THE HIGH COURT

COMMERCIAL

[2015 No. 46S]

BETWEEN

THE GOVERNOR & COMPANY OF THE BANKOF IRELAND

PLAINTIFF

-AND-

MARK GORDON

DEFENDANT

JUDGMENT of Mr. Justice Fullam delivered the 27th day of January 2016

1. This is an application by Bank of Ireland PLC seeking summary judgment against the Defendant on foot of his guarantees of borrowings of VFM Healthcare (Ireland) Ltd (the Company) in the sum of €1.512m.

The Factual Background

2. Mr Mark Gordon, the Defendant, was previously the principal shareholder and director of the Company. The Company was incorporated in 2009 and carried out its business as a private hospital in Mullingar, Co. Meath. Mr Gordon has considerable experience in managing healthcare facilities in the United Kingdom. In his capacity as principal shareholder and director, the Defendant guaranteed the borrowings of the Company. The Plaintiff bank is now seeking to enforce these guarantees. The Defendant disputes the enforcement of the guarantees on a number of grounds. Essentially it is his case that the guarantees are limited to his business assets/borrowings within the Company i.e. the private hospital St Francis. The Defendant further contends that the Plaintiff took over financial control of the Company and should bear some responsibility for the company's poor financial performance and resulting increased level of indebtedness.

3. The Defendant was principal shareholder and director of the Company at the relevant dates. The sum claimed by the Plaintiff is the limit of liabilities under two guarantees. The first guarantee was executed on 7th January, 2011 with a limit of €1,000,000.00. This was an "all sums" guarantee. The second guarantee was executed on 4th July, 2012 having a limit of €512,000.00. This guarantee was in similar terms to the first and followed a loan offer to the Company on 3rd of July 2012 composing a package of six facilities totalling €4,884,652.90.

4. Some time thereafter, the Company began to encounter financial difficulties. In October or November 2012, the Plaintiff, with the consent of the Defendant, appointed consultancy firm BDO to review certain financial operations of the Company. On 19th February, 2013 an increase of an overdraft facility from €200,000 to €700,000 was made available to the Company. The original facility letter was dated 3rd July, 2012. This was followed by a third facility letter of the 3rd April, 2013 in which the Company obtained a temporary increase of the overdraft facility to €950,000. This increase was to be until the 1st June, 2013, at which date it was to revert back to €200,000.

5. In September 2013, the Defendant became ill. As a result of this, the Plaintiff appointed a new interim management team. During this time, the Steinberg Trust took a 10% equity stake in the Company for an investment of €950,000. In December of that year, the Steinberg Trust invested a further €350,000 working capital for the Company, taking 50.1% of the voting rights while maintaining 10% of the Company's shareholding. Following this, the Steinberg Trust appointed two non-executive directors on 3rd April, 2014. At this point, the Defendant resigned as a director of the Company.

6. In April 2014, accountancy firm KPMG were engaged by the Plaintiff to undertake a business review for the Company. On 10th April, 2014, the Plaintiff demanded payment by the Company of €6,028,966.12 on foot of the loan facilities extended to the Company. The Company failed to repay this and thus defaulted on its payment obligations. On 21st April, 2014, Mr Kearney the interim CEO resigned. On 22nd April, 2014, the Plaintiff appointed a Mr Wallace of KPMG as receiver and on 5th June, 2014, the Defendant was made redundant from the Company.

7. In October 2014, it appears that the receiver began to conclude that there would be insufficient realisation of the Company's assets in receivership to discharge the debt owed to the Plaintiff. The Plaintiff avers that it was left with no option but to make a demand on the Defendant on foot of the guarantees. This demand was made on 28th October, 2014. There has so far been a failure to discharge the sum of €1,512,000. The Plaintiff comes to Court seeking a summary judgment against the Defendant for this amount.

Submissions

8. The Defendant has pointed to numerous aspects of the Plaintiff's conduct and communications which he alleges have impacted upon his liability under the guarantees. The first issue is that of the receivership. It is asserted by the Defendant that the Plaintiff is premature in seeking summary judgment as, if the Plaintiff were to await the realisation of the assets in receivership, the debt may be discharged.

9. The Plaintiff does not agree with the Defendant's valuation of the assets. In any event, it is submitted by the Plaintiff that this point is essentially moot. Counsel for the Plaintiff cited *ACC Bank plc v. McEllin & Ors* [2013] IEHC 454 and portions of the 6th edition of Andrews and Millett *'Law of Guarantees'* as authorities for the proposition that there is no obligation that a creditor must enforce rights at any particular time. The Plaintiff also cites Clause 9 of the guarantees which contains words to a similar effect as the position stated in the case law.

10. It is further submitted on behalf of the Defendant that a number of representations by the bank affected the construction of the guarantees. The Defendant has claimed that one can infer that his guarantees were limited in their nature to his business assets, that

is to say the assets in the business of which he was CEO at the time. This is based on a combination of factors, including oral representations made by the bank to him and by taking a pragmatic commercial analysis of the Company and its debt. In particular, the Defendant relies on an email sent by Mr Paddy Leydon on 28th June, 2012, containing the words:

> "Please note for your records that the Letter of Guarantee relates only to your business assets/borrowings i.e. St Francis."

11. The Defendant argues that when considered in light of the context in which it was made, this email has a plain meaning, namely, that recourse on the guarantees was limited to his assets in the business of which he was CEO at the time i.e. his shares. The context is that the finances of the company were very healthy and that the bank's debt position was covered three times over. The Bank knew that a commercial rival was offering to take over the financing of the Company. In light of this, it is alleged that the Plaintiff sought to entice the Defendant into remaining a customer by offering very favourable terms for future financing. It is further alleged that the Plaintiff's represented to the Defendant to the effect that the personal guarantees being sought were merely a perfunctory box ticking exercise and that the guarantees would in fact be limited to his assets in the Company.

12. The Plaintiff states that such communications could not have altered the terms of the guarantees given that it contained, in clause 28, an entire agreement clause which prevents any reliance being made on any representations of the Bank or its agents. It states that

> *"The Guarantors confirm that on entering into this guarantee and the transactions contemplated by this guarantee and the assumption of their obligations hereunder that the Guarantors have not relied and do not rely upon any information or advice provided or any appraisal of investigation effected by the Bank or any of the professional advisors to the Bank."*

13. The Defendant disputes the fact that Clause 28 could amount to an entire agreement clause. The Plaintiff further states that the Defendant appears to be arguing that the correct construction of the first guarantee was retrospectively changed by this 2012 email from Mr Leydon. The Plaintiff submits that this cannot make sense as there were two separate guarantees and the facility letter did not merge the two guarantees. These must be construed at the time the guarantee was made.

14. The final matter in relation to this issue concerns the Plaintiff's contention that the Defendant fails to address why the Bank would only seek guarantees in relation to his business assets. The Plaintiff submits that issues such as the fact that the Company had valuable assets and was profitable might be good reasons why it would not seek a guarantee at all, but did not explain why the bank would only seek a guarantee of limited recourse from the Defendant. The Plaintiff submits that it already held a fixed and floating charge over the entire assets of the Company and a guarantee limited to the Defendant's shares in the Company would be a pointless exercise in an insolvency where those shares would be valueless.

15. An additional contention of the Defendant concerns the allocation of an overdraft facility to the Company. The Defendant alleges that the extension of the overdraft to the Company in April 2013 lacks any formal documentation of a contractual nature legitimising the arrangement. The Defendant submits that the Plaintiff cannot show why the account was permitted to significantly exceed the €200,000 limit which had been contractually agreed upon.

16. The Plaintiff does not dispute the fact that the overdraft was extended. However, the Plaintiff submits that the loan was not required to be evidenced by formal documentation. Specifically, the Plaintiff submits that the lack of formal documentation could not release the Company from its obligations to pay back the debt. Furthermore, the Plaintiff cites clause 12 (ii) of the guarantee as covering such a situation. This clause states that:

> *"The liabilities and obligations of the Guarantors under this guarantee shall remain in force notwithstanding any act, omission, neglect, event or matter whatsoever except the proper and valid payment of the ultimate balance and subject as hereinafter provided in this guarantee, an absolute discharge or release of each of the Guarantors signed by the Bank, and without prejudice to its generality the foregoing shall apply in relation to anything which would have discharged the Guarantors (wholly or in part) or which would have afforded the Guarantors any legal or equitable defence."*

The Defendant questions whether such a clause can have any effect where there is no evidence of an agreement in respect of an overdraft exceeding the amount of €200,000.

17. The final substantive submission of the Defendant relates to the Plaintiff's possible role in directing the finances of the Company. In Mr Gill's second affidavit, it was stated that BDO was appointed by the Bank to provide operational support to the Company. The Defendant avers that BDO in fact went beyond providing operational support and acted in the capacity of a *de facto* director and ultimate decision maker as regards the financial operation of the Company. Furthermore, the Defendant, who at the relevant time was the majority shareholder of the Company, appears to have been excluded from carrying out this finance function, The Defendant has asserted that this raises a case in equity as to why the guarantees should not be enforced against him. This stems from the fact that the Plaintiff essentially installed its agents as the primary financial actors for the Company. These agents, it is alleged, mismanaged the Company's assets. The outstanding revenue was not collected from public healthcare provider in this jurisdiction and in the United Kingdom. Thus, the Defendant's case is that the Plaintiff must be responsible for the consequences of its conduct.

18. The Plaintiff describes such averments as being speculative and further pointed out that under section 176 of the Companies Act 1964, the Bank could not have been a director of the Company. The Plaintiff submits that regardless of this, such a duty of care argument can only in law belong to the Company and not to the guarantor. The Plaintiff relies on *Cellulose Product Pty Ltd v. Truda* (1970) 92 WN (NSW) 561 as authority for this proposition. The Plaintiff also points to clause 29 (ii) of the guarantee which states:

> *"[t]he Guarantors hereby agree that in litigation relating to these presents the aforesaid obligations or any security therefore they shall waive the right to interpose any defence based upon any claim of laches or set-off or counterclaim of any nature or description."*

19. It is the Plaintiff's contention that this clause amount to a term which prevents the guarantor using the counterclaims of principal borrower (i.e. the Company)

Discussion

20. The general principles of summary judgment are well established. In **McGrath -v- O'Driscoll** (2006) IEHC, 195 Clarke J considered the judgment of the Supreme Court in *Aer Rianta -v- Ryanair* and other authority and expressed the following views at paragraphs 3.4

and 3.5:

> *"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.*
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> *So far as questions of law or construction are concerned the Court can, on a motion for summary judgment, resolve such questions, including, where appropriate, questions of the construction of documents, but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."*

21. Clarke J in *ADM Londis Plc v. Arman Retail Ltd*. [2006] IEHC 309 discussed the effect of a potential counterclaim on an application for summary judgment:

> *"…for the purposes of this application I am prepared to accept that it is arguable that a surety is entitled to rely, at least in some circumstances, upon a counterclaim which might have been available to the principal debtor.*
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> *In particular, it seems to me that such an argument arises in circumstances where the counterclaim, if it had been pursued by the principal debtor, might have amounted to a Defence by way of set off in equity under the principles identified by the Supreme Court in* ***Prendergast -v- Biddle*** *, an unreported judgment of 31st July 1957, which establishes that where a counterclaim arises out of event which are closely connected to those giving rise to the amount claimed on foot of a summary application, the counterclaim can amount to a Defence in addition to being a counterclaim so as to justify the extinguishment in whole or in part of the claim."*

22. Clarke J in the Supreme Court decision of *IRBC v. McCaughey* [2014] IESC 44 recently considered the principles governing the grant of summary judgment. Clarke J, having examined the development of the jurisprudence in this area, summarised the status quo at paragraph 5:

> *" 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. If issues of law or construction are put forward as providing an arguable defence, then the Court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in McGrath, the Court may come to a final resolution of such issues. That the Court is not obliged to resolve such issues is also clear from Danske Bank v. Durkan New Homes."*
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> *" 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."*

23. The Defendant submits there are a number of potential defences. Firstly, that the proceedings against him as a surety are premature. The Defendant alleges that the value of the assets in the receivership exceeds that of the debt, which is above €6,000,000. Therefore, it is argued that the Plaintiffs ought to await the realisation of the assets in receivership before assessing whether there is any shortfall. It is only at that point that they should decide whether to move against the Defendant.

24. However, this is not a bona fide defence. It is well established law that a creditor has an unfettered choice in how he can proceed to recover the debt or damages to which he is entitled. This was recently recognised in *ACC Bank Plc v. McEllin & Ors* [2013] IEHC by Birmingham J. In that case, the Defendants contended that the Plaintiff bank should not have succeeded in a summary judgment application as the bank in that case had delayed in appointing a receiver over certain secured assets such that their market value as of the date of the application for summary judgment was lower than it had been when the loans originally went into arrears. The Court held that this issue was not capable of constituting a bona fide defence sufficient to grant leave to defend the Defendants stating that *"…[the defendant's] argument ignores the fact that there is no obligation to enforce rights at any particular time. It is for the bank to choose the time to act".* In the view of the Court, the Defendant offered no evidence in his defence as to why this law should not apply.

25. Moreover, it is clear that the email sent by Mr Leydon cannot have any effect on the construction of the terms of the first guarantee given that the email was sent more than 18 months after this contract had been concluded. There is some suggestion on behalf of the Defendant that this email constituted a collateral contract. The Court has examined the analysis contained in Cheshire, Fifoot & Furmston's *Law of Contract* of such documents, as approved by Finlay Geoghegan J in *AIB Plc v. Galvin* [2011] IEHC 314. Here, the authors contend that collateral contracts are normally devices to enforce promises made prior to entering a contract and thus it may perhaps be more correct for them to be thought of as preliminary contracts. Therefore, plainly if a promise does exist, considering it was given 18 months after the conclusion of the contract it cannot have a contractual effect on the first guarantee in those circumstances.

26. However, in the case of the second guarantee, the Court is satisfied that there may be substance in the assertion that email communication from the bank's agent may on full evidence be credibly argued as meaning that the second guarantee had been limited to the Defendant's business assets. This matter cannot be resolved at a summary judgment hearing

27. A question remains as regards the Plaintiff's conduct in relation to the December 2013 overdraft agreement. The Defendant alleges, and the Plaintiff has not adduced evidence to the contrary, that this agreement was concluded between Mr White, the agent of a minority shareholder, the Steinberg Trust and the Plaintiff. Furthermore, it appears that neither the Company, its shareholders nor the Defendant, who at the time was a majority shareholder, were a party to the negotiations. It is the Court's view that it is appropriate that the issue of whether the Defendant can be the guarantor of loans made on foot of agreements between a minority shareholder and the bank be permitted to be fully pleaded.

28. In addition to this, there are legitimate questions raised as to the role and impact of BDO in the Company operations. In particular, one could point to the issue of the significant uncollected revenue from the public healthcare providers in this jurisdiction and the United Kingdom, and private health insurers. It would seem credible that if the Defendant is able to provide some evidence as to the Plaintiff's conduct in this regard, a stateable case in equity against the enforcement or full enforcement of the guarantees may exist.

Conclusion
29. Looking at the totality of the situation, the issues identified immediately above are not straightforward. The Court cannot be confident that the Defendant has no defence and that if the Plaintiff were granted summary judgment an injustice would not arise.

30. The Court directs that the Defendant be permitted to defend the Plaintiff's claim at plenary hearing on the following issues:

a. Whether the second guarantee had been limited to the Defendant's business assets.

b. Whether ,and to what extent, the Defendant can be liable as guarantor of loans made on foot of agreements between a minority shareholder and the Plaintiff bank;

c. Whether, and to what extent, the Plaintiff's conduct, including the role of BDO, may have impacted on the Defendant's liability under the guarantees.