THE HIGH COURT

[2015 No. 377 S]

BETWEEN

DANSKE BANK A/S TRADING AS DANSKE BANK

PLAINTIFF

AND

MARTIN SHORTT AND PAULINE SHORTT

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 5th day of June, 2019

1. In this application for summary judgment, the plaintiff ("the bank") seeks judgment against the defendants on foot of a guarantee in writing executed by the defendants on the 21st July, 2005. By the terms of the guarantee, the defendants agreed to jointly and severally guarantee payment on demand of all sums due by Blackwood Taverns Ltd ("the company") to the bank. The defendants are husband and wife and were at all material times directors of the company. The guarantee provides that the total liability of the defendants thereunder will not exceed €1,500,000. It is not in dispute that the guarantee was executed by the defendants.

2. Two subsequent facilities were granted by the bank to the company. The first arose on foot of a facility letter of the 6th April, 2010 and was for the sum of €50,000 being a renewal of an existing overdraft facility to assist with the general working capital requirements of the company. The security clause provided for, *inter alia* , the provision of a joint and several letter of guarantee from the defendants in the sum of €1.5 million. The facility letter was signed by the defendants as directors of the company.

3. The second facility was entered into a month later on the 6th May, 2010 and is for the sum of €1.5 million for the purpose of restructuring an existing loan. As in the first facility, the security requirements included the provision of a joint and several letter of guarantee in the amount of €1.5 million by the defendants. Those facilities also provided for various legal and equitable mortgages over certain properties including in particular a first legal mortgage over the premises known as Dagwells Bar and Restaurant, Blackwood, County Kildare. The second facility letter was also executed by the defendants as directors of the company.

4. There is no dispute about the fact that the moneys were drawn down on foot of the two facility letters by the company and have not been repaid. This ultimately resulted in a demand for payment from the company issued by the bank on the 18th September, 2013. This letter gave a period of 24 hours to make the payment.

5. On the next day, the 19th September, 2013, the bank appointed a receiver over the property and assets of the company. On the 18th October, 2013, the bank demanded payment of the sums due by the company from the defendants on foot of their guarantee. Dagwells Pub and Restaurant was sold by the receiver on the 16th May, 2014 and the net proceeds were credited to the account of the company.

6. These proceedings were issued by way of summary summons by the bank on the 25th February, 2015 and the motion for judgment now before the court issued on the 12th December, 2016. Two affidavits have been sworn by the first defendant in response to the claim but none by the second defendant. In his first affidavit, Mr. Shortt avers that he previously carried on business as an auctioneer and insurance broker in Oldcastle, County Meath. He said that most of his business was conducted through two employees of the bank, James Bradley and Jim Deeney. He claims to have introduced substantial business to the bank through his customers and discussed the issue of commission at various stages as far back as 2005 and 2006 with Mr. Bradley and Mr. Deeney.

7. Around that time the company wanted to purchase a large property portfolio to be financed by the bank. Mr. Shortt says that he recalls meeting with Mr. Bradley and Mr. Deeney to discuss the terms of the original facility letters which relate to earlier facilities than those currently before the court. Mr. Shortt says that during the course of these meetings he questioned the necessity for the personal guarantees being sought by the bank from the defendants and said that neither defendant would agree to sign them.

8. He says that ultimately, in view of the fact that he was introducing business to National Irish Bank, the plaintiff's predecessor, and was not receiving commission, it was agreed that in lieu of commission and on the strict basis that he signed up to the personal guarantees, that same would not be enforced against the defendants. He says he received this assurance directly from Mr. Bradley and Mr. Deeney and relied on it. On this basis, Mr. Shortt avers that the defendants have a full defence to the claim herein.

9. Without prejudice to that contention, Mr. Shortt goes on to aver that he is entitled to the benefit of any defence that the company has as principle debtor and in that regard relies on discussions that took place following the company's default with Mr. Neil Carter of the bank and the defendants' solicitor at the bank's premises at Harbourmaster Place in Dublin. He avers that arising out of this meeting it was agreed that he would voluntarily sell the premises known as Dagwells and his solicitor, Mr. Lyons, would have carriage of the sale.

10. He goes on to say that the bank breached the terms of this agreement by appointing a receiver over the company's assets. He complains that in fact even the 24 hours required by the letter of demand was not complied with because the receiver went into possession of Dagwells before it expired. On this basis, Mr. Shortt avers that the appointment of the receiver was defective and unlawful. He says that the consequence of this alleged breach of agreement is that the bank is liable to Mr. Shortt in damages and the receiver has therefore trespassed on the company's property. He says that he is entitled to exemplary damages against both the bank and the receiver arising from this breach of contract and trespass and that the damages due to the defendants will exceed the plaintiff's claim. All of this is disputed by the bank.

11. In his second affidavit, Mr. Shortt confirms that the meeting at which it was agreed that the bank would not enforce the guarantee against the defendants took place at the bank's Virginia branch on Monday the 19th December, 2005. It will be noted that the guarantee was signed five months earlier.

12. Mr. Shortt then goes on to allege in his affidavit that at the time of execution of the guarantee in July 2005, he was what he describes as a vulnerable person and a patient in St. Edmunsbury Mental Hospital in Lucan County Dublin. He says this was known to the bank and that by virtue of this, the guarantee is unenforceable. This is the only evidence offered on this point by Mr. Shortt.

13. He then goes on to repeat his complaints about the appointment of the receiver and the receiver's actions in taking possession of Dagwells. He avers that the property was at that time being actively marketed by an estate agent on behalf of the company as had been agreed with the bank. He reiterates that the appointment of the receiver therefore amounted to a breach of contract and that the receiver had no right to take possession of the property.

14. In neither of Mr. Shortt's replying affidavits sworn on the 21st March, 2017 and the 30th November, 2018 respectively does Mr. Shortt suggest that these alleged issues were at any time prior to the swearing of his affidavits raised with the bank. In submissions before the court, the defendants' solicitor indicated that he had in fact written to the bank at the relevant time making complaint of these matters but none of this correspondence has been exhibited.

15. To summarise the position, the defendants thus suggest that they have a defence to the claim on three grounds:

> 1. The bank agreed that the guarantee would not be enforceable;
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> 2. The bank and the receiver are in breach of an agreement concerning the sale of Dagwells which gives rise to a counterclaim on the part of the defendants which would exceed the value of the bank's claim herein;
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> 3. The first defendant was at the time of execution of the guarantee a vulnerable person and a patient in a mental hospital and this renders the guarantee unenforceable.

16. I propose to deal with each of these alleged defences in turn.

17. With regard to the first defence, what is initially most striking about this is that while the guarantee was signed on the 21st July, 2005, Mr. Shortt claims that it was at a meeting on the 19th December, 2005 that it was agreed that if the defendants signed the guarantee, it would not be enforced. Clearly that cannot be correct. However even assuming for the moment that this alleged agreement on the part of the bank's officers was entered into before the guarantee was signed, the question arises as to whether this could constitute an arguable defence.

18. As the factual chronology above demonstrates, the bank called in the defendants' guarantee on the 18th October, 2013. There is no evidence before the court to suggest that at any time before the swearing of his first affidavit on the 21st March, 2017 was it ever suggested by Mr. Shortt that the guarantee did not bind the defendants for the reasons he now advances. One would have expected any reasonable person faced with a call on a guarantee which had been agreed never to be enforceable to respond swiftly and firmly to that effect. A delay of some three and a half years in raising the issue, and only then when facing a motion for judgment, in my view significantly undermines the credibility of this assertion.

19. Even aside from that, this purported defence faces a significant legal obstacle as identified in my judgment in *AIB v. Kennedy & Anor* [2018] IEHC 381. In that case, a very similar defence was raised by one of the defendants to the effect that the bank had agreed that the guarantee would never be enforced against him. Thus I noted (at p. 6):

> "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):
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> > '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: -
> >
> > > *'...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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> …
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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.' "

20. I am therefore satisfied that the defendants have not raised an arguable defence under this heading.

21. Turning now to the second issue raised by Mr. Shortt, he claims that the defendants have a substantial counterclaim arising out of the breach by the bank of the alleged agreement concerning the sale of Dagwells Pub and Restaurant. I assume what Mr. Shortt means by this is that the company has a claim against the receiver and the bank which would go to eliminating its liability on foot of the two facilities and the defendants are entitled to the benefit of that claim by way of set off defence to the bank's claim herein.

22. Here again, this suffers from the same credibility problems as the previous defence. Several years have now passed since the receiver was appointed and on foot of that appointment, sold the premises. All of that happened without any challenge by the defendants or the company. Although it is now suggested several years later that the appointment of the receiver was unlawful, no steps were taken at the time to impugn the appointment of the receiver, to restrain him from taking possession of the premises, if indeed he did so, or to restrain him from selling the premises.

23. Although the defendants' solicitor claims that he corresponded about the matter at the time, if that is so it is all the more surprising that nothing was done on foot of that correspondence and no proceedings were instituted. As such, it is very difficult to see how this purported defence transcends mere assertion unsupported by any corroborating evidence and quite inconsistent with the sequence of events that actually transpired. It is also noteworthy that no attempt of any kind is made by Mr. Shortt to explain

how the alleged breach of contract by the bank has given rise to a loss suffered by the company or what the quantum of that loss might be, other than simply saying that it exceeds the plaintiff's claim.

24. It is important to distinguish between a cross claim which amounts to a defence by way of set off and an independent claim for damages. Different considerations apply to each as shown in the judgment of Clarke J. (as he then was) in M*oohan v. S. & R. Motors (Donegal) Ltd* [2008] 3 IR 650. In the course of his judgment, he said (at p. 656-657):

> "(a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiffs claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendant's case, it would not be inequitable to allow the asserted set off;
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> (b) lf, and to the extent that, a *prima facie* case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);
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> (c) If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in *Prendergast v. Biddle*."

25. In the present case, in my view it is clear that the alleged counterclaim herein is unrelated to the terms of the guarantee on foot of which the bank claims. Rather it is a claim arising out of entirely different circumstances between different parties viz. the company and the receiver and possibly the bank. It arises, if it exists at all, out of the entirely separate event of the appointment of the receiver over the assets of the company. It therefore cannot give rise to a defence of set off and the only issue to be considered by the court is whether or not, if the plaintiff is entitled to judgment, that judgment should be stayed while the cross claim is agitated. I am not persuaded that it should.

26. The cross claim contended for is, to put it mildly, vague in the extreme. No effort of any kind has been made by Mr. Shortt to explain how a loss arises, what that loss might be and why it has taken him or more accurately the company three and a half years to even intimate the existence of such a claim, never mind issue proceedings. I am therefore satisfied that no arguable defence has been raised on this point. There is no injustice to the defendants in this regard as they, or indeed the company, remain perfectly free to litigate that issue should they wish to do so.

27. The third and final issue relates to Mr. Shortt's alleged vulnerability. I should note in passing that this apparently has no relevance to his wife in any event. How this amounts to a defence is not in any sense explained nor was it argued in submissions by the defendants' solicitor. It is not suggested that the bank sought to exert some form of influence over Mr. Shortt arising out of his illness, an illness notably unsupported by any medical evidence. Here again, it is quite unclear to me how this bare assertion by Mr. Shortt could give rise to any arguable defence.

28. For these reasons therefore, I am satisfied that the defendants have failed to meet the requisite threshold of having a fair or reasonable probability of having a bona fide defence to the bank's claim herein. The bank is therefore entitled to judgment in the sum claimed.