THE HIGH COURT

2016 No. 1324 S

Between:

ALLIED IRISH BANKS PLC

Plaintiff

– and –

ALBIE PURCELL, FLORENCE PURCELL AND ALBERT PURCELL, JUNIOR

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 1st October, 2018.

1. AIB is a regulated financial institution. As regards the individual defendants, (i) the court was advised at hearing that judgment has been entered against the first-named defendant (the father of the third-named defendant), (ii) the second-named defendant (the mother of the third-named defendant) has, unfortunately, passed away, and there has as yet been no grant of probate in respect of her estate, which (iii) leaves the third-named defendant as the sole defendant in respect of whom judgment is now sought.

2. The facts can be stated briefly. By letter of sanction dated 17th January, 2008, AIB made available to the defendants a loan facility in the amount of €3m. The security provision of the letter of sanction, as signed by the three borrowers, provides as follows:

> *"SECURITY: 1. All Sums Legal Charge over 60 acres of Agricultural land at [Stated Lands A]…vesting in the sole name of [the since deceased] Mrs Florrie Purcell.*
>
> *2. All Sums Legal Charge over 97 acres of Agricultural land at [Stated Lands B]…now being purchased to vest in the joint names of Albie Purcell, Florrie Purcell and Albert Purcell.*
>
> *3. All Sums Legal Charge over 20 acres of Agricultural land at [Stated Lands C] vesting in the joint names of Albie Purcell and Florrie Purcell.*
>
> *Security item(s) 1, 2, 3 above must be in place before drawdown. The Bank's cost and outlay if any in taking the security will be advised to you in advance and debited to your account."*

3. By written demands dated 23rd June, 2015 and 3rd December, 2015, AIB demanded the payment of the sum that it claims was then due and owing by, inter alia, the third-named defendant under the above-referenced lending arrangement. Despite the said demands, the third defendant, it is claimed, has failed, refused and/or neglected to pay or repay the sum due and owing by the third defendant to the plaintiff. AIB now seeks, as against the third defendant, summary judgment in respect of the entire sum of €3.7+m owing under the loan agreement.

4. Notably, and the court touched upon this failing at the end of the hearing of this matter, (i) although the letter of sanction expressly provides in its opening line that "*The Bank is pleased to offer you the facility below subject to the terms and conditions set out in this letter and subject also to the Bank's General Terms and Conditions Governing Business Lending*" [Emphasis added] (thus incorporating the said general terms and conditions into the loan agreement between the parties), (ii) AIB has not put the said general terms and conditions in evidence before the court. Instead it comes to court claiming that the third-named defendant is jointly and severally liable under a loan agreement for the entire sum of €3.7+m owing under same (a) without putting the entirety of the loan agreement in evidence before the court, and (b) merely putting in evidence a letter of sanction which issued to three borrowers but which makes no reference whatsoever (none at all) as to whether, for example, those three persons are jointly and/or severally liable. The proposition that a court, at the behest of one party to a contract, would grant an order of €3.7+m on the basis of selected provisions of that contract when the whole is readily available and there is no good reason for the omission is, with respect, unsustainable.

5. Various contentions were made by counsel for the third-named defendant as regards the legal consequences when (as happened here) a lending institution elects, without the knowledge of an affected party, not to insist on compliance with a particular security obligation (here Security Item No 2) where (a) compliance with same would have conferred a benefit on that party and (b) compliance with the security obligation as initially agreed was stated to be a pre-condition to drawdown. Strictly speaking, the court does not consider it necessary to address these contentions: there is and can be no question of AIB getting summary judgment for the amount sought of the third-named defendant on the basis of an alleged joint and several liability by reference to a loan agreement which, to the (incomplete) extent that it has been exhibited before the court, makes no reference to the nature of the liability of the borrowing parties. However, for the sake of completeness, the court deals in the next paragraph below with the issues raised by counsel for the third-named defendant.

6. Counsel for the third-named defendant contends that Item 2 in the security clause contemplates that Stated Lands B (then owned by the first and second-named defendants) will be transferred into the names of the three defendants and charged by them all. That was the arrangement that was agreed between the parties. Instead, AIB elected to depart from that arrangement "*for reasons which I do not presently understand*", the third-named defendant avers in his affidavit evidence, later adding "[T]*his security [i.e. Security Item 2] was, per the Sanction Letter to be in place prior to the drawdown of funds….Insofar as this did not occur, I presently have no knowledge as to why this was the case, save that I would now surmise that a new arrangement may have been entered into the Plaintiff and my father prior to the drawdown of funds*". The net effect of what occurred, at least on the third-named defendant's version of events, is that he appears to have joined in a loan arrangement which was to yield a pre-drawdown benefit to him in terms of a property transfer (without which the transaction was not to proceed); however that arrangement was later restructured, he claims without his knowledge, in such a way that two of the borrowers got the benefit of the borrowings and the third-named defendant got but a repayment obligation. Counsel for the third-named defendant contends by reference, *inter alia*, to *O'Connor v. Coady* [2004] 3 IR 271, that the combined effect of Security Item 2 and the provision in the "*SECURITY*" clause that "*Security item(s) 1, 2, 3 above must be in place before drawdown*" was to establish a conditional agreement that could only be enforced – as against the third-named defendant – upon fulfilment of, inter alia, Security Item 2. Even if the court ignores for a moment (and it cannot ignore) the fact that the court does not have the complete loan contract before it (and so does not know, for example, what provision, if any, the contract makes where a security requirement is waived by one of the parties, if indeed it can be so waived), it seems to the court that there is more than enough in the foregoing to enable the third-named defendant to vault the low hurdle set, *inter alia*, by *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 in terms of having the within matter sent to plenary hearing: the confusion over what was intended, what has occurred, why it occurred, and the legal consequences of same *vis-à-vis* the third-named defendant are not matters that can be resolved at summary hearing.

7. As just mentioned, the hurdle to be surmounted by the third-named defendant as regards having this matter sent to plenary hearing is notably low. As Hardiman J. stated in the Supreme Court in the *Aer Rianta* case, at 623:

> *"[T]he fundamental questions to be posed on an application such as this remain: [1] is it 'very clear' that the defendant has no case? [2] Is there either no issue to be tried or only issues which are simple and easily determined? [3] Do the defendant's affidavits fail to disclose even an arguable defence?"*

8. Given AIB's failure, for no good reason, to put the complete loan agreement before the court – thereby rendering it impossible for the court to identify the nature of the liability arising on the part of the third-named defendant – the clear respective answers to questions [1], [2] and [3] in the just-quoted text is, for the reasons outlined previously above, [1] 'No', [2] 'No', and [3] 'No'. What the position would be if the court had the complete loan agreement before it cannot be known; it may be, for example, that the complete contract makes provision concerning waivers of security requirements. However, for the avoidance of doubt, on the basis of such (incomplete) evidence as is now before the court, and confronted, as it is, with a situation where (a) a lending institution has elected not to insist on compliance with a particular security obligation, (b) in circumstances where compliance with such obligation (I) would have conferred a benefit on a borrower and (II) that security obligation had been agreed to be a pre-condition to drawdown, the court arrives at the same conclusion in respect of questions [1], [2] and [3] above.

9. Having regard to all of the foregoing, and mindful, *inter alia*, of that "*discernible caution*" which McKechnie J. indicates in *Harrisrange Ltd v. Duncan* [2003] 4 IR 1, 7, should be brought to the exercise of the power to grant summary judgment, there is no question but that this is a case which requires to be sent to plenary hearing.