Neutral Citation: [2015] IEHC 27

THE HIGH COURT

[2014 No. 1329 S.]

BETWEEN

TALOS CAPITAL LIMITED

PLAINTIFF

AND

JOSEPH SHEEHAN AND JOHN FLYNN

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered on the 23rd day of January 2015

Introduction

1. This is a claim for summary judgment in which the plaintiff contends that the defendants' affidavits have not established any basis of defence and that the plaintiff is accordingly entitled to judgment.

2. The plaintiff claims €2.4 million plus accrued interest from the defendants jointly and severally on foot of a guarantee dated the 19th March 2014, whereby the defendants guaranteed the payment obligations of a company known as JCS and agreed to indemnify the plaintiff against any losses arising from the failure of the company to meet its liabilities under an agreement of the 17th March 2014. Pursuant to that agreement, the plaintiff lent the company €2.4 million which was drawn down on the 7th April 2014. The plaintiff alleges that the company defaulted in its obligations by way of a series of acts and omissions, any one of which would have been sufficient, giving rise to a right of immediate demand of full repayment of the amount of €2.4 million that was advanced by the plaintiff together with accrued interest and also to make a claim under the guarantee from the defendants and each of them in the same amount.

3. The defendants are shareholders in Blackrock Hospital Limited (BHL), the company that operates the Blackrock Clinic. The first defendant, Dr. Sheehan, holds his shares personally and the second defendant, Mr. Flynn, has his shares owned by a company that he controls named Benray Limited. Dr. Sheehan's shares amount to approximately 28% of the issued share capital of BHL and the Benray shares approximately 8%.

4. Dr. Sheehan's shares are charged to IBRC as successor to Anglo Irish Bank plc to secure substantial borrowings. The Benray shares are charged to NALM as security for borrowings from the same original lender.

5. The plaintiff agreed to fund the acquisition of Dr. Sheehan's loans from IBRC together with the loans of another BHL shareholder, Dr. George Duffy, whose shares amounting to 20% approximately were similarly pledged to IBRC, and also to redeem the Benray loans held by NALM. If the set of complex transactions that was contemplated had proceeded fully to completion the three tranches of shares in BHL would have come out of IRBC and NALM and the plaintiff would have effectively held security for its loans over some 56% of the shareholding in BHL.

The Plaintiff's Claim

6. The plaintiff's grounding and replying affidavits are sworn by James Hawkes, a partner in the firm that is the investment manager of the plaintiff and who was centrally involved in the transactions giving rise to the claim. He sets out the initial understanding between the parties that was embodied in a term sheet signed by the defendants and dated between the 1st and 3rd March, 2014. He says that it was envisaged that the plaintiff would lend up to €45 million to the defendants or companies controlled by them to purchase their loans and those of Dr. Duffy from IBRC and NALM.

7. On the 13th March, 2014 the plaintiff entered into a facility agreement with a Cayman Island exempted company named Medfund, a special purpose vehicle indirectly controlled by the first defendant, to provide finance for the acquisition of the loans of the first defendant and Dr. George Duffy from IBRC and the acquisition or redemption from NALM of the loans of the second defendant held by him through Benray Ltd.

8. The loans were to be secured by way of indirect control of the approximately 56% shareholding in Blackrock Hospital Limited that was cumulatively held by the defendants and Dr. Duffy.

9. It was a condition of the financing to be provided by the plaintiff that Dr. Duffy would enter into a framework agreement between the plaintiff and the defendants among others. That agreement would regulate the rights of the various parties including the control of the flow of dividends from the Blackrock Clinic which would fund interest payments on the loans provided.

10. Following the execution of the agreement of the 13th March, 2014 the defendants notified the plaintiff that Medfund was unable to provide the deposit of €2.4 million to be paid to IBRC under the loan sale deed for the acquisition of the Sheehan/Duffy loans for €24 million. The plaintiff then agreed on the 17th March, 2014 to amend the facility by advancing the deposit on certain terms including (1) that Medfund would resign as borrower and be replaced by an Irish special purpose vehicle; (2) Medfund would grant a charge over the entire share capital of the acceding special purpose vehicle; (3) that the defendants would enter into personal guarantees in respect of the deposit loan and interest thereon; and (4) that the loan sale deed would be executed. In pursuance of the amended agreement JCS (JCS Investments Holdings XIV Ltd.) acceded to the facility agreement in place of Medfund on the 19th March, 2014.

11. On the 2nd April, 2014 the second defendant and Benray undertook by deed of agreement to deliver all of the conditions precedent to the above amended agreement.

12. On the 19th March, 2014 each of the defendants executed the deed of guarantee, which is governed by Irish law, and pursuant to which they jointly and severally guaranteed the payment obligations of JCS and agreed to indemnify the plaintiff in respect of any

loss arising from failure to pay any amount payable under the amended agreement, such liability being limited to €2.4 million plus any accrued unpaid interest.

13. On the 4th April, 2014 the loan sale deed was signed but not exchanged or made effective. There was something of an impasse because the plaintiff could not advance the €2.4 million deposit until the deed was fully effective and IBRC wanted to receive the deposit before it made the deed effective. The difficulty was overcome on the 7th April, 2014 by way of payment transfer between solicitors' client accounts and the deed then became effective.

14. On the 13th April, 2014 the plaintiff learned that the Duffy loans had been redeemed in full at or before the time when the deed became effective. Neither on the 4th April, 2014 when the plaintiff paid the money into its own solicitor's account nor at any time up to the 7th April, 2014 when the money was transferred to the account of the special liquidators of IBRC, did the defendants or JCS indicate to the plaintiff that the Duffy loans had been redeemed. From correspondence passing between lawyers for the first defendant and IBRC it appeared that the first defendant became aware in the afternoon of the 4th April, 2014 that the Duffy loans had been redeemed earlier that day which meant that the first defendant was aware of the situation at the time when the money was used.

15. The situation therefore as of the 7th April, 2014 was that the only loans available for transfer from IBRC were those of the first defendant, which was an entirely different situation from what had been agreed between the parties. The deponent avers that the plaintiff would never have entered into funding for such a limited acquisition, whether the Sheehan loans are considered on their own or even together with the Benray loans.

16. It will be recalled that the claim made by the plaintiff is that there was a continuing obligation on the defendants -- or in the case of Mr. Flynn his company Benray Ltd -- to ensure the correctness of representations made to the plaintiff and that there was a breach of this obligation when JCS drew down the deposit of €2.4 million at a time when it was aware that Dr. Duffy had acquired his own loans separately from IBRC.

17. In the circumstances, the plaintiff claims first that conditions precedent for any further drawdown of funds under the facility agreement became incapable of being satisfied by JCS in a form and substance satisfactory to the plaintiff, as required by the written agreement. There was in addition a series of breaches of the agreement, each of which constituted an event of default, as follows: --

(a) incorrect or misleading representations made by the borrower on the 7th April, 2014;

(b) failure to notify the plaintiff of the redemption of the Duffy loans;

(c) there was a material adverse change within the meaning of the agreement by reason of the non-availability of the Duffy loans and the shares on which they were secured;

(d) under clause 21.17 of the facility agreement a further breach occurred when the acquisition of the Sheehan and Duffy loans had not occurred at the 5th May, 2014.

18. On the 6th May, 2014 the plaintiff notified JCS as to the events of default and demanded immediate repayment of all amounts owing. JCS has failed to make payment at all or any part of the money that was advanced or of any interest thereon.

19. The defendants and each of them are liable to the plaintiff in the amount of the deposit of €2.4 million that was advanced to JCS and interest thereon as provided by the agreement. Despite demand made the defendants have failed and refused to discharge their liabilities.

The Defences

20. Dr. Sheehan's first affidavit is dated the 17th September, 2014. He accepts that he executed the personal guarantee on the 19th March, 2014, but he says he was induced to sign the guarantee by representations made on behalf of the plaintiffs that the plaintiff would fund the purchase of the Tranche 14 loans and/or redeem Dr. Sheehan's loan but the plaintiff had not purchased or redeemed Dr. Sheehan's loan.

21. He says that the plaintiff was to pay the deposit of €2.4 million to Medfund which would then transfer it to JCS as the acceded borrower. The original vehicle had been Medfund but following the agreement by the plaintiff to fund the additional money for the deposit it was agreed that JCS would take over. However, instead of the money going to JCS as planned and agreed it moved by a different route through solicitors' client accounts.

22. When the plaintiff paid the deposit, it exercised powers of corporate control in respect of JCS by removing the existing directors and secretary and replacing them with its own nominees. The affidavit does not say in what way this was wrongful. He does go on to say at paragraph 17 of the affidavit that JCS did not complete the agreement to purchase or redeem the loans at a time when it was under the control of the plaintiff and that led to the loss of the deposit. Therefore, any failure by JCS is really attributable to the plaintiff because it was in control.

23. On the 6th May, 2014 the plaintiff unilaterally terminated the facility agreement of the 13th March, 2014 as amended and restated on the 17th March, 2014.

24. Dr. Sheehan says that he and others commenced proceedings in New York on the 8th May, 2014 in the United States District Court and the proceedings are still extant. He refers to proceedings brought by the plaintiff in the High Court in England on the 12th May, 2014.

25. Dr. Sheehan says that he has a *bona fide* defence to the claim. Mr. Flynn's affidavit in defence is in similar terms to that of Dr. Sheehan. Each affidavit describes how around the beginning of February 2014 negotiations took place between the plaintiff and a number of parties including Benray Ltd. and the two defendants with a view to reaching a financing arrangement whereby the plaintiff would lend €45 million to a special purpose vehicle company in order *inter alia* to purchase or redeem their loans.

26. Dr. Sheehan's second affidavit is dated the 16th September, 2014 and is sworn on behalf of both defendants. He describes the overarching premise of the plaintiff's claim to be that "because of alleged non-compliance or non-execution with certain security documents which the plaintiff claimed that they were entitled to have executed prior to or subsequent to a utilisation request under the Facility Agreement entered into between the parties in/or around the 17th March, 2014 that some sort of contingent payment

obligation under certain guarantees arise."

27. The defendants say that it was and is a feature of the loans held by IBRC that were advanced to the Blackrock Clinic shareholders that the bank was protected by security agreements whereby each shareholder cross-guaranteed the loans of the others. This protection was provided by all the shareholders in Blackrock Hospital Ltd. and not simply by those who were indebted to IBRC. Therefore, as a matter of fact, the plaintiff's position was not undermined by Dr. Duffy's having redeemed his indebtedness prior to or subsequent to the utilisation request for the loan deposit. Dr. Sheehan's point is that the plaintiff suffered no prejudice by the departure of Dr. Duffy.

28. Dr. Sheehan says that it is a matter of construction of the circumstances as to whether or not there was a material adverse change or misleading information whereby some significant event occurred which would allow the plaintiff to accelerate the indebtedness of the defendants and to call in any personal contingent security obligations. He claims that the plaintiff breached its obligation to the defendants in prematurely calling in and accelerating the liabilities and also in failing to provide the residual finance necessary in order to complete and execute the purchase of the defendants' indebtedness with IBRC.

29. Dr. Sheehan says that the defendants have a case in specific performance and/or damages for non-completion of the financing agreement and that the acceleration notice was in breach of the agreement. He refers to the English proceedings, asserting that rectification is sought of the framework agreement and that the term sheet "is sought to be construed as an implied condition into the facility agreement." On this basis, he claims that there is uncertainty at the very least as to the basis on which the plaintiff accelerated or called in the entire facility so as to trigger contingent personal liabilities under the guarantees.

30. He says that no judgment should be given in respect of a contingent liability arising out of "a subjective interpretation of a material adverse change clause" when the agreement is the subject of a claim for rectification.

The Plaintiff's Response

31. James Hawkes in his third affidavit responds to the defences in Dr. Sheehan's second affidavit by first summarising at paragraph 10 what he says is the basis of the plaintiff's claim. Under the facility agreement the plaintiff is entitled to make demand for the immediate payment of the money it lent and to be free of any obligation to provide any further amount if there was default, that is, if there was any one default. In fact, according to Mr. Hawkes, there were no less than seven events of default which are set out at paragraph 29 of his original affidavit.

32. One of the events of default was non-completion by JCS of the acquisition of the underlying IBRC & NAMA loans by the 5th May, 2014. On that happening, the plaintiff had the right to serve an acceleration notice demanding immediate repayment of the money it had lent.

33. Mr. Hawkes asserts that the defendants have not taken issue with the occurrence of those events of default, nor with the plaintiff's entitlement to take action on foot thereof including the right to serve an acceleration notice.

34. Mr. Hawkes declares that the main completion loan would never have been advanced if the framework agreement had not been executed by all the relevant parties including Dr Duffy and relevant special purpose vehicles. The intention was that JCS would hold the majority shareholding in Blackrock Hospital Ltd. and have a controlling interest to ensure payment of the loan interest out of the company's revenue stream.

35. Mr. Hawkes says that the interlocking arrangement between the shareholders in Blackrock Hospital Ltd is irrelevant to this case and he is also advised that its legal validity is questionable. Moreover, the facility provision that Dr. Sheehan relies on does not support his contention and the beneficiary would in any case be JCS and not the plaintiff.

36. In answer to the point about rectification being claimed in the English proceedings and thus giving rise to uncertainty, Mr. Hawkes states that the plaintiff's case is that the loans advanced under the facility agreement were intended to be subject to a separate framework agreement which would set out the obligations of the defendants and Dr. Duffy and the corporate shareholders in relation to their shareholdings in Blackrock Hospital Ltd. and he cites in this respect paragraph 21 of the particulars of claim in the English proceedings. That framework agreement is not the same thing as the term sheet, which was the initial agreement setting out the basis on which the funds would be provided. As appears from paragraph 23 of the claim in England, the plaintiff's primary claim is that rectification is not necessary because the facility agreement "already clearly provides for the execution of a framework agreement (see for example the reference to 'framework agreement' in the definition of 'collateral shares')." But if it happened that a court held that the facility agreement did not expressly provide for the execution of the framework agreement the plaintiff would seek rectification to include such a term. It is quite wrong to suggest, according to Mr. Hawkes, that the plaintiff is seeking to imply the term sheet into the facility agreement.

37. The liability that JCS has to the plaintiff under the facility agreement arises as a result of (1) events of default numbering seven as listed at paragraph 39 and 40 of the English particulars of claim and (2) the failure of the conditions precedent numbering three as set out at paragraph 41 of the same document. On breach or failure of any one of the ten events or provisions the obligation on JCS to repay the funds advanced to it was triggered. Mr Hawkes contends that only one of these circumstances, namely, the third condition precedent specified at paragraph 41 (3), is related to the execution of the framework agreement.

38. Turning to the particulars of claim in the English proceedings, paragraph 39 sets out a series of events of default. It is unnecessary to set out in detail each and every allegation as to the default items alleged against JCS. The essential points are that JCS was aware that the Duffy loans had been repaid independently and separately at the time when JCS drew down the deposit money of €2.4 million for the intended purchase of the Sheehan and Duffy loans for €24 million. This constituted default first in relation to representations that were deemed under the facility agreement to be continuing. Secondly, it meant that the original intent of scheme could not now proceed. The plaintiff as lender was not in the result in a position to have security over a controlling interest in Blackrock Hospital Ltd. Thirdly, the intended sale was not completed by the 5th May, 2014 as required.

39. The plaintiff alleges that conditions precedent and/or subsequent under the facility agreement were not fulfilled in that (1) the plaintiff did not receive in satisfactory form and substance the documents specified in clause 4.2; (2) an event of default was continuing or would result from the drawdown at the time of the utilisation request; (3) the framework agreement had not been finalised and/or executed.

40. The claims at paragraph 42 include that funds advanced under the facility agreement were not applied to the acquisition of the Duffy loans, contrary to clause 3 of the facility agreement.

Submissions
41. Mr. Jarlath Ryan, counsel for the defendants, submitted that the case should be sent for plenary hearing on the basis of the defences that were raised. First, there was a dispute of fact arising out of the definition of collateral shares in the facility agreement. This had a bearing on the material and adverse change clause in the agreement, which was the threshold for the triggering of the recall of the loan. It was not the intention of the parties at the time when the facility agreement was executed that an event or events of the kind relied on by the plaintiff would have that consequence.

42. There were disputed points of law and fact as to the extent to which a material adverse change clause governed by English law could be relied upon in this Court to trigger contingent liability under contract full plenary hearing would afford the opportunity to obtain a determination on that. The term sheet is governed by English law and the facility agreement likewise. The case brought by the plaintiff in the English courts seeks to rectify the facility agreement and such rectification would represent a material change to the facility agreement. This meant that the claim by the plaintiff that there was no defence in respect of that document cannot be said not to be in dispute. This was a matter of fact, and not law. The bank had made it a matter of fact because it was seeking to rectify its own legal documents.

43. The defence was alleging that the material adverse change relied on by the plaintiff that led to the recall of the loan was a subjective interpretation by the financial institution of the events surrounding the sale of the Duffy loans, and a subjective assessment of the consequences of that event and not by reason of necessary implications from the facts and objective interpretation of the commercial documents.

44. The nature and validity of a guarantee may be challenged in the event of an alteration to the principal financial agreement. If a financial institution misconstrued a principal document so as to alter or vary the transaction that the guarantors thought they were entering into, that would affect the validity of the guarantee. The subjective assessment of Talos on the events of the Duffy loan, that it would have a material and adverse change, amounted to a change of the nature of the financial agreement.

45. In this case the plaintiff misconstrued the documents by imposing its own subjective interpretation of what is material and what is adverse, which constituted a unilateral variation of the contract. The defendants wanted to adduce evidence that challenged the attempt by the bank to trigger the acceleration and the events default by view of their own subjective interpretation.

46. Mr. Ryan cited authorities in support of his submissions and in regard to the test to be applied on the question of plenary hearing. He pointed out that the term sheet and facility agreement are governed by English law and referred to *Avestus v. Danske and McQuillan* [2012] IEHC 483 in which Laffoy J cited *Kutchera v Buckingham International Holdings Ltd* [1988] IR 61. The rule is that foreign law must be proved; in default of evidence or sufficient evidence, the court applies Irish law. However, no issue arose on this and no difference was suggested. He also opened passages from *Grupo Hotelero Urvasco SA v Carey Value Added SL* [2013] EWHC 1039 on the meaning of material adverse change clauses. These citations are of little assistance to the defendants.

47. The point that the plaintiff lost its right to proceed against JCS and the defendants in turn because it allowed a period of indulgence after it discovered the facts is untenable. There was actually no disagreement between counsel as to the legal issues.

48. Mr. Bernard Dunleavy, counsel for the plaintiff, responding to these arguments submitted that his principal contention was that, while there are areas of contest, the key facts surrounding the events of default caused by the misrepresentation are both uncontested and verifiable as fact by reference to the commercial documents.

49. The plaintiff contended that there were seven events of default and three failures of conditions precedent. There need only be one event of default or failure to comply with a condition precedent to trigger the obligation of JCS to repay the funds. He argued that only one of the cases of default or failures to comply with the conditions precedent related to the framework agreement and that the misrepresentation point had not been challenged.

50. Mr. Dunleavy set out the following as uncontested claims:

1. That €2.4 million was to be provided as a loan.

2. That a condition precedent to the provision of that loan was a personal guarantee.

3. That the guarantee was signed.

4. That independent legal advice was sought before signing the guarantee.

5. That the deposit advance was in the context of, inter alia, the redemption of the Duffy loans.

6. The redemption of the Duffy loans took place on 4th April, and Dr Sheehan was notified.

7. No money was paid by the plaintiff to the defendant until the 7th April.

8. The plaintiff was not advised that Dr. Sheehan had been notified of the redemption of the Duffy loans.

9. That failure to notify was a misrepresentation on foot of the agreement.

51. Counsel referred to the grounds of defence put forward in the affidavits and submissions and replied to them in turn. He said that many of the proposed points of contention related to matters that were not germane to the existence or otherwise of a defence.

The Law on Summary Judgment
52. In *Aer Rianta v. Ryanair* [2001] 4 I.R. 607, the Supreme Court endorsed two tests from the English jurisprudence that the Court had previously adopted in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75. In the latter case, Murphy J. delivering the judgment of the Court said:

> "For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action (see *Irish Dunlop Co. Ltd. v. Ralph* (1958) 95 I.L.T.R. 70).
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> "In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep. 21, which

was referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v. Daniel* [1993] 1 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the headnote thereto in the following terms:-

> 'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide 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.'

"In the *National Westminster Bank* case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-

> 'I think it right to ask, using the words of Ackner L.J. in the *Banque de Paris* case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or *bona fide* defence?' The test posed by Lloyd L.J. in the *Standard Chartered Bank* case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.'"

53. In *Aer Rianta*, McGuinness J. identified the issue as "whether the proposed defence is so far fetched or so self-contradictory as not to be credible." Hardiman J. asked: "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 Court took the nature and context of the dispute into account. Hardiman J. referred to the facts of the cases in the authorities cited and observed that in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, "the indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the defendant quite untenable."

Discussion

54. The defendants are jointly and severally liable to indemnify the plaintiff against any loss arising under the loan contract with JCS. It follows that if Talos was entitled to assert default on the part of JCS Limited and to call in the deposit loan plus interest then Talos is entitled to recover judgment jointly and severally against the defendants on the basis of their guarantees. The plaintiff's case is that these matters are not in dispute and there is accordingly no factual issue to be decided and that no defence has been suggested that would justify the matter being referred to plenary hearing.

55. It is clear from the affidavits that there is little if any relevant factual matter in dispute in the case. The defendants do not deny that the agreement between them and the plaintiff depended on the involvement also of Dr. Duffy and his loans. The plaintiff agreed to finance the acquisition or extinguishment of the loans owed by the two defendants and Dr. Duffy. The first agreement was with the defendants but the transaction was unitary and comprised the combined Flynn, Sheehan and Duffy loans. These defendants do not deny this feature of the agreement, averring merely that the plaintiff agreed to the acquisition of their own loans but not denying the connectedness of the agreed arrangements inter se or with Dr. Duffy.

56. The funds to be provided by the plaintiff would have gone to IBRC in respect of the Sheehan and Duffy loans and to NALM to redeem the Benray loans. The second defendant knew that Dr. Duffy had bought out his own loans from IBRC and was not going to be involved. When that happened, the agreed programme of loan acquisition and extinguishment could not proceed. The loan of €2.4 million was a 10% deposit on the purchase price of €24 million, the agreed sum for acquisition of the Sheehan/Duffy loans. Notwithstanding the exit of Dr. Duffy from the scene on the 4th of April, 2014 JCS went ahead with the drawdown of funds on the 7th of April, 2014 even though the sale agreement for which it was the deposit could not be completed.

57. If the plaintiff had funded the two defendants' exit from IBRC/NALM without involvement of Dr. Duffy, that would have represented a new agreement. The sum required for the IBRC element would not have been €24m. The plaintiff as the lender would not have been able to control the majority shareholding in the hospital company as security for the money it had advanced.

58. The defendants do not actually challenge the specific defaults alleged by the plaintiff in the affidavits of Mr. Hawkes. There were detailed and continuing obligations as to representations and the failure to notify the plaintiff that Dr. Duffy was no longer involved because he had purchased his loans independently constituted defaults under a number of clauses in the facility agreement.

59. It was also a term that the agreement would be completed by the 5th May, 2014.

60. In his oral submissions on the hearing of the motion, counsel for the defendants argued correctly that the validity of a guarantee may be vitiated in the event of an alteration in the agreement obligation that is guaranteed. In the case of a financial institution, if it misconstrued a document of primary liability in a manner that varied the terms of the guarantee, obviously that would affect the liability of the guarantor. From this, he proposes that the plaintiff adopted its own individual interpretation of what happened to the Duffy loans and considered that to be a material adverse change under the terms of the facility agreement. Since there is an area of legitimate disagreement in law and fact as to what constitutes a material adverse change in the circumstances of a particular contract, the plaintiff's "unilateral" determination of such change represents an alteration of the obligation taken on by the defendants under the guarantee.

61. The Court does not accept this argument as representing a potential defence to the claim. In the first place, this argument, as counsel for the plaintiff pointed out, addresses only one of multiple grounds put forward by the plaintiff to justify its demand for immediate repayment of the money it had advanced to JCS. Therefore, even if it were to be conceded that the point is a legitimate one or that it could potentially be decided in favour of the defendants that would leave all the other failures of condition and breaches of contractual terms unanswered. Secondly and more fundamentally, the question is whether there is anything in the point. The Court has found on the basis of the undisputed evidence that the agreement with JCS was for the acquisition of the Duffy loans as well as those of the defendants, and that the deposit was provided to fund the acquisition of the Sheehan/Duffy loans and constituting 10% of the purchase price. In those circumstances, it may be questioned whether it makes any difference to consider the situation as representing the breach of a condition precedent or as being a material adverse change. If the alteration of circumstances means that the agreed transaction cannot proceed and that any new development requires a different contract, which is the situation here, it would be legitimate to consider the change as representing either or both. The materiality could not be doubted and if it were to be questioned whether it would necessarily be adverse, the fact that under the proposed and agreed scheme the lender would have access to security over the majority shareholding in a valuable asset whereas it would not have that control under the changed arrangement would be a sufficient answer. A contract party might of course decide otherwise but that is not the point.

62. Counsel for the defendants also argued that, since there was a claim in the English proceedings for rectification of the facility agreement that was evidence of uncertainty as to the terms of that agreement and the consequent obligations of the defendants in guaranteeing compliance with it. This contention is dealt with in the third affidavit of Mr. Hawkes. It is true that the English pleading includes a request for rectification but it is a qualified request and conditional on the rejection by the court of the interpretation proposed by the plaintiff. This is a standard pleading device that takes account of the possibility that the court may not adopt the same view as the party. It can legitimately be described as a request for rectification but in circumstances where it is merely put forward as an alternative and to take account of the possibility of rejection of the party's own interpretation, it is very thin evidence of uncertainty. This is also not a sufficient ground of defence but even if it were to have some potential validity, it is of limited applicability to the grounds of the claim.

63. The Court accepts as correct the plaintiff's general submission that all the central facts in the case are not in dispute and that the points advanced by way of proposed defence do not raise any issue that might be decided in the defendants' favour so as to defeat the claim. Neither is there anything to justify fuller hearing on any of the specific matters raised by way of defence in affidavits or argument, in respect of which the Court also accepts Mr. Dunleavy's replying submissions which may be summarised as follows.

a. The defendants did not execute the guarantee as a result of being induced to do so but it was a condition precedent of the borrowings being advanced, a term of the contract. Counsel for the plaintiff cited correspondence confirming the mutual understanding of the parties to that effect. This point was not relied on by Mr. Ryan as a ground of defence.

b. The fact that the entire transaction contemplated in the various loan agreements has not been competed and that the defendants' loans have not been redeemed cannot furnish a basis of defeating the plaintiff's claim even on the defendants' own version of events.

c. It is correct that no deposit monies were actually received by JCS but the agents of the defendants were involved in and consented to the transfer of the money by way of solicitors' client accounts.

d. The facility agreement was unilaterally terminated by the plaintiff and for good reason; the plaintiff was entitled to terminate the agreement in view of a breach of the agreement.

e. The allegation that JCS failed to complete the agreement while it was under the control of the plaintiff is unsustainable in view of the fact that completion of the loan acquisitions was to take place by the 5th of May, 2014, the failure of which occurred while the first defendant was in control of JCS.

f. The assertion that as a result of conduct of the plaintiff, the defendants have suffered loss cannot be a ground of defence because paragraph 4.2 of the guarantee provides that there is no set-off or counterclaim in respect of a demand on foot of the guarantee.

g. Non-execution of the framework agreement by the defendants was not the event of default by JCS on foot of which the claim against the defendants was made.

h. The assertion that no prejudice would have arisen if the plaintiff had continued with the funding and acquired what was left to acquire, because of cross-guarantees among the BHL shareholders is, first, not a defence to the plaintiff's claim and, secondly, is a point of doubtful validity having regard to the terms of the facility letter on which the first defendant relies.

i. On the argument that there is a doubt as to the reliability/enforceability of the framework agreement, of the seven events and three conditions precedent relied upon, only one relates to the framework agreement.

64. It is accordingly clear that the plaintiff's claim is established and that there is no defence to it. There must therefore be judgment for the plaintiff.