THE HIGH COURT

RECORD NO.: 2018/2155P

BETWEEN

ANNE CODY

PLAINTIFF

AND

DECLAN TAITE

DEFENDANT

JUDGMENT delivered by Ms. Justice Tara Burns on 20th day of December, 2018

General

1. The Plaintiff is the owner of agricultural lands comprised in Folio 18654 County Tipperary which lands are situate at Gortderrybeg, Roscrea, County Tipperary. These lands are leased to Ballymore Farms Limited, which is a company controlled by the Plaintiff and are used for the purposes of dairy farming. It is averred to by the Plaintiff, on affidavit, that one hundred heifers are kept on these lands which are replacement stock for the main dairy herd which the Plaintiff's company farms.

2. In 2005, the Plaintiff guaranteed a credit facility which had been provided by Anglo Irish Bank plc to her husband and his business partner, limited to a first legal charge to the bank over the property the subject matter of these proceedings.

3. The guarantee to be provided by the Plaintiff was mis-described in the credit facility executed by her husband and his business partner. However, this was noticed and immediately attended to by the Plaintiff's solicitor who confirmed with the bank's representative that the personal guarantee of the Plaintiff was limited to the value of the lands at Gortderrybeg and was supported by a first legal charge over the said lands.

4. On 6th January 2006 the Plaintiff executed a guarantee and indemnity which stated at Clause 19(1) thereof, under the heading "*Limit on Liability on the Guarantor*":

> *"Notwithstanding anything herein otherwise contained, the Bank agrees that the liability of the Guarantor hereunder shall (save in the event of fraud on the part of the Guarantor) at all times be limited to the total sum(s) which the Bank may from time to time realise pursuant to the exercise of the Bank of its powers under an Indenture of Mortgage/Charge granted or to be granted by the Guarantor to the Bank over ALL THAT AND THOSE the property comprised in Folio 18654 of the Register of Freeholders County Tipperary."*

5. A deed of mortgage over the said lands was executed on foot of the Plaintiff's guarantee on 11th January 2006.

6. In April 2007, the Bank issued a further facility to the Plaintiff's husband and his business partner which said facility was in substitution of all previous facility letters and letters of amendment. This facility letter correctly sets out the limited nature of the guarantee provided by the Plaintiff, as referred to above.

7. The Plaintiff's husband and his business partner defaulted on the credit facility. Summary summons proceedings were instituted against her husband by the institution who acquired this debt from Anglo Irish Bank plc, namely Kenmare Finance Property Limited (hereinafter referred to as "Kenmare"). I was informed by Counsel for the Defendant, prior to me delivering this judgment, that judgment had been entered in those proceedings against the Plaintiff's husband, on 17th December 2018, in the sum of €1.7 million approximately.

8. Summary Summons proceedings were also instituted against the Plaintiff in 2017 by Kenmare claiming a sum of €3,481,862.20 on foot of the guarantee executed by the Plaintiff.

9. However, while there is no agreement between the parties as to the current market value of the land, the value being assigned by the Defendant to the land is approximately €600,000. In contrast, the Plaintiff's valuation of the land is in the region of €200,000.

10. On 31st May 2017, a demand letter was sent to the Plaintiff by Kenmare. This letter demanded that the Plaintiff pay Kenmare the sum of €3,481,862.20 by 6th June 2017. It further gave notice that if full payment was not made by that date, it reserved the right without further notice to avail of other remedies including the right to appoint a receiver over the lands. The letter added:

> *"Please do note that substantial costs may be incurred in the appointment of a receiver, and accordingly we require you to discharge the loan in full or if you have a proposal to submit to us, which may influence our decision to appoint a receiver, please inform immediately and in writing."*

11. The Plaintiff did not contact Kenmare on foot of the letter, although I note in a solicitor's letter, exhibited in her affidavit, there is an assertion that she did not have a recollection of receiving this letter. A certificate of postage was produced by Kenmare on foot of this assertion.

12. The Defendant was appointed as receiver to the said lands on the 16th June 2017.

13. In the Plenary proceedings instituted by the Plaintiff she asserts that the demand made of her on foot of her guarantee is an unlawful demand as it reflects the entire debt owing on foot of the credit facility rather than the limited amount which she guaranteed. She further argues that the appointment of a receiver by Kenmare on foot of a demand which is clearly erroneous renders the appointment of the receiver void ab initio.

14. The relief which is sought before the Court in the present application is injunctive relief restraining the defendant, namely the receiver, from entering upon and taking possession of the lands the subject matter of the proceedings and restraining the defendant from exercising any powers which may have been conferred on him by virtue of the Deed of Mortgage already referred to.

Interlocutory Relief

15. Obviously the test which I have to apply to these proceedings is that which is set out in *Campus Oil limited v. Minister for Industry and Energy (No 2)* [1983] IR 88.

Bona Fide Question to be tried

16. The Defendant asserts that the Plaintiff has not made out a bona fide question to be tried. It is submitted that the Plaintiff has a liability to Kenmare in any event and that while the extent of that liability is limited to the value of the lands, claiming the entire sum due and owing under the credit facility was a lawful and correct way to make this demand. It is further argued that as the value of the lands is uncertain, a specified sum relating to that value could not be claimed in the letter of demand. The Defendant goes further to argue that a demand was not in fact required to be made of the Plaintiff on foot of the agreement, so the fact that a sum in excess of her liability was claimed is not of significance. The Court is also asked to have regard to the practicalities of the situation: that the receiver will be appointed to these lands in any event in due course, as the monies are owing, so the extra cost which Kenmare will be exposed to in carrying out the steps again should be considered by the Court.

17. I am unimpressed by the cavalier attitude of the Defendant to the fact that a sum in excess of three million was demanded of the Plaintiff when she in fact at most, on their own reckoning, was only required to pay somewhere in the region of €600,000. I am also unimpressed that the court is asked to disregard the discrepancies between the amount demanded and the significantly lesser amount due, with the argument being made that as the sum is owing in any event, regard should be had to the cost implications for Kenmare in carrying out these steps again.

18. The people of Ireland are entitled to expect in their dealings with the banks that demands made of them are lawful and accurate and that care is exercised in computing and claiming the amounts due. On the other side of the fence, individuals who have a liability to a bank must face up to such liability and the Courts will not entertain groundless baseless assertions that sums and not due and owing.

19. While there is case law to the effect that a demand for a sum of money greater than that which is owing does not invalidate a demand, that line of case law does not quite meet the issues in this case. Cases such as *Flynn v. National Asset Loan Management Limited* (Unreported, High Court, 25th July, 2014), *Vivier Mortgages Limited v. Lehane* [2017] IEHC 605; *Harrington v. Gulland Property Finance* [2018] IEHC 445 and *McCarthy v. Moroney* [2018] IEHC 379, all relate to a mistake being made in the computation of the amount owing. In the instant case, such an error is not in issue. Rather, a demand has been made for a sum which is simply not due and owing pursuant to the terms of the underlying credit facility and the guarantee executed by the Plaintiff. While the Defendant asserts that claiming the entire amount due and owing pursuant to the credit facility was the correct method to make a demand, the explanation for claiming an amount which simply was not recoverable under the credit facility and the guarantee executed on foot thereof, may well be the fact that the original credit facility erroneously recorded the guarantee which the Plaintiff was in fact providing in respect of the credit facility provided to her husband and his business partner.

20. It may be a correct statement of the law that the Plaintiff's guarantee is in respect of the entire sum due and owing under the credit facility, but the amount which she is liable for is limited by the terms of her guarantee. I am not determining or expressing a view in relation to that issue. However, I am of the view that in light of the fact that there is a limitation to the amount which she is liable for, a bona fide question to be tried arises as to whether the demand made of her should have reflected her liability rather than the entire sum due and owing and therefore is an unlawful demand.

21. Further, I do not accept the Defendant's argument that it was not required to make a demand of the Plaintiff. The Guarantee and Indemnity agreement entered into by the Plaintiff and Anglo Irish Bank plc is peppered by references to a demand being made by the Bank on foot of the principal parties defaulting. Paragraphs 2, 4 and 16 of that agreement relate to same and envisage a demand being made of the Plaintiff. The mortgage executed in respect of the lands also envisages a demand being made of the Plaintiff at paragraph 1 thereof.

22. Accordingly, I am of the opinion that the Plaintiff has established a bona fide question to be tried with regard to the legality of the demand made of her by Kenmare which thereby affects the validity of the Defendant's appointment as receiver to the lands the subject matter of these proceedings.

23. I am the view that damages would not be an adequate remedy for the Plaintiff in the event that she was successful in her plenary proceedings as the land owned by her and leased to a company controlled by her for the purpose of carrying out her business of farming would have been sold by the Defendant and lost to her and her family.

24. Having made enquiries with appropriate persons, I am informed that once pleadings are closed, a date can be obtained in the Chancery list for a trial of an action within three to four months. Accordingly, it would seem to me that the parties should focus on achieving that end. In light of the timescale involved, I am of the view that damages would be an adequate remedy for the Defendant if it transpired that the Plaintiff was unsuccessful in her action against him and he had sustained a loss by reason of the delay in him being permitted to deal with the property.

25. Accordingly, the balance of convenience lies in favour of granting the interlocutory injunction sought.

26. I note that an undertaking as to damages was given by the Plaintiff through her Solicitor at the hearing before me and I directed that an affidavit be filed in relation to this issue.

27. Assuming that that affidavit has indeed been filed, I will grant the Plaintiff the relief as sought at paragraph 1 of the Notice of Motion herein and I will reserve the question of the costs of the motion.