

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

G.R.O. OIL LIMITED, ANTON HUNT, ANTHONY MCCARTHY, MAURICE O'DONOVAN, DANIEL JOSEPH O'SULLIVAN, EDWARD DRAPER, MARY CORKERY (IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF GERARD CORKERY DECEASED), GERARD JAMES O'DONOVAN, STEPHEN SHORTEN, ROY KINGSTON AND MICHAEL O'RIAIN

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 27th day of March, 2019

SUMMARY

1. This is a case in which the plaintiff ("AIB") seeks summary judgment on foot of a guarantee in the sum of €2.18 million against the seventh named defendant ("Ms. Corkery") in her capacity as personal representative of Mr. Gerard Corkery Deceased ("Mr. Corkery"), formerly of Ovens, Co. Cork.

2. Mr. Corkery was a director and shareholder of the first defendant ("G.R.O. Oil") and in that capacity executed a Guarantee (the "Guarantee") on the 4th of April, 2008 along with the other defendants (but not G.R.O. Oil), who were also directors and shareholders of G.R.O. Oil. The Guarantee was limited to €2.18 million and was a joint and several guarantee of the liabilities of G.R.O. Oil to AIB pursuant to a Letter of Sanction ("Letter of Sanction") dated 12th of March, 2008 in respect of a loan to G.R.O. Oil in the amount of €2.18 million.

3. G.R.O. Oil was a company involved in converting rapeseed oil into diesel and the AIB loan was taken out in connection with its plan to acquire a site in Thurles, Co. Tipperary in order to build a manufacturing plant.

4. Mr. Corkery died on the 29th of December, 2015. However, he swore an affidavit in these summary proceedings on the 11th of April, 2015. His wife, Ms. Corkery, in her capacity as personal representative, also swore two affidavits in this case.

5. There is no dispute regarding the fact that the loan fell into arrears and that demand was duly made on Mr. Corkery under the Guarantee. Indeed, judgment has been obtained against G.R.O. Oil arising from default under the Letter of Sanction.

6. Judgment has also been obtained against the sixth and eleventh defendants for €2.18 million on foot of the Guarantee. Judgment in default was obtained against the second named defendant. Proceedings in relation to the Guarantee are ongoing against the remaining defendants, as their motion that judgment under the Guarantee should not exceed €1.1 million was rejected by O'Regan J. and is under appeal.

7. Ms. Corkery has two key defences to these summary proceedings. First, it is claimed that Mr. Corkery signed the Guarantee under undue influence and secondly, it is claimed that Mr. Corkery's estate has a counter-claim against AIB for breach of fiduciary duty and negligence, although at the hearing of the action, the emphasis was very much on the existence of a fiduciary duty, rather than any alleged negligence.

THE LAW**Summary judgments**

8. The law on summary judgments is well established and was summarised by Hedigan J. in *Ulster Bank v. de Kretser* [2015] IEHC 359 at para. 7:

"The principles applicable to this type of application are well established. To proceed to plenary hearing a legally statable defence must be identified. Assertion of a ground for defence is not enough. See *Harrisrange Limited v. Duncan* [2002] IEHC 14 McKechnie J. Is there a fair or reasonable probability of the defence having a real or bona fide defence? See *Banque de Paris et des Pays-Bas (Suisse) SA v. de Naray* [1984] Lloyds' Rep. 21 approved by the Supreme Court Denham J. in *Danske Bank AS trading as National Irish Bank v. Durcan Homes* [2010] IESC 22 at page 9."

9. In the Supreme Court decision of *IBRC v. McCaughey* [2014] IESC 44, Clarke J. (as he then was) stated at para. 6.5.5 in relation to factual assertions that purport to provide a defence:

"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."

10. It is clear therefore that mere assertion of a ground of defence is not sufficient to resist an application for summary judgment. Similarly, where facts are asserted without cogent evidence or any realistic suggestion that there might be such evidence, then this does not amount to a defence to summary judgment.

11. In this case, therefore, where Mr. Corkery has signed a guarantee of his part-owned company's loan, assertions that he was under undue influence to sign that guarantee and that AIB breached its fiduciary duty in asking him to sign it, must be analysed to see if they are simply mere assertions and if there is any cogent evidence or any realistic suggestion of such evidence which would lead this Court to conclude that there is a fair or reasonable probability of a real or *bona fide* defence.

Defence of undue influence

12. In relation to the claim of undue influence, the law is clearly set out in the judgment of Irvine J. in the Court of Appeal case of *Bank of Ireland v. Curran* [2016] IECA 371 at para. 32, where she stated that:

"[...] it is clear that in order to establish a defence of undue influence at a plenary hearing Mrs. Curran would first have to satisfy the court that but for the undue influence exerted upon her by her son she would not have executed the guarantee and second that the bank, i.e. the creditor, had actual or constructive notice that the guarantee was procured by the undue influence. That being so, in order to resist summary judgment, Mrs. Curran had to satisfy the low threshold standard by establishing on affidavit that she might credibly argue in the course of a plenary hearing that she had executed the guarantee as a result of the undue influence. It is only relevant to consider whether it is arguable that the bank was obliged to make inquiries to ascertain whether, having regard to her connection with the company, she fully understood and was freely entering into the guarantee, if she could first establish a credible or arguable case on the facts that she executed the guarantee in circumstances of undue influence. In turn, that required her to set out on affidavit the type of facts, details and circumstances upon which she would rely at the trial to establish that her will was overcome by her son, Michael Curran, when she executed the guarantee."

Thus, for Mr. Corkery's estate to have a defence of undue influence at the plenary hearing, it would have to prove, inter alia, that Mr. Corkery would not have executed the Guarantee but for the undue influence of AIB or its agents.

Defence of breach of fiduciary duty by a bank

13. The case of *Irish Life & Permanent plc. v. Financial Services Ombudsman & Ors* [2012] IEHC 367, is relevant to the consideration of Mr. Corkery's allegation that AIB owed him a fiduciary duty. It is clear from this case that this is not an easy defence for Mr. Corkery to mount, since at para. 44 Hogan J. stated:

"One common theme running through this- and, indeed, the other appeals- was that the Bank owed no fiduciary duty to advise its customers and that it had, not, in fact done so. There is no doubt but that the lender/borrower relationship does not generally impose fiduciary duties on the lender. The whole object of a fiduciary is based upon a recognition that certain categories of persons owe duties to others over and above conventional contractual obligations by virtue of the special nature of their profession, occupation or position, so that, in Professor Delany's graphic words, such persons 'are obliged to act in a completely selfless manner'. See Delany, *Equity and the Law of Trusts in Ireland* (4th.ed.) (at 213). Trustees, agents, directors and partners are among those normally regarded as fiduciaries.

While the categories of fiduciaries are never closed, there is, I think, a reluctance to extend their boundaries beyond the traditional categories because to do so would effectively impose super-added duties of utmost good faith and complete disclosure to persons who never contracted to do so and thus potentially frustrate the ordinary workings of the commercial world. While all who enter into contracts are obliged to discharge them honestly and in good faith, it cannot be supposed, for example, that a retailer is under a positive obligation to disclose to a customer that he or she is aware that exactly the same goods can be purchased for a lower price from a nearby outlet. That would, however, be the position in law if, for example, a retailer were held to be a fiduciary."

It is clear therefore that it will not be an easy matter for Mr. Corkery's estate to prove that he was owed '*super-added duties of utmost good faith*' by his bank.

ANALYSIS

14. The factual background will now be analysed in light of the foregoing legal position. The first point to note is that Ms. Corkery avers in her affidavit of 20th February, 2018, that Mr. Corkery suffered from Asperger's Syndrome, Dyslexia and Attention Deficit Disorder to support her claim that Mr. Corkery was a vulnerable individual who was made subject to special arrangements and care by AIB and thus that the Guarantee was procured from Mr. Corkery through undue influence and that AIB owe a fiduciary duty to Mr. Corkery, which it allegedly breached.

15. However, the only evidence of any significance which is provided for these alleged special arrangements for Mr. Corkery arising from his alleged vulnerability is that Mr. Corkery moved his account from one branch of AIB to another branch of AIB, when the person dealing with his account (Ms. Majella Elliot) transferred to a different AIB branch.

16. It is noteworthy that the claims that Mr. Corkery suffered from these medical conditions are not supported by any medical evidence. As such, these claims amount to mere assertions.

17. In considering these claims it is also relevant to consider Mr. Corkery's affidavit, which he swore several months before his death. This is because he makes no reference to such medical conditions affecting him. Instead, he paints a picture of a himself as a successful farmer/business man, *albeit* one who claims that undue influence was used to procure a Guarantee for in excess of €100,000 (since as noted below, he claims that he believed it was limited to this amount).

18. While Mr. Corkery seeks in his affidavit to claim that he relied on the fiduciary duty of AIB towards him and relied on their advice, he does not suggest that he was a vulnerable individual who suffered from conditions which would affect his judgement. On the contrary, the affidavit makes clear that while he avers on the one hand that he left school at 17, he did in fact attend a third level Agricultural College, *albeit* for a period of just one year, but also that he was, it appears, a successful farmer who was involved in agricultural equipment leasing, conacre land renting, tillage farming and agricultural contracting. While he avers that he made only a '*modest*' living from these activities, it seems to have been a rather successful career since he refers to having owned AIB shares worth €380,000 at one stage. Not only this, but he was in a position to acquire shares in G.R.O. Oil and also his financial position was such that he was not concerned about personally guaranteeing, for at least €100,000, a loan to a company in which he was a shareholder.

19. It is also to be noted that his acumen as a farmer/business man in the community was such that he was approached by a local farmer, the third defendant, to get involved as a shareholder and director in the first defendant company, G.R.O. Oil, which was being set up to produce bio-diesel.

20. Mr. Corkery agreed to enter this business venture as a shareholder and director in G.R.O. Oil. It is also relevant to note that as a shareholder/director he approved the company's decision to borrow €2.18 million to build a manufacturing facility since he attended the Directors' Meeting on the 13th of March, 2008 at which the borrowing of €2.18 million was approved for this purpose. It is also relevant to note that G.R.O. Oil, the company which he part-owned and part-managed was a sufficiently significant company to be seeking investors for its bio diesel business from members of the public through the Business Expansion Scheme ("BES"). The assertion

therefore by Ms. Corkery that Mr. Corkery was such a vulnerable individual as to be owed 'super-added duties of utmost good faith', must be seen in this context.

21. It is also relevant that the reason Mr. Corkery signed the Guarantee was because it was a condition of the lending to his part-owned company, G.R.O. Oil. The Letter of Sanction, which Mr. Corkery approved at a Directors' Meeting on the 13th of March, 2008 explicitly provides as follows:

"Security: [...] Joint and several Letter of Guarantee in the sum of EUR 2,180,000 for the obligations of G.R.O. Oil Limited from Anton Hunt, Anthony McCarthy, Maurice O'Donovan, Dan Joe O'Sullivan, Edward Draper, Gerald Corkery, James O'Donovan, Steven Shorten, Roy Kingston and Michael O'Riain, supported by security to be at a minimum value of EUR 1,000,000."

22. The joint and several Guarantee which was required to be executed by Mr. Corkery was presented to him, and to the other directors, during an Open Day for BES investors in G.R.O. Oil. Mr. Corkery avers that it was presented to them by the solicitor for G.R.O. Oil, Ms. Phil McCarthy, for signature, in a portacabin. He avers that the Guarantee was never presented to him for inspection or to seek independent legal advice. His affidavit states at para 21 that:

"I strongly state that I acted under duress on the day of the signing in the public forum which was created by management and Company Solicitor."

23. It should be noted that although Mr. Corkery avers that he executed the Guarantee under duress, the case which is now being made on behalf of the estate of Mr. Corkery is not one of duress, but of undue influence.

24. Mr. Corkery then avers at para 23 that:

"I say that because point 7 on the special conditions of the loan offer refers to Supporting Security, value to be set at a Minimum of €1 million this led me to believe that with 10 directors my maximum exposure would be 100,000 euros."

I say that after much contemplation, on signing the Guarantee at the open day, it sat heavy on my mind and I spoke with Mr JB O'Donovan who also believed he had a maximum exposure of €100,000. On speaking of the phrase "jointly and severally" this raised mutual concerns and Mr O'Donovan decided to re-enter the portacabin to clarify the phrase. Mr O'Donovan emerged a short time later and appeared anxious and stated his anger after being dismissed by the Management and attending solicitors, telling me that he was informed that he had signed the document and that there was nothing he could do about it. At no time prior to signing of the Guarantee did the Ms McCarthy, Company's solicitor explain the terms Joint and Several or outline the implications of same."

25. As previously noted, this averment regarding Mr. Corkery's personal liability under the Guarantee being limited to €100,000 clearly shows that he was happy to sign the Guarantee which imposed significant personal liability on him, *albeit* that he claims that he did not appreciate the nature of joint and several liability.

26. In these proceedings therefore, the essence of his estate's claim is that he signed up for this joint and several liability under the undue influence of AIB and the solicitor for G.R.O. Oil, a company of which he was a director and shareholder, and that AIB owed him a fiduciary duty, in light of his vulnerability, which they breached by influencing him to sign the Guarantee.

Conclusions re undue influence

27. It is clear from the *Curran* case that Mr. Corkery's estate, to have a defence at a plenary hearing, has to satisfy that court that but for the undue influence exerted upon him by AIB and/or its agents Mr. Corkery would not have executed the Guarantee and that AIB had actual or constructive notice that the Guarantee was procured by undue influence.

28. In the *Curran* case, the Court of Appeal rejected the claim that a guarantee was procured by undue influence in a situation where there was no commercial connection between the guarantor and the borrower but a mother/son relationship, which is a situation in which there is a greater likelihood of undue influence than in a pure commercial relationship.

29. In this case undue influence is alleged not in a personal relationship but in a purely commercial relationship between the guarantor (Mr. Corkery) and the beneficiary of the guarantee (G.R.O. Oil). It is important to remember that G.R.O. Oil was part-owned and part-managed by Mr. Corkery and it seems clear that Mr. Corkery was hoping to be a beneficiary, as a shareholder in G.R.O. Oil, of the loan which he was guaranteeing. Otherwise why would he approve the loan to G.R.O. Oil as director/shareholder of that company and personally guarantee it, up to a maximum of €100,000 (if one accepts Mr. Corkery's assertion that he thought that this was his maximum exposure)?

30. In order for G.R.O. Oil, which was part-owned by Mr. Corkery, to get this loan, it was a pre-condition that Mr. Corkery give a personal guarantee and clearly this principle of him giving a guarantee was accepted by Mr. Corkery, since his complaint is not that he had to give a personal guarantee but that his personal liability went beyond €100,000 and that a personal guarantee of this extent was procured from him by undue influence.

31. It seems clear to this Court that an allegation of undue influence is much harder to prove, where the guarantor has a commercial relationship with the borrower whose loan is being guaranteed and is expecting to be an indirect beneficiary of the loan (as a shareholder in the borrower) as in this case, than where a person gives a guarantee to a family member..

32. More significantly there is nothing in the way of evidence to support the claim of undue influence that goes beyond assertion. The most that is in Mr. Corkery's affidavit is an averment, at para. 7, that he:

"always relied on the advice and service of AIB and would never have thought to question their advice on any matter."

However, this is an assertion which is very easy to make and indeed could be made by many customers of a bank. It does not even come close to amounting to evidence of undue influence.

33. The other 'evidence' in support of the undue influence defence is contained in Ms. Corkery's affidavit regarding Mr. Corkery's alleged medical conditions and vulnerability, but as previously noted, these are assertions without evidence and when considered in light of evidence provided by Mr. Corkery regarding his own business dealings, amount to mere assertions which not only are unsupported by the evidence, but if anything seem inconsistent with Mr. Corkery's evidence regarding the extensive nature of his

farming business and his investment interests.

34. Indeed, as previously noted, Mr. Corkery does not seek to rely in his affidavit on any alleged medical condition or vulnerability to support his claim of undue influence. In particular, he does not make any reference to his moving his account from one branch to another as an indication of his vulnerability or even as evidence of undue influence or duress. The movement of accounts appears to be the only piece of significant evidence relied upon by Ms. Corkery as evidence of undue influence. However, this cannot, in this Court's view, be regarded as cogent evidence, since moving account with a banker, with whom one has a business relationship, cannot in any sense be said to be indicative of the fact that the account holder, who is a successful farmer/business man, is vulnerable and subject to undue influence.

Fiduciary duty

35. The defence which Mr. Corkery's estate seeks to mount under this heading is that he was a vulnerable individual and as a result AIB owed him the '*super-added duties of utmost good faith and complete disclosure*' of a fiduciary.

36. As is clear from the *Irish Life* case, it is not an easy matter for a customer of a bank to show that his bank owed him a fiduciary duty. In this instance, one is dealing with a claim that Mr. Corkery's relationship with AIB was such that it owed Mr. Corkery these '*super-added duties of utmost good faith*', when it was entering commercial banking arrangements with the company he part-owned and part-controlled. It is claimed that these duties were owed in the context of AIB seeking security from Mr. Corkery for that company loan, where that company was involved in the acquisition of a site to build a bio diesel manufacturing plant. Much of what has been said previously regarding the assertions that Mr. Corkery was vulnerable and suffering from certain medical conditions, in the context of the undue influence defence, is equally relevant to this defence of breach of fiduciary duty.

37. This Court does not believe it is credible to claim as a defence to summary judgment that a bank owed a commercial banking customer a fiduciary duty, which, as is clear from the *Irish Life* case is not an easy matter to establish, particularly where the evidence which is said to support this defence is that the customer moved his account from one branch to another (when the bank official he had been dealing with moved branch). As previously noted, it is telling that while Ms. Corkery suggests that the moving of a bank account is indicative of a vulnerable customer, Mr. Corkery, when he was swearing his affidavit to resist summary judgment, did not attach any significance to his moving branch.

38. In addition, the other evidence that Mr. Corkery relies upon for undue influence is his averment at para. 7 that he had:

'limited formal education and I have always employed an accountant to take care of my business finances'

However, a fiduciary duty does not arise when a bank is dealing with a person involved in farming business because he had limited formal education and used an accountant for his business. Indeed, in this instance the use of an accountant by Mr. Corkery would have been expected since he had a wide range of business and investment interests with no doubt complicated tax issues, i.e. farming, equipment leasing, agricultural contracting, ownership of public quoted shares -presumably with dividend tax and possible capital gains tax issues- and ownership of private company shares (G.R.O. Oil) with the possibility of BES tax relief.

39. For these reasons, this Court does not believe that there is any evidence to support the allegation of a breach of fiduciary duty such as to entitle Ms. Corkery to a plenary hearing.

40. Finally, although reference was made to a counter claim by Mr. Corkery's estate based on AIB's negligence, this Court could find no evidence to support such a claim, other than the allegations that AIB breached its fiduciary duty to Mr. Corkery, which has been considered above. Accordingly, this is not a basis upon which to send this matter to plenary hearing.

Conclusion

41. This case amounts therefore to a claim of undue influence and the claim of the existence of a fiduciary duty which is founded on claims of Mr. Corkery's vulnerability arising from medical conditions (as suggested by Ms. Corkery) and of '*always relying on the service and advice of AIB*' (as suggested by Mr. Corkery). This undue influence, it is claimed, led to Mr. Corkery executing the Guarantee at the behest of AIB and/or its agents, which is alleged to have amounted to a breach of AIB's fiduciary duty to Mr. Corkery.

42. In all the circumstances, this Court regards those claims as amounting to mere assertions unsupported by any cogent evidence which forces this Court to conclude that there is not a fair or reasonable probability of Ms. Corkery having a real or *bona fide* defence. Accordingly, this Court will grant the summary judgment sought in this case.