

THE HIGH COURT
ACC LOAN MANAGEMENT LIMITED

[2013 No. 3218 S]

-AND-

GERARD SHEEHAN

Plaintiff

Defendant

JUDGMENT of Ms. Justice Murphy delivered the 17th day of December, 2015.

1. These proceedings come before the Court as a motion for liberty to enter final judgment against the defendant, Mr. Gerard Sheehan, in the sum of €183,732.14 on foot of a guarantee entered into by the defendant on 12th March, 2008. The plaintiff seeks summary judgment on the basis that the defendant does not have a bona fide defence to the plaintiff's claim.

2. The defendant entered into a transaction with the predecessor of the plaintiff, ACC Bank plc, in March 2012, as a director of Newmarket Foods Limited ("the Company"). Newmarket Foods Limited was a private company established by the defendant's brother, Mr. Vincent Sheehan. The defendant asserts on affidavit that the Company was effectively owned and exclusively run by his brother. However, during the course of the proceedings documentation was produced which was registered in the Companies Registration Office indicating that the defendant owned 5% of the issued share capital at the relevant times for the purpose of this application. The defendant disputes having any knowledge or awareness of this fact, however he does accept that he had a commercial arrangement with the company worth €500 per week up until the date of its liquidation on 6th July, 2010, whereby he unloaded deliveries at a warehouse on his lands and received and made up orders for the company.

3. By a facility letter dated 5th March, 2008, the plaintiff agreed to provide the Company with a term loan facility in the sum of €151,500 to assist with the set up costs for a new factory in Castlemahon, County Limerick. The defendant and his brother both signed the facility letter in their capacity as directors of the Company on 12th March, 2008. The facility letter stipulated *inter alia* that the defendant was to provide the plaintiff with a guarantee and indemnity with respect to the facility. It further provided that this was to be supported by a first legal charge over a 1625 square foot warehouse and 2 acres of land at Gorteen, Dromcollogher, County Limerick, owned by the defendant.

4. On 7th March, 2008, the plaintiff wrote to Mr. David O'Connor, the borrower's solicitor, informing him that the Bank were prepared to release the funds to his client on receipt of a number of documents including a "letter from Guarantor Solicitor confirming Guarantor received independent legal advice prior to execution of Guarantee & Indemnity document". By letter dated 12th March, Mr. O'Connor wrote to Mr. Graham O'Sullivan of the plaintiff where he stated:-

"We confirm that Vincent Sheehan and Gerard Sheehan were offered independent legal advice and they waived same. We confirm that the Guarantee and Indemnity was explained to them in full and they understand the nature and effect of same by (sic) nevertheless they decided to waive their right to independent legal advice."

5. The defendant executed the guarantee and indemnity on 12th March, 2008, and his signature was witnessed by the solicitor for the Company, Mr. David O'Connor, of High Street, Newmarket, County Cork. On the same date, 12th March, 2008, the defendant also executed an indenture of charge over the property at Gorteen, Dromcollogher, County Limerick and this was subsequently registered in the Land Registry on 19th January, 2009. The property over which the security was provided was part of a larger folio of lands (Folio 3690F) owned by the defendant consisting of 23.9760 hectares. A new folio was created (Folio 61958F) for the purpose of creating a first legal charge in favour of the plaintiff over a portion of the defendant's property. The limiting of the charge to this particular piece of property, as opposed to providing it over the defendant's entire lands, was the subject of correspondence between Mr. O'Connor and the defendant dated 11th March, 2008, where Mr. O'Connor advised the defendant:-

"...if you are giving a charge over the lands to the ACC Bank then you would want to limit it to a particular piece of the property rather than give them all your lands."

6. Ultimately the Company defaulted in the repayment of the term loan facility as agreed and went into liquidation on or about 6th July, 2010. By letter dated 19th June, 2013, the plaintiff demanded payment of all sums due and owing on foot of the defendant's guarantee and indemnity. Despite this demand the defendant has failed to discharge the sums due and owing resulting in these proceedings being issued by summary summons dated 7th October, 2013.

Defences

7. The defendant has raised two primary defences to the plaintiff's claim for summary judgment. The first defence relates to potential undue influence arising from the non-commercial element to the guarantee, namely the sibling relationship between the defendant and Mr. Vincent Sheehan. The second relates to the legal advice provided to the defendant by Mr. David O'Connor, solicitor, which the defendant claims was wholly deficient.

Undue Influence

8. The defendant in his first affidavit of 18th July, 2014, avers that he felt that he was under "severe pressure" at the time of executing the guarantee. He stated that he believed from speaking with his brother that had he not entered into the guarantee it would have resulted in his brother not obtaining the loan from the plaintiff and consequently the failure of his brother's business.

9. Furthermore, it is the defendant's position that the Bank were on notice of potential undue influence in circumstances where the guarantee in question had a non-commercial element. The defendant argues that it would have been obvious to even the most casual of observers that both parties to the transaction shared a surname and therefore it was a strong possibility that there was some non-commercial element to the transaction being entered into.

10. The defendant relies on the House of Lords decision in *Royal Bank of Scotland plc v. Etridge (No.2)* [2001] UKHL 44 where the court examined the existing jurisprudence arising from the decision in *Barclays Bank v. O'Brien* [1994] 1 A.C. 180, which dealt with undue influence between husbands and wives, and stated that there was no rational cut-off point whereby certain types of relationships could be susceptible to the O'Brien principle and others not. Lord Nicholls at p814 of his decision said:-

"...if a bank is not to be required to evaluate the extent to which its customer influence over a proposed guarantor; the only practical way forward is to regard banks as 'put on inquiry' in every case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety"

11. The general principle espoused by the House of Lords in *Etridge* was adopted by the Irish High Court in the case of *Ulster Bank v. Roche* [2012] 1 I.R. 765, where Clarke J. stated:-

"I am satisfied that the general principal, which underlines Royal Bank of Scotland plc v. Etridge (No. 2) [2001] UKHL 44, is to the effect that 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 a guarantee."

12. In *Roche*, the second named defendant provided a guarantee in respect of the debts of her partner, the first named defendant. The guarantor was a director of the company but took no active role in the business. The bank's knowledge as regards the commercial relationship between the first and second named defendants was described by Clarke J. as indirect and limited but nevertheless was found to be sufficient to place the bank on inquiry requiring it to take steps to ensure the transaction was being entered into freely.

13. The defendant submits that based on the decision of the House of Lords in *Etridge* and on the decision of Clarke J. in *Roche* the plaintiff bank in the instant case was put on enquiry as to a potential claim of undue influence on the part of the defendant due to the non-commercial element to the transaction being entered into, namely the sibling relationship between the parties. As a result of this enquiry, the defendant argues that it was necessary for the plaintiff to take steps to ensure that the defendant was entering into the transaction in a free manner and in full knowledge of what he was agreeing to.

14. The plaintiff argues that from the evidence adduced in this case it is clear that the defendant did not enter the transaction under actual undue influence from Mr. Vincent Sheehan. The plaintiff submits that undue influence revolves around whether circumstances exist for improper influence to be exercised such that the will of the defendant is overborne and his entry into the transaction is not the result of a free exercise of will. In support of its contention the plaintiff relies on the dicta of Shanley J. in *Carroll v Carroll* [1998] 2 I.L.R.M 218 at pp. 228-229 where he said actual undue influence arises:-

"...where no relationship gives rise to any presumption of undue influence, but the parties so alleging undue influence adduce evidence which satisfies the court, on the balance of probabilities, that the transaction was not the result of the free exercise of the will of the donor."

15. The plaintiff submits the evidence falls well short of establishing that the defendant's will was overborne. The defendant has stated that he was "quite close" to his brother which is to be contrasted with having a dependent relationship with his brother, or placing such trust or repose in his brother that he would simply do anything his brother asked. The plaintiff submits that far from doing anything his brother asked, the defendant clearly considered his position and the effects of his actions. At paragraph 13 of his second affidavit of 13th November, 2014, the defendant stated:-

"...I simply would not have risked my livelihood if I had understood that the Guarantee was unlimited in its scope."

The plaintiff submits that this admission serves to underline that the defendant knew his own mind and freely exercised his will in executing the guarantee with his real complaint being that he misunderstood the scope of the guarantee which cannot be an arguable ground of defence.

16. The plaintiff argues that the present case is manifestly different to the type of case considered by Clarke J. in *Roche* where the second named defendant was found to have executed a guarantee in favour of the first named defendant's business under his undue influence. In that case, the second named defendant was found to have had no material involvement with the business and "was in the sort of dependent and abusive relationship with Mr. Roche (first named defendant) at the relevant time where she would have done anything he asked". In the present case however, the defendant was a co-director and a shareholder in the business. Furthermore, it is not disputed by the defendant that he had an involvement in the day to day running of the business in terms of receiving and filling orders for which he was paid approximately €26,000 per annum. The provision of the loan facility to the Company was clearly of the benefit to the defendant as he continued to receive the aforementioned income for a period in excess of two years after the loan facility was drawn down. Therefore the plaintiff submits that there is nothing in the circumstances to suggest that the provision of the guarantee by the defendant was manifestly to his disadvantage.

17. In relation to the defendant's contention that the Court should presume undue influence due to the non-commercial element of the transaction being entered into, namely the sibling relationship between the parties, the plaintiff submits a number of reasons why this plea should not be accepted.

18. Firstly, it is submitted that any presumption of undue influence must be rebutted by the fact that no actual undue influence occurred in this case. It is the plaintiff's contention that this is a case of mistake being dressed up as a case of undue influence. Secondly, whilst there are a number of relationships which automatically gives rise to a presumption of undue influence, the sibling-sibling relationship is not such a relationship. The plaintiff states that it is instructive that the defendant has not been able to cite a single case where a sibling-sibling relationship gave rise to a presumption of undue influence, either in its own right or on the particular facts of the case. In those circumstances the plaintiff submits that the defendant appears to be requesting the Court to break new ground in this case.

19. It is accepted by the plaintiff that the relationship of spouses or partners can in certain specific circumstances be such as to give rise to a presumption of undue influence which puts a third party financial institution on enquiry. However the plaintiff submits that the defendant's reliance on his blood relationship with his brother as being sufficient, in and of itself, to give rise to a presumption of undue influence is a misrepresentation of the decision of Clarke J. in *Roche*. Here it was held that the personal relationship between the parties emerges as a much more significant factor:-

"... in circumstances where a person who is required to offer security is not a shareholder and where there is no evidence to suggest that the bank was aware of any active involvement of that party in the business..."

20. The plaintiff submits that whilst Clarke J. was willing to accept that the bank was placed on enquiry in *Roche* on the basis of the non-commercial element to the guarantee, this did not arise simply by reason of the personal relationship between the parties but also due to the particular circumstances of the case as referred to above.

Legal Advice

21. It is the defendant's contention that the legal advice obtained by him in the instant case was wholly inadequate and that the Bank was on notice of the potential difficulties with the legal advice provided by Mr. David O'Connor. The defendant relies on the decision in *Etridge* which sets out that when a lender is placed on enquiry due to a non-commercial aspect to a transaction they should ensure that the guarantor has obtained independent legal advice regarding the transaction.

22. In relation to the alleged inadequate legal advice the defendant places emphasis on a letter dated 7th March, 2008, from the plaintiffs to Mr. David O'Connor, solicitor. The letter stated that the bank was prepared to release funds on the receipt of *inter alia* a letter from the guarantor's solicitor confirming the guarantor received independent legal advice prior to the execution of the guarantee and indemnity document. The defendant contends that this was a term of the loan offer agreement which was not complied with.

23. In relation to the letter dated 12th March, 2008, to the plaintiff from Mr. David O'Connor, as set out in paragraph 4 of this judgment, stating that the guarantee and indemnity was explained in full to the defendant and that he understood the nature and effect of same but nevertheless decided to waive his right to independent legal advice, the defendant states that there was a conflict of interest on the part of Mr. O'Connor in that he was seeking to act for both the principal debtor and the defendant which was highly inappropriate. The defendant argues that the plaintiff was on notice to the fact that Mr. O'Connor was attempting to act for all parties to the transaction as the letter, on its face, stated that Mr. O'Connor's client was Newmarket Foods Ltd. As a result of this the defendant submits that Mr. O'Connor was not in a position to offer him independent legal advice.

24. In support of his position that a solicitor acting for a principal debtor can never be sufficiently independent to advise a guarantor in respect of a transaction, the defendant relies on the dicta of Laffoy J. in *Tynan v The County Registrar for the County of Kilkenny* [2011] IEHC 250 where she stated at paragraph 4.9:-

"There is no doubt that the advice which the plaintiff got was independent, in the sense that the solicitor whom she attended and who attested her execution of the Deed of Confirmation was not acting for either the mortgagor or the mortgagee".

25. In conclusion the defendant submits that the only way in which the plaintiff could have satisfied the steps to be taken as set out in *Etridge* and as required by the condition of independent legal advice prior to draw down of the facility as set out in their own letter of 7th March, 2008, was to obtain a letter from an independent solicitor confirming that the defendant had obtained independent legal advice regarding the transaction.

26. It is the plaintiff's submission that a presumption of undue influence cannot arise on the facts of this case, however even if it is deemed to arise constructive notice has not occurred as the plaintiff has taken all reasonable steps to ensure the defendant openly and freely acquiesced to the guarantee. The plaintiff submits that the defendant was in receipt of adequate independent advice as he was represented by a solicitor in connection with the transaction thereby negating any constructive notice of undue influence that may have occurred and entitled the plaintiff to assume that the guarantee was freely and fully given.

27. In relation to the defendant's argument that the legal advice he received from Mr. O'Connor was not independent on the grounds that the solicitor was also acting for the Company in the transaction, the plaintiff relies on the judgment of Laffoy J. in *Tynan v. The County Registrar for the County of Kilkenny* [2011] IEHC 250 where the Court cited with approval the following passage from the judgment of Lord Scott in *Etridge* in relation to legal pertaining to a transaction involving a husband and wife:-

"If the solicitor is acting also for the husband, his role presents a little more difficulty. It is, after all, the existence of the risk of undue influence or misrepresentation by the husband that requires the bank to be reasonably satisfied that the wife understands the nature and effect of the transaction. If there is some particular reason known to the bank for suspecting undue influence or other impropriety by the husband, then, in my view, the bank should insist on advice being given to the wife by a solicitor independent of the husband... But in a case in which there is no such particular reason, and the risk is no more than the possibility, there is no reason, in my opinion, why the solicitor advising the wife should not also be the husband's solicitor. In the ordinary case, in my opinion, the bank is entitled to rely on the professional competence and propriety of the solicitor in providing proper and adequate advice to the wife notwithstanding that he, the solicitor, is acting also for the husband." (Emphasis added)

28. The plaintiff submits that the defendant has identified no particular circumstances, save for the sibling relationship between the parties, which give rise to a presumption of undue influence. In these circumstances the plaintiff submits that there was no particular reason the same solicitor could not act for and purport to advise all the parties to the transaction. The plaintiff further states that the proposition argued for by the defendant is somewhat absurd and illogical in that three sets of legal advisors would have to be involved in what was essentially a basic loan and security transaction.

29. The plaintiff also relies on the dicta of Birmingham J. in *Allied Irish Banks plc v. McKenna* [2014] IEHC 122 where he stated:-

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

30. It is therefore the plaintiff's position that as a director and shareholder of Newmarket Foods Limited, the defendant was competent to provide a guarantee for the Company's debts without the requirement for independent legal advice. Finally the plaintiff does not accept that a letter dated 7th March, 2008, from the plaintiffs to Mr. David O'Connor, solicitor formed part of the terms of the loan agreement as the defendant only became aware of this letter when he received his former solicitor's file in 2014.

Law & Conclusions

31. The legal principles applicable to an application for summary judgment are well established and are to be found in the cases of *Danske Bank v. Durcan New Homes* [2010] IESC 22, *Bank of Ireland v. Education Building Society* [1999] 1 I.R. 220, *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 and *McGrath v. O'Driscoll* [2007] 1 ILRM 203.

32. Adopting the wording of Hardiman J, at p. 623 of *Aer Rianta* the Court in the present case must ask itself whether "...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?". The mere assertion of facts on affidavit of a purported defence is not of itself sufficient to allow leave to defend. The Court must look at the situation as a whole in order to determine whether the defendant has raised an arguable and *bona fide* defence.

Decision of the Court

33. It is well established in our jurisprudence that the Court's power to grant summary judgment should be exercised sparingly and only in cases where it is manifest that the defendant has no *bona fide* defence to the plaintiff's claim. The law in this regard follows logically from the constitutional guarantee of access to the courts and the right to litigate. Summary judgment in effect denies a defendant access to litigate his claim to a defence and accordingly, should only be granted, where it is clear that he has, in fact, no such *bona fide* defence. It is also clear from our jurisprudence that the term "*bona fide defence*" means an arguable defence and not one which is likely to succeed on the balance of probabilities. In this case, the plaintiff seeks to make the defendant liable on foot of a guarantee entered into by him on 12th March, 2008 whereby he guaranteed the repayment of a loan from the plaintiff to Newmarket Foods Limited, a company of which he and his brother were directors. It is true that the defendant's shareholding was a mere 5% but it is also true that he was engaged in the business and profited therefrom until its liquidation in 2010.

34. He has sought to advance two potential defences to the plaintiff's claim. Firstly, he asserts that the guarantee was procured by undue influence and that the plaintiff had constructive notice of potential undue influence by virtue of the fact that the guarantors had the same surname and were in fact siblings. Secondly, he seeks leave to defend the plaintiff's claim on the grounds that he received no independent legal advice; that the plaintiff was on notice of that fact and that the advice he did receive from the borrower's solicitor was deficient.

35. On the facts before the Court, the Court is satisfied that there is no evidence of undue influence in this case such as would give rise to an arguable defence of the plaintiff's claim. A desire and willingness to be of assistance to one's brother is not evidence of undue influence, but rather a normal human reaction among siblings who are close and who are both engaged in the same business. While the defendant asserts that he felt under severe pressure to agree to the said loan and to act as surety therefor, his averment at paragraph 13 of his second affidavit, to the effect: "*I simply would not have risked my livelihood if I had understood that the Guarantee was unlimited in its scope*" indicates, as the plaintiff contends, that the defendant knew his own mind and freely exercised his will in executing the guarantee. Having regard to the Court's finding that on the defendant's own evidence there is no room for an arguable defence of undue influence in this case, the Court does not consider it necessary to express any view on the issue of whether the plaintiff had or should have had constructive notice of undue influence in the particular circumstances of this case other than to remark that it would constitute a major evolution of the principles laid down in *Royal Bank of Scotland plc v. Etridge* (No.2) [2001] UKHL 44 and adopted in this jurisdiction in *Ulster Bank v. Roche* [2012] 1 I.R. 765, to extend those principles to brothers who are both directors and participants in a commercial enterprise. The Court is satisfied therefore, that the defendant has failed to demonstrate a *bona fide* defence on this ground.

36. That however is not the end of the matter – contracts of guarantee, where people render themselves liable for the debts of another, always require careful scrutiny. It is in the interest of those who seek to rely on them to ensure that all formalities have been properly complied with. In this case, the plaintiff wrote to the borrower's solicitor on 7th March, 2008, indicating that as a requirement of drawing down the funds the Bank wished to be provided with a "*letter from Guarantor Solicitor confirming Guarantor received independent legal advice prior to execution of Guarantee & Indemnity document*". This is an eminently sensible approach. After all, the sureties are exposing themselves to liability for the borrower's debts and it is in the bank's interests to ensure that the sureties are fully aware of the consequences of executing the guarantee so that in the event that it is necessary to call in the guarantee there can be no dispute as to the sureties' liability there under.

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