:

> "I am also satisfied that given the plaintiffs possible mental and legal condition, there was on his part what is described in the Authorities as a lack of negligence. That is to say he was not negligent".

25. Counsel for AIB submitted that the trial judge was correct in his approach of requiring that Mr. Mansfield adduce evidence that he could separately satisfy the requirement that he took all reasonable precautions in the circumstances to find out what was the document he signed in order to establish an arguable defence of *non est factum*. He relied upon a number of the speeches in *Saunders* and their application by the English Court of Appeal in *Barclays Bank plc v. Bulgin and Others* [1991] EWCA Civ J 1105-8.

26. There was no ground of appeal advanced against the summary judgment test identified by the trial judge in accordance with *Aer Rianta cpt v. Ryanair Limited* [2001] 4 I.R. 607.

**Conclusion**
27. The Court has concluded that the trial judge was correct in his approach to the essential requirements of an arguable defence of *non est factum*.

28. The essential elements of the defence of *non est factum* as set out by the House of Lords in *Saunders v. Anglia Building Society* [1971] A.C. 1004 (on appeal from *Gallie v. Lee*) has consistently been applied in this jurisdiction since *Tedcastle McCormack*. It was not in dispute that it represents the proper approach to the defence of *non est factum* in this jurisdiction. The heavy burden imposed on a person seeking to rely on the defence is well established. Part of the rationale of same is the potential reliance by an innocent third party on a document signed by the person seeking to rely on such a defence and as a necessary consequence the obligation to prove he took reasonable care. As stated by Lord Reid in his speech in *Saunders* at p. 1016:

> "So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances."

29. Viscount Dilhorne at p. 1023, stated:-

> "In every case the person who signs the document must exercise reasonable care, and what amounts to reasonable care will depend on the circumstances of the case and the nature of the document which it is thought is being signed. It is reasonable to expect that more care should be exercised if the document is thought to be of an important character than if it is not."

30. Lord Wilberforce expressly addressed the position of an illiterate, blind or person lacking in understanding where in his speech at p. 1027 he stated:

> "As to persons who are illiterate, or blind, or lacking in understanding, the law is in a dilemma. On the one hand, the law is traditionally, and rightly, ready to relieve them against hardship and imposition. On the other hand, regard has to be paid to the position of innocent third parties who cannot be expected, and often would have no means, to know the condition or status of the signer. I do not think that a defined solution can be provided for all cases. The law ought, in my opinion, to give relief if satisfied that consent was truly lacking but will require of signers even in this class that they act responsibly and carefully according to their circumstances in putting their signature to legal documents."

31. The Court considers that the law in relation to the defence of *non est factum* as set out in Saunders and applied in this jurisdiction requires all persons, in accordance with their own circumstances, to demonstrate, as an essential proof, that they took reasonable precautions in all the relevant circumstances to find out what was the document they signed. Further that this is a separate and distinct obligation from adducing evidence to satisfy the first two limbs of the defence as to the difference in the document and mistake made.

32. Accordingly it follows that where on an application for summary judgment based upon a document signed by a defendant an arguable defence of *non est factum* is sought to be made out the defendant must put before the court evidence which if accepted by a trial judge would at least arguably establish that he took reasonable precautions to find out what was the document he signed. This is a separate and distinct requirement to those of satisfying the first two limbs of the test set out in *Tedcastle McCormack*.

33. On the facts before the trial judge and this Court it is not in dispute that Mr. Mansfield knew that he was signing an acceptance of a facility letter, a legal document which creates financial obligations. Further that albeit in practical terms illiterate he was a businessman with commercial experience and of at least average intelligence where non verbal reasoning is concerned. He has not adduced any evidence which it could be said if accepted by a court could arguably constitute the taking of reasonable precautions. At its simplest, in circumstances where he was unable to read the facility letter he was asked to sign, there is no evidence that he asked of his colleagues the most obvious question as to the amount of the liability he was undertaking if he signed the document.

34. Accordingly the Court dismisses the appeal.