

THE HIGH COURT

[2015 No. 2083 S.]

BETWEEN

PROMONTORIA (ARAN) LIMITED

PLAINTIFF

AND

MICHAEL WALLACE

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 29th day of January, 2016

1. The plaintiff in these proceedings seeks summary judgment against the defendant in the sum of €2,000,000 on foot of a guarantee and indemnity dated 30th March, 2009, whereby the defendant guaranteed the obligations of M&J Wallace Limited to Ulster Bank Limited (the "*bank*") on foot of a facility letter dated 23rd June, 2009.

2. It is not in dispute that M&J Wallace Limited is in default of its obligations under the facility and that its indebtedness under the facility exceeds €2,000,000. Neither is it in dispute that a demand has been made of the company under the terms of the facility and of the defendant on foot of the guarantee.

3. Pursuant to a Mortgage Sale Deed dated 16th December, 2014, made between the bank of the one part and Promontoria Holding 128 B.V. ("*Holding*") of the other part, the bank assigned to Holding the interest of the bank in the loans made by the bank to M&J Wallace Limited and the security for those loans comprised in the mortgage assets and the finance documents including the security documents as defined therein. These loans were secured by the guarantee provided by the defendant.

4. By a deed of novation dated 12th February, 2015, between Holding and the plaintiff and a Global Deed of Transfer of the same date between the bank and the plaintiff, the plaintiff acquired the right, title and interest of the bank in the loan from the bank to M&J Wallace Limited and the guarantee executed by the defendant.

5. By letter dated 27th February, 2015, the bank notified the defendant and M&J Wallace Limited of the assignment by the bank to the plaintiff of the bank's rights, title and interest (past, present and future) in the facility letter and in the guarantee and indemnity and notified the defendant and M&J Wallace Limited that their respective obligations were now owed to the plaintiff.

6. Clause 2.3 of the deed of guarantee and indemnity entered into by the defendant provides:-

"A Certificate signed by any manager or officer of the Bank stating the amount of the Borrower's liabilities to the Bank or the total amount recoverable under this Deed shall, save in the case of manifest error, be conclusive evidence against the guarantors..."

7. In accordance with the provisions of the said clause, Mr. Jonathan Hanly, a director of the plaintiff certified on 23rd October, 2015, that there was due and owing by the defendant to the plaintiff a sum of €2,000,000 on foot of the said guarantee and indemnity. On an earlier date, namely 14th August, 2015, a letter of demand had been served on M&J Wallace Limited, in respect of its then indebtedness in the sum of €2,263,558.29 and following its failure to repay the said monies due, a receiver was appointed by the plaintiff over the property of M&J Wallace Limited at 24 Lower Ormond Quay, Dublin 1. The monies due by the company have not been repaid.

8. The application for summary judgment is grounded on the affidavit of Jonathan Hanley, a director of the plaintiff and supported by an affidavit of Declan Murray, a director of the bank. The defendant has delivered a replying affidavit. In his affidavit, the defendant admits that M&J Wallace Limited was advanced €2,100,000 by the bank on foot of a facility letter dated 23rd June, 2009. He accepts that he executed the guarantee and indemnity dated 30th March, 2009, and he also acknowledges that M&J Wallace Limited did not repay the loan advanced by the bank.

9. In his replying affidavit, the defendant does not dispute the following matters:-

- (a) a demand for repayment by M&J Wallace Limited of the loan was made by the plaintiff on 14th August, 2015;
- (b) as the loan was not repaid, a Receiver was appointed by the plaintiff to the premises of M&J Wallace Limited;
- (c) M&J Wallace Limited has not challenged the indebtedness on the loan or the appointment of the Receiver by the plaintiff;
- (d) the accounts showing the indebtedness of M&J Wallace Limited;
- (e) the service of and entitlement of the plaintiff to rely on the Certificate of Debt; and
- (f) the notice of assignment.

10. The defendant does not dispute the matters deposed to by Declan Murray of the bank who avers that the bank sealed the Mortgage Sale Deed on 16th December, 2014, and that it entered into and affixed its seal to the Global Deed of Transfer dated 12th

February, 2015, which was executed for the purpose of assigning the facility letter and guarantee to the plaintiff. Nor does the defendant take issue with the averment of Mr. Declan Murray that by letters dated 27th February, 2015, the bank notified the defendant and also M&J Wallace Limited of the assignment by the bank to the plaintiff of the bank's right, title and interest (past, present and future) in the facility letter and the guarantee.

11. In his replying affidavit, the defendant purports to raise two matters by way of a defence, namely, whether the plaintiff has established that it is the successor in title to the bank's rights arising under the facility letter and the guarantee and he also invites the court to consider the fact that a receiver has been appointed over the properties of M&J Wallace Limited where a sale of the property by the receiver is likely to realise a sum which will reduce the liability of the defendant under the guarantee. He says that in those circumstances these proceedings are premature.

12. The parties are agreed on the legal principles that apply in applications for summary judgment. They are to be found in the cases of *Danske Bank v. Durcan New Homes* [2010] IESC 22; *Aer Rianta v. Ryanair* [2001] 4 I.R. 607; *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75; and *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1. I apply the principles to be found in those decisions in determining whether or not the plaintiff is entitled to summary judgment.

13. The contention of the defendant that the affidavit of Mr. Jonathan Hanly does not establish that he was authorised to accept the Deed of Transfer does not avail the defendant. While the defendant relies on s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877, this requires the assignment to be in writing and signed by the assignor. There is ample evidence both in the affidavit of Mr. Jonathan Hanly and in the affidavit of Mr. Declan Murray of the bank to show that the assignment was made in writing under the hand of the bank by a duly authorised officer. In *LSREF III Stone Investments Limited v. Morrissey* [2015] IEHC 603, Costello J. addressed a similar issue in a summary judgment application where the validity of the Deed of Transfer was challenged by the defendant, inter alia, on the basis that the deed was not sealed by the plaintiff who was the assignee. She rejected that argument as there was no requirement that the assignment be signed by the assignee. It is the assignor who must sign the document and that has been amply proved in this case.

14. I cannot ignore the fact that the defendant urges the court to have regard to the fact that a receiver has already been appointed over the property of M&J Wallace Limited. The receiver has been appointed by the plaintiff and not the bank and the company took no issue with the appointment of the receiver and indeed, the defendant in these proceedings relies on the appointment of the receiver as a reason why the court should not dispose of this claim in a summary manner. The plaintiff's authority to appoint a receiver derived from the absolute assignment by the bank to the plaintiff of all its rights under the facility granted to M&J Wallace Limited. The doctrine of Election (as expressed in the Scottish law of Approbate and Reprobate) does not permit the defendant to call into question the entitlement of the plaintiff to maintain these proceedings, on the one hand, while calling in aid the receivership on the other hand.

15. In his replying affidavit, the defendant makes a number of assertions on the issue as to whether or not the plaintiff is the successor in title to the bank and has properly acquired the bank's rights which arise under the facility letter and guarantee. But such assertions as he makes are not supported by any evidence and are expressed in the most tentative terms. In para. 6 of his affidavit, he says:-

*"I am, however, concerned that the plaintiff has not adduced sufficient evidence to clearly establish that it is, in fact, the successor in title to the Bank's rights arising under the facility letter and the guarantee. **To be clear, I am not in a position to definitively assert that the plaintiff is not the lawful assignee of the Bank's rights;** by contrast I apprehend that the plaintiff will be in a position to clarify certain aspects of the purported assignment and to assist this Honourable Court in determining the plaintiff's entitlement to pursue this claim."* [Emphasis added].

16. Later, in the same affidavit he states that it is "unclear" from the grounding affidavit what the legal effect of the Mortgage Sale Deed is and adds that an assertion by Mr. Hanly in the grounding affidavit to the effect that the bank has assigned its interest to the plaintiff "does not appear to accurately reflect the true import or meaning of the Mortgage Sale Deed". These averments fall far short of what is required to establish an arguable defence. But, in any event, the plaintiff has established by clear and uncontradicted evidence that it is the assignee of the bank's interest in the loan to M&J Wallace Limited and the guarantee executed by the defendant. That much can be established from the documents exhibited in the affidavit of Mr. Jonathan Hanly and supported by the affidavit of Mr. Declan Murray.

17. The evidence adduced by the Plaintiff in this application is clear and unambiguous and has either been admitted by the defendant or not disputed on any legal or factual basis which meets the test required to have the claim remitted to plenary hearing. The legal point taken under s.28(6) of the Supreme Court of Judicature (Ireland) Act 1877 cannot succeed and there are no issues of fact relied on by the defendant which could be said to raise an arguable defence.

18. Accordingly, the plaintiff is entitled to judgment in the sum claimed.