

BETWEEN:**ALLIED IRISH BANKS PLC****Plaintiff****– and –****ARNOLD FANNING AND SHEILA FANNING AND JAMES FANNING****Defendants****JUDGMENT of Mr Justice Max Barrett delivered on 29th January, 2019.****I. Background**

1. This is a summary debt application. Mr A. Fanning is deceased and AIB is not proceeding against his estate. Ms S. Fanning has defended her case. Mr J. Fanning has entered no defence and neither appeared nor was represented at hearing. Ms Fanning is sued on a capped all sums guarantee of 31.01.08. Her signature is on the guarantee. She has also signed an associated 'Letter of Waiver' confirming that she has been advised to seek legal advice and has elected not to do so. Mr J. Fanning is sued on a capped all sums guarantee of 21.02.11. Both guarantees guarantee all sums owing to AIB from or by Midland Web Printing Ltd, subject to maximum caps.

2. By facility letter of 21.02.2011, AIB made available to Midland Web Printing Ltd two overdraft facilities, respectively in the amount of €250k/€50k. The facility letter references, *inter alia*, the guarantees as security. The overdraft facilities applied to AIB Account Nos. 051 and 721. Also referenced as security is an 'Assignment dated 17/05/2004 over Bank of Ireland Lifetime Policy [625]'. Both guarantees contain a cl.6 which provides, *inter alia*, that "[t]he Bank [AIB] shall be at liberty without obtaining...consent from the Guarantor and without...affecting its rights or the Guarantor's liability hereunder... (ii) to vary...any securities...for or on account of the moneys intended to be hereby secured".

II. Some Points Raised by Ms Fanning

3. *Point A.* Ms Fanning does not recall signing the guarantee and/or waiver. That she does not is not of itself a defence to liability and there is nothing to suggest that anything untoward has arisen in this regard.

4. *Point B.* Ms Fanning sought to suggest that because AIB may have a liability towards her under a separate commercial arrangement, this offers a defence to any liability now claimed. If Ms Fanning wishes to sue AIB in respect of the other commercial arrangement she may. However, that such other proceedings or a complaint to the Financial Services Ombudsman may be under contemplation is no defence to the claim now made.

5. *Point C.* By letter of 10.03.2015, to the late Mr A. Fanning and Ms Fanning, AIB states, *inter alia*, as follows:

"Re: Facility Letter dated 25th July 2005 from Allied Irish Banks plc (the 'Bank') to Arnold and Sheila Fanning (the 'Borrower')... We wish to advise that the policy held as security for this facility, policy number [625] in the name(s) of Arnold & Sheila Fanning has been encashed and that the sum of €[Stated Amount] has been lodged to account [145] in reduction of the balance outstanding."

6. So although Policy 625 was security for the facilities extended under the facility letter of 21.02.2011, the [Stated Amount] was not applied to account 051 or 721, being the accounts to which that facility relates. Instead it was applied to some third account. Ms Fanning contends that this gives rise to a difficulty pursuant to the decision of the Privy Council in *China and South Sea Bank Ltd v. Tan* [1989] 3 AER 839. *Tan* was decided by the Privy Council in favour of the appellant bank, *inter alia*, on the basis that the appellant bank did not act injuriously to the surety or inconsistent with the rights of same, nor omit to do any act its duty enjoined it to do. Here, because the encashed proceeds of 625 (a) were paid jointly to Mr A. and Ms S. Fanning, Ms Fanning claims that AIB has acted injuriously and/or inconsistent with her rights and omitted to act as its duty enjoins it to do. This issue is simply and easily determined: AIB has but acted in accordance with cl.6 of the guarantee.

7. *Point D.* Included in the evidence is a letter of sanction (in effect a loan offer) of 21.06.2013 which issued from AIB to Midland Web Printing Ltd, which has as its stated purpose: 'Take out of overdraft facility'. The Special Conditions of this letter of sanction state, *inter alia*, that "This letter of sanction supersedes [the] letter of sanction dated the 13th of May 2013". The offer comprised by the letter of sanction of 21.06.2013 lapsed before it was accepted. In her pleadings Ms Fanning points to its content and queries how it can be that she is being sued as guarantor in respect of overdraft liabilities which AIB claims arise under a facility agreement of 21.02.2011 when, by AIB's own account in the lapsed loan offer of 21.06.2013 (aimed at "Take out of overdraft facility") there was in place a letter of sanction of 13.05.2013. AIB has left this issue unaddressed in its affidavit evidence. Given that all that presents in this regard is a failure to address on affidavit a simple issue that can simply be addressed (was there or was there not a letter of sanction of 13.05.2013 and did it supplant the facility letter of 21.02.2011?), the court will, before adjudicating on the issue of whether or not to send the within matter to plenary hearing, give two weeks to AIB to file an additional affidavit on the issue aforesaid and will allow an additional two weeks for Ms Fanning to file any further affidavit that she may wish to file.

IV. Application against Mr J. Fanning

8. AIB contended at hearing that whatever about Ms Fanning's liability, Mr J. Fanning has not defended the application made against him and thus the order sought can safely issue against him. This, with respect, is not correct. Even in an undefended claim a claimant must establish its claim on the balance of probabilities and the court must be satisfied that a claimant has done so before making whatever order is sought. The same issue that Ms Fanning has raised successfully (Point D) clearly must also present in respect of the claim against Mr J. Fanning and the court will proceed as indicated in the previous paragraph.