Neutral Citation: [2014] IEHC 221

The High Court

Commercial

Record Number 2012/8998P (2012/168 COM)

Between

Michael Hoare and Mary Hoare

Plaintiffs

and

Allied Irish Banks PLC and James Luby

Defendants

Judgment of Mr Justice Peter Charleton delivered on the 28th of April 2014

Michael Hoare and Mary Hoare are a married couple with a family. Since the 1980s, they have been involved in purchasing houses in Galway city, renovating these and letting them out to students and others having an interest in obtaining a flat. They currently own over 20 houses either in Galway or in the environs. This house purchase and rental business did very well up to 2008. Mary Hoare also runs a business as a chartered accountant. On the house purchase and rental business, an accumulation of investments was possible over some years so that money coming in was used to buy further investment properties. Over the period 2000 to 2008, the Irish economy became overheated by property speculation and this was fuelled by lax bank lending practices. In addition to their personal business, Michael Hoare ran a construction firm called Dangan Homes Limited which built houses in the environs of Galway. Problems became particularly acute in the last four years leading up to September 2008 for both the building firm and for the purchase and rental business. During that time Dangan Homes Limited borrowed €1.4 million in 2004 to develop houses at Moylough; €3 million in 2005 to develop a 29 acre site at Mountbellew; and €1.256 million in 2006 to develop townhouses at 63/65 Upper Newcastle Road. For the house purchase and let business, no corporate vehicle was used by Michael Hoare and Mary Hoare. The relevant loans there are that €1.1 million seems to represent an accumulation of loans from previous purchases that was targeted at a premises in Woodquay through a facility of 7th October 2004; €150,000 was borrowed in respect of premises at Frenchpark through a facility of 4th December 2006; €360,000 was borrowed for a house at Renmore through a facility dated 18th January 2007; €870,000 was borrowed for a house at Salthill through a facility dated 15th of November 2007; a house in very bad repair at Renmore was bought with the intention of building two houses on the site and the amount of the loan was €492,000 through a facility letter of 12th of May 2008; and finally €1.280 million was borrowed pursuant to a facility letter of 30th of October 2008 to purchase properties at Newcastle Road. This all amounts to over €4.25 million of personal borrowing and in addition to that there was an overdraft facility. These are headline figures and the dates of acceptance differ from the dates of the letters of facilities. By a letter of loan sanction, dated 10th June 2010, the defendant bank offered to restructure some of these sums and this was accepted by the plaintiffs. This case is not about liability to repay borrowing from Allied Irish Banks but the merits of the plaintiffs' claim against the defendant bank and the validity of a guarantee given by the plaintiffs in respect of Dangan Homes Limited.

The above merely details a snapshot of the enterprise of the plaintiffs and the borrowings involved. Interest has to be added to these sums and has been unpaid or underpaid for four years or so. In consequence, the bank appointed a receiver over the personal properties of Michael and Mary Hoare. On 6th September 2012 the plaintiff issued a plenary summons against the defendant bank and against the receiver over their properties claiming damages for breach of contract, negligence, loss of reputation and also sought an injunction to restrain the receiver from acting. In that regard, a temporary injunction was in place in the autumn of 2012 from 10 September to 28 November, but this has since been discharged. The claim was amplified in the statement of claim dated 25th of September 2012. The plaintiffs claim that they had a contract by letter of 18th July 2011 which they accepted in which the defendant bank agreed to exercise forbearance on the loans owed by them and that the defendant bank broke this contract. Furthermore, it is claimed that the defendant bank by putting in a receiver not only evidenced this breach of contract but also caused loss to their business. In a defence and counterclaim delivered on 5th October 2012, the defendant bank denied this claim and counterclaimed in respect of seven facilities which had been drawn down in full by the Michael and Mary Hoare and also sought to recover damages in respect of the losses of Dangan Developments Limited on foot of a guarantee dated 14th of July 2004 which was expressly limited in the sum of €1.844 million. The defendant bank pleaded default and failure to pay and that the circumstances of the guarantee rendered it operative. Summary judgment has already been entered by Kelly J on the counterclaim of the defendant bank in the sum of €7,453,556.76 on 28 November 2012.

The various aspects of the plaintiffs' claim against the bank will be considered first and then the enforceability of the guarantee.

Receiver

A receiver is not exempted from the duty of reasonable conduct merely because, as a matter of law, he or she is classified as the agent of the debtor pursuant to a written contract. Who, after all, in the context of the appointment of a receiver by a bank controls the receiver? It is not likely to be the defaulting borrower. In this context, the matter was put thus by Lord Denning MR in *Standard Chartered Bank Limited v Walker and Another* [1982] 1410 at 1415:

> The receiver is the agent of the company, not of the debenture holder, the bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to the company, of which he is the agent, to clear off as much of its indebtedness to the bank as possible, but he also owes a duty to the guarantor, because the guarantor is liable only to the same extent as the company. The more the overdraft is reduced, the better for the guarantor. It may be that the receiver can choose the time of sale within a considerable margin, but he should, I think, exercise a reasonable degree of care about it. The debenture holder the bank, is not responsible for what the receiver does except insofar as it gives him directions or interferes with his conduct of the realisation. If it does so, then it too is under a duty to use reasonable care towards the company and the guarantor. If it should appear that the mortgagee or the receiver have not used reasonable care to realise the assets to the best advantage, then the

> mortgagor, the company, and the guarantor are entitled in equity to an allowance. They should be given credit for the amount which the sale should have realised if reasonable care had been used. Their indebtedness is to be reduced accordingly.

Similarly, a mortgagee exercising a power of sale, usually a bank, is obliged to act in a provident way with due regard to the rights and interests of the mortgagor. This means taking "all reasonable means to prevent any sacrifice of the property." A mortgagee in possession must act as a reasonable person would act in selling property; *Holohan v Friends Provident and Century Life* [1966] IR 1. When a mortgagee enters into possession of premises, it is subject to the equity of redemption. In being obliged to act reasonably, a mortgagee, usually through an agent, must take care to foster the worth of the property to the benefit not only of the mortgagee but also of the mortgagor whose debts stands charged against the land; see Fisher Lightwood – Law of Mortgage (London, 2002) 737-738. In summary, the duty is one of reasonable care.

In the context of a receiver in possession, perfection cannot be the basis upon which legal liability is assessed. Rather, a receiver should act as a careful person to gather together and secure the assets charged in terms of physical protection and insurance, should attempt to gain a reasonable profit out of the assets without unreasonably endangering the assets themselves, should study the market and attempt to see at what point a letting or sale might profitably be made, and should do what is prudent according to the standards of people of business in that regard. Of key relevance to how a receiver should act is the existence of the debt charged on the properties and the need to pay it back and to not unnecessarily incur interest charges over a long period to no good effect. Complaints are often made in litigation that a receiver should wait almost indefinitely for property to recover in value. As against that, countervailing factors must be weighed in the balance. With large unpaid loans, interest accumulates over time in an alarming fashion and this may have the effect of cancelling out any correction in the market or even undermining the debt situation of the person whose assets are charged. State organisations such as the National Asset Management Agency may perhaps be able to take a somewhat longer term view that a commercial organisation which is required in banking terms to maintain a particular level of liquidity. There is no perfect time to sell or let which is predictable accurately. The matrix within which decisions about expending further money have to be made, such as on maintaining property, must also be considered. A person who has real property assets for rental over a period of decades may wish to invest substantial sums in renovation to secure a good return. A receiver in possession of flats may regard a lesser investment in painting and decorating a sufficient use of funds so as to enable short-term letting given that the timescale involved may be very much less. All of this is about taking a commonsense view of the circumstances, pressures and returns as they might reasonably be assessed by a prudent receiver acting diligently. Fundamentally, where property assets for rent are to be dealt with, obtaining a report from a reputable source as to what is involved in terms of the condition of premises, furniture and appliances establishes a good foundation for decision-making.

The receiver in possession here was the second named defendant Jim Luby. His agent dealing with this matter was Des Gibney, a qualified accountant. The receivers were appointed on 20th of August 2012. They wrote to the borrowers and tenants shortly afterwards. Some controversy has been occasioned by this. The claim that is made is that every tenant was written to and that the Renmore property was included in this hail of letters despite being vacant and close to derelict. The attitude of the receivers was that if they had not written to tenants in possession, what appeared to be tenants in possession and what could have been tenants in possession though not ostensibly present at expected hours, they would have been criticised. The position that the receivers were in remained delicate. The properties were mortgaged pursuant to a number of indentures of mortgage, of which the parties have agreed that one dated 13 May 2005 is a representative sample. Under this deed, the powers of the bank are as those conferred under the Conveyancing Act 1881 with variations. These include the removal of restrictions under section 20 of the Act of 1881 and an amelioration of section 18 of that legislation. Clause 8.01 (d) provides:

> Any receiver appointed by the Bank under the power to appoint a receiver shall be deemed to be the agent of the Mortgagor and the Mortgagor shall be solely responsible for the acts and defaults of such receiver and for his remuneration and the Bank shall not under any circumstances be answerable for any loss or misapplication of the rents and profits of the mortgaged property or any part thereof by reason of any default neglect or breach of trust of or by such receiver for the time being and all monies received by any such receiver after providing for the matters specified in paragraphs (i) to (iii) of subsection (8) of Section 24 of the Act of 1881 and the remuneration of such receiver and the discharge of all costs charges or expenses of incidental to the exercise of any of the powers of such receiver made shall if the Bank in its absolute discretion shall so direct be applied in or towards satisfaction of the secured monies and in such order as the Bank may from time to time conclusive be determine.

It is difficult to argue against the powers contained in this text operating as they do as a contract between the defendant bank and the plaintiffs. Because of the injunction proceedings in late 2012, the defendant bank was especially circumspect in relation to entering into possession. It decided not to do so. This, despite the power contained at clause 8.02:

> At any time or times after the execution of these presents the Bank may without any consent from or notice to the Mortgagor or any other person enter into possession of the mortgaged property or any part thereof or into receipt of the rents and profits of the mortgaged property or any part thereof.

Instead, it was decided by the defendant bank to take possession of the rents without, at the same time, entering into possession of the various relevant mortgaged properties. It is established as a fact that shortly after the appointment of the receivers, they wrote to the plaintiffs asking to visit and examined the properties. This offer was not taken up. On 31st of August 2012 the receivers wrote expressing disappointment. The receivers never came along to interact with the receivers, the keys were never handed over and possession remained with the plaintiffs. Then, on 10th of September 2012 the injunction proceedings resulted in a temporary court order against the receivers which was not discharged until 10 weeks later. During that time it was agreed that Michael Hoare would collect rent and hold it in a client account pending the resolution of the disputes. The receivers had earlier appointed responsible estate agents who had been told to visit the properties and see about the collection of the rent. The injunction stood in the way of this. By this stage, upon the injunction being discharged on 28th of November 2012, the student market had passed because it tends to run from August, when candidates for entry into university places tend to get their results and offers of courses, through to early May when third level institutions tend to have completed exams. There is thus a fallow summer period for the checking of premises, decoration, replacement of appliances and furniture and general works. This was entirely missed through no fault of the receivers. This compromised the letting of the properties up to the recommencement of the academic year in September 2013.

The receivers were particularly circumspect as, it is established as a fact, they had a direction from the bank to await the end of litigation and had been advised as to the limits of their powers as a matter of law. Permission was needed to take possession. The reality is that this was slow in coming for understandable reasons of disappointment at the situation as it had developed in terms of the economy on the part of the plaintiffs. As matters currently now stand the rent roll is around €7000 per month. A full report was received on the condition of properties from a responsible agent. This is not regarded as hearsay by the Court because it is merely the discharge of duty in the context of business and how a receiver operated is to be adjudged on the basis of the information that

could reasonably have been obtained and the information that was reasonably available. Many of the properties required new appliances, hobs and washing machines and that kind of thing, almost all of them required professional cleaning and several of them needed extra work in relation to fire blanket and extinguisher provision. The report received indicated that some properties were not in good order. For some of the properties, it would have been possible to spend in the region of €2000 each to make them lettable into the medium term. In physical terms, it would seem that the receivers entered into possession of 19 properties, of which two or three seem to have been multiple units, and of these 11 are let and 8 are vacant. The receivers of paid out around €9000 with a view to enabling the letting of some properties and in the context of the rent roll available and the constraints arising from the litigation their performance has been entirely reasonable.

A complaint is made by Mary Hoare that some of the properties have been allowed to disintegrate into rack and ruin. In that regard, multiple photographs have been produced. For some of the empty properties, the diligent cutting of grass and excision of weeds carried out by Michael Hoare and family has been allowed to lapse. This, however, can be rectified very easily by spraying with Path Clear or something like that. A mattress has been left out the back of one of the houses. It is unknown who did this. One of the windowsills has grown green slime on the outside. In the Irish weather, this is almost inescapable. All of these issues and all of the relevant photographs of blinds and windows and gardens have been taken into account.

In terms of the balance of what could be reasonably expected from the receivers, there has been no breach of duty.

Agreement
From the point of view of the defendant bank, the issue as to whether earlier contracts of loan were replaced by a later agreement was principally dealt with by Graham Kelly and Olivia Tone. The letters between the parties do not help on this issue. As is understandable in cases of this kind, the correspondence has become fraught with questions as to whether either side behaved reasonably, in particular by retreating on obligations. The job of Graham Kelly is to manage a challenged loan book of around €500 million. It was claimed that he was unreasonable. He did not come across while in the witness box as in any way difficult but instead has evidence was calm. Further, what he said meshed with what is recorded in the official documents of the bank. These loans in issue in this case were not loans that were transferred to the National Asset Management Agency because they related to a small or medium-sized enterprises. There is a different police at work in such an instance. Those loans do not go to the national bad bank, but are retained by the banks that entered into them. This, apparently, is a policy matter. Instead of transfer, the task of the bank is to manage these kinds of loans as best as reasonably possible for the benefit of the borrowers in such a way as to allow an extended period for businesses to recover towards something approaching economic health. Of course that may work or it may not be possible. Graham Kelly presented as being honest and fair minded in his approach to that difficult task. Olivia Tone, who works in the section, came across as both meticulous and honest.

The file was taken over by the section in May 2010. Records were kept of all meetings. These are not, of themselves, admissible. There was cross-examination, however, on any alleged inconsistencies between the testimony of Graham Kelly and Olivia Tone and the notes that were taken by her. From this has emerged no evidence of any attempt at obfuscation or evasion. The first meeting between Michael and Mary Hoare and the bank took place on 6th May 2010 in Galway. The issues concerning Dangan Developments Limited were gone through in detail and it was noted that the company was not at that stage completing any work and was therefore inactive. The last completed accounts of the company were for 2008. On the personal business of the plaintiff, it was noted that rental income information had been sought and that certain renovation works were needed on some properties. It is in consequence of this meeting that the June 2010 facility letter was issued by the defendant bank. This references a new loan account in the sum of €370,000 to Michael and Mary Hoare and that this was repayable on demand. This rolled up of a number of smaller loans into one. The second facility of €1.185 million was expressed to be in relation to land at Drom and commercial units and two apartments at Moylough. The third facility was a bank guarantee in favour of Galway city council in the sum of €40,000. All of these were on demand facilities. This particular tidying up exercise in the borrowing was accepted by Michael and Mary Hoare on 7th July 2010. In relation to the company, a letter was issued by the defendant bank to Michael and Mary Hoare relating to borrowings of around €6.2 million. Included was a nil balance in respect of the current account upon which it is said by them that the guarantee was entered into by them for this particular project only. It was around €300 in credit. The guarantee issue will be considered later.

About a year after the first meeting, the parties met again on 7th April 2011. On Dangan Developments Limited, it was noted that the Moylough site was being tidied up; that the Mountbellew side consist of 29 acres but that unfortunately there was now new housing across the road; that income from houses at Newcastle had been given to the bank; and that the company was insolvent. On the personal borrowings of Michael and Mary Hoare, an agreement noted that the student accommodation would be vacant over the summer, but that "whatever rents they receive will go straight to the bank to service interest payments however whatever shortfall will have to be rolled up (clients to provide a rental schedule)." On the evidence, it is impossible not to accept that Michael and Mary Hoare had agreed to put all rents to service the interest charges into the bank and that they would put for five personal properties on the market in order to try and reduce the overall size of the loans. A certified rental schedule was sought from them together with a certified statement of affairs and they were to identify the properties that they were going to be putting on the market. Shortly after that there was a further meeting, this time held in Dublin, where the defendant bank informed Michael and Mary Hoare that in order for the bank to extend the credit facilities, which were then interest only, that €1 million worth of properties would have to be disposed of from their personal holdings and that the bank would not wait; it was to be done within 12 months. Mary Hoare indicated in evidence that she did not remember that this time limit was imposed. She was understandably confused and the bank's evidence is preferable. The approach of the bank was to see how matters went over the year, which in that instance was reckonable from May to May. What is alleged in this case to have been an agreement then emerged by way of an email from the defendant bank to Michael and Mary Hoare dated 18 July 2011. This must be quoted:

> Michael/Mary
>
> I refer to our meeting of July 14th in which the Bank acknowledged the various breaches and arrears accrued on the facility held in the name of Dangan and you.
>
> While the Bank is not in a position to provide a waiver for these breaches the Bank is willing to show a level of forbearance on the basis that both Dangan and you agree to the following:
>
> 1) Dangan Developments Limited
>
> All operatives and sites are to be placed on the open-market for sale.
>
> The properties/sites must be appropriately marketed (i.e. placed on daft.ie, myhome.ie etc) as realistic values that are acceptable to the Bank.

> The Bank is to receive written consent to contact/liaise with your chosen estate agent.
>
> The estate agent is to provide advice on the renting of the units while simultaneously marketing them for sale.
>
> The properties on site to be placed on the market by no later than July 30th.
>
> 2) Michael and Mary Hoare personal account
>
> Properties with a market value of €1 million are to be identified for sale. The Bank is to be satisfied with the properties selected.
>
> The properties/sites must be appropriately marketed (i.e. placed on daft.ie, myhome.ie etc) at realistic values that are acceptable to the Bank.
>
> The Bank is to receive written consent to contact/liaise with your chosen estate agent.
>
> The properties are to be placed on the market by no later than July 30th.
>
> If you have any queries with regard to the above please do not hesitate to contact me.
>
> Regards,
>
> Graham Kelly

The first issue is whether this email constitutes a contract. It does not. The contracts relevant to this case are the contracts of loan and of guarantee. The contracts of loan were in default and, whether they were or not, the defendant bank was entitled to seek repayment by reason of the failure to reschedule loans under the existing facility letters. Obviously, this default was not malicious but resulted from an unfortunate lack of funds due to the collapse of the wildly overvalued housing market in Ireland. It might also be argued on behalf of the plaintiffs that the email constituted a fresh offer which, if accepted, could constitute a contract. That is difficult to argue because the imprecision of what is offered. The most offered is "a level of forbearance". That is not a definite offer. What a reasonable person would take from the text is that the bank was stating that it would hold off for a time on its strict legal rights provided certain conditions were met. This might amount to an estoppel; National Asset Loan Management v Downes [2014] IEHC 71 at paragraphs 19-21. But to get that far there would have to be an unequivocal representation whereby the plaintiffs, as customers of the defendant bank, act in such a way that it would be unfair to allow backtracking. In terms of what is promised in this email it seems to amount to no more than this: the defendant bank will do its best to see you through the next year and then review the situation provided you comply with what the bank needs. In this regard the Court is satisfied that the bank was to review matters, after all it had to review these large loans, and despite a lack of reference to a 12 month period in the text, it would have been clear to everyone from the relevant meetings that this was the timescale envisaged.

As it turned out, things did not go right. It took over two months to get a rental schedule from Michael and Mary Hoare. On 6th of September 2011, there was a meeting with them and Olivia Tone then got the relevant schedule. The defendant bank was told that there were six properties being marketed for sale. As of that point, the defendant bank had not yet got the mandated rents from the properties. A few days later, the six properties were identified and permission was given to the bank to contact the relevant estate agent. A rental schedule was forward eventually on 24th October 2011. There was a further email of 7th November 2011 about the properties. Then, in May 2012 Olivia Tone did a review of how things were going. She was not impressed. What was clearly missing was any apparent seriousness in forwarding the rent roll directly to the bank. Mary Hoare gave evidence on this issue. She came across as a very decent woman who is always doing her best to cope with what were then extremely serious problems. Medical bills had arisen and college fees needed to be paid. Tradesmen who had done work on various properties were demanding payment and they could not been left disappointed. It is hard not to be sympathetic on these issues. These were questions, however, to be addressed to the defendant bank and not to the Court. The parties had come to a point where stringent demands had been made in order to prop up an extremely serious set of debts. This was the priority. While it can be understandable that personal issues intrude and demand to be dealt with as a priority in themselves, the proper approach for borrowers in this situation would have been to return to the defendant bank and to asked to change. An account in National Irish Bank was opened to receive the rent roll so that the funds would not go to the defendant bank and thus to have an independent account to deal with these pressing personal problems. Some dispute could arise in relation to whether or not €1 million worth of properties had been put on the market. Certainly, a number of houses had been entered onto the books of an auctioneer in Galway, but there had been no bites. The situation of the company was even worse. Again, this is understandable. The lands at Mountbellew had been bought for €3 million and planning permission had been obtained for multiple dwellings which if built, in an inflamed market, would have realised a profit. In terms of business, however, the result was that the nearby construction of a housing estate in this town over 40 km from Galway seems to have saturated whatever housing market there might have been. Things just turned out badly. Despite the planning permission, the land retained a certain value as agricultural fields. The site had been marketed through the reputable firm O'Donnellan and Joyce for just under €1 million on the instructions of Michael Hoare. By letter dated 3rd of November 2011, Michael and Mary Hoare had been advised by this firm in the following terms: "we feel that the offer of €85,000 represent a fair market value for the property at present." This referred to an offer which the owners were reluctant to accept. In February 2012, Olivia Tone had been informed by the auctioneers that the highest offer to date on the site had been €130,000. Even that offer did not go through.

There was then a further meeting of the parties on 17th of July 2012. In the meantime there had been solicitors' correspondence on both sides. Unfortunately, by this stage the defendant bank had decided that it had shown sufficient forbearance and that as its conditions had not been met letters of demand must issue and a receiver must be appointed.

The defendant bank did not act incorrectly.

Guarantee
It will be rare indeed for any signed written document to be altered as to its terms by any representation as to its contents. The words of Scrutton LJ in *L'Estrange v Graucob* [1932] 2 KB 394 at 403 remain correct in principle:

> In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, but it is wholly immaterial whether he has read the document or not.

In *Curtis v Chemical Cleaning and Dying Co* [1951] 1 KB 805 a lady handing in a dress for cleaning was asked to sign a document on the representation that it exempted the tradesman only from damage to beads and sequins, whereas the written exemption clause was in respect of "any damage howsoever arising". The oral representation was held to have been overridden by the express representation as to the limits of liability. When it comes to a written document, the doctrine of *non est factum* will require stringent conditions to be met before a party assenting to a contract by signature is to be excused from its express terms. Policy reasons clearly underpin the requirement for care in signing legal documents. The stringency of the test whereby liability may be resiled from on the basis that a written contract is not the deed of the party charged reflects the proposition that those who enter into contractual relations on the basis of documents must take care as to what they are signing. The commercial sense of the propositions which underpin the defence are straightforward. It must be noted that chaos might be the result were defendants held to a less stringent circumscription of the defence. For the correct application of this defence, one turns to the judgment of Kelly J. in *Allied Irish Bank plc v. Higgins and Others* [2010] IEHC 219 (Unreported, High Court, Kelly J. 3rd June, 2010). In that case, the issue was whether a Mr. Mansfield was entitled to escape liability for a debt on the basis of a reading age appropriate to a seven year old and an alleged complete lack of understanding of the relevant documents. He was a seasoned businessman, a helicopter pilot and, at one stage, controlled a large business very successfully. Kelly J helpfully sets out the following treatment of the law at pp. 40 - 41:

> The defence of *non est factum* is one which has been considered in the context of an application for summary judgment by Morris J. (as he then was) in *Tedcastle McCormack & Company Limited v. McCrystal* (15th March, 1999). There that judge considered the decision of the House of Lords in *Saunders v. Anglia Building Society* [1971] AC 1004 which is the authoritative modern authority on the topic. He said:-
>
> 'I am satisfied that a person seeking to raise the defence of *non est factum* must prove:
>
> (a) That there was a radical or fundamental difference between what he signed and what he thought he was signing;
>
> (b) That the mistake was as to the general character of the document as opposed to the legal effect; and
>
> (c) That there was a lack of negligence i.e. that he took all reasonable precautions in the circumstances to find out what the document was.'
>
> In the course of his speech in Saunder's case, Lord Reid having pointed out that there is a heavy burden of proof on the person who seeks to invoke this remedy went on to say:-
>
> 'The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief…'
>
> Lord Hodson in the same case said:-
>
> 'Want of care on the part of the person who signs a document which he afterwards seeks to disown is relevant. The burden of proving *non est factum* is on the party disowning his signature; this includes proof that he or she took care. There is no burden on the opposite party to prove want of care.'
>
> AIB contend that they knew nothing of Mr. Mansfield's reading difficulties until they met Mr. Sutcliffe in August 2009. Mr. Sutcliffe informed them of the difficulties of his client Mr. Mansfield.
>
> Mr. Mansfield himself did not tell AIB about his difficulties. He said in his affidavits that he was not aware as to whether the plaintiff was specifically made aware of these difficulties. He said it may have been known to them at the local branch where he had dealings. He went on:-
>
> 'Certainly no member of the plaintiff's staff ever spoke to me about it in relation to the borrowing. I have never emphasised my difficulties with strangers and there was no reason, as far as I was concerned, to notify the AIB.'
>
> Mr. Mansfield has wide business experience given his company directorships. He is of at least average intelligence where non-verbal reasoning is concerned.
>
> He ought to have taken steps to find out what the letter of 19th January, 2009 was or told the bank of his problems. He did neither. He cannot be said to have taken any, still less 'all reasonable precautions to find out what the document was' (per Morris J.)
>
> Thus, one of the three ingredients required for a defence of *non est factum* is absent.

Where there is an express misrepresentation as to the effect of one term within a written contract, as in the *Chemical Cleaning* case, the argument is not that a person understood clear words differently to how they were expressed in a written agreement, which is an argument likely to fail, or that an entire transaction carefully reduced to words and signed is to no effect, as was the case in the failed defence in the *Mansfield* case, it is rather that a particular clause was expressly and by probable evidence set at naught by a misrepresentation as to its terms by the party reasonably to be regarded as having authority in terms of the contractual obligation. There is high authority that in particular and in necessarily rare circumstances that such a defence can apply to a guarantee. In *Governor and Company of the Bank of Ireland v McCabe* and McCabe (Supreme Court, unreported, 19 December 1994, Egan J) the defendants admitted that they had executed a guarantee. The terms of that document showed that the obligation was in respect of the present transaction on which it had been entered into and was also in respect of all future obligations entered into between the bank and the principal debtor. The defendants pleaded that they had understood the guarantee to be a unique transaction applicable solely to a business dealing with Ballybay Meats. The defendants did not give evidence. However, the manager and assistant manager of the Bank of Ireland in Ballybay gave supporting evidence for this proposition to the effect that they represented at the time that the guarantee in question covered that particular transaction only and did not cover any future liabilities. Egan J recorded the decision of the Supreme Court as follows:

> The real defence seems to me to be that the July guarantee was entered into to cover a specific transaction but the bank are attempting to use it for another purpose i.e. to cover a later transaction. Mr Terry Riley, assistant manager of

> the bank at its Ballybay branch, was the person who actually dealt with the guarantee and signed it. The monies on the particular transaction or paid and he gave evidence to the effect that the bank saw that is the end of the matter [and] it was his opinion that when the company repaid the July loan, the guarantee was discharged. Mr Reid's evidence [as manager of the branch] was equally clear. He agreed that the July guarantee which was in standard form was signed for a limited specific purpose has agreed and was only to cover the previous loan. He also agreed that once the loan was repaid, the guarantee was at an end.
>
> It has been said over and over again that the law of contract depends upon the agreement of the parties. The parties in this case agreed that once a specific transaction had been completed the guarantee was at an end. They did not quantify this in any way so it meant that this was to be so irrespective of the contents of the agreement itself. I am further fortified in the view I have taken by the fact that when [the company] went into receivership it did not mention the guarantee as being an asset.

The wording of this guarantee covers not only the specific borrowing to which it is related but, as in the *McCabe* case, refers also to future liabilities of the principal debtor. The circumstances whereby the particular clause at issue in this case to guarantee €1.844 million are said by Michael and Mary Hoare to have been overtaken by events and overridden by a specific oral representation are as follows. The borrowing was in respect of a particular site by Dangan Homes Limited. As initially inserted into the supporting guarantee, the limit on the guarantee exceeded the amount borrowed and as a matter of fact it is important that it was reduced. Evidence was given on this by Anne Lennon, who was then manager of the defendant bank in Eyre Square in Galway. She had no recollection at all of the particular guarantee but she regard it is likely that an extra €12,000 had been put on top of the specific amount charged and was then taken out. Her evidence was conspicuously fair. Like the other witnesses from the defendant bank she, impressively, did not pretend to reconstruct memories which were not present. She assumed, but did not remember, that Mary Hoare had asked to change the amount in question because it exceeded the liability on the principal debtor's account. At that time, the defendant bank was reusing guarantees from past transactions to cover future liabilities of the principal debtor but because of the experience they have had since then, the invariable practice has grown up of tailoring specific guarantees to specific projects. Mary Hoare testified to a clear recollection that the guarantee was to be for the specific project of Dangan Homes Limited which, as it turned out, was successful and one where the company had repaid the bank and was in credit, as previously noted, in the sum of approximately €300. On the correspondence, this evidence seems supported as it was later manifested as the attitude underpinning the approach of Michael and Mary Hoare to every request from the bank for a new guarantee. The letter of 29th of July 2010 related to the company is refererable and reads in part:

> Following on from these meetings, the Bank confirms the terms and conditions under which it was willing to renew the Company's expired facilities in its Letter of Sanction dated 10th of July 2010. One of the conditions of sanction was that you both provide a new Personal CPC Letters of Guarantee or, alternatively, confirm that your existing Joint and Several Letter of Guarantee for €1.844 million dated 14th of July 2004 could be relied upon for this renewed facility. As you have advised the Bank that you will not be meeting this condition of sanction, I am now writing to formally advise you that the Bank is withdrawing its offer of facilities as set out in the Letter of Sanction dated 10 July 2010 with immediate effect.

In earlier correspondence related to the company from 6th of November 2007, seven facilities were offered and then accepted. Briefly, an overdraft of €250,000, a loan of €3.376 million, a loan of €2.26 million, a loan of €450,000, a loan of €280,000, a loan of €87,000 and a loan of €40,000. The security listed included an indemnity in respect of bank guarantees, a mortgage debenture over the fixed and floating assets of the company, a legal charge over three sites and it was noted expressly in the text: "Letter of Guarantee from Michael and Mary Hoare in the amount of €1.844 million supported – now to be increased to €2 million." As it happened, the company resolved to accept the offer but there was never a new guarantee in the sum of €2 million entered into. Further, the run of the evidence in this case has been to the effect that Michael and Mary Hoare would never accept to enter into any later demand for a guarantee in respect of the assets of the company at €10 million and always regarded the relevant guarantee as spent through the repayment of the monies by the company on that particular project. The resolution of the company accepting the loan did not accept the guarantee or the increase in the guarantee. That, in any event, would have been a matter for Michael and Mary Hoare. The time to call these matters to order would have been in November 2007. The defendant bank did not do that. Now, it is too late. Finally, the Court cannot ignore the fact that all of the evidence on the guarantee is one way.

The Court is extremely reluctant to allow any term of a written contract to be overridden orally. Here the bank has, with great responsibility, not attempted to contradict the testimony given on behalf of the plaintiffs. Without the authority of the Supreme Court decision on an express representation being capable of overriding a specific clause within a written contract, the case made on the guarantee would be difficult to support. Some of the documents might be construed so as to raise an inference against the direct testimony of Mary Hoare. But an inference as against direct testimony should be considered with particular caution. In these particular circumstances, any inference against the testimony given on behalf of the plaintiffs is too weak. In that context, the guarantee must be held to have been extinguished by performance, meaning the repayment of the loan which it had supported.

Result

In the result, judgment has already been entered on 28 November 2012 by Kelly J as against the plaintiffs on the counterclaim of the defendant bank in the sum of €7,453,556.76. There is nothing in the claim of the plaintiffs against the defendant bank which would allow any contrary award of damages to be entered and consequently to be set off. That judgement therefore stands and the stay pending the trial herein is lifted. The claim on the guarantee by the defendant bank as against the plaintiffs is dismissed for the reasons stated. Costs follow the event. Because one issue was resolved in favour of the plaintiffs, that of the applicability of the guarantee, those costs will be limited to 75% of the defendant bank's total costs.