

THE HIGH COURT

[RECORD NO. 2015 1767 S]

BETWEEN

DEUTSCHE BANK AG

PLAINTIFF

V.

H.B. DENNIS MOTORS (FAIRVIEW) LTD. AND PETER DENNIS

DEFENDANTS

[RECORD NO. 2017 251 S]

DEUTSCHE BANK AG

PLAINTIFF

V.

H.B. DENNIS MOTORS LTD. AND JOHN DENNIS

DEFENDANTS

JUDGMENT of Mr. Justice Robert Eagar delivered on the 20th day of May, 2019

1. The Court proposes to give judgment in relation to these matters together as essentially the same issues arise with each of the second named defendants, Peter Dennis and John Dennis, respectively.

2. The Court would make these remarks at the outset of its judgment: -

(i) These two cases were called on in the non-jury list for one hour by counsel on behalf of all parties.

(ii) This was clearly a very careless estimation as this Court has set aside nearly two days in relation to these cases.

(iii) This Court insisted upon brief written submissions on behalf of the plaintiff setting out his claim on the basis of same, and the defendants setting out what they say are defences which are raised for the purposes of the jurisprudence in relation to summary judgements.

(iv) This Court has been submerged with various submissions with the defendants appropriately serving their submissions in relation to their defences on the plaintiffs eighteen – page submissions in relation to the nature of the claim. The Court is very unsatisfied with the way this matter has been presented by all parties.

3. The background of the case is that the plaintiff is a credit institute, the first named defendant is a limited company, the second named defendant in relation to 2015 1767 S is Peter Dennis and the second named defendant in 2017 251 S is John Dennis. Both were company directors of the first named defendant, and a receiver was appointed to the first named defendant in or about May 2012.

Peter Dennis

4. Firstly, the Court will deal with the case of the second named defendant, Peter Dennis, and will in turn deal with the second named defendant, John Dennis.

5. The proceedings against Peter Dennis were commenced by summary summons issued on the 15th September 2015 setting out the claim and seeking judgment as against the second named defendant in the sum of €1,568,607.17 and the costs in respect of the proceedings. On the 18th July 2012 the company and the first named defendant were in receivership.

6. On the 17th November 2017, a notice of motion for liberty to enter final judgment as against the second named defendant was entered. This was grounded on the affidavit of Martin Leonard.

Affidavit of Martin Leonard

7. Mr. Leonard introduced himself as being the lending manager with First Citizen Finance DAC (hereinafter FCF), an agent of the plaintiff, Deutsche Bank AG, and was duly authorised by the plaintiff to make this affidavit.

8. He said that prior to working with FCF he was a lending manager with Permanent TSB Finance Ltd until the 24th December 2012. It is in that capacity and in his later capacity with FCF that he is familiar with the subject matter of the proceedings including the loans, guarantees, defaults and demands and that he has further fully examined the relevant books and records relating to the defendant herein. Those books and records were compiled and used in the usual and ordinary course of business.

The loans and personal guarantees

9. By letter of offer dated the 10th October 2011, Permanent TSB Finance Ltd. (hereinafter PTSBF) offered to advance to the first named defendant a sum of €391,000 for the purpose and subject to the terms and conditions set out in the letter of offer. In relation to the security required, a personal guarantee of Peter Dennis was sought.

10. On the 7th July 2008, the board of H.B. Dennis (Fairview) Ltd. agreed that it was in the best interests of the company that the credit facility should be accepted and it was resolved that Peter Dennis and John Dennis were authorised to complete the formal acceptance of the said letter of offer and counter indemnity. By guarantee in writing dated the 7th July 2008, (the 2008 guarantee) the second named defendant unconditionally and irrevocably guaranteed to discharge on demand all sums of money then or at any time owing or remaining unpaid by the first named defendant to PTSBF under the facility letter dated the 4th July 2008 plus interest and expenses from the date of such demand. It was noted: -

"1. The Guarantor hereby irrevocably and unconditionally guarantees on demand to pay to PTSBF all sums of money due under the attached facility letter dated the 4th July 2008 (hereinafter the ultimate balance) which now or at any time

shall be owing or remain unpaid to PTSBF by the customer anywhere and/or whether on any banking or other account or otherwise in any manner whatsoever.

2. The Guarantee shall be in addition to and not in substitution for any other guarantee of the customer given to PTSBF by the guarantor and shall be deemed to be an indemnity.

3. The liability of the Guarantor shall not be affected nor shall this guarantee be discharged or diminished by reason of 311 any present or future bill, note, guarantee, indemnity, mortgage, charge, pledge, lien or other security or right or remedy held by or available to PTSBF being or becoming wholly or in part void, voidable or unenforceable on any ground whatsoever by PTSBF from time to time dealing with exchanging varying, realising or failing to enforce any of these same".

11. By letter of offer dated the 26th May 2010, PTSBF offered to advance to the first named defendant the sum of €1,641,340 and by Board Resolution of the 9th June 2010, by H.B. Dennis Ltd. of Fairview, it is agreed that the best interests of the company that credit facilities should be accepted and it was resolved that Peter Dennis and John Dennis be and are hereby authorised to complete the formal acceptance of the said letter of offer.

12. PTSBF advanced to the first named defendant the sum of €1,641,340 on or about the 15th June 2010 and by guarantee in writing dated the 9th June 2010, Peter Dennis unconditionally and irrevocably guaranteed to discharge on demand all sums of money then or at any time owing or remaining unpaid by the first named defendant to PTSBF.

13. The Court notes the following, found stipulated in the formal guarantee in bold capitals on the last page prior to the signature of Peter Dennis:-

"WARNING AS GUARANTOR OF THIS LOAN YOU WILL HAVE TO PAY OFF THE LOAN, THE INTEREST AND ALL ASSOCIATED CHARGES IF THE BORROWER DOES NOT. BEFORE YOU SIGN THIS GUARANTEE YOU SHOULD GET INDEPENDENT LEGAL ADVICE." (this Court's emphasis)

Further, the guarantee continues: -

"The Guarantor hereby confirms that: -

(i) He is fully aware of the nature of this guarantee, the effect of which had been explained to, and understood by him.

(ii) He has been advised to take and has been given the due opportunity to take separate independent legal advice on the effect of this guarantee.

(iii) He is now willing to be legally bound by the terms of this guarantee.

There is no evidence before the court as to whether or not Peter Dennis took legal advice.

14. On the 22nd October 2012 the second named defendant gave his written consent to the assignment or transfer of the benefit of the guarantees to any third party. The terms of the consent letter were: -

"Dear Sirs,

I refer to the Guarantee(s) and any other Guarantees provided by me to PTSBF in connection with the provision of credit and/or banking facilities and other accommodation to H.B. Dennis Motors Fairview Ltd. (the Guarantees).

I hereby irrevocably consent to the assignment or transfer of the benefit of the Guarantees: (i) By PTSBF to any other persons including a company (as assignee) and; (ii) By an assignee and any subsequent assignees to any other person including a company.

Signed,

Guarantor name: Peter Dennis,

Guarantor address, 114 Howth Road, Dublin."

This irrevocable consent to the assignment was signed by Peter Dennis. On or about the 24th December 2012, PTSBF assigned all its rights and interests and benefits in respect of the loan agreements and all of its rights relating to the said loan agreements including the benefit of the personal guarantees given by the second named defendant to the plaintiff as well as relevant documentation.

15. By letter dated the 24th December 2012, the first and second named defendants were informed of the assignment of rights to the plaintiff. The matters were sent to the directors of H.B. Dennis Motors Fairview Ltd., and to Peter Dennis at 114 Howth Road, Clontarf, Dublin 3. Neither the first named nor the second named defendant Peter Dennis made any reply to these letters.

16. The assignment made between PTSBF and Deutsche Bank is serviced by FCF, a firm regulated by the Central Bank of Ireland. Pursuant to Power of Attorney dated the 22nd March 2013, the 28th March 2015 and the 28th March 2017, the plaintiff gave to FCF the power on its behalf to facilitate the recovery of all amounts from time to time due and to become due in respect of the agreements entered into by the defendants with PTSBF.

Demands

17. The first named defendant was indebted to the plaintiff in the sum of €1,568,607.17 including interest on foot of the loan agreement as of the 21st July 2014. By letter dated 31st July 2014, FCF acting as an agent of the plaintiff wrote to the secretary of the first named defendant on behalf of the plaintiff stating that at close of business that day that sum was due and owing, and made a formal demand for the sum. This letter was signed by Mr. Leonard as a duly authorised officer for and on behalf of the plaintiff.

18. By letter dated the 5th August 2014, FCF acting as an agent of Deutsche Bank wrote to Peter Dennis stating that on the 31st July 2014 it had written to the first named defendant making formal demand for payment forthwith for the payment of the sum of

€1,568,607.17 on foot of the loan agreements and that no payment had been received following such demand. The said letter proceeded to make formal demand for payment of the sum which was due and owing from the second named defendant. This letter was signed by Mr. Leonard. By letter dated the 14th November 2014, the solicitors for the plaintiff wrote to the first and second named defendants noting that each of them had failed refused or neglected to pay the amount outstanding. The letter also stated that legal proceedings would be initiated unless the amount was paid or acceptable proposals received in respect of the debt.

19. In spite of the letters of formal demand, both the first named and the second named defendant refused to honour the demands and discharge the sum due and owing to the plaintiff.

Summary Judgement Procedure

20. Having set out the principal affidavits seeking summary judgment in both cases, I now propose to set out the jurisprudence in respect of applications for summary judgment. The starting point of the modern case law in this area is the decision in *First Commercial Bank plc. v. Anglin* [1996] 1 IR 75 [hereinafter *Anglin*]. In this case, the Master directed that the case should be placed in the judge's list. However, Costello J. refused to give the defendants leave to defend the action on the basis that there was no credible evidence of a real bona fide defence to the plaintiffs' claims and granted summary judgment to the plaintiff. On appeal by the defendant to the Supreme Court, in a judgment delivered by Murphy J., it was held that for the court to grant summary judgment and refuse leave to defend was not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine defence and he adopted the test laid down in the *Banque de Paris v. de Naray* [1984] 1 Lloyd's Reports Rep. 21. This test was reaffirmed in the *National Westminster Bank plc. v. Daniel* [1993] 1 WLR 1453, namely that in deciding whether to grant summary judgment to a plaintiff and to refuse leave to defend, the court has to look at the whole situation to see whether the defendant has satisfied the court that there is a fair and reasonable probability of the defendant having a real or bona fide defence or whether what the defendant has said in his defence was credible. In this regard, the mere assertion on affidavit in a given situation which was to form the basis of the defence did not, of itself, constitute a ground for granting leave to defend. Murphy J. concluded, in dismissing the defendant's appeal, that there was no credible evidence for the defence which he had sought to assert and that he had failed to establish either on the law or on the facts the probable defence to the plaintiff's claim.

21. The principles set out by Murphy J. were endorsed by the Supreme Court in *Aer Rianta Cpt v. Ryanair Ltd* [2001] 4 IR 607. The plaintiff brought an application for summary judgment against the defendant for monies due in respect of landing charges and other fees at Dublin Airport. In the High Court, Kelly J. (as he then was) held that the defendant had not demonstrated that there was a fair or reasonable probability of it having a real or bona fide defence and he granted the plaintiff liberty to enter summary judgment. That decision was overturned on appeal and in her judgment McGuinness J. endorsed the test laid down in *First National Commercial Bank plc. v. Anglin* and identified the task for the court as being: -

"To decide whether... the defence set out in the affidavits... is credible, or in other words, whether there is a fair or reasonable probability that the defendant having a real or bona fide defence".

She pointed out that the question for the court was not whether the defendants or the plaintiff's version of events was the more probable but rather whether the proposed defence is so farfetched or so self-contradictory as not to be credible. She was of the view that the probability remained open that the defendant had a real or bona fide defence and what was put forward by the defendant was credible. In the same case, Hardiman J. delivered a concurring judgment in which he engaged in a comprehensive review of the authorities relating to the jurisdiction to grant summary judgment. He referred with approval to a number of English judgments where the jurisdiction to enter summary judgment "must be used with great care" and that a "defendant ought not to be shut out from defending unless it was very clear indeed that he had no case." He also endorsed the statement of Sir Peter O'Brien C.J. in *Crawford v. Gillmor* [1891] LR Ir 238, that: -

". . . final judgment should not be given on a motion for final judgment in any case where any serious conflict as to the matter of fact or any real difficulty as to the matter of law arises".

Hardiman J. stated that: -

"The defendants hurdle on a motion for judgment such as this is a low one and the jurisdiction is one to be used with great care".

He further stated that the test of "fair and reasonable probability of the defendants having a real or bona fide defence" is ". . .not the same thing as a defence which will probably succeed, or even a defence whose success was not improbable".

22. McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 IR 1 sets out a clear identification of the principles which must be applied by a judge as follows: -

"(i) the power to grant summary judgment should be exercised with discernible caution,

(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,

(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,

(iv) where truly, there are no issue 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,

(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,

(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,

(ix) leave to defend should be granted unless it is very clear that there is no defence,

(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,

(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".

23. In *McGrath v. O'Driscoll* [2006] IEHC 195, Clarke J. (as he then was) referred to the decision in *Aer Rianta*, and laid out the approach to be taken when issues of fact arise: -

"So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved".

24. Subsequently, in *GE Woodchester Ltd. v. Aktiv Kapital Asset Investment Ltd.* [2009] IEHC 512, he elaborated on the extent of the plaintiff on the defendant to adduce factual evidence to support an alleged defence at the stage of the application for summary judgment, stating that a defendant will not necessarily be in a position to put or have to put affidavit evidence before the court to establish a factual basis for that defence. He noted that the factual basis for the defence may not derive from facts within the defendant's own knowledge.

25. The general principle that mere assertion is not sufficient to establish a *bona fide* defence was outlined by Charleton J. in *National Asset Loan Management Ltd. v. Barden* [2013] 2 IR 28 where he stated: -

"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".

26. In *Irish Bank Resolution Corporation v. McCaughey* [2014] IESC 517, Clarke J. (as he then was) set out the principles in relation to "credibility" of the defence in summary summons proceedings: -

"It is important, therefore, to reemphasise 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*, be clear that the defendant has no 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".

27. However, Baker J. held that while the court cannot resolve a dispute of facts, it can assess the evidence, including the documentation exhibited to the affidavits and come to a view as to whether the defendants had made out a bona fide and credible defence. On the facts of the case before her, Baker J. found that the assertions made by the defendants which were alleged to give rise to a bona fide defence, were not consistent with the documentary evidence and as such were not credible.

28. Finally, Charleton J. in *Danske Bank v. Durkan New Homes* [2009] IEHC said: -

"If the addition of evidence can assist in any material way in the construction of a document then, I agree, the matter should be put for plenary hearing. If, on the other hand the question of law arising on affidavit evidence can be as well considered on a motion for summary judgment as at a plenary hearing, then I feel it is the obligation of the court to resolve it on hearing that motion".

Affidavit of Peter Dennis

29. The defence raised by Mr. Dennis in this affidavit is: -

(i) Misrepresentation in that he says that PTSBF informed the first named defendant of which he was a director that the subject loan was for the purpose of regularising the long term lending relationship between PTSBF and the first named defendant for their mutual benefit. He says that this was a misrepresentation for the true purpose of the loan and that he alleges that the loans were consolidated in order to make the subject loan easier for PTSBF to sell to a special purpose vehicle.

30. The Court notes from the form of guarantee which was signed by Mr. Dennis that it was clear that he was encouraged to get independent legal advice. The terms are bold in the guarantee form: "Before you sign this guarantee you should get independent legal advice." He continues by suggesting that if he had known the true purpose of the written consent he would never have executed it. He referred to Permanent TSB Group Holdings plc. announcing to the Irish Stock Exchange that it had agreed to the disposal of the majority of the loan assets of PTSBF to Consumer Auto Receivables Finance Ltd. (CAR). The company separately agreed to sell the business platform of PTSBF to First Citizen Finance Ltd. (First Citizen). He refers to the transfer of certain loans to Spinnaker and said that he was not informed of loans transferred to Spinnaker. He further makes the point that PTSBF advanced at least fifteen separate facilities to the first named defendant including the first loan agreement dated the 4th July 2008, and he said that it appeared that

the actual purpose of PTSBF in preferring the subject loan dated the 26th May 2010 was to consolidate various unsecured loans into one loan agreement secured by a part of the personal guarantee executed by him. He also makes the point that in respect of a judgment mortgage registered by PTSBF over property owned by the first named defendant that this judgment mortgage was clearly registered outside of any agreement that PTSBF had either with H.B. Dennis Motors Ltd. or H.B. Dennis Motors (Fairview) Ltd. He also states that he did not receive either of the demand letters sent by the solicitors for the plaintiff. Mr. Dennis stated that FCF was established and owned by members of the former management team of PTSBF. CAR entered into a contract with FCF for the servicing of the acquired loan assets.

31. Mr. Dennis claims that the plaintiff is not acting as a bank in these proceedings, but its sole purpose is acquiring the subject loan for the purpose of enforcing it or in this case the purported personal guarantees executed by Mr. Dennis and he says that the powers of attorney executed by it in favour of First Citizen are specifically limited: -

(i) "To initiate and maintain all claims, actions, demands and proceedings (including any proceedings for the enforcement of any judgment) for the purpose of enforcing facilities or any related guarantee or other security for the purpose of recovering any amount from time to time outstanding thereunder.

(ii) To retain solicitors and counsel to prepare and swear all affidavits, to make all filings, to give evidence in court and to execute and deliver all deeds, agreements, instruments, matters or other documents as are necessary in connection with any proceedings.

(iii) To repossess and sell any vehicle or other property the subject of any default facility".

Mr. Dennis also makes the point that Mr. Leonard's evidence is hearsay and inadmissible on the grounds that Mr. Leonard confirms that the transfer of the subject loan and purported ancillary personal guarantees relied upon by the plaintiff would not take effect until two months later, on the 26th February 2013. On that date the subject loan between the first named defendant and PTSBF was purportedly transferred to the plaintiff. Mr. Leonard could not have known what sum was allegedly outstanding by the first named defendant. Both second named defendants, Mr. Peter Dennis, and Mr. John Dennis states that Mr. Leonard cannot as a matter of fact positively aver to the sum allegedly due on the actual transfer date.

Second affidavit of Martin Leonard

32. He seeks to deal with the matters raised by Peter Dennis. He said that on the 17th November 2009 the first named defendant acknowledged in a letter signed by the second named defendant that it owed PTSBF Ltd. the sum of €2,086,636.67 that it consented to judgment being given against it. Having referred to fifteen of the loans which were Chattel Mortgages whereby PTSBF had a registered charge over an individual car or cars. Once the car was sold the first named defendant was obliged to pay PTSBF the amount lent against that car or cars. PTSBF discovered that the cars had been sold but the sale proceeds had been retained by the first named defendant and the amount involved was over €1.3m. He makes the point that the second named defendant made no reference to this debt. He said the subject loan was made for administrative purposes, it reduced 20 loans to two loans, and set new repayment terms which were not met by the first named defendant. He also stated that the consent signed by the second named defendant permitted PTSBF to assign or transfer the benefit of the guarantee to any party it wished to. He referred to the affidavit of Cathal McCarthy which the court will deal with later. He states that there was no sale of the subject loan to Spinnaker. He also denies the allegations regarding misrepresentations and suggested they are extremely vague and un-particularised. Having obtained the judgment on 25th February 2010 for over €2,000,000 against the first named defendant, PTSBF registered judgment against three properties, the third property which was not in the name of H.B. Dennis (Fairview) Motors Ltd. and H.B. Dennis Motors Ltd. but a third company of which Mark Dennis was a director. He also denied there was any sale to a special purpose vehicle and that the subject loan was transferred to the plaintiff which was a bank. He referred to the letters sent on the 24th December 2012 to the defendants and in particular the second named defendant as the first named defendant was not solvent and the demand letters that were sent were not returned by the postal authorities. He also refers to the 20 directorships held by the second named defendant, identifying him as a businessman.

Affidavit of Cathal McCarthy

33. Mr. McCarthy is a solicitor of Bloom Solicitors who act on behalf of the plaintiff and identified the history of the Irish Permanent Building Society, its acquisition of Irish Life plc., and of Trustee Savings Bank. He refers to the 31st March 2011 after the Government of Ireland had entered into an agreement with the European Central Bank, the European Convention, and the International Monetary Fund to finance the Irish State. He said that PTSBF was a wholly owned subsidiary of Irish Permanent Building Society and he said that no loans to dealers are sold or form part of the securitisation which was known as the Spinnaker securitisation. He said that the subject loan was made for administrative purposes because there were nineteen loans to the first named defendant on which PTSBF had obtained judgment on the 25th February 2010 in the sum of €2,086,636.67. He said the plaintiff is a large branch of Deutsche Bank, a leading European bank. The loan, which is the subject matter of the proceedings had never been sold to a special purpose vehicle and that the second named defendant appeared to have made an assumption which was incorrect in relation to the Spinnaker securitisation.

Second affidavit of Peter Dennis

34. In relation to Cathal McCarthy's affidavit, he states that the content is remarkable and raises a fundamental issue with regard to Mr. McCarthy and the firm of Bloom Solicitors representing the plaintiff in the case.

35. He makes the case that the first named defendant never purchased any money at all from the plaintiff but the plaintiff is a debt purchaser who is engaged for the clear purpose of debt recovery.

Third affidavit of Peter Dennis

36. The third affidavit of Peter Dennis was sworn on the 28th February 2019 and in this affidavit he said that throughout the long course of the first named defendant's dealings with PTSBF he regularly signed finance contracts on behalf of the first named defendant. He said the frequency was monthly and naturally more often. He then refers to the Chattel Mortgages on stock vehicles. He says he always dealt with the same sales representative, whom he identified as Alan McGuckian. He said the circumstances of the execution of the consent which the plaintiff's case rests in its entirety is because the document was distinct from the other financial documents.

37. The final affidavits sworn in relation to Peter Dennis was that of Alan McGuckian, who described his role as a "sales representative". He said that he did not deal with him in relation to the consent of the assignment of his personal guarantees. He also said that Peter Dennis did not query with him the purpose of the consent nor did he make clear to him the representations asserted by Mr. Dennis. Mr McGuckian finds it surprising that Mr. Dennis asserted and maintained that he did not receive certain correspondence that was sent to him in circumstances where he believes that Martin Leonard met with Mr. Dennis after the transfer of the loans.

Submissions of the second named defendant

38. Counsel on behalf of the second named defendant said he wanted to highlight the relevant legal principles to the matter, the second issue was to highlight the question of "consideration" and the third issue was the issue of misrepresentation and counsel for the second named defendant quoted from the relevant legal authorities.

39. His primary defence was that there was a lack of consideration. The plaintiff asserts that consideration was not required. He said there was a clear legal dispute between the parties and he refers in particular to the decision of McKechnie J. in *Harrisrange Ltd. v. Durcan* (previously cited) where McKechnie J. stated: -

"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".

40. The second issue was that of misrepresentation and he submitted that the representation on the basis of the consent or assignment was made through Alan McGuckian was false and implied in this defence was the fact that there was a dispute between Alan McGuckian and Peter Dennis as to what took place.

41. The submissions of the plaintiff suggested that each defence was an attempt by the defendant to generate complexity on the application and he referred to McGovern J. in *NAMA v. Breslin* [2017] IEHC 350, where McGovern J. stated: -

"The raising of complex arguments in answer to an application for summary judgment will not avail a defendant unless those arguments address the basis of the claim and provide an arguable defence to the claim as pleaded. Just as mere assertions, without proof, do not afford a defence to a claim for summary judgment, neither will the raising of complex issues of fact or law..."

42. In relation to the issue of consideration, counsel on behalf of the plaintiff said that consent is not a new contract, it is not a promise, neither is it an amendment, rather it is the activation of Clause 9 of the Guarantee and accordingly there was no requirement for consideration to the consent to the assignment of the Guarantee.

43. He submitted that in relation to consideration each of the Dennis brothers were consulted on the subject loan and consented to it because they actually agreed to the subject loan on behalf of each company. In relation to the alleged misrepresentation, however, it is stated that the alleged representations were only identified late in the day but no material conflict of fact arises. He submitted that the defendants had raised various issues and none of them reached the threshold for leave to defend.

Discussion in respect of Peter Dennis

44. Points which the second named defendant intends to be a framing of his intention and preparedness to defend the proceedings.

(i) The second named defendant did not borrow money from the plaintiff in the proceedings. This is correct. Peter Dennis acted as guarantor for the first named defendant in relation to a loan from PTSBF which was then transferred by way of assignment to the plaintiff with the consent of Peter Dennis.

(ii) The second named defendant did not at any time provide personal guarantees in respect of any monies borrowed by any party from the plaintiff. The consent upon which the plaintiff seeks to rely on dated the 22nd October 2012 is expressly in respect of the guarantees provided by the second named defendant to PTSBF "in connection with the provision of credit and/or banking facilities or other accommodation to H.B. Dennis Motors Ltd. It is the second named defendant's position that the said consent to assign all transfers provided solely on the basis of representations made by Alan McGuckian, a servant or agent of PTSBF. This named individual whom the second named defendant will maintain misrepresented the necessity and basis for requesting the said consent is a person whose evidence will be required and tested in plenary hearings should the court grant leave to defend the within proceedings. The second named defendant is entitled to full information in relation to the provision of personal guarantees to a non - party, which the plaintiffs sought to rely on, on the face of the summary summons.

(iii) PTSBF misrepresented that the purpose of the subject loan was to regularise a long term lending relationship between PTSBF and the first named defendant. The two purposes of the subject loan were to consolidate several loans so they could be more easily sold as a package and to seek enforcement as against the second named defendant. The demand letters being relied upon by the plaintiff in respect of the second named defendant were not received by him.

(iv) In "consolidating" the loans in respect of the first named defendant it is noteworthy that the subject loan expressly provides that PTSBF was free to assign it to any other entity without the consent of the borrower.

(v) The plaintiff's case is that PTSBF loaned money to the first named defendant, the primary borrower, and that it obtained guarantees from the second named defendant in relation to these loans. His case is that the primary borrower defaulted and PTSBF decided to sell those defaulting loans which it did to the plaintiff. However, there was clearly a problem, mainly the loans were worth nothing when the primary borrower was insolvent and incapable of paying them back, the only asset held by PTSBF worth anything were the second named defendant's personal guarantees. These could not be sold without the second named defendant's written consent.

45. The plaintiff's case is that the second named defendant freely consented to the assignment of his personal guarantees to the plaintiff. The only facility that the assignment ought to be provided but that it could be enforced against him. That transfer is the bedrock of the plaintiff's stated case.

46. Furthermore, it is submitted that they fundamentally altered the contracts in respect of PTSBF and ultimately the plaintiff and the second named defendant received no consideration for this amendment to his contract.

Decision of the court in respect of the claim against Peter Dennis (2015 1767 S)

47. The second named defendant was an experienced businessman and was also a director of H.B. Dennis Motors (Fairview) Ltd., the first named defendant in these proceedings. What is clear from the documentation in the case is that the directors of H.B. Dennis Motors (Fairview) Ltd. agreed that it was in the best interests of the company that the credit facility up to a maximum €391,000 in the case of a Chattel Mortgage facility could be accepted. It was also clear by the letter dated the 4th July 2008 that the security required was inter alia a personal guarantee of Peter Dennis. This decision of the company was dated the 7th July 2008, and the Memorandum of Acceptance indicated as follows: -

"We hereby accept the foregoing terms and conditions of the facility on behalf of H.B. Dennis Motors (Fairview) Ltd. and acknowledge that this letter supersedes all previous letters in relation to the facility".

The next document is a guarantee which is signed by Peter Dennis which is dated the 7th July 2008 and it was agreed: -

"In consideration of PTSBF granting or continuing to make available credit and/or banking facilities and/or other accommodation to H.B. Dennis (Fairview) Ltd. the guarantor irrevocably and unconditionally guarantees on demand to pay PTSBF all sums of money due under the attached facility letter dated the 4th July 2008".

48. On the 26th May 2010 PTSBF stated "following on from our negotiations" which has not been denied by the second named defendant, he was a director of the first named defendant, a facility in the amount of €1,641,314 was to be used to pay off the facilities including the payment of sold vehicles in the sum of €1,348,529. Among the securities required was a personal guarantee of Peter Dennis. Again, on the 9th June 2010, at a meeting of the directors of the above company, it was agreed that in the best interest of the company the said credit facilities should be accepted and it was resolved that Peter Dennis was authorised to complete the form of acceptance and this was signed by Peter Dennis. The guarantee in respect of the 9th June 2010 was in consideration of PTSBF granting or continuing to make available credit and other contract lease facilities and this was signed by Peter Dennis on the 9th June 2010. Further, on the 22nd October, Peter Dennis irrevocably consented to the assignment or transfer of the benefit of the guarantee: -

(i) By PTSBF to any other person including a company (as assignee).

(ii) By an assignee and any subsequent assignees to any other person including a company.

The second named defendant claimed that is a misrepresentation in relation to the nature of this consent, but it is clear to this Court that there must well be an allegation of misrepresentation.

49. The Court accepts the principles applied by McKechnie J. in *Harrisrange Ltd v. Duncan* and on the facts of the case before me, the court adopts the decision of Baker J. in *ACC Loan Management Ltd. v. Dolan*, previously cited, in which she referred to the earlier decision of Charleton J. in *NAMA v. Barker* where he said: -

"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. Where a case is based on documents, a defendant must be in a position to show that the defence which they seek to make is not totally undermined by the correspondence between the parties."

50. This is such a case, and this case is based on documents.

51. When PTSBF sold its rights, titles, interests and benefits to the plaintiff, the second named defendant was written to at his home address at 114, Howth Road, Clontarf, Dublin 3 and in respect of both loans he never sought to raise any issues which are now the subject matter of purported defences.

52. When FCF wrote to both the secretary of H.B. Dennis Motors (Fairview) Ltd. by way of letter of demand, and to Mr. Dennis as guarantor, and a reference made to the 9th June 2010 and 17th July 2008, formal demand was made for the amount outstanding on the loan which was guaranteed.

53. It is also clear that the references in the affidavit of Peter Dennis to Spinnaker Securitisation was irrelevant and in the view of the court, the attempt to add an amount of confusion to the issues before the court. It is clear that the first named company consented to judgment in the sum of €2,086,636.67 on the 17th November 2009.

54. In all the circumstances of the case, the court will award summary judgment to the plaintiff in the sum of €1,568,560.89.

Deutsche Bank AG v. H.B. Dennis Motors Ltd. and John Dennis

55. The Court will now consider the case against John Dennis, which by notice of motion dated the 17th November 2017 sought liberty to enter final judgment as against the first named defendant in the sum of €1,195,756.23 and a similar sum against the second named defendant. Again the notice of motion was grounded on the affidavit of Martin Leonard.

56. In his affidavit, he indicated that on the 10th October 2011, PTSBF offered to advance to the first named defendant the sum of €1,234,286. As part of the security required a personal guarantee of John Dennis was sought and noted that this was already held under various all sums due guarantees dated the 3rd February 2006, the 8th August 2007, the 20th June 2006, and the 22nd December 2008. Also, it is clear from the terms of the letter of offer that PTSBF without the consent of the borrower granted participation in, assign, transfer or otherwise dispose of the whole or any part or parts of its rights benefits and obligations in respect of the facility.

57. An extract from minutes of the meetings of the directors at H.B. Dennis Motors Ltd. noted that it was agreed that it was in the best interest of the company that the said credit facility should be accepted and it was resolved that John Dennis was authorised to complete the formal acceptance of the said letter of offer. This was signed by John Dennis and the Memorandum of Acceptance of the agreement was also signed by John Dennis and the guarantee was duly signed by John Dennis. The Court notes again at para. 9 which includes the following quote: -

" . . . PTSBF shall, upon prior written notice to the guarantor, be entitled to assign the benefit of this guarantee or any part thereof to any subsidiary of any associated company of PTSBF or any other company with the prior written consent of the guarantor and the guarantee was duly signed by John Dennis on the 8th August 2007."

58. By letter dated the 22nd October 2012, Mr. Dennis as guarantor referred to the guarantee and *irrevocably* consented to the assignment and transfer of the benefit of the guarantees (i) by PTSBF to any other person including a company (as assignee) and (ii) by an assignee and any subsequent assignees to any other person including a company. Mr. Leonard then refers to the resolution of PTSBF to transfer the debt to the plaintiffs, and by letter dated the 24th December 2012, Mr. Dennis was written to at 128, Castle Avenue, Clontarf, Dublin 3 in relation to the loan agreements. A formal demand was made to the secretary of H.B. Dennis Motors Ltd. and in a letter dated the 31st July 2014, and by letter dated the 5th August 2014, Mr. John Dennis was written to, care of H.B. Dennis Motors Ltd., Airside Motor Park, Swords Co. Dublin. The letter was sent to John Dennis at the same address by Bloom Solicitors on behalf of the plaintiffs.

59. Again, Mr. John Dennis states that the subject loan was for the purpose of regularising the long-time lending relationship between PTSBF and the first named defendant and that this was a clear message of representation.

60. He also advises that he is satisfied that the plaintiff cannot claim that the subject loan dated the 10th October for €1,234,286 can be secured in part or in full by the personal guarantee which predated the subject loan by more than four years.

61. Before proceeding any further, the Court notes that it is quite clear that the plaintiffs are lacking in their proofs in respect of two of the guarantees. The court refers to the letter signed by John Dennis of the 22nd October 2012 consenting to the assignment to transfer.

62. Again, there is a reference to the Spinnaker securitization. The Court believes they took no part in the subject loan, however the Court does note that the following personal guarantees were not produced before the Court: -

(i) Personal guarantee dated 28th June 2008.

(ii) Personal guarantee dated 22nd December 2008

The only guarantees that are produced are one dated the 3rd February 2006 and the other dated the 8th August 2007.

63. In all the circumstances the Court is not satisfied to grant summary judgment against John Dennis in respect of the failure to produce these personal guarantees. The Court has clearly indicated that this case is based on documents.

64. The Court will direct that this matter be heard by plenary hearing.

Decision of the court

65. The Court is satisfied to grant summary judgment against Peter Dennis in the proceedings 2015 1767 S, but refuses to grant summary judgment in relation to John Dennis in the proceedings 2017 251 S, and will direct that it be heard by plenary hearing.