THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 343

RECORD NUMBER: 87/2016

FINLAY GEOGHEGAN J.
PEART J.
STEWART J.

BETWEEN/

ACC LOAN MANAGEMENT LIMITED

PLAINTIFF / APPELLANT

- AND–

GERARD SHEEHAN

DEFENDANT / RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 21ST DAY OF NOVEMBER 2016

1. In these proceedings the appellant bank seeks judgment against the defendant in the sum of €166,746 and interest on foot of his personal guarantee and indemnity which he executed on the 12th March 2008. This guarantee was one of a number of conditions of a loan sanctioned by the bank to Newmarket Foods Limited ("the company") by a facility letter dated 5th March 2008. The loan was for a term of ten years and was repayable on demand, and until any such demand was made it was repayable by monthly instalments.

2. In due course the company defaulted on its loan repayments, and on the 19th June 2013 the bank sent a letter of demand to the defendant calling upon him to discharge the amount owing by the company on foot of his guarantee. He failed to do so, and on the 7th October 2013 the bank issued these proceedings by way of summary summons.

3. Following the entry of appearance by solicitors acting for the defendant, the bank issued a motion seeking liberty to enter final judgment for the amount claimed to be due by the defendant on foot of his guarantee and indemnity. That motion came before the Master of the High Court in the normal way pursuant to the procedure provided for in Ord. 37, r.1 of the Rules of the Superior Courts. The defendant filed a replying affidavit to this motion in which he raised a number of issues by way of defence to the bank's claim, and sought to have the proceedings adjourned for full plenary hearing so that those issues could be determined.

4. The Master of the High Court transferred the motion to the court list in view of the contested issues disclosed on the affidavits, as he is required to do under Ord. 37, r.6 RSC, and that is how the bank's motion came to be determined by Ms. Justice Murphy who gave her judgment on the 17th December 2015 in which she concluded that an arguable defence was raised by the defendant which required to be determined by way of plenary hearing. Having then adjourned the matter for mention to the 9th February 2016, she made an order of that date directing a plenary hearing, and also gave the usual directions as to further pleadings to be delivered. It is against that order that the bank now appeals.

5. The company to which the loan was made was principally owned and operated by the defendant's brother, Vincent Sheehan. It manufactured and distributed sauces throughout Ireland. In fact the defendant owned a 5% shareholding in the company, but was unaware of that fact until it was revealed during the course of these proceedings in an affidavit filed on behalf of the bank. He was also a director of the company though in his first replying affidavit he stated that he did not become aware of that fact either, until his solicitor made a search in that regard. According to his replying affidavit he never participated in the affairs of the company qua director, and that his brother never consulted him in relation to the running of the company.

6. In his first affidavit at para. 6 he gives some detail of how he first became involved in the business and the nature of that involvement. He states the following:-

> *" … My dealings with the company arose when my brother Vincent Sheehan approached me in 2008 and indicated that he was in financial difficulty and was anxious to save his business. At that time my brother Vincent had a manufacturing facility in Northern Ireland. He then obtained the old Castlemahon Chicken Factory in Castlemahon, County Limerick. I believe that Vincent may have leased this property. He then borrowed money from ACC Bank and needed it to develop the plant further by way of upgrading its fabric and buying appropriate machinery and the payment of wages/working capital.[Vincent], prior to this, when he was manufacturing the sauces in Northern Ireland, with my permission, built a shed/warehouse on my property at Gorteen, Dromcollogher, County Limerick. I recall that I was paid €500.00 per week by way of rent for the premises and for my dealing with [deliveries] from the manufacturing plant. I would unload the [deliveries] into the warehouse. I would then receive orders and I would make up the orders and Vincent would arrange for couriers to call to me to deliver the various orders to various people. That was the full extent of my dealings with Newmarket Foods Limited. I say that I ceased receiving the said payments of €500.00 a week from Newmarket Foods Ltd on 31st July 2014".*

7. In his second affidavit he made a clarification to what he had stated in this regard by stating at para. 4 thereof:-

> *"I say that there is a slight error in my earlier affidavit when I averred that I received payments of €500 per week by way of rent the premises at Gurteen, Dromcollogher in the County of Limerick up to the 31st July 2014. For the purpose of clarifying the position, I did receive payments of €500 per week from Newmarket Foods Ltd up until the date that the company went into liquidation which occurred on or about 6 July 2010".*

8. In addition to requiring a personal guarantee and indemnity from the defendant, the bank's facility letter specified another security condition, namely "a first legal mortgage and charge over the 1625 sq. ft warehouse and 2 acres at Gorteen, Dromcollogher, Co. Limerick". This warehouse and two acres of land were part of lands owned by the defendant which were comprised in Folio 3690F Co. Limerick. To facilitate the creation of a mortgage and charge over the warehouse and 2 acres, that part of the defendant's lands

were transferred out of that folio and into a new folio comprising only those lands, namely Folio 61958F, Co. Limerick.

9. The defendant says that he was informed by his brother that the extent of his personal liability under the guarantee and indemnity that he being asked to sign was the warehouse and 2 acres which were the subject of the mortgage and charge. He says that if he had known that by providing this guarantee he was putting his entire farm at risk he would not have agreed to provide the guarantee. He says that while David O'Connor, solicitor, advised him about providing a charge over the warehouse and 2 acres of land, he was never advised by him, nor informed by his brother, that he was putting his entire farm at risk. Mr. O'Connor was the solicitor who was acting for the defendant's brother and the company in relation to the provision of security for the loan.

10. Shortly after the issue of the facility letter to the company, the bank wrote to David O'Connor, solicitor on the 7th March 2008. This letter stated that the bank understood that Mr. O'Connor was acting for the company in relation to a commercial loan to the company and gives some details of that loan. It then states that the bank's security will comprise a guarantee and indemnity from Vincent Sheehan to be supported by the assignment of a life policy in his name, and a guarantee from the defendant which was to be supported firstly by a first legal mortgage and charge over the warehouse and 2 acres of land, and secondly by an assignment of a life policy in his name.

11. The letter went on to state that the Bank was prepared to release the loan funds to Mr. O'Connor upon receipt of 16 specified items, one being:-

> *"13. Letter from Guarantor Solicitor confirming Guarantor received independent legal advice prior to execution of Guarantee & Indemnity document".*

12. By letter dated 8th March 2008 to the bank David O'Connor, solicitor stated:-

> *"We are acting [for the] Guarantors for Newmarket Foods Limited. We confirm that Vincent Sheehan and Gerard Sheehan were offered independent legal advise [sic] and they waived same. We confirm that the Guarantee and Indemnity was explained to them in full and they understand the nature and effect of same but nevertheless they decided to waive their right to independent legal advise [sic]."*

13. The defendant has stated on affidavit that nobody from the bank ever met him or ascertained his status vis-à-vis the company, or advised him that independent legal advice would be appropriate. He says that he knew that his brother was in some financial difficulty, and that he felt pressurised into providing the guarantee but that he was assured by his brother that the extent of his liability under the guarantee was the value of the warehouse and the 2 acres of land over which the charge was being created.

14. While those averments were made in the context of a plea that he executed the guarantee under the undue influence of his brother, that particular defence was rejected by the trial judge. It is implicit in her judgment that she considered that it did not meet the threshold for plenary hearing. Nevertheless the averments are relevant also as background facts to his defence that the bank failed to comply with its own condition for the drawdown of the loan of letter confirming independent legal advice to Guarantors by simply accepting at face value the statement by the company's solicitor that the defendant had waived his entitlement to independent legal advice, and that accordingly the guarantee is unenforceable against him. He claims that there was an onus on the bank to seek a confirmation of waiver directly from the defendant before permitting a drawdown of the loan, and that it was not appropriate to simply accept at face value a letter in that regard from the company's solicitor. He states that if it had been explained to him that by executing the guarantee he was putting not only the warehouse and two acres at risk but also his entire farm of land, he would never have agreed to same. He says also that he was unaware that Mr. O'Connor had written his letter dated 8th March 2008 to the bank, and denies that the contents of that letter reflect the nature of the advice given to him by Mr. O'Connor. In any event he makes the point that as Mr. O'Connor was acting for the borrower company, any advices which he gave to the defendant cannot be considered to be independent legal advice. I should add that Mr. O'Connor witnessed the execution of the guarantee by the defendant.

15. The bank on the other hand submits that it was entitled to rely upon Mr. O'Connor's confirmation that the defendant had waived his entitlement to get independent legal advice, and to allow drawdown. It is noteworthy that in an affidavit sworn on the bank's behalf by David Phillips on the 13th January 2015 he states the following in relation to the contents of Mr. O'Connor's letter dated 8th March 2008:-

> *"9. I say and believe that there was clearly some discussion between the defendant and his solicitor, Mr David O'Connor, with respect to limiting the charge to the warehouse and 2 acres of lands rather than providing a charge over his entire lands. This is evident from Mr. O'Connor's letter to the defendant dated 11th of March 2008.*
>
> *10. However I say and believe that it is clear that there was no discussion in terms of limiting his guarantee to provide that it was only enforceable against the secured property."*

16. It would appear therefore that the bank accepts that the defendant did not receive advice in relation to the contents of the guarantee and indemnity document prior to signing it.

17. As I have indicated, and as noted by the trial judge, the replying affidavits filed by the defendant on the motion for judgment sought to raise two matters by way of defence to the bank's claim, namely undue influence by his brother, and secondly, the legal advice provided to him by Mr. O'Connor was not independent legal advice, and was in any event wholly deficient in that he was never advised that his entire farm and livelihood was potentially being put at risk under the guarantee. On this appeal we are concerned with only the second proposed defence. It seems clear from the judgment of the trial judge that she did not consider that the first ground was sufficiently arguable to be permitted a plenary hearing, and there is no cross-appeal by the defendant against that conclusion.

18. Having concluded that there was no evidence to support an arguable defence on the basis of undue influence, the trial judge moved on to address the second proposed defence. At paras. 36 - 37 she expressed her conclusion as follows:-

> *"36. It is in the interests of those who seek to rely on [contract of guarantee] to ensure that all formalities have been properly complied with. In this case, the plaintiff wrote to the borrower's solicitor on 7th March 2008, indicating that as a requirement of drawing down the funds the Bank wished to be provided with a 'letter from Guarantor Solicitor confirming Guarantor received independent legal advice prior to execution of Guarantee & Indemnity document'. This is an eminently sensible approach. After all, the sureties are exposing themselves to liability for the borrower's debts and it is in the bank's interests to ensure that the sureties are fully aware of the consequences of executing the guarantee so*

that in the event that it is necessary to call in the guarantee there can be no dispute as to the sureties' liability thereunder.

37. In this case, having stipulated that, as a condition of releasing the funds, the plaintiff required confirmation that the sureties had received independent legal advice, the plaintiff altered its position and decided to accept the borrower's solicitors' word that the sureties had waived their entitlement to independent legal advice. One might have expected that, as a minimum, they would have required signed waivers from the proposed sureties, but they did not do so. They chose to rely on an assurance from the borrower's solicitor that such an entitlement had in fact been waived. It seems irrelevant to the Court that the sureties were, in fact, unaware of the Bank's stipulation to the borrower's solicitor until after the letter of demand on foot of the guarantee. The fact remains that the Bank waived its own requirement without notice to the sureties. Now, as they seek summary judgement on foot of the guarantee, that which they sought to avoid by insisting on independent legal advice, has come to pass. The defendant guarantor maintains that the advice given to him by the borrower's solicitor was deficient and that had he realised the scope of the guarantee, which he was required to execute, he would never have signed the guarantee. The Court notes that no evidence, one way or the other, has been adduced from the borrower's solicitor, as to the nature or extent of the advice given by him to the defendant. It may transpire, on a full hearing, that the advice was perfectly adequate. However, as matters stand, it seems to the Court that the defendant has an arguable defence that he should not be bound by the terms of the guarantee entered into by him on 12th March, 2008. On that basis, the Court refuses the plaintiff's motion for liberty to enter final judgment against the defendant."

19. The Court's order adjourning the case to plenary hearing, as drawn, and giving directions as to the delivery of the statement of claim by the plaintiff and a defence by the defendant, does not specify that the defence to be delivered must be confined to the issue of independent legal advice and/or its adequacy.

20. The bank's notice of appeal points to a number of grounds upon which it contends that the trial judge fell into error. They can be summarised as follows:-

(a) That she erred in her conclusion that the defendant required legal advice or independent legal advice if the guarantee is to be valid and enforceable, given that he was a director and shareholder of the borrower company, and had a commercial arrangement with the company.

(b) It was perfectly satisfactory for the bank to the borrower company and the defendant to be represented and advised by the same solicitor where the defendant was a director and shareholder of the company.

(c) The trial judge was incorrect to conclude that the bank was on notice of the deficiencies in the legal advice given to the defendant given the contents of Mr. O'Connor's letter to the bank dated 8th March 2008.

(d) That the adequacy of any legal advice given to the defendant was a matter between the defendant and Mr. O'Connor, and not a matter for the plaintiff.

(e) The conclusion of the trial judge that the letter from the bank to Mr. O'Connor dated 7th March 2008 was part of the agreement between the bank and the defendant, in circumstances where the condition regarding confirmation that the defendant received independent legal advice prior to drawdown by the company was not part of the loan agreement, and where in fact the defendant was unaware of the letter dated 7th March 2008 until 2014.

(f) The bank did not in fact breach the condition referred to as to independent legal advice, and was entitled to rely upon the letter dated 8th March 2008 which it received from the defendant's solicitor which informed it that such advise had been waived by the defendant. It is submitted that this was an acceptable means of complying with the condition.

(g) Where the trial judge rejected the proposed defence of undue influence because there was no evidence to support it being an arguable ground, the presence or absence of independent legal advice and the adequacy of any advice received by the defendant from Mr. O'Connor was irrelevant to the bank's claim for judgment under the guarantee.

(h) The trial judge failed to apply, or have regard to, the correct test when adjourning the case to a plenary hearing, without limiting the trial to the sole ground of defence which she considered to be arguable.

21. The defendant's notice pleads that the trial judge was correct in the conclusions she reached. He submits that the guarantee is void. He points to the fact that the bank itself knew that the defendant was not in receipt of independent legal advice and that he ought to receive such before entering into this guarantee. He submits that in circumstances where it had identified that the defendant was someone who needed to be independently advised it was obliged to ensure that this happened, and it therefore included it as a requirement before drawdown could take place. It is submitted that where the bank did not comply with its own requirement it would be unconscionable for the bank to succeed in obtaining judgment on foot of the guarantee.

22. He submits that the condition as to legal advice was one that was for the benefit of both parties and not just for the bank so as to ensure that the defendant would not be able to raise this sort of defence in the event that proceedings had to be brought against him if the company defaulted on its loan. He reiterates that it was for his benefit too, and that the bank realised that this was the case, and hence included the condition because it knew that the loan was solely for the benefit of the company, and that the defendant had little or no direct involvement in the company. He submits that the importance of the requirement that he receive independent legal advice is clear from the events that unfolded where, contrary to what he had understood to be the extent of his exposure under the guarantee as informed by his brother, and where no information or advice was given by Mr. O'Connor, at least according to the plaintiff, his entire farm was placed at risk in the event of default by the company.

23. In its oral submissions to this Court the bank has submitted that in so far as the defendant makes a complaint that his solicitor failed to advise him as to the extent of the guarantee, contrary to what is stated in the letter dated 8th March 2008, it is a matter between the defendant and that solicitor, and does not affect the enforceability of the guarantee. It submits that even having specified the condition as to independent legal advice, it was entitled to rely upon Mr. O'Connor's letter in reply stating that the defendant had waived his entitlement to same, and to permit the loan to be drawn down by the company. It also submits that Mr. O'Connor should be considered to be independent in the sense that he was not acting for the bank, and even though he was acting for the company, the defendant and his brother were directors and shareholders of the company.

24. The bank has asserted its disbelief that the defendant did not understand the nature and scope of the guarantee he gave, and

that in any event the guarantee itself which the defendant freely signed without undue influence contains no limitation as to its scope, and the defendant must be taken to have understood the document that he signed. In the bank's submission, the guarantee makes it clear that the defendant's liability extends to all the liabilities of the company and is not limited in any way, and in particular, to the assets over which the defendant was agreeable to have a charge registered, i.e. the warehouse and two acres of land.

25. The bank also notes that the defendant did not seek to defend the proceedings on the basis of a unilateral mistake. It submits that this is unsurprising since it has not been alleged that the bank represented to the defendant that the guarantee was in any way limited as to recourse.

26. The bank submits that there is no general requirement that before a guarantee is enforceable the bank must have satisfied itself that the guarantor has received legal advice, be it independent advice or otherwise, and that if a proposed guarantor is uncertain as to what he/she is undertaking by executing a guarantee, it is a matter for that person to seek advice. If that advice turns out to have been deficient in any way, that, it is submitted, is an issue between them and the legal adviser, but does not affect the validity and enforceability of the guarantee. In this regard the bank has referred to what is stated by Birmingham J. in *Allied Irish Banks plc v. McKenna* [2014] IEHC 122 as follows:-

> *"So far as independent legal advice or more specifically the alleged lack of it is concerned, there is no requirement in law that an adult entering into a guarantee on behalf of the company of which he is a director and shareholder should have independent legal advice".*

I would just note in passing that it does not appear from the judgment of Birmingham J. that the bank had itself made it a condition for drawdown that it must receive a confirmation that such advice had been provided to the guarantor.

27. In so far as the bank's letter to Mr. O'Connor dated 7th March 2007 contained a condition for drawdown that the bank would receive confirmation that the defendant had received independent legal advice, the bank points also to the fact that the guarantee document itself expressly warns the proposed guarantor in the following terms: *"Before you sign this guarantee and indemnity, you should obtain independent legal advice"*. It also submits that the defendant does not seem to have been aware of the letter from the Bank to the solicitor prior to executing the guarantee.

28. The bank has also sought to rely upon what is stated by Laffoy J. in *ICC Bank v. Gorman* [1997] IEHC 47 where on very different facts, Laffoy J. stated:-

> *"The requirement that [the borrower's wife] should state that she obtained independent legal advice, in my view, merely evidences an abundance of caution, not an infirmity in the mortgage".*

29. Again, I would just note the different context in which that was stated. In *ICC Bank v. Gorman* the bank had sought possession of a family home on foot of a mortgage executed in favour of the bank by the husband. The husband sought to resist a possession order on the basis of certain alleged deficiencies, one of which was that his non-owning wife had not signed her consent to the mortgage prior to the execution of same by him as required by s. 3 of the Family Home Protection Act, 1976. What was stated by Laffoy J. above was stated in the context of a submission that there was no evidence that the wife had consented prior to the execution of the mortgage by the husband, and secondly that there was no evidence that prior to signing her consent she had received independent legal advice. By the time the case was heard the wife had left this country to reside in England. Laffoy J. found that the consent signed by the wife stated in its own terms that it was a prior consent, and also noted that her signature had been witnessed by a solicitor. She stated that there was no requirement under s. 3 of the Act of 1976 that the wife must have received independent legal advice before giving her consent, and that what was required was a fully informed consent, and that having regard to the fact that her signature was witnessed by a solicitor and *".in the absence of evidence to the contrary the Court was entitled to assume that [the wife] gave her consent voluntarily and on the basis of adequate knowledge of what she was doing"* [emphasis added]. In the present case, quite apart from the very different context of *ICC Bank plc v. Gorman*, I would emphasise the words *"in the absence of any evidence to the contrary"*. The defendant in the present case has sworn that he did not receive advice as to the extent of the guarantee he was being asked to sign. It seems to me that *ICC Bank v. Gorman* does not provide any support to the bank's argument in the instant case.

30. I am satisfied that the trial judge approached her task of deciding if a *prima facie* defence was made out in relation to the absence of legal advice in accordance with the correct legal principles. She referred to the leading cases in which these principles are set forth. That is not really in controversy, though I appreciate that the bank would say that in reaching her conclusion she misapplied those principles. Having referred to these cases, she stated:-

> *"Adopting the wording of Hardiman J. at p. 623 of Aer Rianta, the Court in the present case must ask itself … '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 defence?"*

31. In my view the trial judge was correct to conclude that the defendant had done enough to establish a *prima facie* defence in relation to legal advice to the required level. What is critical in this case, and central to the finding that such a prima facie defence had been made out, is the fact that it was the bank itself that specified that it was a requirement for drawdown that it receive *a "letter from Guarantor Solicitor confirming Guarantor received independent legal advice prior to execution of Guarantee & Indemnity document"*. The bank need not have imposed such a precondition to a drawdown of the loan. Had it not done so, the Court might very well have concluded that there was no obligation upon it to ensure that the guarantor received such advice prior to drawdown, even though on the guarantee document itself it urges the guarantor to get legal advice prior to executing same. That encouragement to seek legal advice may well be given out of an abundance of caution so as to avoid possible difficulties with enforcement down the road.

32. But where, as in this case, the bank itself decided that it required that confirmation, and subsequently waived its own requirement unilaterally in the light of what Mr. O'Connor stated in his letter dated 8th March 2008, that is arguably at least something which may at trial be found to provide the defendant with a defence to the bank's claim on foot of the guarantee. The opposing arguments in this court focused in part on the question as to whether the condition imposed by the Bank was or was not for its benefit alone such that it might unilaterally waive same. The resolution of that issue depends upon an assessment of all the relevant evidence.

33. If I ask myself as suggested by Hardiman J. in his judgment in *Aer Rianta v. Ryanair*, whether it very clear that the defendant has no case or arguable defence to the plaintiff's claim, I find myself answering it in the negative. That is not to indicate any probability as to the outcome of the case following a plenary hearing. The Court at that stage, unlike this Court or indeed the Court below, will

have the benefit of hearing oral evidence from the parties and their witnesses before reaching a final determination. Nothing in my judgment should be taken as a concluded view or even a tentative view on the ultimate merits of the case being made by either party. But I consider the defendant's case on this one issue to be at least an arguable issue on the evidence adduced on affidavit.

34. For these reasons I would dismiss the appeal.

35. However, I would vary the order made in the High Court, if necessary, so as to clarify that the defendant's defence is confined to the defence found to be arguable by the trial judge, thus making it clear that the defence of undue influence is not in the case. The Court was informed that a statement of claim and a defence which did not include undue influence had already been delivered so it may not be necessary to amend the High Court order. The Court will hear the parties on this question.

36. However it is important to emphasise that on a motion for summary judgment, and where not all of the issues raised by way of defence on affidavit meet the required threshold, that the order adjourning the case to plenary hearing should clearly identify the issue(s) found to be arguable and limit the defence to be delivered to those issues which have been found to pass the threshold, as was done by Finlay Geoghegan J. in *Bussolino Ltd v. Kelly* [2011] IEHC 220, and by this Court in NAMA v. Kelleher [2015] IECA.