

BETWEEN**THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND****PLAINTIFF****AND****IAN CORRIGAN, ALAN CLARKE, JOE CLARKE AND ITA CLARKE****DEFENDANTS****JUDGMENT of Mr. Justice Robert Eagar delivered on the 19th day of May, 2017**

1. This is a judgment on a notice of motion issued by the plaintiff dated the 13th of April, 2016 seeking summary judgment against the fourth named defendant Ita Clarke in the sum of €122,762.71 comprising the principal sum of €120,000.00 together with continuing interest of an amount of €2,762.71 from the 16th of June, 2015 to the 7th of April, 2016.

2. The notice of motion was grounded on the affidavit of Brian Feely who states that he is employed by the plaintiff as a relationship manager at the Bank of Ireland, Business Banking, Regional Business Unit, Eyre Square in Galway. He also says that he makes this affidavit on behalf of the plaintiff and with its authority, from a diligent perusal of his books and records, and from facts within his own knowledge save where otherwise appears.

Issues

3. It is necessary to set out some of the issues that arise in relation to the other defendants. The plaintiff says that the indebtedness in relation to the first three defendants arose pursuant to the letter of guarantee and indemnity executed on a joint and several basis by the first three defendants on the 4th of February, 2009 in the amount of €360,000.00 in respect of the indebtedness of Kindalen Ltd. to the plaintiff. The guarantee and indemnity was signed by the three first named defendants and they also signed the certificate concerning independent legal advice.

4. Mr. Feely says that the indebtedness of the fourth named defendant Ita Clarke arises pursuant to a letter of guarantee and indemnity executed by her on the 20th of March, 2009 in the amount of €120,000.00 in respect of the indebtedness of the Company to the plaintiff. Here again there is a guarantee and indemnity which is signed by Ita Clarke, she again says that she understands the nature and liability incurred and did not want to be independently advised by a solicitor.

5. Pursuant to the first letter of guarantee and indemnity in relation to the first three named defendants the plaintiff wrote to the secretary of Kindalen Ltd., 2nd Floor, Park Court, Austin Friar Street, Mullingar, Co. Westmeath indicating that subject to the terms and conditions outlined below and in the appendix the Bank of Ireland will make available to Kindalen Ltd. the following facility (1) €360,000.00 by way of commercial loan and the purpose of the facility was to assist with the restructure of existing bridging term loan.

Terms of Facilities and Repayment

6. Exact repayments will be determined on a drawdown date based on the interest rate then prevailing:

(1) The commercial loan is repayable in full within 240 months of drawdown. Monthly interest only payments of €1,233.00 will apply for a period of 24 months from drawdown.

There were a number of securities:

(1) A first legal mortgage charge over property at 4 St. Lomans Terrace, Patrick Street, Mullingar, registered in the name of Kindalen Ltd.;

(2) letter of guarantee from Alan Clarke guaranteeing the borrowers liability in the amount of €360,000.00 supported by an assignment to the Bank of level term life policy on the life of Alan Clarke for an amount of €120,000.00;

(3) letter of guarantee from Ian Corrigan guaranteeing the borrowers liability in the amount of €360,000.00 in respect of the principal, together with interest and costs supported by an assignment to the Bank of level term life policy on the life of Ian Corrigan for an amount of €120,000.00;

(4) letter of guarantee from Joe Clarke guaranteeing the borrowers liability in the amount of €360,000.00 supported by a first mortgage/charge over the property as Castle Geoghegan, Co. Westmeath comprising 5 acres registered in the name of Joe Clarke with an assignment to the Bank of level term life policy on the life of Joe Clarke for an amount of €120,000.00;

This was accepted on the 4th of February by the three first named defendants.

7. Mr. Feely says that by letter dated the 8th of April, 2009 (which he describes as Facility Letter No. 2) the plaintiff issued a revised offer letter to the Company. The said offer was made on the revised special terms and conditions set out in Facility Letter No. 2 as supplemented by the plaintiff's general terms and conditions which were appended thereto. The Facility Letter No. 2 was accepted by the three defendants on behalf of the Company on the 8th of April, 2009.

8. He exhibits the Facility Letter No. 2 which says initially:

"This offer letter will supersede offer letter dated the 2nd of February, 2009.

Re: Kindalen Ltd."

9. The amount of the facility of €360,000.00 was the same amount. The commercial loan was now repayable in full within 240 months of drawing. Monthly interest only repayments of €1,038.00 will apply for a period of 24 months from the drawdown. Repayments of

capital and interest will commence following this period at a rate sufficient to redeem the commercial mortgage within the remaining repayment term of 216 months. The security held was as follows: the same security as in the first Facility Letter coupled with the guarantee and indemnity in relation to Ita Clarke with an address of Castle Geoghegan, Co. Westmeath to Kindalen Ltd. 2nd Floor, Park Court, Austin Friar Street, Mullingar, Co. Westmeath, signed by Ita Clarke with two witnesses from the Bank as witnessing her signature. She confirms that she understood the nature of the liability incurred and she has no wish to be independently assisted by a solicitor. This signature was dated the 20th of March, 2009.

Facility Letter No. 3

10. On the 29th of August, 2011 the plaintiff offered to make available to the Company the sum of €358,479.00 to assist with the restructure of the existing facility. The said offer was made on the revised special terms and conditions set out in Facility Letter No. 3 as supplemented by the plaintiff's general terms and conditions which were appended there.

11. It was accepted by the second named defendant on the 16th of September, 2011, and by the third named defendant on the 5th of October, 2011. The letter was addressed to Alan Clarke and Associates, Kindalen Ltd., York Street, Castleblayney, Co. Monaghan and the terms and facilities of repayment of the loan is that it was now repayable within 212 months of restructure agreed. Monthly payments of €1,057.51 will apply for a period of 6 months from restructure, monthly repayments of capital interest will commence following this period at a rate sufficient to redeem the loan within the remaining repayment term of 206 months.

12. The security held was the same security held previously in relation to the Facility Letter No. 2.

13. The terms and conditions of Facility Letter No. 3 made express provision for the calling in of the loan account, should one or more events of default occur as specified in clause 12. The Company failed to make payments in accordance with the said terms and conditions which amounted to an event of default in accordance with clause 12(3) thereof. The event of default entitled the plaintiff to demand repayment of the loan account.

Letter of Demand

14. By letter dated the 31st day of October, 2013 the plaintiff formally demanded repayment by the Company of the sum of €384,734.69 which was then due in respect of the loan account. He also indicated that the plaintiff formally demanded repayment by the first named, second named and the third named defendant pursuant to the terms of the letter of guarantee and indemnity in the sum of €360,000.00 and by letter dated the 3rd of January, 2014, the fourth named defendant was called upon by the plaintiff pursuant to the terms of the letter of guarantee and indemnity to pay the sum of €120,000.00. By letters dated the 15th of June, 2015 Messrs. Harrison O'Dowd solicitors for the plaintiff called upon the Company for the full repayment of its indebtedness, the first named, second named and the third named defendants to pay the appropriate sum to the plaintiff pursuant to the letter of guarantee and indemnity and to the fourth named defendant to pay the sum of €120,000.00 to the plaintiff pursuant to the terms of the letter of guarantee.

15. He says that notwithstanding the letters of demand, the Company had failed to pay the sums demanded and further that the defendants had not paid any of the monies demanded of them on foot of the several guarantees and he said that the total amount due and owing by the fourth named defendant is €122,762.71. He believes that the defendants and in particular, the fourth named defendant had no defence to the claims therein.

Responding Affidavit of Ita Clarke

16. The next affidavit is the responding affidavit of Ita Clarke, sworn on the 30th of June, 2016. She states that by letter dated the 2nd of February, 2009 the plaintiff offered to make available to the Company the sum of €360,000.00 by way of a commercial loan (Facility Letter No. 1).

17. This was accepted by the first, second and third named defendants but not the fourth named defendant on behalf of the Company. She says that a new facility letter issued by the Bank to the Company dated the 8th of April, 2009, this is the Facility Letter No. 2 which states "that this offer letter will supersede other offer letter dated the 2nd of February, 2009". Under the heading "Security held" there is reference to the security including inter alia the letter of guarantee from she, Ita Clarke guaranteeing the borrower's liabilities in the sum of €120,000.00.

18. She says that enclosed with the Facility Letter is a letter of guarantee in the sum of €120,000.00 which is to encompass her interest in joint security with Mr. Joe Clarke as pledged as counter cover for the guarantee dated 4th of February, 2009, supported by a first legal mortgage charge over the property at Castletown Geoghegan, Co. Westmeath comprising 0.5 acres registered in the name of Mr. Joe Clarke and Mrs. Ita Clarke. She says there was a clear intention of the parties to the lending arrangements that Mrs. Clarke would facilitate the plaintiff taking security over a property at Castletown Geoghegan, Co. Westmeath held in their joint names of Mr. and Mrs. Clarke and which property the plaintiff had originally incorrectly understood was held in the sole name of Mr. Clarke.

19. She says that she no specific recollection of signing the guarantee and indemnity on the 20th of March, 2009 and she notes that the document appears to record that she executed same in the presence of a witness employed by the plaintiff on the 20th of March, 2009 and she is satisfied that this did not occur. She said further and insofar as the document refers to her having received a copy of the document and her understanding the nature of the liability incurred and having no wish to be independently advised by a solicitor, she said she did not receive a copy of the document nor did she understand the nature of the liability which is now contended she was committing, in respect of the Company's indebtedness.

20. She referred to Facility Letter No. 3 and stated that she was not a party to such an arrangement and had no knowledge of same, nor was notified of the new arrangements entered into between the parties. Self-evidently, this new facility constituted a material change in the Company's borrowing arrangements with the plaintiff. She is advised this is relevant having regard to the provisions of the Consumer Protection Code, which were then applicable by law and which are in any event referred to and incorporated as terms of both Facility Letters. She said that her solicitor communicated her position to the plaintiff. The plaintiff responded by letter dated the 24th of September, 2014, referring to a copy of the CPC notification letter dated the 28th of October, 2010 which allegedly issued to her advising of the change, and also confirmed that the Bank would continue to rely on the letter of guarantee.

21. She says that her solicitors have made clear to the plaintiff prior to the issue of these proceedings, that she did not receive the said letter due to the fact that the notification letter was addressed (by reason of an acknowledged error on the part of the plaintiff) to Mrs. Clarke c/o Kindalen Ltd. at an address of 50 Belvedere Hill, Ballinderry, Mullingar, Co. Westmeath. She says that she did not and never had any connection with this address. She said that she advised the Company's registered office on the 2nd of October, 2011, was 2nd Floor, Park Court, Austin Friar Street, Mullingar, Co. Westmeath, not 50 Belvedere Hill.

22. She stated that she would not have agreed to any material changes with regard to the Company's borrowing arrangements with

the plaintiff, nor did she agree with the plaintiff's communicated position in a letter to her solicitors dated the 9th of December, 2014 (that the restructuring of the borrowed facilities did not have any impact on Mrs. Clarke's liability to the Bank on foot of the guarantee).

23. She exhibits correspondence, the first of which is a letter from Tom Casey Solicitors to Ann Henry who is business manager of Bank of Ireland Business Bank, Main Street, Longford on the 16th of June, 2014 wherein the solicitors stated that to assist them in advising Mr. and Mrs. Clarke, they would be obliged if the Bank would furnish copies of the guarantees at issue, together with copies of the Facility Letters of the loan offer between Kindalen Ltd. and the Bank.

24. These were provided by letter dated the 7th of July, 2014 and by letter dated the 12th of September, 2014 Tom Casey Solicitors wrote and the main points are:-

"(1) By letter of loan offer dated the 1st of February, 2006 the Bank advanced monies to the Company on the terms and subject to the security requirements recited therein; They understood that Mrs. Clarke was not a party to this agreement as guarantor or otherwise,

(2) By letter of the loan offer dated the 7th of February, 2009 the Bank advanced monies to the Company on the terms and subject to the security requirements recited therein; And that their client Mrs. Clarke is not a party to the agreement as guarantor or otherwise,

(3) By loan offer dated the 8th of April, 2009 the Bank agreed to make available to the Company as facility in the sum of €360,000.00 by way of a commercial loan, with this letter stating that it superseded the offer letter dated the 2nd of February, 2009.

The solicitors noted that the 8th of April, 2009 loan provided that the security held included a letter of guarantee in the sum of €120,000.00 in respect of the principal loan together with interest and costs.

25. The solicitors then referred to a letter in relation to the loan offer dated the 29th of August, 2011. Finally, the solicitors sought copies of all communications forwarded by the Bank to their client. They received a CPC notification letter which is dated the 28th of October, 2011 into the guarantee and the address is Kindalen Ltd., 50 Belvedere Hill, Ballinderry, Mullingar, Co. Westmeath.

26. By letter dated the 9th of October, 2014 the solicitors referred to the Bank's CPC notification letter and indicated that Mrs. Clarke never received this letter, due to their sending it to the wrong address. They further say that their client would not have agreed to any material variation to the principal borrower's agreement with the Bank and/or relief of any other guarantor from the obligation to guarantee the borrowings, as appears to have occurred in October, 2011 following communications and subsequent agreement between the Company, the Bank and one of the guarantors of the Company's obligations.

"You might please:

(a) advise us as to why the Bank wrote to our client in purported compliance with its obligations pursuant to the Consumer Protection Code c/o the principal debtor's Company and to an address at 50 Belvedere Hill, distinction our client's actual address which is known to the Bank being Castletown Geoghegan, Co. Westmeath."

27. The Bank of Ireland responded on the 11th of November, 2014 stating that the guarantee signed by Mrs. Clarke expressly authorises the Bank to provide further advances to the Company or restructure the Company facilities, all of which will continue to be secured by the guarantee. The Bank apologised for the incorrect address.

Final affidavit of Brian Feeley

28. The final affidavit was the second affidavit of Brian Feeley of the plaintiff Bank. He says that he believes that the third and fourth named defendants are joint owners of the property comprised in Folio 22471F Co. Westmeath and that the plaintiff was registered as owner of a first legal charge in Part III of the Folio on the 2nd of March, 2011. He says that in relation to her averment that she did not execute the guarantee, he states that Mrs. Clarke's signature appears three times in the signature page of the said guarantee, and was witnessed by the employees of the plaintiff.

29. He refers to a letter from M.A. Stephens Consulting and is dated the 8th of April, 2015 and says that:

"As you are aware Ita Clarke is taking legal advice in respect of the guarantee which is being provided by her to the Bank and I understand her solicitor Tom Casey has been in correspondence with the Bank in relation to same.

Ita Clarke does not accept that she has any liability whatsoever to the Bank on foot of the personal guarantee which she executed, on the basis she is not willing to offer any payment to the Bank in respect of same and has indicated she is prepared to defend any legal proceedings taken against her by the Bank in respect of the guarantee".

30. The letter clearly indicates that the fourth named defendant executed the guarantee. Brian Feeley also apologises on affidavit for sending the notification letter to restructure to the wrong address. He says that the restructure which occurred on foot of Facility Letter No. 3 dated 29th day of August, 2011 was agreed to by the second and third named defendants on behalf of Kindalen Ltd. The effect of restructure was to reduce the monthly repayments on the existing facility for a period of six months. He believes and has been advised that the fourth named defendant's consent was not a prerequisite to the restructuring of the loan facility as the guarantee which the fourth named defendant executed was, and is, a continuing obligation on the fourth named defendant to pay the principal in the sum up to €120,000.00 and he says that she does not have a defence to this.

Defences

31. Counsel on behalf of the fourth named defendant identified the following defences:

(1) The fourth named defendant did not sign the guarantee and there is no affidavit from the "witnesses" to her signature on the guarantee and indemnity dated the 20th of March, 2009.

(2) The Consumer Protection Code data was sent to an address which she did not have which is referred to as "c/o Kindalen Ltd., 50 Belvedere Hill, Ballinderry, Mullingar, Co. Westmeath". This was sent in relation to the Facility Letter No. 3 dated the 29th of August, 2011.

(3) There was no consideration offered in relation to Facility Letter No. 3.

The General Principles

32. The parties are not in dispute as to the threshold which a defendant must meet in order to avoid summary judgment. The question that the court must ask itself is that identified by Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 namely:-

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

33. *McKechnie J. in Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 identified twelve factors material to the court's consideration on such an application. It is clear from this decision, that a mere assertion as to a given situation which is to form the basis of a defence is insufficient. The defendant must do better than bold assertions.

34. Counsel for the defendant proposed that the defences of the fourth named defendant can be analysed as follows.

35. Mrs. Clarke says that she does not recall signing the guarantee and indemnity which is dated the 20th of March, 2009 (this Court's emphasis).

36. The document on foot of which the plaintiff relies shows clearly a signature of a person describing themselves as Ita Clarke with two Bank witnesses signing. There is also a certification concerning independent legal advice which is also signed by an "Ita Clarke".

37. The second affidavit of Brian Feely on behalf of the Bank exhibits a letter from M&A Stephens Consulting, the terms of that letter are as follows:-

"RE: Ita Clarke

As you are aware Ita Clarke has taken legal advice in respect of the guarantee which is provided by her to the Bank and I understand that her solicitor Tom Casey has been in correspondence with the Bank in relation to same.

Ita Clarke does not accept that she has any liability whatsoever to the Bank on foot of the personal guarantee which she executed and on this/that basis she is not willing to offer any payment to the Bank in respect of same and has indicated that she is prepared to defend any legal proceedings taken against her by the Bank in respect of the guarantee."

38. It is clear that M&A Stephens Consulting confirm that she had provided a guarantee to the Bank and that she had executed the personal guarantee. It seems clear to this Court that the defence of her not recalling having signed the guarantee is not open to her on the basis on this affidavit evidence.

39. The next defence is the failure of the Bank to send the Consumer Protection Code notification letter to the correct address. This related to the third Facility Letter. This was acknowledged by Mr. Feely, who apologised for this mistake on the part of the Bank.

40. Counsel on behalf of the plaintiff quoted from *Allied Irish Banks plc. v. Mark Smith* [2012] IEHC 381, a decision of Ryan J. (as he was then) delivered on the 5th of October, 2012. Under heading the Consumer Credit Act 1995, Ryan J. said:-

"His case is that s. 38 applies, which provides that a creditor is not entitled to enforce a credit agreement or a contract of guarantee relating thereto unless the requirements of Part III of the Act have been complied with and in particular section 30."

41. The defendant in this case states that she was not given a copy of the contract of guarantee, in that it was sent to the wrong address. This means that the agreement is unenforceable.

42. Ryan J. continued:-

"A "credit agreement" is defined in the Act to mean "an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, a cash loan or other similar financial accommodation". This is a loan or similar financial accommodation granted to the company, so the question then becomes whether the accommodation was granted to a consumer. In other words, was the company that got the facility from the plaintiff bank a consumer? Consumer means "a natural person acting outside his trade, business or profession". This company is not a natural person and was not acting outside his trade, business or profession. Accordingly, the company that got the financial accommodation was not a consumer within the meaning of the Act. That is the fundamental point which means that the contract of guarantee is not within the statutory definition. These definitions are contained in s. 2 of the Act and in the result it is clear and irresistible in my view that s. 30 does not apply."

Similarly, in this case the financial accommodation was provided to the Company Kindalen Ltd. and thus the Consumer Credit Act s. 30 does not apply.

43. The third limb of the defence which the defendant claims relates to the fact that there was no consideration in relation to the third facility letter. The position is that it is clear from the terms of the first, second and third letters of facility that different repayment rates were being paid. The Court accepts that this is the consideration.

Conclusion

44. The fourth named defendant has not made out an arguable defence on any of the arguments put forward by her or on her behalf, and the Bank is accordingly entitled to judgment.