

## THE HIGH COURT

## COMMERCIAL

[2018 No. 170 S]

## BETWEEN:

ALLIED IRISH BANKS, P.L.C.

PLAINTIFF

-AND-

SIOBHAN SMITH

DEFENDANT

## EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 24th April, 2018.

## Summary

1. The defendant, Siobhan Smith ("Mrs. Smith") is being sued on a guarantee dated 30th April, 2008 (the "Guarantee") which she executed, along with her now deceased husband, Frank Smith ("Mr. Smith") in favour of the plaintiff, Allied Irish Banks, p.l.c. ("AIB"). AIB is seeking summary judgement in sum of €6,000,000.

2. The guaranteed sums were in excess of €50 million and related to the purchase of the Ashleaf Shopping Centre and the Submarine Bar in Crumlin. The Guarantee is by its express terms capped at €6,000,000 and guarantees the borrowings of Mr. Smith and Mr. Gary Smith, the son of Mr. and Mrs. Smith, in relation, *inter alia*, to the purchase of the Ashleaf Shopping Centre.

3. The nub of Mrs. Smith's defence is that it was misrepresented to her by her husband that the guarantee was restricted to two houses in the K Club which she owned, which she had been advised were worth €6 million and that there was to be no recourse to her personally, when in fact the terms of the guarantee make it clear that it is for the sum of €6 million and thus is recoverable from her personally.

## Misrepresentation

4. Mrs. Smith disputes the entitlement of AIB to summary judgment. She says that the Guarantee was misrepresented to her by her husband and her son as being a limited recourse guarantee in the sense that exposure was limited to two houses in the K Club. Thus, while the Guarantee is in fact a limited guarantee, since it is limited to €6 million, notwithstanding the amount borrowed by her son, she claims that she wrongly believed that it was limited in a different sense, namely that it was limited to two houses in the K Club with no further recourse to her.

## Undue influence

5. Mrs. Smith also alleges that she signed the Guarantee under the undue influence of her husband, Mr. Smith, who she says was a bully. Mr. Smith died in March, 2015. She avers that the bank manager in AIB at that time of the Guarantee, Mr. Dan O'Driscoll ("Mr. O'Driscoll"), was a personal friend of Mr. Smith's and that he lived rent free in an apartment attached to Mr. and Mrs. Smith's house in the 'early 2000s' which was a number of years prior to the time of the execution of the Guarantee, which was executed on the 30th April, 2008. She avers that Mr. O'Driscoll was aware that Mr. Smith bullied her.

## Relevance of the Settlement Agreement in 2013

6. In the context of her defence that the Guarantee was misrepresented to her and that it was procured by undue influence of her husband, it is relevant to refer to a Settlement Agreement ("Settlement Agreement") that was entered into by her and Mr. Smith on the 22nd November, 2013. This Settlement Agreement is relevant because it deals with Mr. Smith's and Mrs. Smith's joint liability under the Guarantee, which Mrs. Smith claims was procured by misrepresentation and undue influence.

7. When executing the Guarantee in 2008, Mrs. Smith did not receive independent legal advice. However, in relation to the Settlement Agreement in 2013, Mrs. Smith received independent legal advice from Mr. Colman Bermingham of Noel Smyth & Partners, as this was a condition precedent to the coming into force of the Settlement Agreement. In her affidavit, Mrs. Smith avers that Mr. Bermingham explained the Settlement Agreement to her. It is also relevant to note that here is no question of Mrs. Smith not having the capacity to sign the Guarantee or the Settlement Agreement.

8. The purpose of the Settlement Agreement was, *inter alia*, to replace the Guarantee with other financial obligations of Mr. Smith and Mrs. Smith to AIB. It is important to note that in this Settlement Agreement in 2013, Mrs. Smith expressly acknowledges, with the benefit of independent legal advice, the existence of her obligations under the Guarantee for €6 million (which Guarantee she now says in 2018 in the proceedings before this Court was procured by misrepresentation and undue influence).

9. In particular, the Settlement Agreement provides for the release of Mrs. Smith and Mr. Smith from their obligations under the €6 million Guarantee (and for Mr. Smith's obligations for his personal borrowings to be made limited recourse) in return for their selling properties, including a villa and an apartment in Spain, with a target of achieving €7.6 million for AIB. It is also expressly provided under Clause 10 of the Settlement Agreement that on the payment of €6 million to AIB, Mrs. Smith will have no further liability under the Guarantee. Thus, in 2013 this Settlement Agreement provided, *inter alia*, that Mr. Smith's obligations under the €6 million Guarantee are being released in return for the payment by her of €6 million.

10. It follows therefore that some five years after the execution of the Guarantee, which Mrs. Smith alleges was procured by undue influence and misrepresented by Mr. Smith to her as being limited to two houses in the K Club (and *not* a guarantee for €6 million even though it is expressly stated to be a €6 million guarantee), she signed, after obtaining independent legal advice, a Settlement Agreement whereby, *inter alia*, she was to be released from her €6 million Guarantee in return for the payment to AIB of the sum €6 million.

11. After the execution of the Settlement Agreement, and after Mr. Smith's death in March, 2015, AIB's solicitors were in contact with Mrs. Smith's solicitors and her financial advisers for almost three years regarding her compliance with the terms of the Settlement Agreement and various proposals were made on her behalf and at least one Spanish property owned by Mrs. Smith was sold before the demand was made on 26th January, 2018, by AIB, which resulted in these proceedings.

12. During this almost three year period, Mrs. Smith had the benefit of legal advice from her current solicitors and at no time did she claim that she did not understand the Settlement Agreement or the Guarantee or that her signature on the Guarantee had been procured by undue influence and misrepresentation.

13. In fact, during this three year period, Mrs. Smith's actions gave the contrary impression, since Mrs. Smith, through her agents, engaged in correspondence with AIB regarding proposals to comply with the Settlement Agreement which dealt with her liability under the Guarantee, with no reference to the Guarantee being unenforceable due to duress and misrepresentation.

14. When it became clear to the Bank that these proposals were not sufficient, AIB instituted these proceedings in February 2018 seeking to enforce the Guarantee and it was at that stage that Mrs. Smith made her claim for the first time that the Guarantee had been procured by the misrepresentation and undue influence of her husband. Her explanation for the delay in disclosing these matters was because it involved her betraying her husband whom she loved very much.

#### **Decision**

15. It is clear from the decision of McGuinness J. in *Aer Rianta v. Ryanair* [2001] 4 IR 607 at 615 that the key issue for this Court in deciding whether to grant a summary judgment is whether the defendant has a 'credible defence'.

16. The two affidavits filed by Mrs. Smith to support her application for a plenary hearing have been very carefully drafted. For example, at paragraph 18 of her first affidavit, she does not aver that Mr. O'Driscoll was actually aware of the alleged misrepresentation by Mr. Smith that the Guarantee was limited to the two houses in the K Club. Instead she puts it as follows:

"In this respect Mr O'Driscoll left it to Frank [Mr. Smith] to explain the operation of the Guarantee to me and he was aware of the manner in which Frank would engage in that explanation because he had been living at our property for several years and he knew my late husband extremely well." [emphasis added]

Thus it is not alleged by Mrs. Smith that Mr. O'Driscoll witnessed the misrepresentation that the Guarantee was limited to the two houses. Yet, with no additional evidence to support her allegation, in para 21 of the same affidavit, she makes what is therefore a bald assertion that Mr. O'Driscoll was 'aware of the nature of the explanation which Frank had given to me'.

17. However, what is crucial to determining whether Mrs. Smith has a credible defence to the summary proceedings for this Court is the fact that for her to have a defence to the proceedings, it must be her case that, if it were not for the alleged misrepresentation of Mr. Smith, that the Guarantee was limited recourse, and the undue influence of Mr. Smith upon her to sign the Guarantee, Mrs. Smith would not have signed the Guarantee. This is because if it she would have still signed the Guarantee if she had known that it was not limited to the two houses or because she wanted to enable her son get the borrowings from AIB (irrespective of her husband's persuasion/undue influence), then she has no defence to the summary proceedings.

18. In this regard, it is relevant to refer to para 18 of her first affidavit, since it is implicit therein that she would have been happy to have signed a Guarantee which was limited to the two houses in the K Club, which she happened to believe were worth €6 million. This is because she avers:

"In 2008 my husband Frank and my son Gary stated that signing the document which I now believe to be the 2008 Guarantee would free up money and that two houses in the K Club would be the bank's security for the Guarantee so that if the Guarantee was ever called upon by the Plaintiff the bank might take the two houses, but the Guarantee would not result in any other exposure for me to the Plaintiff. Frank said that the value of these two houses was around €6 million and I believed this statement."

However, what she does not say is of more significance than what she does say.

19. Nowhere does she aver that if she had known that it was actually a different type of limited Guarantee, limited to €6,000,000 rather than limited to the two houses (which she believed were worth €6 million), she would she not have signed the Guarantee.

20. Thus, even though, Mrs. Smith has filed two carefully drafted affidavits, and had the benefit of legal advice in so doing, there is nowhere an averment by her that were it not for the alleged misrepresentation of Mr. Smith and his undue influence, she would not have guaranteed the borrowings of her son and her husband subject to a cap of €6,000,000.

21. This is a crucial element to her having a defence to these summary proceedings. Without it, this Court does not believe, in all the circumstances of this case, including her acknowledgement of the validity of the Guarantee five years after its execution with the benefit of independent legal advice, that she has a credible defence to the enforcement of the Guarantee and a summary judgment in the sum of €6,000,000