THE HIGH COURT

[2011 No. 5039 S]

BETWEEN

ACC LOAN MANAGEMENT LTD

PLAINTIFF

AND
SEAMUS DOLAN,
JOHN WALDRON,
AND JOHN A. WALDRON

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 9th day of February, 2016.

1. This judgment is given in the claim by the plaintiff for summary judgment against the defendants in the sum of €3,893,135.06, together with interest, on foot of five separate guarantees of the liabilities of a company DW Developments Ltd. (hereafter "the Company"), of which the three defendants are directors and shareholders,.

2. The defendants were represented by counsel and seek to defend the proceedings on eight identified grounds. Before dealing with those grounds, I will briefly outline the relevant sequence of events.

The facility letters

3. The plaintiff claims on foot of five contracts of guarantee and indemnity made by the defendants in respect of the liabilities of the Company arising out of the facilities next described. The guarantees were executed by them on diverse dates, and the final guarantee was executed on 28th August 2008.

4. By letter dated 18th July 2007 the bank made available to the Company a loan facility in the amount of up to €1,105,000 for the fixed term of one year, and the amounts agreed to be thereby advanced were drawn down on various dates between 10th October 2007 and 13th May 2008.

5. By a second facility letter, also dated 18th July 2007, the plaintiff made available to the Company the sum of €883,000 for the term of one year for the purpose of funding the construction of units at a development in Co. Mayo on land in title of the defendants. The monies agreed to be advanced were drawn down on various dates between July 2007 and July 2008.

6. By a third facility letter, also dated 18th July 2007, the plaintiff made available to the Company a loan facility in the sum of €402,000 for the purpose of funding a community centre and associated works at the development in Co. Mayo. The monies agreed to be advanced were drawn down in one lump sum on 30th July 2007.

7. By a fourth facility, the plaintiff made available to the Company a loan facility in the sum of €502,000 to fund the purchase of a land bank. The monies agreed to be advanced were drawn down in one lump sum on 9th January 2008.

8. By a fifth facility letter dated 15th August 2008, the plaintiff agreed to make available to the Company an overdraft facility in the sum of €100,000 for providing working capital.

9. The Master of the High Court gave liberty to the plaintiff to enter final judgment in respect of part of the claim on 6th December 2013. Judge Ryan on 7th July 2014 discharged the order of the Master, and adjourned the motion to the non-jury list for mention. It was agreed by the parties, having regard to the procedural history of the matter, that I am to treat the application as a motion for summary judgment in which the defendants seek leave to defend.

10. On 26th November 2015, I made an order substituting ACC Loan Management Ltd as the plaintiff in the proceedings, evidence having been adduced of a change of name of the plaintiff on 27th June 2014. No real contest arose with respect to that order.

The grounds of defence

11. The defendants seek to assert that they have a *prima facie* defence on six grounds which I set out now for convenience:

> a. That the proofs purported to be advanced by the Bank in support of its application are hearsay, and not within the exceptions contained in the Bankers' Books Evidence Act.;
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> b. That the receiver appointed by the Bank on foot of its charge was not properly appointed;
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> c. That the guarantees are procedurally defective and have not been proven;
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> d. That the Bank and the defendants and/or the Company entered into a joint venture to develop the lands at Knock, Co. Mayo. In the alternative a collateral oral agreement was entered into between the Bank and the defendants by which it was agreed that the loans to the Company would be repaid from the sale of the units to be developed on the lands in Co. Mayo, and that the Bank would not seek to enforce until a reasonable opportunity to complete the development and sell was afforded.
>
> e. That a reasonable period to pay was required to be, but was not in fact, given by the Bank to the principal debtor before the Bank could proceed to enforce against the guarantors.
>
> f. That the Bank acted *mala fides* in requiring the Company to accept further finance in 2011 when it ought to have known that the Company was already in some degree of financial difficulties.

12. I will deal with each ground of defence in turn, although some overlap does arise.

First defence: the affidavit evidence is hearsay

13. The defendant's assert that the affidavit evidence of the plaintiff contains hearsay evidence. It is argued that Eoghan Gavigan, who has sworn four affidavits on behalf of the Bank, was not an "officer" of the Bank as a consequence of which the Bank may not rely on the exceptions to the hearsay rule contained in the Bankers' Books Evidence Acts 1879 – 1989.

14. Documents exhibited in the affidavits include the facility letters, various letters of demand, a statement of account showing that the monies advanced were not repaid by the Company, the five guarantees, and the certificate from the Bank which identifies the amount claimed to be due by the principal debtor at the relevant date.

15. The defendants argue that the evidence is of the same category as that criticised by Cregan J. in *ACC Bank Plc v. Byrne* [2014] IEHC 530 where he identified six proofs required to be given by an officer of a bank in order that the enabling provisions of the Acts were properly engaged.

16. The plaintiff argues that the Bank does not need to engage the statutory exceptions, and that the matter may be dealt with under the principles identified in the recent decision of the Supreme Court in *Ulster Bank Ireland Limited v. O'Brien & Ors* [2015] IESC 96.

17. Before I deal with this argument, I briefly outline the basis on which the court can engage the question of the adequacy of proof at the summary hearing.

18. It is established that a court hearing a motion for summary judgment must remit to plenary hearing matters in which the defendant has raised a *bona fide* or credible defence. However the authorities suggests that a court hearing a summary motion may make a determination on a legal argument on which a defence is asserted to arise, unless it is considered that more lengthy legal argument may be required .

19. There is logic to that proposition, in that no oral evidence or cross-examination of evidence is required for the court to determine that a point of defence based on a proposition of law is made out.

20. I consider that I may at the hearing of the summary motion determine the legal issue whether the necessary proofs are met as a matter of the law of evidence, and that no issue requiring more comprehensive legal argument has been identified.

21. O'Malley J. in *Ulster Bank Ireland Limited v Dermody* [2014] IEHC 140 is clear authority for the proposition that Mr. Gavigan, as an employee of the Bank, is an "officer" within the meaning of s.4 of the Bankers' Books Evidence Acts 1879 and he is competent to make an affidavit for the purposes of the Acts and thereby avail of the statutory exception to the hearsay rule. I reject the argument to the contrary.

22. The Supreme Court in *Ulster Bank (Ireland) Ltd. v. O'Brien & Ors*. has recently considered the question of proof in these circumstances. Judgments were given by Charleton J., Laffoy J. and McMenamin J.

23. In their judgments, Laffoy J. and Charleton J. expressly leave over the resolution of a difference in approach to the Bankers Books Evidence Acts in recent High Court judgments, Charlton J. dealt with the appeal on a different basis entirely, one found in the general law of evidence, and in particular in the well-established exception to the hearsay rule that a court can draw inference from admissions, or from an absence of contradiction or denial by a defendant

24. *Ulster Bank (Ireland) Ltd. v. O'Brien & Ors*. concerned the admissibility of documents alleged to be hearsay within the context of default on a bank loan. The bank offered proofs of the same form offered in the present case, namely an affidavit made by an employee of the bank with its authority and consent which exhibited the loan facilities, evidence to show that they fell into arrears and the quantum of the claim. At para. 17 of his judgment Charleton J. said the following:

> *"…both the sworn and the unsworn documents amount to the same thing: a party is making an allegation that money has been borrowed and that a debt has not been repaid, which is now due for payment. Depending upon the particular circumstances, an inference can be drawn, where a reasonable person would feel compelled to issue some form of denial, whereby the absence of contradiction can amount to the acceptance of the contrary case; in other words, an admission against interest. This principle is based on sound authority. It is also one of the primary exceptions to the rule against hearsay."*

25. Whether the exception was engaged was "*entirely dependant upon the factual circumstances*", and whether a failure to respond in the face of an accusation can amount to a declaration against interest must, he said, "*depend upon a myriad of factors*" as follows:

> *"…an analysis of the nature of the relationship between the parties is essential; the circumstances under which an allegation is made must be taken into account, what is solemn, being different from what is social and from what is jocular or mischievous; the nature of what is claimed may amount, on the one hand, to a bare allegation or, on the other, to an apparently definitive statement backed-up by documentary proof; but finally, the test must be that a failure to respond, in circumstances when a denial would clearly be required, would amount in terms of the conduct of reasonable people to an admission."*

26. Charleton J. pointed also to the fact that civil proceedings carried "*procedural solemnity*", and that the swearing of an affidavit, provided it is correct in form and is adequately supported by the necessary exhibits, could carry "*sufficient indications of reliability*". The combination of procedural safeguards, the solemnity of the process, and the requirement that assertions be *"properly referenced and exhibited"* means that an admission against interest establishes an exception to the rule against hearsay.

27. The separate judgment given by Laffoy J. in *Ulster Bank v. O'Brien* approached the matter by reference to the wording of O.37, r.1:

> *"…as regards proof of the claim, an affidavit sworn by a person other than the plaintiff who can swear positively to the relevant facts is sufficient."*

28. She pointed to the provisions of O.37 which are protective of a defendant, including the proviso that a party may serve a notice to cross-examine, and, most significant in the light of the facts of the present case, that the defendant may show cause against the motion by affidavit.

29. Laffoy J. having regard to the contents of the grounding affidavit, most of which were, in her view, uncontroverted, concluded that the deponent of the affidavit *"could swear positively to the relevant facts to establish the Bank's claim."*

30. At para. 13 of her judgment Laffoy J. set out what she believed to be the correct legal position:

> *"13. I am satisfied that, in the absence of any assertion by or on behalf of the O'Briens that the sum, which Ms. Murray, as a senior employee of the Bank, has deposed is due and owing by the O'Briens to the Bank, is not due, the High Court judge was entitled to conclude on the basis of Ms. Murray's affidavit that there was a sufficient evidential basis for giving the Bank liberty to enter final judgment against the O'Briens. Ms. Murray could, and did, swear positively to the facts showing that the plaintiff was entitled to judgment in the sum claimed. The Bank did not have to rely, and was not relying, on an entry in a banker's book being admitted in evidence to establish the O'Briens' indebtedness to it in the sum claimed in accordance with the provisions of the Act of 1879 as amended, so that the necessity to comply with the provisions of ss. 4 and 5 of the Act of 1879 as amended did not arise. Accordingly, the submission made on behalf of the O'Briens that there was no admissible evidence before the High Court proving the indebtedness of the O'Briens to the Bank is rejected."*

31. Again Laffoy J. did not approach the matter of proof by reference to the Bankers' Books Evidence Acts, and I consider it of importance that her decision was premised on a view that a bank could seek to prove a claim other than by means of availing of the exceptional provisions of that statutory scheme .

32. The Supreme Court judgment is definitive on the question of whether a bank seeking summary judgment must of necessity avail of the special statutory provisions of the Bankers' Books Evidence Acts, and identifies other means by which a bank prove a claim, whether by reference to the common law exception to the hearsay rule, or under the Rules of the Superior Courts.

33. The defendants point to the fact that they have sworn several affidavits and seek to distinguish *Ulster Bank v. O'Brien* where no affidavit evidence of the defendant was proffered. I note in that regard that the affidavits sworn by Mr Dolan on his own behalf and on behalf of the other defendants do not deny the loans, the terms of the facility letters, the execution of the guarantees, or the amounts said to be now owed by the company. What the defendants also cannot overcome is the effect of a long and detailed letter sent by the then solicitor for the debtors, Barry Sheehan, Solicitor, on 16th July 2012 to the receiver appointed by the Bank in which he set out the history of the transaction between the Bank and the Company, and in which he challenged the validity of the appointment of the receiver, and sought an undertaking from him to vacate the lands. In this letter Mr. Sheehan set out the history of the commercial loans and identified and confirmed the following:

a. the five sanction letters and the respective terms of each;

b. the fact that the loans were secured by a charge on the development site owned by the individual directors;

c. the rolling over by the Bank of those loans and the offer of the overdraft facility.

d. the account numbers and balances outstanding on the then outstanding loans as of 28th September 2011;

e. details of a solicitor's undertaking to furnish the net proceeds of the sale of the development site reduction of the debt;

f. that the guarantees were signed by each of the three defendants, linked to an individual sanction, although he noted that they were not signed by the Bank or dated.

34. The solicitors for the plaintiff wrote in response on 24th July, 2012 noting that the letter confirmed the facilities and the security and that the sole issue in contention seemed to be the validity of the deed appointing the receiver.

35. The next substantive response from Mr. Sheehan was the letter of 24th March, 2014 which dealt with conveyancing issues arising from the sale of various completed units and the request that the Bank would execute partial discharges for the purpose of those sales. That letter arose in a context which will be explored more fully below.

36. Mr. Sheehan wrote another comprehensive letter on 13th May, 2014 where again he dealt with the appointment of the receiver and referred back to the contents of his letter of 16th July 2012. In this letter he also confirmed the relevant details of the Bank facilities, the guarantees, the nature of the security in place or agreed to be put in place, and the outstanding amounts.

37. I regard that letter as particularly significant in that it arose in the context of the response to the letter of 24th July, 2012 from the Bank's solicitors from two years earlier, (ref para. 35 above) where the Bank's solicitors had noted the limited nature of the disagreement between the parties, and that there were limited legal issues involved.

38. The two letters from Mr. Sheehan are in my view exactly the form of evidence in respect of which the Supreme Court gave its judgment in *Ulster Bank v. O'Brien*, and from which I can draw an inference. The assertions made by Mr. Sheehan are assertions against interest, and I reject the suggestion made by counsel for the defendants that an assertion against interest cannot have force if it is made by an agent, as such an assertion flies in the face of well-established law with regard to the power of an agent to bind his principal, and in that regard I note that there is no suggestion that Mr. Sheehan was not acting within his authority.

39. Further, the fact that the letter was sent to the receiver is not sufficient to permit me to regard it as falling outside the exception identified by the Supreme Court, as I note that Mr Sheehan made his complaints primarily against the Bank, and refereed to the Bank as "client" of the receiver.

40. I conclude therefore that there is sufficient evidence before me of the key elements required to be proven by the Bank, and that the affidavits of Mr. Gavigan are sufficient evidence of the advance of monies to the Company, the demand on the Company and on the guarantors on foot of the guarantee, and the amounts now said to be due on foot of the various facilities.

41. I deal more fully below with the single issue of the validity of the guarantees but I consider that the defendant has not made out a defence under this head, and that the Bank has established the formal proofs required under O.37 of the Rules of the Superior Courts, and that there are sufficient assertions against interest to enable the Bank to rely on the established exception against the hearsay rule. The plaintiff has made out a *prima facie* case and, as stated by McMenamin J. at para. 6 of his judgment in *Ulster Bank v. O'Brien*, that being the case and the defendants not having adduced any meaningful evidence to rebut it, the plaintiff is "*found to have discharged the burden of proof devolving upon it"*.

Second defence – The receiver not properly appointed

42. This matter can be dealt with shortly. The appointment of the receiver is the subject matter of other proceedings commenced by the defendants against the receiver and the Bank. The present proceedings are proceedings for debt which any action by the Bank by

way of enforcement on foot of its security does not arise for consideration. This claim is brought on foot of guarantees accepted as having been made by the defendants in support of the Company's loans. Subject to what I say below with regard to the validity of the guarantee, counsel for the defendants has not made out any statable argument that his complaint with regard to the appointment of the receiver might give his client a defence.

Third defence: the guarantees are not proved

43. Counsel for the defendants argues that the form of the guarantees exhibited do not show that they were executed by the Bank. Section 2 of the Statute of Frauds (Ireland) Act, 1695 requires a memorandum or note in writing for the purpose of taking action *inter alia* on foot of a guarantee. That note or memorandum must be signed by "the party to be charged therewith", and in the present case, the guarantees are signed by the three defendants against whom the guarantee is sought to be enforced.

44. No stateable legal basis has been established to ground an argument that the guarantee must be signed by the person in whose favour it is made. No such requirement exits and this defence might fail.

Fourth defence: the alleged joint venture between the Bank and the defendants

45. This is identified by counsel for the defendant's as being his primary or core ground of defence and this particular ground of defence requires me to engage the principles identified in the authorities, particularly in *Aer Rianta CPT v. Ryanair* [2001] 4 IR 607 and *Harrisrange Ltd. v. Duncan* [2003] 4 IR 1, and whether there is what was described recently by McMenamin J. in *Ulster Bank v. O'Brien* as a "*fair and reasonable probability of the defendant having a real or bona fide defence",* whether it is clear that the defendants have no case, or have not shown an arguable defence. It is also established on the authorities, and it will become clear later that this is an important factor in the present case, that mere assertions on the part of a defendant as to a possible defence cannot suffice, as the court must be confident that the deposed facts, if established on oral evidence, could give a real or *bona fide* defence.

46. The Bank asserts that the commercial transaction had all the usual hallmarks of a commercial lending for property development, and the assertions that the Bank and the defendants and/or the Company were engaged in a joint venture as "inherently improbable".

47. Counsel for the defendants accepted that the designation of the banker customer arrangement as a "joint venture" in the affidavits might not be accurate, and suggests that the proposition might usefully be considered in conjunction with his argument that there exists a collateral oral agreement between the Bank and the defendants, and/or the Company, that the Bank would enforce its entitlement to be repaid and/or its entitlement on foot of the security until the development was fully built and sold. The matter is described in various ways in the first affidavit of Seamus Dolan sworn on 7th July, 2014 which he makes on behalf of all defendants, and at para. 38 and the following paragraphs he sets out details of onsite meetings between the representatives of the Bank and the defendants during the course of the development work, and a detailed engagement with the Bank as to the minimum sale price at which the built units were to be sold. At para. 44 of this affidavit, Mr. Dolan says the following:

> "… the Plaintiff and the Defendants were engaged in a joint business venture they agreed to pool their respective resources, being financial and property development acumen, for the purpose of a one-off large-scale residential development at Knock, Co. Mayo. Due to the subsequent downturn in the housing market, both parties suffered their own discreet losses and the Defendants should not be liable for the losses the Plaintiff alleges it suffered by reason of its own contributory negligence in electing to invest in the said joint venture…"

48. Mr. Dolan makes similar, but perhaps more nuanced and refined, assertions in his second replying affidavit of 12th May, 2015 where, at para. 11, he says that while the initial facilities to the Company expired in or around July of 2008,

> "… these were expressly renewed on an indefinite basis with the agreement of the plaintiff. In particular, it was agreed that the development would continue, the units would be sold, part of the proceeds of sale would be used to pay for operational costs to fund the development of the remaining unit and the balance would be used to repay the loans."

49. Counsel for the defendants clarifies the assertion of his clients that the loans were agreed to be extended "indefinitely", and says that this is not meant to suggest that they were to be deferred on an "eternal" basis, but that the agreement that evolved as a result of the crisis in the relevant residential property market, was that repayment was linked to the finishing of the development, and was "open ended" in that way.

50. This evidence is rejected by the replying affidavit of Eoghan Gavigan sworn on 30th March, 2015 and a further affidavit sworn on 14th May, 2015. He says the plaintiff was a bank and in the business of lending and not investing or collaborating with third parties in property development, and describes the relationship between the plaintiff and the Company as a "normal arms-length commercial lending arrangement", and "subject to the usual lending practices, which included credit applications and objective risk assessments."

51. It is accepted by counsel that I cannot resolve a dispute of facts, but equally that I may assess the evidence including the exhibited correspondence and come to a determine whether the defendants have made out an arguable or *bona fide* or credible defence on this basis. I turn to consider the evidence and assertions.

The evidence and assertions said to support the defence of joint venture

52. I will deal more fully with the correspondence below, but I note that a degree of flexibility did find its way into the payment arrangements between the Company and the Bank, and that by July 2008 or thereabout, the Bank was aware of a slowdown which pointed to a significant difficulty in building and selling the development,

53. The defendants, on behalf of the Company, engaged with the Bank and committed resources of time, effort and energy to the completion of a sufficient number of units and they became what their counsel rather colourfully describes as "unpaid receivers".

54. Counsel for the defendant argues that the trigger that resulted in the calling in of the facilities was the refusal of the Company to accept a refinance facility offered by letter of 21st June, 2010, in respect of the total balance then due on the six loan accounts. The facility was to be repayable on demand, subject to a fixed term of six months. The defendants argue that special condition 11 in this offer supports their argument that there was an arrangement or joint venture between the Bank and its customer. No distinction was made by counsel as to the Company and the guarantors for this purpose. I quote that special condition in full:

> "In addition to the warranty contained in the General Terms, the Borrower hereby warrants and represents to the Bank:-
>
> (a) The Borrower warrants and agrees that the previous arrangement with the Bank regarding the sale proceeds, as outlined in letters from the Bank to the Borrower dated 19th August, 2008 and 9th September, 2008, is cancelled in its

entirety from the date of this Facility Letter."

55. That letter arose in the context of a number of emails between Mr. Gavigan and Mr. Dolan in regard to the proposed sale prices of the units, and a de facto arrangement in place between them that in lieu of the Bank enforcing strictly the prior agreement that the full proceeds of sale would be paid to the Bank, an amount could be deducted by the Company to fund ongoing building works on the then un-built 23 units.

56. That email correspondence occurred in the middle of March 2010 and counsel for the defendants places particular emphasis on the fact that Mr. Gavigan provided his mobile phone number to Mr. Dolan and suggested that he should not "hesitate to call".

57. The defendants also place some store on the fact that the Bank commissioned its own valuation report as evidence of a form of "micromanagement" by the Bank of the development works, tantamount, it is argued, to the Bank becoming a partner or engaging in a class of joint venture or agreeing to a long term stay on any demand for repayment. It is asserted that the relationship was one of mutual trust, and comprised a class of "special relationship", the indices of which, while they were not such as to create the duty of fiduciary, did differ from the normal commercial banker/customer relationship.

58. By a letter of 16th August, 2010, from the Bank to Mr Dolan, the immediate contact between Mr. Gavigan and the other defendants and the Company, the Bank noted its "continued cooperation and willingness to facilitate the sale of the units". Critical to the credibility of the assertions made by the defendants is that the Bank expressly refused to provide any comfort to the Company, or to the directors, with regard to the loan, and especially in the context of this litigation with regard to the guarantees. The letter concluded as follows:-

> "However, your email appears to suggest that I provided you with some level of comfort in relation to the personal guarantees and indemnities provided to the Bank in support of the facilities advanced to DW Developments Limited.
>
> For the avoidance of doubt, the Bank continues to rely on the personal guarantees and indemnities, and, will, if necessary, recover all monies due to it from John Waldron, John A. Waldron and yourself in this regard, as it is entitled to do. I trust this clarifies the position.

Are these assertions credible?

59. My approach to the argument by the defendants must take account of the so-called *Aer Rianta* principles, including the dicta of Hardiman J. in that case at para. 3.4 and 3.5 of his judgment that a "*mere assertion of a defence is insufficient"* and the court is entitled to consider whether those assertions are credible in the circumstances. I am persuaded especially by the judgment of Charleton J. in *National Asset Loan Management v. Barden* [2013] 2 I.R. 28, where he said at para. 5:-

> *"The mere assertion on affidavit of a defence is insufficient. A defence must, if the matter is to be remitted to plenary hearing, have some reasonable foundation. An assertion, for instance, that a cheque was paid in discharge of a debt means little if no bank statements are produced to show the provenance of the funds or when, how or to whom money was remitted. Often, arguments are advanced as to collateral contracts or representations that are claimed to override the express terms of a written contract. It is for each such allegation to be analysed in the context of whatever claim the plaintiff may make in response, bearing in mind that the summary judgment procedure does not involve the weighing of competing facts but rather requires an analysis as to whether a defence that might reasonably be an answer to the plaintiff's claim has been made out. If it is very clear that the defendant has no defence, the court should proceed to enter summary judgment."*

60. The same judge in National Asset Management Ltd. V Barker & Ors. 2014 IEHC said the following:

> *"If an assertion of fact is made which is in the teeth of a written contract, then a particular scrutiny will be made of that fact and how it is alleged to fit within the matrix that amounted to the contract between the plaintiff and the defendant."*

61. The first observation I make is that counsel has not identified the indices of the alleged special relationship. As its height, he argues that the loan of the Company was agreed not to be repayable on demand as expressly agreed, but from the proceeds of sale of the units whenever that was to occur. There was no evidence as to the precise number of units that remained undeveloped when demand was made on 28th September 2011, but I note the number of 23 units identified in email correspondence. No evidence has been furnished as to the possible net returns were those units to be built, nor indeed, how those works might have been financed. The defendants' argument rests on several contingencies, including the availability of funds to complete the development, the possible sale price, and taking the maximum sale price identified as €99,000, VAT inclusive, the maximum gross VAT inclusive figure that would have been available to the defendants on the sale of the 23 unbuilt sites was circa €2.2m. I make the observations to highlight what I consider an air of unreality in the assertion that the Bank agreed to indefinitely stay its hand. The last affidavit the defendants was sworn on 12th May, 2015, and even at that stage, the defendants had not adduced evidence on affidavit as to the point in time it was anticipated that the net proceeds of the sales would be sufficient to discharge the loans.

62. Furthermore, having regard to the dicta of Charleton J. in *National Asset Loan Management v. Barden* that an assertion on affidavit which flies in the face of written documents must be examined with care, I consider that the correspondence and the formal Bank documents do not bear out even an arguable case that the Bank and the Company were engaged in a joint venture or that some form of special relationship existed. The correspondence between the Bank and the solicitors for the Company of 14th June 2010 in my judgment identifies a hope or a wish of the Bank to achieve maximum benefit from the units, and it is clear that the indulgence the Bank displayed in not seeking immediate demand following default was not agreed, nor represented, to be open ended. The last two paragraphs of that letter bear repeating:-

> "The Bank reserves the right to review, modify and/or cancel this arrangement at any time by notice in writing to the Borrower or your firm on the Borrower's behalf.
>
> For the avoidance of doubt, please note that the contents of this letter are entirely without prejudice to, and should not, in any way, limit and/or be construed as a waiver of, the Bank's further remedies at common law and under the Bank's general terms and conditions. All such remedies are preserved in full and exercised by the Bank at its discretion."

63. I regard the assertion by the defendants that there existed a special relationship to be not consistent with the documentary

evidence, and the indices of such a relationship have not been identified with any specificity. Accordingly, I find the assertion to be incredible. For a relatively small developer to argue a special relationship with a bank in the context of a commercial loan when all the documentation pointed to an alternative view, would be to ignore the fact that the Bank was entitled to and did offer indulgence to its customer from time to time, and did so for very sound commercial reasons and in the hope of achieving the maximum return on a default loan in the context of a profound property price collapse.

64. Further, it is not doubted that the loans were subject to Bank's general terms and conditions applicable to commercial loans, clause 4.23.1 whereof identifies in clear terms that a waiver or indulgence by the Bank did not, of itself, amount to a general waiver of the right of the Bank to enforce the general special conditions:-

> "A waiver by the Bank of any breach by the Borrower of any of the terms and conditions applicable to a Facility will not constitute a general waiver of such terms and conditions. No failure or delay by the Bank to exercise any power, right or remedy in relation to a Facility shall operate as a waiver thereof nor shall any single or partial exercise by the Bank of any power, right or remedy, preclude any further exercise thereof or the exercise of any other power, right or remedy. The remedies of the Bank contained in a Sanction Letter and these general terms and conditions are cumulative and not exclusive of any remedies provided by law."

65. I consider that the defendants have not made out an arguable case that the loan facility to the Company was anything other than a standard commercial loan in respect of which the Bank, no doubt in its own commercial interests, agreed to a degree of indulgence for a period in the hope of achieving some return. Even had the defendants shown precisely how a long term and indefinite stay on demand might have resulted in the Company being in a position to repay the loan, the fact remains that the facilities were demand facilities and the Bank was contractually entitled to engage in indulgence and to forego to demand notwithstanding default, without loosing thereby its right to engage the full rigours of the contract.

66. For completeness, I regard as not credible the suggestion in Mr. Dolan's affidavit that Mr Gavigan was acting as a "*de facto* director" of the Company in the manner in which he engaged with the question of the appropriate sale price of the units. No such role is apparent on the evidence. Mr Gavigan was a full time bank official and was engaged in the business of his employer.

Relationship may be inferred by virtue of estoppel by convention.
67. The defendants argue that the doctrine of estoppel by convention must inform my conclusion with regard to the assertion that there existed a joint venture or special relationship, and an agreed indefinite deferral on payment. It is well established that such estoppel can arise only if it is based on a common and not unilateral assumption or behaviour of the parties. The judgment of the Supreme Court and *Ulster Investment Bank v. Rockrohan Estate* [2015] IESC 17 is clear authority in this regard. At para. 24 of the judgment, Charleton J. delivering the judgment of the Court, said the following:-

> *"Estoppel can arise, however, through an assumption shared by those interacting…. This requires some demonstrable action, behaviour or representation by the party who is to be bound by the altered state of affairs. It is insufficient, to establish estoppel, merely for the party later pleading that defence to conclude that matters must be so. There must, instead, be a foundation in the behaviour of the party who is to be estopped from asserting a legal entitlement, either pursuant to contract or otherwise."*

68. The documentation and evidence on affidavit from the Bank unequivocally shows that the Bank did not act on an assumption that the repayment of the loan would be extended indefinitely. The opposite is the case and the letters of 16th August, 2010 referred to at para. 58 above makes this clear. The arrangement for the repayment of the proceeds of sale was undoubtedly changed many times between 2008 and 2010, and different amounts were agreed to be retained by the developer, and different price ranges agreed with respect to the identified units, but those arrangements were negotiated from time to time in the context of identified intended sales. It is quite clear to me that the Bank was prepared to engage these agreements in the hope either that the economy would improve or that the Company would be put in a position to pay some or all of the money borrowed. In simple terms, the Bank was owed a sufficient amount of money by the Company for it to be justified in staying its hand in the hope that the Company could repay its debt, as the alternative of placing the Company in liquidation would have offered the Bank no solace.

69. There is no evidence of a common assumption that could found an estoppel.

Collateral contract
70. In the alternative counsel argues that a joint venture or special relationship arose by virtue of a collateral contract entered into between the Bank and the Company following the economic crash in 2008. He argues in reliance on the judgment of Finlay Geoghegan J. in *Allied Irish Banks Plc v. Galvin Developments (Killarney) Limited & Ors* [2011] IEHC 314 that the existence of that collateral contract displaces the Bank's entitlement to payment on demand, and that a contractual arrangement was in place by which the developers were entitled to finish out the development, and were working to this end with the co-operation, knowledge and positive engagement of the Bank, and that nothing happened to put an end to this arrangement. The letter of 21st June 2010, which he identifies as the trigger event by which the Bank wrongly put an end to the collateral contractual arrangement, was not acceptable to the Company. He argues too that the letter was sent by the Bank in bad faith and that it tried to "slip in" a termination date, which his clients, as conscientious borrowers, refused to sign.

71. The difficulty with this argument is that the defendants have not shown the type of detailed evidence and argument which was available to Finlay Geoghegan J. in *Allied Irish Banks plc v. Galvin Developments (Killarney) Ltd* [2011] IEHC 314. The defendants have not identified the specific terms and conditions asserted to be part of the collateral contract. At best the defendants can say that the Bank agreed to stay its hand, but the documentary evidence points to a refusal on the part of the Bank to give comfort either to the Company or to the guarantors, and while that of itself might not determine the matter at summary judgment stage, the defendants must offer a credible argument and evidence to support a proposition that the documentation did not mean what it said.

72. There is ample case law on how a court may imply a term into a contract, but a contracting party seeking to argue such an implied term must at summary judgment stage persuade a court that there is credible evidence that the term or terms argued to be implied do not fly in the face of the documentary evidence and is credible in all the circumstances. The express terms of the loans, and in particular the demand nature of the facilities, and the fact that there was an express general condition that a waiver or temporary indulgence by the Bank would not constitute a waiver of its overriding right to seek payment on demand, are insurmountable hurdles for the defendants.

73. Further, even if the defendants can establish that a duty of good faith arises, they have not shown the manner in which this duty is alleged to have been breached, nor what the legal consequences of such might be. Thus, for example, if it were suggested that the Bank acted in bad faith in relying on its general conditions when it had agreed to suspend those, the defendants would have to show

the relevant conditions which the defendant said were substituted for those general conditions. There is to my mind no more than a vague assertion that the monies would be repaid from the development, which is unrealistic having regard to the degree of indebtedness, and as there is insufficient detail for me to know whether there was any reality in the Company ever repaying the debt by that arrangement, there is nothing in the correspondence that would suggest to me that the Bank did anything other than agree the sale price for a particular tranche of identified units, and how those net proceeds would be distributed.

74. That it seems to me is the height of the defendants' argument, namely that the Bank engaged with the Company in some detail with regard to the marketing of some of the built units and as to how the sale proceeds were to be disbursed. There was nothing more than a temporary arrangement with regard to part of the proceeds of the sale of part of the development and no element of bad faith has been credibility shown, nor can I glean what the consequences of such might be even were it to be established.

Await discovery?
75. The defendants rely on the recent judgment of Irvine J. giving the judgment of the Court of Appeal in *Templecrone Co-operative Agricultural Society Ltd. v. McLoughlin* [2015] IECA 14 where she did consider that the summary proceedings should be remitted to plenary hearing as:

> *"…discovery of documents may assist the parties in resolving the disputed facts. It would accordingly be unjust and premature in the absence of such discovery to grant judgment to the plaintiff where the true relationship between the parties may well be advanced, clarified or resolved through that process."*

76. I adopt that clear and definitive statement of the law, but note that Irvine J. identified a number of evidential matters that had been put forward by the defendants that threw doubt on the assertion by the plaintiff that it was dealing with the defendant in person or, as asserted by the defendant, with a company formed by him for the purpose of the relevant trade.

77. The defendants in the present case have produced very little documentation supportive of their assertion that there was an agreement for the long-term or indefinite stay on the recovery of the debt by the Bank. The height of the argument is the exchange of emails, and I have dealt with this above. I take particular note of the fact that the defendants have not exhibited documentation with regard to the building out of the balance of the units and how they were to be funded, which arises either because none such exists, or because the defendants have opted not to discover it.

78. Clarke J. in *GE Woodchester v. Aktiv Kapital Investment Limited* [2009] IEHC 512, agreed that the true nature of a defence might have to await discovery or interrogatories, went on to say at 6.6,:-

> *"That is not to say that it is open to a defendant, on a summary judgment application, to make a vague and generalized contention which would amount to nothing more than an assertion that something useful to his case might turn up on discovery or the like. 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."*

79. I cannot adjourn the matter to plenary hearing on account of an argument that discovery may assist the parties, unless some rational basis is put to me as to the class of documents which might so avail the parties, and as to why it is asserted they are in the hands of the plaintiff only, and given the nature of the documentation some at least of it must be in the hands of, or within the procurement of, the defendants.

80. Internal Bank documentation dealing with the on-going arrangement between the parties between 2008 and June 2010, might at best show that the Bank was prepared then to allow the Company to try and deal with its financial difficulties in the context of the economic crash which was perhaps initially hoped to be short term. The correspondence from the Bank, and the attitude that it took in the summer of 2010, and in particular in the letters of 14th June 2010 and 21st June 2010, must be interpreted as meaning that the Bank's patience had come to an end, or that the Bank had lost confidence that the Company would be in a favourable financial position even were it to be further supported in building out the development.

81. I reject this ground of defence for all of these reasons.

The fifth defence: the guarantees have not been proved
82. The defendants argue that the guarantees have not been proved and that the exhibited documents are inadmissible hearsay. This is not an argument with regard to the Bankers' Books Evidence Acts, but counsel argues that the Bank must prove the guarantees by calling the person who witnessed the execution of the defendants of the documents.

83. This argument can be dealt with shortly and the guarantees are original evidence, being a record of an agreement. The evidence of Mr. Gavigan *prima facie* establishes that five guarantees were signed and each of them is exhibited. The defendants have not denied that the guarantees were signed, and the letters from their solicitor contain admissions against interest. Edwards J. in *Leopardstown Club v. Templeville Developments Limited* [2010] IEHC 152 deals in detail with the use of a document as original evidence. I adopt the statement at 5.13 of that judgment:-

> *"Where a document is produced by a party who proposes to rely upon the statements it contains, not as evidence of their truth by way of an exception to the hearsay rule, but to show for some legitimate purpose that the statements (whether or not they be true) were in fact made, then the document is properly to be characterised as non-hearsay original evidence (otherwise original evidence)."*

84. The Bank has produced the guarantees as evidence of the fact that the guarantees were made and as the documents are "original evidence", I consider that counsel for the defendants is incorrect in its assertion. The plaintiff has proved that the guarantees were made in fact, and there is evidence from the defendants themselves that they were properly executed.

85. I reject also as not supported by any authorities the proposition advanced by counsel for the defendants that the guarantees were required to be executed by deed, or document under seal. The evidential requirements for the enforcement of a contract of guarantee are found in section 2 of the Statute of Frauds (Ireland) Act, 1695, by which is required that the contract be evidenced in writing. The contract is not one of the class of transactions required to be made by deed, such as a document by which title to land is assured.

Sixth defence: reasonable time to principal debtor
86. The defendants also argue that the Bank failed to give reasonable time to the Company to repay the debt and that as a matter of

law, a bank is required to give a reasonable period to a principal debtor before it may proceed to enforce against a guarantor. Counsel relies on the judgment of Bingham J. giving the judgment of the High Court of England and Wales in Bank of *India v. Transcontinental Commodity Merchants Limited & Anor* [1982] 1 Lloyds Rep 506, where he said at p. 515:-

> *"…I consider the true principle to be that while a surety is discharged if the creditor acts in bad faith towards him or is guilty of concealment amounting to misrepresentation or causes or connives at the default by the principal debtor in respect of which the guarantee is given or varies the terms of the contract between him and the principal debtor in a way which could prejudice the interest of the surety, other conduct on the part of the creditor, not having these features even if they regular, and even if prejudicial to the interest of the surety in general sense, does not discharge the surety."*

87. The Court of Appeal in England and Wales in its decision [1983] 2 Lloyds Rep 298 agreed with that statement of principle although Goff L.J. said that he would have perhaps preferred to state it "*the other way around*":-

> *"that is to say that there is no general principle that irregular 'conduct' on the part of the creditor, even if prejudicial to the interests of the surety, discharges the surety though there are particular circumstances in which the surety may be discharged, of which the interests specified by the learned Judge provides certainly the most significant, and perhaps the only, examples…. But that merely irregular conduct on the part of the creditor, even if prejudicial to the interests of the surety does not discharge the surety, there can in my judgment…"*

88. In *O'Flynn v. Carbon Finance Limited* [2014] IEHC 458, gave in my view a definitive analysis of the principles applicable to the general question of how much time must pass where money is payable on demand before a debtor can be said to be in default. Much analysis is found in the English case law whether the applicable test is the so called "mechanics of payment test", or a "reasonable time" test as was discussed by McGovern J. in *Allied Irish Bank Plc v. Moran* [2012] IEHC 323, quoted by Irvine J, who rejected the reasonable time test as being the test in Irish law.

89. A para. 135 of her judgment, having comprehensively examined both the Irish judgments and those of the Courts in England and Wales, she said as follows:-

> *"From these authorities it is easy to see why the mechanics of payment test has proved itself so attractive to the Courts and why there is an almost complete dearth of authority to support an alternative test. This is probably because the mechanics of payment test involves the application of relatively objective criteria. Applying this test, a borrower can without too much difficulty determine when it is likely to be safe to proceed to enforce its security. This cannot be said of the reasonable time test which involves a great deal of subjectivity and is one that the Courts have considered imprecise and undesirable in the commercial context in which it usually arises."*

90. I consider this judgment to be a comprehensive review of the authorities and a reasoned approach to the question of why the preferred test was objectively to be preferred, and I adopt her reasoning.

91. The defendants must fail in this argument and cannot make a bona fide argument that they will succeed. There are a number of reasons for this. The judgments of the Court of England and Wales in *Bank of India v. Transcontinental Commodity Merchants Limited & Anor* suggest the proposition that the liability of the guarantor cannot be increased or become more burdensome as a result of any action by which a creditor procures a default, or makes it impossible for the primary debtor to discharge the guaranteed liabilities.

92. The Company defaulted in its loans in 2008, and that is not denied. An event of default giving the Bank an entitlement to demand arose then, and there is no argument advanced that default was procured by any action of the Bank.

93. I accept the argument of counsel for the Bank, and this is borne out also by the evidence of the defendants, that the Bank did what it could to try to assist the Company in continuing the development in the hope that it could trade out of its financial difficulty. The Bank's actions cannot be characterised as having increased the liability of the defendants on the guarantee, and the opposite is the case. I am not persuaded that the defendants have shown any credible basis that this defence avails them.

94. Furthermore, the guarantees were in express terms a guarantee and indemnity and by the operative part the parties of the first part "irrevocably and unconditionally" indemnified the Bank in full on demand against any losses arising from the facilities. The word "indemnify" and the relevant variations of that verb are found throughout.

95. Furthermore, clause 4.2.1 contains an acknowledgment on the part of the guarantors that none of the liabilities thereby created should be reduced, discharged or otherwise adversely affected by:-

> "any variation, extension, discharge, compromise, dealing with, exchange or renewal of any right or remedy which the Bank may now or hereafter have from or against any of the principal debtor and any other person in respect of the obligations and liabilities…"

96. I also reject the argument of counsel for the defendants that the fact that the Bank did not make formal demand of the principal debtor and of the guarantors immediately upon the happening of an event of default, meant that the Bank implicitly recognised that it should wait until time had passed after demand was made of the principal debtor, as the provisions of 4.2.3 of the guarantee provided that the Bank should not be obliged before taking steps to enforce its rights under the guarantee:-

> "To make demand, enforce or seek to enforce any claim, right or remedy against any of the principal debtor and any other person."

Seventh defence: the construction of the facility letters

97. Counsel makes an argument not advanced in the affidavit evidence, namely that on a true construction of the facility letters the loan of the Company was not repayable on demand. This is a legal argument and one which I consider capable of resolution at a summary hearing. As the individual facility letters are in identical terms in the relevant respects, I will consider the argument in regard to the first of those, namely the letter of 18th July 2007, the term of which is described as follows:

> "The Facility is for a term of one year from the date of first draw down of the Facility unless a demand for earlier payment is made in accordance with Clause 6"

Clause 6 deals with repayment.

"The Facility shall be repayable immediately on demand being made by the Bank on the Borrower unless and until such demand is made, (and without limiting the Bank's right to make demand at any time)".

> (The balance of this part relates to interest and is not relevant to the argument)
>
> ……..
>
> The Facility (including all rolled-up and capitalised interest) will be repayable when the secured property is sold, or when the term of the loan expires, whichever is earlier.

Counsel argues that on a true interpretation of that clause, the Bank could have demanded repayment of the Facilities early under Clause 6, but once the fixed term of one year from the date first draw down had expired, the loan was repayable only when the secured property was sold. No denial is made by the defendants that the Company's loans were governed also by the general conditions of the Bank's commercial trading, clause 4.8.2 whereof sets out as follows:

> "Without prejudice to:
>
> a. the ability of the Bank to demand immediate repayment at any time of any facility which is, in accordance with the Sanction Letter for that Facility, repayable on demand; or
>
> b. the ability of the Bank to demand immediate repayment at any time of any overdraft facility; or
>
> …
>
> all principal, interest and other amounts payable under each facility shall become immediately repayable on demand being made by the Bank on the Borrower and all the obligations on the Bank in respect of the Facility shall be cancelled if:
>
> i. any amount payable by the borrower under the Facility when due…"

98. I consider that the combined effect of the special and general conditions is that the loan facility was for a fixed term of one year, that the Bank had the right to demand within the year on any event of default, and the Bank had a general right to demand after the term expired.

99. Even if I am wrong in this, the guarantees did not require demand of the principal debtor and the construction sought to be advanced by counsel for the defendants cannot hope to succeed in those circumstances, as the clear terms of the documents that they executed are inconsistent with that argument.

Eighth defence: further advances mala fides

100. Finally the defendants make the argument that the Bank acted *mala fides* in offering further advances to the Company by the letter of 21st June in circumstances when in well knew that the Company was not in a financial position to meet any further loans. That argument might have had some force had the Company accepted the loan offer, but as it did not, no causative connection can be found between any alleged *mala fides* on the part of the Bank, and the absence of a causative link is fatal to this argument.

Conclusion

101. In the circumstances then I am satisfied that each of these defendants executed a guarantee and indemnity in respect of the loans of the Company as follows:

> a. Three guarantees in respect of the facility letters each of the 18th July 2007. While it is not clear on the face of those guarantees which of three facility letters, is guaranteed by the respective guarantees, I am satisfied that three guarantees were made in respect of three facility letters and that there is no reasonable basis on which I could hold that the guarantees do not cover the liabilities arising under the three facilities.
>
> b. Guarantee in respect of the facility of the 18th December 2007
>
> c. Guarantee 20th August 2008 in respect of the facility of the 15th August 2008.

102. In each case, the guarantees were in the form of guarantees and indemnities, and created primary as well as surety obligations on the part of the defendants. I am satisfied also that the guarantees each contain a clause (Clause 11.1) by which any certificate given by the Bank specifying the amounts payable in respect of the monies so guaranteed should be conclusive and binding, and there is no dispute with regard to the actual quantum owed by the principal debtor.

103. I am not satisfied that the defendants have established any basis on which they might be entitled to defend, being aware of the low threshold that applies in respect of summary judgment, but also noting that some of the arguments advanced were arguments as to legal principles which I considered possible to resolve on a summary basis, and consider that the defendants have not made out a credible defence on the factual or legal matters on foot of which they have sought to defend.

104. Accordingly, I propose to enter judgment in the sum of €3,893,135.06, and will hear counsel an the question of interest.