

THE HIGH COURT

[2015 No. 1573 S.]

BETWEEN

DANSKE BANK A/S (TRADING AS DANSKE BANK)

PLAINTIFF

AND

RAYMOND O'REILLY, DENISE O'REILLY AND LIAM O'REILLY

DEFENDANTS

JUDGMENT of Ms. Justice Donnelly delivered the 9th day of November, 2017

1. The plaintiff bank ("the bank") seeks an order for summary judgment against the third defendant in the sum of €203,842.05, on foot of a guarantee. The third defendant claims that he has a full and *bona fide* defence to the plaintiff's claim.

2. The bank loaned money to a company called Denray Construction Limited ("the company") pursuant to two separate facility letters. The first facility letter dated 3rd May, 2005 (and subsequently amended), made an overdraft facility of €40,000 available to the company. The second facility letter, dated 29th February, 2008, made available an overdraft facility in the sum of €150,000. The monies advanced to the company were subject to security which included a guarantee executed by the first and third defendants on 18th March, 2008 ("the guarantee").

3. The first and second defendants are husband and wife and were the directors of the company. The third defendant is a brother of the first defendant. The Court has been informed that the first defendant has consented to summary judgment in these proceedings which included a sum in respect of the guarantee. In principle, this is not a matter relevant to the issue of whether the Court can grant summary judgment in relation to the third defendant.

The Guarantee

4. The bank claims that under this guarantee, in consideration of the bank, *inter alia*, making or continuing advances to the company, the first and third defendants agreed to pay and satisfy to the bank, on demand, all and every sum of money "which are now or shall at any time be owing" to the bank by the company. The guarantee provided that the total liability ultimately enforceable would not exceed the sum of €290,000 together with interest thereon from the date of demand by the bank.

5. The document presented to the Court as the guarantee does not have a National Irish Bank (then the trading name of the bank) letter head. The various other documents relating to facility letters or guarantees entered into around this time by the bank with some or all of the defendants have such a heading. The guarantee is, however, headed 'Joint and Several Guarantee to Danske Bank A/S'. The final page of the document is an execution page which is dated 18th March, 2008. At the top of that page in bold and delineated in a box is the following statement:-

"Warning: as a guarantor of this loan, you will have to pay off this loan, the interest and all associated charges if the borrower does not. Before you sign this guarantee you should get independent legal advice."

The guarantee is signed by both the first and third defendant and both signatures were witnessed by Maria Toal with an address in Bailieborough, Co. Cavan. Her occupation is given as solicitor.

6. The company failed to comply with the repayment terms of their facility agreements. By letter dated 29th November, 2010, the bank wrote to the third defendant demanding payment in the sum of €177,461.42 being the amount due and owing on foot of the guarantee. A further letter was sent on 1st September, 2014, by the bank's solicitor demanding payment in the sum of €203,842.05, being the amount then due and owing on foot of the guarantee. In these proceedings, the bank has stated that it is voluntarily waiving any further claimed interest on the amount.

The Defendant's Evidence

7. The third defendant does not contest that the company owed the money to the bank. He does not deny that he signed the execution page of the guarantee but asserts that the guarantee is nonetheless unenforceable against him as he was not shown the full document he was signing. He also claims that he was informed by the representative of the company and by his brother that it was limited to a bond in the sum of €100,000 to Cavan County Council ("the Council"), and that it only referred to his interest in lands. In order to understand the third defendant's claims, it is necessary to examine his affidavits in more detail.

8. The third defendant's first affidavit in these proceedings was sworn on 28th October, 2015. At that time, he was legally represented by the solicitor who also acted for the first and second defendants. Although not directly stated on affidavit, it appears, on inquiry by the Court, that the solicitor who witnessed the guarantee was a solicitor in the practice of the predecessor to that solicitor's practice.

9. In the third defendant's first affidavit, he states:-

"I say that the said guarantee referred to therein as the second guarantee was executed by I this deponent and said guarantee provided that the total liability ultimately enforceable would not exceed the sum of €290,000 together with interest thereon."

The third defendant went on to refer to clause 7(b) of the facility letter dated 29th February, 2008. He said that as further security for the said borrowings, the bank took an equitable deposit over 28 acres of property owned by him jointly with his brother, the first defendant.

10. The third defendant then stated that subsequent to the said borrowings, "my solicitors" received a letter of comfort from the bank's representative, Danny Hamilton. He said that he obtained a copy of that letter from his solicitors and he refers to a copy of it. The letter on its face is addressed to the solicitors T. Sheridan & Co., Bailieborough, Co Cavan, which said practice, according to a subsequent affidavit of the third defendant, was taken over by his solicitors on record at the date of the first affidavit. That letter is headed "Re, Denray Construction Limited" and states: "I wish to advise that Bank will be relying on guarantee signed by Liam O'Reilly

with regard to mortgage on property of 28 acres at Shercock, Co. Cavan."

11. The third defendant said that there appears to be several errors made in the letter. He says that firstly, the second paragraph of the letter states as follows: "this is item 7(b) of facility letter dated 29th February, 2007". He says that the intention of the bank was to refer to the facility letter dated 29th February, 2008. Secondly, the letter is dated 22nd October, 2007, which he states is an error as it was received by his solicitors on 12th March, 2008. The third defendant stated that it was "unclear what the meaning and effect of this letter is".

12. The third defendant stated that at the time of execution of the said guarantee, he understood it related solely to a bond required for a contract the company had with Cavan County Council and not otherwise. He said he did not have the benefit of independent legal advice when signing the guarantee. He stated that he wanted to take further legal advice and that he required clarification of the information contained in the letter of comfort received by his solicitors from Mr. Danny Hamilton.

13. The third defendant subsequently changed solicitors and swore a second affidavit. In this new affidavit, he claimed that he was not and never had been a director or shareholder of the company. Furthermore, he stated he was a carpenter and that at all material times he was not a company director or in any way familiar with company books, account loans etc. He said that his sole involvement with the company was in a capacity as subcontractor. The company was the main contractor and he was a subcontractor. He claimed that there was no consideration in terms of the guarantee. He also claimed that he was not given the benefit of Chapter 1 of the Consumer Protection Code 2006 and that the bank had failed in its duties to him thereunder. He claimed that by reason of the plaintiff's failure to adhere to the code and in failing in its duties to him as a customer, the purported guarantee should be set aside as void, voidable and/or unenforceable.

14. The third defendant said in relation to the purported execution of the guarantee that:-

(a) the bank or its servants or agents did not offer him advice or guidance as to the terms, conditions or warranties contained in the guarantee;

(b) it did not recommend that he take independent legal advice;

(c) it did not show him or furnish him with a copy of the guarantee;

(d) he was not shown or did not receive a copy of the loan offer letter, loan agreement, overdraft letter or any other such facility letters afforded to the company;

(e) he was not told what he was signing or guaranteeing;

(f) it was not represented to him that he would be held personally liable for the company's debts of up to €290,000;

(g) he was not informed that the company could have incurred liabilities to the bank which he was supposedly guaranteeing or that the company could incur further future liabilities for which he would also be held liable;

(h) he was neither shown nor handed the four pages comprising eighteen paragraphs proceeding the execution paid of the guarantee dated 18th March, 2008, or any ancillary terms or conditions pertaining to. He says he simply went in, signed the single page and left. The exchange was over in less than three minutes; and

(i) he was led to believe that he was signing a guarantee for a bond security that was to be afforded by the bank to Cavan County Council in respect of construction works being carried out by the company which bond was limited to the sum of €100,000 until released by the Council and his personal liability for which extended only to his interest in 28 acres of land held at Shercock, Co. Cavan.

15. The third defendant stated that at all times it was represented to him by the company that he was signing a guarantee for the bond required by the Council in respect of development works being undertaken by the company on behalf of the Council, and that the bank's predecessor in title caused, permitted or allowed him, "by way of silent misrepresentation or otherwise", to believe he was signing a guarantee as aforesaid. The company could not commence work for the Council until such a bond was in place. He said his brother, the first named defendant, approached him and informed him that he needed another guarantor to procure the facility required to cover the bond from the bank. He said he agreed to do this on the basis that the bond was for a limited sum and for a definite duration.

16. The third defendant says that the work was completed by the company without difficulty and the bond was not ultimately relied on by the Council. He says that the Council released him from the bond by way of a letter written to the bank's predecessor in title on 14th April, 2010. He refers to and exhibits a letter from the Council to the bank and confirming that the guarantee was cancelled.

17. The third defendant states that he first learned of the extent of his purported liability to the bank on foot of the alleged guarantee in December 2010. He said that upon receiving the demand dated 29th November, 2010, he immediately contacted the bank seeking a copy of the guarantee upon which it intended to rely. He said that the bank responded with a photocopy of the purported guarantee, pp. 1 – 5 and 7 of which he has never seen before. Page 6 is the execution page of the guarantee. Page 7 appears to be a covering sheet entitled:-

"Raymond O'Reilly and Liam O'Reilly to Danske Bank A/S guarantee (joint and several) in respect of the accounts and liabilities of Denray Construction Limited

EUR290,000."

18. That is the same document relied upon by the bank in their affidavit grounding the motion for summary judgment.

19. It is perhaps worth noting at this point that despite knowledge of the contents of the guarantee since December 2010, the third defendant does not appear to have taken any steps to disavow that guarantee and indeed by October 2015, when he swore his first affidavit, he said he was seeking legal advice and did not set out at that point any details as to how he might have come to sign such a guarantee.

20. Of particular importance is that the third defendant claimed that exhibit A in his first affidavit did not contain the full contents of

that letter in that a second page was missing. He now says that the letter of Danny Hamilton also included a second page ("the addendum"). This page is not headed, it is not signed, it does not contain any page numbering and at the top of the page is to be found the following sentence: "I hereby confirm that the liability of Liam O'Reilly pursuant to the guarantee referred to at item 7(b) on facility letter from National Irish Bank dated the 29th February 2008 to will (sic) extend only to his right title or interest in the property comprising 28 acres at Shercock, Co. Cavan and will not affect any of his other assets."21. He says he does not know why it was not properly exhibited in his previous affidavit but says that the previous solicitors did at all material times have both pages in their possession. The third defendant claimed that the second page meant that the banks' predecessor in title expressly represented that the extent of the third defendant's liability pursuant to the guarantee was limited to his interest in 28 acres of land at Shercock, Co. Cavan which has since been disposed of. He says that this was his understanding as to the limitation of his guarantee towards the council's bond of €100,000 being only his interest in the land as aforesaid.

22. The third defendant goes on to say that this is evidence by the bank's internal memorandum dated 4th November, 2010. He refers to a document which he appears to have obtained pursuant to data protection provisions, as the name of his brother was blocked out. The complete document was provided by the bank in a later affidavit.

23. That document says

"collateral #8-guarantee Raymond O'Reilly E40K,

Application has been approved by Credit Dept to remove Collateral from our systems signed by Raymond O'Reilly in relation to his brother Liam.

There is no Copy of Guarantee Agreement on file here & it is not detailed in the Mortgage Facility Letter dated 27th March 2009.

This Guarantee is affecting overall Business Exposure as Business Manager Anne Aspell is trying to complete application on business side for Raymond."

The document goes on to say: "approved on the basis that we cannot reply (sic) on the guarantee."

24. In the third defendant's affidavit he states that this is an acknowledgement that the collateral in relation to him was to be removed. He says that this again is because the agreement in fact reached, and the guarantee in fact signed, extended to the bond required by Cavan County Council only. He uses the document as evidence of the banks' breaches of the Consumer Credit Act, 1995.

25. Finally, the third defendant disputes his responsibility for the €40,000 overdraft facility provided for the company as he says he was never aware of this. Furthermore, he disputes that he could possibly be liable under the guarantee for any more than €150,000 even if his above points are rejected. He submits that the loan upon which he was required to execute a guarantee of security was a loan for €150,000 offered by way of the facility letter dated the 29th February, 2008 and this was significantly less than the guarantee purportedly executed which the bank claims is for the sum of €290,000.

The evidence of Marie Moylett on behalf of the bank

26. In response to that affidavit, Marie Moylett, debt management recovery officer of the Irish registered branch of the bank, swore a second affidavit. She made a number of points in relation to the affidavits filed on behalf of Mr. O'Reilly. She points out that the third defendant is not just a carpenter but is a company director with experience of business. Indeed he appears to have been company director in respect of a number of companies including at least one company prior to the execution of the guarantee.

27. Ms. Moylett goes on to say that it was the bank's usual practice to give customers a copy of any banking guarantee. She also points out that the guarantee signed is clearly on its face a guarantee for the debts of the company and that it is a joint and several guarantee. She highlights the execution page of the guarantee with its warning as stated above. She said that the bank wrote to the third defendant prior to the execution of the guarantee providing full information to him about the nature of a guarantee and the consequences of entering into a guarantee. She exhibited an undated copy letter sent by Ann Aspell of the bank, from an office in Northern Ireland (unlike the letter from Mr. Hamilton on behalf of the bank which emanated from an address in Co. Louth).

28. She points out that the guarantee clearly encompasses all past and future liabilities of the companies to the bank on whatever account or agreement. She points out that the facility letter dated 29th February, 2008 had been accepted on behalf of the company prior to the signing of the guarantee but the funds had not been drawn down until afterwards.

29. Ms. Moylett claims that it is wholly disingenuous to claim that he believed that he was signing a guarantee for a bond security to be afforded to Cavan County Council. She refers to the nature of a bond requirement which is a usual condition of any planning permission for a development. She said that the company had applied for the second company facility in the sum of €150,000 to complete a contract for the Council and also applied for a guarantee in the sum of €100,000 for the purposes of a bond to Cavan County Council. The bank had separately provided a contract guarantee bond in the sum of €100,000, and when the company had completed those works the bond was cancelled. In her view the cancelling of the bond and the related documents made it very clear that the contract guarantee bond to the Council had nothing to do with the bank's claim against the third defendant.

30. In relation to the so-called letter of comfort, she points out that clause 7 of the second company facility had provided for two forms of security for the company's borrowings:

a) A guarantee signed by Raymond O'Reilly and Liam O'Reilly for €290,000 supported by: legal mortgage over dwelling house at Bailieborough

and

b) Security for Denray Ltd: equitable deposit over 28 acres owned by

R and L O'Reilly.

31. She says that the first item of security was the guarantee and that is the guarantee dated 18th March, 2008 which is the subject of the proceedings. She referred to the bank letter of Mr. Danny Hamilton dated 22nd October, 2007 which contains obvious typographical errors. She said that the letter stated that the bank was relying "on guarantees signed by Liam O'Reilly with regard to mortgage and property of 28 acres at Shercock, Co. Cavan". In her view, the letter, when objectively construed in accordance with

the words used, is one which simply confirmed that the bank was relying on the guarantee for €290,000 which was supported by a legal mortgage. There is simply no other reasonable interpretation.

32. She states that the guarantee provided for a clear and express liability cap of €290,000. She claims that the third defendant now seeks to make some sort of case that there was an entirely different cap being his interest in the property comprising 28 acres. She questions the circumstances upon which the third respondent makes this case. She points to its omission from the first affidavit sworn by the third defendant; she refers to its lack of reference in the text of that original letter and to the difference in language being used therein.

33. Ms. Moylett states that she finds it quite extraordinary that the third defendant would seek to rely on a document referring to a guarantee that Raymond O'Reilly gave in respect of Liam O'Reilly's liabilities. This is the bank's claim against the third defendant. She refers to a credit application dated 2nd November, 2010 and a copy of the full unredacted document referred to earlier. She says that this was a cancellation of a guarantee signed by Raymond O'Reilly relating to the liabilities of his brother the third defendant. She says that the third defendant well knows the position and his attempt to rely on these documents and to misconstrue them completely destroys any remaining credibility.

34. Ms. Moylett addresses concerns about monies due and owing by the third defendant on foot of the guarantee. She exhibits statements of accounts in respect of the first company facility and the second company facility. A claim as to lack of particulars of debt was not pursued at the hearing of this application.

The defendant's reply

35. In reply, the third defendant refers to the two companies of which he owned, one of which he says was only set up just over eighteen months ago. He says that these were two small companies that facilitated his personal carpentry business. He said he was advised to incorporate his carpentry business for tax and ease of employing workers.

36. He says that although it is contended that it was the banks usual practice to give customers a copy of a banking guarantee, he did not get any. He says that the guarantee that was presented to him for signing was not in fact clear on its face. He refers to a copy of what he states is "the guarantee present to me (sic) for singing (sic) when produced". This document is in similar terms to the guarantee relied upon by the bank in these proceedings save for a handwritten heading. The heading is "Liam O'Reilly re loan of Denray Construction Ltd re agreement with Cavan County Council." This unusual averment, accepting as it does on its face that a document was in fact presented to him for signing, is later explained by him through his counsel as being a document that he received from the bank on request for information. He says that this supports his position that he was led to believe that the guarantee was in some way tied or related to the County Council bond.

37. In reply to Ms. Moylett's exhibiting of the undated letter from Anne Aspell referring to a bank guarantee, he says that letter was issued and received by him in November 2010 when the bank's predecessor in title was attempting to reissue loans on the company's behalf. He said he first heard of Ms. Aspell in 2010 when she contacted him by telephone over the guarantee when the company went into liquidation. He says it was Danny Hamilton who was the bank official dealing with the matter at the time of drawdown in 2008.

38. The third defendant takes issue with the manner in which he is portrayed in the affidavit of Ms. Moylett and he notes there has been no attempt to cross examine him on his affidavits. He takes issue with the attempt to interpret the letter of Danny Hamilton dated 22nd October, 2007 as these are matters for submissions. He explains that he attended his former solicitor when preparing his first affidavit and that "Mr. Carolan produced this addendum page which appeared alongside Danny Hamilton's letter from National Irish Bank dated 22nd October, 2007." He repeats that the contents of the guarantee were not explained to him by the bank and he was led to believe that he was executing a guarantee in respect of the bond made in favour of Cavan County Council.

The Law

39. The Supreme Court in its decision in *Aer Rianta CPT v. Ryanair Ltd* [2001] 4 IR 607 clarified the law in relation to these applications for summary judgment. The bar for a defendant in resisting summary judgment is a low one. It is for the court to decide whether the defence as set out is credible, or in other words, where there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. A fair and reasonable probability of the defendant having a real or *bona fide* defence is not the same thing as a defence which would probably succeed or even a defence whose success was not improbable. The fundamental questions to be posed are, was it very clear that the defendant had no case? Was there either no issue to be tried or only issues which were simple and easily determined? Did the defendant's affidavits fail to disclose even an arguable defence?

The Defences

40. An affidavit must contain fact and not law. It is unsurprising therefore that the bank approached the hearing of this application for summary judgment on the basis of extrapolating possible defences from the affidavits of the third defendant. Counsel for the bank identified four purported defences as set out in the affidavit. In his reply to the application for summary judgment, counsel for the third defendant identified two defences (subtly different from those anticipated by the bank).

41. In the present case, the identification of the four purported defences by counsel for the bank represents a framework for the assessment of the legal and factual claims of the third defendant. For that reason, the Court will set out the purported defences as identified by the bank and then the two defences identified by the third defendant.

42. The bank identified the four purported defences as follows:

- a) That the third defendant was a consumer and the bank failed to provide him with the benefit of the Consumer Protection Code 2006, by failing to act fairly and failing to provide him with his entitlements under s.50 of the Consumer Credit Act 1995 by failing to give him a cooling off period.
- b) The third defendant misunderstood the nature and legal effect of the guarantee. He did not have independent legal advice, and he was led to believe by the first and second named defendants that he was only executing a guarantee by way of a bond in favour of Cavan County Council.
- c) That the bank provided him with a letter of comfort dated 22nd October, 2007 (sic). He makes the case that this letter together with the addendum meant that the banks' recourse under the guarantee was limited to the third defendant's interest in properties which have already been sold.
- d) That based on the documents, the guarantee was "removed" by the bank. He says that the guarantee was removed or cancelled because he executed the guarantee by way of a bond in favour of Cavan County Council and the building

project was successfully completed.

43. The third defendant's defences as identified by his counsel, were as follows:

- a) That he was not furnished with a full copy of the guarantee.
- b) That it was represented by the solicitor for the company/bank that this was a limited guarantee.

The Defendant's First Defence

44. In support of the first of the defences, counsel for the third defendant pointed to the lack of heading on the guarantee. He also pointed to the lack of any reference mark on the execution page of the guarantee which relates it to earlier in the document. He submitted that the Court could not decide the issues on the basis of an affidavit. He also submitted that Mr. Danny Hamilton, the then Relationship Manager in the bank, could give oral evidence as to whether the third defendant had a copy of the guarantee or not. He submitted that the letter of Anne Aspoll, referred to by Ms. Moylett, was not signed or dated and it could not be taken to relate to the guarantee at issue, particularly in the light of the third defendant's averments that it related to a subsequent matter in 2010.

45. Counsel accepted that the third defendant was not a consumer under the Consumer Credit Act of 1995; however he maintained that he was a consumer under the Consumer Protection Code 2006. In that regard, he submits the third defendant was a person or business trading at less than €3,000,000. He submitted that there were certain duties under that code, and that the bank had failed as regards that issue. For example, there was no cooling off period.

46. Counsel for the third defendant relied upon the decision of Herbert J. in *Friends First Finance Ltd v. Cronin* [2013] IEHC 59. He relied upon this case to show that it was held to be at least arguable that a principle of fiduciary care applied between a credit institution and a borrower. In those circumstances, there may be a duty on a bank to ensure that the defendant formed an independent and informed judgment on the proposed transaction before committing himself.

47. The height of the defendant's case under this first heading is the decision of Herbert J. in *Friends First Finance Ltd v. Cronin*. In that case the defendant was an employee of the plaintiff. In the course of his decision, one of the grounds on which Herbert J. held that there was an arguable defence was that there was a principle of fiduciary care between a credit institution and a borrower. Herbert J. referred to the UK decision of *Lloyd's Bank v. Bundy* [1974] 3 All E.R. 757, in which it was held that a duty of fiduciary care may arise in circumstances where a special relationship is found to exist between a bank and a defendant. The UK cases that followed that decision were mostly concerned with disputes between banks and vulnerable sureties, or between banks and spouses where constructive notice of dominance by the other spouse was an issue. Where such circumstances were found to exist, the Court would set aside the agreement.

48. Prior to dealing with that, the Court observes that this is a different argument than that of *non est factum*. In that regard, insofar as the affidavits of the third defendant might be seen to raise such a purported defence, it is undoubtedly the case that no such defence arises in this case. The judgment of McDermott J. in *Danske Bank v. Connors Ltd* is apposite. McDermott J. stated as follows:

"The first point raised is that of *non est factum*. Three conditions need to be satisfied in order that this defence be successfully raised. Firstly, there must be a radical or fundamental difference between what the defendant signed and what he thought he was signing. Secondly, this mistake must be as to the general character of the document as opposed to its legal effect. Thirdly, there must be a lack of negligence i.e. the defendant must have taken all reasonable precautions in the circumstances to discover what the document was (see

JIC 4 Saunders v Anglia Building Society [1971] AC 1004 and *Morris J* (as he then was) in *Tedcastle McCormick and Co. Limited v McCrystal* (unreported, High Court, 15th March, 1999) and *Kelly J* (as he then was) in *Allied Irish Banks Plc v Higgins and Ors* [2010] IEHC 219".

49. In the present case, the third defendant accepts that he signed a guarantee. It is clear that the third defendant knew that he was signing a guarantee when he did execute it. Therefore, the first condition is not met. In other words there is no radical or fundamental difference between what the defendant signed and what he thought he was signing.

50. Secondly, any mistake that may have existed was not as to the general character of the document as he clearly understood he was guaranteeing company loans from the bank. He may have been under a misapprehension as to the legal effect i.e. the extent of the loans, but there is simply no evidence that he misunderstood the general character of the document. Thirdly, there was negligence on the part of the third defendant. By his own admission, he signed a document that he did not even read, in circumstances where, on his own evidence, there was nothing preventing him from doing so. Perhaps most importantly he signed a page which stated on its face that he was being advised to seek independent legal advice. The Court is quite satisfied that the defence of *non est factum* would not be available to this defendant.

51. Insofar as there is a claim for non-enforceability by virtue of a supposed breach of the Consumer Credit Code, this type of argument has been consistently rejected by the courts. Even in the case of *Friends First Finance Ltd v. Cronin*, relied upon by the third defendant, the High Court rejected an argument based on the Consumer Protection Code 2006. As Herbert J. said:

"There is nothing in any of these statutes which expressly or impliedly would render the loan agreements illegal, invalid or unenforceable because of a breach by the plaintiff of any of these statutory provisions or of the Consumer Protection Code 2006."

52. Furthermore, in the oft-quoted case of *Freeman & Anor v. Bank of Scotland Plc & Ors* [2014] IEHC 284, McGovern J. held that:

"non-compliance with a statutory code does not relieve a borrower from his obligations under a loan to repay the lender, nor does it deprive the lender of its rights and powers under the loan agreement. If that is the case so far as statutory codes of conduct are concerned, then, *a fortiori*, the plaintiffs in this action cannot make the case that they are relieved from their obligations under the loan or that the Bank is deprived of its rights under the loan agreements, if there has been a breach by the Bank of what is a voluntary code."

In those circumstances, I also reject that there is any arguable defence based on a purported breach of the Consumer Protection Code 2006.

53. The Court has observed that the third defendant's first purported defence is different to a claim of *non est factum*. It is clear that there is a no defence in this case of *non est factum*. The Court considers however, that the particular claim the third defendant is making, i.e. that he was not given a copy of the guarantee, is, in substance, an attempt to circumvent the strictures of the law on *non est factum* which is clearly against him. In the absence of a claim to *non est factum*, the defendant cannot avoid liability by reason of the fact, if it be a fact, that he did not get a copy of the guarantee. This defendant knowingly signed a guarantee in circumstances where he does not suggest that he was refused access to a copy of the guarantee or refused sight of the document he was signing. The fact that he did not have or obtain a copy of the guarantee does not set aside his liability on foot thereof.

54. Furthermore, in this case the defendant does not claim that there was an undue influence over him by his brother or by the company. The law does not establish that it is a requirement for all credit institutions to insure that independent legal advice has been provided to every borrower/guarantor prior to entering into a guarantee. In this case, the signed page indicated in clear language that the defendant would have to pay off the loan if the borrower did not, and that, before signing the guarantee, the defendant should get independent advice. Thus, any duty the bank might have had in that regard was fulfilled. The third defendant seeks to go further and suggests that because there is a statement by him, which has not been denied by the bank, that he did not receive the full copy of the guarantee, the guarantee must therefore be set aside.

55. A signature on the execution page of a guarantee is an acknowledgement of the fact that one is bound by the terms of that guarantee and it will only be in very specific circumstances that one's execution of the guarantee can be set aside. The fact that the person was not in possession of a copy of the guarantee, in circumstances where they knew they were entering a guarantee and knew the legal significance of that guarantee, is not a basis for avoiding liability thereunder. Most importantly however, as stated above, the Court views this as an attempt to circumvent the law on *non est factum*.

56. In so far as his affidavit raised issues about lack of independent legal advice, no authority has been produced to support the proposition that there is an independent distinct defence for a guarantor, who may be related to the principle debtor, to seek to vitiate a guarantee in favour of a bank by reason of a breach of an alleged duty owed by the bank to him to ensure that he had obtained independently legal advice or that he had taken some further steps to ensure that he fully understood the nature of the guarantee being given. In short, the third defendant's defence that he did not receive a copy of the guarantee fails. For the purpose of deciding on this particular defence, I am therefore of the view that it is not necessary for me to decide the issue of whether the letter of Ann Aspell was in fact sent to, or received by him, prior to entering into this guarantee.

The Second Defence

57. The second purported defence of the third defendant centres upon a claim of misrepresentation. In submission to the Court, Counsel for the third defendant claimed that there had been a representation to the defendant by the solicitor acting for the company/bank. Counsel submitted that the person who had witnessed the guarantee of the 18th March, 2008, Ms. Maria Toal, was a solicitor in the firm of T. Sheridan. This Court does not accept that there is any evidence, either from the defendant or apparent from any of the papers, that Ms. Maria Toal was acting as a solicitor for the bank in the course of the execution of the guarantee. There is therefore no evidence of any direct representation from the bank that the guarantee would be limited to the bond required by the Council in respect of development works being undertaking by the company and that the limit of his personal liability would only extend to the 28 acres of land held at Shercock, Co. Cavan.

58. The Court is prepared to infer that T. Sheridan & Co., were the Solicitors for the company or the solicitors for his brother. The respondent has sworn affidavits asserting he was not independently legally represented at the time he executed the guarantee. I take that to mean that T. Sheridan & Co. was not acting as his solicitors. The letter from Danny Hamilton referring to this defendant and his guarantee, was addressed to T. Sheridan & Company, Market Square, Bailieborough, Co. Cavan. It is entitled "Re: Denray Construction Limited". If the letter was being sent to T. Sheridan & Co. in respect of either this defendant or his brother, one would expect the letter to be headed in their names.

59. For the sake of completeness, the Court has considered that the affidavits of the third defendant refer to the letter from Danny Hamilton of the bank being in the possession of "my solicitors". The Court is of the view that this was intended to mean that the letter was in the possession of *his solicitors at the time he swore the affidavit*. Indeed, it could be observed that if the letter had been sent to his own solicitors prior to the guarantee, it is arguably the case that his defence of misrepresentation by the bank would be all the stronger.

60. The substantive argument of the third defendant is that there was a misrepresentation made by the company and his brother about the extent of the guarantee he was signing. His claim is that it was a "silent misrepresentation" made by the bank that caused him to believe that he was signing a guarantee limited to the bond required by Cavan County Council. This silent representation is really a type of indirect misrepresentation, where the letter of Mr. Danny Hamilton provides evidential support for his factual claims that his brother and the company misrepresented the situation to him.

61. Counsel for the bank has strongly urged upon this Court to subject the evidence of the third defendant to very close scrutiny. The contradictions and omissions, as detailed in the affidavit of Marie Moylett above, has caused this Court to pause and assess whether these are "facts which are in themselves contradictory and inconsistent with uncontested documentation" (*Irish Bank Resolution Corporation Limited (in special liquidation) v. McCaughey* [2014] 1 I.R. 749). It is certainly of considerable concern to the Court that this defendant swore an affidavit to the High Court which failed to include an addendum to a letter, which said addendum he now seeks to rely on as particular significance. That first affidavit also failed to set out in detail his defence, stating as it did that he now wished to take independent legal advice in respect of his position and seek time from the Court to do so. His counsel described that affidavit as a holding affidavit; in truth there is no such thing. It must also be considered somewhat unusual for a legally represented defendant to swear an affidavit setting out what he now says is an incomplete factual position. The fact that he swore in that affidavit that he wished to have more time to take legal advice does not in general provide an excuse for an incomplete affidavit.

62. In my view, it is however, of some considerable significance that this defendant has not sought in any of his affidavits to make the case that he actually saw the letter from Mr. Hamilton or the addendum prior to entering into the guarantee. His case is that these documents support the contention that he is making i.e. that the true position as to the guarantee was misrepresented to him by the company and his brother. The third defendant has said that his then solicitor produced the addendum page which appeared alongside Mr. Hamilton's letter from the National Irish Bank. This solicitor had taken over the practice of the original solicitor for the company and/or his brother and it is understandable that the solicitor had the letter on file with the addendum. In light of all this, the defendant's solicitor at the time of the swearing of the affidavit may not have been totally familiar with all the issues involved and

could have omitted the addendum when compiling the exhibit. In all these circumstances, the fact that the addendum was not exhibited in the first affidavit is not quite as sinister as it may appear at first glance.

63. Turning to the letter of Mr. Danny Hamilton, it can be seen that the letter is a curious construction even without considering the addendum. While both parties before me accepted that there were typographical errors on this letter, I am not so sure that each party was *ad idem* as to those errors. The bank did not put forward any evidence surrounding the issue of this letter apparently because Mr. Hamilton no longer works with the bank. Nonetheless, the Court must give attempt to assess the meaning and purpose of the letter from the evidence available.

64. The letter from Mr. Hamilton was dated 22nd October, 2007, but was stamped as received on 12th March, 2008 (strictly 12 MAR 2008). The body of the letter refers to a date of 29th February, 2007 as being the date on the facility letter. The second facility letter from the bank was undoubtedly dated 29th February, 2008. Indeed, as there was no 29th February in the non-leap year 2007, it is crystal clear that the reference was an error. Therefore the letter must have been referring to the facility letter of 29th February, 2008. The only reasonable conclusion is that 22nd October, 2007 is an incorrect date and that the letter was drafted and sent between 29th February, 2008 and the date of receipt namely 12th March, 2008. This is before the guarantee was signed on 18th March, 2008.

65. The letter concerned a guarantee "signed" by the third defendant but based on the dates this must have been the guarantee to be signed by the third defendant. There is no other guarantee to which it could have referred. The letter referred to the guarantee signed by the third defendant with regard to the mortgage on the property of 28 acres at Shercock, Co. Cavan would be relied upon by the bank. The letter then goes on to say that this was item 7(b) of the facility letter. That particular reference may well be correct and was meant to limit the first sentence to that of item 7(b) of the facility letter. It did not refer to item 7(a) which was the guarantee by Raymond O'Reilly and Liam O'Reilly for €290,000 supported by legal mortgage over dwelling house at Bailieborough.

66. In light of the lack of explanation from the bank as to how or why that letter came into being, it is difficult to be sure of the precise meaning of the letter. Is it restricted only to that part of the guarantee that relates to item 7(b) thus having no relevance to the full extent of the guarantee? Or is a reasonable construction of the letter that it was a confirmation that the guarantee that was to be signed, was only going to be enforceable in so far as item 7(b) was concerned? The Court accepts however, that on the face of the letter, it is at least arguable that it is reasonable to construe it as what has been termed a letter of comfort for the third defendant's position.

67. Such a construction might arise in two ways. It is an arguably reasonable construction of that letter that the only part of the guarantee to be signed by the third defendant will be that part of the guarantee relating to the 28 acres which in turn was the part of the guarantee which referred back to item 7B on the facility letter of 29th February, 2008. Moreover, it could also be an indication that despite a more complete guarantee being signed by the third defendant, the bank will only rely on that part which relates to the mortgage on the property of 28 acres at Shercock. On either construction, it is arguable that the disputed addendum adds nothing further to the statement on the first page of the letter.

68. In those circumstances, the documentation before the Court establishes that the bank wrote an undisputed single page letter to the solicitor for the company bearing an arguably reasonable construction that the only guarantee that the bank would be relying upon as against the third defendant was one which was restricted to the land at Shercock. Although that representation was not made directly to the third defendant, it is at least arguable that it was a representation made in the knowledge that it would, in turn, be made by the company/company director to the proposed guarantor. It must be recalled that the third defendant, was not a shareholder or a director of this company. Although the Court does not accept that he was a neophyte in terms of matters of company law in that he had been, at that stage, a director of at least two companies, he was nonetheless a proposed guarantor who was not directly involved with the company. Indeed, there is no evidence before me that the bank knew he was a sub-contractor of the company at the time of the guarantee.

69. Perhaps the importance of the letter lies in it as a piece of documentary evidence that shows that the company was interested in obtaining an indication from the bank as to the limit of the third defendant's guarantee. Even without having to finalise the letter's precise meaning, it certainly lends support to the third defendant's case that he was misled about the extent of the guarantee by the principal debtor, namely the company or indeed by the company's representative, namely his brother. The third defendant had always made the case that he believed that the guarantee related solely to the bond required for a contract that the company had with Cavan County Council and not otherwise. In his second affidavit the third defendant puts forward in detail for the first time the claim that it was represented to him that his personal liability would only extend to the interest in 28 acres of land held at Shercock, Co. Cavan. As stated above, the initial affidavit was sworn in a somewhat truncated fashion. While the Court deprecates this, the fact that his then solicitors were the solicitors for the company is a factor that the Court must take into account in considering whether the apparent contradictions between the affidavit rob his defence of any credibility.

70. In the view of the Court, it is an important factor that it was consistently claimed that there had been a misrepresentation to the third defendant about the extent of the guarantee. Insofar as the third defendant swore that it was unclear what the meaning and effect of the letter was, I do not view this as undermining his credibility to the extent that would require the Court to proceed to summary judgment. To a certain extent, the third defendant may be correct that it is unclear what the letter actually meant, given the incorrect dates and indeed the extent of the "comfort" it is providing. As stated above, it is also significant that the third defendant was not maintaining he had actually seen that letter. The letter does support a defence case that a misrepresentation had been made to him about the extent of the guarantee and that the misrepresentation was at the very least made indirectly by the bank, in the sense that the bank were at least on constructive notice that the contents of the letter would be presented to the third defendant by the company or its agents for the purpose of representing the extent of the legal guarantee.

71. For the reasons put forward by the bank, I am satisfied that the third defendant gains no support from the documentation from the Council confirming that the guarantee of the bank in relation to the €100,000 bond from the company had been cancelled. That documentation was simply confirming a factual situation and it did not have any particular relevance to the guarantee that the third defendant signed, save insofar as he claims that at an earlier stage it was represented to him, that his guarantee was limited to the extent of that bond. I do not accept however the contention that because that unmeritorious argument was made on affidavit that the third defendant's credibility was essentially undermined and his purported defence must be rejected. For the reasons I have set out, there is a document i.e. a letter from Danny Hamilton of the bank which bears the arguably reasonable construction that the bank will limit the guarantee to that covering the 28 acres at Shercock.

72. I have also had regard to the third defendant's argument about the heading of the guarantee which was sent to him by the bank after the commencement of proceedings. This now has a hand written heading which refers to "agreement with Cavan County Council." Although there is no evidence that this was on the guarantee at the time he signed it, the fact that it is referred to gives

some, *albeit* tenuous, support for the argument he is making i.e. that the guarantee was a limited one and primarily related to the bond with the County Council.

Conclusion

73. I am not satisfied that the third defendant has an arguable defence arising from his claim that he did not receive a copy of the guarantee. For the reasons set out above, I am however satisfied that there are arguable grounds for contending that this guarantee was entered into by reason of the wrongful act, namely misrepresentation, of the principle debtor (or its agents) as to the meaning and extent of the guarantee. In circumstances where the bank had provided a letter which might arguably be reasonably construed as a letter of comfort as to the extent of the guarantee, it is also at the very least arguable that the bank were under a duty in the circumstances of this particular case to ensure that the guarantee actually entered into was fully and completely understood by the third defendant.

74. Therefore the Court will refuse leave to the bank to enter summary judgment. I am not satisfied that the true meaning and purpose of the letter or of any alleged misrepresentation are matters upon which I can adjudicate in a summary fashion. I will direct a plenary hearing and grant the third defendant leave to defend the claim by the bank on the basis that the guarantee is unenforceable due to the misrepresentation by the principle debtor (or its agents) as to the extent of the guarantee, that the potential for that misrepresentation was known or ought to have been known by the bank as a result of the letter dated 22nd October, 2007 (*sic*) and that the bank in those circumstances took no further steps to ensure that the actual contents of the guarantee were known and understood by the third defendant.