Neutral Citation: [2015] IEHC 560

THE HIGH COURT

[2013 No. 2711 S]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

FRED ROGERSON, SEAMUS REDDAN, ROBERT BERKELEY, VALL LINNANE, COLMAN STACK, JOHN HUGHES AND DAVID KEENAN

(trading as THE CORNER PARK GROUP)

DEFENDANTS

JUDGMENT of Mr. Justice David Keane delivered on the 14th August 2015

Introduction

1. In these proceedings, the plaintiff seeks summary judgment against the defendants on a joint and several basis in the sum of €1,000,000, together with interest and costs.

2. The plaintiff is a bank and the defendants are a group of businessmen who in 2006 arranged to borrow the sum of €8,167,000, which they shortly afterwards drew down, to acquire certain lands at Newcastle, County Dublin for developments purposes ("the development property"). The loan was for a two-year term, with interest rolled up during that period, at the end of which it was to be cleared in full from the anticipated proceeds of the development or else refinanced. It is common case that the loan has not been repaid and it is averred on behalf of the bank that the overall debt due stood at in excess of €11 million in May 2014, whereas the value of the development property and other cross secured assets ("the secured assets") at that time was less than €4.5 million.

3. The agreement between the parties is evidenced by a letter of commercial loan offer ("the facility letter") dated the 13th March 2006 and accepted by the defendants on the 21st March 2006.

4. There is no dispute that, under the terms of the loan agreement, the bank is entitled to terminate the loan facility and to call for immediate repayment of the monies due on the occurrence of an 'event of default'. An event of default is defined under the loan agreement to include not only a breach of any term governing repayment of the principal and interest but also any material adverse change in the borrowers' circumstances. There does not appear to be any dispute that an event of default has occurred in the circumstances already outlined.

The bank's claim

5. The bank's claim in these proceedings is that, while the facility letter specifically provided that the bank's recourse to each of the defendants in respect of monies due and owing was to be limited to, and satisfied from, the secured assets only, the facility letter also contains a proviso whereby the bank is entitled to have recourse to the defendants and their assets in respect of any claim made under the indemnity clause of the agreement and, in addition, in respect of a joint and several liability of the defendants for a further sum of up to €1 million. The bank wrote to the defendants on the 7th May 2013 demanding payment of the sum of €1 million. Having received no such payment, the bank now seeks summary judgment in that sum.

The defences advanced

6. The defendants who have entered an appearance in answer to the bank's claim (comprising all but the fourth named defendant) have between them identified three lines of defence. Those defences may be shortly summarised as follows:

> (a) That on a proper construction of the loan agreement, as evidenced by the facility letter, the bank's recourse to the defendants personally for a sum of up to €1 million relates solely to the specific potential liability in respect of which they had indemnified the bank, which liability was, in fact, addressed prior to the execution of the loan agreement, so that no such recourse is now available;
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> (b) Further or in the alternative, that on a proper construction of the loan agreement, as evidenced by the facility letter, the bank's recourse to the defendants personally for a sum of up to €1 million can arise only in the event of a remaining indebtedness on the part of the defendants after the realisation of the secured property by the bank, which had not occurred when the proceedings issued, so that the bank's claim is premature; and
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> (c) In the event that the loan agreement, properly construed, does not limit the bank's recourse to the defendants personally for a sum of €1 million solely to any liability arising under the indemnity provided to the bank by the defendants (and which liability was, in fact, discharged prior to the execution of the contract), then the facility letter was drawn up and executed under a mutual mistake of fact and the defendants are entitled to rectification of the loan agreement to the extent necessary to include such a term.

The relevant terms of the loan agreement

7. Under the heading "Security" in the facility letter, beneath a list setting out the security documentation that the bank required the defendants to provide, the loan agreement provides as follows:

> "Subject always to the proviso below but notwithstanding any other provision of this facility letter and the security documents referred to above ("the Security Documents"), the Bank's recourse to the Borrower in respect of all monies, obligations and liabilities now or hereafter due, owing or incurred by the Borrower (or any one or more of the Borrower) to

the Bank under, pursuant to or in connection with this facility letter and/or the Security Documents whether actually or contingently, whether as principal or surety or otherwise and whether alone or jointly with another or others (the "Obligations") shall be limited to and satisfied out of the assets secured pursuant to the Security Documents. If such assets prove to be insufficient to meet all the Obligations, the Bank agrees that it shall not insofar as the Obligations are concerned have any further recourse to the Borrower or their other assets.

Provided always that the bank shall at all times have recourse to the Borrower and all their assets in respect of costs, expenses and any claims made by the Bank under the clause headed Indemnity herein and in addition the Borrower shall be liable to the Bank for a sum of up to €1,000,000 in addition to the assets secured pursuant to the Security Documents."

8. The facility letter contains the following clause under the heading "Indemnity":

> "In the event of any stamp duty or other Revenue duty or levy arising in respect of any of the properties secured in favour of the Bank the Borrower shall immediately pay such stamp duty, duty or levy (together with any interest and/or penalties) to the Revenue Commissioners and shall indemnify and keep the Bank indemnified against any costs, liabilities and other expenses suffered or incurred by the Bank (whether before or after the enforcement of the security) as a result of the non-payment of the Borrower of any such stamp duty, duty or levy."

The evidence

9. There has been a significant exchange of affidavits between the parties concerning the circumstances in which the terms just quoted came to be inserted in the facility letter.

10. Briefly summarised, Mr Rogerson, the first named defendant, avers that he negotiated the loan agreement on behalf of the defendants with Des Ryan, a Senior Business Manager in the bank. According to Mr Rogerson, the particular terms at issue were tailored to the specific borrowing requirements of the defendants. In particular, the development property was to be acquired by the defendants on a "resting on contract" basis. This was a contractual mechanism, in widespread use at the time, whereby it was believed that liability to stamp duty on the transaction could be lawfully avoided. Mr Rogerson contends that, on behalf of the bank, Mr Ryan had a concern that a liability to stamp duty might arise and, should it do so, that the value of the secured property would be diminished to that extent. Mr Rogerson avers that it was for that reason that the indemnity clause quoted above was inserted into the agreement on the bank's insistence. Crucially, Mr Rogerson goes on to aver that it was also in that context, and in that context alone, that he was prepared to agree on behalf of the defendants, that there should be personal recourse to them in a sum of up to €1 million i.e. to cover the potential liability to stamp duty on the acquisition of the secured property.

11. The defendants argue, in effect, that the admitted fact that there was a concern on the part of the bank regarding a potential exposure to stamp duty, which the bank itself then estimated in the amount of €914,000 (i.e. approaching €1 million), provides corroboration for their asserted defence that the personal recourse provision in the loan agreement was linked to the indemnity provision, rather than distinct from it, and/or forms part of the matrix of fact in the context of which the said provisions fall to be construed, further militating in favour of the construction for which the defendants contend. The parties acknowledge that, in the event, one of the vendors of the development property refused to complete the transaction on a "resting on contract" basis and the bank ultimately provided additional funds to discharge the stamp duty applicable which, less an inducement payment that would have been paid for the vendors' participation in a "resting on contract" transaction mechanism, amounted to €458,000.

12. Mr Colman Stack, the fifth-named defendant, has sworn an affidavit for the purpose of the present application in which he avers that "in so far as the wording of the said facility letter is capable of being construed as granting [the bank] recourse to [the defendants] for the sum of €1,000,000 [other than as an indemnity up to that sum against a liability to stamp duty on the development property], the said wording does not faithfully reflect the agreement or intention of the parties, as relayed to, and understood by [the defendants] and is the result of an error." It is on this basis that the fifth, sixth and seventh-named defendants submit that the facility letter must have been drawn up and executed under a mutual mistake of fact and that the defendants are, therefore, entitled to rectification of the loan agreement to reflect its intended meaning and effect.

13. On behalf of the bank, Mr Ryan avers to the firm intention of the parties at all times that the bank's limited recourse to the defendants would be in addition to, rather than simply in respect of, the indemnity that they were required to provide in relation to the potential liability to stamp duty on the acquisition of the development property and their joint intention that such recourse should be available at all times, rather than solely in the event of a shortfall between the value of the security when realised and the defendants' outstanding liability at that point. In support of that averment, Mr Ryan exhibits certain of the bank's internal documentation referable to the negotiation of the loan transaction, which, it might be argued, really only speaks directly to the bank's intention, rather than the common intention of the parties.

The test for summary judgment

14. There is no issue between the parties on the test to be applied.

15. In *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75 at 79, the Supreme Court (per Murphy J., Hamilton C.J. and Denham J concurring) endorsed the following test laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep 21, which had been referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v. Daniel* [1993] 1 W.L.R. 1453:

> "The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or *bona fide* defence."

16. Murphy J. continued:

> "In the National Westminster Bank case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-
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> > 'I think it right to ask, using the words of Ackner L.J. in the *Banque de Paris* case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or *bona fide* defence?' The test posed by Lloyd L.J. in the *Standard Chartered Bank* case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable

probability of the defendant having a defence.' "

17. Murphy J. prefaced the Court's adoption of that test by stating (at pp. 78-9 of the report):

> "For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the *bona fides* of the defendant or to doubt whether the defendant has a genuine cause of action (see *Irish Dunlop Co. Ltd. v Ralph* (1958) 95 I.L.T.R. 70)."

18. In considering the *Anglin test in Aer Rianta cpt v. Ryanair Ltd* [2001] 4 IR 607, McGuinness J. pointed out that it is not for the Court to weigh the affidavit evidence adduced by the parties or to attempt to resolve any factual contradictions contained within it, before stating (at p.615):

"In deciding whether the defendant may have a "credible" defence, the court must concentrate its attention on the matters put forward in the defence itself. The court does not ask whether [the defendant's] account of events is probable, or likely to be true; nor does it ask whether [the plaintiff's] account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible."

19. In the same case, Hardiman J. examined the historical antecedents of the present summary judgment procedure, locating the origin of its modern form in the Judicature Acts. Hardiman J. cited the following passage from the judgment of Lord Esher in *Sheppards and Co. v. Wilkinson and Jarvis* (1889) 6 T.L.R. as the most clear expression of the criteria for the exercise of the power (at p. 13 of the report):

> "…The rule which had always been acted upon by this Court in considering cases under [the relevant Order] was that the summary jurisdiction conferred by that order must be used with great care. A defendant ought not to be shut out from defending unless it was very clear indeed that he had no case in the action under discussion. There might be either a defence to the claim which was plausible, or there might be a counter-claim pure and simple. To shut out such a counter-claim if there was any substance in it would be an autocratic and violent use of [the relevant Order]. The Court had no power to try such a counter-claim on such an application, but if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded."

20. Hardiman J. found Lord Esher's statement of the rule to be perfectly consistent with the following observation of Lavery J. in *Prendergast v Biddle* (Unreported, Supreme Court, 31st July, 1957):-

> "The procedure by summary summons was provided in order to enable speedy justice to be done in particular cases where there is either no issue to be tried or the issues involved are simple and capable of being easily determined."

21. Hardiman J. also quoted, with approval, the following statement of O'Brien C.J. in *Crawford v Gillmor* (1891) L.R. Ir. 238:

> "I think, however, that final judgment should not be given on a motion for final judgment in any case where any serious conflict as to matter of fact or any real difficulty as to matter of law arises."

22. Considering these cases in conjunction with more recent Irish authority, Hardiman J. noted (at p. 621) "that the defendant's hurdle on a motion such as this is a low one and that the jurisdiction is to be used with great care," before concluding (at p. 623):

> "In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable case?"

23. A very helpful distillation of the principles to be derived from the jurisprudence is set out in the judgment of McKechnie J. in *Harrisgrange Ltd. v. Duncan* [2003] 4 I.R. 1 (at pp. 7-8):

> "From these cases it seems to me that the following is a summary of the present position:-
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> (i) the power to grant summary judgment should be exercised with discernible caution;
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> (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
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> (iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
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> (iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;
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> (v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;
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> (vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;
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> (vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;
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> (viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;
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> (ix) leave to defend should be granted unless it is very clear that there is no defence; 8 Harrisrange Ltd. v. Duncan

[2003] H.C. McKechnie J.

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

The arguments

24. Shortly put, the test the Court is required to apply on an application for summary judgment is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence to the plaintiff's claim.

25. Two of the three defences upon which the defendants in this case seek to rely involve the proper construction of what Hardiman J. described in *Aer Rianta v Ryanair Ltd* as "the indisputable documentation of a commercial transaction." It follows that whether the defendant can establish a fair or reasonable probability of a real or *bona fide* defence is, in significant part, a matter of construction of the relevant terms of the facility letter.

26. In *McGrath v O'Driscoll* [2007] 1 ILRM 203, Clarke J. identified the correct approach as follows (at p. 210 of the report):

> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

27. This dictum was endorsed by the Supreme Court (per Denham J., Hardiman and Finnegan JJ. concurring) in *Danske Bank a/s v Durkan New Homes* [2010] IESC 22 (at para. 16), subject to the significant clarification (at para. 20) that there is no obligation to resolve issues of law (or, presumably, issues of construction) on an application for summary judgment and that the test remains whether the defendant has established an arguable defence.

28. The bank submits that the issues of construction that arise in this case are relatively straightforward and, on the plain meaning of the words used in the relevant provisions set out in the facility letter, must be resolved in its favour. In particular, the bank points to the use of the following phrases: "subject always to the proviso," the bank "shall at all times" have recourse to the defendants in respect of the indemnity, "and in addition" the defendants shall be liable to the bank for a sum of up to €1,000,000, "in addition" to the secured property.

29. The fifth, sixth and seventh-named defendants make the same submission but to the opposite effect. They argue that, on the plain meaning of the words used in the facility letter, the proviso it contains must be construed as permitting recourse to the defendants personally only where the assets comprised by the secured property "prove" to be insufficient to meet the defendants' obligations to the bank and, then, only "up to" a sum of €1 million, which the defendants contend necessarily implies the prior realisation of the secured property both in order to prove the insufficiency of the proceeds to meet the bank's claim and, if that is so, to provide a starting point for the calculation of any further personal liability of the defendants up to a sum of €1 million.

30. In consequence, Mr Buttanshaw submits on behalf of the fifth, sixth and seventh named defendants that these proceedings have been commenced, and are being maintained, at a time when the bank has, as yet, no extant cause of action against the defendants, and so should be dismissed.

31. The judgments of both Fennelly and O'Donnell JJ. in *ICDL v. European Computer Driving Licence Foundation Ltd.* [2012] 3 I.R. 327 confirm that the best modern statement of the principles governing the interpretation of contractual terms is to be found in the following passage from the judgment of Lord Hoffman in *I.C.S. Ltd. v. West Bromwich B.S.* [1998] 1 W.L.R. 896 at pp. 912-3:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as 'the matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonable have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason have used the wrong words or syntax; See *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1977] A.C. 749.
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> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one nevertheless concludes from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania S.A. naviera v. Salen Rederiena A.B.* [1985] A.C. 191, 201:-

> 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."

32. Fennelly J. prefaced his endorsement of the foregoing principles by noting that they had been approbated in the judgment that Geoghegan J. delivered on behalf of the Supreme Court in *Analog Devices B.V. v. Zurich Insurance Company* [2005] IESC 12, [2005] 1 I.R. 274, which had also referenced the well known 'matrix of fact' dictum of Lord Wilberforce in *Reardon Smith Line v. Young Hansen-Tangen* [1976] 1 W.L.R. 989. Fennelly J. then commented (at pp. 350-1 of the report) :

> "[66] These various dicta are notable for their emphasis on the potential admissibility of background knowledge or what Lord Wilberforce famously described as the 'matrix of fact'. Emphasis on those admissible aids to interpretation should not, however, mislead us into forgetting that a contract is, in the first instance, composed of the words used by the parties. It is of note that Geoghegan J. in his judgment in *Analog Devices B.V. v. Zurich Insurance Company* [2005] IESC 12, [2005] 1 I.R. 274 cited at p. 280 a passage from the judgment of Griffin J. in *Rohan Construction v. I.C.I.* [1988] I.L.R.M. 373 at p. 377, a case concerning an insurance policy, to the following effect:-
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> 'It is well established that in construing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The court must not speculate as to their intention apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at and not merely a particular clause'.
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> [67] Geoghegan J. went on to note that Griffin J. had explained his reference to 'surrounding circumstances' and that he had cited the following passage from the speech of Lord Wilberforce in *Reardon Smith Line v. Young Hansen-Tangen* [1976] 1 W.L.R. 989 at p. 996:-
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> > 'When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have had in mind in the situation of the parties….What the court must do is place itself in thought in the same factual matrix as that in which the parties were.'

33. Having endorsed Lord Hoffman's five principles, Fennelly J. then added the following helpful gloss (at p. 352):-

> "[69] This passage, particularly para. 4, should not be misunderstood as advocating a loose and unpredictable path to interpretation. A court will always commence with an examination of the words used in the contract. Moreover, words will, as Lord Hoffman emphasises, normally be interpreted in accordance with their "natural and ordinary meaning…". Business people will be assumed to know what they are doing and will normally be bound by what they have signed. The exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract. Keane J. summarised the law briefly but comprehensively in the High Court in *Lac Minerals Ltd. v. Chevron Mineral* [1995] 1 I.L.R.M. 161.
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> [70] Evidence of the surrounding circumstances, but not of subjective intentions, may be admitted to explain the subject-matter and even what particular words should be understood as referring to. Such evidence will not normally be allowed to alter the plain meaning of words."

34. A further aspect the Supreme Court decision in *ICDL v European Computer Driving Licence Foundation Ltd.* (supra), worth noting for the purposes of the present application, is the concurrence of opinion that the principle of interpretation *contra proferentem* may usefully be applied not just to exemption clauses but to a contract in general, though normally only as a last resort in the case of ambiguity and not as a general approach.

35. From among the various statements of principle I have just described, the bank lays emphasis on the principle that the plain words should prevail. The defendants also rely in part on that principle (though to the opposite effect) and further point to the need to have regard to the surrounding circumstances (or matrix of fact) and, where ambiguity arises, to resolve it *contra proferentem.*

36. The bank argues with some force that it would flout business common sense for the bank to agree not to have personal recourse to the defendants before realising the security provided and establishing a shortfall, since there may be any number of unforeseen obstacles to realising that security, one or more of which may even prove insurmountable. With equal force, the defendants point to the lack of commercial common sense from their perspective in agreeing a qualification upon a non-recourse loan whereby the bank can bypass or ignore the security it holds, even if ample to meet the bank's claim, and instead pursue the defendants personally for €1 million, subject only to the defendants' implied entitlement to a distribution of any surplus on the subsequent realisation of that security.

37. The bank points to the endorsement by Hardiman J. in *Aer Rianta, supra,* of the dictum in *National Westminster Bank v. Daniel* [1993] 1 W.L.R. 1453 that "the mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend," although it seems to me that I cannot overlook the next sentence in Hardiman J.'s judgment: "Equally, 'it is not sufficient that the court should have reason to doubt the *bona fides* of the defendant or to doubt whether the defendant has a genuine cause of action' (*First National Commercial Bank v. Anglin*)."

38. The bank invokes the decision of Birmingham J. in *ACC Bank plc v. McEllin & Ors* [2013] IEHC 454 in support of what it asserts is a general principle of law that a bank may exercise its rights under a loan agreement at any time. However, it seems to me that an argument may be made that the case concerned is authority only for the well-established, more narrow principle that a mortgagee is not a trustee of the power of sale for a mortgagor and does not owe the latter a general duty of care to sell only at the most propitious moment in the market cycle. That principle, though undoubtedly correct, does not seem to me to illuminate the separate issue that arises in this case of the proper construction of those provisions of the contract now at issue that deal with the circumstances in which, or event(s) upon which, the bank was entitled to have personal recourse to the defendants in the sum of up to €1 million.

39. Turning to the issue of rectification, the fifth, sixth and seventh defendants acknowledge, through Counsel, that the onus on any

party seeking rectification of a contract is a heavy one, namely, to establish by convincing proof that the instrument (in this case, the facility letter) does not reflect the common intention of the parties, outwardly expressed or communicated, and that the true common intention of the parties has continued from its formation throughout the period antecedent to the execution of the contract which it is sought to rectify: *Irish Life Assurance Co. Ltd. v. Dublin Land Securities Ltd* [1989] I.R. 253. Those defendants further acknowledge that, in asserting a claim to rectification, they must rely on the evidence of the first named-defendant, Mr Rogerson, although he has asserted no such claim on his own behalf. They also acknowledge that Mr Ryan's averments as to his (and, by extension, the bank's) subjective intention, while inadmissible as an aid to the construction of the loan agreement between the parties, are probative of the issue whether or not the common intention of the parties was reflected in the express terms of that agreement. Nevertheless, they submit that, while the Court may be sceptical of their chances of discharging that onus and bringing home that defence at trial, the Court cannot and should not conclude that they have no defence to make in that regard.

40. The bank submits that the Court should attribute some significance to, what it suggests, is the absence of a shred of documentation to support the defendants' averments concerning the construction of the contract (or the common intention of the parties) for which they contend. In doing so, the bank relies on the decision of this Court (per McGovern J.) in *Ulster Bank Ireland Ltd. v. Deane* [2012] IEHC 248 and, in particular, the following distinction drawn (at para. 12) between the facts at issue there and those that arose before Finlay Geoghegan J. in *AIB v. Galvin Developments (Killarney) Ltd. [*2011] IEHC 314:

> "The facts of that case bear no resemblance to the case which I have to decide, and the defendants have simply not been able to point to any written document or any facts which go any near to establishing a collateral agreement."

41. As the passage just quoted implies, each of those cases involved the assertion of a collateral agreement by way of defence to a contractual claim. In this case the defendants do not base their defence on the asserted existence of an undocumented collateral agreement. Rather, they base it upon what they contend is the proper construction of an extant written document, namely the facility letter recording the terms of the loan agreement between the parties, and also upon the evidence they hope to adduce concerning the common intention of the parties in respect of the relationship between the indemnity sought by the bank and the bank's entitlement to personal recourse against the defendants, against the accepted factual backdrop of a concern on the part of the bank at the material time regarding a potential stamp duty liability in an amount in excess of €900,000.

42. Moreover, in response to the plaintiff's argument on this point, the defendants cite the approach of McGuinness J. in the *Aer Rianta* case (at p. 618) whereby, despite noting the considerable weaknesses in the defence proffered (including the lack of detail provided and the lack of clarity in the documentation exhibited in support of that defence), the learned judge concluded that the probability remained open, on the affidavit evidence, that the defendant in that case had a real or *bona fide* defence or that what was put forward by that defendant was credible.

Conclusion

43. Notwithstanding the endorsement by both McGuiness and Hardiman JJ. in the *Aer Rianta* case of various dicta in *Crawford v. Gillmor* (1891) L.R. Ir. 238, I accept the submission made on behalf of the bank that the test to be applied to the arguments put forward in support of an application for leave to defend is qualitative rather than quantitative. In reality, I do not believe there is any real conflict on the point, since, in the earlier decision, Barry L.J. linked his conclusion that the length of time that had been occupied in argument was a material factor in the application of the test to the observation that not one moment of the court's time had been occupied unnecessarily.

44. Similarly, I accept in principle the submission made on behalf of the bank that it is appropriate, in considering whether to grant leave to defend, to consider the proposed grounds of defence individually and to refuse leave to advance any ground that the Court is not satisfied gives rise to a fair or reasonable probability of forming the basis of a real or bona fide defence to the claim being made; *Bussoleno Ltd. v. Kelly* [2011] IEHC 220.

45. Having considered the entirety of the situation and the facts of this particular case in the manner set out above, and conscious of the obligation on the court only to exercise the power to grant summary judgment with discernible caution, I have come to the conclusion that the issues of construction raised are not sufficiently straightforward to be resolved in a summary manner or in the absence of fuller argument than I have heard in the context of the present application. Accordingly, I believe that there is a risk of injustice being done by purporting to determine those questions within the framework of a motion for summary judgment.

46. In considering the claim to rectification asserted on behalf of the fifth, sixth and seventh named defendants, I have had particular regard to the following guidance provided by Clarke J. in *McGrath v. O'Driscoll* [2007] 1 ILRM 203 (at 210):

> "So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that the issue of fact can be resolved."

47. It seems to me that the averments of Mr Rogerson, in particular those at paragraphs 8-10 (inclusive) of his affidavit sworn on the 7th March 2014, constitute evidence of fact (in the form of an asserted common intention) that, if true, would arguably give rise to a defence, which evidence is sufficient to require leave to be given to assert that defence in order that the controversy of fact in that regard can be properly resolved at trial.

48. In consequence, I must refuse the bank's application for judgment and must also refuse the application made on behalf of the fifth, sixth and seventh named defendants for an order dismissing the proceedings. Instead, I will give leave to the defendants to defend the proceedings on each of the three separate grounds that have been identified.