THE HIGH COURT

2014 No. 2988 S

Between:

Allied Irish Banks p.l.c.

Plaintiff

– and –

James Doran, Senior

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 11th January, 2018.

I

Connolly

1. The decision in this application falls to be framed in the context of the decision of the Court of Appeal in *ACC Loan Management Ltd v. Connolly* [2017] IECA 119. In that case, certain loans to the first defendant, Mr John Connolly, were guaranteed by way of two guarantees, one of 2005 and one of 2008, given by Mr Maurice Connolly, co-defendant, appellant, and father to John. Mr Maurice Connolly contended on appeal that account should have been taken of the fact that he had not been provided with independent legal advice before giving the guarantee and that the transaction was an improvident one for a man who was a vulnerable and not especially well person in his late 60s. No evidence of the son's supposed undue influence was given. Even so, it was argued that the low standard identified in *Aer Rianta v Ryanair* [2001] 4 I.R. 607 was met where the lender knew of a close relationship (including father and son) and had not taken steps to ensure that independent legal advice had been obtained by the guarantor. This last-mentioned argument failed in the Court of Appeal, Finlay Geoghegan J. observing as follows, at para.28:

> *"There was no evidence before the High Court upon which it could be concluded that an arguable defence of undue influence or other wrong by the son was made out….I am not satisfied that, in the absence of the father making out an arguable defence that he gave the guarantee under the undue influence of his son (or because of any other alleged wrong such as misrepresentation), there is any arguable defence available in Irish law to him that the bank was under an obligation by reason of the known fact that he, the proposed guarantor, was the father of the principal debtor to take steps to ensure that he received independent legal advice or otherwise ensure that the guarantee was freely entered into such that the failure of the bank to take such steps is an arguable defence to the enforcement of the guarantee against him."*

2. The within case offers another example of an aged father giving a couple of guarantees in favour of, *inter alia*, his son, the latter of which guarantees is now being sued upon. A distinction between the facts of *Connolly* and those at hand is that here there is affidavit evidence which is prayed in aid of the defence that the guarantee being sued upon was procured by misrepresentation, to which issue the court returns later below.

3. Continuing for now, however, with the judgment of Finlay Geoghegan J. in *Connolly*, she found, at para.29, that neither the decision of the House of Lords in Royal *Bank of Scotland v Etridge (No.2)* [2002] 2 A.C. 773 nor that of Clarke J. in *Ulster Bank v. Roche and Buttimer* [2012] IEHC 166 provided "*authority for an independent or distinct defence for a guarantor, albeit related to the principal debtor, seeking to vitiate a guarantee executed in favour of a bank by reason of a breach of an alleged duty owed by the bank to him to ensure that he has obtained independent legal advice or has taken some further steps to ensure that he fully understood the nature of the guarantee being given".*

4. The case at hand, as will be seen, does not contend for such a free-standing duty. Here, submission is made that "[h]*istorically the bank believed it necessary to ensure* [that Mr Doran]*…had independent legal advice but in 2010…for some reason, the bank chose to deal with…Mr Doran where he had no independent advice*…[I]*nstead he relied exclusively on the bank"*. However, this submission is not borne out by Mr Doran's evidence. He avers, as will be seen below, that "*Prior to my entering into the guarantee arrangement in 2006 I had the opportunity to receive and to consider independent legal advice….The plaintiff was aware that I had received independent legal advice"*. There is no mention in his evidence that the bank acted differently in 2006 and 2010; it is Mr Doran who acted differently as regards whether or not to obtain legal advice in respect of the respective guarantees. Moreover, Mr Doran's complaint in his affidavit evidence, as will be seen, is not that he relied exclusively on the bank but rather that through the concatenation of circumstances presenting, "*I had no understanding of the nature and effect of the guarantee that I signed".*

5. Finlay Geoghegan J. concludes, *inter alia*, as follows, in *Connolly*, at para.49:

> *"The appellant's unfortunate position is that as a person of full age he has signed a guarantee in favour of the bank. Whilst he was referred to in submission as a 'vulnerable' person there was no evidence of any particular vulnerability. He has not put any evidence before the court upon which it could be argued that he did not freely enter into the commitments under the guarantee he signed and permitted to be delivered to the bank in connection with the loans being given to his son. In the absence of evidence which would support an arguable duty imposed on the bank and arguable breach thereof there is no arguable defence."*

6. Armed with this consideration of *Connolly*, the court turns now to a detailed consideration of the case at hand.

II

Facts

7. This is a summary claim for €126,195 plus interest and costs pursuant to a personal guarantee dated 20th July, 2010. The circumstances in which the guarantee came to be executed are as well described by Mr Doran in his affidavit as they could be by the court; for some reason Allied Irish Banks never engages in its affidavit evidence with the circumstances in which the guarantee came to be executed by Mr Doran, confining itself to a recitation of certain elements of the guarantee and a consideration of the substance of the same, so the following averments of Mr Doran are effectively uncontroverted in the evidence.

"5. Briefly, by way of background, I say I am a retired farmer and am now 80 years of age. I only completed my primary school level of education. I am in receipt of the State Pension and a Pension from Eircom. I am not a man with much experience in commercial or banking matters. The only personal loan I have entered into with the plaintiff was for £1,000 many years ago for a tractor.

[Court Note: What Mr Doran avers to in this regard is a vulnerability that rests on his advanced years, his relatively limited education, and his general inexperience in banking and commercial matters.]

6. In 2006 I did provide a guarantee to the plaintiff in respect of a loan…advanced by the plaintiff to my son…and his wife. My knowledge of the project, for which the loan was required, was quite superficial but I understood that the [said] loan….was to assist them in setting up a dental practice…

7. I had no direct financial interest in the project. I was neither a shareholder, director nor an employee of the business….

[Court Note: What Mr Doran avers to in paras.6 and 7 likewise paints a picture of vulnerability in the form of an elderly man of limited financial means, with no banking and commercial knowledge and but a superficial knowledge of a project, giving a financial guarantee of that project.]

8. I say that the 2006 loan advanced to [my son and his wife]…*was repayable over 180 months…commencing on the 22nd August 2006.*

9. Prior to my entering into the guarantee arrangement in 2006 I had the opportunity to receive and to consider independent legal advice….

[Court Note: Repeatedly contended by counsel for the bank at the hearing of the within application was the fact that the two guarantees, that of 2006 and that of 2010, are effectively identical, and so if Mr Doran was satisfied to enter into the guarantee of 2006, following on the legal advice obtained around that time, it followed that he would likewise have been satisfied to do so had he received legal advice in 2010. The court respectfully does not accept that this is so. Professional legal advice is given by reference to all the facts presenting at any one time. Moreover, the facts in 2010 were notably different in at least two significant respects: first, Mr Doran was an older man than he had been; second, by 2010 the beneficiaries of the guarantee had acquired a history of default, a point the significance of which any competent legal advisor would doubtless have drawn to the attention of Mr Doran.]

10. In respect of the events leading to the signing of the 2010 guarantee document by me, I say the following:-

> *(i) I say that on 20 July 2010, I was asked by my son…to attend at the plaintiff's premises in Carrick-on Shannon to sign documentation. At no point did my son or…AIB Bank explain what the document was, what it related to or why they needed your deponent to sign it.*
>
> *(ii) I was not contacted by AIB or anyone acting on its behalf prior to the meeting.*
>
> *(iii) I did not have sight of the guarantee document prior to signing same. At no stage prior to the meeting was I presented with a draft or copy of the document that I was required to sign so I could read, review or consider the document or its contents.*
>
> *(iv) I say that when I attended at the plaintiff's premises on 20 July 2010, I was presented with the document to sign. I had no idea of the nature of the document. I say that I was not given any opportunity to read same or to familiarise myself with the details of the proposed guarantee. I was not given an opportunity to read same or to familiarise myself with the details of the proposed guarantee. I was not given an opportunity to ask any questions. I was simply presented with the document in the public office of AIB in Carrick-on-Shannon and…[a bank official] told me where to sign.*
>
> *(v) I was not requested by AIB or anyone acting on its behalf to provide details of my personal finances and assets or to give any details of my wherewithal to pay the sum of €126.195 if called upon to do so.*
>
> *(vi) I was not advised by AIB or anyone acting on its behalf that I should take independent legal advice prior to signing the guarantee.*
>
> *(vii) I was not asked by anyone at the meeting whether I had reviewed the guarantee nor was it suggested to me at the meeting that I should take the time to read the guarantee. The meeting lasted three minutes and was all over very quickly. Similarly, no inquiry was made of me as to whether I had been offered or taken legal advice on the guarantee.*
>
> *…*
>
> (ix) *At no point was I, your deponent, told that the guarantee I was signing was materially different to the 2006 guarantee* [Court Note: it was not materially different] *or that the purported guarantee related to potential future credit to be offered to* [my son and his wife]….
>
> *(x) I had no understanding of the nature and effect of the guarantee that I signed. I did not pay attention to the amount of the guarantee. I simply signed the guarantee because I trusted my son's judgment and in the belief that it was in his interests and for his benefit to do so…".*

[Court Note: What Mr Doran clearly seeks to portray to in the foregoing is a situation in which an elderly man of limited financial means, with no banking and commercial knowledge and but a superficial knowledge of a project, is led into signing up to a financial guarantee in pressurised circumstances in which he did not appreciate what he was doing and was given no opportunity properly to consider what he wanted to do.]

8. As Hogan J. notes in his (somewhat reluctant) concurring judgment in *Connolly*, para.25 "*the settled view of this Court* [of Appeal, which view is, of course, binding on the High Court] *is to the effect that, at least absent an express claim of undue influence or a claim of misrepresentation, a bank is under no affirmative duty to ensure that a surety receives independent legal advice*". It does not appear to the court that undue influence is contended for in this case: it is half-hinted at in Mr Doran's affidavit evidence but never touched upon 'head on', and the submissions have focused on the possibility of misrepresentation (considered hereafter). Neither, the court notes in passing, is there any evidence that there was some unusual feature of the relationship between the beneficiaries of the guarantee and Allied Irish Banks which ought to have been disclosed to Mr Doran.

9. Misrepresentation typically occurs when one contracting party utters a statement of fact which is untrue; it is possible for silence to constitute a statement, though only in exceptional cases. Mr Doran contends that misrepresentation arises on the facts of this case because, he maintains, Allied Irish Banks remained silent about the fact that, by the time of the 2010 guarantee, his son and daughter-in-law were debtors in default. Thus, Mr Doran avers, "*I say when I was asked to sign the Guarantee…in AIB Bank in Carrick-on-Shannon in July 2010 I was not made aware I was providing a guarantee to cover loans to a defaulter and I was not made aware that* [my son and daughter-in-law]…*were in default*." This touches on the issue of whether, as a matter of Irish law, a bank has a duty to inform a prospective guarantor of the details of the underlying transaction. Writing in this regard, Breslin, J. in Banking Law in Ireland, 3rd ed., observes, *inter alia*, as follows, at 580-1:

> *"It need hardly be stated that a bank is no ordinary business undertaking. The banking crisis and its consequent devastating effect on the national and international economy has generated, or lent support to, the realisation that banks bear a measure of responsibility in the carrying on of business with their customers, be they retail or business customers. These responsibilities go beyond what is required by statute or regulatory stipulation. The difficulty lies in identifying the boundaries of a bank's unremunerated responsibilities. In the context of guarantees, it is unclear whether, as a matter of Irish law, a bank has a duty to inform a prospective guarantor of unusual features of the underlying transaction. In* Moorview Developments Ltd v. First Active plc [[2009] IEHC 214], *Clarke J. accepted the proposition – but only for the purposes of argument – that there may be circumstances in which a creditor is obliged to explain to a surety unusual features of the arrangements between either the creditor and surety, or surety and creditor, so that if no explanation is provided the surety could be discharged. Clarke J. held that such a duty could not arise on the facts of this case. The plaintiff contended that the following two matters should have been explained to it. First, that the bank had unilaterally altered its standard terms and conditions. Secondly that it was considering appointing a receiver over the plaintiff's assets. Clarke J. held that neither of those matters could conceivably constitute the sort of unusual feature which a bank would have to alert a surety to – even assuming that such a duty existed. Accordingly, the status of such a duty in Irish law is uncertain. Other common law jurisdictions have refrained from imposing such a duty on a creditor. It has been held by the Canadian courts that the bank has no duty to advise a guarantor of the principal debtor's financial circumstances: the mere fact that the bank is seeing a guarantee should make it clear that the principal debtor is a doubtful credit risk. It has been held by the English courts that the bank is under no duty to explain the nature and effect of the transaction to a prospective guarantor."*

10. Even if this Court, for the purposes of argument, takes the position that there are circumstances in which a creditor is obliged to explain to a surety unusual features of the arrangements between either the creditor and surety, or surety and creditor, so that if no explanation is provided the surety could be discharged, the court respectfully does not see that there are any such unusual features averred to in the evidence before it, least of all in the proposition that a father would act as guarantor for his son in circumstances in which there is no commercial advantage to the father in so acting.

III

Form of Summons

(i) Complaint Made.

11. Order 4, rule 4 of the Rules of the Superior Courts (1986), as amended, provides, *inter alia*, that "*The indorsement of claim on a summary summons…shall state specifically… the relief claimed and the grounds thereof.*" The summary summons that issued in the within proceedings reads, *inter alia*, under the heading "*SPECIAL INDORSEMENT OF CLAIM*":

> *"…3 The Plaintiff's claim against the Defendant is for the sum of €126,195.00 which said sum is due and owing by the Defendant to the Plaintiff on foot of a Letter of Guarantee dated the 20th day of July 2010 whereby the Defendant agreed to pay to the Plaintiff on demand all sums of money due to the Plaintiff by* [named persons]…*up to a limit of €126,195.00 and which said sum is now due and owing by* [the said named persons]…*to the Plaintiff*.
>
> *4. Despite demand the Defendant has failed, refused and/or neglected to discharge the said sums or any part thereof.*
>
> ***`And the Plaintiff claims***
>
> *(a) Judgment in the sum of €126,195.00.*
>
> *(b) Interest and charges pursuant to the Terms of the Guarantee Agreement…".*

12. Complaint is made that the special indorsement of claim in the within proceedings fails to set out properly the plaintiff's claim, fails to set out any calculation for interest, and contains no particulars with regard to the demand made. Reference has been made by the plaintiff to a number of cases, *viz. Gold Ores Reduction Company Ltd v. Parr* [1892] 2 Q.B. 14, *Caulfield v. Bolger* [1927] I.R. 117, *Bank of Ireland v. Connell* [1942] 1 I.R. 1, *Stacey and Harding Ltd v. O'Callaghan* [1958] I.R. 320, *Bond v. Holton* [1959] I.R. 302, and *Gladney v. Grehan* [2016] IEHC 561. However, it seems to the court that the relatively recent decision of the Court of Appeal in *AIB plc v. Pierce* [2015] IECA 87 is determinative of the issue raised. The facts at play in Pierce are stated by Hogan J. as follows, at paras. 2-5:

> *"2. The plaintiff bank…advanced various sums by way of loan to the defendant, Ms Pierce, from 2007. Further facilities were granted in April 2008 and were again re-structured in June 2009. The facility fell into arrears and by letter dated 23rd April 2013 the plaintiff's solicitors demanded repayment of the principal sum. These proceedings were commenced by way of summary summons shortly thereafter.*
>
> *3. The affidavits filed on behalf of the Bank give further details of the account and accrued interest. One of the documents therein exhibited was an open letter from the defendant's financial adviser to AIB. It is, perhaps, striking that*

this letter did not seriously dispute the debt and gave details of settlement proposals which had been advanced on her behalf.

4. The matter came before the Master on a number of occasions, but on 16th October 2014 he struck out the summons pursuant to Ord. 63, r. 5 on the ground that the summons was defective for want of failure to disclose adequate particulars regarding interest. AIB appealed that decision to the High Court. In his decision 14th November 2014 Binchy J. upheld the decision of the Master to strike out the summons on the ground that the claim for interest had not been sufficiently particularised. AIB now appeals to this Court against that decision.

5. The indorsement of claim contained in the summary summons was in the following terms:

> *'The plaintiff's claim is for €785,928.24 against the defendant together with continuing interest at current bank rates being monies due by the defendant to the plaintiffs for monies leant by the plaintiffs to the defendant forborne at interest by the plaintiffs from the defendant and paid by the plaintiffs as bankers for the defendant at her request within the last six years.'*

Particulars:

Loan Account Number [details supplied]

23rd April 2013: - amount formally demanded: (total): €785,928.24".

(ii) The Decision in Pierce.

13. In his judgment, Hogan J. considers the object of pleadings, addresses the question of sufficiency of particulars provided, indicates the general desirability that an indorsement of claim on a summary summons would be pithy and concise, and notes that it would be "*special*", "*unusual*", "*perhaps even exceptional*" cases where more elaborate particulars might be required. It would be fair to say that his is a judgment which, drawing on earlier case-law, adopts what might not unreasonably be styled a 'non-pernickety' approach to considering the adequacy of pleadings. Per Hogan J., at paras. 9-18:

"[Object of Pleadings]

9. [T]*he whole object of pleadings and, specifically, the requirements contained in the Rules of the Superior Courts regarding to particulars was articulated by Henchy J. in* Cooney v. Browne [1984] I.R. 185, 191 *in the following terms*:

> *'…where the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled to such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial.'*

10. The Rules of the Superior Courts admittedly contain a variety of distinct provisions dealing with the obligation to provide particulars. While the obligation to supply particulars may vary depending on the context, these provisions all, however, share one common objective, namely, to ensure that litigants properly know the case that they have to meet. The obligation to supply particulars is, accordingly, not an end in itself.

11. This general principle is also reflected in the case-law regarding particulars in summary summons proceedings. It is true that the procedure provided for by Ord. 4, r.4 is attenuated. This, however, reflects the limited purpose of the summary summons procedure, namely, to provide for a speedy mechanism whereby a plaintiff creditor can recover a liquidated sum from a defaulting debtor. But as to the guiding principle to be applied, there can, I think, be very little doubt.

[Sufficiency of Particulars]

12. The defendant is accordingly entitled to sufficient particulars as will enable him to determine himself whether he is obliged to pay the sum claimed. The principle was stated by Cockburn C.J. in Walker v. Hicks (1877) 3 Q.B.D. 8, 9:-

> *'I think a party, who is placed in the predicament of being liable to have a judgment signed against him summarily, is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist… It seems to me that a party is entitled, before summary proceedings for judgment are taken against him, to know specifically what is the claim against him.'*

13. Mellor J. spoke to the same effect [(1877) 3 Q.B.D. 8,9-10]:

> *'It seems to me very important to prevent any loose dealing with regard to the form of special endorsements. A very summary remedy is given to the plaintiff where there has been such an endorsement. But before the plaintiff can ask for final judgment the defendant ought to have afforded him, by the endorsement of reasonably specific particulars of claim on the writ, an opportunity to see whether the claim is one to which he has any defence or not.'*

14. This issue was further considered in Allied Irish Banks Ltd v. The George Ltd, *High Court, 21st July 1975. At issue in* The George *was whether the standard form endorsement of claim used in summary summons proceedings actually satisfied the requirements of Ord. 4. This was a case in which the bank sued for money owed by a customer. Butler J. held that the special endorsement of claim 'complies, though not perhaps ideally, with these requirements.' He continued:-*

'I think it would have been preferable if the agreement to pay interest at the normal rate had been more particularly pleaded and that it had been indicated whether the loan was by way of overdraft or special advance or term loan or whatever might be the case. All this, however, is something which is clearly within the knowledge of the defendant so as to determine his attitude towards the claim. But with the reservations as stated, I am prepared to accept the special endorsement of claim as sufficient.'

15. In the present case the particulars supplied by AIB in the indorsement of claim refer to the sum outstanding, the date of demand and the relevant account. To my mind, this is sufficient, at least so far as the present case is concerned. It is clear from the correspondence from her financial adviser which has been exhibited in the grounding affidavits filed on behalf of AIB that she is fully acquainted with the nature of the bank's claim against her. Adopting the words of Ryan J. in Bank of Ireland v. Keehan *[2013] IEHC 631, it cannot be said that this defendant 'has asserted…any confusion or uncertainty as to his liability.'*

[Pithy and Concise]

16. Counsel for Ms Pierce…suggested that the Bank could and should have provided by way of particulars contained in the indorsement of claim a running account of the loan obligations, with additional details as to interest, nature of the loan, repayments and so forth. Doubtless all of this information could have been supplied, save that in that situation the indorsement of claim would have taken on the character of a bank statement rather than a pleading. It is clear, however, from the language of Ord. 4, r. 4 that this is what the drafters of the Rules sought to avoid: they aimed instead for a pithy and concise statement of the claim.

17. I do not doubt but that there might be special cases involving proceedings brought by way of summary summons where more elaborate particulars might be required. Yet such cases are likely to be unusual – perhaps even exceptional – and no objection to the form of pleading should properly be entertained unless the defendant has first made out a convincing case by way of replying affidavit to the effect that, absent such additional particulars, the fair defence of the proceedings would be compromised.

18. Nothing of the sort arises in the present case….[T]*he objection here was based on a pure pleading point to the proceedings as cast in their present form. In my view, however, the indorsement of claim in the present case complies with the requirements of Ord 4, r. 4."*

(iii) Key Points Arising.

14. It seems to the court that six key points of immediate relevance arise from the judgment of the Court of Appeal in *Pierce, viz*.

A. Object of Pleadings

1. The whole object of pleadings is to ensure that litigants properly know the case that they have to meet.

2. The obligation to supply particulars is not an end in itself.

B. Sufficiency of Particulars

3. A defendant is entitled to sufficient particulars as will enable him to determine himself whether he is obliged to pay the sum claimed.

C. Pithy and Concise

4. Order 4, rule 4 of the Rules of the Superior Courts (1986), as amended, aims for a pithy and concise statement of the claim.

5. There might be special cases involving proceedings brought by way of summary summons where more elaborate particulars might be required. Yet such cases are likely to be unusual, perhaps even exceptional.

6. No objection to the form of pleading should properly be entertained unless the defendant has first made out a convincing case by way of replying affidavit to the effect that, absent such additional particulars, the fair defence of the proceedings would be compromised.

(iv) Conclusion.

15. Mr Doran properly knows and knew from the indorsement of claim in this case what case he has had to meet. He has received sufficient particulars as have enabled him to determine whether he is obliged to pay the sum claimed. The indorsement of claim in a summary summons, as contemplated by the Rules of the Superior Courts, is pithy and concise. This is not a special, unusual or exceptional case in which more elaborate particulars are required. Mr Doran has not made out a convincing case by way of replying affidavit that, absent such further particulars as he claims to be desirable, the fair defence of the within proceedings would be compromised. It follows from all of the foregoing that adequate particulars have been supplied by the plaintiff for the purposes of O.4, r.4.

IV

Unfair Terms in Consumer Contract Regulations

16. Clause 6 of the guarantee of July 2010 provides, *inter alia*, as follows:

> *"The Bank shall be at liberty without obtaining any consent from the Guarantor and without thereby affecting its rights or the Guarantor's liability hereunder at any time:-*
>
> > *(i) to determine, enlarge or vary any credit to the Borrower…*
> >
> > *(iv) to compound with, give time for payment to, accept compositions from and make any other arrangements with the Borrower or any obligant on any bills, notes, obligations or securities whatsoever held or which may hereafter be held by the Bank for or on behalf of the Borrower."*

17. That, it is claimed for Mr Doran, is the class of term identified in Schedule 3, para.1.(i) of the Regulations of 1995 as an unfair term, being (to quote para.1(i)) a term which has the object or effect of "*irrevocably binding the consumer to terms which he had no real opportunity of becoming acquainted before the conclusion of the contract*". Two problems, it seems to the court, arise with this contention. First, there is no aspect of cl.6 of the guarantee being sued upon with which Mr Doran did not have the opportunity of becoming acquainted before he signed the guarantee. It was he who elected to sign the guarantee without reading it. Second, para.1(i), it seems to the court, is concerned with the terms of the contract that the consumer is executing; it does not impose a requirement that the detail of every eventuality which might arise pursuant to that contract must be captured *a priori* by that contract. It suffices, in other words, that Mr Doran expressly agreed to clause 6; it does not follow as a consequence of para.1(i) that he needed expressly to agree to all that was done pursuant to cl.6.

18. Counsel for Allied Irish Banks also suggested that the form of the 2010 guarantee was and is, for all intents and purposes, identical to the 2006 guarantee and that Mr Doran had the opportunity of considering the form of the 2006 guarantee prior to executing the 2006 guarantee and, as touched upon previously above, had even received legal advice at that time, so in effect he did have a real opportunity of becoming acquainted with the form of the 2010 contract. Respectfully, the court does not accept this contention. There are two reasons why this is so. First, the 2010 guarantee was not even in contemplation in 2006. Clearly a very real difficulty would present under para.1(i) with the suggestion that a person could become familiar with the terms of a contract at a point in time which was so far in advance of the conclusion of a contract that the contract was not even in contemplation at the time of the alleged familiarisation. Second, even if this was a possibility, the consideration of the terms of a prospective contract is a contextual exercise done in light of all the circumstances presenting at any one time. So, for example, a contract, the terms of which seem perfectly acceptable to a prospective guarantor in 2006, e.g. where he is contemplating acting as surety for someone who has never defaulted on a loan, may seem thoroughly unacceptable in 2010, e.g., because the person whose liabilities it is proposed to guarantee has in the meantime defaulted on certain loans, thus almost certainly raising his risk profile for a prospective guarantor.

V

Sending Matters to Plenary Hearing

19. Mr Doran contends that the within proceedings ought to be sent to plenary hearing. The hurdle that he must cross to succeed in having matters sent to plenary hearing is strikingly low. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 623:

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

20. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, 7, McKechnie J. summarised as follows the relevant principles to be brought to bear when a court approaches the issue of whether to grant summary judgment or leave to defend:

> *"(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…*
>
> *(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…*
>
> *(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?'…*
>
> *(viii) this test is not the same as and should not be 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 is 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."

21. Notwithstanding the low threshold set in *Aer Rianta*, and mindful, *inter alia*, of that "*discernible caution*" which, to borrow from the judgment of McKechnie J. in *Harrisrange*, falls to be exercised by the court when it comes to the power to grant summary judgment, the court does not consider that Mr Doran has advanced any argument that would justify the within matter being sent to plenary hearing.

22. Reference was made at the hearing of the within application to the judgment of Hogan J. in *Connolly*. Had the within application fallen to be decided by reference, *e.g.*, to Part III of that judgment and the equitable principles as identified and considered therein, a contrary – and it might (perhaps not unreasonably) be contended, fairer – conclusion to that which this Court is compelled by the *ratio decidendi* of *Connolly* to reach, would have been arrived at. However it is the *ratio* of the decision of the Court of Appeal that binds this Court, and it is clear from, *inter alia*, Part IV of the judgment of Hogan J., where that *ratio* lies. This Court is therefore coerced as a matter of law into granting to AIB plc the judgment that it comes to court seeking.

23. Given Mr Doran's advanced years, the court respectfully expresses the earnest hope that the manner of enforcement of the within judgment by AIB plc will be informed and tempered by that regard which Mr Doran's age ought rightly to command. However, the court cannot of course dictate how AIB plc may elect hereafter lawfully to proceed in the pursuit of its commercial self-interest.