THE HIGH COURT

[2016 No. 1907 S.]

BETWEEN

ALLIED IRISH BANKS PLC.

PLAINTIFF

AND

CATHERINA MAGUIRE, DERMOT MAGUIRE AND NIALL MAGUIRE

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 9th day of October 2018

1. This is an application for summary judgment in the sum of €341,856.55 against the first named defendant in respect of monies advanced by the plaintiff to her on foot of a loan facility agreement (account no. 932477/12119366). The plaintiff also seeks judgment in the amount of €320,000.00 against the second and third named defendants on foot of separate letters of guarantee signed by each of them dated 18th November 2009 as security for the above mentioned loan facility. The first named defendant has not sought to defend these proceedings.

The Loan Facility

2. It is averred in the affidavit grounding this application by Mr. McGuinness on behalf of the plaintiff, that by letter dated 29th July 2010 the plaintiff made available to Ms. Catherina Maguire, the first named defendant, a loan facility in the amount of €320,000.00, subject to terms and conditions, which required the provision of certain securities including letters of guarantee for €320,000.00 from the second and third named defendants. The facility was accepted by the first named defendant on 11th August 2010. A letter of sanction dated 29th July 2010 was exhibited.

3. The loan facility was obtained for the purpose of purchasing 25 acres of land at Annie's, Clones, Co. Monaghan, Folio MN19030. The money was drawn down and the purchase of the lands was completed in 2007. The plaintiff claims that the first named defendant defaulted in respect of monies due and owing and letters of demand were sent to her by the plaintiff on the 6th November 2012, 12th February 2014, 7th January 2015 and 2nd August 2016 seeking repayment of the amount due.

4. The second and third named defendants did not execute guarantees as originally contemplated in the original loan facility letter. However, on the 18th November 2009 they each entered into guarantees in respect of all sums of money at any time owing to the Plaintiff from or by the first named defendant provided that the total amount recoverable from each should not exceed €320,000.00. By this stage, of course, the money had already been drawn down. Indeed the original agreement under which the time was limited for the repayment of the sum advanced had been renewed annually without further recourse to the second and third defendants but on substantially the same terms and subject to the same security. However, no guarantee was executed under any of these renewals. The last such renewal relied upon by the plaintiff was set out in the bank's facility letter of 29th July 2010 which post-dated the date upon which the guarantees were executed. The court notes that the history and purpose of this facility and the circumstances in which the guarantees were executed years after the advancement of the original amount have not been addressed by the plaintiff in the grounding affidavit of Mr. McGuinness. Letters of demand were issued by the plaintiff, its servants or agents to the second and third named defendants dated 20th September 2012, 12th February 2014, 7th January 2015 and 2nd August 2016.

Affidavits of Mr. Dermot Maguire and Mr. Niall Maguire

5. In a replying affidavit sworn on the 9th October 2017, Mr. Dermot Maguire, the Second Named Defendant, avers that Mr. McGuinness' affidavit is incomplete because it fails to describe the circumstances in which the loan facility was provided to the first named defendant.

6. Mr. Maguire states that the first named defendant, his cousin, did not *first* receive the loan from the plaintiff for the purpose of purchasing the 25 acres of land in July 2010 as stated in the affidavit of Mr. McGuinness but in September 2006 when the land in question was purchased. Mr. Maguire exhibited a copy of a credit agreement dated 25th September 2006 between the plaintiff and the first named defendant a special condition of which required that guarantees be obtained from him and his brother, Niall Maguire, the third named defendant. He states that he did not execute any such guarantee prior to the funds being advanced to the first named defendant. He states that the facility originally advanced to the first named defendant pursuant to the credit agreement of 25th September 2006 was for a term of 12 months and it was renewed on an annual basis. While he did not have copies of all correspondence relating to the loan facility, he exhibited a copy of a credit agreement dated 25th September 2009 by way of example. This credit agreement pre-dated the letters of guarantee by approximately two months. On this basis the second and third defendants wish to advance the defence that the guarantees were not supported by any consideration since the monies had been advanced a number of years prior to the execution of the guarantees, no further money was advanced thereafter, there was no evidence of an agreement by the plaintiff not to pursue the first defendant if the guarantees were executed and there was no contact with the second and third defendants before the annually renewed agreements with the first defendant were executed: it is said that the plaintiff is attempting to rely upon past consideration in seeking to enforce the guarantees.

7. Mr. Maguire also referred to a meeting that was held in November 2009 attended by him, the Third Named Defendant, a Ms. Moira Lynch and Mr. Enda Mulligan of the Monaghan branch of AIB, Ms. Maria Maguire and Ms. Susan McKenna. He states that the purpose of this meeting was to review the family business, Maguire International Limited's general borrowings with the plaintiff. He states that towards the end of the meeting Mr. Enda Mulligan, on behalf of the bank, stated that he required guarantees to be signed for the loan facility agreed between the Bank and Catherina Maguire, as no guarantees were in place. He states that after the meeting he and the third named defendant discussed whether they should sign the guarantees sought in light of the fact that the funds "had been advanced to the First Named Defendant several years previously." He states that "[g]iven the total reliance which our business had on AIB continuing to advance Maguire International Limited credit we very reluctantly signed these guarantees". This is relied upon as the basis for a proposed defence of duress which is said to render the guarantees unenforceable.

8. Mr. Maguire also states that the loan was advanced by the plaintiff to the first named defendant in her capacity as a consumer and that the guarantees which were then sought from him and the third Named defendant were also sought in their capacities as consumers as they were each acting for purposes outside their respective businesses. As such, it is stated that the loan facility is subject to the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000. Mr. Maguire states that the contract for the loan facility contains several unfair terms including those which relate to interest calculation and variation; charging

and surcharging; withholding, forbearance, securitisation and early redemption which are unfair and are unenforceable against the defendants within the meaning of Regulation 6 of the Regulations of 1995 and 2000. There is no specific unfairness identified. The guarantees are in a standard form.

9. In an affidavit sworn on the 9th October 2017, Mr. Niall Maguire, the Third Named Defendant endorses each of the points of defence raised in Mr. Dermot Maguire's affidavit and supports his recollection of the meeting which is said to have given rise to duress based upon the "total dependence which our business had on AIB continuing to advance Maguire International credit, we very reluctantly signed these guarantees".

The Law

10. The principles applicable to the court's consideration of an application to grant summary judgment are well established and summarised by McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 as follows:-

> "9. … it seems to me that the following is a summary of the present position:-
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> (i) the power to grant summary judgment should be exercised with discernible caution;
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> (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
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> (iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
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> (iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;
>
> (v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;
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> (vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;
>
> (vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;
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> (viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;
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> (ix) leave to defend should be granted unless it is very clear that there is no defence;
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> (x) leave to defend should not be refused only because the court has reason to doubt the *bona fides* of the defendant or has reason to doubt whether he has a genuine cause of action;
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> (xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;
>
> (xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

11. In *Aer Rianta c.p.t. v. Ryanair Ltd*. [2001] 4 I.R. 607 Hardiman J. stated at p. 623:

> "… the 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?"

12. In *IBRC Ltd. v. McCaughey* [2014] 1 I.R. 749 the Supreme Court considered the approach to be adopted in considering facts deposed to on affidavit in an application for summary judgment. Clarke J., delivering the judgment of the court, stated:-

> "22. It is important, therefore, to re-emphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in *Aer Rianta v. Ryanair Ltd*. … be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction … the court may come to a final resolution of such issues. That the court is not obliged to resolve such issues is also clear from *Danske Bank v. Durkan New Homes* [2010] IESC 22, ….
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> 23. Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta* …. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

Past Consideration
13. Counsel for the second and third defendants submits that the letters of guarantee dated 18th November 2009 were not under seal and therefore did not create a deed. The letters of guarantee contain a signature block where each guarantor signed his name alongside the words "signed and sealed by". It is submitted that this wording alone is insufficient to create a deed in circumstances where it was signed prior to the commencement of the Land Law and Conveyancing Reform Act 2009 and no additional mark or impression was made on the letters in order to act as the seal. It is submitted therefore that the letters of 18th November 2009 are not deeds of guarantee and that the letters of guarantee must be supported by valid consideration in order to be enforceable against the defendants. However, the defendants also submit that there was no valid consideration passing at the time of the execution of the guarantees. It is argued that it is "patently clear" that the plaintiff did not grant the first named defendant any additional advances or forbearance at the time of execution of the guarantees, as the loan was first advanced in 2006 in accordance with the credit agreement dated 25th September 2006 and rolled over on an annual basis. The defendants state that at the time the letters of guarantee were signed, the first named defendant's facility was operating in accordance with a further credit agreement dated 25th September 2009 which provided that the loan was repayable on 3rd April 2010. It is submitted that there was therefore no forbearance granted by the plaintiff to the first named defendant which amounted to sufficient consideration at the date of execution of the guarantees. Counsel for the defendants relies o*n ACC Bank Plc v. Dillon* [2012] IEHC 474, in which Charleton J. endorsed the principles set out by the Supreme Court of Victoria in *McKay and Another v. National Australia Bank Ltd* [1998] 1 VR 173, in which it was stated:

> "… the mere recitation in a document of guarantee that the guarantee was given for consideration for 'advances to be made' by the person to whom the guarantee was given will not, by itself be sufficient to support the guarantee if the evidence demonstrates that no such advances were, or were intended to be made… Furthermore, 'past' consideration is not sufficient consideration. A guarantee given to secure a debt already incurred, but unsupported by any further consideration will fail for want of valuable consideration…if it is evident that the guarantee was intended to be limited to past transactions alone for example, because the surety knew the principal debtor was already indebted to the creditor in an amount exceeding the limit of the surety's guarantee, the guarantee will be void as being given without consideration."

In relation to the contention that forbearance to sue amounted to good consideration the court stated:

> "No demand had been made by the bank for repayments of the existing debt and no request had been made by the debtor or the appellants for any such forbearance. As the instrument of guarantee itself recognises, the mere fact of forbearance is not of itself sufficient consideration for a person becoming surety for an existing debt. There must be either an undertaking to forbear or an actual forbearance at the surety's request."

14. The decision of the Northern Irish Court of Appeal in *Provincial Bank of Ireland v. Donnell* [1934] N.I. 33 is also relied on. In that case Andrews LJ stated:

> "… the real defence argued was that as the guarantee was not under seal it must, like other simple contracts, be supported by a valuable consideration. The mere existence of debt is not sufficient to support the surety's promise to the creditor. A past or executed consideration, unless moved at the defendant's request, was not binding without some new consideration. An agreement by a creditor to forbear to sue for a past debt was a sufficient consideration: as was actual forbearance at the request, express or implied of the defendant."

Counsel for the defendants submits that there was no evidence advanced by the plaintiff, upon whom the burden of establishing valid consideration lies, that the guarantees were procured from the defendants pursuant to their request that the plaintiff forbear from suing the first named defendant for repayment of the monies advanced: it is submitted that the present case is therefore distinguishable from *ACC Bank Plc v. Dillon* in this regard.

15. The defendants also submit that the fact that the creditor did not sue does not, in and of itself amount to valid consideration. Reliance is placed in this regard on the decision of Barron J. in *Commodity Broking v. Meehan* [1985] IR 12 in which the court stated:

> "… I can find no implied request by the defendant not to sue the company nor clearly any express request. Nor can I find that the defendant's promise to pay influenced the plaintiff's decision not to sue the company. The plaintiff did not deliberately refrain from suing the company. Had it seemed to it a sensible course to adopt, it would have done so. Its reason for not doing so was not the defendant's promise to pay but the realisation that it would be a fruitless exercise. If it had been deliberately misled by the defendant, either as to the solvency of the company or into not suing the company by reason of the payments made, the matter might have been otherwise."

It is submitted that the plaintiff entered into an agreement with the first named defendant pursuant to the credit agreement of the 25th September 2006 whereby the plaintiff advanced her a loan for the purpose of purchasing property. The loan was stated to be repayable within a year which was subsequently altered to extend the time for repayment by agreement with the first named defendant and plaintiff independently of and without further reference to the second and third named defendants.

16. I am satisfied that the second and third defendants have on the facts set out above raised an arguable point of defence on this aspect of the case. The issue of past consideration is a mixed question of fact and law. The plaintiff has chosen not to give a full account of the course of dealing between the parties in this case concerning the delay in seeking the guarantees from the two defendants for a number of years after the money was drawn down and the purchase of the property was completed. There is no evidence of how or why the further credit agreements were made annually or why or how the special condition in respect of furnishing the guarantee was required and repeated in these agreements or, to what extent, if any, the two defendants were involved in these transactions. I am satisfied that an arguable defence has been raised sufficient to meet the low threshold applicable and to require me to send the case to plenary hearing. This does not mean that I consider that the defence will succeed, merely that the relevant test has been met.

Economic Duress
17. It is also contended on behalf of the defendants that their affidavits give rise to a stateable ground of defence of economic duress because it is averred that they reluctantly agreed to sign the letters of guarantee due to Maguire International Limited's total reliance on the continued provision of banking facilities by the plaintiff. It is submitted that the viability of this defence will depend on the evidence to be adduced by the second and third defendants and other persons attending at the meeting of November 2009 and therefore the only appropriate manner in which this defence can be considered is in the context of a full plenary hearing. The Defendants again rely on *ACC Bank v. Dillon* in this regard.

18. There is no evidence that any representation express or implied was made by the plaintiff or on its behalf at that meeting or otherwise that if the guarantees were not executed the financial support or credit given by the plaintiff to the family company would be withdrawn or that further facilities would not be granted if requested. There is nothing in either of the carefully drafted affidavits to support that allegation. There remains a simple assertion by the two defendants that this was their subjective understanding of what might happen if they did not do so. All that is alleged is that Mr. Mulligan indicated that the two guarantees were required by the bank as per the agreement made: indeed it is implied in the affidavits that the defendants did not believe themselves bound to give them because of the fact that the money had long since been drawn down and there was no fresh consideration for them. Though I take account of the low threshold required I am not satisfied that, beyond the subjective assertions made by the two defendants, there is any cogent evidence of such a nature that gives rise to an arguable defence of duress in the circumstances. I find the paucity of facts set out in the affidavits to be entirely inadequate and insufficient to give rise to a contrary conclusion on such a serious issue.

Unfair Terms Regulations

19. The Defendants aver in their affidavits that they executed the guarantees for a purpose outside of their businesses and that the loan was obtained by the first named defendant for a purpose outside of her business. It is submitted therefore that the Defendants are consumers within the meaning of regulation 2 of the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 which consequently apply to the loan contract and the guarantees in accordance with regulation 3(1) of the Regulations. It is submitted that the plaintiff has not contested the defendants' evidence that they acted in their capacity as consumers when executing the guarantees or that the first named defendant acted in her capacity as a consumer when she obtained the loan facility. I am not satisfied that the latter proposition is determinative of this case since the affidavits submitted consist for the most part of unsupported assertions.

20. It is also submitted that since the Plaintiff has not exhibited the general terms and conditions which apply to the first named defendant's facility, this court is unable to conduct a review of the terms impugned by Mr. Dermot Maguire in his affidavit to determine whether they are in compliance with the requirements of the Regulations. The Defendants rely on *EBS Ltd. v. Kenehan* [2017] IEHC 604 in which Barrett J. held that in order for the court to discharge its obligations arising from the decision of the European Court of Justice in Case C-415/11 *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa* it must be furnished with the documentation which the contract or agreement in question incorporate. In that case a mortgage agreement put before the court contained a clause incorporating an Offer Letter and the Mortgage Conditions. The Mortgage Conditions in turn incorporated EBS Rules. While the Mortgage Conditions were put before the court, the Offer Letter and the EBS Rules were not. Barrett J. consequently held:

> "… the court cannot discharge its Aziz-Counihan obligations and, having been placed by EBS in a position where it is unable to perform a task incumbent upon it as a matter of European Union law before the order for possession may stand, the court cannot allow that order to stand…
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> In a situation where EBS knew that it would face a Counihan based argument on appeal, it was in EBS' self-interest to place the court in a position where it could discharge its Aziz-Counihan obligations. This EBS did not do."

21. The defendants therefore submit that this court has been deprived of the opportunity to discharge its obligation to scrutinise the fairness of the terms of the loan and that the proceedings herein should be remitted to plenary hearing to allow the second and third defendants to obtain full copies of the terms and conditions applying to the loan facility provided to the first defendant in order to ensure they are compliant with the regulations.

22. The word "consumer" is defined in the Regulations as "a natural person who is acting for purposes which are outside his business". Under article 3(1) the regulations apply to "any term in a contract concluded between a seller of goods or supplier of services and a consumer which has not been individually negotiated". The terms of a contract drafted in advance such as the terms of a standard form loan agreement with a consumer are covered by the regulations. Article 6(1) provides that "an unfair term concluded with a consumer by a seller or supplier shall not be binding on the consumer". In this case the "consumer", the first defendant, does not seek to defend the plaintiff's claim or to advance a defence that any of the terms of the loan agreement were unfair. The second and third defendants seek to rely on the suggested void or voidable nature of the loan facility because of the alleged unfairness of its terms. I am not satisfied that the second and third defendants have on the evidence available advanced any arguable grounds upon which to challenge the fairness of the terms of the loan agreement under the provisions of Article 6(1). The bald assertion of the unfairness of the terms is insufficient to give rise to an arguable ground of defence. The affidavits are formulaic and offer no evidential basis upon which a court might conclude that the terms of the agreement were unfair or operated unfairly against the first defendant – the primary alleged consumer- who does not and has never made any such claim. Furthermore, I am not satisfied that the court in this case has been deprived of any relevant proof in that regard similar to that identified by Barrett J. in *Kenehan* in which it was clearly the case that the defendants were parties to a loan agreement. There is nothing in the terms of the loan agreement placed before the court which I have considered which suggests the existence of any unfair terms in the loan agreement or relevant to the obligations assumed under the guarantee or otherwise nor have the second and third defendants attempted to identify such terms or how they operated adversely against the first defendant or either of them in any respect.

23. It is claimed by the defendants in their affidavits that they were consumers and entitled to the benefit of the regulations in respect of the guarantee agreements if the guarantee agreements are otherwise valid. They assert that in making these agreements they were acting outside their course of business and that the burden is on the plaintiff to show otherwise and that the terms were not unfair. I am not satisfied that the bald assertion that the guarantee agreements were entered outside the defendant's course of business is sufficient to demonstrate an arguable defence without more. The surrounding facts of the purchase by the first defendant must be within the knowledge of the second and third defendant. There is a marked reluctance and failure to disclose fully to the court in the affidavits submitted the facts relevant to these transactions. Even assuming that the two defendants are to be regarded as consumers in respect of the guarantees there is no evidence at all as to the business conducted by either of the defendants or the circumstances in which they chose to agree to provide guarantees in respect of the plaintiff's loan in 2006 or later when they executed the guarantees. The mere adoption of and adherence to the formula set out in the regulations is not in my view sufficient to give rise to a *bona fide* or arguable defence notwithstanding the low threshold applicable. There is no factual basis for the assertion that the terms of the guarantees are in any way unfair or operated unfairly. Indeed the affidavits rely on the unfairness of the loan agreement terms rather than those set out in the guarantees. I am satisfied having considered the evidence and the terms as set out in the guarantees against the criteria by which unfairness is to be considered and determined under the regulations, that as a matter of law and/or fact the terms are not unfair and no such arguable ground exists that might lead the court to find otherwise.

Conclusion

24. I am satisfied that the second and third defendants have raised an arguable defence in respect of the issue of past consideration. I therefore refuse the plaintiff's application for summary judgment and will direct that the case be sent for plenary hearing.