

## THE HIGH COURT

[2013/1697S]

BETWEEN

ACC BANK PLC

PLAINTIFFS

AND

JOHN CONNOLLY &amp; MAURICE CONNOLLY

DEFENDANTS

**JUDGMENT of Mr. Justice Fullam delivered the 12th day of February 2015**

1. This is an application by the plaintiff, ACC Bank Plc ("The Bank") for summary judgment against two defendants John Connolly and Maurice Connolly. . The first defendant is a business man residing at Ballykenna, Tullogher, Co. Kilkenny and the second defendant as a business man residing at Dunamore, Ballinaboola, New Ross, Co. Wexford. The first defendant is the son of the second defendant

2. On the 28th October, 2005, the plaintiffs advanced the sum of €686,000 to the first defendant for the purpose of acquiring a development site with planning permission for 5 houses on 1.7 hectares at Fethard, Co. Wexford. Security for the loan consisted of two guarantees; one from the vendors of the site, Noel and Margaret Hayes, which was supported by a fixed legal charge over the site, and a further guarantee dated the 4th November, 2005 from the second defendant ("The first Guarantee") which was supported by a first legal charge over his agricultural lands comprising 35 acres at Dunamore, Folksmills, Wexford.

On the 30th November, 2007, the plaintiffs advanced the sum of €613,000 to the first defendant for the purpose of building the 5 houses. The security for this loan was supported by two further guarantees; one from the vendors Noel and Frances Hayes supported by an extension of the first legal charge on the site and another guarantee from the second defendant dated the 28th January, 2008 ("The second Guarantee") which was supported by an extension of the legal charge over the second defendants agricultural lands comprising 35 acres at Dunmore, Co. Wexford.

3. The first defendant defaulted on the two loans.

4. On the 10th May, 2013, the plaintiffs demanded repayment from the first defendant of the total sum then outstanding of €2,178,601.49 together with accrued interest of €512.97.

5. On the same date, the plaintiffs demanded the sum of €2,178,601.49 from the second defendant in accordance with the terms of the First and Second Guarantees.

6. The defendants failed to discharge the indebtedness. As of 14th February, 2014, there was a total sum of €2,327,705.02 due to the plaintiffs by the defendants.

7. In these proceedings, only the first defendant has sworn a replying affidavit. Despite being given "*one last chance*" to do so, by Ryan J, the second defendant has not sworn an affidavit.

**The Case Made by the First Defendant**

8. 1. The first defendant states that he is not in a position to repay the loans because he cannot give title to potential purchasers in respect of any of the houses which he has built. This, he alleges, is because the vendor's title was fraudulently obtained by Mr. Noel Hayes. The first defendant issued proceedings against the vendors in May 2014 and he asks the court to adjourn the plaintiff's application until those proceedings have been concluded.

2. The first defendant asserts that the second defendant did not have independent legal advice when executing the two guarantees. The first defendant says that his solicitor, Mr. O'Neill, also advised the second defendant.

3. The first defendant further submits that the guarantees executed by the second defendant were not executed under seal.

**Submissions by the Second Defendants Counsel**

9. Mr. McNally, on behalf of the second defendant submitted that:

(a) The second defendant had no independent legal advice and that there was nothing before the court as to the circumstances of the signing of the documents, and

(b) The transaction was an improvident one for the second defendant who was a vulnerable person in his late sixties who had had a heart operation.

**The Plaintiffs Case against the First Defendant**

10. The plaintiffs say that

(a) They had no involvement in the alleged fraud by one of the vendors,

(b) They had no obligation to ensure the first defendant got good title to the site and;

(c) That the first defendant has delayed six years before taking any steps against the vendors and in the circumstances an adjournment would be unreasonable.

### **The Plaintiffs Case against the Second Defendant**

11. 1. Not having legal advice is not a defence in Irish Law. If there was evidence of undue influence exerted by the first defendant on the second defendant, and in this case there is no such evidence, it might afford a defence (*Ulster Bank v. Roche and Buttimer* [2012] IEHC 166 Clarke J). In this regard, the second defendant, having been given time by the court to swear a replying affidavit has failed to do so.

2. The second defendant's proceedings against the plaintiff and their appointed Receiver were struck out by the Court (Hedigan, J).

### **The Law**

#### **Summary judgment**

12. The test to be applied in an application for summary judgment have been set out clearly in the judgments of the Supreme Court most notably in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 by Hardiman J and in *Harrisgrange Ltd. v. Duncan* [2003] 4 I.R. 1 by McKechnie J.

13. The head note in *Aer Rianta* summarises the position as follows:

1. The defendants hurdle in a motion for summary judgment was a low one and the jurisdiction to grant summary judgment was one to be used with great care.
2. It was for the court to decide whether the defence set out in the affidavits together with the documents exhibited therewith, was credible or in other words, whether there was a fair or reasonable probability of the defendant having a real or *bona fide* defence.
3. The defendant has to show that he has an arguable defence not a defence which would probably succeed.
4. The fundamental questions to be posed remained:

(a) Was it very clear that the defendant has no case?

(b) Was there either no issue to be tried or only issues which were simple and easily determined?

(c) Did the affidavits fail to disclose even an arguable defence?

14. In his summary in *Harrisgrange*, McKechnie pointed out at (XI):-

*"That leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence."*

### **Independent Legal Advice**

15. In *Ulster Bank v. Roche & Buttimer*, in the context of undue influence, Clarke J considered the circumstances in which a bank would have an obligation to ensure that a surety obtained independent legal advices where parties are married or otherwise closely connected. The learned judge had to decide whether he followed the decision of the High Court (O'Donovan J) in *Ulster Bank Ltd. v. Fitzgerald & Anor* (unreported, 9th November, 2001) or a slightly earlier decision of the House of Lords in *Royal Bank of Scotland v. Etridge (No. 2)* [2002] 2 AC 773. In *Fitzgerald*, the court decided that the bank had no obligation to ensure a surety obtained independent legal advice, whereas in *Etridge*, which considered eight appeals concerning the position of a wife as surety, it was held that a bank was put on inquiry when faced with a transaction which called for an explanation where the lender is aware of the relationship.

16. Clarke J noted that the substance of academic criticism in the approach taken in *Fitzgerald* was that it offered insufficient protection to potential vulnerable sureties and left a lender with no obligations arising from the knowledge that the parties were married or otherwise closely connected unless it had some special reason to believe that a wrong (undue influence) had actually taken place.

17. Clarke J noted that the decision in *Etridge* was not opened to O'Donovan J and, following a detailed consideration of the House of Lords judgment, he found it to be persuasive. At 5.14 Clarke J said :-

*"while not necessarily accepting that the precise parameters identified in Etridge are those which give rise to an obligation on the bank to inquire, and thus represent the law in this jurisdiction, I am satisfied that the general principle which underlies Etridge, is to the effect that a bank is placed on enquiry where it is aware of facts, which suggest, or ought to suggest that there may be a non-commercial aspect to a guarantee."*

18. The two questions the court had to consider, according to Clarke J, were:

1. Are the circumstances such that the bank is placed on inquiry, and
2. If so, what steps must a bank take?

19. At 5.16 Clarke J said:-

*"Again, under this heading, nothing which I say should be taken as necessarily implying the full rigours of the regime which applies in the United Kingdom represents the law in Ireland. However, I am satisfied that a bank which is placed on inquiry is obliged to take some measures to seek to ensure that the proposed surety is openly and freely agreeing to provide the requested security. As Ulster Bank, in this case, took no such steps, it is, in my view, unnecessary to*

*consider the precise level of steps which a bank must take."*

20. As mentioned earlier, *Etridge* was concerned with eight different appeals concerning the general issue of a wife standing surety for the indebtedness of her husband or his business or his company in which they both had a shareholding. The head note in *Etridge* states that the obligation on the lender was to take reasonable steps to satisfy itself that she had understood and freely entered into the transaction. The House of Lords suggested such reasonable steps included the requirement to obtain confirmation from an independent solicitor that the wife understood the documentation "to prevent her from subsequently disputing the transaction". The House of Lords did not rule out the solicitor who provided the confirmation also acting for both husband and wife.

21. In *ACC Bank Plc v. McEllin* [2013] IEHC 454, Birmingham J indicated that the situation of elderly parents becoming guarantors for an offspring's commercial debts arising from a business enterprise with which they were not involved would probably warrant the lender drawing to the attention of the proposed guarantor the desirability and importance of obtaining independent legal advice.

### **Analysis**

22. 1. While there is no specific allegation of undue influence, either by the first defendant on affidavit or the second defendant through his counsel's submissions, the relationship between the first and second defendant does place the plaintiff on inquiry and, therefore under an obligation to take some reasonable steps to ensure that the guarantees have been freely entered into by the second defendant.

In this regard the plaintiffs obtained a declaration from the second defendant that he had been afforded independent legal advice in respect of the first guarantee. The second defendant's declaration dated 4th November, 2005 was witnessed by Mr. O'Neill, the solicitor, who is an officer of the court. If the second defendant wished to contradict the import of that declaration, he has had ample opportunity to do so by swearing a replying affidavit. He has chosen not to make such affidavit.

23. In the circumstances I am satisfied that the obtaining of the declaration was a sufficiently reasonable step on the part of the plaintiffs and the declaration has not been dislodged by the assertions of the first named plaintiff on affidavit or the submission of counsel for the second defendant.

24. However, the position is different in relation to the second guarantee. Here there is no evidence of any similar declaration and consequently no evidence of the plaintiff taking any steps to satisfy themselves that the second defendant had freely undertaken the obligations of a guarantor.

25. The objection that the guarantees have not been executed under seal is not sustainable. The obligation to have a guarantee by an individual executed under seal was abolished by s.64 of the Land and Conveyancing Law Reform Act, 2009.

### **Decision**

26. 1. The plaintiffs are entitled to leave to enter judgment against the first defendant in respect of the two loan facilities dated 28th October, 2005 and 30th November, 2007.

2. The plaintiffs are entitled to leave to enter judgment against the second defendant in respect of the first guarantee dated 4th November, 2005.

Therefore judgment in the amount due under the first loan facility and associated guarantee will be on a joint and several basis against both defendants.

3. The issue of the second defendant's liability under the second guarantee is to be remitted to plenary hearing.

27. While accepting that the plaintiffs are not responsible for the extraordinary misfortune which has befallen both defendants in this case, it seems just that a stay be placed on both orders for summary judgment to allow time for the defendants to take advice on the consequences of very recent developments for the proceedings against the vendors.

28. The stay will be for one year.