Neutral Citation Number: [2013] IEHC 190

THE HIGH COURT

[2011 No. 2661 S]

BETWEEN:

DANSKE BANK A.S. (TRADING AS NATIONAL IRISH BANK)

PLAINTIFF

AND

MICHAEL WALSH, JAMES CUMMINS AND JOHN BRENNAN

DEFENDANTS

JUDGMENT of Mr. Justice Herbert delivered on the 26th day of April, 2013.

1. The plaintiff in this action is an external company authorised and registered under the laws of Denmark. It is registered in this State and is licensed to carry on the business of banking in the State, under the style and title of National Irish Bank. The plaintiff's claim is for liberty to enter final judgment for a sum of €300,000 together with interest against the second and third defendants on foot of a guarantee dated the 10th September, 2007. The plaintiff sought repayment of all sums due on foot of this guarantee by letters of demand dated the 17th December, 2009. Further letters of demand were issued dated 15th February, 2011. No payment was received from any of the defendants.

2. An appearance was entered on behalf of the second defendant and the third defendant on the 31st August, 2011. By order of the Master of the High Court, made on the 23rd November, 2011, liberty was given to the plaintiff in default of appearance by the first defendant to enter final judgment against the first defendant for the sum of €311,208.34, of which sum €11,208.34 represents interest accrued from the 12th January, 2009, to the 30th August, 2011, inclusive. By order made pursuant to the provisions of O. 63, r. 7 of the Rules of the Superior Courts, the Master of the High Court referred the application against the second and third defendants to this Court for hearing.

3. In the affidavit grounding this application sworn on the 16th September, 2011, David Taylor, a manager of the plaintiff bank, avers that the defendants have no *bona fide* defence to the plaintiff's claim in law or on the merits and that the appearances entered on their behalf were solely for purposes of delay. This was denied by the defendants who stated through counsel that the facts deposed by them on affidavit establish that they have three *bona fide* defences: *non est factum*, undue influence, and discharge by reason of a breach by the plaintiff of a fundamental condition of the agreement between the plaintiff and the principal debtor. Counsel for the plaintiff submitted that the defendants do not have even an arguable defence on any of these grounds and further contends that pleas of *non est factum* and undue influence are mutually exclusive.

4. The second defendant in his replying affidavit sworn on the 22nd February, 2011, states that he is a businessman and that the first defendant had acted as his accountant since 1991. The third defendant states in his replying affidavit sworn on the 22nd November, 2011, that he is a publican and is the owner of two licensed premises in Waterford and one in Washington D.C. United States of America and that the first defendant had acted as his accountant since 2004. There can be no question therefore, but that the second defendant and the third defendant are businessmen actively and constantly involved in commercial and financial transactions and decisions. The affidavit evidence advanced by these defendants is that the first defendant approached each of them individually in 2007 and asked if they wished to become involved in a property transaction with him and the other defendant. This transaction, they claim, involved obtaining planning permission for the development of a small site of 751sq.mtrs beside "Ryans Bar" Kilbarry, Ballybeg, Co. Waterford. It is stated in a supplemental affidavit sworn by the second defendant on the 9th March, 2012, that at the time of this approach by the first defendant, he was aware that this property was owned by Totty Barry Taverns Limited. The second and third defendants allege that the first defendant informed them that the only commitment required from them at that time was a payment of a sum of €5,000 each to be utilised in paying an architect who would apply for planning permission. They state that these sums were paid by them to the first defendant. It is alleged by the second defendant in the supplemental affidavit sworn on the 9th March, 2012, that he was advised by the first defendant that 51% of the shares in Totty Barry Taverns Limited would be transferred to the first defendant at a nominal fee and that he would hold a portion of these shares in trust for the second defendant and the third defendant in order to ensure that they had an interest in Totty Barry Taverns Limited, the owner of the property, reflecting their investment of €5,000 each.

5. The fifth paragraph in each of the replying affidavits of the second defendant and the third defendant is in precisely the same terms and asserts as follows:-

> "At no point whatsoever was I instructed that I had to enter a Personal Guarantee for the amount of €300,000 plus interest by either Michael Walsh, any Solicitor or representative from National Irish Bank now known as Danske Bank. If I had been instructed that such a guarantee was required I would not have proceeded with the property transaction as I felt at the time I had ample borrowings to repay and under no circumstances was I going to enter any further financial obligations to banks."

6. In his supplemental affidavit the second defendant asserts that he was not and neither was the third defendant involved in any application to the plaintiff for loan facilities for Totty Barry Taverns Limited and they had no knowledge prior to the institution of these proceedings of any such loan facility having been granted to that company by the plaintiff. At para. 12 of his supplemental affidavit the second defendant avers that he had complete trust in the first defendant and trusted him to take all necessary steps in relation to the share transfer and to engage appropriate advisors in relation to any legal aspects of the transfer. There is no similar averment on affidavit by the third defendant. However, at para. 1 of this supplemental affidavit, it is stated by the second defendant that it is made on his own behalf and, "on behalf of and with the authorisation and knowledge of the third named defendant herein". I therefore consider that the court should proceed on the basis that these assertions are also being made by the third defendant.

7. At para. 7 of the grounding affidavit of David Taylor there is exhibited what is averred to be a true copy of a facility letter, dated the 26th June, 2007, sent by the plaintiff to the directors of Totty Barry Taverns Limited. This letter offers a facility which is

described as a "Structured Term Loan", of €910,000 to that company for the following expressly stated purposes:-

> "To repay Bank of Ireland loan €560,000.
>
> To repay directors loans €250,000
>
> Professional fees/renovations €100,000."

8. Paragraph 5 of this facility letter, under the heading "Security", requires that a first legal mortgage be granted over the public house known as Noddy's Bar, Ballybeg, Waterford, which, by para. 8(a)(i) of the letter must be shown to have an open market value of not less than €1,200,000 and, Letters of Guarantee be signed by Michael Walsh, James Cummins and John Brennan for a minimum €300,000.

9. As regards the second item above it was made an express condition precedent at para. 8 of the facility letter that prior to the drawdown of the loan:-

> (b) [The] Bank's solicitors be satisfied that there are no legal issues in relation to the repayment of the directors loans to the Ryans as consideration for the 51% shares being acquired by the investors.
>
> (c) Ml. Walsh and Co. to confirm similarly and also that there are no tax implications in relation to Clause 8(b) above.
>
> (d) Security to be in place prior to drawdown to the satisfaction of the Bank's solicitors.
>
> (e) Copy of contract to purchase shares to be provided to the Bank confirming purchase price quoted.

10. The identity of "the investors" is not given in subpara. 8 or elsewhere in the facility letter.

11. At para. 7 of his supplemental affidavit sworn on the 9th March, 2012, the second defendant claims that he had no knowledge until the institution of these proceedings of this loan facility letter or of the provision of such a facility to Totty Barry Taverns Limited. He asserts that he had no part whatsoever in seeking this loan. He states that he believes that the third defendant was equally unaware of these matters. The summary summons in these proceedings was issued on the 23rd June, 2011 and was served on the defendants on the 2nd August, 2011. Apart from anything else, I find it impossible to reconcile this statement by the second defendant with the terms of a letter dated the 18th February, 2010, from Clinton Flynn, Chartered Accountants, Waterford, to the plaintiff, (per. David Taylor) which states as follows:-

> "RE: Totty Barry Taverns Limited
>
> . . .
>
> As part of an information gathering exercise I am currently completing, I obtained information from the solicitor who dealt with the original transaction between the bank and the company. This information indicates that €810,000 of the loan facility was drawn down by the company on the 27th March, 2008. The solicitor's records indicate that the final €100,000 was held bank [sic] to pay for professional fees etc. The solicitor does not appear to have any further information in relation to the drawdown of the balance.
>
> . . .
>
> I can also advise that the directors of the company have engaged our firm to act as auditors to the company. I have enclosed a letter from John Brennan which details our appointment to act on his and Jim Cummins behalf and authorizes us to discuss the company's business with the bank.
>
> Regards."

12. Enclosed with this letter is a letter dated the 18th February, 2010, from John Brennan, (third defendant) to the plaintiff, (per. David Taylor) which states as follows:-

> "RE: Totty Barry Taverns Limited
>
> Dear David,
>
> I refer to the above named company and hereby authorize Ronan Clinton of Clinton Flynn Chartered Accountants to act on the behalf of myself and James Cummins with National Irish Bank.
>
> I also note that Clinton Flynn have been engaged to act as auditors to Totty Barry Taverns Limited.
>
> Regards"

13. At para. 8 of his supplemental affidavit sworn on the 9th March, 2012, the second defendant makes reference to a sale and purchase agreement dated the 21st December, 2007, whereby 51 of the 100 issued ordinary shares in the capital of Totty Barry Taverns Limited were sold by Eugene Ryan and Maria Ryan as legal and beneficial owners to Michael W. Walsh (in trust) for a consideration of €51. By this agreement the vendors warranted *inter alia*, that the company had a good and marketable title, free from encumbrances to its premises being the lands comprised in folio 16182F and folio 19371F of the Register of Freeholders Co. Waterford. Peter O'Connor and Son, Solicitors, Wyse House, Adelphi Quay, Waterford, acted in the transaction for the purchaser and the vendors. A draft trust deed is exhibited by the second defendant in the supplemental affidavit sworn by him on the 9th March, 2012. This trust deed is dated "---------- day of March, 2007" and is made between Michael Walsh as "trustee" and Michael Walsh and two other unnamed persons as "beneficiaries". The recitals record that Michael Walsh had acquired 51 of the issued ordinary shares in the capital of Totty Barry Taverns Limited. They go on to state as follows:-

> "C. At all times prior and subsequent to the acquisition by him of his controlling interest in the Company, the Trustee has acknowledged that the consideration for the same was not provided by the Trustee himself, but rather the entire of same was provided by the Beneficiaries to the intent that while the legal title to the Sale Shares was taken in the name of the

> Trustee the entire beneficial and equitable interest therein is vested in the Beneficiaries in the manner appearing hereafter."

14. Michael Walsh as "trustee" acknowledges and declares that he holds the sale shares not beneficially for himself, but in trust for and on behalf of the beneficiaries in the following proportions:-

> "1.1 Michael Walsh: 13 Shares
>
> 1.2 . . . : 13 Shares
>
> 1.3 . . . : 26 Shares."

After item 1.2, someone has written "Jim Cummins" and after item 1.3, someone has written "John Brennan".

15. The second and third defendants contend that a trust deed either in the form of this draft or in any other form, was not executed by the first defendant and that consequently no legal or beneficial interest in Totty Barry Taverns Limited ever passed to or was held by them or either of them. At para. 11 of his supplemental affidavit sworn on the 9th March, 2012, the second defendant states as follows:-

> "I say and was so advised by the First Named Defendant that the proposed transfer of shares in Totty Barry Taverns Limited to the First Named Defendant on trust for your deponent and the Third Named Defendant was for the purposes of ensuring that your deponent and the Third Named Defendant had an interest in Totty Barry Taverns Limited, which was the owner of the property, which it was proposed to be developed at Kilbarry, Ballybeg, Co. Waterford. I say that the transfer of shares to be held on trust was to be for a nominal fee to reflect the previous investment of €5,000 each invested by your deponent and by the Third Named Defendant."

16. However, in my judgment the letter dated the 18th February, 2010, from Clinton Flynn, Chartered Accountants, to the plaintiff indicates that the second defendant and the third defendant have in fact at all material times acted as controllers of Totty Barry Taverns Limited.

17. It is not at all clear from the affidavit evidence of the second defendant and the third defendant whether they deny that they signed the document or, accept that they signed it, but claim that they did not know that what they were signing was a guarantee. At para. 13 of his replying affidavit sworn on the 22nd February, 2011, the second defendant makes reference to, "a guarantee I did not sign". However, at para. 15 of his supplemental affidavit sworn on the 9th March, 2012, the second defendant states that he has no recollection of signing the guarantee and, that their advisors, the first defendant and Peter O'Connor and Son Solicitors or one of them should have informed him and the third defendant that the document was a guarantee and warned them of the risks inherent in signing a guarantee to secure a loan to Totty Barry Taverns Limited. However, during the course of argument, the defendants through their counsel accepted that the signatures on the document appeared to be their signatures and they would not dispute this, but claimed that they had no recollection at all of signing the document and were certain that they had not signed it on the 10th September, 2007.

18. It was not contended on behalf of the second defendant and the third defendant that the guarantee was unenforceable because of a non-compliance with the provisions of s. 2 of the Statute of Frauds (Ireland) 1695. This section does not require the signature of the party to be charged to be witnessed. A contract of guarantee, like any other written agreement, is deemed, *prima facie*, to have been executed and to take effect from the date stated in it unless that date is proven to be incorrect: the onus of proof being on the party so asserting. I am satisfied that these defendants have not raised even an arguable case that the document was not signed by them on the 10th September, 2007. Their assertion in their replying affidavits that they had not met the witness to their signatures, Thomas Murran, solicitor, Wyse House, Adelphi Quay, Waterford, on that date and were otherwise engaged, - the third defendant in playing golf in Waterford and, the second defendant working all day in his office at Mayfield, Cashel, Co. Tipperary, where (based upon an entry in an unexhibited diary) he claims he met his manager, his in-house accountant and an agricultural adviser, - is not enough to raise an arguable case that the date appearing on the document, just above what they now acknowledge to be their signatures, is incorrect.

19. By a letter of demand dated the 16th December, 2009, the plaintiff demanded repayment by Totty Barry Taverns Limited of €932,446.08 with continuing interest. By letters dated the 17th December, 2009, addressed to the second defendant and the third defendant, the plaintiff called-in the "guarantee of obligations of Totty Barry Taverns Limited". The first paragraph of each such letter stated as follows:-

> "National Irish Bank (the "Bank") regrets that it has now become necessary to call upon you for payment of €300,000 (Three Hundred Thousand Euros) being the amount for which you are liable to the Bank on foot of a Letter of Guarantee dated the 10th day of September, 2007, given by you for the account of Totty Barry Taverns Limited."

20. The letter dated the 18th February, 2010, from Clinton Flynn, Chartered Accountants, to the plaintiff refers to the letter of the 17th December, 2009, and to several telephone conversations between the author and Richard Morrissey of the plaintiff subsequent to the issuing of that letter. The author of the letter, Ronan Clinton, suggests that it would be helpful if he and Richard Morrissey could meet with the addressee, David Taylor with a view to discussing the current position of Totty Barry Taverns Limited, "and the work the investors are currently completing to rectify the company's position with the bank". On the affidavit evidence the second defendant did not, nor did the third defendant nor did Clinton Flynn, Chartered Accountants, deny that these defendants had entered into any such guarantee with the plaintiff.

21. By a letter dated the 10th March, 2010, exhibited by the second defendant in his supplemental affidavit sworn on the 9th March, 2012, Peter O'Connor and Son, Solicitors, wrote to Nolan Farrell and Goff, solicitors as follows:-

> "Re: OUR FORMER CLIENT: MICHAEL WALSH AND AISLING WALSH
>
> YOUR CLIENT: JOHN BRENNAN
>
> Totty Barry Taverns Limited ("the Company")
>
> Dear Sirs,

> We refer to the above matter and to your letter of the 9th March, 2010.
>
> We confirm that your client and James Cummins called to this office yesterday afternoon to discuss their difficulties with National Irish Bank. The writer and Marie Dennehy attended on Mr. Brennan and Mr. Cummins out of courtesy with a view to assisting them with their inquiries.
>
> We furnished your client and Mr. Cummins with a copy of a letter of loan sanction from National Irish Bank dated the 26th June, 2007 which issued to the Directors of the Company. One of the Banks requirements as part of the security for the advancement were "letters of Guarantee signed by Michael Walsh, James Cummins and John Brennan for a minimum of €300,000".
>
> We do not have copies of those Guarantees on file as we did not advise either your client or Mr. Cummins in relation to the security documentation. We understand that these would have been executed by your client and Mr. Cummins at Michael Walsh's former office and on his advice, as their accountant.
>
> We trust that this is the information that you require, but if you have any further queries, do not hesitate to contact the writer.
>
> Yours faithfully."

22. On the affidavit evidence, this statement with regard to the execution of the "security documentation" was not challenged or denied. As appears from the above mentioned letter from Clinton Flynn to the plaintiff, €810,000 at least of the sanctioned €910,000 was drawn down by Totty Barry Taverns Limited on the 27th March, 2008. A mortgage dated the 14th March, 2008, in favour of the plaintiff by Totty Barry Taverns Limited was registered as a charge on the lands in folio 16182F Co. Waterford (Noddy's Bar) on the 20th March, 2008. The fact that the offer contained in the facility letter dated the 26th June, 2007, to the directors of Totty Barry Taverns Limited was not accepted by the nominated acceptance date, the 20th July, 2007, and the first legal mortgage over Noddy's Bar and the guarantee by Michael Walsh and these defendants was not in place by the stipulated, the 31st August, 2007, permitted the plaintiff, at its option to renegotiate the terms of the offer and to renegotiate the security required. The fact that the plaintiff chose not to avail of this option does not invalidate the late acceptance of the facility letter by Totty Barry Taverns Limited or any security entered into consequent upon the late acceptance.

23. The case of the plaintiff is plain: there is here a straightforward guarantee clearly and repeatedly identified as such on its face, dated, and signed by each of these two businessmen, whose signatures are witnessed by a then and still practicing solicitor. Though not expressly stated therein, the defendants' affidavits clearly indicate that a defence of *non est factum* is sought to be relied upon by them. It was submitted by counsel for the defendants that the affidavits of the defendants also raise an arguable defence that the execution of a trust document identifying the beneficial owners of the shares was by reason of the provisions of para. 8(b), (c), (d) and (e) of the facility letter a condition precedent to the drawdown of the loan to Totty Barry Taverns Limited and the failure of the plaintiff to ensure that this was done amounted to a material alteration of the agreement between the plaintiff and the principle debtor without their consent such as to discharge them from all liability on foot of the guarantee. It was further submitted by counsel for the defendants that the defendants' affidavits disclosed an arguable defence of undue influence in that these defendants generally and in respect of this transaction in particular had placed trust and confidence in the first defendant as their accountant and, the fact that they had no legal or beneficial interest in Totty Barry Taverns Limited put the plaintiff on inquiry as to the circumstances in which the alleged guarantee was obtained, and the plaintiff had failed to take any or any reasonable steps to ensure that it was properly obtained.

24. The test to be applied by this Court in determining whether or not to grant summary judgment is set out succinctly by Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 (at 623):

> "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?"

25. The defence of *non est factum* was considered by Morris J. in *Tedcastle McCormick and Company Limited v. McCrystal* (Unreported, High Court, 15th March, 1999), where he approved and applied the decision in *Saunders v. Anglia Building Society* [1971] A.C. 1004. This decision of Morris J. was followed in *A.I.B. Plc v. Higgins and Others* [2010] IEHC 219 (Unreported, High Court, 3rd June, 2010) where Kelly J. cited the following passage from the judgment:

> "I am satisfied that a person seeking to raise the defence of *non est factum* must prove:-
>
> (a) That there was a radical or fundamental difference between what he signed and what he thought he was signing;
>
> (b) That the mistake was as to the general character of the document as opposed to the legal effect;
>
> and
>
> (c) That there was a lack of negligence i.e. that he took all reasonable precautions in the circumstances to find out what the document was."

26. In *I.B.R.C. v. Quinn* [2011] IEHC 470 (Unreported, High Court, 16th December 2011), Kelly J. cited with approval the following passage from the judgment of Lord Reid at p. 1016 in *Saunders v. Anglia Building Society (ante):*

> "Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect, whereas in fact, its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief."

27. In *I.B.R.C. v. Quinn (ante),* the plaintiff sought summary judgment for the sum of €3 million. The second named defendant in that case, the wife of the first defendant, sought to raise the defence non est factum. In the course of his judgment, Kelly J. held as follows:-

> "Even the most cursory of glances at the documents which bear her signature would alert any but the illiterate to the fact that this was some form of borrowing transaction. But it would appear that even such information was lost on Mrs. Quinn because she apparently simply signed documents as part of a course of conduct without giving the matter a second thought. That is the height of the case which she makes. I am satisfied that it is one which falls far short of providing even a statable defence on the basis of *non est factum*."

28. Kelly J. also referred with approval to the decision of Clarke J. in *A.C.C. Bank v. Kelly* [2011] IEHC 7 (Unreported, High Court, 10th January, 2011), where he held that :-

> "By signing a commercial banking arrangement, a borrower agrees to be bound by the terms of that arrangement and if the borrower has not taken the trouble to adequately read the document or to be adequately informed as to its meaning then the borrower must accept the consequences of having signed a commercially binding agreement in those circumstances."

29. In *Saunders v. Anglia Building Society (ante),* Lord Hodson held that:-

> "The burden of proving *non est factum* is on the party disowning his signature; this includes proof that he or she took care. There is no burden on the opposite party to prove want of care."

30. In the instant case the second defendant and the third defendant are by their own admission businessmen actively involved in the management of their respective businesses. Had they troubled themselves to take even the most superficial glance at the document which bears their lately admitted signatures, they could not but have appreciated that it was a guarantee. Even if they were so lamentably careless in the conduct of their affairs that they accepted to be shown only the page on which they were asked to place their signatures, immediately above the spaces marked "sign here" the following words appear in a solid line box in bold print:-

> **"WARNING: As a guarantor of these credit facilities, you will have to pay off these credit facilities, the interest and all associated charges if the borrower does not. Before you sign this guarantee you should get independent legal advice:"**

31. Unless this was covered - which given its position in relation to the space provided for signatures should excite immediate suspicion - it would require a degree of negligence amounting to recklessness not to have seen and be alerted by the word "Warning" and, if nothing more by the seven words following it:-

> "As a guarantor of these credit facilities."

32. I am satisfied that the defendants' affidavits do not disclose even an arguable case that they took any reasonable precautions in the circumstances to find out what the document was. I find that they have not demonstrated even an arguable defence based on *non est factum*.

33. At para. 8 and para. 7 of their replying affidavits sworn respectively on the 22nd February, 2011, and the 22nd November, 2011, the second defendant and the third defendant employing exactly the same language, state as follows:-

> "At no point did Michael Walsh Accountant instruct me that I had to enter a Guarantee nor discuss the matter with me. At no point did Mr. Walsh as my accountant advise me in relation to execution of a Guarantee nor the repercussions thereof."

34. At para. 5 of each of their respective replying affidavits they aver that at no point whatsoever were they instructed by the first defendant, by any solicitor or, by any representative of the plaintiff that they had to enter into a guarantee for €300,000 plus interest. Further, it is important to keep clearly in mind that these defendants' claim to have no recollection whatsoever of having signed the guarantee. However, the defendants submitted through counsel that if they did sign the guarantee it could only have been as a result of undue influence on the part of the first defendant in whom they placed trust and confidence as their accountant. This they submitted had to be the case because as claimed at para. 5 of each of their respective affidavits they had ample borrowings to repay and were not prepared to enter into further financial obligations to banks.

35. I find this claim to a defence based on undue influence to be simply untenable. In every case where a transaction is sought to be set aside for undue influence, this must be proved as a matter of fact. Even if I were to accept the mere assertion without any proof that these defendants did have trust and confidence in the first defendant as their accountant, I am satisfied, to borrow the words of Sir Eric Sachs in *Lloyds Bank Limited v. Bundy* [1974] 3 A.E.R. 757 at 767, that the basis for this did not go, "beyond… the confidence that can well exist between trustworthy persons who in business affairs deal with each other at arms length".

36. However, even if the relationship was one which as a matter of law gave rise to a presumption of influence, there is more than sufficient evidence to rebut any such presumption in these statements of fact in the affidavits of the defendants. Further, I am satisfied that even if these defendants on the 10th September, 2007, had no legal or beneficial interest in Totty Barry Taverns Limited, this fact alone would not have put the plaintiff on inquiry as to the possibility of undue influence. The facility letter of the 26th June, 2007, shows that this was a commercial transaction between persons all of whom were involved in business and as such persons whom the law generally regards as well capable of looking after their own interests. Unlike the situation which pertained in *Ulster Bank v. Roche and Buttimer* [1012] IEHC 166, there was no element of personal relationship or of moral or of psychological dependency between the parties in the instant case. That case is therefore entirely distinguishable on its facts from the present case. In the present case, I am satisfied that the plaintiff knew who the debtor was and its circumstances. The plaintiff also knew the purpose for which the structured term loan was being advanced and, I am satisfied that it understood the true nature of the transaction. To have framed the conditions precedent at para. 8(b), (c), and (e) of the facility letter, the plaintiff must have been advised and clearly understood that this apparent borrowing by Totty Barry Taverns Limited to pay creditors in fact involved a mechanism whereby "the investors" were acquiring a majority shareholding in that company. I am satisfied that these conditions precedent arose out of the concern of the plaintiff to ensure that there were no legal or tax issues arising before any drawdown of the facility could take place.

37. If, which is altogether improbable, the plaintiff considered that these defendants were not also, "the investors" in Totty Barry Taverns Limited, in my judgment, there is still nothing in the affidavit evidence from the defendants regarding this transaction which should have raised an issue in the mind of the plaintiff as to the circumstances in which these defendants were entering into the guarantee and which should have caused the plaintiff to take reasonable steps to ensure that this guarantee was properly obtained. Absent some special circumstance or circumstances in a transaction, a bank is not generally required to inquire why a number of

businessmen might be willing to enter into a guarantee with the bank to enable a company in which they had or appeared to have no apparent interest to obtain finance from the bank.

38. I do not accept that these defendants have shown even an arguable defence that they entered into this guarantee because of undue influence on the part of the first defendant. Even if they were able to show such an arguable defence, I find that they could not show an arguable defence that the plaintiff was fixed with constructive notice of such undue influence. Additionally, these defendants have failed to demonstrate that they have an arguable defence that the express warning in the guarantee, located as it is in a large box in bold print on the same page as and, immediately above the indicated signature spaces, (as in *Ulster Bank v. Fitzgerald* (Unreported, High Court, 9th November, 2001, per. O'Donovan J.)) was not in the particular circumstances of this case a sufficient discharge by the plaintiff of any obligation on its part to take reasonable steps to ensure that the guarantee was properly obtained, free from influence by others.

39. The third and final alleged ground of defence is based, it appears, on the averments contained at paras. 8, 9 and 11, of the supplemental affidavit of the second defendant sworn on the 9th March, 2012, which are as follows:-

> "8. I say and believe that the First Named Defendant had instructed Peter O'Connor and Son, Solicitors to facilitate and advise in relation to a share transfer of 51% of the shares in Totty Barry Taverns Limited from the shareholders of Totty Barry Taverns Limited. I say that it was agreed that the First Named Defendant would hold a portion of the said 51% of the shares on trust for your deponent and the Third Named Defendant herein. I say that in that respect the First Named Defendant was acting as an agent for your deponent and for the Third Named Defendant. I say and believe that Peter O'Connor and Son, Solicitors drew up the deed of trust and was, therefore, at all times, aware that they were acting on behalf of an agent of your deponent and the Third Named Defendant. I say however, that the deed of trust was never executed. I beg to refer to a copy of the said trust deed upon which, marked with the letter "D", I have signed my name prior to the swearing hereof.
>
> 9. I say and believe that 51% of the shares in Totty Barry Taverns Limited were transferred to the First Named Defendant on the 21st December, 2007. I say that the Share Sale and Transfer Agreement was drawn up by Peter O'Connor and Son, Solicitors and they were aware that the deed of trust as exhibited above had not been executed. I further say however, that as the deed of trust was never executed, no legal or beneficial interest in the shares in that company passed into the possession of your deponent or the Third Named Defendant, on trust or otherwise. I beg to refer to a copy of the Share Sale and Purchase Agreement upon which marked with the letter "E", I have signed my name prior to the swearing thereof.
>
> 11. I say and was so advised by the First Named Defendant that the proposed transfer of shares in Totty Barry Taverns Limited to the First Named Defendant on trust for your deponent and the Third Named Defendant was for the purposes of ensuring that your deponent and the Third Named Defendant had in interest in Totty Barry Taverns Limited, which was the owner of the property, which it was proposed to be developed at Kilbarry, Ballybeg, Co. Waterford. I say that the transferral shares to be held on trust was to be for a nominal fee to reflect the previous investment of €5,000 each invested by your deponent and by the Third Named Defendant."

40. It is contended on behalf of these defendants that it was a condition precedent to any liability on their part on foot of the guarantee that the deed of trust to which I have referred be executed by the first defendant declaring and acknowledging the beneficial interest of these defendants in the 51% of the shares in Totty Barry Taverns Limited prior to the drawdown of any sums secured by that guarantee. This is not stated in any of the affidavits of these defendants, who deny having any recollection of anything whatsoever to do with this guarantee including how, what they now accept are probably their signatures, came to be on it.

41. This alleged defence is based upon an interpretation of the provisions of item (e) of para. 8 of the conditions precedent in the facility letter dated the 26th June, 2007, the very existence of which these defendants claim they were unaware until the institution of these proceedings. It will be recalled that this provision requires that:-

> "Copy of contract to purchase shares to be provided to the Bank confirming purchase price quoted."

42. Paragraph 8(e) makes no reference whatsoever to a trust deed. I do not accept that the execution of such a document was mandated by this condition precedent. This condition does not expressly or impliedly require that the plaintiff be furnished with such an executed trust deed. The second defendant on his own behalf, and on behalf of and with the authorisation and knowledge of the third defendant, acknowledges expressly at para. 11 of his supplemental affidavit (*ante*), that the proposed transfer of shares was to be to the first defendant in trust. This was carried into effect by the terms of the share sale and purchase agreement made on the 21st December, 2007. No contract or copy of a contract to purchase shares, separate from and antedating this share sale and purchase agreement of the 21st December, 2007 was exhibited in the affidavit evidence. It will be recalled that the drawdown of €810,000 of the agreed funds occurred on the 27th March, 2008. The submission of this share sale and purchase agreement made on the 21st December, 2007 to the plaintiff would therefore have been a complete satisfaction of this condition precedent to the draw down of these funds. There was no affidavit evidence by the defendants to suggest, even *prima facie*, that this had not occurred. Further, even if the plaintiff had waived performance of condition precedent 8(e), which *prima facie* was for its sole benefit, these defendants have not shown an arguable defence that this was a material variation in the performance of the contract between the plaintiff and the debtor such as would enable them to be fully discharged from the guarantee.

43. In light of the foregoing, I am satisfied that the defendants' affidavits do not disclose any arguable defence and do not meet the requirements of the test set out in the *Aer Rianta v. Ryanair(ante)*. I will therefore grant the plaintiff's motion for summary judgment in this case.