Neutral Citation [2016] IEHC 629

THE HIGH COURT

COMMERCIAL

[2016 No. 1000 S.]

BETWEEN

ALLIED IRISH BANK PLC

AIB MORTGAGE BANK

PLAINTIFFS

AND

BRONWYN MCGOURAN (OTHERWISE KNOWN AS BRONWEN MCGOURAN)

TANYA MCGOURAN (OTHERWISE KNOWN AS TANYJIA MCGOURAN)

JOSEPH MCGOURAN AND ANN MCGOURAN

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 10th day of November, 2016

1. This is an application by the plaintiffs for summary judgment against each of the defendants. The claims arise as follows. Between 2001 and 2013, the first named plaintiff ("the Bank") made nine facilities available to the first and second named defendants, who are sisters. The first three facilities were to both the first and second named defendants on a joint and several basis (loans 1,2 and 3), loans 4, 5 and 6 were advanced solely to the first named defendant and loans 7, 8 and 9 were advanced solely to the second named defendant. The Bank assigned to the second named plaintiff, a company in the AIB group of companies, all its interests in loans 1, 2, 4 and 7 on the 8th of February, 2006, pursuant to S.I. 60 of 2006.

2. There is no dispute that the first and second named defendants entered into the various agreements, that the monies were advanced, that there was default in respect of each of the facilities and that the sums due were demanded by the plaintiffs. There is no dispute raised in regard to the sums claimed in respect of each facility. After the institution of these proceedings but before the hearing of the motion for judgment, facility 4 was repaid in full by the first named defendant. The first and second named defendants argue that they are not liable to the Bank in respect of loans 5 and 8 and that they should be allowed to defend these two claims. In this judgment, these two facilities are referred to as the term facilities.

3. By letter dated 2nd June, 2010, the Bank offered the first named defendant a term loan facility in the amount of €457,000 for a period of one year. The reference was 931020 37127687. The purpose of the facility was "*restructure of loan originally sanctioned to assist with the purchase of property at Hillcourt Park, Glenageary and property investment in Spain.*" The security for the loan was described as,

> *"the security, which will extend to cover all your present and future obligations to the Bank, including these facilities, will comprise the undernoted:*
>
> *- AIB Bank personal guarantee from Ann McGouran for EUR457,000 for the obligations of Bronwyn McGouran restricted to loan facility 931020 37127687 (Supported)*
>
> *- AIB Bank personal guarantee from Joseph McGouran for EUR457,000 for the obligations of Bronwyn McGouran restricted to loan facility 931020 37127687 (Supported)"*

4. The first named defendant accepted the letter of offer by signing it on 4th June, 2010, and her signature was witnessed by her solicitor on the same date. Included in the letter of loan offer was a page headed "Information about your distance contract. A paragraph headed "Your right to cancel" stated:

> *"You have the right to cancel a loan….(the agreement) with us within 14 days of your receiving a copy of the signed Credit Agreement (in the case of a loan) ….. by writing to the Manager of your AIB Branch quoting details of the agreement."*

5. The first named defendant did not repay the loan within the 12month period of the term. By letter dated 14th November, 2011, the bank offered the first named defendant a facility the purpose of which was "*extension to term of existing loan*". The reference on the facility letter was 93-10-20 37127687 10205611. The security provisions were identical to those set out in the letter of 2010. The expiry date for the agreement was 6th September, 2012. The first named defendant signed the letter on 23rd December, 2011, by way of acceptance of the facility and her signature was witnessed by her solicitor on the same date.

6. The loan was not repaid prior to the expiry date and the bank issued a further letter dated the 18th September, 2012, to refinance the existing loan account 93-10-20 37127687. The security provisions remained unchanged and the reference remained the same. The first named defendant did not accept this facility.

7. A letter of offer was also sent to the second named defendant on 2nd June, 2010, bearing reference 93-10-20 37143106. The purpose of this term facility was "*restructure of loan originally to assist in the purchase of property at St. Anne's, Tubbermore Road, Dalkey and property investment in Spain.*" The facility was for €430,000 for a period of one year. The security was to extend to cover all her present and future obligations to the bank including these facilities and to comprise

> *"AIB Bank Personal Guarantee from Ann McGouran for EUR430,000 for the obligations of Tanya McGouran restricted to loan 931020 37143106. (Supported)*
>
> *AIB Bank Personal Guarantee from Joseph McGouran for Eur 430,000 for the obligations of Tanya McGouran restricted to*

loan facility 931020 37143106. (Supported)"

The second named defendant accepted the facility by signing it on 4th June, 2010, and her signature was witnessed by her solicitor. The documentation contained an identical statement regarding her right to cancel the loan within 14 days as appeared in the letter furnished to the first named defendant.

8. The facility offered by the Bank to the second named defendant by letter dated 2nd June, 2010, expired on 2nd June, 2011, without the borrower having repaid the sums due under the facility. By letter dated 14th October, 2011, the Bank offered to extend the term of the existing loan to 6th September, 2012. The reference was 93-10-20 37143106 10205611. The security required was not altered. The second named defendant accepted the offer of the 14th October, 2011, by her signature on 23rd December, 2011. Her solicitor witnessed her signature.

9. The agreement expired on 6th September, 2012, without the second named defendant having repaid the monies advanced pursuant to the facility. The Bank offered to refinance the existing loan account 931020 37143106 by a letter of offer dated 20th September, 2012. However the second named defendant did not accept this offer.

10. Negotiations between the plaintiffs and the first and second named defendants and their financial advisor in relation to their liabilities to the plaintiffs ultimately proved unsuccessful. Each of the first and second named defendants were in default in repaying the term facilities and the other facilities the subject of these proceedings. By letter dated 5th January, 2016, solicitors for the Bank wrote to the first named defendant in respect of a housing loan facility; account number 37127687, noting that letters of demand dated 27th August, 2014, and 9th July, 2015, for repayment of the amount outstanding had been made but the facility remained outstanding. They informed the first named defendant that as of the close of business on 3rd January, 2016, the aggregate sum of €490,199.15 was due and owing under the facility and called upon her forthwith to pay the sum together with additional interest accruing at a rate of €160.95 per day.

11. Likewise on 5th January, 2016, they wrote to the second named defendant in respect of her housing loan facility; account number 37143106. Despite demands, the facility remained outstanding and as of 3rd January, 2016, the aggregate sum due under the facility was €841,010.73. Interest continued to accrue at a rate of €157.93 per day. Each of the defendants was called upon to repay the amount outstanding and they failed to do so.

12. The proceedings issued on 17th June, 2016, and by notice of motion returnable for 25th July, 2016, the plaintiffs applied to have the matter entered into the Commercial list of the High Court and sought summary judgment against the defendants herein. The proceedings were defended and the first named defendant swore a replying affidavit on behalf of herself and the second named defendant on 10th September, 2016.

Defence of the first and second named defendants

13. The first and second named defendants do not dispute their liabilities in respect of loans 1,2,3,6,7 and 9. Loan 4 was repaid in full after the institution of these proceedings from the proceeds of sale of the secured property. They say that they have an arguable defence in respect of the term facilities and should be given leave to defend the proceedings. They submit that they are consumers within the meaning of the Consumer Credit Act, 1995 and that s.30 of the Act applies to the two facilities but the Bank failed to comply with the requirements of the section in two respects. They argue that the failure to comply with these requirements renders the loans unenforceable. (Section 38 of the Act)

14. At para. 14 of her affidavit the first named defendant baldly asserts that "*both of us were, in fact, "consumers" within the meaning of the Consumer Credit Act, 1995."* She states that the Bank operated on the assumption that the first and second named defendants were acting as consumers and that the term facilities came within the definition of a "housing loan" within the meaning of the Consumer Credit Act, 1995. She states that the term facilities did not fall within the definition of a housing loan as the security for the loans did not include any mortgage or charge over any house owned by the borrower in respect of each of the loans.

15. Response of the Bank

Counsel for the Bank submits that the mere assertion by the first and second named defendants that they are consumers within the meaning of the Act of 1995, is insufficient to resist the Bank's application for summary judgment. He submits that in fact they are not consumers within the meaning of the Act. The term facilities were to replace existing bridging facilities the first and second named defendants had with the Bank. This was accepted by the first named defendant in her affidavit. He submits that therefore, neither of them could be acting as consumers in respect of the term facilities. He points to the fact that the express purpose of each of the 2010 facilities was to restructure the original loans granted separately to the first and second named defendants to purchase Hillcourt Park, Glenageary and St. Anne's, Tubbermore Rd. respectively, "*and property investment in Spain*." He submits that on its face the term facilities were for the purpose *inter alia* of property investment in Spain. He relies upon the conclusion of Kelly J. in *Allied Irish Bank plc v. Higgins & Ors*. [2010] IEHC 219, that a borrower who borrows money with a view to investing in property and its development for profit is engaged in business and the Consumer Credit Act has no application to such a borrower. He therefore submits that the Act does not apply to these defendants.

16. In response, counsel for the first and second named defendants argues that the purpose of each of the facilities was a dual purpose. The first and second named defendants argue that they are consumers within the meaning of the Act and therefore the matter should be referred to plenary hearing.

Discussion

17. In *AIB v. Higgins* [2010] IEHC 219, Kelly J., held that the subjective view of the Bank in relation to the facility, whether right or wrong, was of no relevance. Therefore the defendants' argument based upon the attitude of the Bank to the term facilities is of no assistance to them in this case.

18. Mr Justice Kelly also held that it was for the defendants to demonstrate that they borrowed as consumers in order to be beneficiaries of s.30 of the Consumer Credit Act, 1995. He quoted with approval the decision of Hardiman J. in *Aer Rianta c.p.t v. Ryanair Ltd.* [2001] 4 I.R. 607 where Hardiman J. in turn cited with approval the observations in *National Westminster Bank v. Daniel* [1993] 1 W.L.R. 1453:

> *"...the mere assertion in an affidavit of a given situation which is to be the basis of a defence did not of itself provide leave to defend; the court had to look at the whole situation to see whether the defendant had satisfied the court that there is a fair or reasonable probability of the defendant's having a real or bona fide defence."*

19. It is thus clear that the mere assertion that the first and second named defendants are in fact consumers is not sufficient on its

own to establish that the defendants have raised an arguable defence and the proceedings should be referred to plenary hearing.

20. Thus, the first two grounds advanced by these defendants must be rejected. I turn then to see whether the other grounds advanced on behalf of the defendants can assist their argument.

21. In *AIB v. Higgins,* Kelly J. construed the word consumer in the Act of 1995. Consumer is defined in the Act as meaning a natural person acting outside the person's business. The term "business" is defined as including "trade and profession". A credit agreement is "*an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a cash loan or other similar financial accommodation".*

22. He noted the observations of the European Court of Justice in the case of *Benincasa v. Dentalkit* (Case 269/95) [1997] E.C.R. 337. In the course of its judgment, that court stated:-

> *"15. As far as the concept of 'consumer' is concerned, the first paragraph of Article 13 of the Convention defines a 'consumer as a person acting 'for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law,* ***it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities....***
>
> ***16. It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned.*** *As the Advocate General rightly observed in point 38 of his Opinion, the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.*
>
> *17. Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically.* ***The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity,*** *even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character." (emphasis added).*

23. It seems to me clear that the Court of Justice envisages that each individual contract must be assessed to ascertain whether or not it was concluded for the purpose of satisfying the individual's own needs in terms of private consumption. The concept of a consumer is one which must be strictly construed. This does not admit the possibility of a dual purpose contract coming within the ambit of the protections afforded to consumers by the Directive. It would involve accepting that a person could at one and the same time and in one contract be entitled to the protection of the Directive as both satisfying their individual private needs and acting in their trade or profession. This is inconsistent with a strict construction of the concept of a consumer. If a person wishes to maximise the protection afforded to him by the Act and the Directive it is open to the person to separate his business or trade dealings from his purely personal dealings. The provisions do not in my opinion apply to dual purpose contracts as argued by counsel (even assuming for the purposes of the argument that the term facilities were dual purpose facilities). Such a construction is without authority. It is inconsistent with the reasoning of the judgment of the Court of Justice. It introduces uncertainty into the application of the Act and the Directive and is not necessary to give effect to the protections to be afforded to consumers.

24. I am, therefore, satisfied that the assertion by the first and second named defendants that they are "*consumers*" which is contained in the affidavit of the first named defendant is not sufficient to warrant this case being adjourned to plenary hearing. No arguable defence or triable issue has been identified by the defendants on this issue.

25. If I am incorrect in my conclusion that the first and second named defendants are not consumers within the meaning of the Act in respect of the term facilities, I am satisfied that, in fact, the Bank has complied with the requirements of s. 30(1) and (2) of the Act of 1995. Therefore the first and second named defendants have no defence to the claim in respect of the term facilities base upon section 38 of the Act. Section 30 of the Act provides as follows:

> *"30.—(1) A credit agreement and any contract of guarantee relating thereto shall be made in writing and signed by the consumer and by or on behalf of all other parties to the agreement, and—*
>
> *(a) a copy of the agreement shall be—*
> *(i) handed personally to the consumer upon the making of the agreement, or*
>
> *(ii) delivered or sent to the consumer by the creditor within 10 days of the making of the agreement, and*
>
> *(b) in the case of any contract of guarantee relating to the agreement, a copy of the guarantee and the agreement shall be—*
> *(i) handed personally to the guarantor upon the making of the contract, or*
>
> *(ii) sent within 10 days of the making of any contract by the creditor to the guarantor.*
>
> *(2) A credit agreement shall contain a statement in respect of the cooling-off period that the consumer—*
>
> *(a) has a right to withdraw from the agreement without penalty if the consumer gives written notice to this effect to the creditor within a period of 10 days of the date of receipt by the consumer of a copy of the agreement, or*
>
> *(b) may indicate that he does not wish to exercise this right by signing a statement to this effect, this signature to be separate from, and additional to, the consumer's signature in relation to any of the terms of the agreement."*

26. It is quite clear that the Bank afforded each of the first and second named defendants a fourteen day cooling off period in respect of each of the transactions as I have set out above. The requirement of the Act is that a period of ten days be afforded. Mr. Philip Butler on behalf of the Bank confirmed that this cooling off period was afforded to the first and second named defendants. This was not contested by them. Therefore, any argument that the notice included in the contractual documentation did not, in fact, apply to the transaction is unsustainable. The Bank complied with the terms of section 30(2) of the Act in relation to the term

facilities.

27. Did it comply with the requirements of section 30(1) of the Act? By letter dated 3rd June, 2010, Mr. Joe Lyons, Creditor Manager of the Bank, wrote to the solicitors for the defendants enclosing documentation for completion and return. He enclosed the letters of offer of 2nd June, 2010, to each of the first and second named defendant executed by the Bank **with a customer copy** to be signed and accepted by the first and second named defendants. On 4th June, 2010, the first and second named defendants each signed the letters of offer directed to them and the executed agreements were duly returned to the Bank. The Bank did not furnish the first and second named defendants with copies of the executed agreements within ten days of 4th June, 2010.

28. Counsel for the first and second named defendants submits that there is thus no evidence before the court that the Bank, in fact, complied with the requirements of section 30(1)(a). There is no evidence that a copy of the agreement signed by the consumer and the Bank was handed personally to the consumer upon the making of the agreement (s. 30(1)(a)(i)) and the creditor (the Bank) did not deliver or send a copy of the agreement to the consumer within ten days of the making of the agreement. The Bank had sent a copy of the agreement to the consumer's solicitor under cover of the letter of 3rd June, 2010, but this was prior to the making of the agreement which was only made when the first and second named defendants accepted the agreement on 4th June, 2010. Counsel submits that the Act requires that the agreement be sent or delivered by the creditor and the Bank could not rely upon the first and second named defendants' solicitors to perform this function.

29. The evidence establishes that the Bank furnished the first and second named defendants' solicitors with a customer copy of the agreements. The agreements only came into effect when the first and second named defendants executed the documents. Their signatures were witnessed by their solicitors. It is, therefore, clear that they were personally handed copies of the agreement. The fact that this was by their solicitor rather than by the Bank does not mean that there was a failure to comply with the provisions of s. 30(1)(a)(i) of the Act of 1995. The section requires that the consumer be handed a copy of the executed agreement but it does not specify who should furnish the agreement to the consumer, in contrast to subparagraph (ii). It is important to note that the first named defendant herself exhibited her own copies of these agreements in her replying affidavit; her copies differ in appearance to those exhibited by Mr. Butler on behalf of the Bank. Neither of these defendants stated that they were not handed copies of the agreements, only that the Bank did not send them executed copies of the agreements. Thus, on balance I am satisfied that the evidence shows that there was, in fact, compliance with the provisions of section 30(1)(a)(i). Therefore, the argument that there was a failure to comply with the requirements of s.30(1)(a)(ii), as advanced by counsel, is of no avail to the defendants. I am of the view that the defendants have not raised a triable issue that there was a failure to comply with the requirements of s.30 as there was compliance with s.30(1)(a)(i).

Case against the third and fourth named defendants

30. The third and fourth named defendants are the parents of the first and second named defendants. They have been sued as the guarantors of the liabilities of the first and second named defendants to the plaintiffs. Originally the plaintiffs sued the third and fourth named defendants on foot of guarantees entered into in 2005 as well as guarantees entered into in 2010. They now accept that this was in error and that by agreement in 2010, the 2005 guarantees were released. They were replaced by four guarantees executed in 2010 in favour of the Bank. The Bank maintains its case against the third and fourth named defendants pursuant to these guarantees.

31. By an agreement in writing dated 4th June, 2010, the third named defendant guaranteed the liabilities of the first named defendant to the Bank for the sum of €457,000. His solicitor witnessed the execution of the guarantee. Clause 1 of the guarantee provides as follows:

> *"In consideration of the Bank agreeing at my/our request to give time or make or continue advances or otherwise give credit or afford banking facilities for so long as the Bank may think fit to [the first named defendant] (hereinafter called "the Borrower") [the third named defendant] (hereinafter called "the Guarantor") hereby agree to pay and satisfy to the Bank on demand all sums of money which are now or shall at any time hereafter be owing to the Bank anywhere on any account whatsoever..."*

32. Clause 2 provides:

> *"This guarantee... shall be a continuing security... and shall extend to any sum or sums of money which shall from time to time constitute the balance due from the Borrower to the Bank upon any such account as is hereinbefore mentioned."*

33. Clause 6 provides:

> *"The Bank shall be at liberty without obtaining any consent from the guarantor and without thereby affecting its rights or the Guarantor's liability hereunder at any time:-*
>
> > *(i) To determine, enlarge or vary any credit to the borrower;"*

34. On the same day, 4th June, 2010, the fourth named defendant executed a guarantee in identical terms in favour of the Bank in respect of the liabilities of the first named defendant in the amount of €457,000. Her execution of the guarantee was witnessed by her solicitor.

35. Also on 4th June, 2010, the third and fourth named defendants each executed separate guarantees in respect of the liabilities of the second named defendant to the Bank in the sum of €430,000. Likewise, the execution of these guarantees was witnessed by their solicitor. The terms of the guarantees were as set out above.

36. As explained earlier in this judgment, these guarantees were required as security for the term facilities. The term facilities were extended in 2011 by agreement with the first and second named defendants. By letter dated 7th September, 2011, the Bank wrote to the third and fourth named defendants in respect of the first named defendant's facility "*Bronwyn McGouran loan facility 931020 37127687*" in the following terms:

> *"Dear Ms and Mr McGouran,*
>
> *We hold a guarantee from you for the facilities specified above.*
>
> *We would like to notify you that we have agreed with the Borrower to change the terms of the facilities as set out in the enclosed copy of our letter to the Borrower dated 06/09/2011.*

This notice is sent to you in compliance with the Consumer Protection Code."

On the same day they wrote in identical terms in respect of the second named defendant in relation to a facility described as "*Tanya McGouran Loan Facility 931020 37143106*".

37. On 18th September, 2012, the Bank wrote to the third and fourth named defendants separately but in identical terms in respect of the first named defendant. The facility was described as "*Loan Account 931020 37127687*". The text of the letter was identical to that sent on 7th September, 2011 save that the letter enclosed and referred to was dated 18/09/2012. On 20th September, 2012, the Bank wrote to the third and fourth named defendants in respect of the second named defendant and the facility was described as "*Loan Account 931020 37143106*". The letter was in identical terms save that it referred to an enclosed copy of a letter to the borrower dated 20/09/2012.

38. As already set out, by letter of demand dated 9th July, 2015, the Bank demanded repayment of the term facilities from the first and second named defendants. By letter dated 20th August, 2015, the Bank's solicitors wrote four separate letters to the third and fourth named defendants in respect of their guarantees of the liabilities of the first and second named defendants. The letters were sent to 9, Hillcourt Park, Glenageary, Co. Dublin. In relation to the first named defendant, the letter referred to a housing loan facility – Account Number: 37127687 and stated:

> *"By letter of sanction dated 14[th] November 2011, the Bank made a facility available to the* ***B****orrower and we are instructed that you executed a personal letter of guarantee in relation to this facility." The letter then demanded payment of the guaranteed sum of €457,000.*

39. The letters of demand in respect of the liabilities of the second named defendant referred to a housing loan facility "*Account Number: 37143106*". The letters stated:

> *"By letter of sanction dated 14th October 2011, the Bank made a facility available to the Borrower and we are instructed you executed a personal letter of guarantee in relation to this facility."*

Thereafter it demanded repayment of the full sum guaranteed of €430,000. The defendants did not pay the sums demanded by the Bank and these proceedings were instituted against the third and fourth named defendants seeking judgment on foot of the guarantees together with continuing interest and costs.

The defence of the third and fourth named defendants

40. The third and fourth named defendants say that they have a defence to the claims of the Bank and that the matter should be adjourned to plenary hearing on the following grounds. Firstly, they say that no proper demand for repayment was made as (1) it was not sent to their residence and (2) it was based on agreements of November, 2011. They say that the guarantees relate to the facilities of the 4th June, 2010, and that they did not guarantee liabilities based upon the facilities of 2011. The Bank is suing upon the 2011 agreements in these proceedings and the demand was in respect of the 2011 agreements and therefore they state they have an arguable defence to the claim in these proceedings.

41. They also argue that the Bank had no right to vary the terms of the 2010 agreements and that as it did so in 2011 they are released from the guarantees. They further say that the Bank did not inform them of the variation to the terms of the primary liabilities and this is a further reason that they are released from the guarantees.

42. They also rely upon the defence advanced by the first and second named defendants on the basis of an alleged failure to comply with the requirements of the Consumer Credit Act, 1995.

43. The third and fourth named defendants argue that "*the written guarantee was intended to cover the new term loan arrangements arranged in 2010 only*." They say the guarantee should have been a specific guarantee limited to that facility and that the wording of the guarantee "*was not appropriate in the circumstances*". They say that the provisions of the term loan facility issued by the Bank on 2nd June, 2010, states that the security to be provided by way of guarantee provided by the third and fourth named defendants was to be restricted to the particular loans set out in the letter of offers.

44. They submit that each of these points raise triable issues and therefore the proceedings should be adjourned for plenary hearing.

Response of the Bank

45. The Bank submits that the starting point should be the terms of the guarantees themselves. They were executed by the third and fourth named defendants and their execution was witnessed by their solicitor. Their solicitor was acting for all of the defendants in these proceedings and he was familiar with the overall transaction. Specifically, the solicitor had the letters of offer dated 2nd June, 2010 addressed to the first and second named defendants as well as the draft guarantees provided by the Bank. In the circumstances counsel submits that the Bank is entitled to rely upon the terms of the guarantees. It says it is clear from Clause 1 that these were all sums due guarantees limited only as to the monetary amount guaranteed in respect of the first and second named defendants. The Bank submits that this clause precludes the third and fourth named defendants from arguing that the guarantees were specific guarantees confined to the facilities offered by the letters of 2nd June, 2010, to the first and second named defendants.

46. Counsel points to the fact that they did not assert that they negotiated a specific guarantee with the Bank and they did not assert that they relied upon the terms of the letters of offer when they entered into the guarantees. They stated that they believed that the written guarantee was intended to cover the new term loan arrangements arranged in 2010 only. This was contrary to the express wording of the terms of the guarantees and they had the benefit of legal advice prior to entering into the guarantees.

47. The Bank states that even if the guarantees were to be restricted to the loans 931020 37143106, (which the Bank does not accept) they are still liable to pay the sums claimed in the proceedings pursuant to the guarantees. This is because the letters of 2011 expressly extended the particular facility and therefore there was only one facility which they had guaranteed and not two as they sought to argue in court. This is clear from the text of the letters of 2011 extending the 2010 facilities. Therefore, as a matter of fact, the actual claim in these proceedings is restricted to the loan accounts identified in the two letters of offer of 2nd June, 2010. Therefore the argument advanced that the guarantees should not have been all sums due guarantees is of no avail to them on the facts of this case.

48. It is submitted that it is not open to the third and fourth named defendants to now argue that the Bank could not vary the terms of the facilities or was obliged to notify them in advance of so doing in order that they would remain bound by their respective

guarantees. This argument was precluded by Clause 6 of the guarantees. Clause 6 expressly allows the Bank to vary any credit to the borrower without obtaining any consent from the guarantor or thereby affecting the Bank's rights or the guarantor's liability under the guarantee at any time.

49. The Bank submits that it is perfectly correct to sue upon the term facility letters of 2011 and the demand, referring to the term facility letters of 2011, was correct. The agreements of 2011 extended the 2010 facilities and thus were the last operative agreements. The guarantees were continuing guarantees (as is set out in Clause 2) and were all sums due guarantees (as is set out in Clause 1). Even if they were restricted to the loans identified in the letters of offer of 2nd June, 2010, these were the same facilities referred to in the 2011 agreements and therefore there was no mistake in either the letters of demand or the proceedings as instituted.

50. It is submitted that the demands of 20th August, 2015, were valid demands and it does not matter that they were sent to an address other than their residence. There was no requirement that the demand be sent to their residence. It is submitted that this is not a matter which has been raised at any time prior to the hearing. The third and fourth named defendants did not state that they did not receive the demand. No issue in relation to the demand was raised at all by way of a defence in the affidavit filed on behalf of the third and fourth named defendants. There was no triable issue raised in respect of this point either.

51. Finally, insofar as the third and fourth named defendants state they are not liable on foot of the guarantees because the first and second named defendants were not liable pursuant to s. 38 of the Consumer Credit Act, 1995, this is incorrect for the reasons advanced in relation to the arguments in respect of the defence raised by the first and second named defendants.

Discussion

52. The starting point must be the guarantees themselves. The third and fourth named defendants do not deny that they executed the guarantees or that they had the benefit of legal advice and indeed their execution of the guarantees was witnessed by their solicitor. Clause 1 expressly states that the guarantee is in respect of "all sums due". It is a continuing guarantee (Clause 2). Therefore, on its face, it is not a specific guarantee, as was contended by the third and fourth named defendants. They do not make the case that they agreed with the Bank to provide a specific guarantee rather than an all sums due guarantee and that therefore the documentation did not reflect the terms reached between the parties. They do not state that the Bank represented to them that their guarantees were to be specific guarantees. They state, on the basis of the Bank's statement in the letters offer of 2nd June, 2010, that the Bank only required a specific guarantee, and not an all sums due guarantee. This is based upon their construction of the security as being restricted to the identified loan account.

53. This is rejected by Mr. Philip Butler on behalf of the Bank. No corroborating document from the Bank to either the third or fourth named defendants has been produced to support this construction of the guarantee which the Bank required from the third and fourth named defendants in the letter of loan offer addressed to the first and second named defendants. There is no evidence to indicate that the Bank did not seek guarantees in the terms of the drafts sent to the third and fourth named defendants' solicitor for acceptance and execution. In my opinion, the Bank sent out guarantees in the terms it required from the third and fourth named defendants and these terms were accepted by the third and fourth named defendants without demur, and were executed in the presence of their solicitor. Therefore this argument on behalf of the defendants must be rejected.

54. If I am incorrect in this conclusion, the averment by the third named defendant that he and his wife believed that the guarantees were restricted to the particular loan account, on the facts of this case, makes no difference to the Bank's right to recover judgment against them in these proceedings. It is clear from the documentation that the facilities were extended in 2011. That means that they remain the same facility which, on their own case, the third and fourth named defendants agreed to guarantee to the Bank on 4th June, 2010. Thus, even if the guarantees were not all sums due guarantees, they are continuing guarantees in respect of facilities which still remain outstanding from 2010. These defendants do not deny that the guarantees were continuing guarantees.

55. I also find no merit in a defence based upon the fact that the terms of the 2010 facilities were varied in 2011. Clause 6 of the guarantees expressly acknowledges that the Bank may vary the terms upon which the borrowers borrow money from the Bank and it is not obliged to obtain the consent of the guarantors to any such variation and indeed, is not obliged to notify the guarantors of any such variation. In point of fact, the Bank did notify the third and fourth named defendants of the variations as I have set out above. It is noteworthy that the third and fourth named defendants made no response to these letters and in particular did not object to the variations or claim that they were in any way discharged from their liabilities under the guarantees.

56. I do not accept that the third and fourth named defendants have raised a triable issue in relation to the demands made by the Bank on the third and fourth named defendants on 20th August, 2015. The guarantees provide that service upon the guarantor at his or her residence or place of business shall be deemed sufficient service. It is not required that they be served at that address. The demand was served upon what might be described as a family address. Mr Butler on behalf of the Bank exhibits 14 letters addressed to the third and fourth named defendants at 9 Hillcourt Park in 2014 and there was no indication that these were not received or that either the third or fourth named defendants objected to the use of this address for the correspondence. The crucial point is that the third and fourth named defendants received the demand. In the affidavit of the third named defendant sworn on behalf of himself and his wife he made no complaint regarding receipt of the demand. Specifically, he did not state that it was not received and his affidavit is completely silent on the subject of the demand.

57. Secondly, it is argued that the demand was incorrect in that it referred to the agreements of November, 2011 rather than the original term facilities dated 2nd June, 2010. It is clear that the letters of November, 2011 extended and varied the facilities granted in June, 2010. The first and second named defendants were only in default once there had been a failure to repay the sums advanced in accordance with the extension granted by the letters of November, 2011. While it might have been possible to demand repayment in respect of the agreement of June, 2010 as amended and extended by the agreements of 2011, it does not follow that demanding payment pursuant to the agreements of November, 2011 was incorrect. Certainly, I am not of the opinion that it could give rise to an arguable defence in this case.

58. Finally, as I have rejected the defence of the first and second named defendants based upon s.38 of the Consumer Credit Act 1995, it follows that this defence is likewise not opened to the third and fourth named defendants.

59. Thus the third and fourth named defendants have not established an arguable ground of defence to the Bank's claim and there is no reason to remit the matter to plenary hearing.

Conclusion

60. The Bank is entitled to judgment against each of the defendants in accordance with the rulings in this judgment. I direct that the Bank file an affidavit setting out the sums due by each of the defendants in accordance with my findings and I adjourn the matter for

one week to enable this to be done. Judgment will then be entered in accordance with the updated affidavit against each of the defendants.