Neutral Citation Number: [2012] IEHC 516

THE HIGH COURT

[2010 No. 3861 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFFS

AND

SEAN KEANE, MICHAEL RYAN AND MICHAEL RYAN SENIOR

DEFENDANTS

JUDGMENT of Ms. Justice Dunne delivered the 23rd of November 2012

The plaintiff's claim herein against the first and second named defendants is in respect of two loans, one for the purchase of a site and the second in respect of the development of the site, amounting in total to the sum of €2,527,628. The claim against the third named defendant, the father of the second named defendant, is on foot of a guarantee dated the 13th August, 2007.

This matter came before the Master of the High Court on foot of a motion seeking liberty to enter final judgment. Following an exchange of affidavits between the parties, the matter came before this Court and in the course of the hearing, the plaintiff sought judgment against the defendants while the defendants maintained that there was a *bona fide* defence to the proceedings and argued that the matter be adjourned to plenary hearing.

The background to this matter is set out in some more detail in the affidavit of Michael Flanagan sworn herein in the 17th January, 2011, on behalf of the plaintiffs. He explained that the bank made loan facilities available to the first and second named defendants for the purpose of acquiring and developing a commercial development site located at Waterford Airport Business Park. The site was approximately two acres and initially it was intended by the first and second named defendants to construct 41,000 sq. feet of industrial development property on the site. A letter of sanction dated the 13th August, 2007, was furnished to the first and second named defendants in respect of an overall sum of €5,300,000 on terms and conditions set out therein. That letter of sanction was duly executed by the first and second named defendants on the 15th August, 2007. The loan consisted of two separate facilities, the first being in the amount of €1,300,000 for the purpose of funding the acquisition of the site together with stamp duty and interest roll up for the two year term of the loan. That sum was drawn down on the 17th August, 2007 and is reflected in loan account No. 17721031 in the name of the first and second named defendants. The balance of the facility, namely €4 million, was to be provided to fund the development costs of the industrial units on the site. Part of this facility was drawn down and is comprised in account No. 17721387. As security for the loan, the bank required a guarantee from the third named defendant in the sum of €5,300,000. A guarantee appears to have been executed on the 13th August, 2007, by the third named defendant. That guarantee was supported by a charge over a stud farm situate in Dungarvan, Co. Waterford. I will refer later to this guarantee in the context of the affidavit sworn herein on behalf of the third named defendant.

Paragraph 8 of the affidavit sworn by Mr. Flanagan is of some significance and I propose to refer to it in detail. He stated:-

> "I say and believe that subsequent to the acquisition of the site and in view of the economic downturn which occurred at that time, the first and second named defendants advised the plaintiffs that they intended limiting the initial development of the site to 17,000 sq. feet (ie. approximately 40% of the original scale of development). I say and believe that the plaintiffs agreed to provide support for the revised development in the sum of €1,150,000, being the amount of the fixed price contract in respect of the 17,000 sq. feet development. I say and believe that the said agreement was made orally and that no revised letter of sanction was either prepared or executed in respect of this agreement."

Mr. Flanagan went on to point out that the facilities provided on foot of the letter of sanction of the 13th August, 2007, were to be cleared within two years from the date of drawdown of the first facility. He pointed out that the loans were not cleared within that period but that the 17,000 sq. feet of development was practically complete with only some groundwork remaining outstanding. He then outlined meetings between the first and second named defendant and the bank on the 30th November, 2009, for the purpose of discussing the extension and renewal of the facilities. A sum of €127,000 was sought at that stage for the purpose of completing the outstanding works together with a sum of €25,000 sought to clear outstanding balances owed by a company of the first and second named defendants namely First Adventure Limited. That request was approved and a letter of sanction dated the 10th December, 2009, was provided to the first and second named defendants. That provided for an extension of the facilities to the first and second named defendants for a further period of one year. It contemplated that the guarantee provided by the third named defendant would be reduced in amount to a total of €2,670,000 reflecting the reduced amount of the overall loan facilities being provided. However, the third named defendant sought in the course of discussions in relation to the provision of further facilities that his liability under the guarantee be reduced to €1,000,000. That was not acceptable to the bank and it was decided to demand repayment. Correspondence then ensued between the bank and the first and second named defendants through their representative Mr. Frank Wallace, accountant. The first and second named defendants were dissatisfied with the interest terms contained in the letter of sanction. They also indicated that there was a requirement for a further sum of approximately €200,000 to complete the initial stage of the development although it was suggested by the bank that it had provided the additional sum of €127,000 in November, 2009, on foot of the final architect's certificate. Ultimately the first and second named defendants declined the plaintiffs offer but appealed the matter to the plaintiff's internal appeals board, which notified the defendants by letter of the 14th June, 2010, that the appeal had been rejected. Subsequently on the 30th June, 2010, a revised proposal was submitted on behalf the first and second named defendants on terms that were acceptable to the plaintiffs and a further letter of sanction issued on the 7th July, 2010, together with a revised guarantee addressed to the third named defendant. The third named defendant sought to have the amount of the guarantee reduced to €1 million and that was not acceptable to the plaintiffs and as no agreement could be reached between the parties, a decision was made to demand repayment on foot of the facilities and those letters of demand were issued on the 8th July, 2010. Notwithstanding this, the plaintiffs remained prepared to extend the faculties as set out in the letter of loan sanction dated the 7th July, 2010, subject to the provision of a supporting guarantee of the third named defendant. The first and second named defendants subsequently returned the letters of loan sanction duly executed but the third named defendant declined to put in place

the securities specified in that letter of loan sanction and therefore the plaintiffs did not approve the further extension of loan facilities. Whilst there were further discussions between the parties, the matter was not resolved and these proceedings duly issued.

Sean Keane swore an affidavit on behalf of the first and second named defendants on the 2nd May, 2011. There is little factual dispute between the parties in relation to the background to this matter. Mr. Keane in his affidavit pointed out that a Mr. Eamon Moore of the plaintiff's bank, a bank manager based in Dungarvan, Co. Waterford was involved in dealing with the negotiation of the letter of loan sanction dated the 13th August, 2007. The facility in respect of the sum of €1,300,000 was drawn down on the 17th August, 2007, on which date, the purchase of the site was completed. A tender was issued for a building contractor and a Mr. Sean Colfer was successful in that regard. Planning permission was sought on the 17th October, 2007, and duly granted. By June 2008, the first and second named defendants decided that it would be prudent not to build out the entire development in one phase in the light of the increasing financial uncertainty. They sought a price from their builder in respect of completing the development in two phases comprising six units in the first phase and 12 units in the second phase. The builder gave a price in the amount of €1,151,882.82 for the completion of ground works and servicing together with phase 1. This revised tender was accepted and the builder was requested to commence works on that basis. The builder was to be paid by way of staged payments on foot of invoices certified by a quantity surveyor and architect.

The central point raised by way of defence on behalf of the first and second named defendants appears to be encapsulated in paras. 11 and 12 of the affidavit of Mr. Keane, in the following terms:

> "11. The decision to phase the development in this fashion was communicated to Allied Irish Banks and in particular Mr. Eamon Moore, branch manager in Dungarvan, Waterford. It was explained to Mr. Moore that given the economic downturn and circumstances of the property market in general it was felt safer and more appropriate to phase the development. This would also have the added effect of protecting the bank's investment in that the least amount of monies possible would be drawn into each phase. Further during the talks with Mr. Moore it was discussed that given the new phasing proposals, it would no longer be possible to complete the project within two years and that once the first phase was complete the issue of time needed to finalise the second phase would have to be 'looked at'. It was agreed between us that the time element would be amended and extended from its original two years so as to facilitate our new verbal agreement. It was not possible to agree definitive terms of extension as the deepening financial crises made this impossible to predict. This was to be judged as the project progressed.
>
> 12. Whilst there was no formal alteration of the letter of loan sanction of the 13th August, 2007, the matter was agreed verbally with Mr. Moore. Allied Irish Banks plc. readily agreed to our proposals. Given the discussion had with Mr. Moore Eamon Moore (sic) our understanding that a lesser amount of money would be drawn initially in the amount of €1,151,882 for the purposes of building and as per our amended tender (but excluding incidental payments of professional fees etc. and as previously agreed with the bank) and that the time limit as specified of two years in the letter of loan sanction of the 13th August, 2007, would also be extended in order to facilitate this phasing proposal. In return we would construct 17,331 sq. feet of units comprising of six light industrial units. This equated to approximately 40% of the development. As stated this reduced exposure to finances being borrowed, it reduced the bank's exposure in terms of money lent and allowed time for the economic crisis to be dealt given the slower pace of property transactions."

It will be seen that up to this point there is little dispute between the parties as to the nature of the agreement between the plaintiff and the first and second named defendants. Initially there was an agreement to provide facilities in the total sum of €5,300,000. By agreement between the parties that figure was revised downwards to reflect the phased development and there was some discussion about the extension of time in respect of the facility but it is clear from the affidavit of Mr. Flanagan and Mr. Keane that there was no agreement on "a definitive term of extension".

In the course of his affidavit, Mr. Keane went on to complain about delays in the payment of certified sums due to Mr. Colfer. There is no doubt that the first cheque written in favour of Mr. Colfer was not paid when presented and there is a dispute between the parties as to the reason for that. The point is made by Mr. Moore in an affidavit sworn by him on behalf to the plaintiff on the 23rd May, 2011, that that cheque did not bounce but was presented by the builder on the 27th November, 2008, before there were cleared funds in the account to meet it. In other words, the funds had not been credited to the account prior to the cheque being furnished to the builder. Subsequently Mr. Keane went on to outline a number of other alleged delays in the payment of the funds by way of staged payments to the builder. He complained that no reason was provided in respect of those delays and set out details in his affidavit. Mr. Keane in his affidavit for example, noted that one payment was certified on the 25th May, 2009, and paid on the 18th June, 2009, and another was certified on the 22nd June, 2009, and paid on the 22nd July, 2009. In his affidavit, Mr. Moore pointed out that the certificate dated the 25th May, 2009, was received by the plaintiffs on the 16th June, 2009, and that on foot of that a further sum of €118,000 was released to the first and second named defendants on the 18th June, 2009. The certificate dated the 22nd June, 2009, was received via facsimile on the 14th July, 2009, and €119,300 was released to the first and second named defendants on the 22nd July, 2009. Mr. Moore dealt with the other complaints made in that regard by Mr. Keane in the course of his affidavit. Having considered this complaint of Mr. Keane, I have to say that I reject the suggestion that there were delays caused by the plaintiff in the drawdown of the staged payments. It is quite clear that the facilities were provided within days of the certificates being furnished to the plaintiffs. In my view, there is no basis for the suggestion made by Mr. Keane that the completion of the project was delayed as a result of any delays on the part of the plaintiffs in relation to the provision of funds in a timely manner.

Although it was initially suggested in the grounding affidavit by Mr. Flanagan that a further sum of €127,000 had been paid, it was disputed by Mr. Keane that the final payment of €127,000 had been paid. Mr. Moore in his affidavit confirms that this is so. He stated that the first and second named defendants were advised around that time that all that was available on foot of the facility was a further sum of €32,000. It was indicated that there had been overruns and a further certificate in the amount of €158,348 dated the 28th September, 2009, was submitted to the plaintiff on the 5th October, 2009. At that stage there was correspondence between Mr. Moore and Mr. Wallace explaining the circumstances in relation to the facility and requesting details of the amounts required to complete. Given that the facilities had expired, proposals were also sought in relation to the covering of interest on the facilities pending completion. Ultimately a further letter of sanction was furnished to the first and second named defendants dated the 10th December, 2009, in which provision was made for an additional sum of €127,000 to be provided. A new letter of sanction of the 10th December, 2009, was furnished in respect of that and I have previously outlined in the context of the affidavit sworn by Mr. Flanagan the events thereafter. Ultimately the sticking point between the parties appears to have been the refusal of the third named defendant to furnish a fresh guarantee in the amount of €2,670,000 in favour of the plaintiffs.

A further affidavit was sworn by Sean Keane and in that affidavit he deals extensively with the question of the further sum of €127,000; he argued that insofar as it was suggested on behalf of the plaintiffs that there was a further review following which the plaintiffs decided to advance that sum, he stated the sum was provided for under the original letter of loan offer. He added that the sum was never actually advanced and had it been, the defendants would not be in the difficulty that they are in now. He makes the

point that had that sum been advanced, the estate could be finished and the units could have been sold sometime prior to this or at the very least rented. He points out that that letter of sanction providing for the sum of €127,000 was signed by himself and the second named defendant. Accordingly, he makes the point that as the plaintiff did not provide the final drawdown as was originally promised, that has caused the inability to make any payments on the loan and therefore the bank is in breach of the loan offer and that is the breach that has prevented the defendants from repaying the sums concerned.

It is clear from the affidavits sworn on behalf of the plaintiff and the first and second named defendants that the original project as envisaged would not be completed as planned and that accordingly, the full amount of the loan would not be required. The only dispute in this regard appears to be the sum to be provided by the bank. The bank has said it was to be a sum of €1,150,000 while the first and second defendants say the sum required was €1,151,882. This disparity in the figures is of little or no significance. There was some confusion initially in the affidavits as to whether the sum of €127,000 was paid by the bank on foot of a final certificate but this confusion was cleared up and it is clear that that sum was not paid by the bank. It is also clear that there was some discussion concerning the extension of the term of the loan but it is clear from the affidavit of Sean Keane at para. 11 set out above that there was no actual agreement on any extension of time.

Submissions
The plaintiff in this case relies on the proposition that it was entitled to call in the moneys due on foot of the loan as the term of the facility had expired. Reliance was placed on the decision of the Court of Appeal in the case of *Lloyds Bank plc v Lampert*, *1999 1 All. E. R. 161*. The Defendant in that case was chairman and guarantor of a company. The company had been provided with facilities by way of a bridging loan through the defendant and an overdraft. The loans were stated to be "repayable in full on demand" but it was also provided that each loan was to be available for a specified period of time. Prior to the expiry date of the facility, the bank called in the sums due on foot of the guarantee and the bridging loan and obtained summary judgment against the defendant. The defendant contended that he had an arguable case that neither the overdraft facility nor the bridging loan was repayable on demand. It was held that:

> "It was not inconsistent for a lender to grant a facility which both it and the borrower envisaged would last for some time, but with the caveat that the lender retained the right to call for repayment at any time on demand. In the instant case, the terms of the facility letter and the surrounding circumstances disclosed no incompatibility. Nor was there any inconsistency between the expectation that repayments on the bridging loan would begin in August and the preservation of a right to call for a full repayment at any time."

Kennedy L.J. in the course of his judgement at page 167 stated:

> "I am wholly unpersuaded that the words 'repayable on demand' used in the facility letter do not mean what they say. It is in no way inconsistent for a bank or any other lender to grant a facility which it and the borrower both envisage will last for some time, but with the caveat that the lender retains the right to call for repayment at any time on demand. That is what happened here. As the judge said, the terms of the facility letter and the other circumstances to which Mr Cohen has referred disclose no incompatibility. The bank was therefore entitled to do as it did on 10 July 1996 and to require heritage to repay on demand."

Accordingly, it was contended on behalf of the bank that it was entitled to call in the sums due as under the General Terms and Conditions applicable, it was entitled to make demand even if the term of the facility was not expired or had been extended. It was provided in the General Terms and Conditions, inter alia, that:

"a term loan though expressed to be repayable over or within a specified period may be terminated by the bank and the bank may demand early repayment at any time with or without notice to the borrower upon the occurrence of any of the following events:

> (i) on the failure by the borrower to make any repayment of principal or interest on the date it is due.
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> …
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> (iii) if any guarantor notifies the bank that they no longer wish to act as guarantor or that the guarantee is to terminate or on a material change relevant to a guarantor occurring which is in the opinion of the bank prejudicial to the banks interests."

A number of other events of the default were set out in the General terms and conditions.

Apart from the fact that the first and second defendants had not made any repayment of principal or interest on the expiry of the facility, it is also the case that there were problems with the guarantor. In the course of discussions in relation to the provision of further facilities, he sought to have his liability on foot of the Guarantee reduced to €1,000, 000 as previously noted.

Counsel on behalf of the first and second defendants referred to the well known decision of the High Court in the case of *Harrisrange Ltd v Duncan 2003 4 I. R. 1* in which McKechnie J. set out the principles applicable to an application for summary judgement. The test applicable was not in dispute but reliance was placed in particular to the following observation of McKechnie J:

> "Leave to defend should be granted unless it is very clear that there is no defence."

It was contended by counsel that there was a variation of the terms of the loan provided in the letter of sanction which had provided for repayment within 2 years from the date of drawdown of the facility in respect of the purchase price of the land on which the development was to take place. It was set out in paras. 11 and 12 of Mr. Keane's affidavit that there was a variation of the terms of the loan facility to the effect that the bank would supports the defendants over the longer term. It was contemplated that the bank would be repaid out of the proceeds of the whole development. It was in that context that further facility letters of the 10th December 2009 and 7th July 2010 were furnished by the bank. The only reason that further sums were not furnished ultimately was because of the refusal of the 3rd named defendant to sign a new guarantee. It was contended that the bank had committed to provide finance for the project and therefore had a contractual duty to continue to do so until the development was finished. Accordingly, the bank was not entitled to call in the loan when it did.

The final point made on behalf of the first and second in defendants related to the issue of delay in the payments made by the bank on foot of the architects certificates. I have already dealt with this issue and nothing further requires to be said on this topic.

Decision on the entitlement of the plaintiff to enter final judgement against the first and second defendants

The high point of the case made by the first and second in defendant use as pointed out previously contained in paras. 11 and 12 of the affidavit of Mr Keane on behalf of the first and second in defendants. I think it is fair to say that there is no dispute between the parties that there was a variation in the terms of the facilities to be provided by the bank to the first and second in defendants in that it was agreed that the sum to be drawn down by the first and second named defendants would be reduced in accordance with the reduction in the scale of the development. It also appears to be the case that there was some discussion between the parties as to the extension of time in relation to the term of the loan. Mr Moore in his affidavit disputes the assertion that the plaintiff agreed to an extension of the period of the facility. Indeed he maintained that the plaintiff was anxious to ensure that the project remained within its time frame. Thus, there is a measure of dispute between the parties on that particular point. It is clear that notwithstanding that dispute, the bank entered into discussions with the first and second named defendants in relation to the completion of the first phase of the project and ultimately, the bank provided further letters of sanction as set out above. Ultimately, those letters of sanction were not acted upon by the bank in circumstances where the guarantor, the third named defendant, refused to sign a new guarantee.

In considering the issues that have arisen in this case, and I have had regard to the decision in *Harrisrange* referred to above and to the decisions in the case of *Consulnor Gestion SGHC S. A. v Optimal Multiadvisors Ireland plc., High Court, Unrep. 27 March 2009* and to the decision in *GE Capital Woodchester Ltd. v. Aktiv Kapital & Ors., High Court, Unrep. 19 November 2009*. In the latter decision, Clarke J. set out the applicable law and I do not think it is necessary for me to repeat all that he said. In his review of the applicable law, he referred to a number of authorities including *Aer Rianta v Ryanair 2001 4 I. R. 607*, saying:

> "The standard to be applied in examining whether a defendant has a fair or reasonable probability of the defendants having a real or *bona fide* defence is set out in the decision of the Supreme Court in *Aer Rianta v. Ryanair Limited* [2001] 4 I.R. 607. In his judgment in *Aer Rianta* Hardiman J. noted that a fair and reasonable probability of a real or *bona fide* defence is not the same thing as a defence which will probably succeed or even a defence whose success is not improbable. At p. 621 of his decision, Hardiman J. states that 'the defendant's hurdle on a motion such as this is a low one and the jurisdiction is one to be used with great care.' In summary, Hardiman J. concluded, at p. 623 of his decision:-
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> > 'In my view the fundamental questions 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?'"

The facts of this case must be viewed in the light of the test to be found in the cases to which I have referred. It is clear from the authorities that the mere assertion of a defence is not sufficient. There must be evidence of facts, which if true, would arguably give rise to a defence.

Applying the principles I have outlined above, I do not think it can be said that the first and second defendants have succeeded in overcoming the low threshold applicable to the grant of leave to defend. The core of the defence is the assertion that the original terms of the letter of sanction were varied, an assertion which is correct, that as a result of this the period of time within which to complete the development was to be extended (it is accepted by the first and second named defendant that there was no concluded agreement reached on the period of any such extension) and that in those circumstances, the bank was not entitled to call in moneys due. The latter assertion ignores the General Terms and Conditions which formed part of the agreement between the parties. Assuming for the moment that the first and second named defendants are correct in saying that the bank had agreed to extend the period of time in which to repay the amount of the loans beyond the two year period from the date of drawdown of the first tranche of the facility, that does not alter the fact that the bank was entitled to demand payment in circumstances where an event of default occurred. In this case, the bank clearly was willing to allow the first and second defendant some measure of leeway as is evidenced by the furnishing of further letters of sanction but ultimately, the refusal of the third named defendant to provide a new guarantee led to the decision to call in the loan. That refusal was an event of default provided for in the General Terms and Conditions applicable in this case and accordingly, the bank was entitled to demand repayment.

In the circumstances, I am satisfied that the plaintiff is entitled to liberty to enter final judgment against the first and second named defendants.

The Position of the Guarantor
I now want to look at the issues raised on behalf of the third named defendant.

The first point to note is that the third named defendant relied on any defence open to the first and second named defendant. As I have decided to give liberty to enter final judgment against them, the third named defendant cannot rely on any such defence.

The third named defendant raised an issue as to the execution of the guarantee relied on by the bank. He stated that he had no recollection of signing the guarantee exhibited by Mr Flanagan. He did not say that the signature on the guarantee was not he is. The point he makes relates to the date of execution he says he does not believe that he signed a guarantee on the 13th of August 2007. He referred to the date on the copy of the guarantee exhibited by Mr Flanagan as not having been inserted by him "but which may have been inserted on behalf of the plaintiff before the guarantee was sent to me". He exhibited an unsigned version of the guarantee and added that he received a faxed version of the guarantee in 2010.

The third named defendant also sought to make a point in relation to the security held by the plaintiff in respect of the guarantee. He referred to a letter of the seventh of July 2010 which he contended was a letter in which the plaintiffs sought to extend a charge held over land owned by him and the second-named defendant even though this had not been contemplated by the letter of sanction of the 13 August 2007. In fact, as was pointed out by Mr Flanagan in a subsequent affidavit, the third named defendant had expressly consented to the provision of that security and a letter of the 3rd August 2007 was exhibited by Mr Flanagan in which it was stated as follows:

> "Dear Michael,
>
> I refer to the letter of guarantee being provided by you in favour of the bank for the obligations of the above named borrowers.
>
> As advised, the bank currently holds a first legal charge over Al Eile Stud, Dungarvan. Please note that the bank will rely upon your interest in this security in support of your letter of guarantee.
>
> Please indicate your acceptance of this by signing and returning one copy of this letter."

The third named defendant signed the said letter.

There is no merit in the point being made by the third named defendant in relation to the extension of the security already held by the plaintiff. He accepted the terms of the letter of the 3rd August 2007 and to the reliance by the bank on the security so held.

The third issue raised on behalf of the third named defendant was the point that the effect of giving time to the principal debtor may be released the surety. In other words, as there was a variation in the terms of the original agreement between the plaintiff and the first and second named defendant, the third named defendant should have been consulted. Under the original arrangement payment was to be made by a sale or refinancing of the first and second named defendants within a two-year period. The third named defendant was prejudiced by the fact that payment was not to be made in the two-year period provided for in the letter of sanction.

The terms of the guarantee at issue in provided for at clause 61 as follows:

> "The bank shall be at liberty without obtaining any consent from the Guarantor and without thereby affecting its rights or the Guarantor's liability hereunder at any time:
>
> (i) to determine, enlarge or vary any credit to the borrower;"

It is a well accepted principle that a material variation of the terms between the lender and the borrower will discharge a surety from liability on foot of the guarantee. (See Holme v Brunskill 1878 3 Q.B.D. 495) However, on the facts of this case, the terms of the guarantee itself provided for the bank to vary or enlarge the credit to the borrower. Accordingly it is not my view that the variation in the terms of the agreement between the bank and the first and second named defendants is such as to discharge the third named defendant from his liability under the guarantee.

The only issue that remains to be considered is the question raised by the third named defendant in relation to the execution of the guarantee. The execution of the guarantee is not denied by the third named defendant. What is stated by the third named defendant is that he does not recollect signing the guarantee on the 13th of August 2007. I know from the guarantee exhibited that the signature of the third named defendant was witnessed by Eamon Moore, the second deponent to provide evidence on behalf of the plaintiff. Mr Moore in his affidavit which was sworn on the 23rd of May 2011 made no reference to the execution of the guarantee by the third named defendant was affidavit was sworn on the 29th of March 2011. The issue as to the execution of the guarantee was dealt with in the affidavit of Mr Flanagan sworn on the 28th of April 2011 in which he stated:

> "In respect of the execution of his guarantee of the 13th of August, 2007, it is noted that the third named defendant does not suggest that the signature appearing on the said guarantee is not his. Indeed, I say and believe that the third named defendant has never previously suggested that he did not execute his said guarantee and it would appear that this contention has been raised purely for the purposes of the present proceedings."

An issue has been raised as to the date on which the guarantee was executed by the third named defendant. The third named defendant has not said that he did not execute the guarantee. Mr. Flanagan said in his first affidavit that the Guarantee was executed by the third named defendant. Presumably, he made that averment having examined the original guarantee.

I do not accept the contention on behalf of the third named defendant that the plaintiff does not have its proofs in order. The guarantee is before the court. It is produced by an authorised officer of the bank and there is no suggestion that it was not executed by the third named defendant. I see no point in adjourning the issue as to the date of execution of the guarantee to plenary hearing in circumstances where there is nothing of any kind in the papers before me to suggest that any issue by reason of the date of execution could arise which might give rise to a defence. Certainly, none has been suggested. It might have been better if Mr. Moore had dealt with the point raised as to the date of execution but even allowing that, I do not see any defence based on this point. Accordingly, the plaintiff is entitled to judgment against the third named defendant also.