THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 180

Record Number 2017 No. 300

Peart J.
Irvine J.
Hogan J.

BETWEEN/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

APPELLANT

AND

PETER O'GRADY

FIRST NAMED DEFENDANT

RESPONDENT

AND

BARBARA O'GRADY

SECOND NAMED DEFENDANT/

RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 20th day of June 2018

1. This is the appeal of The Governor and Company of the Bank of Ireland ("the bank") against the judgment and order of the High Court, Binchy J., of the 15th June 2017.

2. By his order the High Court judge directed that the within summary summons proceedings be adjourned for a plenary hearing and he reserved the costs of the application for summary judgment to the trial judge.

3. By notice of expedited appeal dated the 23rd June 2017, the bank asserts that the trial judge erred in law and in fact in refusing to grant summary judgment against the respondents for the sum of €290,282.84. It claims that he erred in law and in fact in concluding that the respondents had demonstrated that there was a fair or reasonable probability of them having a real and *bona fide* defence to its claim. In this regard, it should be stated that the High Court judge restricted the respondents' entitlement to defend the proceedings to issues concerning the construction and interpretation of the guarantee and facility letters, the subject matter of the proceedings.

Background Facts

4. By summary summons dated the 19th March 2015 the bank sought judgment against the respondents in the sum of €290,282.84 being money payable by the respondents on foot of a Guarantee and Indemnity ("the guarantee") dated the 27th November 2000. The guarantee, on its face states that it was provided by the respondents in respect of the indebtedness of Lewis Stores Limited ("the company"), of which company they were directors. The proceedings were issued in circumstances where the company had failed to discharge its liabilities to the bank following service of a letter of demand of the 10th December 2012, and the O'Gradys' failure to meet the bank's demand for repayment of the said sum by them on foot of their guarantee by letter dated the 16th January 2015.

5. In the High Court, the respondents advanced two potential grounds of defence to the proceedings. First, they claimed that the guarantee did not comply with the Statue of Frauds 1695. That argument was rejected by the High Court judge and needs no further consideration in circumstances where there is no cross appeal from his determination on the issue. The second was based upon the respondents' assertion that the guarantee was one which was limited in nature. According to the O'Gradys it had been their understanding that the guarantee required by the bank was one to be provided by them for the sole purpose of securing payment to the bank of monies that might become payable on foot of a Life Policy, which they were also to provide to the bank to secure the company's indebtedness.

6. The second of the respondents' aforementioned submissions found favour with the High Court judge. He concluded that they had demonstrated the probability of a credible and bona fide defence to the bank's claim. The High Court judge, in particular, relied upon an ambiguity in the bank's facility letter dated the 24th November 2000, addressed to the company, wherein the "security" required to support the banking facilities to be made available to the company was stated to include the following:-

> "(ii) Assignment of Keyman cover/life cover on Peter & Barbara O'Grady to a level of IR£350,000. As the Life Policy is in your personal names, a Letter of Guarantee will be requested from Peter and Barbara O'Grady, to cover the company's liabilities."

7. It was in reliance on this term in the facility letter that Mr. Peter O'Grady, on behalf of both respondents, asserted that the guarantee had been signed for the express purpose of securing the beneficial interest that either party would have in the Life Policy if the other died. In the event of such an occurrence the proceeds could then be applied in reduction of the company's liabilities to the bank.

8. Material to the factual background also is the fact that the Life Policy mentioned in the facility letter dated the 24th November 2000 was taken out by the O'Gradys on the 2nd April 2004 and thereafter assigned to the bank on the 28th April 2004. Of further relevance is the fact that the Life Policy subsequently lapsed in or about July 2012, as is the fact that the company went into liquidation on the 6th November 2012 prior to being dissolved from the 29th July 2014.

Other Material Documentation
9. Given that this appeal is one which focuses upon the contractual arrangements between the bank, the company and its directors and the fact that these were committed to writing, it may be helpful to refer to some of the relevant extracts from the supporting documentation.

10. The letter of loan offer to the company of the 24th November 2000 under the heading 'Security' includes the following statement: -

> "Any security held now, or at any future time, shall be security for all liabilities of the Borrower to the Bank. *Security currently held*, and/or that required for the above facility(ies) is as listed below."

11. Clause A of the guarantee dated the 27th November 2000, signed by the O'Gradys, provides as follows:

> "In consideration of the bank making or continuing advances or otherwise giving credit or affording banking facilities to the customer, for as long as the bank may think fit, the guarantors unconditionally and irrevocably guarantee and agree as a continuing obligation to pay to the bank on demand all sums of money (hereinafter called 'the ultimate balance') which are now or shall at any time be owing or remain unpaid to the bank . . ."

Clause B.4. of the guarantee provides as follows:

> "This guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the bank for all or any part of the liabilities hereby guaranteed."

Clause 4.10 provides as follows:

> "This guarantee shall be binding as a continuing security on the guarantors, and in the event of death of any of the guarantors, on his executors or administrators and on his estate, until the expiration of one calendar month after all the guarantors, including in the case of death, all the executors or administrators of the estate of the deceased guarantor shall have given to the bank notice in writing to discontinue and determine it."

12. The guarantee is also endorsed with a certificate concerning receipt by the O'Grady's of independent legal advice. This was completed and signed by them individually. The following is what they certified:

> "I confirm that prior to the execution of the above guarantee I was independently advised on the nature, terms, the effect of the guarantee by a solicitor."

Signed: P. O'Grady

> "I confirm that prior to the execution of the above guarantee I was independently advised on the nature, terms, the (*sic*) of the guarantee by a solicitor."

Signed: Barbara O'Grady"

13. It is not in dispute that the terms advised in the letter of loan offer were duly accepted by the company. Further, it would appear *prima facie* that it was the bank's intention that any security which it held pursuant to that offer would secure all liabilities of the "Borrower to the Bank" as per the terms quoted at paragraph10 above. Of importance also is the fact that the terms of the guarantee, signed by the O'Gradys, are in standard form and expressly provide that the Guarantee is to cover all sums of money then or which may at any time remain owing or unpaid by the company up to a limit of IR£350,000.

14. Material also to the overall circumstances of this claim is the supplemental affidavit sworn by Mr. John Conville wherein he stated that all subsequent letters of loan offer were expressly premised upon the security provided by the guarantee of the 27th November 2000. There are four such letters of loan offer which are dated the 4th April 2003, the 20th May 2004, the 6th October 2005 and the 13th September 2010 respectively. I will refer to but two extracts from these facility letters.

15. In the letter of loan offer of the 20th May 2004 under the heading "Security" the 'security currently held' was stated to include the following:-

> "2. Assignment of Hibernian Life Policy on the joint lives, with sum assured of €440,000.
>
> 3. Letter of guarantee from Peter and Barbara O'Grady in favour of Lewis Stores, in the amount of €440,000."

16. In the letter of loan offer of the 13th September 2010 under the "Security Held" provisions the following is noted:-

> "Letter of guarantee from Mr. Peter O'Grady and Mrs. Barbara O'Grady guaranteeing the borrowers' liabilities in the amount of €444,408 in respect of principal together with interest and costs accrued thereon.
>
> **Supported by:**
>
> Assignment to the bank of Level Term Hibernian Life & Pensions Ltd. Life Policy No. A4314659K on the lives of Mr. Peter O'Grady and Mrs. Barbara O'Grady for an amount of €444,409 each."

17. It is asserted by the bank in its grounds of appeal that the learned trial judge failed to have regard to the fact that, apart from the facility letter addressed to the company dated the 24th November 2000, there was no other document or other evidence produced by the respondents to lend credibility to, or support, their bare assertion that the guarantee was limited to securing payments as might fall due on foot of the Life Policy. The guarantee itself, which was signed by the O'Gradys, contained no such limitations.

Submissions of the Appellant
18. Counsel for the bank submits that:

> (i) It is simply not credible for the O'Gradys to contend that the guarantee did not guarantee the company's liabilities, but only guaranteed the payment to the bank of such sums as might fall due to be paid under the Life Policy. He submits that it is preposterous to believe that the bank would have accepted a guarantee of that nature as it would have been entirely unsecured until such time as the Life Policy was triggered. A guarantee of that nature was of no value to the bank and was precarious because the Life Policy could be brought to an end simply by non-payment of the premium by the O'Gradys. A borrower who was not *bona fide* could therefore unilaterally cause the policy to lapse. Further, there was no note or memorandum to support Mr. O'Gradys' stated belief as to the terms of the guarantee. Neither was there any evidence from their solicitor who clearly had advised them on the nature and terms of the guarantee.
>
> (ii) The contract between the bank and the O'Gradys was the guarantee. The bank's proceedings are on foot of the guarantee dated the 27th November 2000. It is not suing on the facility letter which was addressed to the company. That letter affords no credible defence to the O'Gradys. The guarantee made clear that the O'Gradys were securing all liabilities of the company to the extent of IR£350,000. While the letter of loan offer might have been clumsily drafted, it was nonetheless clear from its face that the letter of guarantee was to be provided to "cover the company's liabilities" rather than, as alleged by the O'Gradys, to capture any entitlement of either respondent to any payment as might ultimately be made pursuant to the Life Policy. Whilst it was stated that the letter of guarantee was required because the Life Policy was in the O'Gradys' personal names, the relevant clause nonetheless made clear that the letter of guarantee was to cover the company's liabilities rather than any potential default in payment of the Life Policy.
>
> (iii) The terms upon which the O'Gradys contend they executed the guarantee are not supported by any document. They had "unconditionally and irrevocably" guaranteed the company's liabilities and had done so on a "full and unqualified indemnity basis". They had provided the guarantee "in addition to" any other security. The express understanding contended for by Mr. O'Grady was in the teeth of the commercial documentation signed by himself and his wife and in respect of which they both certified they had been advised by a solicitor. Further, the agreement for which they contended was wholly inconsistent with what was recorded in later letters of loan facility which made clear that the guarantee was always separate from the Life Policy and was intended to cover the companies' liabilities rather than to support, in some way, the Life Policy.
>
> (iv) The defence of *non est factum* was not available to the O'Grady's because they were not in a position to meet the requirements of the relevant test as advised by this court in *Allied Irish Banks v. Higgins* [2015] IECA 23.

The Respondents' Submissions
19. Counsel for the respondents submits that the High Court judge cannot be faulted for his decision to remit these proceedings for a plenary hearing. He submits, *inter alia*, as follows:

> (i) There was sufficient ambiguity in the documentation exhibited for the court to conclude that it could not rule out the possibility that Mr. and Mrs. O'Grady had a *bona fide* defence to the proceedings.
>
> (ii) Whilst, on Mr. O'Grady's understanding of the guarantee, the bank was unsecured until the Life Policy was put in place four years later and then only in the event of the death of one or other of the respondents; that was the bank's problem to cure.
>
> (iii) The fact that the bank, on the O'Gradys' understanding of the guarantee, would only be secured in respect of the company's liabilities should either of the respondents die and the insurance company fail to pay out the policy, that again was not determinative as to the terms of the guarantee.
>
> (iv) Whilst the bank might have been entitled to sue the respondents in light of the fact that the Life Policy was allowed lapse in 2012, any such entitlement did not render the respondents liable for the sums claimed by the bank on foot of the guarantee.
>
> (v) The intention of the parties, in 2000, when the guarantee was executed, could not be altered by the fact that the letter of loan offer of 13th September 2010, or indeed any other letter of loan offer, treated the guarantee as separate security for the liabilities of the company and went on to record that the guarantee in turn was supported by the Life Policy.
>
> (vi) The High Court judge, on the evidence, was entitled to conclude that the O'Gradys had demonstrated a fair or reasonable probability of have a real or *bona fide* defence to the proceedings based on their assertion that it was the intention of the parties that the guarantee would be limited in nature and was to be provided solely for the purposes of securing any future payment on foot of the Life Policy.

The Principles to be Applied on an Application for Summary Judgment
20. There is no real dispute between the parties as to the principles to be applied by a High Court judge when hearing an application for summary judgment. The most straightforward guidance on the proper approach to the judge's task is to be found in the decision of Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R.621 where he stated:-

> "In my view, the fundamental question to be posed on an application such as this remain: is it "very clear" that the defendant has no case? 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?"

21. More detailed guidance on the approach to be adopted by the court is to be found in the judgment of McKechnie J. in *Harrisrange Limited v. Duncan* [2002] IEHC 14, [2003] 4 I.R. 1 where he identified the following principles as those to be applied on an application for summary judgment, namely: -

> "(i) the power to grant summary judgment should be exercised with discernible caution;
>
> (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
>
> (iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
>
> (iv) where truly there are no 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;
>
> (vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;
>
> (viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;
>
> (ix) leave to defend should be granted unless it is very clear that there is no defence;
>
> (x) leave to defend should not be refused only because the court has reason to doubt the *bona fides* of the defendant or has reason to doubt whether he has a genuine cause of action;
>
> (xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;
>
> (xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

22. Of some additional assistance in the context of the legal issues raised by the bank on this appeal is the decision of Clarke J. (as he then was) in *McGrath v. O'Driscoll* [2007] 1 ILRM 203, where he stated, in the context of a summary judgment application at para. 3.5:-

> "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 in determining those questions within the somewhat limited framework of a motion for summary judgment."

23. When the dispute between the parties on an application for summary judgment centres upon the potential construction of documents, the decision of Charleton J. in *Dankse Bank v. Durkan New Homes* [2009] IEHC 278 as to when a plenary hearing might be required to advance matters, is of relevance. The following is what he stated at para. 17 of his judgment: -

> "17. …If the addition of evidence can assist in any material way in the construction of a document then, I agree, the matter should be put for plenary hearing. If, on the other hand, the question of law arising on affidavit evidence can be as well considered on a motion for summary judgment as at a plenary hearing, then I feel it is the obligation of the court to resolve it on hearing that motion…."

24. In the High Court, Charleton J. concluded that there was nothing in the legal issues to be determined that necessitated a plenary hearing and accordingly he decided the case on the basis of the arguments that had been advanced by the parties. It is important nonetheless to note that his decision was reversed on appeal and that in the course of her judgment, Denham J. stated at para. 20 *"while a court may resolve questions of law there is no obligation to do so"* (emphasis added). She reiterated the test was whether the defendant had established an arguable defence and she was satisfied that the defendants had fulfilled the test because the issues to be tried were not simple and clear.

Decision

25. Having considered all of the documentation that was before the High Court judge and the able submissions of counsel for the respective parties, I am satisfied that the O'Gradys did not establish a fair or reasonable probability of having a real or *bona fide* defence to the proceedings. In my view, the defence proposed by the O'Gradys lacked any credibility, was in the teeth of the terms of the contract of guarantee which they signed and was unsupported by any credible evidence such as evidence from the solicitor who advised them concerning the terms and conditions of the guarantee.

26. Prior to summarising my conclusions, I should state that I have significant sympathy for my High Court colleagues when it comes to the circumstances in which they are expected to hear and determine applications for summary judgment. The applications are often burdensome in terms of the volume of papers provided and, unlike judges in the appellate courts, High Court judges rarely have the opportunity to read in advance the papers upon which they will be invited to reach an immediate conclusion. Quite often neither do they have the benefit of written submissions. Because of the pressure of work, they are under pressure to deliver judgment ex tempore judgments when they might prefer to postpone their deliberations. In such circumstances it is easy to see how the High Court judge came to the conclusion which he did. However, on a more thorough analysis of the affidavits and exhibits and with the benefit of written submissions, I am satisfied that the O'Gradys did not meet the modest threshold of proof required to justify the

proceedings being referred for a plenary hearing.

27. The question this court must address is whether the issues raised for the consideration of the High Court judge were simple and clear to the point that they should have been decided favour of the bank, or did he err in law and in fact in concluding that the O'Gradys had demonstrated a fair or reasonable probability of having a real or *bona fide* and defence?

28. To answer this questions, it is necessary to consider in slightly greater detail the respondents' submissions, which were in truth almost entirely based upon the wording of one sentence in the letter of loan offer of the 24th November 2000 from which the court is asked to conclude that the O'Gradys might reasonably, credibly and *bona fide* contend that the guarantee executed by them was one intended only to support the Life Policy rather than the liabilities of the company to the extent of IR£350,000.

29. The first matter which is of critical importance is the fact that the bank has brought these proceedings on foot of the contract contained in the guarantee. It is not suing the company for payment of monies outstanding further to the letter of loan offer of the 24th November 2000. The terms of the guarantee could not be clearer. It is what is commonly described as an all sums guarantee and indemnity and its wording does not limit or confine the guarantee to the Life Policy. Indeed, the Life Policy is not mentioned at all in the document. Further, the guarantee is stated to be unconditional and additional to any other security. It provides that it is irrevocable and exists to support the continued liabilities of the company. There is simply in the guarantee to support the interpretation of the contract proposed by Mr. O'Grady.

30. In light of the clear terms of the guarantee and the certificate to the effect that the nature and terms of the guarantee had been fully explained to them by their solicitor, it was in my view incumbent on the O'Gradys to seek to support their otherwise bare assertion as to the intended terms of the guarantee by reference to some credible documentation or objective evidence including perhaps in this case an affidavit from the solicitor from whom they say that they received independent advice. I say this because Mr. O'Grady in his first affidavit states that it was his "express understanding" that the guarantee was only to secure to the bank in respect of any payment that might later be made on foot of the Life Policy. It follows that he was asking the court to accept that his solicitor had advised himself and his wife that the guarantee would have no effect so long as they both remained alive and that it would be rendered ineffective should, for any reason, the Life Policy lapse or be terminated.

31. I accept that the guarantee must be construed to give effect to the intention of the parties and that notwithstanding its clear terms earlier described the court is entitled to consider the circumstances surrounding its execution in order to establish the true nature an extent of the contract of suretyship created between the bank and the O'Gradys in much the same way as it might look at the factual matrix needed to construe any other commercial agreement. However, even the facility letter so heavily relied upon by the O'Gradys, does not support the interpretation of the contract of guarantee which they propose. The relevant clause under the heading 'Security' reads as follows:

> "Any security held now, or at any future time, shall be security for all liabilities of the Borrower to the Bank. *Security currently held*, and/or that required for the above facility (IES) is as listed below:
>
> > (ii) assignment of Key Man Cover/Life Cover on Peter and Barbara O'Grady to a level of IR£350,000. As the Life Policy is in your personal name, a Letter of Guarantee will be requested from Peter and Barbara O'Grady to cover the company's liabilities."

32. Twice it is stated in the above extract that the Guarantee is intended to cover the company's liabilities.

33. Leaving aside the terms of the letter of the loan offer, a document principally material to the contract between the bank and the company, there is no other document exhibited to support the bare averment made by Mr. O'Grady as to his understanding of the guarantee. Further, all of the subsequent letters of loan offer refer to the bank currently holding a personal guarantee from Mr. & Mrs. O'Grady to secure the company's liabilities in addition to the security provided by the Life Policy. On reading the terms of those letters, and if they understood their guarantee to be what they now contend, they would surely have immediately contacted the bank to say that the guarantee was never intended to secure the liabilities of the company but was only to secure the life policy if one of them died. Is it credible that they failed to observe an error of such fundamental importance to their interests on four occasions? I think not.

34. As to whether Mr. O'Grady's stated understanding as to the very limited terms of the guarantee for which he contends is credible and *bona fide*, I consider it material that at the time of the execution of the guarantee that Mr. & Mrs. O'Grady both certified that the nature and terms of the guarantee had been explained to them by their solicitor. I ask myself: is it credible that their solicitor, having read the terms of the guarantee, could have advised them that it was only in the event of one of them dying and the insurance company failing to pay the sum secured by the Life Policy, that the survivor would have to pay the sum of IR£350,000 to the bank in reduction of the company's liabilities to the bank? Is it credible that they would have been advised that whilst they were both alive the bank could not, regardless of the clear terms to the contrary, demand payment from them of any sum due by the company regardless of the amount outstanding or the occurrence of an event such as liquidation? Surely not. I also ask myself how a guarantee in the terms proposed by the O'Gradys would provide the bank with any additional security to that provided by an assignment of the Life Policy stated to be required to support the company's liabilities. In my view it could not.

35. Having regard to the documentation earlier referred to, I am satisfied that the trial judge erred in fact and in law when he concluded, on the evidence before him, that the respondents had established that they might credibly advance a defence to the within proceedings on the basis of the letter of loan offer. The defence proposed in my view was not only not credible but was to be in terms which are not even supported by the said letter which is in turn not consistent with the clear terms of the guarantee signed by both respondents following legal advice from their solicitor.

36. It is undoubtedly the case that the language in the letter of loan offer, which was addressed to the company, was badly drafted. But it is simply preposterous to suggest that this affords the possibility of a *bona fide* defence to the claim on foot of the guarantee. Echoing the words of Hardiman J. in *Aer Rianta v. Ryanair* it is very clear that the respondents have no defence to the bank's claim.

37. The terms of the guarantee, as proposed by Mr. O'Grady, would have given the bank no security for the company's borrowings unless one of them died. It is not credible that the bank expressly agreed that it was to have no security in the event of the company going into liquidation or failing to meet any repayment commitments particularly given that the guarantee states to the contrary and the bank insisted that the O'Gradys obtain independent legal advice before signing it. Even less credible is the submission that the bank would have taken the guarantee solely to secure the Life Policy. The guarantee could be rendered valueless in the event of the policy holders failing to make such payments as were necessary to keep the policy in place or the termination of the policy for other reasons.

38. Insofar as Mr. & Mrs. O'Grady might seek to rely upon the doctrine of non est factum it is clear from the decision of this court in *Allied Irish Banks v. Higgins* that they would have to prove:-

> "(a) that there was a radical or fundamental difference between what they signed and what they thought they were signing;
>
> (b) that the mistake was as to the general character of the document as opposed to its legal effect; and
>
> (c) that there was a lack of negligence *i.e.* that they took all reasonable precautions in the circumstances to find out what the document was."

39. It is not disputed in this case that the defendants knew that they were signing a guarantee. They knew the general character of the document. Their only dispute is as to its legal effect. In terms of the legal effect. By reason of this one fact alone they could not seek to advance a defence based on *non est factum*.

Conclusion

40. For the reasons earlier set out in this judgment, I am satisfied that the High Court judge erred in law and fact when he concluded that the O'Gradys had established a fair or reasonable probability of their having a real or *bona fide* defence to the within claim. The construction of the guarantee for which they contend is, in my view, entirely lacking in credibility, is unsupported by the documentary evidence and flies in the face of commercial reason and common sense.

41. Accordingly, I would allow the appeal. It follows that I would also grant summary judgment against the respondents in favour of the appellant for the sum of €290,282.84.