THE HIGH COURT

[2014 No. 2849 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND
WILLIAM KENNEDY AND TIM O'KEEFFE

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 6th day of June, 2018

1. This is an application for summary judgment brought by the plaintiff ("the bank") against the second named defendant on foot of a guarantee. Judgment has already been obtained against the first defendant in respect of an identical guarantee. The second defendant (Mr. O'Keeffe) was at all material times a director and the secretary of a company called Island Field Properties Ltd. The first defendant was a director of the same company. The company appears to have been engaged in property speculation.

2. By letter of loan sanction dated the 11th January, 2007, the bank agreed to make a loan facility in the amount of €1 million available to the company for the purpose of purchasing a residential property with three adjoining sites. The repayment proviso in the facility letter stated:

> "Facility to be revised within two years from date of drawdown, when a suitable repayment arrangement is to be put in place. In the interim, quarterly interest charges will be charged to your working account."

3. The security provisions of the facility letter included the execution of a legal mortgage over the property being acquired together with a letter of guarantee to be executed by both defendants. The defendants on behalf of the company accepted the terms of the facility letter by executing it. Further to the terms of the facility letter, both defendants executed written guarantees dated the 16th January, 2007. It is suggested by Mr. O'Keeffe that the guarantee was probably actually signed by him in his solicitor's office on the 17th or 18th January, 2007. As the funds were drawn down by the company on the 18th January, 2007, it would suggest that the guarantee was executed by this stage at the latest.

4. There was some negotiation between the bank and the defendants concerning the terms of the loan. The bank initially appeared to have required the payment of an arrangement fee for this loan in the sum of €10,000. As part of the negotiations being conducted by the company's accountant, Mr Kelleher, with the bank, it was apparently agreed that this should be waived. Mr. O'Keeffe relies upon a handwritten note from the accountant to that effect.

5. It is not in dispute that the loan itself is repayable on demand. On the 3rd April, 2009, the bank wrote to Mr. O'Keeffe presumably following some interaction between him and the bank to advise him that the bank was extending the loan to the 2nd May, 2009 subject to the same terms and conditions. The extension was to allow for time for a review of the loan to take place.

6. The bank again wrote to Mr. O'Keeffe on the 2nd December, 2009 this time in his capacity as a guarantor notifying him that the bank had agreed with the borrower to change the terms of the facilities as set out in the accompanying letter. The letter indicated that the facility would now continue until the 1st March, 2010 when it would become repayable. The bank again wrote to Mr. O'Keeffe on the 11th August, 2010 referring to a meeting of the same day when obviously the company's loans were discussed. This letter required him to provide to the bank a statement of his net worth for the purposes of considering whether the bank would renew the company's facility.

7. Mr. O'Keeffe replied to this letter on the 1st September, 2010 saying that he did not think any purpose would be served by renewing the facility and he did not wish to request such renewal. Instead he made proposals for putting the secured property up for sale with a view to discharging the loan. Mr. O'Keeffe accordingly declined to furnish a statement of affairs as he was not requesting a renewal of the loan on behalf of the company. Obviously the purpose of Mr. O'Keeffe being requested to furnish such a statement of net worth to the bank can only have been in connection with his own ability to meet the terms of the guarantee which would presumably have been required for the bank to consider renewal of the loan to the company.

8. It is important to note that this letter written by Mr. O'Keeffe, the best part of four years after entering into the guarantee the subject matter of these proceedings, makes no mention of that guarantee or any suggestion that it was at that time other than in full force and effect.

9. The company ultimately defaulted on the loan and a demand for payment was made to the company on the 26th June, 2013. Following upon the company's failure to satisfy that demand, a separate demand was made by the bank on the 18th September, 2013 of Mr. O'Keeffe personally for payment of €1 million on foot of the guarantee. The summary summons herein was subsequently issued on the 19th November, 2014 and the within motion for summary judgment on the 19th August, 2015. Mr. O'Keeffe's first replying affidavit in this application was sworn on the 2nd June, 2016.

10. In essence, in this affidavit, Mr. O'Keeffe suggests for the first time that he is not liable on foot of the personal guarantee for three reasons. First he says that an express representation was made to him by the relevant bank official Gerard O'Brien, which Mr. O'Keeffe understood to mean that the bank would not be relying on the guarantee. Second, he suggests that there was some invalidity in the terms of the demand for payment made of him by the bank and third because the bank extended the loan to the company and thus altered the terms of the facility underlying his letter of guarantee without his assent, he is no longer bound by the guarantee.

11. In his first affidavit, Mr. O'Keeffe raised the issue of the bank's representation in the following terms:

> "13. However, on receipt of the plaintiff bank's facility letter dated 11th January, 2007, the first written information I had received regarding the proposals, I became aware for the first time that additional security for the facility in the form of personal guarantees by the directors was being sought by the plaintiff. I was very concerned at this prospect but was reassured by Mr. O'Brien of the plaintiff bank, who personally represented to me in conversation, on either the 17th or 18th January, 2007, that the personal guarantees sought 'would not be a problem'.
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> 14. Following my conversation with Mr. O'Brien he also agreed with Mr. Kelleher to eliminate the proposed 'arrangement fee'.

> 15. I say that it was then my understanding following that conversation with Mr. O'Brien that any security deficit regarding the proposed loan would be resolved by way of a cross guarantee, as opposed to personal guarantees, which was to be provided from the connected company Aran Field Ltd for the amount of €1 million…"

12. Mr. O'Keeffe goes on to aver that essentially he thought the execution of the guarantee was merely a temporary measure to allow the drawdown of the funds and a revised offer letter would shortly be issued by the bank which would not include the requirement for the guarantee. It is noteworthy also that the guarantee together with the other relevant documents were, according to Mr. O'Keeffe's affidavit, signed by him at his solicitor's office on the 18th January, 2007.

13. Counsel for Mr. O'Keeffe submitted that his client's evidence raised the issue that the alleged representation made by Mr. O'Brien worked an estoppel in his favour that operated to prevent the bank now relying upon the terms of the guarantee.

14. The first point to note is that the only relevant averment made by Mr. O'Keeffe on this issue is that Mr. O'Brien said the guarantee "would not be a problem". Mr. O'Brien denies saying this. However even if he did, it is, at the very least, an extremely vague statement capable of any one of a number of interpretations. Mr. O'Keeffe says that his interpretation was that the bank would not rely on the guarantee. Why he reached this conclusion is not explained. It would certainly be a very unusual position for a bank official to adopt. No obvious reason has been advanced by Mr. O'Keeffe as to why this "temporary" arrangement was being put in place pending a revised arrangement without the requirement for a guarantee. Such a revised arrangement could presumably have been put in place very readily. If it was simply a case of amending the terms of the facility letter to provide for what Mr. O'Keeffe says was the agreement, that could have been done by the bank in a matter of minutes.

15. The phrase allegedly used by Mr. O'Brien could of course have been capable of many other meanings. It might have been simply an expression by Mr. O'Brien of the expectation that the guarantee was unlikely to be called in in circumstances where the value of the property, at that time, presumably well exceeded the amount of the loan.

16. Even if any of this was said and even if it meant what Mr. O'Keeffe says it meant, in my view the argument that this works some form of estoppel against the bank is entirely misconceived. The doctrine of promissory estoppel operates to prevent reliance by a party on his strict legal rights where a representation is made that they will not be relied upon and the party to whom it is made relies upon it to his detriment. Clearly therefore, an estoppel cannot operate until legal rights have been established. Accordingly, the doctrine of promissory estoppel has no application to pre-contract negotiations in advance of the creation of any legal rights.

17. It seems to me that what Mr. O'Keeffe is actually contending is that the contract included a term that the guarantee to be executed by him would never be relied upon by the bank and was thus devoid of any force or effect, in itself a total contradiction in terms and scarcely credible. What in reality the defendant seeks to do here is to amend the terms of the agreement by reference to this alleged oral representation. This is impermissible as *Promontoria v. Mallon* [2018] IEHC 145 demonstrates. In his judgment in that case, McGovern J. referring to an earlier judgment quoted (at para. 16):

> "In *Ulster Bank v. Dean* [2012] IEHC 248, this Court rejected the defendant's contention that a collateral contract had varied the express terms of a loan facility. At para. 6, the court stated: -
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> *'…The defendants have not produced any written documentation to support this claim. It appears, therefore, that they are seeking to alter the terms of the facility letters which are clear on their face by means of parol evidence. This is not permissible. For reasons of public policy, the courts have not permitted oral evidence to be admissible if it is introduced in an attempt to contradict the terms of a written agreement between the parties. This is known as the "parol evidence" rule. See Macklin v. Graecen & Co. [1983] I.R. 61 and O'Neill v. Ryan [1992] 1 I.R. 166. In short, a party is not permitted to adduce evidence which, in effect, contradicts the reasonable construction of words used in a written agreement.'*
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> 18. Although the threshold for leave to defend proceedings is a low one, it still has to be crossed and the courts are entitled to look at the defence raised and assess its credibility in the light of all the surrounding facts, including contractual documents. If, at the end of the day, the defence raised is based on mere assertion, is wholly implausible, and inconsistent with, or contradicted by, documentary evidence which is admitted by the defendant, then the court may reject the defence contended for on the basis that it is untenable or lacking in credibility. See *Irish Life and Permanent v. Hudson* [2012] IEHC 11, *ACC Loan Management v. Dolan* [2016] IEHC 69."

18. Whilst it true to say that in a summary judgment application, the court can only look at the issue of credibility on a much narrower basis than it might at a substantive trial, this does not mean that issues of credibility are to be ignored at a fundamental level. This is clear from the judgment of McGovern J. and also the recent judgment of the Court of Appeal in *Allied Irish Banks Plc v. Stack* [2018] IECA 128 where Irvine J., giving the court's judgment, stated:

> "27. It is also well established that the threshold of arguability which a defendant must exceed to achieve a plenary hearing is a low one. Nevertheless, it is a threshold that amounts to more than mere assertion or stateability. There must be substance to the proposed defence and it must be based on facts which if true and established would amount to a defence and it must also be credible."

Irvine J. also referenced the oft cited passage of Clarke J. (as he then was) in *IBRC v. McCaughey* [2014] 1 I.R. 749 where he said:

> "[23] 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 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."

19. Mr. O'Keeffe seeks to surmount the credibility hurdle by suggesting that his evidence amounts to more than mere assertion because, *inter alia*, it is corroborated by the handwritten note of Mr. Kelleher which confirms that as Mr. O'Keeffe suggests, the arrangement fee was waived by the bank. However, far from corroborating his version of events, to my mind the document is entirely at odds with it. If such a fundamental term had been agreed between the parties on the 18th January, 2007, it is extraordinary to say

the least that Mr. Kelleher made no note of it. He did note the considerably less important term concerning the arrangement fee. The asserted terms of the contract must also be tested by reference to the subsequent conduct of Mr. O'Keeffe and in particular, the correspondence to which I have already referred. At every hand's turn, Mr. O'Keeffe was presented with the opportunity to put forward the case he now makes. In particular, when the bank was seeking information about his personal assets in 2010, which can only have been for the sole purpose of his guarantee, he made no reference to the case which is raised now for the first time in his replying affidavit the best part of a decade after the transaction was entered into. On any view of the matter, this purported defence consists of mere assertion, lacks any credibility and is contradicted by the documentary evidence.

20. As regards the second head of defence raised by Mr. O'Keeffe that no valid demand was made by the bank, his counsel submitted that the bank's proofs were not in order in circumstances where it had failed to comply strictly with the terms of para. 5 of the guarantee which requires an officer of the bank to provide a certificate with regard to the underlying debt to satisfy the requirement of showing that it had become due. He said that the grounding affidavit of David Coleman was deficient in this respect because the affidavit was sworn on the 17th August, 2015 but exhibit DC7 therein was actually dated the 8th September, 2015. Counsel for the bank indicated that the bank was waiving reliance on this certificate in circumstances where the bank did not have to rely upon it having exhibited a copy of the order of the Master of the High Court granting judgment to the bank against the company on the 29th October, 2015. That judgment is conclusive evidence of the underlying debt and there is no additional requirement on the bank to furnish the certificate referred to. Clause 5 merely provides the bank with an alternative and convenient means of establishing the underlying debt rather than having to prove it *ab initio.*

21. The third and final issue raised by Mr. O'Keeffe is that he is not liable on the guarantee because of changes made without his consent to the underlying loan thereby discharging the guarantee. The first point to note in that regard is that the terms of the guarantee it self clearly exclude the operation of the equitable doctrine. Thus para. 6 of the guarantee provides:

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

22. A similar defence was raised in *Danske Bank v. McFadden* [2010] IEHC 116 where Clarke J. (as he then was) said the following:

> "6.1 The entitlement of a guarantor to be discharged as a result of a change in the underlying contract which is guaranteed derives from equity. In order to be able to place reliance on the discharge, the guarantor must himself do equity. In follows that a guarantor who agrees or assents to such a change will not be able to claim discharge."

23. It seems to me that the correspondence to which I have already referred demonstrates clearly that Mr. O'Keeffe was in fact the guiding hand of the company insofar as its arrangements with the bank were concerned and he at all material times was not only aware of any changes to the terms of the underlying contract but expressly or by implication agreed to them. As noted by Clarke J. in *Danske v. McFadden*:

> "6.4 It does not appear that it is necessary that there be a formal assent by the guarantor to the relevant change. A guarantor who is a principal or significant player in a corporate entity whose liabilities are guaranteed may be taken to assent by virtue of active participation in the relevant changes. In *Grubbs v. Bouwhuis* [2007] BCSC 887, and *High Mountain Feed Distributors Limited v. Paw Pleasers Limited* [2004] NBQB 220, the Canadian Courts refused to discharge a guarantor from liabilities in circumstances where, in the case of *Grubbs* , the guarantor was 'the managing director of (the debtor) and had full knowledge of the deviation from the contract…and acquiesced in and consented to the business relationship that grew up …' while, in *High Mountain Feed* , the guarantor was president of the defendant corporation and in the words of the court 'must have not only known of… but actively participated' in the relevant variations.
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> 6.5 It would seem, therefore, that the (*sic*) at the level of principle a guarantor will not be discharged where the guarantor actually agrees or assents to a change which might otherwise give rise to a discharge. In addition, a guarantor will not be discharged where that guarantor is an active participant in arranging the alteration concerned, albeit not in the capacity of guarantor but rather as a significant player in the entity that is the principal debtor."

24. It is absolutely clear in the present case that Mr. O'Keeffe was at all times an active participant in all banking arrangements of the company, knew about them and if he did not actively make the arrangements himself, did not at any stage dissent from them. This purported defence therefore cannot succeed. For these reasons therefore, I am satisfied that Mr. O'Keeffe has not met the threshold of arguability required in the seminal *Aer Rianta v. Ryanair* case of demonstrating that he has a fair or reasonable probability of having a bona fide defence to the plaintiff's claim herein.

25. Accordingly, I must grant judgment to the bank in the sum of €1 million.