

BETWEEN

ALLIED IRISH BANKS P. L. C.

PLAINTIFF

AND

KIERVIEW LIMITED, HAROLD LYNCH AND BETH HAUGHTON (OTHERWISE ELIZABETH ANN HAUGHTON)

DEFENDANTS

JUDGMENT of Mr. Justice MacGrath delivered on the 5th day of February, 2019.

1. In this application the plaintiff seeks summary judgment against the first named defendant, Kierview Limited, in the amount of €16,133.14. It also seeks joint and several judgments against the second and third named defendants in the sum of €235,539.34, in respect of the alleged liabilities on foot of certain loans and guarantees. The plaintiff's claims are partially conceded by the defendants.

2. The application is grounded on the affidavit of Brian McGuinness, senior manager of the plaintiff bank, sworn on 30th June, 2017. He avers to the existence of liabilities arising from a course of dealing between the parties in relation to various accounts and agreements. The dispute which now exists between the parties relate to alleged liability on foot of two credit agreements, stated to have been created with the purpose of consolidating existing loans, both of which were entered into on the 5th March, 2010.

3. For the sake of completeness, the following are the accounts in respect of which claims arise in these proceedings.

Current Account No (93-41-43) 40962-134

4. By letter of sanction dated 31st May, 2013 the plaintiff approved the continuation of an existing overdraft facility to Kierview Limited subject to a credit limit of €15,000.00 and the plaintiffs general lending terms and conditions. The overdraft facility was to continue until further notice or review. Interest was specified and the facilities were supported by individual guarantees to the sum of €15,000.00 provided by both the second and third named defendants.

5. The first defendant failed to maintain payments as required. By letter dated 3rd November, 2015, the plaintiff terminated the overdraft facility and demanded repayment of the outstanding balance of €15,748.01. The outstanding amount had increased to €16,182.27 as of 24th May, 2016. No repayments were made to the account between the 4th November, 2016 and the 27th March, 2017.

6. Liability has been accepted in respect of this debt.

Guarantee

7. By guarantee dated 30th October, 2009 and in consideration of the plaintiff bank agreeing to provide continuing advances Mr. Lynch, the second named defendant herein guaranteed the debts of Kierview Limited up to and including the sum of €15,000.00 together with interest thereon from the date of demand.

8. The third named defendant, Ms. Haughton, signed a similar guarantee dated the 25th October, 2009 in respect of the debt of Kierview Limited up to and including the sum of €15,000.00 together with interest thereon from the date of demand.

9. Letters dated the 26th September, 2016 issued to Mr. Lynch and Ms. Haughton demanding repayment of the sum.

10. The defendants are not contesting the monies due and owing under these guarantees.

Loan Account No. (93-41-43) 40963-371

11. By credit agreement dated 20th October, 2008 ("*the first credit agreement*") the plaintiff bank offered to advance a loan facility to the second and third named defendants in the sum of €85,000.00. This was accepted by the defendants on the 20th October, 2008. The facility was payable on demand, and by 240 instalments. A particular rate of interest was agreed. This facility appears to have been related to a property transaction.

12. The defendants subsequently defaulted and a letter issued on 7th July, 2016 demanding immediate repayment of the sums due. No issues now arise in relation to the second and third named defendant's liability in respect of sums due on foot of this account. The amount due is €60,775.28 plus continuing interest from the 18th June, 2018.

Loan Account No. (93-41-43) 40963-538

13. By further agreement dated 5th March, 2010 ("*the second credit agreement*") the plaintiff offered to the second and third named defendants a loan facility of €94,500.00. This was accepted by them on the 9th March, 2010. The purpose of this facility was described as debt consolidation and was repayable by way of 240 consecutive monthly payments commencing on the 30th March, 2010. Interest was payable at the variable base lending rate plus 4.700%, which was 5.432% per annum as at the 12th February, 2010.

14. The defendants defaulted on payments and by letters of demand dated 7th July, 2016, the plaintiff sought immediate repayment of the sums due and owing which as of the date of demand was €99,438.52.

Loan Account No. (93-41-43) 40963-611

15. A further loan was offered to the second and third named defendants by way of a credit agreement dated 5th March, 2010 ("*the third credit agreement*") in the sum of €49,000.00, which was accepted by the defendants on the 9th March, 2010. This was subject to the bank's general lending terms and conditions, with a base lending interest rate plus 4.700%, which as of 12th February, 2010 was 5.411%. Section D of the said credit agreement is of relevance. In the context of "*Security/Special conditions*" the following is stated:-

"The Special Conditions for this credit facility are:

- 1. ACCOUNT NO.'S 934143 40963298 & 934143 93112071 ARE TO BE CLEARED IN FULL UPON DRAWDOWN OF THIS FACILITY*
- 2. EXISTING AIB F&L FACILITIES N/O PAGE SERVICES LTD ARE TO BE CLEARED IN FULL ON DRAWDOWN*

The Security for this credit facility is:

- 1. ASSIGNMENT FROM MR HAROLD LYNCH OVER HIBERNIAN LIFE WHOLE LIFE POLICY 80537979 ON THE LIFE OF MS BETH HAUGHTON FOR EUR95230.36.*
- 2. ASSIGNMENT FROM MS BETH HAUGHTON OVER HIBERNIAN LIFE WHOLE LIFE POLICY 80537944 ON THE LIFE OF MR HAROLD LYNCH FOR EUR95230.36. "*

16. A similar condition was implemented in the second credit agreement.

17. The defendants defaulted on the repayments of these loans and by letter dated the 7th July, 2016 the plaintiff, through its solicitors, demanded immediate repayment of the outstanding sum of €48,949.06. The defendants have failed to pay the outstanding balance.

18. The second and third named defendants have sworn affidavits in reply to this claim. Although liability on foot of the first credit agreement is no longer in issue, in a replying affidavit, sworn on the 31st October, 2017, Mr. Lynch refers to the exhibited copy of the first credit agreement in the grounding affidavit of Mr. McGuinness and made the point that the document, as exhibited, does not refer to the correct account number and that the correct account number could not be found therein. The affidavit highlights the concern of the second and third named defendants in relation to the distribution of the proceeds of sale of "Tarrangona" at Wilton Avenue, Cork. The second defendant averred his belief that the proceeds of the said sale in the sum of €189,481.09 was lodged in October, 2009 in satisfaction of the security required in the first credit agreement.

19. Mr Lynch, in his first replying affidavit also rejected the description given to the second and third credit agreements as being "debt consolidation". He asserts his belief that he may have entered into such agreements under duress, as he was given the impression that he was responsible for the consolidated loans which were advanced to two limited liability companies, one being the first named defendant herein.

20. A supplemental affidavit was sworn by Mr. McGuinness on 17th November, 2017 and he clarified the position in relation to the first credit agreement. The "Tarrangona" funds were to be paid to another account number 40960-298, at the request of the defendants solicitors by way of letter dated 30th October, 2009.

21. By way of further replying affidavit sworn by Ms. Haughton dated the 13th June, 2018 the clarified position in respect of the "Tarrangona" funds is accepted by the defendants. It is accepted that the defendants have liabilities in respect of account number 40963-298, a joint account in their names, but Ms. Haughton avers that account number 39112-071 is a company account of either Page Services Limited and/or Kierview Limited and protests the plaintiff bank failed to furnish copies of the statement of account, despite repeated requests.

22. It is maintained by the second and third named defendants that the third credit agreement was also executed solely on the basis of representations made by the bank that the second and third named defendant were responsible for the borrowings of Page Services Limited and Kierview Limited. Ms. Haughton asserts that they would not have assumed the liabilities of the companies, had they no obligation to do so, and further that this third credit agreement was executed without legal advice.

23. Mr. Lynch also swore a further affidavit on the 6th July, 2018. He avers that the funds supplied under the third credit agreement were used to clear accounts in relation to Page Services Limited and "existing AIB F&L facilities n/o Page Services Ltd". It was drawn down on the basis of representation made by an account manager in the Patrick Street branch, Cork to the effect that the second and third defendant were personally liable for the company debts. These representations were made a time close to when Page Services Limited was liquidated on or about the 30th September, 2009. Mr. Lynch avers that at the time they were "extremely traumatised following the collapse of Page Services Limited and did not question the banks position that we were personally responsible for the company " Further, he avers that they would not have personally borrowed monies to satisfy the liabilities of the company unless they had an obligation to do so. Finally he asserts that they received no legal advice prior to signing the credit agreements.

24. The affidavit also emphasises the attempts made by his solicitors since these proceedings commenced to ascertain the basis on which the bank maintains that the defendants were personally responsible for the liabilities of Page Services Limited. He states that such requests have been ignored and/or refused by the plaintiff bank. The second and third defendants argue that this matter cannot be properly resolved without resorting to discovery.

25. As the second and third named defendants contended that the plaintiff had failed to provide details of the companies' liabilities, particularly Page Services Limited, and that they had insufficient details of the company's liabilities, the court offered the opportunity to make inquiries of the liquidator of Page Services Limited and to seek clarification of its loans and credit facilities. In his affidavit of 6th July, 2018, Mr. Lynch offered no evidence of attempts to contact the liquidator. However, some further detail was provided in relation to the circumstances of the creation of the disputed credit agreements, which I will address below.

26. The principles applicable on an application for summary judgment were stated in *Harrisrange v Duncan* [2003] 4 I.R. 1, by McKechnie J. at p. 7:-

"From these cases it seems to me that the following is a summary of the present position:-

(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. "

27. On the hearing of this application, counsel for the plaintiff placed significant reliance on the decision of Hedigan J. in *Allied Irish Banks plc and AIB Mortgage Bank v. Flanagan* [2015] IEHC 632 and seeks to draw parallels between that decision and the facts of this case. There, the bank applied for summary judgment in respect sums outstanding on foot of certain loan agreements. The defendant was a businessman of considerable experience in the restaurant and property sectors. He was a long-standing customer of the bank. He accepted the fact of the loans and the amount stated to be due but sought leave to defend on three grounds, the most relevant of which for present purposes were that the loan agreement was signed under duress and without the benefit of independent legal advice. No details of duress were provided and duress was alleged in respect of only two loan agreements out of a number of transactions. The purpose of the loans was to restructure earlier loans. Hedigan J. did not find the defence credible.

28. In the absence of some clear indication of disability on the part of the borrower, he held that there is no legal obligation on the bank to ensure that the customer has the benefit of independent legal advice.

29. The second and third named defendants are business people who have several bank accounts and a history of dealing with the plaintiff. It is not asserted that the alleged misrepresentation applied to any of the dealings, save for the ones in dispute and only to the extent that such credit facilities relate to company accounts which were otherwise unsupported by personal guarantees. Also, despite the receipt of regular statements relative to the loans in dispute, there is no evidence that the second and third named defendants, prior to the swearing of the affidavits in these proceedings, communicated with the bank and asserted the position had been misrepresented by the plaintiff or any of its agents or that they had laboured under a misunderstanding on their part in this regard. Indeed, following the threat of proceedings, and during the course of pre-litigation correspondence, issues were also raised in respect of what the defendants now accept was the appropriate attribution of the proceeds of the sale of property to reduce another loan. The correspondence illustrates that the second and third named defendants recollection of their transactions with the plaintiff has frailties. On the other hand, counsel for the defendants submits that where clarification has been forthcoming, liability has been accepted by his clients, as is evidence of their *bona fides*.

30. Analysis of the bank statements show that the second and third named defendants made monthly repayments in accordance with the terms of the loan for a period of at least three years – to mid or late 2013.

31. In essence the defence advanced is that the monies provided on foot of the credit agreement in dispute was for the purposes of, *inter alia*, clearing company accounts and facilities provided by AIB F&L in respect of a company, Page Services Limited, which went into liquidation on 30th September, 2009, six months prior to the execution of the credit agreements and in respect of which the second and third named defendants had not previously provided personal guarantees. Ms. Haughton avers that when the facilities in the two loan agreements of 5th March, 2010 were executed by them it was solely on the basis of representations by the bank that they were responsible for the borrowings of Page Services Limited and/or Kierview Limited. While the person who is alleged to have made the representation has not been named, in the more detailed affidavit sworn by Mr. Lynch on 6th July 2018, he avers that it was his accounts manager in the plaintiff's branch in Patrick Street, Cork who contacted him and represented to him that both Ms. Haughton and he were personally responsible for the company's debts due to the bank on the basis of personal guarantees. He states that they would not have entered into the agreements, if there were no such guarantees in existence.

32. This court must be mindful of *dicta* of Clarke J. in *IBRC v. McCaughey* [2014] 1 I.R. 749 where he stated at para. 23 as follows:-

"...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."

33. While this court may have reservations in relation to the strength of a defence, it is clear from *McCaughey* that it is not the function of the court on an application such as this to determine issues of credibility where a potential conflict arises.

34. There are certain factors which, in my view, may be said to indicate that the proposed defence of the defendants amounts to no more than an assertion. The misrepresentation defence has been raised very late, indeed several years after the transaction, the obligations under which the second and third named defendants complied with for at least three years. Further, the application for summary judgment was adjourned to enable the second and third named defendants to communicate with the liquidator of Page Services Limited, and to seek clarification regarding that company's accounts, but this was not done and no reason is proffered as to why it was not done.

35. That the defendants were not legally advised, in my view, is not relevant in the circumstances, given that there is no suggestion that the defendants were under a disability. While they may have been traumatised following the collapse of Page Services Limited, no particular evidence has been adduced as to their medical state or condition at that time - or that if such a relevant condition existed, that it continued for a period thereafter.

36. It is clear from an analysis of the two credit agreements which were executed on 5th March, 2010 that it was a special condition that, upon drawdown of each facility, certain accounts would be cleared in full, including existing "AIB F&L" facilities. Page Services Limited appears to have gone into liquidation a number of months previously. Thus, if the company had gone into liquidation and if the second and third defendants assumed a personal liability for the debts of that company to another but separate branch of the plaintiff group of companies, then a query arises as to how, absent a pre-existing personal liability, the second and third defendants assumed those particular debts of the company, now in liquidation. The defendants maintain that this occurred as a result of a misrepresentation by a now identified, but unnamed, person at the plaintiffs branch in Patrick Street, Cork.

37. This court must be mindful of its role on an application for summary judgment. In applying the relevant principles as recognised by McKechnie J. in *Harrisrange* I must bear in mind the constitutional rights of the parties of access to the courts. Further, it is not the function of the court on this application to determine issues of credibility. In the affidavit sworn by Mr. Lynch on 6th July, 2018 a specific averment is made in relation to the representation. It is stated to have been made by an accounts manager at the plaintiff's Patrick Street branch in Cork. This is not particularly disputed on affidavit by the plaintiff save to contend, by way of submission, that this is a mere assertion.

38. The plaintiff may prove to be correct that there is little substance to the defence proffered by the defendants but I must consider whether, at this stage, the suggested defence must be ruled out as being unarguable? Despite reservations which I have in relation to the strength of the second and third named defendant's potential defence in this regard, I am not satisfied that I can safely answer in the affirmative, the underlying question which must be addressed, of whether it is clear that the second and third named defendants have no defence. This court must consider where the interests and balance of justice lies. If the second and third named defendant have assumed liabilities for debt which they were not obliged to, and this was the result of a misrepresentation made by an agent of the plaintiff, it would be to risk injustice to preclude them from arguing that point at plenary hearing.

39. In the circumstances, I must refuse the plaintiff's application for judgment in respect of this aspect of the claim but the bank is entitled to judgment in respect of the uncontested amounts.