THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 399

Appeal Nos. 2016/22

Ryan P.
Irvine J.
Hanna J.

BETWEEN/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF / RESPONDENT

- AND -

MICHAEL CURRAN

FIRST NAMED DEFENDANT

- AND -

MAUREEN CURRAN

SECOND NAMED DEFENDANT / APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 21st day of December 2016

1. This is an appeal by the second named defendant, Mrs. Maureen Curran, ("Mrs. Curran") against the judgment and order of the High Court (McGovern J.) of 21st December, 2015, whereby he granted the plaintiff / respondent, the Governor and Company of the Bank of Ireland ("the bank"), summary judgment against Mrs. Curran for the sum of €1m. The issue on this appeal is whether the trial judge erred in law when he concluded that Mrs. Curran had not established a bona fide credible defence to the bank's claim such that the proceedings ought to have been remitted to plenary hearing.

2. The bank, in its claim which was commenced by summary summons on 27th October, 2015, sought judgment against Mrs. Curran on foot of a guarantee dated 28th May, 2008, ("the guarantee") whereby she guaranteed the liabilities of a company, XL Fuels Group Ltd. ("the company"), to the extent of €1m. plus interest.

3. Following the issue of the bank's motion for summary judgment on 2nd November, 2015, affidavits were exchanged between the parties. Three in number were sworn on behalf of the bank detailing Mrs. Curran's dealings with the bank and the circumstances surrounding her execution of the guarantee. In response, Mrs. Curran swore two affidavits in which she advanced her intended defence. Mr. Michael Ryan, a solicitor who had acted on her behalf concerning other banking transactions concluded some weeks earlier, also swore an affidavit on her behalf.

4. In her affidavits Mrs. Curran set out to demonstrate that there were three grounds upon which she might arguably and credibly defend the proceedings; the first being that the guarantee was unenforceable as one executed under undue influence, the second that the guarantee was unenforceable as an unconscionable bargain and, thirdly, a defence based on the doctrine on *non est factum*.

5. In his detailed judgment delivered on 21st December, 2015, McGovern J. addressed the evidence upon which Mrs. Curran relied in support of her three potential grounds of defence before concluding that she had not established any arguable defence to the proceedings.

Relevant background facts

6. It is only possible to consider whether the trial judge erred in law in failing to refer the within proceedings to plenary hearing if the relevant background facts are known. For this reason I will try to summarise the more relevant aspects of the evidence that was before the High Court.

7. The company was incorporated in 2007. Mrs. Curran was a director of the company and was also its secretary. She received what was described as a "stipend" in respect of such services.

8. By facility letter addressed to the company secretary dated 28th May, 2008, the bank agreed to make additional facilities available to the company on the terms and conditions therein proposed. These included the requirement that further security would be provided in the form of a letter of guarantee (limit of €1m.) to be executed by Mrs. Curran. The acceptance of that facility was signed by Mrs. Curran and her son, Michael Curran, the first named defendant.

9. On the same date, at her home which was at her request, Mrs. Curran signed the aforementioned guarantee in the presence of two bank officials, Vivien Rountree and Lorraine Kavanagh. Mr. Michael Curran was not in attendance.

10. It is not disputed that Mrs. Curran signed the guarantee in three places. The first signature appears beneath a warning advising that if the borrower failed to pay the guarantor would become liable to discharge the outstanding loan together with interest and which also advised that prior to signing the guarantee independent legal advice should be obtained. The second signature acknowledges receipt of a copy of the guarantee and indemnity. The third signature appears beneath a statement written by Mrs. Curran which advises that she understood the nature of the liability she was undertaking and that she did not wish to obtain the independent advice of a solicitor. It is accepted that the text of this last statement, whilst written in the hand of Mrs. Curran, was one which would have been read out to her by one of the bank officials present.

11. It is not disputed that the following day Mrs. Curran received a letter from the bank enclosing a copy of the guarantee. The same letter explained the reason for which the guarantee had been required and also advised her that the bank would review the ongoing

facility in three months time.

12. On 22nd September, 2008, the bank wrote to Mrs. Curran asking her to confirm that she was amenable to permitting the bank to rely upon the guarantee as continuing security for the facility then being afforded to the company, a request accepted by Mrs. Curran as acknowledged by her signature which she duly appended to the acceptance form enclosed with the bank's letter.

General principles
13. The parties are not in dispute as to the threshold which a defendant must meet in order to avoid summary judgment. The question the Court must ask itself is that identified by Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 at 623, namely:-

> "…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?"

14. Further and more particular guidance as to the proper approach of the court on an application for summary judgment is to be found in the judgment of McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1 where at para. 9 he identified twelve factors material to the court's consideration on such an application. It is clear from this decision, and indeed many more besides, that a mere assertion as to a given situation which is to form the basis of a defence is insufficient. The defendant must do better than bald assertions as was advised by Ackner L.J. in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Reports 21, where he stated as follows::-

> "…the mere assertion in an affidavit of a given situation which is to be the basis of a defence did not, ipso facto provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence."

15. That last statement of Ackner L.J. has been approved of in this jurisdiction in many decisions including that of Murphy J. in *First National Commercial Bank plc v. Anglin* [1996] 1 I.R. 75 and more recently the judgment of Ryan J. in *Bank of Scotland plc v. Hickey* [2014] IEHC 202, the latter being a decision to which I will later return.

16. It is also well established law that there are issues that may conveniently be dealt with otherwise than on a plenary hearing. However these are relatively limited as was stated by Clarke J. in *McGrath v. O'Driscoll* [2007] I ILRM 203 where, in the following brief passage from his judgment at p. 210, he said as follows:-

> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

Submissions
17. The parties delivered very extensive submissions in writing on this appeal. It is not in my view necessary to rehearse these as the same will be apparent from my appraisal of each ground of defence proposed by Mrs. Curran and which are dealt with individually below. Suffice to state that Mr. O'Reilly S.C. submits that the trial judge erred in law insofar as he could not have been satisfied, as was required of him to grant summary judgment, that Mrs. Curran had no arguable defence to the proceedings. He further maintained that there were issues of law which were complex and were not capable of being determined in the course of an interlocutory hearing.

18. I now intend to review each of the potential defences advanced on behalf of Mrs. Curran for the purposes of considering whether the trial judge erred in his conclusion that she had not made out a *bona fide* or credible defence entitling her to have the proceedings referred to a plenary hearing. .

Undue influence
19. It is necessary first to consider in brief the law in this jurisdiction in relation to the defence of undue influence. That of course very much depends upon the circumstances in which such a defence is advanced. If one contracting party induces or forces the other to enter into a particular contract or agreement, it is clear that such a contract will be set aside *inter partes*. That, however, was not the scenario with which the High Court was concerned in this case. Here, Mrs. Curran's claim of undue influence, insofar as it can be ascertained from her affidavits, does not appear to be made against the contracting party *i.e.* the bank, but rather against a third party, her son, Michael Curran, who had an interest in procuring the execution of the guarantee. The same was required in order that the company would be provided with the banking facilities contained in the Facility Letter of 28th May, 2008.

20. The law in this particular area was relatively recently and thoroughly addressed by Clarke J. in *Ulster Bank (Ireland) Ltd v. Roche and Buttimer* [2012] 1 I.R. 765, a case in which he was asked to adopt as the law in this jurisdiction the law as clarified by the House of Lords in *Royal Bank Of Scotland plc v. Etridge (No.2)* [2002] 2 A.C. 773 and in which he was encouraged to reject the approach that had been adopted by O'Donovan J. in *Ulster Bank Ireland Ltd v. Fitzgerald and Williams* [2001] IEHC 159. I will refer in some detail to the decision in *Ulster Bank (Ireland) Ltd v. Roche and Buttimer* as I consider the same of significance to my conclusions.

21. The first defendant, Mr. Roche, was involved in the motor trade and was running his business through a corporate entity, Louis Roche Motors Ltd. Ms. Buttimer, who was his partner, in the personal sense of that term, was employed as a hairdresser. She was also a director in Mr. Roche's business although it was accepted that she played no role in it. Ms. Buttimer signed a guarantee in respect of the liabilities of the business and when the bank moved to enforce it against her she sought to rely upon a defence of undue influence.

22. The first substantial issue which Clarke J. had to address was the factual question as to whether Ms. Buttimer was actually under the undue influence of Mr. Roche at the time she executed the guarantee. This was what he described as the first leg of the "test" for undue influence. Only if that issue was resolved in her favour, would it be necessary for the court to address the legal question as to whether there were sufficient circumstances to permit Ms. Buttimer contend that the guarantee should be set aside, given that the bank was not itself guilty of any undue influence.

23. Having heard the evidence of Ms. Buttimer and that of the clinical psychologist who had been treating her at the time she signed the guarantee, Clarke J. expressed himself satisfied that at the time she executed the guarantee she was indeed under the undue influence of Mr. Roche. He found as a matter of fact that she was in a dependent and abusive relationship and that she would have done anything that he asked of her.

24. Clarke J. then went on to consider the second leg of the test, namely whether Mr. Roche's undue influence provided Ms. Buttimer with a defence. He did so in the context of the decisions in *Etridge* and *Fitzgerald*, the latter being a decision which had received some criticism as providing insufficient protection to potentially vulnerable sureties, insofar as he had absolved the lender of any responsibility to the guarantor unless it could be established that the lender had some special reason to believe that a wrong had actually taken place.

25. Given that there was no evidence from which it could be inferred that the bank was actually aware of the undue influence exercised by Mr. Roche over Ms. Buttimer, Clarke J. went on to consider the circumstances in which it would be appropriate to attribute to a bank knowledge of undue influence where it was not actually aware of the undue influence concerned.

26. The following is what Clarke J. stated, at para. 25 of his judgment concerning the issue of constructive notice:-

> "Constructive knowledge can often usefully be broken down into two separate questions. The first is as to what factors place a party on inquiry. The second is as to the nature of the inquiry or action that may then be required. If, in circumstances where a party is put on inquiry, that party does not carry out the inquiries necessary or take whatever other form of action may be mandated, then the party will be fixed with knowledge of matters which it would have discovered had it made the appropriate inquiries or, at least, may be faced with the situation where the court views the case on the basis that appropriate steps were not taken."

27. It is clear from what is stated in his judgment that Clarke J., whilst agreeing that the decision in *Fitzgerald* provided insufficient protection to potentially vulnerable sureties, was not prepared to go so far as to adopt as the law in this jurisdiction that which was laid down by the House of Lords in *Etridge*.

28. In his judgment Clarke J. refers to two particular statements made by Nicholls L.J.; the first being that the only practical way of dealing with the issue was to regard the lender as on inquiry in every case "where the relationship between the surety and the debtor was non-commercial" and the second being that a proposed guarantee over the debts of a company in which the shares were held by both spouses or partners placed the lender on enquiry, having regard to the fact that, in many such cases, the shareholding did not reflect the true situation. It is noteworthy that Clarke J. does not state whether he would endorse either proposition. However, he described, at para. 32, the general principle which underlies *Etridge* in the following manner:-

> "…a bank is placed on inquiry where it is aware of facts which suggest, or ought to suggest, that there may be a non-commercial element to the guarantee. That general principle, at a minimum, goes far enough to cover the facts of this case where the bank was, for reasons set out, aware of the personal relationship between Ms. Buttimer and Mr. Roche and was also aware that Ms. Buttimer had no direct interest in the company (other than being a director) and was, indeed, in those circumstances, in a less secure position than a spouse or, in the modern context, a civil partner who has at least certain potential legal rights in the assets or income of the other spouse or partner. The potential for undue influence against a partner, such as Ms. Buttimer, who has very limited legal rights indeed and who has no interest in the company whose debts it is sought that she should guarantee, seems to me to be well on the side of whatever threshold might ultimately be fixed for determining the point at which a bank is placed on inquiry."

29. As the bank had taken no steps to ensure that Ms. Buttimer had freely agreed to the guarantee it was unnecessary to consider the precise steps which the bank was obliged to take. He held that Ms. Buttimer was entitled to rely on the "undoubted undue influence" which Mr. Roche had exercised over her and that, having regard to the bank's failure to conduct any inquiries, the claim had to fail.

30. More recently, Ryan J. in *Bank of Scotland plc v. Hickey* [2014] IEHC 202 considered the obligations of a bank when taking security to support borrowing in the context of summary summons proceedings. The decision is particularly material to the type of evidence required of a defendant should they wish to rely upon a defence such as undue influence. In that case the defendant and her partner had entered into a loan agreement with the bank the terms thereof required that the parties provide security in the form of a legal mortgage over a number of properties. When the borrowers fell into arrears the bank brought proceedings against Ms. Hickey who sought, in the context of a motion for summary judgment, to contend that she had an arguable defence based upon her assertion that she executed the relevant document "at the behest and direction of Mr. Porter" her partner with whom she was in a personal relationship. The bank had failed to take steps to ascertain the circumstances in which she had executed the documentation and that being so Ms. Hickey maintained that she had an arguable defence to the proceedings based upon undue influence.

31. What Ryan J. made clear in the course of his judgment was that it was hopelessly inadequate for Ms. Hickey, in order to avoid summary judgment, to make what was a relatively bald assertion that she was under the undue influence or domination of Mr. Porter when she executed the relevant documentation. This is what he said at para. 34 of his judgment:-

> "Ms. Hickey says that she "executed the relevant documents at the behest and direction of Mr. Porter" which counsel, Mr. Downey, interprets as a claim of undue influence or domination of Ms. Hickey by Mr. Porter. This is the only evidence put forward to establish that this defendant was not in control of her own destiny in taking out these loans. It is hopelessly inadequate as evidence and goes nowhere near establishing the case. As the plaintiff submitted, the defendant has provided no proof or detail of any fact or circumstance to suggest that Mr. Porter exerted undue influence over her. Moreover, she was at all times represented by a solicitor. No information is provided, no example is given of how the alleged coercion was exercised and it is impossible to deduce from the bald and brief statement the overbearing of will that would be necessary to avoid liability. Taking the statement entirely at face value, it does not amount to coercion or undue influence."

32. From the last two mentioned decisions, it is clear that in order to establish a defence of undue influence at a plenary hearing Mrs. Curran would first have to satisfy the court that but for the undue influence exerted upon her by her son she would not have executed the guarantee and second that the bank, *i.e.* the creditor, had actual or constructive notice that the guarantee was procured by the undue influence. That being so, in order to resist summary judgment, Mrs. Curran had to satisfy the low threshold standard by establishing on affidavit that she might credibly argue in the course of a plenary hearing that she had executed the guarantee as a result of the undue influence. It is only relevant to consider whether it is arguable that the bank was obliged to make inquiries to ascertain whether, having regard to her connection with the company, she fully understood and was freely entering into the guarantee, if she could first establish a credible or arguable case on the facts that she executed the guarantee in circumstances of undue influence. In turn, that required her to set out on affidavit the type of facts, details and circumstances upon which she would rely at the trial to establish that her will was overborne by her son, Michael Curran, when she executed the guarantee.

33. As has so often been advised in the relevant case law, a bald assertion as to the existence of circumstances which might afford a

defence is insufficient for the purposes of resisting summary judgment. That is all that Mrs. Curran placed before the High Court for the purposes of defending the motion for summary judgment. I am quite satisfied that evidence does not meet even the relatively low threshold required of the defendant to have the case remitted to plenary hearing.

34. In her affidavit of 23rd November, 2015, having referred in some detail to entering into mortgage agreements with the bank in early 2008 to secure joint borrowings of €1.7m with her son Joseph Curran, she states as follows concerning the guarantee:

> Paragraph 13:
>
> "I say that given my age and lack of involvement in the businesses, I cannot explain how the said documentation actually came to be executed by me…"
>
> Paragraph 18:
>
> "…aside from the advices obtained from Mr. Ryan, my solicitor, I relied wholly on the explanations and advices provided to me by Michael Curran and Vivien Rowntree of Bank of Ireland and did what was asked of me by them. I say that at no time was it explained to your Deponent that I was doing anything which I had been advised by Mr. Ryan, not to do. I say that both Michael Curran and Ms. Rowntree knew that I had been advised by Mr. Ryan."
>
> Paragraph 30:
>
> "I say that Michael Curran would call to my house and request my signature for various documentation at various intervals. I say that I relied upon him to explain the nature and purpose of the request. I say that at no time was I aware that there was a personal guarantee in effect. I say that I always understood that the nature of the security provided was solely in respect of the mortgage properties."

35. What is glaringly absent from her affidavits is evidence to demonstrate that any undue influence was brought to bear upon her by her son, Michael Curran, or indeed by the bank itself. In regard to the bank also, Mrs Curran's affidavits cannot support any potential defence of undue influence based on the conduct of the bank as the contracting party.

36. In these circumstances I am satisfied that the High Court judge cannot be faulted for concluding that Mrs. Curran had failed to demonstrate a *bona fide* or credible defence based upon acts of undue influence. There was no evidence that the bank should have been on inquiry to satisfy itself that she understood the nature of the guarantee proposed and that she was executing it otherwise than under her son's influence.

37. It is unnecessary in light of the above conclusions to consider a number of other matters raised by way of potential defence to these proceedings. These include (i) Mrs. Curran's evidence that she was advised by the bank officials at the time she signed the guarantee that she did not require legal advice (ii) whether she played an active role within the company or (iii) whether legal advice carried over from when she executed mortgages in respect of her joint borrowings with her son, Joseph Curran, earlier in the year. These are issues which are only material to the second leg of a court's analysis of an undue influence claim. They do not fall to be considered in the absence of factual evidence to support the undue influence alleged. Having said that, I do not think there is any reason to disagree with the conclusions of McGovern J in his judgment.

Unconscionable bargain

38. As with her proposed defence based upon a claim of undue influence, the trial judge concluded that Mrs. Curran had adduced no credible evidence to support a defence of unconscionable bargain. In coming to this conclusion he relied upon the fact that she had extensive connections with the company with the result that the guarantee could not arguably be considered an unconscionable bargain.

39. In his decision in the High Court in *Carroll v. Carroll* [1998] 2 ILRM 218, [1998] IEHC 42, a decision later upheld by the Supreme Court, Shanley J. set out the elements which must be established before equity would intervene on the grounds of unconscionable bargain. First, one party must be at a serious disadvantage to the other by reason of poverty, ignorance or otherwise, so that circumstances exist of which unfair advantage can be taken. Second, the transaction must be at an undervalue and third there must be a lack of independent legal advise.

40. Assuming that Mrs. Curran can credibly argue that the advice she received from Mr. Ryan concerning the execution of guarantees at the time she executed two legal mortgages six weeks prior to the transaction under scrutiny in this case was insufficient, the question is whether she put before the trial judge *bona fide* and credible evidence which could arguably satisfy the other two elements of the test. In my view she did not do so. Mrs. Curran did not put forward on affidavit any evidence to demonstrate that she was at any serious disadvantage to the bank by reason of poverty, ignorance or otherwise. Her age or ignorance had not precluded her from carrying out her obligations as company secretary which included signing its annual accounts. Further, some six weeks prior to the execution of the guarantee she borrowed jointly with her son, Joseph Curran, €1.7m. and executed two deeds of mortgage to support those borrowings. There is nothing in her affidavits upon which she might reasonably rely to bring herself close to the type of personal situation established by the plaintiff in *Grealish v. Murphy* [1946] 1 I.R. 35 or *Carroll v. Carroll*. The facts of those cases are well known and it is unnecessary to refer to them in any detail. Suffice to mention that Mr. Grealish was an elderly farmer who lived on his own, had a range of mental difficulties, was relatively illiterate and was known to be irresponsible with money. Further, unlike the transactions in *Grealish* and *Carroll*, the guarantee in this case can't be stated to have been given for nothing or for some insignificant advantage. It is clear that the bank agreed to provide additional banking facilities to the company which would not otherwise have been made available had the guarantee not been provided by way of security. The "bargain" could never be considered extortionate.

41. In the aforementioned circumstances I am quite satisfied that the trial judge was correct as a matter of law when he concluded that the facts advanced by Mrs. Curran on affidavit were insufficient to demonstrate a credible defence based upon the doctrine of unconscionable bargain.

Non est factum

42. The law in relation to *non est factum* has been discussed in a number of recent decisions including those of Kelly J. in *Allied Irish Banks plc v. Higgins and Others* [2010] IEHC 219 and *IBRC v. Quinn* [2011] IEHC 470 and Clarke J. in *Ulster Bank Ireland Ltd v. Roche and Buttimer* to which I have already referred.

43. In the first of the aforementioned decisions, Kelly J. at p. 41 approved of the following proposition as advised in *Saunders v. Anglia*

Building Society [1971] A.C. 1004:-

> "The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisors without making any inquiry as to their purpose or effect. But the essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have had such a belief unless he had taken steps or been given information which gave him some grounds for his belief…"

44. In the present case if Mrs. Curran had taken the trouble to read the document presented to her for her signature on 28th May, 2008, as was advised by the trial judge in the course of his judgment, she would not have had any difficulty in understanding that she was signing was a guarantee for €1m. and that in doing so she was providing security to the bank that was separate and distinct from any earlier security she had provided in respect of other borrowings.

45. I am quite satisfied that the conclusion of the trial judge that Mrs. Curran, on the facts advanced, had not demonstrated an arguable defence based on non est factum is borne out by the decision of Clarke J. in *Ulster Bank Ireland Ltd v. Roche and Buttimer* when referring back to his own decision in *ACC Bank plc v. Kelly* [2011] IEHC 7 as adopted by Kelly J. in *Irish Bank Resolution Corporation Limited v. Quinn* [2011] IEHC 470, at p. 771 he stated:-

> "….A person who signs a document which may well have significant legal effect and does so, either without reading the document or without applying themselves to the content of the document, "must accept the consequences of having signed a commercially binding agreement in those circumstances" and will, prima facie, be bound by what they have signed."

Conclusion

46. Having considered the relevant legal principles, the judgment of McGovern J. and the evidence that was before him at the time he granted summary judgment in favour of the bank, I am satisfied that he was correct when he concluded that Mrs. Curran had not established an arguable or credible defence to the bank's claim. For the reasons earlier set out I would dismiss the appeal.