THE HIGH COURT

[2016 No. 2434 S]

BETWEEN

STAPLEFORD FINANCE D.A.C.

PLAINTIFF

AND

BERNARD MCEVOY AND COLUM BUTLER

DEFENDANTS

JUDGMENT of Mr. Justice MacGrath delivered on the 22nd day of February, 2018.

1. The plaintiff is a designated activity company. The first named defendant is a solicitor and was at the relevant time a solicitor in McEvoy Partners. The second named defendant is a businessman and, the Court has been informed, is a brother-in-law of the first named defendant.

2. By notice of motion dated 8th March, 2017, the plaintiff seeks an order granting liberty to enter final judgment against the second named defendant in the sum of €1,048,713.49. In the summary summons issued on 15th December, 2016, the plaintiff claims that by facility letter of 1st August, 2007, the plaintiff's predecessors in title (Anglo Irish Bank) offered the first named defendant two facilities of €630,000 each to enable him and the firm in which he was a partner, McEvoy Partners, to part fund and fit out premises at Connaught House, Burlington Road, Dublin 4. By agreement dated 28th March, 2014, made between the Irish Bank Resolution Corporation Limited (in special liquidation) and the special liquidators to Irish Bank Resolution Corporation Limited (in special liquidation), the plaintiff acquired certain loans and assets including, as pleaded, all rights and obligations of the defendants in respect of certain loan facilities and personal guarantees. The plaintiff also pleads:-

> *"By a Personal Guarantee in writing dated the 1st August, 2007, the Defendants, in consideration of the Plaintiff's predecessors in title making or continuing advances or otherwise giving credit or affording bank facilities to the first named Defendant and/or McEvoy Partners for as long as the Plaintiff's predecessor in title should think fit, agreed to pay to the Plaintiff's predecessor in title, its successors and assigns on demand all sums of money then owing or which at any time be owing or remain unpaid to the Plaintiff or its predecessor in title by the said first named Defendant and/or McEvoy Partners whether as principal or surety and whether solely or jointly with any other party whether for actual or contingent liability or on any account whatsoever, together with all interest and other bank charges including legal charges occasioned by or incidental to this or any other security held by or offered to the Plaintiff's predecessor in title for the ultimate balance due plus interest from the date of demand or earlier determination of the Personal Guarantee."*

The application is grounded on the affidavit of Mr. Donal O'Sullivan, an officer of the plaintiff, sworn on 6th March, 2017. It appears from Mr. O'Sullivan's affidavit that he had no personal dealings with the defendants at the time of the loan or the execution of the guarantees. Mr. O'Sullivan avers that the second named defendant executed the personal guarantee on or about 1st August, 2008. The Court notes that the pleadings refer to a facility letter and guarantee dated 1st August, 2007.

3. In his affidavit, Mr. O'Sullivan exhibits three documents, the facility letter and personal guarantee, a letter of demand dated 5th September, 2016 (the letter to Mr. Butler does not refer to 2016, but this is an accepted date), and statements of two accounts, in respect of the sums outstanding on foot of the facility provided.

4. The facility letter of 1st August, 2007 is addressed to "*The Partners, McEvoy Partners, Connaught House, Burlington Road, Dublin 4"*. Appended to the facility letter is a section entitled "*Borrower's Acceptance*" of the terms and conditions of the said facility letter. This was signed by Ms. June Hynes, and Mr. Bernard McEvoy, the first named defendant. The borrower's acceptance refers to the facility letter, the bank's general conditions and the bank's terms of business, which are stated to form part of the agreement between the borrower and the bank. The guarantee, which was signed by Mr. McEvoy on 1st August, 2007 and by Mr. Butler on 1st August, 2008, is in the following form:-

> *"We have read the Facility Letter of 1st August 2007 to McEvoy Partners and the Bank's General Conditions which form part of the agreement between the Borrower and the Bank (the 'Agreement') and confirm that we fully understand the terms of the Agreement and acknowledge that we are guaranteeing the performance by the Borrower of its obligations under the Agreement to the Bank. We acknowledge that we have been given due opportunity to take independent legal advice of the effect of the Agreement and have taken/waived (delete one) the opportunity to take such legal advice."*

The option of "*taken/waived*" is not deleted. The guarantee contained a warning that, as guarantor of the loan:-

> *"…you will have to pay off the loan, the interest and all associated charges if the borrower does not. Before you sign this Agreement, you should get independent legal advice."*

The final paragraph of the guarantee states that:-

> *"In relation to the warning above, the 'loan' means all amounts owing from the borrower to the Bank from time to time not only amounts owing under the Agreement."*

5. The letters of demand issued to both Mr. Butler and Mr. McEvoy are in identical terms. No distinction is made in those letters between the demand made of Mr. McEvoy (who is a borrower and guarantor) and Mr. Butler (who is a guarantor only). The letter advised that full particulars of the amounts outstanding had previously been furnished to Mr. Butler but that the balance had not been discharged. No previous letter of demand has been exhibited.

6. By letter dated 27th April, 2017, solicitors acting on behalf of Mr. Butler sought a copy of the general conditions which were referred to in the facility letter of 1st August, 2007 and referred to in Mr. O'Sullivan's affidavit. They also sought confirmation that the guarantee upon which the plaintiff was relying was in fact a one page document. In a response of 2nd May, 2017, the plaintiff declined to provide this information. The solicitors for the plaintiff replied that as the request amounted to the raising of particulars, it was not appropriate in the context of summary proceedings.

7. Mr. Butler, in his affidavit, sworn on 12th May, 2017, raises a number of issues:-

(a) The absence of proof that the rights and obligations under the guarantee were in fact transferred to the plaintiff.

(b) The partners of McEvoy Solicitors (to whom the facilities had been afforded) had a primary liability for same. He queried why those partners had not been pursued in respect of the debt.

(c) The characterisation of the guarantee signed by him was radically different to the actual wording contained in the facility letter exhibited to in the affidavit of Mr. O'Sullivan.

(d) The absence of evidence that the borrowers had complied with conditions precedent, described in the facility letter. Mr. Butler avers that the lender was under a duty to perfect and maintain the security to ensure protection of the surety. There was no evidence that this had been done.

(e) That if he has a liability under the facility letter, he is entitled to indemnity from the partners, to whom his solicitor had written.

(f) That the plaintiff's claim was statute barred in circumstances where the guarantee was of a pre-existing debt.

(g) That he is entitled to raise any defence which the principal debtors may have, and that he was not in a position to ascertain and assert any such defences in the absence of discovery.

8. In reply, Mr. O'Sullivan, in an affidavit sworn on 13th June, 2017, exhibited the loan sale deed between Irish Bank Resolution Corporation Limited, the special liquidators, and Stapleford Finance Limited. Mr. O'Sullivan maintains that as Mr. Butler had unequivocally acknowledged executing the guarantee, there is simply no merit to his complaints. Further, in the light of the acknowledgement of the execution of the guarantee, he avers to his belief, from a review of the file, that contemporaneous to executing the guarantee, the defendants executed a document entitled "*Guarantee and Indemnity*" which prescribed the terms and conditions attached to the guarantee. This document is exhibited in the second affidavit of Mr. O'Sullivan. It is undated but it is signed by the first and second named defendant. Mr. O'Sullivan avers that even if it is the case that one or more of the conditions precedent to the granting of the facility was not met, it merely permitted the bank to refuse to advance the moneys, as the conditions were not to the advantage of the borrowers. He asserts that the terms and conditions attaching to the guarantee expressly confirm that the liability of the guarantor shall not be affected by any invalidity in any security taken, or the failure by the bank to take any security. Thus, he states his belief that there is no *bona fide* defence to these proceedings. Mr. O'Sullivan acknowledges, however, that certain of the grounds of defence alleged to be available to the second named defendant, are matters for legal submission.

9. For the sake of completeness, reference ought to be made to the second affidavit of Mr. Butler sworn on 20th July, 2017. Mr. Butler reiterates that he is at a significant disadvantage in defending the application for liberty to enter final judgment in respect of a debt to which he is and remains a stranger. He avers that the document entitled "*Guarantee and Indemnity*", exhibited to Mr. O'Sullivan's supplementary affidavit, is not only undated, but is also silent as to the identity of the borrower whose liabilities were being thereby guaranteed. He also avers that there is no indication within that document that it relates to the borrowings of McEvoy Partners.

10. While there may be a disagreement between the parties as to the manner of their application, there is no significant disagreement as to the principles which the Court must consider in determining whether to make an order for summary judgment or to grant leave to defend.

11. In *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75, Murphy J. approved the test to be applied as that being laid down in *Banque de Paris v. Naray* [1984] 1 Lloyd's Law Rep. 21 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; 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."*

12. McGuinness J. in her judgment in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 reiterated that it was for the court to decide whether the defence set out in the affidavits with the documents exhibited therewith were credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. McGuinness J. stated at p. 615:-

> *"The court does not ask whether Mr. O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr. Byrne'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."*

Hardiman J., at p. 623 stated that the fundamental question is:-

> *"…is it 'very clear' that the defendant has no case?"*

13. Both parties relied on the principles outlined in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, albeit emphasising different aspects. McKechnie J. stated:-

> *"9. From these cases it seems to me that the following is a summary of the present position:-*
>
> *(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(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;*
>
> *(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;*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is*

suitable for use;

(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;

(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;

(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;

(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;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(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."

Mr. Gardiner S.C. representing the interests of the second named defendant, placed particular emphasis on principle (vi) above.

14. He also relied on dicta of Barton J. in *Stapleford Finance Limited v. Courtney* [2014] IEHC 668 that, in applying the test, the court must be mindful that the completeness of the defence may only become available as a result of the adoption of certain core procedures such as discovery, inspection and interrogatories. Reliance was also placed on *dicta* of Clarke J. in *McGrath v. O'Driscoll* [2006] IEHC 195 at para. 3.5:-

> *"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 an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."*

15. In emphasising issues of law, Mr. Gardiner S.C. submitted that there were, what he described as a number of substantial legal issues and arguable grounds of defence open to the second named defendant. These grounds include the following:-

(i) A creditor is not entitled to waive a condition precedent, insofar as a guarantor is concerned. The decision of Charleton J. in *Irish Bank Resolution Corporation Limited v. Cambourne Investments Incorporated* [2014] 4 I.R. 54 is cited in support of this contention. Referring to the term of the facility letter Mr. Gardiner S.C. highlighted that the security to be provided included *"an assignment over the capital's allowances relating to the fit out of the fourth floor, Connaught House, Burlington Road, Dublin 4",* and he emphasised that the terms and conditions of the facility letter itself, and the general conditions, provide that the facilities will not be available for drawdown unless the conditions precedent are satisfied. He submits that the moneys provided for in the facility letter were drawn down without, *inter alia*, this condition being met.

(ii) There is no consideration for the guarantee. Referring to the date of the execution of the guarantee by the second named defendant (1st August, 2008), and the date upon which all loans were drawn down, (which on the face of it preceded the date of the execution of the guarantee), he argues that consideration is past and the agreement is unenforceable. In this context he relies on Breslin, Banking Law, 3rd Ed., (2013), at para. 14-33 as follows:-

> *"Because a guarantor on the face of it receives no direct benefit for entering into the contract of guarantee, the identification of consideration is an important issue where the contract of guarantee is not executed as a deed. Consideration must move from the promisee – in this case the creditor (usually a bank). Consideration typically takes the form of the creditor agreeing to lend money to the principal debtor. However, although this is valid consideration, this may not be so where a guarantee is entered into to secure a loan which has already been made by the bank to the principal debtor. If the only consideration is the bank's agreement to lend, then this will be past consideration and therefore will not support the contract of guarantee. In particular cases it maybe possible to identify consideration in the form of forbearance on the bank to call in the principal debtor's loan: but this will depend on the facts of the case."*

It is submitted the burden of proving that a consideration is valid is on the person seeking to enforce the guarantee. Past consideration could be valid in the following circumstances:-

(a) The contract made between the bank and the principal debtor is expressly dependent on the granting of the personal guarantee; or

(b) the guarantee is entered into at the guarantor's request; or

(c) there is forbearance on the part of the creditor.

Here, Mr Gardiner S.C. submits that there is an absence of evidence to substantiate these potential scenarios. The plaintiff does not assert that the guarantee was given at the request of the guarantor or that there was evidence that the advances were dependent on the granting of the guarantee. He contends that this is a matter of proof which, given that the advances were made without the fulfilment of other conditions precedent to the drawdown, is not available.

(iii) Insofar as an arguable defence pursuant to the statute of limitations is concerned, Mr. Gardiner S.C. relies upon the decision in *Parr's Banking Company Ltd v. Yates* [1898] 2 Q.B. 460 at p. 464 as authority for the proposition that as no advances were made for a period of more than six years before the date of the proceedings, the plaintiff's right of action in respect of the advances is statute barred (with the exception of interest). He further submits that if the debt is statute barred, there can be no liability on foot of the guarantee. Pursuant to s. 11 of the Statute of Limitations Act 1957, the limitation period for an action on foot of a guarantee is six years, and if the guarantee is of an existing debt, the cause of action will accrue as soon as it is given. As Mr. Butler signed the guarantee on 1st August, 2008, by which date the loans had already been drawn down in their entirety, the claim against Mr. Butler became statute barred as of 31st July, 2014.

(iv) The second defendant also submits that there is evidence of a compromise by the first named defendant sufficient to discharge his liability. On 29th June, 2017, the plaintiff in these proceedings, by agreement, entered judgment against the first named defendant for the full amount, no order as to costs and a significant stay on execution of the judgment. It is contended that this constitutes a compromise of the claim.

(v) It is submitted that despite the fact that Mr. Butler in his second affidavit averred that the guarantee and indemnity was undated and did not identify the borrowers, no replying affidavit had been filed by Mr. O'Sullivan to contest this and therefore that document cannot be attached to the facility letter by way of evidential sequence.

(vi) The validity of the assignment. Reference is made to *O'Rourke v. Considine* [2011] IEHC 191, the provisions of s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 – and the four conditions therein contained that:-

(a) The assignment was of a debt or other legal chose in action.

(b) The assignment was absolute and was not by way of charge only.

(c) It was in writing under the hand of the assignor.

(d) Express notice in writing thereof was given to the debtors.

16. In response to the certain of the submissions referred to above, Mr. Neuman B.L. for the plaintiff submits that the second named defendant had used careful wording in his affidavit and had not proffered a positive defence to the claim. Many of the matters of complaint, he submits, are not legal grounds upon which a defence can be maintained. Thus, for example, that the plaintiff had chosen not to pursue other partners and that third parties might be joined in the proceedings is irrelevant. Insofar as the argument based on an alleged condition precedent is concerned, he relies upon in the decision of Noonan J. in *Ulster Bank v. Moyne* [2015] IEHC 483 to the effect that the bank can waive such a condition precedent, if the condition is in favour of the lender. Insofar as any point might arise based on the guarantee being executed on 1st August, 2008, whereas the facility letter was executed on 1st August, 2007, Mr. Neuman B.L. submits that these documents should effectively be read together. He further submits that the requirement for consideration is satisfied either on the basis that the guarantee was entered into at the guarantor's request or alternatively that there was forbearance on the part of the creditor in calling in the guarantee. He also submits that many of the legal arguments of the second named defendant are answered by the terms and conditions of the guarantee itself. By making payments within the previous six year period, the borrowers had acknowledged the debt. In respect of an argument based on the compromise of the debt, Mr. Neuman B.L. submits that the terms agreed in respect of the stay of execution in the judgment could not amount to a compromise of the debt, given that the first named defendant consented to judgment in respect of the full amount. That judgment, it is submitted, establishes by court order, the liability of the principal debtor. Mr. Neuman B.L. contends that Mr. McEvoy would not have consented to judgment in respect of the full amount claimed, if all or a portion of the debt was statute barred.

17. I have outlined submissions and arguments of the parties as being illustrative of the very real issues and potential grounds of defence that may exist. To adopt the wording of Noonan J. in *Cave Projects Limited v. Gilhooley & Ors* [2015] IEHC 14, it is this Court's view that it cannot be said that points raised by Mr. Gardiner S.C. on behalf of the second defendant "*are not at least arguable*". In the Court's view, the suggested grounds of defence are not mere assertions. Neither can it be concluded that it is "*very clear*" that there is no defence. To take but one example (and without expressing any opinion on the strength of the ground of defence advanced in this regard, which may or may not be successful after a full hearing), while it is suggested that forbearance to sue might defeat the argument that consideration is past, on the basis of the information and evidence before the Court, there is no *prima facie* evidence of forbearance, while there is reasonable *prima facie* evidence of draw down of funds by the borrowers before the date of the guarantee. In this Court's view, the points raised by the second named defendant involve substantial issues of fact and law which can not, and should not, be disposed of or disregarded without further hearing.

18. Mr. Gardiner S.C. submits that the Court does not have to conclude in favour of the second named defendant that all of the points raised by him are arguable – it is sufficient that at least one of the grounds is arguable in order for this Court to direct that the matter should be transferred to plenary hearing. I accept his submissions in this regard. I therefore do not accept that the replying affidavit of Mr. Butler, and the submissions made on his behalf, including legal submissions amount to "*nothing other than other speculation or lack any credibility*". Regarding the potential legal issues which have been raised the Court is of opinion, to adapt the *dicta* of McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 that "fuller argument and greater thought is required for a better determination of such issues".

19. Rather than transferring the case to plenary hearing, Mr. Neuman B.L. invited the Court to consider identifying issues of potential defence about which the Court had particular concern and permit further affidavits to be filed to address such concerns. Given the multiplicity of grounds which have been raised by Mr. Gardiner S.C. on behalf of the second named defendant which, as stated, in the Court's view, are "*at least arguable as grounds of defence*", this is an invitation which the Court declines on this occasion.

20. In view of the foregoing, the Court refuses the order sought in the notice of motion and directs that the matter be remitted to plenary hearing.