[2017] IEHC 533

THE HIGH COURT

2015 No. 1428S

Between:

ALLIED IRISH BANKS PLC

Plaintiff

– and –

ROSTAFF PROPERTY DEVELOPMENT LIMITED

AND MARY GERAGHTY AND JAMES KEARNEY

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 7th September, 2017.

I. Background

1. By guarantee in writing of 15th July, 2009, Ms Geraghty entered into a guarantee and guaranteed all sums of money at any time owing to AIB from or by Rostaff, provided that the total amount recoverable should not exceed a particular sum. In September, 2011 and February, 2012 certain credit facilities were granted by AIB to Rostaff. By guarantee in writing of 13th February, 2012, and for like consideration to that described in the context of the guarantee of 15th July, 2009, Ms Geraghty guaranteed all sums of money at any time owing to AIB from or by Rostaff, provided the total amount did not exceed a defined amount. Each of the guarantees aforesaid was in addition to, and not in substitution for, any other guarantee or security for the obligations of Rostaff given by Ms Geraghty. At some point after the giving of the second guarantee, a loan default scenario arose; thereafter, by various demands from May, 2014 into May, 2015, AIB demanded repayment of such amounts as it now claims are owing to it. Judgment has previously been obtained against the first and third-named defendants. Summary judgment is now sought against Ms Geraghty pursuant to her guarantees.

II. Ms Geraghty's Situation

(i) Ms Geraghty's First Affidavit.

2. Ms Geraghty has sworn a couple of affidavits in the within proceedings. The background facts are well-captured by the below-quoted averments from her initial affidavit.

> *"I say that in or about 1996 I meet the 3rd Named Defendant and we developed a romantic relationship….[I]n 1997 the 3rd Named Defendant did move into my home…where I have resided all my life. I say that when I meet the 3rd Named Defendant, he was involved in the construction business and I was working as a hairdresser. I say that the 3rd Named Defendant in 1999 started up his own construction company (hereinafter the '1st Named Defendant'), and suggested that I would act as the Company Secretary and that he would give me 49% of the allocated share capital. The 3rd Named Defendant persuaded me at that time to invest the sum of €17,500…into the 1st Named Defendant, and asked that I would do some of the administration work associated with the development of the business. I say that I had never previously been involved in this type of business, nor had I ever handled the administration of such business, however the 3rd Named Defendant wanted me to have some role in the activities of the 1st Named Defendant, considering that I had invested my money in its start-up. I was not offered any remuneration or paid anything for my work….*
>
> *I say that within six months of this new company operating its business I was told by the 3rd Named Defendant that I was no longer required to contribute to the administration of, nor to be involved in the day to day business of the 1st Named Defendant. The 3rd Named Defendant took full control of the 1st Named Defendant and thereafter did not all me access to any of the paper work associated with its operations….*
>
> *I say that I became aware the business of the 1st Named Defendant was not doing so well in 2001 as I began to receive calls from the Revenue Sheriff Bailiffs, angry tradesmen, and wholesale builders' providers and agents who were calling to my house looking for money. At all times during this period those persons who called to my home were looking for the 3rd Named Defendant but he was never available and avoided dealing with them. During this time my own home bills fell behind because I did give the 3rd Named Defendant money from my savings to help him out and pay off some of the 1st Named Defendant's bills. The 3rd Named Defendant during this time never spoke to me about or told me the extent of the 1st Named Defendant's problems, and during this time I had to seek support from my own family….*
>
> *I say I did what the 3rd Named Defendant asked of me, to help him with the business of the 1st Named Defendant in the hope that we could make our relationship work but realised in 2011 that the relationship was in difficulty and that the 3rd Named Defendant was becoming more and more distant. I say that in November 2013 the 3rd Named Defendant left my home and told me…that our relationship was over. I say that shortly after this the 3rd Named Defendant came back to me and required that I sign over my shares in the 1st Named Defendant, to his nephew…which I did….*
>
> *I say that in respect of the Documents, which the Plaintiff states I signed, and while I accept that that it is my signature on those documents therein referred to, I did not knowingly sign a personal guarantee. I was never made aware by the Plaintiff, or indeed by any other party that I would be held liable for the debts of the 1st Named Defendant. I was not given any advice as to this by the Plaintiff or any other party to the proceedings, nor was I advised to seek independent legal advice before signing these bank documents. I was never told at any stage that my family home was at risk by virtue of the business transactions of the 1st Named Defendant. I trusted the 3rd Named Defendant at that time even though our relationship was going through a rough period. I was an authorised signatory for the 1st Named Defendant at the material time and I was told by the 3rd Named Defendant that I had to sign the paperwork to keep the 1st Named Defendant afloat….*
>
> *I say that I…am being required to deal with this matter in circumstances where the 3rd Named Defendant is in complete control of the 1st Named Defendant and until very recently, has refused to deal with this matter, in a timely matter or at all, save that he has only now come around to accept that asset[s] of the 1st Named Defendant be sold and the full sale proceeds to be remitted to the Plaintiff so as to reduce the liability of the 1st and 3rd Named Defendants to the*

Plaintiff."

3. The above averments are made in the context of guarantee documents which, in each case,

(a) state as follows on the last page:

"…21. I certify that I have read the Guarantee and have received a copy thereof for my use.

Dated [Date inserted]…

_____

SCHEDULE

Name(s) of the Borrowrt(s) Rostaff Property Developments Limited

Address(es) of the Borrower(s) [Address stated]…

_____

Name of the Guarantor Mary Geraghty

Address of Guarantor [Address stated]…

_____

Amount of Guarantee (in figures) [Amount Stated]…

Amount of Guarantee (in words) [Amount Stated]…

Signed and sealed by: Mary Geraghty Mary Geraghty

(Print name of (Guarantor sign here)

Guarantor here)[1]

[Witness details then follow and are duly completed].

[1] Ms Geraghty has inadvertently signed her name twice.

(b) state as follows, in bold text and a considerably enlarged font size, at the start of the first page of the guarantee document:

(i) in the first guarantee document (of 15th July, 2009)

"

WARNING: - As Guarantor of the credit facilities you will have to pay off the credit facilities, the interest and all associated charges if the Borrower does not. Before you sign this guarantee you should get independent legal advice.

Guarantee

To: Allied Irish Banks p.l.c…"

and

(ii) in the second guarantee document (of 13th February, 2012)

"

WARNING: - As Guarantor of the credit facilities you will have to pay off the credit facilities, the interest and all associated charges if the Borrower does not. Before you sign this guarantee you should get independent legal advice.

If you give security (collateral) to the Bank to support this guarantee:

☐ While the guarantee remains in force you may not dispose of the property held by the Bank as security without the Bank's consent.

☐ If the Bank demands payment under the guarantee and you do not pay in dull immediately, the Bank may dispose of the property held as security towards payment of your liability.

Guarantee

To: Allied Irish Banks p.l.c…"

(ii) Ms Geraghty's Second Affidavit.

4. In a later affidavit, sworn after judgment had been obtained against the other defendants, Ms Geraghty avers, inter alia, as follows:

> *"I want to set out at the outset the legal Defences I will rely upon. These are the legal Defences of undue influence, unconscionable bargain, non est factum, misrepresentation and mistake….It is clear that I was under the undue influence of my former romantic partner, Mr James Kearney; that I was under emotional pressure at the time; that the signing of the guarantees was an unconscionable bargain as the signing of the guarantees was a contract which no sensible person would enter into, and which no honest person would accept…that the document was not presented to me as a guarantee and I believed it was a meaningless document; that there was a misrepresentation in that I was led to believe the guarantees did not potentially open me up to a financial liability and that I was mistaken as to what I was signing….*
>
> [Certain complaints are then made about the application by AIB of other receipts and the fact that the proceedings have been continued in the High Court]
>
> *I reassert my earlier averments that I did not knowingly sign either of the guarantees as alleged although I do confirm that it is my signature on both guarantees. I did not know its legal and financial implications for me, was not advised that it had any such implications, did not receive nor was I offered independent legal advice and did not know what I was signing, which I have no recollection of signing, were guarantees…..*
>
> *[W]hile I do not contest that my signature appears on both guarantees, I say and believe that it is obvious that I did not understand nor was it explained to me what these documents related to nor that they legally obligated me to do certain acts if the First Named Defendant defaulted….*
>
> *While I have no recollection of ever seeing this guarantee or a copy of it before the proceedings herein, I must have been under the impression that it was a meaningless or standard document and one that was to be signed per course as part of my involvement with the company and not a document potentially exposing me to a large liability….*
>
> *[T]he bank should have gone to greater efforts to ascertain whether I knew what I was signing and…this failure to do so nullifies their case.*
>
> *This failure of the Plaintiff and of the First and Third Named Defendants to act in a conscionable manner and one required by law, has now resulted in the Plaintiff seeking to claim [the amounts now sought]…"*

III. The Bank's Position

5. The affidavits sworn for AIB set out the 'black and white' detail of what was contractually agreed, the loan amounts advanced and the amounts claimed. Notably, despite the fact that AIB is the plaintiff in the within proceedings, that the burden of proof therefore rests on it, and that the threshold for sending summary applications to plenary hearing has been pitched at a notably low level in *Aer Rianta*, no effort is made by AIB, beyond a couple of bald averments that the appearances entered are for the purpose of delay and that the defendants have no *bona fide* defences, to engage with any of the features touched upon by by Ms Geraghty in the above-quoted segments of her affidavit evidence.

IV. Emotionally Transmitted Debt

6. This is a case that raises, amongst other matters, the issue of what might be styled 'emotionally transmitted debt', being the process whereby legal liability is spread from a principal debtor to a romantic partner. Often, the principal debtor is a man and the person taking on actual or potential economic liability for his business borrowings, or the debts of a company primarily operated by him, is his wife or romantic partner. However, in our more enlightened times, when a variety of lawful adult relationships between partners who are respectively, for example, heterosexual, homosexual, bisexual, *etc*. are properly recognised to exist, the issue of 'emotionally transmitted debt' is clearly one that can affect a more vulnerable and/or less business savvy partner in any such relationship. And there is, of course, no reason why in a male-female relationship it would not today be the woman who is the primary earner and the man who is the more dependent partner. (A variant of 'emotionally transmitted debt' can also present for parents who may be asked by their young adult children to assist them in acquiring a first home). Such cases are regularly contended to present issues of undue influence and unconscionability, these being aspects of the law that are the subject of learned and helpful commentary in, *inter alia,* Breslin J., *Banking Law* (3rd ed.) and Biehler, H., *Equity and the Law of Trusts in Ireland* (6th ed.). (The court would respectfully add to that commentary that it may be that notwithstanding, for example, the decision of the Supreme Court in *Bank of Nova Scotia v. Hogan* [1996] 3 IR 239, and any inclination on the part of the Irish courts hitherto to prefer the (British) *O'Brien-Etridge* line of case-law, that there are still some lessons of value to be taken from the (Australian) *Yerkey-Garcia* line of case-law which latterly seems more expressly to take account of concerned feminist legal commentary regarding the legal liability of vulnerable sureties). Without compromising freedom of contract, a fundamental and inherent human freedom, the courts need to be careful, in (rightly) acknowledging that freedom, not to privilege financial institutions and economic freedoms to such an extent that the issue of emotionally transmitted debt goes un-addressed or ill-addressed. Too often in cases such as that now presenting, the affidavit evidence (as here) follows the sequence of: 'Bank: I have a contractual entitlement', 'Defendant: There are other factors presenting', 'Bank: I have a contractual entitlement' – with little or no real engagement by the plaintiff bank, on which the burden of proof rests, as to why its claim does not raise contended-for equitable concerns that would justify the matter being sent to plenary hearing. Moreover, although the commencement in operation of the Companies Act 2014 has ended the need for an LTD company (though not other forms of company) to have two directors (and the related practical need which the two-director requirement for private limited companies often presented in the past for a parent, spouse or romantic partner to become a director of a private limited company operated by a loved one, despite such 'second' director in reality having little or no real involvement in the operation of such company), there remain instances in which emotionally transmitted debt can and will present as an issue in the context of family companies, *e.g.*, (1) where, as here, a spouse/romantic partner provides a personal guarantee, and (2) where a spouse/romantic partner becomes a member or director of a family company but, because of some romantic relationship-related reason, cannot access company information and/or make duly informed decisions. Be all that as it may, however, in the within case, the court is tasked solely with deciding, by reference to the notably low threshold recognised by the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 I.R. 607 (and bringing to its deliberations in this regard, *inter alia*, that "*discernible caution*" to which McKechnie J. refers in *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1, 7) whether, in the case of Ms Geraghty (judgment having previously been obtained against the other defendants) this case ought to go to plenary hearing, or whether, alternatively, summary judgment ought now to issue against her.

V. The Legal Test Applicable and Applied

(i) Aer Rianta.

7. As Hardiman J. stated in Aer Rianta, at 623:*"[T]he fundamental questions to be posed on an application such as this remain: 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?"* [Emphasis added]. The court notes just how low this test is set. It must be *very clear* that there is *no case, no issue* to be tried (or only issues that are *simple* and *easily determinable*). There must be *no arguable defence*. How does Ms Geraghty fare by reference to the *Aer Rianta* standard? It will be recalled that the four defences which she intends to rely on at any plenary hearing are undue influence, unconscionable bargain, *non est factum*, misrepresentation and mistake.

(ii) Undue influence.

8. The courts have traditionally shied away from any precise attempt to define what constitutes undue influence. However, as good a definition as any is offered by Henchy J. in *Harris v. Swordy* (Unreported, 21st December, 1967) when he described the concept as embracing "*unfair, undue and unreasonable mental control*" over another party. On a not unrelated note, Lindley L.J. made clear in *Allcard v. Skinner* (1887) 36 Ch.D. 145, 182, that the doctrine of undue influence's guiding principle is not "*to save persons from the consequences of their own folly*" but "*to save them from being victimised by other people".*

9. There is a dispute on the evidence before the court as to whether, (a) Ms Geraghty was the victim of undue influence (as opposed to foolish in love), or (b) (as contended for by AIB) that she has merely entered an appearance for the purposes of delay and has no *bona fide* defence. The court cannot properly conclude at this time, in the context of such a dispute, and on the evidence before it (including but not limited to Ms Geraghty's averment, in the context of an overall financial arrangement that seems, at first glance – though matters may eventually be proved otherwise – to be greatly more to her commercial detriment than to her commercial advantage) that she "*did not benefit in any way from the activities of the 1st Named Defendant*", that it is very clear that Ms Geraghty has no case, that there is no issue to be tried, that the issues raised in this regard are simple and easily determined, or that she has no arguable defence to the amounts now sought of her by AIB.

(iii) Unconscionable bargain.

10. Whether unconscionability logically sits separately from undue influence is something of a moot point among the academic community. (See generally Biehler, *op. cit*., 823-4). There is *perhaps* a distinction to be made between the two concepts, the focus of undue influence being on the alleged victim's consent, while the focus of unconscionability is on the impugned actions of the person who perpetrated the unconscionable. Suffice it, for present purposes, for this Court to note that it does not see how it could reasonably conclude that there was sufficient in the evidence now before it to send the within proceedings to plenary hearing by reference to the issue of undue influence, yet to conclude at the same time that the same result does not flow by reference to the issue of unconscionability. Any (if any) weakness in Ms Geraghty's consent as opposed to any (if any) exploitation by Mr Kearney of any (if any) vulnerability on the part of Ms Geraghty seem to the court either to be two sides of the same coin (with both sides capable of being seen when the mirror of equity is deployed) or, if not two sides of the same coin, then so logically linked as to be inseparable in this case, and perhaps generally.

11. There is a dispute on the evidence before the court as to whether (a) the conclusion of the guarantee represents an unconscionable bargain given an alleged exploitation by Mr Kearney of Ms Geraghty's alleged vulnerability at the time when the contracts of guarantee were concluded (with her allegedly acting as she did in a bid to safeguard her romantic relationship at a time when it was allegedly deteriorating), or (b) (as contended for by AIB) that she has merely entered an appearance for the purposes of delay and has no bona fide defence. The court cannot properly conclude in the context of such a dispute, and on the evidence before it, that it is very clear that Ms Geraghty has no case, that there is no issue to be tried, that the issues raised in this regard are simple and easily determined, or that she has no arguable defence to the amounts now sought of her by AIB.

VI. Conclusion

12. Having regard to the court's conclusions as to the defences of undue influence and unconscionable bargain, the court does not consider, by reference to the decisions in *Aer Rianta* and bringing to bear that discernible caution referred to by McKechnie J. in *Harrisrange*, that this is a case in which the summary judgment sought falls properly to be issued. The court will therefore refer this matter to plenary hearing. The court does not consider it necessary in light of the conclusion just reached to consider further the defences of *non est factum*, misrepresentation and mistake.

ADDENDUM

A DIFFICULTY REPEATEDLY PRESENTING

(1). Overview

A. The court is repeatedly presented with summary debt proceedings in which persons have, to borrow a colloquialism, acted 'out of the goodness of their heart' when deciding: (i) to provide a guarantee to a private limited company operated by a loved one, and/or (ii) to accept membership of, or a directorship or other executive office in, such a company. The following paragraphs are intended to give a sense of the caution that persons ought to bring to such situations.

(2). Engaging a Solicitor

B. In many instances where an individual elects to participate in a private limited company operated by a loved one and engaged in lawful business, much of the financial misery that has followed for such individuals when that company fails could likely have been avoided or ameliorated by availing, *before entering into the proposed arrangements*, of the services of a solicitor competent in company law. The cost of engaging a competent solicitor to provide such independent advice typically pales in comparison with the financial risk and personal stress that can arise when a company fails.

(3). ODCE Guides

C. Persons minded to become a company director, secretary or shareholder in a private limited company operated by a loved one and engaged in lawful business will find much of use in the following helpful 'Quick Guides' published by the Office of the Director of Corporate Enforcement and available for free on its website:

(1) Directors, Their Duties and Powers, A Quick Guide,

(2) Company Secretaries, Their Duties and Powers, A Quick Guide,

(3) Members and Shareholders, Their Duties and Rights, A Quick Guide.

D. However good the ODCE Quick Guides are (and they are good), they are not intended to be used, and should not be used, as a substitute for the seeking and obtaining, *before entering into the proposed arrangements*, of independent, client-focused advice from a solicitor competent in company law.

(4). Becoming a Guarantor

E. Giving a guarantee for the debts of a loved one engaged in lawful business (or a private limited company operated by a loved one and engaged in lawful business), is effectively taking a gamble that (a) all will go well and/or (b) that if things go badly, the loved one will act as one expects. Unfortunately, it is a feature of life that companies fail and people do not always act as one might expect. So it is important to be cautious before ever giving a personal guarantee.

F. Again, much of the financial misery that can arise when a guarantee is invoked could likely be avoided or ameliorated by a proposed guarantor availing, *before entering into the proposed guarantee*, of the services of a solicitor competent to advise on the proposed arrangement. The cost of engaging a competent solicitor to provide such independent advice typically pales in comparison with the monetary risk and personal stress that can arise when demand is made under a guarantee.

G. Useful questions that a person asked to become (a) a personal guarantor to a loved one engaged in lawful business and/or (b) to a private limited company operated by a loved one engaged in lawful business, include, but are not limited, to the following:

(1) How much am I being asked to guarantee?

(2) Could I pay back the amount guaranteed without difficulty?

(3) Do I have to put up assets as security?

(4) Could I afford to lose those assets?

(5) Why does the person seeking the guarantee need it?

(6) Has s/he explored other means of obtaining her or his desired business end?

(7) Can s/he (or a company they operate) be trusted to pay all of her or his (or its) bills?

(8) Am I satisfied to lose money and/or other assets for this person?

(9) Will the financial institution benefiting from the guarantee give me relevant ongoing information?

H. The above questions are by way of general indication only. There is no substitute for obtaining independent, client-focused advice, *before entering into such arrangements,* from a solicitor competent to advise on guarantee arrangements.