THE COURT OF APPEAL

Irvine J.
Mahon J.
Edwards J.

Appeal No.: 2014/282

Bernard McDonnell and Nancy McDonnell

Plaintiffs/Respondents

- and -

Niall Ring and Greencastle Investments Limited

Defendants

- and -

Jerry Beades

Defendant/Appellant

JUDGMENT of Mr. Justice Mahon delivered on the 3rd February 2016

1. These proceedings were commenced in the High Court by Summary Summons dated 23rd September 2009. The respondents claim is for the sum of €255,000, plus interest, in respect of *"sums advanced by the plaintiffs for the benefit of the defendants which said sums remain due and owing on foot of loan agreements and guarantees despite demands made …" .*

2. The respondents sought liberty to enter final judgment in the sum of €291,042 from the Master of the High Court on 9th July 2010. The notice of motion was grounded on an affidavit sworn by the first named respondent, in which he exhibited certain loan agreements under which monies were advanced to Greencastle Investments Limited, and also written personal guarantees signed by Mr. Ring (the appellant's business partner and co-defendant), and the appellant. The affidavit averred to the first named respondent's belief that the appellant, and the other defendants, had no *bona fide* defence to the claim, and that any such defence entered would be purely for the purposes of delay. A replying affidavit was sworn by the appellant on 18th November 2010 in which he explained the basis for his opposition to the claim.

3. In due course the application for summary judgment was listed before O'Neill J. in the High Court, and on 21st March 2011 O'Neill J. made an order, in favour of the plaintiffs, granting them judgment as against the appellant in the sum of €291,042, plus costs. He also ordered that there be a stay on the execution of the said judgment for a period of one month from that date. In a short report of his judgment dated 29th July 2011, O'Neill J. stated that he was satisfied that a credible bona fide defence to the proceedings was not disclosed and on that basis he granted liberty to enter final judgment for the sum claimed. The appellant has appealed against that order.

Background information
4. Greencastle Investments Limited is a property development company with its registered office at 30 Richmond Avenue, Fairview, Dublin 3. At all material times its directors and shareholders were Mr. Niall Ring and the appellant herein.

5. Three separate loan agreements were executed in 1998 and 1999. All are identical in their format and content, save for loan amounts, and the dates of the agreement which are, respectively, 18th May 1998, 1st February 1999 and 17th February 1999. The loan amounts are, respectively, IR£80,000, IR£50,000 and IR£70,000. The loan agreements were signed by Mr. Ring and by the appellant, and the appellant's signatures are acknowledged by him as his.

6. The first loan agreement states as follow:-

> *"This agreement is made on 18th May 1998 between (1) Bernard and Nancy McDonnell of 27, Leopardstown Avenue, Blackrock, Co. Dublin (the lenders) and (2) Greencastle Investments Limited of 30 Richmond Avenue, Fairview, Dublin 3 (the borrower).*
>
> *Whereas:-*
>
> > *"the lenders have agreed to provide an amount of IR£80,000 (the loan amount) to the borrower at a rate of interest to be agreed between the parties, such amount to be repaid within one year from the date of this loan agreement.*
> >
> > *The borrower represents to the lenders: it has available security in the form of personal letters of guarantee of the undersigned directors of the company's and of property at Greencastle Road, Coolock, which may be provided to the lenders on request by the lenders.*
> >
> > *The lenders confirm that the effect of this agreement has been explained to them.*
> >
> > *This agreement may be terminated by either party by giving no less than thirty days notice in writing to the other party/parties.*

7. The three agreements were also signed by the respondents and are said to have been executed by the parties in the presence of a Mr. Peter Kearney.

The guarantee agreement
8. The guarantee agreement is dated 29th May 2003, and is stated to be *"signed, sealed and delivered"* by the appellant in the presence of a solicitor, Mr. Damien Carley. The appellant acknowledges that the signature on the document is his signature. A

guarantee in similar terms was also executed Mr. Ring.

9. The guarantee agreement provides as follows:-

> *"1. "Bernard McDonnell and Nancy McDonnell at the request of Niall Ring and Jerry Beades agreed to advance the sum of IR£200,000 (now €255,000) to the said Niall Ring and Jerry Beades to be applied by them in respect of the development by Greencastle Investments Limited for a mixed commercial residential development at Greencastle Parade, Coolock, Dublin 5.*
>
> *2. Niall Ring and Jerry Beades agreed to repay the said sum of €255,000 on demand and until such time as such payment had been made to pay interest at the rate of 9.44% thereon, said interest to be discharged on a monthly basis and payable as to 50% thereof to Bernard McDonnell and 50% thereof to Nancy McDonnell.*
>
> *3. By way of security for the repayment of said loan Niall Ring and Jerry Beades have agreed to enter into this guarantee to repay in the manner hereinafter appearing*
>
> *NOW IT IS AGREED AS FOLLOWS:-*
>
> *I, Jerry Beades, of Mount Prospect Avenue, Clontarf, Dublin 3 hereby promise to pay to Bernard McDonnell and Nancy McDonnell both of 27 Leopardstown Avenue, Blackrock, Co. Dublin, the sum of €255,000 on demand provided always that:-*
>
> > *(i) liability of the said Niall Ring and Jerry Beades in respect of this agreement and an agreement of even day to be entered into between Bernard McDonnell and Nancy McDonnell of the one part and Jerry Beades of the other part shall not give rise to a liability for the repayment to Bernard McDonnell and Nancy McDonnell of any sum in excess of €255,000 together with such interest as may accrue from time to time.*
> >
> > *(ii) Niall Ring and Jerry Beades shall from time to time as requested by Bernard McDonnell and Nancy McDonnell furnish such financial statements accounts and other information pertaining to the development at Greencastle Parade, Dublin 5 which may reasonably be required to confirm the assets and liabilities of the said development.*
>
> *4. The appellant stated that this guarantee agreement was hurriedly signed by him in the offices of Carley & Co. Solicitors, who were not his solicitors..*

The grounds of appeal

10. The appellant's grounds of appeal as set out in his notice of appeal dated 15th April 2011 are:-

> (i) When the case was called (the appellant) requested an adjournment to give time to lodge a replying affidavit as he had just been handed the original documents which were ordered by the Masters Court on Friday 17th December 2010 to be provided as they were not available in his court that day. Time was needed to examine these documents and respond to same.
>
> (ii) O'Neill J. denied the appellant this opportunity and proceeded to register judgment. As a result, the appellant was severely disadvantaged in not being afforded an opportunity to put a response on affidavit.
>
> (iii) (The appellant) derived no benefit, nor did the company, Greencastle Investments Limited, from this guarantee.
>
> (iv) There is a *bona fide* dispute surrounding these complex transactions. They should not have been dealt with by summary judgment as (the appellant), should have been allowed set out a full defence and being provided with the benefit of a full hearing.
>
> (v) As a party to a guarantee in 2003, I received no benefit and no consideration transpired between this defendant. No evidence was produced in court regarding the transfer of benefit.
>
> (vi) The learned judge erred in not allowing the full circumstances surrounding the guarantee in full to be placed before the courts.
>
> (vii) No evidence was produced in court to verify what efforts had been made by (the respondents) to recover their money from their son-in-law from the date of judgment in July 2010 until 21st March 2011.
>
> (viii) The learned judge erred in the amount of the judgment as the guarantee limited the liability to €255,000.

11. When the appeal initially came on for hearing before this court as an Article 64 transfer, it was adjourned at the appellant's request to facilitate his application to have the appeal heard by the Supreme Court. The Supreme Court declined to accede to the appellant's application and the matter has now returned to this court for hearing.

The appellants' submissions

12. In a document headed "Submissions of Jerry Beades Defendant" and opened to this court in the course of the hearing of this appeal on 20th January 2016, the appellant made submissions in support of his appeal, and which I have summarised as follows:-

> (i) The disposal of a claim by way of summary judgment raises issues in relation to ECHR Article 6 including the right of access to a court, and the right to a fair trial, and is a clear breach of human rights.
>
> (ii) The appellant maintains that there was a lack of "equality of arms" as between himself and the respondents. He claims that he was not given a reasonable opportunity to consider documentation provided on the day of the case, and circumstances where he did not have the opportunity to read and consider them.
>
> (iii) The appellant referred to the background to the money being advance by the respondents to Greencastle

Developments Limited and he alleged that IR£200,000 of company funds was in effect misappropriated by his business partner, Mr. Ring, to facilitate the purchase by Mr. Ring of a family home in Clontarf. The appellant described in some detail the family relationship and circumstances as existing between Mr. Ring and the respondents.

(iv) The appellant maintained that he derived no benefit from the loans advanced to the company and further, that the respondents failed to take steps to secure the monies advanced to the company, including the lodgement of documentation in the Companies Office to reflect the borrowing.

(v) The appellant maintains that O'Neill J. failed to consider in full the circumstances surrounding the guarantee.

(vi) The appellant maintained that the guarantee was unenforceable, as no consideration existed in relation to it.

13. A number of the submissions by the appellant in the course of the appeal hearing were unrelated to the grounds of appeal as originally filed by him. This is certainly so, in particular, in relation to grounds (i) and (ii) as summarised above. These matters were, as such, additional grounds of appeal of which neither the respondents or this court had any prior notice in advance of the hearing of this appeal. Notwithstanding same, the court permitted the appellant to raise these matters in the course of his submissions.

The conduct of the High Court hearing in the context of the Article 6 ECHR claim

14. The appellant's claim that the manner in which O'Neill J. conducted the hearing of this matter in the High Court on 21st March 2011 breached his rights under Article 6 of the ECHR is not a ground of appeal particularised in the appellant's notice of appeal dated 15th April 2011. The submission was first raised by the appellant in his written submissions in this court. As a result neither the Court nor the respondent had any notice that he wished to advance such an argument until the day of the hearing of the appeal. It is therefore not appropriate that this court should make a determination in relation to this particular issue.

15. Having so found, but having particular regard to the fact that the appellant is a lay litigant, albeit a lay litigant with considerable court experience, I will make the following observations:-

(i) The summary judgment procedure in the High Court is designed to operate in an expeditious manner. Its operation is essentially conducted in accordance with Order 37 of the Rules of the Superior Courts. Its purpose is to ensure that defendants are not permitted to unduly delay proceedings in which liquidated sums are claimed in the absence of a *bona fide* and stateable defence. A court required to make a determination in respect of an applicant for summary judgment does so with due consideration of relevant decisions of the Superior Courts. I will refer to a number of these decisions later in the judgment.

(ii) The papers available to the High Court judge in this respect included the summary summons, the notice of motion, the affidavit sworn by the first named respondent on 11th May 2010 and the exhibits referred to therein (including the relevant loan and guarantee agreements), the affidavits sworn by the appellant on 18th November 2010 (and which set out in considerable detail almost all the points raised by the appellant in this court) and the exhibits referred to therein, and a supplemental affidavit sworn by the first named respondent on a date in 2010 (the copy provided to the court is undated). This documentation, when considered in its entirety, provides a comprehensive picture of the details of the claim and of the appellant's then response to it. The appellant's affidavit sworn on 18th November 2010 explains in considerable detail his reasons for contesting the respondent's claim.

(iii) In these circumstances the learned High Court judge was in a position to consider the case and to make a determination thereto. The appellant has exercised his right to appeal that determination, and it is for this court to pronounce on whether such determination was or was not correct.

(iv) Notwithstanding the appellant's criticism of the manner in which the matter was dealt with in the High Court, it is appropriate to point out that the hearing of the appeal in this court took over two hours with most of that time taken up by the appellant in relation to his submissions.

The failure to provide relevant documentation

16. The appellant complains that there was a failure to provide him with relevant documentation and that consequently he has been disadvantaged in these proceedings. However, this does not in fact appear to be the case. The appellant was present both in the Masters Court, and in the High Court, when the case was dealt with. It is abundantly clear from the affidavits sworn by the appellant on 18th November 2010 that he had already seen and considered the grounding affidavit of the respondent (sworn on 11th May 2010), and its exhibits. It is not clear from the appellant's submissions as to precisely what documentation he maintains was not available to him at the time he was defending this claim before O'Neill J. and which would have demonstrated that he had a bona fide defence to the proceedings . Furthermore, in the period that has elapsed since judgment was obtained against him, he has not sought sight of or production of such documentation in order to demonstrate to this Court that had it been available in the court below the matter would have been referred to a plenary hearing.

The loan and guarantee agreements, and the circumstances in which the appellant placed his acknowledged signature thereon

17. According to the appellant, there is a complex background to the execution of these agreements and which is not apparent from their content. He maintains that company monies were inappropriately used by his fellow director of Greencastle Investments Limited to part purchase his family home thereby fatally undermining the finances of the company, and hence, the need for the company to borrow money from the respondents. Mr. Ring is the respondent's son in law. In any event, the three loan agreements clearly refer to sums totalling IR£200,000 being advanced to Greencastle Investments Limited between 18th March 1988 and 17th February 1999. Each loan agreement provides for:-

(i) repayment with interest within one year, and

(ii) the agreement of Mr. Ring and the Appellant to provide personal guarantees in respect of outstanding amounts to the respondents if so requested.

18. The appellant acknowledges that it is his signature that appears on the three loan agreements. On 31st March 1999, Greencastle Investment Limited paid the respondents interest to the respondents amounting to IR£8,393.84. A letter to the respondents enclosing a cheque for this sum bears two signatures, and those signatures purport to be those of Mr. Ring and the appellant as directors of

the company. Further there is similar type correspondence, referring to interest and in each instance purportedly signed by both directors, are dated 27th June 2000, 28th June 2001, 22nd January 2002, 17th January 2003, 2nd February 2004 and 11th January 2005. The appellant denies that the signatures on these items of correspondence are his own.

19. In a letter dated 19th October 2002, the solicitors for the respondents wrote to "Niall Ring c/o Greencastle Investments Limited" at the company's registered address (30 Richmond Avenue, Fairview), requesting repayment of the outstanding monies advanced to the company, before the end of December 2002. The appellant does not believe he saw this letter. The company did not discharge its indebtedness to the respondents within the stipulated time, or at all.

20. Some seven months after this letter of demand is sent by the respondents, and some five months after the deadline set by the respondents for the repayment of the loans, on 29th May 2003, the personal guarantee was signed by the appellant in a solicitor's office. A similarly worded guarantee was also signed by Mr. Ring.

21. The appellant contends that he was duped "into signing the guarantee while present in the solicitor's office on other business". However, no such contention is made in his affidavit sworn on 18th November 2010 being the document in which he detailed his opposition to the respondent's claim, and the affidavit considered in the High Court proceedings. In that affidavit the appellant described the circumstances in which he signed the guarantee in the following terms:-

> (Paragraph 31) *"Niall Ring asked me to sign this document. I did so after being told that his father in law was going to ask for Niall Ring to repay the money. He didn't want to repay it. He assured me that the money that was in Greencastle's bank account would be used to repay it at a later date. As he didn't want to repay to at that time, he asked me would I sign the guarantee and I confirmed that my signature is on this document"*

22. It is noteworthy that all three loan agreements, and which the appellant acknowledges he signed, expressly refer to the availability of security "in the form of personal letters of guarantee" from the directors (being Mr. Ring and the appellant) "on request". Undoubtedly this agreement to provide a personal guarantee informed the appellant's decision to later sign such a document and assume that liability.

The consideration issue

23. Much of the appellant's oral submissions to this Court point to what the appellant so describes as a lack of consideration in relation to the guarantee. He submits that a guarantee, in order to be valid, requires the existence of present or future consideration.

24. The three loan agreements were signed by Mr. Ring and the appellant, as directors of Greencastle Investments Ltd. They were also the shareholders in the company and therefore had a beneficial interest in it. The company received the benefit of the sums advanced by the respondents, and became liable to repay the sums advanced plus interest, in accordance with the terms of the agreements.

25. In the letter addressed to "Niall Ring, c/o Greencastle Investments Ltd" dated 19th October, 2002, the respondents called for repayment of the outstanding amounts by Greencastle before 31st December, 2002. Repayment did not occur, and within months, the appellant and Mr. Ring signed the guarantees in which they jointly and severally took responsibility for the then outstanding company debt of €255,000, plus interest.

26. While the appellant complains about having been "duped" into signing the guarantee, and while he may have agreed to out of misplaced loyalty to Mr. Ring, or for other reasons, it is nevertheless a fact that he signed the document in the full knowledge of the legal implications for him in so doing. He was at the time an experienced business man well used to dealing with substantial financial matters.

27. In his judgment in *ACC Bank plc v. Gerard Dillon and Others* [2012] IEHC 474 Charlton J., in considering the issue of consideration in relation to a personal guarantee of a bank debt stated:-

> *"A contract not under seal must be supported by consideration. This means that there is either some detriment to the promisee, for instance by giving value or some benefit to the promiser. However … this principle can be looked at in a mirrored way from the point of view of each party vis-à-vis the other. One party gets something by giving their promise to give something, while the other party has the expectation of that benefit and at the same time promises or delivers a value which the other wants in return. Rarely will courts condemn a bargain on the basis on the inadequacy of consideration as sometimes it is to the benefit of the parties to establish an underlying bargain by reference to the legality of a price that does not reflect the surface reality. Beneath the surface may be something which the parties to the contract want to happen and which they have pursued through fair negotiation."*

28. There is evidence of consideration in relation to the guarantee agreement. It is reasonable to assume that the company was in the final months of 2002, coming under pressure from the respondents to repay the loans, and because it could not do so, (or decided not to do so), its directors and shareholders took personal responsibility for the repayment, thereby, in effect, buying more time for such repayment. The consideration is the forbearance to sue to recover the debt from the company in which the appellant and Mr. Ring were directors and shareholders. The benefit to the appellant may have been relatively small (and possibly greatly outweighed by the personal liability taken on by him), but adequacy of consideration is irrelevant.

29. In this case, I am satisfied that the loans payable by the company were properly called in by the respondents prior to the execution by the appellant of the guarantee. The failure to repay the loans by the stipulated deadline followed by the execution of the guarantee nearly five months later, and in which the appellant provided a personal guarantee in respect of the loans repayable by the company, is strongly indicative of the forbearance by the respondents seeking to recover the amounts outstanding from the company. Such forbearance was of benefit to the appellant in his capacity as a director and shareholder of the company. In these circumstances there existed consideration in relation to the guarantee.

30. Even if there had been an absence of consideration, the guarantee was "Signed Sealed and Delivered" by the appellant. Where a contract is executed "under seal" it is not necessary to establish the existence of consideration. In this case, although the guarantee is said to be "under seal" there is no evidence that the document was in fact sealed. However, the absence of a seal is not necessarily fatal to the respondent's claim. In Halsbury's Laws of England (Vol. 32/2012) the following is stated:-

> *"Where a person executes a deed by stating that it has been "Signed, Sealed and Delivered" but without in fact sealing it, and another person relies on the deed to his detriment, the person executing the deed is estopped from denying that it was sealed."*

31. In this case the appellant is estopped from denying that the guarantee signed by him was sealed, in circumstances where it is also clear that the guarantee agreement represents on its face that it was "signed sealed and delivered" by the appellant, and he accepts that it was signed and delivered to him.

32. I am therefore satisfied of the following

> (a) The appellant cannot credibly argue that he was "duped" into executing the guarantee. Neither can he credibly argue that he did not do so willingly and in the full knowledge of the legal implications of doing so. To his credit he has acknowledged his signature on the documents in relation to the three related loan agreements.
>
> (b) The loans from Greencastle Investments Ltd. were called in by the respondents shortly prior to the guarantees being signed by the appellant and Mr. Ring. The loans were not repaid by the company.
>
> (c) There was, on the respondents' part, a forbearance to sue/move to recover the debts from the company in return for the said guarantees being executed, and such benefited Mr. Ring and the appellant as directors and shareholders of the company. This constituted consideration sufficient to validate the guarantee. It is clear to me that there was nothing in the appellant's affidavits to demonstrate that he had an arguable defence in this regard.
>
> (d) Furthermore, the appellant has not demonstrated any arguable legal or factual basis on which he might have been in a position to challenge the validity and enforceability of the guarantee which was noted to have been signed, sealed and delivered.

The Appeal

33. On a contested application for summary judgment, as is the case here, a High Court judge may do one of three things. He may (a) dismiss the action, (b) grant judgment for the sum to which he believes the plaintiff is entitled or (c) grant leave to the defendant to defend the proceedings in whole or in part unconditionally or subject to terms (Order 37, rr. 7 and 10 RSC).

34. The consequences of any decision made will have significant repercussions for the parties to the litigation. If it is the decision of a court to remit a case to plenary hearing, there will be substantial delay encountered by a plaintiff in his efforts to recover the sum claimed. There are also obvious repercussions for both sides in relation to costs On the other hand, if summary judgment is granted against a defendant, the consequences of that decision may be very serious for him, as he will be denied an opportunity to defend himself at a full plenary hearing.

35. If summary judgment is to be denied, and the case sent for plenary hearing, with all the accompanying delay and cost that such entails, such should only occur where a defendant has failed to put forward an arguable defence. The underlying test is as set out in Hardiman J. in *Aer Rianta CPT v. Ryanair Limited* [2001] 4I.R.607. As Hardiman J. pointed out at p. 623:-

> *"…the fundamental question to be posed on an application such as this remains: 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?"*

36. In her judgment in *Danske v. Durkan New Homes* [2010] IESC 22, Denham J. approved a passage from a judgment delivered by Clarke J. in *McGrath v. O'Driscoll* [2007] ILRM 203, where, at p. 210, he stated:-

> *"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 you would only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice been done by determining those questions within the somewhat limited framework of a motion for summary judgment".*

37. In *IBRC v. McCaughey* [2014] IESC44, Clarke J. commented as follows:-

> *"It is important therefore to re-emphasis that what is meant by the credibility of a defence. A defence is not credible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in Aer Rianta, be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined, in favour of the defendant, they would provide for a defence."*

38. Clarke J. also stated:-

> *"The sort of factual assertions which may not provide an arguable defence are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta."*

39. In *AIB v. Treacy* [2015] IECA49, Peart J., in delivering the judgment of the court, stated the following in relation to the threshold of arguability which a defendant must surpass to achieve a plenary hearing being a low one:-

> *"Nevertheless, it is a threshold that amounts to more than mere assertion or stateability. There must be some perceivable potential substance to it. It must be based upon facts which if true and established would amount to a defence. It must be a credible defence."*

40. The threshold required of a defendant was clearly explained in *First National Commercial plc v. Angling* [1996] 1 I.R. 75 at 78/79, when Murphy J. dealt with the issue in these terms:-

> *"For the court to grant summary judgment to a plaintiff and to refuse leave to defend, it is not sufficient that a court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action.. in my view the test to be applied is that laid down in Banque de Paris v. de Naray [1984] I Lloyds Law Report 21, which was referred to in the judgment of the President of the High Court and re-affirmed in National Westminster Bank v. Daniel [1993] 1 W.L.R. 153. The principle laid down in the Banque de Paris case is summarised in the head note*

thereto in the following terms:-

The mere assertion in an affidavit of a given situation which was to be the basis of the defence did not of itself give leave to defend; the court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of the defendants having a real or bona fide defence."

41. In relation to this case, the question to be asked is; has the appellant established that he has a credible or arguable defence? I do not believe he has. While clearly, and understandably, based on the background information provided by the appellant as to the reason for the loans and his agreement to guarantee them and the alleged behaviour of Mr. Ring, the appellant is unhappy with the prospect of his personal liability for a very substantial sum of money in circumstances where, from his perspective, he does not accept or believe that he received any benefit in relation thereto, no arguable or credible defence is apparent such as could justifiably deny the respondents their entitlement to summary judgment.

42. I would therefore dismiss the appeal.