

THE HIGH COURT

[2011 No. 2061 S]

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

JAMES HORGAN

DEFENDANT

JUDGMENT of Mr. Justice Birmingham delivered the 7th day of March, 2014

1. In this case, the plaintiff is seeking judgment in the sum of €151,511.32 against the defendant on foot of a guarantee in writing entered into by him on the 23rd September, 2004. The proceedings were commenced by way of summary summons and the bank brought an application for summary judgment, which coincidentally came on for hearing before me on the 12th February, 2013. On that occasion, unusually and I would feel somewhat undesirably, a number of witnesses were cross - examined on foot of notices of intention to cross - examine. Having heard the application, I directed that the matter should be remitted to plenary hearing. On that occasion and again when a full hearing came on before me in Cork in recent days, the major issue between the parties was a contention by the defendant, on which he was supported by a number of family members that in or about November 2005, he was released by the bank in writing from all obligations under the guarantee. At the recent hearing a number of subsidiary points by way of defence were raised, counsel for the defendant referring to these as "technical issues". I will deal briefly with the subsidiary matters first before turning to deal with the question of the alleged release from the guarantee which is the core issue in the case and which is a heavily disputed matter of fact.

2. I should explain that the parties were in agreement that in deciding the case, I should have regard not just to the evidence given in the recent hearing in Cork, but also to the evidence of a number of witnesses, Mrs. Mary Horgan, Mr. William Horgan and Ms. Deirdre McCarthy, who gave evidence on the summary judgment application. Given the nature of the examination and cross - examination of witnesses on the full hearing which involved extensive references to the evidence given in the course of the earlier proceedings, I indicated to the parties that I would read the transcript of the evidence of the earlier hearing in full and I have done so.

3. Before turning to the subsidiary defences, the technical issues, I should just by way of general background explain that by virtue of the guarantee of the 23rd September, 2004, the defendant purported to guarantee borrowings by Robert Horgan and David Horgan. The defendant is the father of Robert Horgan and the uncle of David Horgan. At the relevant time, they were seeking to take their first steps on the property investment ladder and were anxious to purchase three properties in Mallow towards that end. It appears that the bank indicated that the application for loan approval would run more smoothly if Michelle Horgan, wife of Robert, who held down a salaried position in UCC, participated.

4. The bank agreed to lend €419,000, on the basis of valuing the properties at €524,000 thus representing a loan to value ratio of 80%. The defendant's bank required and indeed insisted that a guarantee be provided by James Horgan Senior. It appears the borrowers and certainly Mr. Robert Horgan were reluctant to see Mr. James Horgan involved as a guarantor, but the bank insisted that this was a requirement and so a guarantee was duly provided. It is a notable feature of the case that the defendant, Mr. James Horgan has never denied, but on the contrary has at all stages fully accepted that he provided a guarantee and indemnity in the sum of €419,000, the only factual issue in dispute being whether he was released from his obligations by the bank.

5. Two of the three Mallow properties were subsequently sold at a profit, but the third property was never disposed of. I am told that it is now valued at approximately €30,000, whereas in 2004 it was valued at €179,000.

6. There was default on the part of Robert and David and in those circumstances the bank looked to the guarantee only to be met with the response that it had released Mr. James Horgan from his obligations, something which the bank denies.

7. On behalf of the defendant, it has been argued during the course of the recent hearing that the defendant was not informed that there was a third borrower namely his daughter in law Michelle. This argument coming as it does late in the day, is hard to square with the defendant's unequivocal statement that he set out to guarantee in the amount of €419,000, the borrowings of his son Robert and his nephew David and that he did just that.

8. The next argument advanced is that at clause 2.1 of the guarantee where a space is left for the account number to be inserted, that the space has been left blank. Associated with this is the fact that an account number 56170201 had been handwritten onto the top of the first page of the guarantee. Mr. James Horgan Senior has indicated that he cannot say whether this handwriting was there when he signed the guarantee or not. This seems a very frank position as it would have been a matter of no consequence at the time and it is hard to see how anyone could be expected to remember a matter of such insignificance nine and a half years on. Mr. Robert Horgan, though, thinks that he can recall that the handwriting was not there as he feels this is something that he would remember.

9. Counsel for the defendant has argued that this was a unilateral and unauthorised alteration made after the guarantee was signed and that it thus serves to invalidate the guarantee. A witness for Bank of Ireland Mortgage Bank, Mr. Graham Healy in the course of his evidence, was asked about this and offered three possible explanations, that it might have been added by someone engaged in making up a loan pack for the borrowers solicitor, that it might have been added by someone in the solicitors office or that it might have been appended on the return of the pack. All of these explanations have in common that they serve to identify, label or to facilitate the linking of the guarantee to the account with which it is associated. The language here, label, identify, link is mine. However, I am entirely satisfied that the addition of the handwriting to a part of the page which is otherwise free of text was certainly not for any ulterior purpose. This was not a case of the bank seeking to alter the documentation to the disadvantage of the guarantor or the borrower or even an attempt on the part of the bank to cure a frailty. All in all I am satisfied that there is no

substance in this point whatever.

10. On behalf of the defendant reference is made to the fact that the borrowers were permitted to sell two of the properties and in each instance required to repay to the bank in reduction of their borrowings only the sum of €140,000, approximately two thirds of the price obtained.

11. Paget's *Law of Banking*, 13th Ed. at para. 33.30 comments as follows:-

"Bank guarantee forms almost invariably provide for preservation of the guarantors liability if circumstances arise where he would otherwise be discharged (in particular if time were given to the principal debtor) such provisions are in principle effective at common law, provided that as a matter of construction they cover the events which have happened. Therefore, they tend to be all encompassing. In particular they preserve the guarantor's liability in the event of the bank giving time or any indulgence to the principal debtor; variation or discharge of the principal transaction or the guaranteed obligations; composition or settlement with the principal debtor, release, variation, loss of securities or rights against any co-surety; and breach by the bank of any contract with the principal debtor."

12. As one would expect, the issue was addressed in the guarantee signed by Mr. Horgan. Paragraph 4 of the guarantee is headed "Protective Clauses". Paragraph 4.1(a) is in these terms:

"The liabilities of the guarantors shall not be affected nor shall this Guarantee be discharged or diminished by reason of;

(a) the Bank compounding with, discharging, releasing or varying the liability of or granting any time, indulgence or concession to the Borrower or any other person or issuing, confirming or renewing, determining, varying or increasing any bill, promissory note or other negotiable instrument, accommodation, facility or transaction in any manner whatsoever or concurring in, accepting or varying any compromise, arrangement or settlement or omitting to claim or enforce payment from the Borrower or any other person; ..."

13. It seems to me that the clear language of the guarantee leaves no room for argument and so I am satisfied that these arguments do not provide a defence.

14. Accordingly, I turn to the real issue in the case and what on the summary judgment application was the only issue, the alleged release from the guarantee.

15. In that regard while Mr. James Horgan Senior states that he was shown a letter which had the effect of releasing him from his obligations, he has not been able to produce such a letter. The bank's case is that the reason that the defendant cannot produce a letter releasing him from his obligations is because there never was any such letter. In a situation where the defendant, supported by other witnesses asserts that there was a letter, but that he is not in a position to produce it, the bank is placed in a position of seeking to prove a negative.

16. The evidence on this topic was that Mr. Robert Horgan was reluctant to have his father provide a guarantee, as he saw this as a step back. His father had been supportive in the past and provided a guarantee in relation to his first business venture, but time had moved on and Robert Horgan felt that he should be regarded as being capable of standing on his own two feet. I attach some significance to the fact that despite the clients reluctance to provide a guarantee to the extent that they were talking about taking their business to a competitor of Bank of Ireland which did not have such a requirement, that the bank insisted on a guarantee as a condition of providing a loan.

17. Having regarded the guarantee as necessary, even to the extent of being willing to risk losing the business, I find somewhat surprising the suggestion that the bank would dispense with the security at a time when the amount of the borrowing had been reduced by only €3,000 to €416,000.

18. While Robert and David Horgan proceeded with the transaction and a guarantee was provided, Robert Horgan has stated that he remained anxious to extricate his father from the guarantee. Of note, is that he said the Horgans involvement with property investment expanded with members of the family becoming involved in a large number of properties. This involved an intensification of the relationship with Bank of Ireland, but also saw relationships developing with a number of other banks.

19. As the Horgans portfolio expanded, they went from dealing initially with Ms. Tara Brown, a financial adviser to a situation where their affairs were dealt with by a more senior official, Ms. Theresa Murphy. Mr. Robert Horgan makes the point that at this time the relationship with the bank was a very positive one and his recollection is that at the conclusion of a meeting that he had with Ms. Murphy which focused on the acquisition of a property in Shandon Street, that he made a request that the bank would look at releasing his father's guarantee. When giving evidence on the summary judgment application, he made the point that this request was being made at a time when the second property was sold and when the loan was substantially reduced. Mr. Robert Horgan's recollection is not entirely accurate in that regard in that the sales closed and the bank received the share of the proceeds due to them only in July 2006 and March 2007, respectively. In fairness to Mr. Robert Horgan, it appears that there were delays in closing, securing payment and consequently reducing the indebtedness to the bank and Mr. Horgan may have been regarding the properties as sold once the purchaser was identified. Mr. Robert Horgan indicated that at this stage, when he had requests that Ms. Murphy would normally react positively to them, but would indicate that she would have to refer the matter to the credit authorities.

20. Mr. Robert Horgan has explained that at this time some of the correspondence from the bank was posted to him at his address, some correspondence would be left for collection at the bank branch and some was handed over directly to him by an assistant of Ms. Murphy. He cannot recall how the letter releasing his father from his obligations came into his possession. While he does not have a recollection of what he describes as the finer details of the letter, his recollection is that it was most likely addressed to his father. He does recall that the letter was only a couple of lines long.

21. Mr. Robert Horgan then states that on a date in November 2005, after the working day was over that he went to his parents home. He showed the letter to his father who took it and read it, his mother looked at the letter and his father handed the letter back to him for safe keeping. At this point in time his father did not have an office at home. According to Mr. Robert Horgan on the following day he brought the letter into his office in Turners Cross. He says that a book keeper/administrator Ms. Deirdre McCarthy was present, that he told her that he had obtained a release for his father and that he showed her the letter and that he then filed the letter away.

22. In February 2009, Ramada Construction Limited went into liquidation. Mr. Robert Horgan says he was denied access to his files for

a prolonged period and when he did eventually secure access the files were in a state of some disarray. The letter from the bank that he had filed away was not there.

23. Supporting evidence in relation to the dinner time meeting was provided by the defendant and his wife Ms. Mary Horgan and in relation to what transpired at the office in Turner Cross by Ms. McCarthy the book keeper/administrator. Ms. McCarthy said that when she was contacted in 2011 and asked whether she had any recollection of what had occurred that she had a distinct recollection. She recalls that Mr. Robert Horgan was buoyant, buoyant at his success in securing the release of his father's guarantee and was indicating that he would now be seeking to disentangle Michelle.

24. The other evidence offered was that of William Horgan, who is the brother of the defendant and acts as his accountant. On the 1st December, 2011, he had a telephone conversation with Ms. Theresa Murphy whom he had known previously. He says that he explained that a release letter had been mislaid, and he asked Ms. Murphy whether she could recall if such a letter had issued. He recalls Ms. Murphy as saying that she could not recall requesting a guarantee from Mr. Horgan Senior or releasing him from a guarantee. He says in these circumstances that he finds it surprising that six weeks after the conversation that he had with her that Ms. Murphy would swear an affidavit which included the statements "no such letter was issued by the bank through me or otherwise" and "I have no recollection of any such letter being sought and I can confirm that no such letter issued and/or exists".

25. Ms. Murphy swore an affidavit in response to the affidavit sworn by Mr. William Horgan. She explains that at the time of the call from Mr. Horgan which she returned, that she was based not in Cork on the South Mall as she had been previously, but in Limerick. She refers to Mr. Horgan telephoning her "out of the blue", she says that Mr. William Horgan's call can be considered "a cold call".

26. However, despite the reference to "cold call" and an "out of the blue call" in the course of her evidence on the application for summary judgment it emerged that she had access to the affidavits in the case in November 2011, and that she was in Cork in the period between the 25th November, 2011 and the 1st December, 2011, when she carried out an initial review of the files.

27. Given that Ms. Murphy was aware of the existence of the guarantee release issue, by the 1st December, 2011, the reference to "cold call" and "out of the blue" does not present the full picture and this is a matter of some concern.

28. That said, Ms. Murphy on behalf of the bank has given assurances and firm evidence that she did not release Mr. James Horgan Senior from his obligations. She had absolutely no entitlement whatever to do so, and had she done so, she would have rendered herself liable to dismissal. Notwithstanding my reference to the "cold call" and "out of the blue language", I found Ms. Murphy a clear and careful witness and indeed an impressive witness.

29. I accept that Ms. Murphy would not have had any entitlement to release Mr. Horgan Senior from his obligations and I am quite sure that she did not do so.

30. Had such a request for a release been made it would have had to have been put into the system for processing. The discovery documentation shows the extensive documentation trail that was created by the request to be permitted to lodge only €140,000 from each of the two property sales. A request to release the guarantee if made and considered by the relevant authorities would certainly have produced a similar trail.

31. Witnesses from the bank have been challenged on the basis that their evidence is only as good as the quality of the bank's record keeping. The bank's approach to discovery has also been the subject of contention, this is perhaps somewhat surprising in a situation where the defendant did not discover a single document.

32. While it is the case that a supplemental affidavit of discovery was required from the bank, I have formed the view that the bank's approach to the discovery process was a conscientious and thorough one. I am of the view that there is no possibility that records in relation to the guarantee release were generated, but that they have somehow slipped through the cracks. Too many different sections of the bank would have had to be involved with documents going in both directions for this to be remotely credible.

33. The only other possibility is that the documents did exist and were deliberately suppressed. This is not a suggestion that has been made and properly so. I do not believe that this is what happened. If it did happen, it would have had to have been carried out in a remarkably skilled fashion to avoid attracting the attention of the bank's internal and external legal advisers, not to mention the bank's I.T. security department.

34. I am satisfied by reference to the bank's extensive documentation which shows how the decision making process works within the bank, that as a matter of probability that there never was a letter releasing the guarantee. I am reinforced in that view by the fact that it would seem surprising that a guarantee would be released at a stage when the borrowings in question were still at almost their original level.

35. The bank has suggested as a possible explanation for the conflict between the parties, that perhaps there may have been confusion with the dropping of a request for a guarantee in the case of James Horgan Junior in 2007. The Horgans, it must be said are utterly dismissive of any such suggested confusion, pointing out that what happened there was entirely different, it was not a question of a guarantor who had entered into a guarantee being released from his obligations, but a change of mind so that a guarantee which had been sought was not in fact required. For my part, I would like to think that there might have been a degree of confusion whether by reference to the James Horgan Junior situation or to some other factor, but whether confusion is the explanation or not, in relation to the conflict between the parties I find myself unable to accept the evidence on behalf of the defendants, unsupported as it is by any documentary evidence whatever. Rather I am satisfied on the balance of probabilities that Mr. Horgan was not released from his obligations and that accordingly, the plaintiff is entitled to the judgment that it seeks.