**THE HIGH COURT**

**[2017/2383 S]**

**BETWEEN**

**FENITON PROPERTY FINANCE DESIGNATED ACTIVITY COMPANY**

**PLAINTIFF**

**AND**

**EUGENE McCOOL**

**DEFENDANT**

**JUDGMENT of Mr. Justice Noonan delivered on the 20th day of June, 2019**

1. In this application for summary judgment, the plaintiff seeks judgment against the defendant (Mr. McCool) in respect of both personal borrowings and borrowings of a company in respect of which a personal guarantee was given by Mr. McCool. The company in question is Lyngarth Ltd ("Lyngarth") and Mr. McCool is a director and shareholder of that company.

**Background Facts**

2. In or around 2003, Mr. McCool was involved, *inter alia*, in property investment and owned a number of residential properties in the Clontarf area of Dublin. The plaintiff's predecessor, Bank of Scotland (Ireland) Ltd ("BOSI") advanced a loan of €150,000 to Mr. McCool on foot of a facility letter dated the 4th December, 2003 subsequently amended on the 21st March 2007. This was for the purposes of renovating the property known as 159 Howth Road, Dublin.

3. The business of BOSI vested in Bank of Scotland Ltd ("BOS") by virtue of an order of the Court of Session in Scotland made pursuant to UK regulations, The Companies (Cross Border Mergers) Regulations 2007, with effect from midnight on the 31st December, 2010. In 2015, by loan sale agreement and subsequent deed of assignment, BOS disposed of a loan portfolio to the plaintiff herein which included Mr. McCool's loan and the guarantee referred to below. The loan was granted by way of overdraft and was payable on demand.

4. In or about 1999, Lyngarth was involved in the purchase and development of a development site in Kinsale, County Cork, where a hostel known as Guardwell Lodge was constructed. By a facility letter dated 21st July, 1999 subsequently amended, ICC Bank Plc ("ICC") advanced €1.35 million to Lyngarth for the purchase and development of this property. ICC granted a further facility on the 21st February, 2002 to Lyngarth in the amount of €240,000 for the purposes of capital expenditure on the Kinsale property.

5. The business of ICC was transferred to BOSI in 2002 by virtue of the Central Bank Act (Approval of Scheme of Bank of Scotland (Ireland) Limited) Regulations, S.I. 27 of 2002. By a further facility given on the 8th April, 2008, BOSI agreed to advance €466,000 to Lyngarth for the purpose of converting the hostel property into sixteen apartments. On the 30th January, 2009, Mr. McCool entered into a written guarantee with BOSI whereby he guaranteed the obligations of Lyngarth in respect of all present and future advances from BOSI.

6. Default occurred on both the personal and company loans and in respect of the personal facility, a demand for payment was made by BOS on the 21st July, 2014 and subsequently by the plaintiff on the 2nd October, 2017. With respect to the company, three letters of demand were issued by BOS on the 21st July, 2014 demanding payment of the sums then due on each of the facilities. The letter of demand from the plaintiff of the 2nd October, 2017 above referred to also demanded payment on foot of Mr. McCool's personal guarantee of all sums then due by Lyngarth.

7. On the 9th October, 2014, BOS appointed a receiver over two residential properties owned by Mr. McCool at 145A and 157A Howth Road, Clontarf. On the same day, BOS also appointed a receiver in respect of Lyngarth's assets including the Kinsale property.

8. All of these facts emerge from a number of affidavits sworn by John Burke, a director of the plaintiff. Mr. Burke avers that as of the 2nd October, 2017, the total sum due by Mr. McCool on foot of the personal loan and the company guarantee was €2,631,185.27. Although Mr. McCool denies that he is indebted to the plaintiff in this amount or any amount, he does not dispute any of the facts set out in Mr. Burke's affidavits.

9. Mr. McCool has sworn a number of affidavits primarily focused upon his involvement with Lyngarth's dealings with the Kinsale property. He avers that when the hostel was built, the ground floor was leased to a third party. When Mr. McCool became involved in the matter, he says that he entered into an agreement to sell the Kinsale property for €2.9 million but this was contingent upon the buyout of the lessee on the ground floor.

10. He avers that ICC had agreed with Lyngarth to advance €100,000 for this buyout but ICC breached its contract with Lyngarth in this respect by refusing to advance the money in consequence of which the sale fell through. Mr. McCool says that this gives rise to a claim for damages against the plaintiff who now stands in the shoes of ICC. Clearly these events occurred prior to 2008 when it was decided to convert the hostel to apartments.

11. In that regard, Mr. McCool says that ICC's successor, BOSI, agreed to fund the apartment conversion. It would seem therefore that it must follow that any complaint Mr. McCool or Lyngarth had about the failed earlier sale was subsumed into the alleged new arrangement whereby BOSI was to advance €466,000 to enable the conversion to apartments to take place. He says that this was in reality a joint venture between Lyngarth and BOSI and as proof of that, he relies upon a letter written by Lyngarth's own solicitors, Messrs. William Fry, to their own client.

12. It appears to be common case that the first tranche of the loan, amounting to €70,000, was advanced to Lyngarth and was used for the purpose of stripping out much of the plumbing and electrical services of the building in preparation for the conversion. However, Mr. McCool says that BOSI then breached the contract by refusing to advance the further sums they had agreed to advance in respect of the facility and in consequence, the project was never completed and the building fell into near dereliction.

13. He complains that it was ultimately sold for a fraction of its value, the said price being in the region of €300,000 when, but for BOSI's breach of contract, it should have been worth more than €3 million. Mr. McCool therefore claims to have a substantial counterclaim against the plaintiff, the quantum of which should equal or exceed the plaintiff's claim. This putative counterclaim was

raised for the first time by Mr. McCool in his initial replying affidavit sworn on the 18th December, 2017.

**Defences raised by Mr. McCool**

14. One of the primary defences raised by Mr. McCool is the one to which I have just referred i.e. that he has a very substantial counterclaim against the plaintiff who he says stands in the shoes of ICC/BOSI. He argues that he requires discovery from the plaintiff in order to fully set out the terms of this counterclaim. However, discovery is generally not appropriate in summary proceedings. An application for discovery normally follows on the delivery of a defence and the close of pleadings when the issues are knit between the parties.

15. It is usually only at that stage that the issues are defined with sufficient clarity to enable the court to determine whether discovery of documents is necessary for the fair disposal of the issues. In summary proceedings, that point is not reached until the defendant is given liberty to defend at plenary hearing – see *Irish Life and Permanent v Hanrahan* [2015] IECA 125. If the plaintiff establishes that its proofs are in order, it is then for the defendant, on the authorities, to demonstrate that the pleadings and affidavits before the court disclose that he has a fair or reasonable probability of having a bona fide defence.

16. Even if the facts alleged by Mr. McCool are assumed to be correct, there are obvious difficulties with the suggested counterclaim. The first, and most obvious, is that it is not a claim by Mr. McCool at all but rather by Lyngarth, who is not a party to these proceedings. Equally the claim is also against a non-party, namely BOSI. There is the further difficulty that the claim is mooted for the first time in Mr. McCool's replying affidavit, the best part of a decade or so after the claim is said to have arisen and certainly outside the six-year period for bringing such a claim prescribed by the Statute of Limitations 1957.

17. Taken at its height, Mr. McCool says that the counterclaim arises from the alleged breach of a joint venture agreement with BOSI but this is unsupported by any other evidence, documentary or otherwise, which would enable it to transcend the level of mere assertion. The reference in a letter from Lyngarth's solicitors to its own client to a joint venture arrangement could not be regarded as corroborative of the claim.

18. The next issue raised by Mr. McCool is the suggestion that he is not bound by the terms of the guarantee because the guarantee was furnished under cover of a letter from Lyngarth's solicitors, William Fry, on the 27th January, 2009 to BOSI's solicitors which stated, *inter alia*:

> "Please note that the enclosed are being furnished strictly subject to your client advancing funds to our client pursuant to the loan facility. If funds are not advanced to our client, the documents at 1.6 above should be returned to us."

19. Mr. McCool says that the facility provided for an advance of €466,000 of which only the first tranche of €70,000 was actually advanced by BOSI. The wording of the Fry letter appears to suggest that if no funds were advanced, the documents would be returned but of course this is not what happened. Funds were in fact paid over to Lyngarth on foot of the security documents, including the guarantee, and the fact that further drawdowns were not made could have occurred for any number of reasons. It would be surprising if this letter were to be taken as recording an intention by the parties to the agreement that the security would become invalid unless the entirety of the sums provided for were paid over.

20. Such a construction of the Fry's letter is also inconsistent with the terms of the facility letter of the 28th January, 2009 itself. It provides at clause 10 dealing with "Drawdown" that the full amount of the Loan is to be drawn down by 28th April, 2009 and any undrawn balance will thereafter be cancelled. Clause 4 dealing with "Conditions Precedent to Drawdown" specifies at sub-clause (vii) that drawdowns are to take place on foot of architects' certificates, valid invoices or expenditure certified by the Borrower's Accountant. It is thus clear that the facility letter expressly envisages that part only of the facility might be drawn down if the relevant conditions precedent were not met.

21. Certainly the wording of the guarantee itself would be quite inconsistent with the construction of the agreement between the parties contended for by Mr. McCool. By the terms of clause 2.1, Mr. McCool as guarantor agreed:

> "In consideration of the bank at the request of the guarantor making or continuing advances or otherwise giving credit or affording banking facilities, for as long as and to the extent agreed between the principal and the bank, to or with the principal, the guarantor as principal oblige or and not merely as surety hereby unconditionally and irrevocably covenants to pay and guarantees payment on demand by the bank of all and every sums of money …which are now or shall at any time (and whether on or after such demand) be due, owing or incurred and payable to the bank…from the principal…"

22. Of note in the foregoing, the obligation undertaken by Mr. McCool pursuant to the terms of this guarantee was to make payment "on demand". This is relevant to the next issue raised by Mr. McCool which is that any claims on foot of the guarantee are statute barred by virtue of the fact that it was entered into on the 30th January, 2009 whereas the summons issued more than six years later. However, it seems to me that Mr. McCool is simply mistaken in this regard as of course the cause of action could not accrue prior to the demand being made and that demand was first made by the plaintiff on the 2nd October, 2017. I am satisfied therefore that no limitation issue arises.

23. As previously alluded to, Mr. McCool makes complaint of the fact that the receiver appointed by BOSI sold the Kinsale property at a substantial undervalue and Mr. McCool claims that the sale was conducted negligently giving rise to a claim against the plaintiff. As in the earlier instances, if a claim were to arise in this regard, it is a claim by Lyngarth against the receiver, not a claim by Mr. McCool against the plaintiff.

24. It is also mere assertion, being unsupported by any independent evidence of a kind that one would expect to see in such a case from a valuer. Even if such a claim could be maintained, it is not a claim that is connected with Mr. McCool's guarantee in the sense explained in *Moohan v S & R Motors (Donegal) Ltd.* [2008] 3 IR 650 and could thus not give rise to an arguable defence to this claim.

25. Similarly, Mr. McCool complains about the realisation by the receiver of other secured residential properties owned by Mr. McCool at 145A and 157A Howth Road, Clontarf. He alleges that the receiver was negligent in the discharge of his duties in relation to the sale of these properties resulting in them being sold at substantial under values. Again these are mere assertions by Mr. McCool not underpinned by any objective evidence of the kind referred to in *Anglo Irish Bank Corporation v. Collins* [2011] IEHC 385 which held that independent expert evidence is required in order to show that a receiver has been negligent in the conduct of the receivership.

26. That is entirely absent here but in any event the claim is against the receiver, not against the plaintiff. Contrary to what Mr. McCool suggests, a receiver is under no obligation to improve a mortgage property with a view to realising a better price – see *ACC Bank Plc v. McEllin* [2013] IEHC 454 following the judgment of the Court of Appeal of England and Wales in *Silven v. RBS* [2004] 1 WLR

997.

27. Turning now to some other issues raised by Mr. McCool, he complains that the plaintiff's evidence does not comply with the Banker's Books Evidence Acts and is inadmissible as hearsay. As the plaintiff is not, and does not claim to be, a bank, the Banker's Book Evidence Acts have no application to it. The evidence of the debt in this case is to be found in affidavits sworn by a director of the plaintiff. The deed of assignment of the debt by BOSI to the plaintiff is evidence of what is contained therein and does not constitute hearsay.

28. Subsequent demands for payment were made by the plaintiff and interest accumulated since the assignment has been calculated by the plaintiff. None of this is in dispute. Mr. McCool does not contest the fact that he executed the original facility letter in respect of his personal borrowings or that he executed the guarantee for the company's borrowings. There is thus no question of hearsay arising and thus no issue in defence.

29. Mr. McCool makes complaint of the fact that the charges registered over the security properties were registered in favour of BOSI and BOS itself never became registered as the owner of these charges. I am not entirely clear what point is being made by Mr. McCool as this case does not concern the transfer of a charge on registered land. Even if the point were relevant, it has been conclusively settled by the judgment of the Court of Appeal in *Tanager DAC v. Kane* [2018] IECA 352 where precisely this issue arose, but in the context of possession proceedings where the charge was sought to be enforced, and was resolved in favour of the plaintiff fund.

30. Finally, Mr. McCool makes complaint of the fact that he and his family were subjected to surveillance by a private investigator retained by the BOSI/BOS. This is disputed by BOS in correspondence in 2015. In any event, even if this did occur, I cannot see any conceivable basis upon which this could give rise to a defence to the claim of the plaintiff herein.

**Conclusion**
31. I am therefore satisfied for these reasons that Mr. McCool has not established that he has a fair or reasonable probability of having a *bona fide* defence to these proceedings and that it is clear that he has no defence. Mr. McCool does not dispute the fact that he executed all the relevant documents, the monies claimed to have been advanced were in fact advanced and have not been repaid. In those circumstances, the plaintiff is entitled to judgment for the amount claimed.