THE HIGH COURT

[2014 No. 2545 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

DECLAN O'DONOGHUE

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 8th day of February, 2019.

1. This is an application for summary judgment in which the plaintiff claims the sum of €1,541,000 stated to be owing and due on foot of guarantee executed by the defendant on 10th February, 2009. It is alleged that the defendant guaranteed payment to the plaintiffs of all and every sum, or sums, of money due, or thereafter to become due, to the plaintiff by a company named Lodge Gaven Limited of which Mr. O'Donoghue was a director.

2. This application is grounded upon the affidavit of Ms. June MacCabe sworn on 3rd September, 2015. She is an officer of the plaintiff's financial solutions group, Cork. She avers that the plaintiff provided banking facilities to Lodge Gaven Services Limited over a number of years and that borrowings were habitually supported by a personal guarantee provided by the defendant, limited to a sum approximating to the aggregate liabilities of the sanctioned facilities.

3. By letter of sanction of 10th February, 2009, the plaintiff offered to extend the loan facility and an overdraft facility to Lodge Gaven Limited to the sum of €1,340,000. The borrower was therein described as Lodge Gaven Limited and two facilities were thereby provided. The first related to a €90,000 overdraft, described as a working capital facility, the terms of repayment being that the facility would revert to €35,000 by 10th March, 2009. In the meantime, the account was to be operated strictly within the temporary limit of €90,000.

4. The second facility related to what is described as a business credit line, in the amount of €1,250,000. Its purpose was stated to be "*Line of credit to assist with property acquisition"*. The obligation to repay was stated to be at the pleasure of the bank, subject to review by 1st August, 2009. Interest was chargeable on a quarterly basis to one of the company's current accounts. As a special condition, it was provided that if an extension of the current account limit was required beyond 10th March, 2009, additional security would be necessary – "*i.e. All Sums Mortgage over 60 acres at Muckera, Kenmare, Co. Kerry*". The relevant security was described as being a mortgage debenture dated 13th January, 2006, over the assets of Lodge Gaven Limited, together with a letter of guarantee in the amount of €1,541,000 from Declan O'Donoghue, the defendant, for the obligations of Lodge Gaven Limited. The word "*supported*" appears thereafter. It was also required by the loan facility that the "*security item*" (referable to the letter of guarantee) had to be in place before the drawing down of facilities. This letter of sanction was signed on behalf of the company by Mr. O'Donoghue and Ms. Breda O'Donoghue and is stated to have been witnessed by Mr. Colm Griffin. A company resolution was passed on the same date, to accept the facility in the amount of €1,340,000, subject to the terms and conditions contained in the letter of sanction. This was also signed by Mr. O'Donoghue and Ms. Breda O'Donoghue, as chairman and secretary respectively. This resolution was required by the bank. By further letter of sanction dated 15th May, 2009, the overdraft facility was extended to 31st August, 2009. Again this letter refers to the guarantee in the sum of €1,541,000 as security. This was also signed by Mr. O'Donoghue on behalf of the company and was witnessed by Mr. Griffin. A further company resolution of 15th May, 2009 was provided to the bank and this too was signed by Mr. O'Donoghue and Ms. Breda O'Donoghue as chairman and secretary, respectively, of Lodge Gaven Limited.

5. Mr. Appelbe, solicitor, who appeared on the instructions of the defendant, lays particular emphasis on the wording "*Line of credit to assist with property acquisition*", it being the case that no property was acquired after this date by the company. It also appears to be the case that, in so far as the business credit line facilities are concerned, the final drawdown of funds occurred in advance of the execution of the guarantee. It appears from the accounts that the last drawdown on the business credit line account occurred on 13th June, 2007, in the sum of €128,000, which brought the balance due as of that date to €1,249,189.16.

6. Ms. MacCabe avers that the limit of the guarantee made allowance for accruing interest between the date of sanction and the specified review on 1st August, 2009.

7. On 2nd February, 2011, a sum of €1,642,461.16 was due and owing by Lodge Gaven Limited. The plaintiff demanded payment from the company. This was not paid and on 16th October, 2013, the plaintiff demanded payment of the sum of €1,541,000 on foot of the guarantee.

8. Condition 13 of the letter of guarantee dated 10th February, 2009 provides that the guarantee shall be in addition to, and not in substitution for, any other guarantee or security for the obligations of the borrower given by the guarantor to the bank. Despite this, it was stated on this application that this guarantee was provided in substitution for previous guarantees and the previous guarantees were no longer enforceable. The letter of guarantee contains what is contended to be the signature of Mr. O'Donoghue and was witnessed by Mr. Colm Griffin, a bank official in Kenmare. He is now the assistant manager in that branch.

9. Exhibited to the affidavit of Ms. MacCabe is a copy of the resolution passed at a meeting of the directors of Lodge Gaven Limited, on 10th February, 2009 in respect of a facility for €1,340,000 and 15th May 2009, in respect of a facility of €90,000. The company thereby authorised Mr. O'Donoghue to sign a letter of sanction on its behalf and also such other authorities, documents and instructions that the bank required to be signed in connection with the facility.

10. In a replying affidavit sworn on 12th February, 2016, Mr. O'Donoghue avers that he had always been advised by various solicitors never to sign a guarantee and that he had no recollection of ever doing so. He avers that he does not believe that it was his signature on the guarantee and if the matter goes to trial, he will retain the services of a handwriting expert. He states that he never received independent legal advice in relation to the execution of any guarantee and that as far as he is concerned, being a guarantor for Lodge Gaven Limited for a sum well in excess of €1,3000,000, simply never arose. He further denies that he should be made responsible for the debts of the company and is unaware of the origin of the amount in the guarantee. He also refers to the letter of sanction of 10th February, 2009 which in turn refers to "*Business Credit Line*" sum of €1,250,000 which is stated to be to for the

purposes of assisting with property acquisition. Mr. O'Donoghue avers that Lodge Gaven Limited expended only €100,000 on property acquisition. He seeks a full analysis of all the figures claimed against Lodge Gaven Limited. He protests that the bank should in the first instance pursue Lodge Gaven Limited as the primary borrower, before proceeding against him. He did not believe that the company ever had borrowings in excess of €1,300,000. He did not recall the passing of any company resolution in relation to any loan, that the company resolution authorised the company to borrow €1,340,000 and stated that there is no resolution to borrow €1,541,000. He also states that it is impossible for the company to pass a resolution that is retrospective. He avers that his wife did not sign any documentation, but no affidavit is forthcoming from her. At para. 13 of his affidavit, he avers that while he denies the signature on the guarantee is his, it is also part of his case that the bank must have forced and/or tricked him into signing it. He refers to a subsequent transaction on 14th March, 2011, where the bank wrote to him stating that he had been nominated as a guarantor for a total of €193,000 for a separate company, DSL Coastal Properties Limited. He queries if the bank was already in possession of a guarantee from him in the sum of €1,540,000, why would it contemplate permitting him becoming a guarantor for a further €200,000. He also points to the fact that the proposed letter of guarantee of 14th March, 2011 stated "*you are advised to obtain independent legal advice before signing the guarantee".* He queries why he was not advised of this in February, 2009. He also refers to other internal bank documentation which he obtained pursuant to a request under Data Protection legislation and queries why the guarantee is not mentioned in those documents.

11. Mr. O'Donoghue refers to a number of documents received pursuant to the said request including a document entitled "*Customer Details*" which was generated for an "*outlying policy*" with Ark Life, and in which there is no mention of the existence of the guarantee.

12. Mr. O'Donoghue also refers to a document dated 16th December, 2014, relating to "*customer securities".* This appears to contain a detailed list of securities held by the bank in respect of dealings with him. Again, he avers that there is no mention of the guarantee in that document. He points to the fact that there exist memoranda within the banks files and none mention the guarantee. He particularly emphasises that the bank did not advance monies to Lodge Gaven Limited after the execution of the guarantee and contends that the guarantee is unsupported by consideration and is not under seal.

13. In a further affidavit sworn on 1st June, 2016, Ms. MacCabe avers that the defendant's contention that he had always been advised never to sign a guarantee and had no recollection of ever doing so lacks credibility because as a matter of fact he had executed such guarantees in the past in the presence of, and witnessed by, a solicitor. She refers to a guarantee which was executed by the defendant and his spouse in support of the company's borrowings on 14th December, 2004. Guarantees were executed by him on 22nd December, 2003 and 3rd May, 2007, in the amount of €1,501,000, a copy of the latter being exhibited to Ms. MacCabe's affidavit. It was witnessed by his then solicitor. The former two guarantees are not exhibited. Ms. MacCabe avers that the letters of loan sanction were executed by the defendant and each is accompanied by a company resolution. Communications in respect of the said loans and facilities and in particular statements of the four company accounts were sent to the defendant's address.

14. Ms. MacCabe also deals with the liabilities of the company which include two current accounts and two loan accounts, the amount due on the second of which is stated to €1,270,887.39. Loan facility letters in respect of the first three accounts are exhibited, but not the larger, fourth one. This is described in Ms. MacCabe's affidavit as a business credit line facility in the amount of €1,250,000. It was opened in January, 2006, but Ms. MacCabe was unable to locate the letter of sanction applicable at the time of opening of that account. The security there provided was the guarantee of €1,501,000 executed on 3rd May, 2007.

15. In so far as a guarantee in respect of DSL Coastal Properties Limited is concerned, it is accepted by Ms. MacCabe that the defendant did not execute a guarantee in respect of that company's debt. The reason why it was sought was that the liabilities of that company were not the subject of any existing guarantee. In reference to the letters of sanction of 10th February, 2009 and 15th May, 2009, she states that these provided for the extension and renewal of overdraft facilities on accounts number 01688021 and renewal of the business credit line on account number 01688627. She highlights that each of the letters of sanction specify the security as including the guarantee in the sum of €1,541,000, which is the subject of these proceedings.

16. Ms. MacCabe also avers that Mr. O'Donoghue was advised to obtain legal advice and refers to a document, exhibited to the affidavit of Mr. Griffin sworn on 1st June, 2016, evidencing that he waived his right to independent legal advice. A loan report prepared in February, 2011 in fact referred to the guarantee but this had been redacted when documentation was given to Mr. O'Donoghue pursuant to his data protection request. Ms. MacCabe also exhibited to her affidavit what is described as "*criticised loan report*" dated February, 2011 which refers to the defendant's guarantee in the sum of €1,541,000.

17. Despite the offer to have the original guarantee inspected and examined by a handwriting expert, this has not yet been done. Mr. O'Donoghue states that he cannot afford to do so. But the defendant asserts that if this matter goes to plenary hearing, he will engage these services.

18. Mr. Griffin avers that he is acquainted with the defendant, who had been a significant business customer of the branch office where Mr. Griffin works. He confirms that his signature is on the guarantee as witness. While he does not profess to have any specific recollection of the circumstances or occasion of the defendant's execution of the document, he has worked in the bank for 36 years and throughout that time he has *"not an any time or in any circumstances executed a document in my capacity as witness without the individual concerned not being present in front of me*". Although use of the double negative in this sentence tends to confuse, the next sentence clarifies that Mr. Griffin had no doubt that he followed this procedure with the defendant and that Mr. O'Donoghue was present at the time that he witnessed the execution of the guarantee.

19. Also exhibited to Mr. Griffin's affidavit is what is described as a "*Letter of Waiver of Independent Legal Advice"* which was allegedly signed by the defendant on 10th February, 2009.

20. In reply, Mr. O'Donoghue reiterates that he has no recollection of signing the guarantee and argues that it is clear that Mr. Griffin has no recollection of signing it either. Further, he had no recollection of executing a deed of waiver as suggested by Mr. Griffin. He states that he has spoken to all the solicitors involved and they have their own notes to prove that they did so advise him. No affidavit has been sworn in support of this averment by any solicitor nor have any notes been exhibited. In particular, in relation to the guarantee of the 3rd May, 2007, no evidence has been adduced from the solicitor stated to have witnessed the document that it is not his signature, and no explanation has been given as to why such an affidavit has not been forthcoming. Mr. O'Donoghue does not otherwise positively call its creation into question. He reiterates that the letter of sanction allows for a maximum amount of €1,340,000 and that *"somehow the 'guarantee' which was allegedly signed on the same day as the letter of sanction is for €1,541,000."* At para. 9 of that affidavit Mr. O'Donoghue avers that he does not accept that such a valid guarantee exists, *"there is no need for me to address it here as it is simply not part of these proceedings."*

21. In an affidavit sworn on 7th December, 2018, Mr. Appelbe, outlines the main arguments of defence being:-

(i) A dispute in relation to whether the guarantee was signed by the plaintiff.

(ii) The absence of consideration.

(iii) That the advance intended under the facility letter was never drawn down, and that property was not acquired by the company after the execution of the guarantee. Mr. Appelbe submits that this raises a serious issue as to what was to be covered by the alleged guarantee and as to whether there was a failure of consideration.

Mr. Applebe points to inconsistencies between such documentation received under a data protection request and the case being made by the plaintiff. This, however, is not expanded upon. Issues such as the amount of the guarantee, whether company resolutions were properly executed, and the absence of a seal have also been raised. Mr. Appelbe states that a substantial notice for particulars will be required, as will discovery, to ensure that all of the issues at the heart of this case are fully ventilated at plenary hearing.

22. The principles upon which this Court must proceed in determining whether to grant summary judgment or liberty to defend, are well established. In *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 I.R. 607, Hardiman J. stated that the fundamental question being posed in an application such as this is whether it is "*very clear*" that the defendant has no case. He stated at p. 623:-

> *"Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

These principles were elaborated upon by McKechnie J. in Harrisrange Ltd. v. Duncan [2003] 4 I.R. 1 at p. 7:-

> *"From these cases it seems to me that the following is a summary of the present position:-*
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> *(i) the power to grant summary judgment should be exercised with discernible caution;*
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> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
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> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
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> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(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;*
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> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;*
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> *(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
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> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
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> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(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. Counsel for the plaintiff submits that the contentions of the defendant that he did not sign, or has no recollection of signing, or that he signed the guarantee in circumstances where he was not given appropriate advice concerning independent legal advice, are simply not credible. In support, he refers to the terms of the guarantee and other documents which are said to have been executed by Mr. O'Donoghue, including letters of loan sanction on behalf of the company whose debts were guaranteed. He also points to the history of borrowing, and significantly, to the previous guarantees executed by the defendant which he submits contradict his averments to the effect that he had been advised never to sign such a guarantee.

24. Counsel for the plaintiff also submits that there is more than adequate evidence of consideration for the guarantee including the relinquishing of previous securities and more particularly that the new arrangements were entered into between the plaintiff and the company. It is emphasised on behalf of the defendant, however that the purpose of the loan facilities as stated in the letter of sanction is of importance, and that the guarantee should be construed as being in respect of past advances with no facilities being supplied thereafter by the plaintiff.

25. In *IBRC v. McCaughey* [2014] 1 I.R. 749, Clarke J. stated at para. 23:-

> *"…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 c.p.t. v. Ryanair Ltd. [2001] 4 I.R. 607. 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."*

26. It is submitted by the plaintiff that if the defence lacks credibility and is unsupported by uncontested documentary evidence, the court may proceed to grant summary judgment. In *AIB plc. v. Moloney & McCarthy* (*ex tempore*, Court of Appeal, Irvine J., 26th June, 2018), Irvine J. stated:-

> "*Further, while the defendants have asserted the existence of a defence based upon an agreement allegedly concluded at the meeting of the 21st June 2013, the defence so proposed is one which, in my view, lacks credibility and is unsupported by the uncontested documentary evidence and I place emphasis on the word uncontested when I refer to documentary evidence because it is clear from the McCaughey decision it is important that the documentary evidence relied upon by the High Court judge is uncontested evidence*." (para. 30)

Irvine J. stated that the court is entitled to look at all of the circumstances of the case in deciding whether one of the defendants' proposed defences is credible. She continued:-

> *"I also want to acknowledge that when the authorities speak of credibility in the context of the credibility of a proposed defence, a defence is not to be considered incredible simply because the judge is not inclined to believe the defendant. It must be clear that the defendant has, in fact, no defence, and in my view, in this case, the defendants have no defence."* (para. 32)

27. There, the trial judge had tested the credibility of the proposed defence against the documents authored by both parties and the Court of Appeal concluded that he was entirely correct in finding that it could not credibly be argued that there was a binding agreement such as provided a defence to the claim for summary judgment. Irvine J. stated that the court is entitled to look at all of the circumstances of the case in deciding whether the defendants' proposed defence was credible. Documentary evidence, all of which was uncontested, was inconsistent with the existence of such agreement.

28. The court also referred to the decision of Murphy J. in *First National Bank v. Anglin* [1996] 1 I.R. 75, where he viewed the test as being one of whether there was a fair or reasonable probability that the defendant had a real or *bona fide* defence in the proceedings.

29. Counsel for the plaintiff in his summation of the applicable test, and having referred to the above case law, accepted that the onus is on the plaintiff to satisfy the court, in the light of all documents, more particularly uncontested documents, that it is untenable that the defendant did not sign the guarantee. He accepts that it is not open to the court to reject the proposed defence on this application because it is not inclined to believe it. In assessing whether the defence is tenable, counsel invited the court to consider the following documentation in particular.

> (i) The guarantee of the 10th February, 2009, the subject matter of these proceedings and in particular that it is referred to as being security in the letter of loan sanction of 10th February, 2009. This facility letter was signed by Mr. O'Donoghue on behalf of the company. He also signed the resolution of the company passed on that date which authorised the company to accept the facilities;
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> (ii) The letter of sanction of 15th May, 2009 providing for the extension of overdraft facilities. This letter also specifies as security, the defendant's guarantee for €1,541,000. Both this letter and the company resolution were executed by Mr O'Donoghue;
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> (iii) The history of borrowings detailed in Ms. MacCabe's second affidavit. He submits that the guarantee of the 10th February, 2009 did not emerge from the ether, it replaced a guarantee of a lesser amount provided by the defendant on the 3rd May, 2007. While the February, 2009 guarantee does not expressly state that it is replacing the May, 2007 guarantee, counsel highlights that the May, 2007 guarantee was also executed by Mr. O'Donoghue and witnessed by his then solicitor. He submits that this illustrates that the defendant had a history of executing guarantees.
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> (iv) The letter of sanction in respect of the previous borrowings of 26th November, 2008, when a guarantee for the slightly lesser sum of €1,501,000 was in place. That letter of sanction and a company resolution passed at that time in relation to the acceptance of the facility were signed by Mr. O'Donoghue on behalf of the company. It is submitted that this further emphasises the consistent practice that a guarantee was provided by the defendant in respect of the borrowings of the company.

30. Mr. O'Donoghue contests the guarantee, a central document, but he does so either on the basis of lack of recollection of signing it, that he was tricked into it or by reference to what might be described as a suggested invariable practice of not signing such documents. This suggested practice is contradicted by the earlier guarantee executed by the defendant on 3rd May, 2007. It also contradicts the averment at para. 3 of his affidavit sworn on 12th February, 2016, that he was always advised by various solicitors never to sign a guarantee and that he had no recollection of ever doing so. It seems to me that this aspect of the defendant's defence amounts to no more than an assertion, based on poor recollection, that he did not sign the guarantee.

31. While there are unsatisfactory aspects of the defence advanced by the defendant, particularly in relation to the signing of the guarantee, I must nevertheless bear in mind that the court, at this stage of the proceedings, ought not to engage on a determination of credibility. The existence of the earlier guarantee undermines the defendant's contention that he did not execute guarantees. The existence and contents of the documentation created at the time of the guarantee undermine the defendant's suggested lack of recollection, or that he was tricked in to signing it. In so far as arguments have been raised in connection with the amount of the guarantee, this has been clearly answered by Ms. MacCabe at para. 6 of her affidavit, that the limits of the guarantee make allowance for interest between the date of the letter of sanction and the specified review date.

32. In *AIB plc. v. Moloney & McCarthy*, Baker J. stated at p. 15:-

> *"This case is fairly dealt with on the basis that, while this is not a matter where mere assertions were made by the defendants, as is found in some cases, the assertions made are not credible and they are not supported by the evidence".*

This is particularly apposite in this case. In my view, counsel for the plaintiff is correct in his submission that when the documentation to which he refers, including the guarantee, the historical guarantee, the various letters of loan sanction and the various company resolutions are considered in their entirety, the defence of the defendant that he did not sign the guarantee, is simply not tenable and that he does not recall doing so. It is contradicted by documents which he has signed, such as the guarantee of the 3rd May, 2007 and the many facility letters and company resolutions which he signed. Although he does not accept that the resolution was executed by the company, this averment is no more than a mere assertion and no attempt is made to explain his signature on this, or indeed any other company resolution. His suggested defence and reasoning on this aspect of the case has varied from lack of memory, to him being tricked to being against his practice. In the words of Baker J., it is an assertion that is not credible and not supported by the evidence.

33. I have come to the conclusion, however, that an arguable defence has been raised concerning the absence of consideration. This defence is likely to involve a consideration of matters of fact and law. Counsel for the plaintiff does not expressly rely on a defence of forbearance to sue, rather it is submitted that consideration was provided in the form of the new guarantee as security for the borrowings and in the context of the extension and restructuring of facilities. The defendant, on the other hand, points to the stated purpose of the facility and the absence of evidence of drawdown of monies after the execution of the guarantee and contends that the guarantee is unsupported by consideration. Taking into account the constitutional rights of both parties and the threshold which has to be met on this application, in my view it cannot be concluded that it is clear that the defendant has no defence on this point, and in those circumstances I find that this is an appropriate case in which grant the defendant liberty to defend on this ground and to transfer the case to plenary hearing.