THE HIGH COURT

[RECORD NO. 2016 1880 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

GEMMA HINEY

DEFENDANT

JUDGMENT of Ms. Justice O'Regan delivered on Tuesday the 5th day of June, 2018

Issues

1. The plaintiff's claim before the court is brought by way of notice of motion dated the 13th of April, 2017 wherein the plaintiff seeks to enter final judgment against the defendant in the sum of €11,821,000 and further seeks interest pursuant to contract and/or the Courts Act 1981 from the 16th of September, 2016 to the date of judgment. The defendant is resisting the plaintiff's application and seeks to have the matter adjourned for plenary hearing.

2. The parties have not disputed that in or about assessing whether or not summary judgment should be afforded or the matter adjourned to plenary hearing, the Supreme Court judgments in *Aer Rianta v. Ryanair Ltd* [2002] 1 ILRM 381 and *Harrisrange Ltd v. Duncan* [2003] 4 IR 1 identify the principles to be applied. In *Aer Rianta*, Hardiman J. indicated that the question to be posed is this; is it very clear that the defendant has no case? In *Harrisrange*, McKechnie J. indicated that the test was whether the defendant had satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence.

The plaintiff has referred to the judgment of Baker J. in *ACC Loan Management Ltd v. Dolan* [2016] IEHC 69 where she quoted from an earlier decision of Charleton J. in *National Asset Loan Management v. Barker* [2014] IEHC 216 to the effect that if a defendant's assertion is made in the teeth of a written contract, then a particular scrutiny of the facts and how it fits with the matrix will be required, and a defendant must be in a position to show that a defence which they seek to make is not totally undermined by the correspondence between the parties. In the case before Baker J., the case which the defendants sought to make was not consistent with the documentary evidence and therefore not credible.

Background

3. The within proceedings have been commenced by way of summary summons of the 10th October, 2016 which records that by way of letter of loan sanction of the 23rd November, 2011 the plaintiff agreed to advance the sum of €11,734,371 to Drogheda Leisure Facilities Ltd ("the Company") to refinance existing facilities, which loan was repayable on demand and without prejudice to that, it was envisaged that interest would be paid as it fell due and the balance would be paid in full on or before the 31st March, 2012. The company accepted the facility by executing same on the 14th December, 2011 and part of the security for such facility was a guarantee in writing from the within defendant. Such guarantee of the defendant was previously executed by the defendant bearing date 10th November, 2008 wherein the defendant agreed in consideration of the advances to the company, to pay and satisfy on demand the plaintiff all sums due and owing by the company to the plaintiff limited to the sum of €11,861,000. The summary summons records that the company failed to pay the loan in full on or before the 31st March, 2012 and a demand was made of the defendant on foot of the guarantee which demand is dated the 16th September, 2016 however the defendant failed, refused and/or neglected to pay the sum demanded, being the sum mentioned in the notice of motion aforesaid.

4. Although Mr. David Nolan executed two supplementary affidavits bearing date the 11th October, 2017, and the 20th October, 2017, the plaintiff's claim is based upon, in the main, the grounding affidavit of Mr. Nolan of the 12th April, 2017. The claim of the plaintiff is resisted by way of a replying affidavit of the defendant of the 21st June, 2017 wherein the defendant effectively seeks to have the within matter transferred to plenary hearing. The defendant's grounds of resistance are: -

> (i) The defendant had previously signed a joint and several guarantee in favour of the plaintiff in respect of the company's indebtedness bearing date the 31st May, 2006, which was also executed by five co-guarantors. However, the defendant asserts that there was a significant shift in the status as and from November, 2008 when the security moved from joint and several liability of the guarantors to several liability. The defendant asserts that the significance of this change was never advised to her;
>
> (ii) The defendant complains that Eugene Caulfield, shareholder and director of the company and a guarantor of a portion of the company's indebtedness to the plaintiff was treated more favourably than other guarantors. The defendant complains at para. 20 of her grounding affidavit that this preferential treatment in favour of Mr. Caulfield was made without informing the defendant. At para. 21 she states that preferential treatment was concluded without her agreement and she would not knowingly have prejudiced her position in this way.
>
> By reason of the asserted significant shift, the defendant complains that she is no longer entitled to rely on and take the benefit of s. 17 of the Civil Liability Act, 1961.
>
> (iii) At para. 26 of the grounding affidavit of the defendant, the defendant states that she believes that the plaintiff has entered into settlement discussions with her co-guarantors and the plaintiff has not informed her or given her details in relation to same. The basis for such belief is not set forth in the affidavit nor does the defendant refer to any particular document or set of circumstances to ground such a belief.

Uncontested factual background

5. In the prior guarantee referred to by the defendant of the 31st May, 2006 there were six joint and several guarantors and notably Mr. Caulfield was not one of same.

In a loan offer from the plaintiff to the company of the 12th of November, 2008, it is apparent from the content thereof that the plaintiff was looking for several guarantees from the directors, six of which would be for the sum of €11,861,000 and one of which,

from Mr. Caulfield's, was in the sum of €1,360,015.

The defendant executed her several guarantee to the plaintiff on the 19th November, 2008, being after the loan offer of the 12th November, 2008, and prior to the execution of same by the company on the 14th December, 2008. The defendant's 2008 guarantee was witnessed by a solicitor.

The company minutes of the 4th May, 2006 record that the company agreed to furnish joint and several guarantees at that time by six shareholders and directors with Mr. Caulfield's position being by way of a several guarantee as Mr. Caulfield did not wish to enter into a joint and several guarantee

In the facility letter of the 23rd November, 2011, which was cc'd to the defendant, six individual several guarantees in the sum of €11,861,000 was sought with a separate lesser guarantee from Mr. Caulfield.

The facility letter of the 23rd November, 2011 was executed by the company and by the defendant on the 14th December, 2011, at which time the defendant was the company secretary.

The defendant's asserted grounds of defence
6. The defendant asserts that the plaintiff was under a duty of disclosure and/or obligation to

point out to the defendant the significant shift from the joint and several guarantee status to a several guarantee status, and also in respect of the asserted preferential treatment of Mr. Caulfield.

In this regard, the defendant relies upon *Royal Bank of Scotland plc v. Etheridge & Ors (No 2)* [2000] AC 773, which the defendant asserts acknowledges an obligation on, *inter alia*, the lending institution to reveal anything relevant to the potential liability of a guarantor under a guarantee.

In my view, this argument is bound to fail on the basis of: -

> (i) In *ACC Bank plc v. Connolly & Anor* [2017] IECA 119, Finlay Geoghegan J. at para. 43 thereof, indicated that in Etheridge, the approach taken by the court was only in circumstances where they were considering the position of a bank where the wife successfully raises a defence of undue influence against her husband. There is no assertion in the instant set of circumstances of undue influence, duress or diminished capacity on the part of the defendant. At para. 49 of the judgment Finlay Geoghegan J states:

"The Appellants' unfortunate position is that as a person of full age he has signed a Guarantee in favour of the bank… He has not put any evidence before the Court upon which it could be argued that he did not freely enter into the commitments under the guarantee he signed and permitted to be delivered to the bank in connection with the loans being given to his son. In the absence of evidence which would support an arguable duty imposed on the bank and an arguable breach thereof there is no arguable defence."

> (ii) There is no freestanding obligation on a lender to inform a Guarantor of material facts surrounding the guarantee (see para. 15.7 of *Moorview Developments Ltd & Ors v. First Active plc & Ors* [2009] IEHC 214 and 5 (i) above)
>
> (iii) Even assuming that a duty to point out the difference as between the 2006 guarantee and the 2008 guarantee status arises by reason of the terms and provisions of the loan offer of the 12th November, 2008 and the subsequent letter of facility of the 23rd November, 2011 (cc'd to the defendant in advance of execution by the Company and the defendant), together with the content of the guarantee of the 19th November, 2008 and the company minutes of the meeting of the 4th May, 2006 when Mr. Caulfield refused to execute a joint and several guarantee, the defendant was on notice of the difference between a joint and several guarantee and the several guarantee then sought. There were 6 signatures to the 2006 guarantee, whereas the defendant was the only guarantor in the 2008 guarantee
>
> (iv) The defendant had the benefit or availability of legal advice, her signature on the 2008 guarantee being witnessed by a solicitor.

The foregoing reasons also apply to the alleged preferential status of Mr. Caulfield and in particular the minutes of the company meeting of the 4th May, 2006, with reference to the joint and several guarantee of 2006 which clearly demonstrates that Mr. Caulfield did not execute the joint and several guarantee of 2006, and his co-directors and shareholders were aware from the 4th May, 2006, that he did not wish to be involved in any joint and several guarantee and they accepted this status.

7. I am satisfied, therefore, that it is very clear that the defendant has no case based upon a duty to disclose or a failure to disclose on the part of the plaintiff. She, therefore, has no fair and reasonable probability of having a real or *bona fide* defence in this regard.

8. The argument of prejudice under s. 17 of the Civil Liability Act, 1961, as asserted on the part of the defendant, would only arise if the defendant could establish some breach of duty on the part of the plaintiff.

9. Insofar as the defendant has asserted that the bank has entered into settlement discussions with her co-guarantors, this assertion does not give rise to a fair and reasonable probability of having a real or *bona fide* defence because: -

> (i) The height of the defendant's assertion, at para. 26 of her replying affidavit, is to the effect that settlement negotiations have been entered into; this cannot be equated to a settlement agreement.
>
> (ii) The statement is not supported by any basis for same and therefore comprises a bald statement. In this regard, in *GE Capital Woodchester Ltd v. Aktiv Kapital Assets Investment Ltd* [2009] IEHC 512, Clarke J., when dealing with the obligation of a defendant in respect of factual evidence required in attempting to resist summary judgment and have same adjourned to plenary hearing, indicated that mere assertion will not suffice.
>
> (iii) In the grounding affidavit of the plaintiff, at para. 13 thereof, it is averred that the sum due and owing and contained in the notice of motion is the balance outstanding after all credits and allowances have been afforded and the defendant has not negated this averment.

Conclusion
10. By reason of the foregoing: -

(i) The duty contended for by the defendant as a consequence of the change from joint and several liability to several liability only in the guarantee status of the defendant (which the defendant asserts was not pointed out to her) is not an arguable duty imposed on the bank in the light of the Court of Appeal decision in *ACC v. Connolly* and is not supported by any of the documents before the court; it is in fact contradicted by the terms of the 2008 guarantee, therefore is not credible (even if one assumes that the asserted duty of disclosure does arise, notwithstanding the Court of Appeal decision in *ACC Loan Management v. Connolly* herein before referred to).

(ii) The asserted preferential treatment to Mr. Caulfield which was allegedly not made known to the defendant or otherwise pointed out to her is contradicted by documents before the court and not supported by any documentary evidence exhibited including the documentary evidence exhibited on the part of the defendant. This line of defence must therefore be considered as not credible.

(iii) The bald assertion in para. 26 of the replying affidavit of the defendant to the effect that she believes that the bank has entered into settlement discussions with her co-guarantors is not sufficient to deprive the plaintiff of the benefit of securing summary judgment.

(iv) In these events I will grant summary judgment to the plaintiff in the sum claimed.