THE HIGH COURT

[2016 No. 1332 S]

BETWEEN

CABOT ASSET PURCHASES IRELAND (LIMITED)

PLAINTIFF

AND

CATHAL BOYLE

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 31st day of May, 2019.

1. This is an application for summary judgment in respect of sums allegedly due on foot of a guarantee executed by the defendant, in respect of the debts of CIM Trawlers Limited ("*the Company*"), which has since been dissolved. The Company was indebted to Ulster Bank Ireland Limited and through a series of transactions its debt is alleged to have been transferred to Cabot Asset Purchases Ireland Ltd., the plaintiff in these proceedings.

2. The application comes before the court by way of notice of motion dated 21st November, 2016. It is grounded on the affidavit of Ms. Orla Hughes, a director of the plaintiff. The plaintiff is a limited liability company registered in the State. It is alleged that it acquired the legal and beneficial ownership of certain debts and related rights pursuant to the terms of a portfolio acquisition deed made between the plaintiff and Ulster Bank Ireland Limited., Ulster Bank Limited, UBSIG (NI) Limited and UBSIG (ROI) Limited. The deed became effective on the 22nd January, 2016. While a copy of the deed exhibited to her first affidavit is undated, in a supplemental affidavit sworn by Ms. Hughes on the 6th February, 2017, a signed copy of the deed is exhibited. She was a signatory to the deed.

3. Ms. Hughes avers that the defendant guaranteed the performance of the Company liabilities to Ulster Bank Ltd by way of letter dated 6th July, 2006. The limit of the guarantee is €750,000 together with interest from the date of demand.

4. By letter dated 9th June, 2016, the plaintiff demanded payment of the outstanding debt under the guarantee.

5. In a replying affidavit sworn on the 15th March, 2017, Mr. Boyle claims that he has a full defence to the proceedings and avers, *inter alia*, as follows:-

> *"I say that at Ulster Bank Ireland Ltd. I met with Mr. Sean Cotter of Ulster Banks Specialised Lending Services, Ulster Bank Group Centre, Georges Quay, Dublin 2, issued a demand under the contract of guarantee to me verbally in clear and unambiguous terms and on more than one occasion after the sale of the merchant fishing vessel "India Rose" was sold by CIM Trawlers Limited. I say and believe that my account is supported by the fact that CIM Trawlers Limited's only asset was the merchant fishing vessel "India Rose" and the company ceased trading after the vessel was sold on 23rd November, 2008 and all other contact with the plaintiff and in particular Mr. Sean Cotter related to the personal guarantee."*

6. Mr. Boyle is a 50% shareholder and managing director of the company. He was also an employee and when the trawler was sold he suffered personal detriment and was no longer deriving income which had been generated by the trawler. The company's sole asset was the trawler and once the trawler was sold, there was no further means by which the company could generate income.

7. Mr. Boyle observes that the plaintiff had not addressed the history of the borrowing or the relationship between Ulster Bank Ireland Limited and the Company between the date of the guarantee and dissolution of the company on the 20th January, 2012.

8. Although the circumstances surrounding the dissolution of the company have not been averred to on affidavit, it was explained by counsel that the Company was dissolved because it had not filed the required statutory returns.

9. Ms. Hughes, in an affidavit sworn on 24th May, 2017 avers that the history of the borrowing relationship between Ulster Bank Ireland Limited and the Company is not a matter for the proceedings save insofar as she believes that as of the date of its dissolution on 20th January, 2012, the company remained indebted to the plaintiff's predecessor in title, for a sum in excess of €750,000. She avers that the plaintiff is a stranger to the alleged agreement between the defendant and Ulster Bank which purports to discharge him from his liability in respect of the guarantee. She contends that the defendant has failed to provide evidence of the agreement and Mr. Boyle's bald allegations cannot amount to a defence.

10. Mr. Boyle in a further affidavit of 28th June, 2017, maintains that it is important that he is provided with the opportunity to give oral evidence of his conversations with Mr. Cotter. He contends that discovery will be required and it will also be necessary to serve a subpoena on Mr. Cotter if he fails to present as a witness.

11. Mr. Boyle also maintains that a demand had been made by Mr. Cotter for payment on foot of the guarantee in 2008 or 2009 and that therefore the claim is statute barred. The plaintiff maintains however, that such an allegation is inconsistent with the alleged representation made by Mr. Cotter. As no evidence of such demand has been exhibited, the only evidence of demand is the letter of 9th June, 2016. Therefore, it is contended that the case is not statute barred.

Relevant clauses in the guarantee

12. By virtue of clause 2.1.2 of the guarantee, a primary obligation to indemnify the bank is placed upon the guarantor. Further, all sums payable under the guarantee become due on demand. The guarantee is a continuing security for the liabilities of the company.

13. Clause 4.2 provides:-

> *"the liability of the Guarantor under this Guarantee will be as the sole or primary obligor and not merely as the surety and will be not impaired or discharged by reason of any of the matters referred to in Clause 4.1 above nor by any other act or omission whereby the liability of the Guarantor would not have been discharged if it had been the principal debtor and the Guarantor hereby waives all or any of his rights as surety which may at any time be inconsistent with any of the provisions of this Guarantee. The obligations of the Guarantor should be enforceable regardless of the validity, legality,*

effectiveness or enforceability of the obligations of the Company under the Finance Documents."

14. Clause 4.5.3 provides that before acting "*under the guarantee, the bank is not obliged to take any action, obtain judgment or make any file or claim or proof in the bankruptcy, examination, dissolution or winding up of the company*." The clause further provides that the bank need not advise the guarantor of their dealings with the company or of any default by the company of which the bank may have knowledge.

15. Clause 8, entitled "*Waiver of Defences*", states:-

> *"In any litigation relating to this Guarantee or any security given by the Guarantor, the Guarantor irrevocably waives the right to interpose any defence based upon any Statute of Limitations or any claim of laches or set off or counter-claim of any nature or description".*

16. Clause 11 under the heading "*Waiver and forbearance*", provides that:-

> *"No failure or delay by the bank in exercising any right or remedy will operate as a waiver of such right or remedy, nor will any singular or partial exercise a waiver of any right or remedy prevent their further exercise or the exercise by the bank of any other right or remedy".*

17. By virtue of clause 16, the bank is entitled to assign the benefit of the guarantee to any person and the guarantor is taken to have consented to such assignment.

18. Clause 17.1 under the heading, "*Variation*", provides:-

> *"This Guarantee may not be released, discharged, supplemented, amended, varied or modified in any manner except by an instrument in writing signed by a duly authorised officer or representative of each of the parties to this Guarantee."*

19. Clause 17.2 provides that there are no oral understandings between the bank and the guarantor in any way varying, contradicting or amplifying the terms of the guarantee. By virtue of clause 17.3 the guarantee supersedes all prior representations, arrangements, understandings and agreements.

20. Clause 19 provides that any notice or demand for payment to be given or served under the guarantee must be in writing and:-

> *"shall be duly expressed to be a notice or demand under this Guarantee and will be deemed duly given or served if sent by facsimile at the time of transmission (subject to the correct code or facsimile number being received), or if posted, 48 hours after the time at which it was posted…"*

21. The letter of demand which was served on 9th June, 2016, advised that the sum of €2,384,773.62 remained unpaid in respect of the loan facility.

22. Mr. Monaghan B.L. on behalf of the defendant submits that the plaintiff has failed to prove acquisition of the legal and beneficial ownership of the personal guarantee and/or the principal debt between Ulster Bank and the Company. A subsidiary argument raised in relation to the Bankers Book Evidence Act 1879 was not pursued as the plaintiff is not a bank. Counsel highlights the heavily redacted portfolio acquisition and transfer deeds and he relies on the decision of Murphy J. in *English v. Promontoria (Aran) Limited* [2016] IEHC 662, where at para. 23 she stated as follows:-

> *"As a condition of granting the plaintiff loan facilities Ulster Bank Ireland Limited required the plaintiff to agree that Ulster Bank Ireland Limited could transfer his loans and the security provided in respect thereof, to whoever it wished, whenever it wished, without his consent and without notice to him. This is a significant power contractually granted by the plaintiff to UBIL. If, as in this case, it purports to exercise that right of transfer, then a complete stranger with whom the plaintiff has no connection can come knocking on his door claiming an entitlement to possession of his property. It appears to the Court that before ceding possession of his property, the plaintiff is entitled to insist that the stranger prove its entitlement to possession by showing that it duly acquired the interest of the bank in his loans and the security underpinning those loans, in particular, the mortgage on the property."*

23. Insofar as the deed of transfer has been exhibited, the defendant submits that this does not amount to proof of acquisition and that the reference to a name and identification number is insufficient. It is also contended that the plaintiff has failed to establish that the sum of €750,000 remains outstanding under the facility. Reliance is placed on *dicta* of Twomey J. in *Bank of Ireland v. Macken* [2016] IEHC 804:-

> *"16. Although it does not need to decide on the issue, to the extent that the Bank is relying upon Order 37, rule 1 of the Rules of the Superior Court to be able to swear positively regarding the debt due, this Court is also of the view that both counsel for the defendants have made an arguable case that the Bank has failed to establish a prima facie case regarding the amount due.*
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> *17. Both counsel assert, in reliance on,* inter alia*, Bank of Ireland v. Paul Keehan [2013] IEHC 631 and Ulster Bank v. O'Brien [2015] IESC 96, that for a bank official to satisfy the Court that there is a prima facie case that a certain sum is due, it is not enough that he simply makes a bald averment of the amount of the debt due (as has been done in this case).*
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> *18. Rather to make a prima facie case, they argue that the averment of the bank official should be supported by some bank statements/bank records to provide some documentary support for the amount of the debt due (which has not been done in this case). The logic presumably is to give the Court some comfort that the figure has not simply been picked out of the sky and sight of a bank statement (unless it is claimed to be a forgery or otherwise incorrect) should achieve this aim. As Laffoy J. stated in the Supreme Court case of Ulster Bank v. O'Brien at para. 29, in quoting Clarke J. in Moorview Developments v. First Active plc [2010] IEHC 275 at para 6.3:*
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> > *"A witness from a bank is entitled to give evidence of the bank's records showing the amount due by a customer of the bank. That evidence and those records provide prima facie evidence of the liability (emphasis added)."*

> *19. Without deciding this point, this Court would simply observe that it is certainly arguable that something more than a bald averment is needed, even if that something more is simply the exhibiting of one bank statement showing the amount due at a relevant date."*

24. Ms. Hughes avers in her affidavit sworn of 24th May, 2017:-

> *"… I believe that as of the date of its dissolution on 29th January, 2012, the principal debtor remained indebted to the Plaintiff's predecessor in title in a sum excess of €750,000".*

25. Bank statements have not been exhibited. Nevertheless, the plaintiff relies on the executed copy of the deed of transfer and the schedule attached thereto. Ms. Hughes also relies upon the portfolio acquisition deed as providing clear evidence of the transfer of the asset from Ulster Bank to the plaintiff. In an affidavit sworn by her on 15th June, 2018, she avers that the principal debt is recorded on p. 40 of the deed. The "*connection I.D.*" number, refers to Mr. Boyle and the obligor is described as "*CIM Trawlers Limited – dissolved".* She also refers to the same connection I.D. at p. 50 of the document under the heading of "*RCRI guarantors*". She contends that the deed of the transfer provides additional evidence of the assignment of the debt to the plaintiff. Schedule 1, entitled "*Underlying loan agreements*", contains a multitude of redacted information but includes under the heading "*Security documentation*", reference to the Company and the date 6th July, 2006, which coincides with the date of the guarantee. She avers that the information regarding assets legally assigned to the plaintiff is contained in an "*interlinks data site"* made available by the sellers (*i.e*. Ulster Bank and its associated company) to the plaintiff. The data site contained an electronic data tape which has details of the Connection I.D. and the Facility I.D. concerning the assets in sale. It includes details of the borrower, the facility type and the outstanding balance. She exhibits what is described as the facility tab section of an electronic data tape, downloaded from the data site. She also exhibits a section of the electronic data tape relating to the connection name of the defendant, which refers to the guarantee. The details in relation to the facility include a connection I.D. number is identical in both documents. A connection name is identical in both documents. A borrower's name is also identical and other information relate to the facility I.D. Regarding the current outstanding balance, on the facility, this is recorded as €2,384,773.62. Another section states "*please list the security I.D. for relevant guarantees*". This refers to a number which coincides with the security I.D. of the guarantee. Under the guarantee tab the guarantee is described as "*€750,000 personal guarantee from Cathal Boyle, replacing €35,000 overdraft previously held*". Ms. Hughes avers that the date identifying the guarantee in the schedule to the deed of transfer corresponds with the date of the guarantee as exhibited in her grounding affidavit. In summary, therefore, she maintains that this is sufficient proof of the debt, the amount outstanding and its transfer.

26. Further it is contended that the defendant is a sole or primary obligor under clause 4.2 of the guarantee.

27. Mr. Monaghan B.L. argues that a defence on the principle of promissory estoppel arises and that it would be inequitable to allow the plaintiff to pursue the defendant where, on reliance on Mr. Cotter's representations, he had arranged for the sale of the trawler. The sale was organised in circumstances where he had been assured that if he did so, he would be absolved of any liability under the personal guarantee. If he had not sold the fishing vessel he would have been able to continue fishing, thereby maintaining a source of income.

28. In *National Asset Loan Management Limited v. McMahon* [2014] IEHC 71, Charleton J. adopted the formulation of the principle as outlined in *Snell's Equity* as follows:-

> *"Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to effect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and therefore, before it is withdrawn the other party acts upon it, altering his/her position so that it would be inequitable to remit the first part to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it."*

29. It is submitted that the verbal demands made by Ulster Bank on the guarantee after the sale of the trawler does not undermine the defence of promissory estoppel. The demands of the bank were inequitable as it was effectively seeking to revert to its previous legal position as if no promise or assurance had been made. The fact that the bank did not pursue the defendant for the outstanding debt at any stage subsequent to those demands corroborates his assertion that the defendant was released from all liabilities under the personal guarantee. Counsel for the defendant also submits that the plaintiff does not positively deny that such an agreement had been reached between Mr. Cotter and the defendant. The furthest that Ms. Hughes goes in her affidavit is to say that the plaintiff is a stranger to the alleged agreement.

30. It is further submitted that it is inequitable to permit the plaintiff to rely on clause 17.1 of the guarantee and requests that the matter be referred to plenary hearing when the defendant will seek discovery of such written instruments as may exist.

31. Counsel for the plaintiff, Mr. Neuman B.L. submits that the defendant has failed to substantiate the circumstances surrounding the alleged vague representation by Mr. Cotter including details of the date upon which it was given, the manner in which it was made or whether it was given on one or multiple occasions. Further, he states that it is surprising that the defendant has been unable to produce a single document, note or piece of correspondence in support. It is also unclear from the defendant's affidavit if the allegation is that the assurance relates solely to the company's debt, the guarantee or both. Such vagueness wholly undermines the veracity of the defendant's contention.

32. Counsel also submits that detrimental reliance, if any, was not that of the defendant, it was that of the Company and such reliance is too remote. Detriment amounting to a loss of income, as suggested by the defendant, is vague and uncorroborated. In the absence of further details Mr. Neuman B.L. submits that the defendant's bald assertion of detrimental reliance ought to be rejected. Further, clause 17 makes it clear that the guarantee may not be released in any manner except by an instrument in writing, signed by a duly authorised officer of the parties to the guarantee. The defendant did not raise this suggested defence at any time prior to the issuing of the motion or judgment. The plaintiff also submits that even if it is to be accepted that an assurance of some nature was given, the plaintiff is entitled to rely on the terms of the guarantee which expressly provided that the sale of the secured asset does not discharge the defendant's obligations under the guarantee and that any attempt to undermine the written terms of the agreement, in this regard, by the introduction of oral evidence, offends against the parol evidence rule.

33. It is also submitted that the alleged defence under the Statute of Limitations should be rejected in the light of clause 8 of the guarantee whereby the defendant irrevocably agreed to waive any defence based upon the Statute of Limitations in any litigation relating to the guarantee. Alternatively, it is contended that the guarantee requires that notices or demands for payment should be made in writing. The defendant had failed to adduce evidence of such a written demand, as may have had the effect of commencing the period from which the limitation period might be calculated.

Decision

34. The principles applicable on an application for summary judgement are well – established. In *Aer Rianta v. Ryanair Ltd* [2001] 4 I.R. 607, Hardiman J. stated that the fundamental question on such an application is:-

> *"Is it very clear that the defendant has no case? Was there either no issue to be tried or only issues which were simple and easily determined? Did the defendant's affidavits fail to disclose even an arguable defence?".*

In *Harrisrange v Duncan* [2003] 4 I.R. 1, McKechnie J. stated that the power to grant summary judgment should be exercised with discernible caution. He amplified the principles which are applicable at p. 7:-

> *"From these cases it seems to me that the following is a summary of the present position:-*
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> *(i) the power to grant summary judgment should be exercised with discernible caution;*
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> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
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> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
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> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
>
> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;*
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> *(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
>
> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*
>
> *(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be. "*

35. Thus, as McKechnie J. observed, the overriding determinative factor is the achievement of a just result, whether that be by granting liberty to enter judgment or by granting liberty to defend. The court must be mindful of the constitutional right of access to justice either to assert or to respond to litigation. If the suggested defence is no more than a mere assertion of a given situation, leave to defend should not be granted; neither should it be refused only because the court has reason to doubt the *bona fides* of the defendant or has reason to doubt whether he has a genuine cause of action. It is not up to a defendant to prove that his defence will probably succeed or that success is not improbable. The test is whether it amounts to an arguable defence.

36. In *GE Capital Woodchester Ltd. and Anor v. Aktiv Kapital Asset Investment Ltd and Anor* [2009] IEHC 512, Clarke J. (as he then was) cautioned at para 6.5, *inter alia*:-

> *"There may be a variety of circumstances, nonetheless, where the defendant may be able to persuade the court that the Aer Rianta test is met. Where, for example, a defendant establishes a credible basis for suggesting that witnesses will be available who will depose to facts which might arguably give rise to a defence, the fact that the evidence of those witnesses is not strictly speaking before the court in the form of an affidavit sworn by such witness will not necessarily be fatal. To take but one, albeit extreme, example a defendant may have been told something by a witness who is unwilling to swear an affidavit but who would be amenable to subpoena. Provided the defendant concerned puts forward a credible basis for the contention that such evidence might be forthcoming, it could never be the case that the relevant defendant would be deprived of the opportunity of requiring the witness concerned to attend under subpoena and seeking to establish relevant facts through the evidence of that witness."*

37. Further, Clarke J. acknowledges that there are circumstances where the true nature of the defendants defence might rest on documentary evidence which might only become available through discovery or interrogatories. However, that does not mean that it is open to a defendant on an application for summary judgment, to make a vague and generalised allegations which amounts to nothing more than a suggestion that something useful to his case might turn up in discovery. He continued:-

> *"However, it seems to me that where a defendant satisfies the court that there is a credible basis for asserting that a particular state of facts might exist which state of facts, if same were in truth to exist, could be established by appropriate discovery and/or interrogatories, then such defendant should be entitled to liberty to defend. It should, again, be emphasized that mere assertion is insufficient. A credible basis for the assertion needs to be put forward even if it is not, at the stage of the motion for summary judgment, possible to put before the court direct evidence of the assertion concerned."*

In this case, the defendant places significance on the fact that part of its defence rests or is likely to rest on the evidence of Mr. Cotter.

38. There is no dispute as to the execution of the guarantee. There is no dispute regarding the terms of the guarantee. What is in dispute is whether the plaintiff is entitled to rely upon and to enforce the terms of the guarantee. The second issue relates to proof of the transfer of the security and of its amount. A third issue relates to the Statute of Limitations.

39. Insofar as the Statute of Limitations defence is concerned, it appears to me, on the basis of the terms of the guarantee, that such a defence is unarguable. Clause 8 of the guarantee provides that in any litigation regarding the guarantee or any security given by the guarantor, the guarantor irrevocably waives the right to interpose a defence based upon any Statute of Limitation. Mr. Boyle asserts that the Statute of Limitations has expired because demands were made by Mr. Cotter at an unspecified time and in an unspecified manner. Nothing in writing has been produced by Mr. Boyle to substantiate the making of such demands. It is not suggested or argued that this clause is unenforceable for any particular legal or factual reason, save that made in the context of the defence of promissory estoppel a defence which relates to the security in its entirety. It therefore seems to me on the basis of the guarantee as executed (about which there is no issue), if the only defence advanced by Mr. Boyle related to the Statute of Limitations, I would not be satisfied that such defence would be arguable, particularly by reason of the provisions of clauses 8 and 17 of the guarantee.

40. Regarding the defence of promissory estoppel, a number of factors require to be a considered. Mr. Boyle avers that he was assured by Mr. Cotter in what he described as clear and unambiguous terms that if the trawler was sold by the Company to meet the Company's liabilities with the bank, he would be discharged from his obligation under the terms of the personal guarantee. It is true that on the face of it, this seems to be contradicted by the subsequent demands made by Mr. Cotter for repayment of the sums due. As against this, the defendant maintains that the sums were not paid because it would have been inequitable for the bank to go back on its word. Further, it is suggested that the fact that the bank did not follow through on its demand at that time corroborates Mr. Boyle's version.

41. Mr. Neuman B.L. makes a not unreasonable argument that the suggested detriment of the plaintiff is too remote. No authority has been opened to support the contention of the defendant that promissory estoppel might arise in favour of a person in circumstances where an asset owned by a third party has been disposed of in consequence of a representation. However, the evidence indicates that Mr. Boyle is a 50% shareholder, director and employee of the company. He maintains that as the trawler was the only asset of the company, and therefore, the only asset capable of generating income for the plaintiff, once it was sold he suffered detriment. It may be that this proposition, after a full hearing, will ultimately be found to be remote as a matter of law, nevertheless the court must bear in mind the principles outlined by McKechnie J. in *Harrisrange*, including that stated at subpara. (vi) that "*Where there are issues of law, this summary process may be appropriate but only so, if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues*." Mr. Boyle was not legally a party to the sale transaction, albeit he may have been the company's agent in effecting it. Having said that, however, it would appear, on the face of it, that it is arguable that Mr. Boyle in his personal capacity was enlisted to assist the sale of the trawler and to that extent it may well be that the defence is arguable. It seems to me that such a defence is likely to involve legal argument of the type envisaged by McKechnie J. in *Harrisrange*.

42. Finally, I have considered the documentation relating to the transfer of the company's liabilities and the guarantee from Ulster Bank Ireland Ltd. to the plaintiff.

43. I am satisfied on the basis of the information and evidence adduced that *whatever* assets or security were in existence as of the date of transfer in January, 2016, either in the form of the initial facility to the company or the security, be it the principle loan or the guarantee, were transferred to the plaintiff. What is not so clear, however, is the amount of any such liabilities and proof thereof. *Dicta* of Twomey J. in *Bank of Ireland v. Macken* is relevant. In this case, the averment of Ms. Hughes is unsupported by statements of account or bank records identifying the amount of the indebtedness of the Company and therefore by necessary extension, the extent of any liability of the guarantor. While she has referred to certain data records made available by Ulster Bank, the furthest that her affidavit goes is to state her belief that this was the amount which was transferred, based on the computer records. In the particular circumstances of this case, I am not satisfied that it is not arguable that the computer printouts and the computer data referred to during the course of the application provide an adequate evidential basis or are an adequate substitute for proof by the production of a bank statement or documentation evidencing the bank accounts. On the basis of the evidence currently before the court, I am not satisfied that the defendant does not have an arguable case in relation to the amount of its liability particularly in circumstances where the liability on foot of the guarantee is dependent upon the existence and extent of the company's liability.

44. It appears to me that in the circumstances the defendant has made out an arguable defence to the plaintiff's claim. Nevertheless, it is my view that any such defence should be confined to the issue of promissory estoppel and the extent and amount of the liability which the defendant may have, rather than the plaintiff's ownership of, and entitlement to, the security.

45. On those two grounds, therefore, I propose to grant the defendant liberty to defend the proceedings.