THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2016] IECA 371

Peart J.
Birmingham J.
Hogan J.

Appeal No. 355/15

BETWEEN

ULSTER BANK (IRELAND) LIMITED

APPELLANTS

AND

WALTER DE KRETSER AND GILLIAN FOX

RESPONDENT

JUDGMENT of Mr. Justice Birmingham delivered on the 7th day of December 2016

1. This is an appeal by the defendants/appellants from a judgment of the High Court (Hedigan J.) dated the 10th June, 2015, granting the plaintiff/respondent liberty to enter final judgment in the amount of €126,077.06 (representing a principal sum of €89,350.95 with interest thereon from the 19th August, 2010). The plaintiff/respondent sued on foot of a joint and several guarantee in writing entered into by the appellants dated the 5th July, 2007, in respect of the obligations of a company of which both defendants were directors, named Stones Finishes Supply Limited. The guarantee was a condition for the granting of an overdraft facility to the company which was granted by way of a facility letter dated the 29th June, 2007. The guarantee was limited to the principal sum of €100,000 plus interest.

2. The company defaulted on its obligations under the facility letter and a demand was consequently made under the guarantee for the principal sum of €89,350.95 on the 7th January, 2009. Thereafter a summary summons was issued in respect of that sum plus interest on the 19th January, 2009. The background to the entry into the guarantee is that the first named appellant/defendant was a stonemason by trade and an expert in restoration. He started Stone Finishes Supply Limited in 1999 and it grew into a very successful business, having a turnover of over €1.1 million per annum at one stage and employing fifteen staff directly as well as a number of subcontractors. However in late 2007 the company came under significant pressure with regards to cash flow with a number of clients delaying payments due. The company encountered major difficulties in mid to late 2008 when two of its biggest clients became insolvent. In those circumstances the company went into voluntary liquidation on the 4th December, 2008.

Summary of defences and issues raised

3. The High Court concluded that the defendants had not made out an arguable defence to the claim. The appellants had resisted the bank's claim advancing inter alia the following defences:-

(i) A lack of review or understanding of the guarantee by the appellants, which was supposedly signed in desperation in a situation where the company was in an extreme financial situation.

(ii) That Ms. Fox only signed the guarantee consequent upon undue influence and duress by Mr. De Kretser.

(iii) That the guarantee was unenforceable due to the rule in relation to past consideration.

(iv) That the respondent was legally bound to accept the assignment of certain insurance policies offered in full and final settlement of the claims under the guarantee.

4. On the 18th February, 2012, the appellant/defendant Gillian Fox swore an affidavit which asserted *inter alia*:

(a) That she had been pressured into signing the guarantee by her husband, the first named defendant/appellant Mr. De Kretser.

(b) She had only signed the guarantee under duress.

(c) She had not seen copies of the guarantee prior to signing it.

(d) She was only a 1% shareholder of the company and received no benefit from the guarantee.

5. The first named appellant also swore an affidavit on the 18th February, 2012. He averred that:

(i) He was a 99% shareholder in the company.

(ii) The original guarantee provided to the company had only been provided by him and he did not understand why his wife had been required to act as co-surety in 2007.

(iii) He put undue pressure on his wife to execute the guarantee, as the company was under huge pressure in order to meet obligations and the respondent insisted on this prior to releasing funds.

(iv) He had not seen copies of the guarantee prior to signing it.

(v) The respondent had made contractual agreement to settle all outstanding liabilities under the guarantee by taking an assignment of an Ark Life Assurance policy which was valued at just over €55,000 and then unreasonably insisted on a contractually impossible encashment deadline of 28 days.

(vi) The respondent was legally obliged to take an assignment of the Ark Life policies.

6. Both defendants/appellants swore further affidavits on the 13th June, 2012. On this occasion Mr. De Kretser swore an affidavit reiterating his position in relation to the Ark Life policies and stated that he had a valid defence under the past consideration rule. Ms. Fox in her affidavit stated that she wished to defend the action based upon the defences of duress/undue influence and the rule of past consideration.

7. On the 18th October, 2012, Mr. Damien Devlin of the Collections and Recoveries Department swore an affidavit on behalf of the plaintiff bank refuting the claims that had been set out in the appellant's affidavits. In relation to Ms. Fox, the second named defendant/appellant he stated that:-

(a) Ms. Fox was not under the undue influence of her husband and that she had in fact introduced her husband to the respondent, with whom she had had prior dealings through her spa and beauty business Heavenly Spa Limited.

(b) That while she only held 1% shareholding in the company, she was also a director of the company and drew a €2,000 per month salary from it, contrary to her assertion that she received no benefit from the guarantee.

(c) That the facility letter was addressed to and signed by both appellants as directors and the guarantee was not signed until two weeks after the facility letter issued.

(d) That Ms. Fox had previously provided guarantees in the same or similar form going back to 2000, when she had guaranteed the liabilities of Heavenly Spa Limited and she had provided guarantees in respect of Stone Finishes Supply Limited on four occasions in 2002, 2003 and 2006.

8. In relation to Mr. De Kretser, Mr. Devlin stated that:

(a) Contrary to Mr. De Kretser's assertion that Ms. Fox had only been asked to provide a guarantee in 2007, she had in fact provided four previous guarantees in relation to the obligations of the company.

(b) His statement in relation to not having seen the guarantee in advance had to be seen in the context of his having known about the obligation to provide it two weeks earlier and his previous record of having signed guarantees.

(c) His statement about desperation to get funds for the company was refuted by the fact that he was also, at the time seeking a €740,000 mortgage in respect of the business premises that he owned and in which the company was operating.

(d) That the respondent had only conditionally accepted the assignment of the Ark Life policy when offered subject to encashment within 28 days and when this did not happen, the offer lapsed and there was consequently no contract to enforce.

9. While there has been mention of other issues, the real point in this case, both at first instance and on appeal is as to whether the guarantee was valid and that in turn raises the issue of whether there was a positive or affirmative duty on the bank to ensure that Ms. Fox understood the nature of the guarantee and had done what was required to ensure that she had access to independent legal advice, if she required it, before executing the guarantee.

10. Before addressing the issues raised in greater detail and before seeking to put those issues in a factual context, I need to remind myself these issues are arising in the context of an application for summary judgment where the defendants/appellants are contending that they have an arguable defence. The principles applicable to cases where the judgment is sought have been considered by the Superior Courts on a number of occasions in recent years. The principles that have emerged have been helpfully synthesised and summarised by McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1. He did so in 12 numbered paragraphs as follows:-

"(i) the power to grant summary judgment should be exercised with discernible caution;

(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;

(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;

(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) 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 and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

11. So, I approach this case on the basis that Ms. Fox should be given leave to defend unless it is very clear that she has no defence, not even one which could be described as arguable.

How the High Court dealt with the issue
12. The High Court dealt with this aspect of the case in the following terms:

"Taking the points in order:

(a) The defendants are both experienced business people with a track record of multiple guarantees provided to the bank. It is entirely unreal to suggest that they did not know what they were doing. Even were this not so, between the letter of facility and the signing of the guarantee two weeks later, they had every opportunity to acquaint themselves with all they needed to know. During this time they also had every opportunity to obtain legal advice. It should be noted in passing that absent some clear evidence of the need to insist upon customers obtaining it, there is no obligation on a bank to insist on customers obtaining legal advice before entering into contracts with them. (See *Ulster Bank Limited v. Roche and Buttimer* [2012] IEHC 166)

(b) There is no evidence of any duress or undue influence, there is simply an assertion. That assertion flies in the face of the evidence. This is, as noted above, that both defendants were experienced business people. Moreover, it was in fact the second defendant who introduced the bank to the company Stone Finishes. Also the second defendant was in receipt of a monthly salary of €2,000 from the company. Far from there being any existing evidence to show duress or undue influence, in fact the evidence shows the opposite."

13. The High Court judgment, the operative parts of which have been quoted, adverted to a number of the relevant facts in this case. However, it may helpful to refer to some of the matters that emerged from the affidavits in a little more detail. From the affidavit of Mr. Devlin it emerges that it was the second named defendant/appellant Ms. Fox who introduced Stone Finishes Supply Limited (the company) to the plaintiff bank in early 2002. At that time Ms. Fox ran a spa and beauty business known as Heavenly Spa Limited based in the Shelbourne Hotel in Dublin with Heavenly Spa Limited maintaining its bank accounts with Ulster Bank. Ms. Fox and her husband, the first named defendant/appellant, were directors of Heavenly Spa Limited. In December 2000, Ms. Fox and Mr. De Kretser, as directors of Heavenly Spa Limited, entered into a guarantee for the sum of €40,000.

14. Ms. Fox had stated on affidavit that she only held a 1% share in the company and that she was not involved in the day to day running of the company and did not benefit personally therefrom. Factually the position is that apart from being a shareholder, she was also a director of the company and received a monthly salary of €2,000. In relation to Ms. Fox's contention that she was pressurised into signing the guarantee by her husband Mr. De Kretser, the bank points out that the facility letter to the company dated the 20th June, 2007, issued to both defendants as directors and it provided under the heading "Security" as follows:-

"Personal letter of guarantee signed by the directors – Walter De Kretser and Gillian Fox."

15. Ms. Fox signed the facility letter on the 29th June, 2007, and it was only on the 5th July, 2007, some two weeks after the facility letter had issued was the guarantee signed.

16. On four previous occasions, the 30th July, 2002, 19th February, 2003, 3rd November, 2003 and the 6th November, 2006, Ms. Fox had signed guarantees in relation to the liabilities Stone Finishes Supply Limited. While the language of the 2007 guarantee at issue in the present proceedings and the earlier guarantees are not identical in all respects, it was to all intents and purposes the same.

17. The extent of an obligation on a bank or similar financial institution entering into financial transactions with married couples or couples living together has been considered by the courts in Ireland and in Britain on a number of occasions in recent years. The starting point for consideration of this issue is the case of *Ulster Bank Ireland Limited v. Fitzgerald* [2001] IEHC 259. In that case the second defendant, a Ms. Williams, had signed two guarantees in respect of the liabilities of a particular company in which her husband Mr. Fitzgerald had controlling or important stake. When the plaintiff bank sought to enforce the guarantees, it was argued on behalf of Ms. Williams that she had entered into them as a result of undue influence by Mr. Fitzgerald. She suggested that the marriage had been in difficulties and that she was convinced that a refusal to sign the guarantee would cause "further trouble between them and again threatened their marriage". She also claimed that Mr. Fitzgerald had "insisted that he knew what he was doing and that she should trust him". Her argument was that, as a result of this undue influence exercised by her husband, the bank should be precluded from enforcing the guarantee.

18. O'Donovan J. believed that while it "may well" have been the case that Ms. Williams had signed the guarantees as a result of undue influence from Mr. Fitzgerald, it was not necessary for him to reach a conclusion on this point because the bank would not have been affected by any undue influence which took place. He was satisfied that none of the representatives of the plaintiff bank had either actual or constructive notice of any undue influence which might have taken place. As O'Donovan J. put it, the bank did not have "even an inkling" of any reason why the guarantor might not have been a free agent. He considers that a bank was not put on inquiry simply because a wife guarantees a loan to her husband's business.

19. A somewhat more intense and nuanced consideration of the issue occurred in the case of *Ulster Bank Ireland Limited v. Roche and Buttimer* [2012] IEHC 166. It must be said immediately that there are significant, even dramatic differences between the facts of the *Ulster Bank v. Roche and Buttimer* case and the present case. In *Roche and Buttimer*, Ms. Buttimer was the partner in the personal sense of that term, as Clarke J. put it, of Mr. Roche who was running a business involved in the motor trade. She took no role in the business and was employed as a hairdresser on a modest salary. She had been named as a director of the company involved, Louis Roche Motors Limited, though it appeared that her involvement was limited in the extreme. Judgment was obtained against Mr. Roche, but Ms. Buttimer was permitted to defend *inter alia* on the basis that in providing the guarantee she was subject to undue influence. As Clarke J. pointed out, there were both factual and legal aspects to the argument. The first factual question

was as to whether Ms. Buttimer was actually under the undue influence of Mr. Roche.

20. Clarke J. having heard the evidence of Ms. Buttimer and the evidence of a clinical psychologist whose client she was, was satisfied that Ms. Buttimer was under the undue influence of Mr. Roche at the time in question. He was satisfied that she had no involvement in the business of Roche Motors of any material variety, and that she was in a dependent and quite abusive relationship. He said that he found the evidence of the psychologist in the case of particular assistance given the fact that the professional contact between Ms. Buttimer and her clinical psychologist was contemporaneous to the events with which the case was concerned and that it was not one of those cases where a mental health professional is attempting to reconstruct a situation sometime (often years) after the events which are crucial to the proceedings.

21. Turning to the legal issue in the case, Clarke J. acknowledged that if he was to follow the views of O'Donovan J. in *Fitzgerald*, Ms. Buttimer must fail because there was no evidence that Ulster Bank was in any way aware of any undue influence that Mr. Roche might have brought to bear on Ms. Buttimer.

22. However, counsel for Ms. Buttimer placed reliance on a decision of the House of Lords in *Royal Bank of Scotland plc v. Etridge (No. 2)* [2001] 2 AC 773. The decision in *Fitzgerald*, it might be noted, came a few weeks after *Etridge* and as Clarke J. observed for understandable reasons *Etridge* does not appear to have been referred to in argument and was certainly not referred to in that judgment. Clarke J. felt that what he was concerned with was a case of constructive knowledge. Constructive knowledge issues, he was of the view, could often usefully be broken down into two separate questions. The first is as to what factors place a party on inquiry. The second is as to the nature of the inquiry or actions that may then be required.

23. It is clear that Clarke J. had some difficulties with the test as it appeared to be formulated in *Etridge* pointing out that it would give rise to surprising results in the case of two business partners who were the principals and shareholders in the business, whose debts were to be guaranteed and were also same sex partners in the relationship sense of that term, (his judgment of course predated the marriage equality referendum). In such a situation there would be no particular reason why either one of the partners might not be said to be the one who might exercise undue influence and the other be the one who might be influenced. If that is so it would seem to follow that it was necessary to ensure that both had independent legal advice. Again, given the recognition that the principle applies equally between husband and wife as it does between wife and husband, it is difficult to see how there could be any logic in requiring a wife to have independent legal advice, but not a husband in circumstances where they are both shareholders in the business the debts of which were to be guaranteed. So, he said, that nothing in the judgment should be taken as necessarily implying that the law in Ireland goes as far as the position in the UK identified in Etridge in placing a bank on inquiry.

24. However, he felt it was not necessary to go that far. He identified as relevant the fact that Ms. Buttimer was not a shareholder in Roche Motors, even though she was a director and said that was a factor which suggests at least a significant possibility of a non commercial aspect to the case. Secondly, the bank had some knowledge of the fact that Mr. Roche and Ms. Buttimer were involved in a personal relationship. Furthermore all of the discussions between Roche Motors and the bank were conducted by Mr. Roche. That fact, of itself would not, in his view, be sufficient. Frequently it is the case that one of a number of partners in business ventures whether carried out as a partnership or through a corporate vehicle will have primary responsibility for dealing with financial matters including relations with the ventures bank. So that fact of itself should not necessarily place a bank on inquiry as to whether others involved in the venture who are asked to put up security by way of guarantee might not be the subject of undue influence.

25. However he felt that in the circumstances where the person who is required to offer security is not a shareholder and where there was no evidence to suggest that the bank was aware of any actual involvement of that person in the business then it seems to him that the personal relationship between the parties emerged as a much more significant factor. He was satisfied that in those circumstances the bank was on inquiry.

26. He then went on to address the question of what a bank on inquiry must do. He was satisfied that a bank placed on inquiry was obliged to take at least some measures to seek to ensure that the proposed surety is openly and freely agreeing to provide the requested security, though leaving over to another day the precise steps a financial institution had to take.

27. The issue of undue influence in the context of a marriage was considered by Kelly J. in the case of *Irish Bank Resolution Corporation v. Quinn* [2011] IEHC 470. It seems to me that his treatment of the issue merits quotation in full:-

> "Undue Influence
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> 38. The second line of defence is an attempt to say that everything which Ms. Quinn did occurred under the undue influence of her husband.
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> 39. It was argued during the course of the hearing that there is at law a presumption of undue influence between husband and wife. There is not. That much is clear from case law going back to the middle of the eighteenth century. In Halbury's *Laws of England* (4th Ed.) para. 40, vol. 18, one finds on this topic the following under the heading '*No presumption between husband and wife*' – 'it is noticeable that the relation of husband and wife is not one which gives rise to the presumption that undue influence was exercised'.
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> 40. In support of that statement, there is a line of cases which begins with that of *Rigby v. Cox* in 1750 going right through the nineteenth century and up until the twentieth century. So it is a principle that has been well established in law. Its effect was eloquently articulated in this jurisdiction by Carroll J. in *In Re. Hunting Lodges Limited* [1985] ILRM 85. Now admittedly, Carroll J. was dealing with a different situation to what I am dealing with here. In her case, a wife sought to avoid personal liability for the debts of a miscreant company in circumstances where she acted as a director of that company. As part of her defence, she alleged that she was in fact a housewife and mother and that she really took no part in the running of the company and therefore should be able to avoid liability. This is what Carroll J. had to say:-
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> > 'In relation to Mrs. Porrit, the case has been made on her behalf that she played no part in the running of the company. The day has long since passed since married women were classified with infants and persons of unsound mind as suffering from a disability so far as responsibility for their acts was concerned, or since a married woman could escape criminal responsibility on the grounds that she acted under the influence of her husband. Mrs. Porrit cannot evade liability by claiming that she was only concerned with minding her house and looking after her children. If that was the limit of the responsibilities she wanted, she should not have become a director of the company, or having become one she should have resigned.'

41. Whilst the circumstances are different, it seems to me that that is an accurate articulation of the legal position.

42. I am satisfied that there is no presumption of undue influence at law arising simply because of the relationship of husband and wife. That has been clear since at least 1750.

43. The lack of any presumption of undue influence is not, however, the end of the matter. The absence of the presumption does not mean that there could not be actual undue influence. But if there was such actual undue influence, there would have to be, at least, some evidence demonstrative of such impropriety. There is no evidence of any sort to support such a contention. There is no suggestion of Mrs. Quinn suffering from any intellectual disability, mental illness, feebleness of mind or cognitive impairment. Neither is there any evidence of any threats of bullying or such behaviour towards her by Mr. Quinn. There is not the slightest evidence to suggest any allegation of actual undue influence could be sustained. Accordingly, I am of the view that there is here neither a presumption of undue influence or evidence of any undue influence to make such an argument possible. Accordingly, this line of defence fails."

28. In *Royal Bank of Scotland v. Etridge*, the House of Lords was concerned with eight appeals. Each appeal arose out of a transaction in which the wife charged her interest in her home in favour of a bank as security for her husband's indebtedness or the indebtedness of a company to which he carried on business. The wife later asserted that she signed the charge under the undue influence of her husband. In seven of the appeals the bank had sought to enforce the charge signed by the wife claiming an order for possession of the matrimonial home. In each of those cases the wife raised a defence that the bank was on notice that her concurrence in the transaction had been procured by her husband's undue influence. The eighth appeal concerned a claim by a wife for damages from a solicitor who advised her before she entered into a guarantee obligation of such a character.

29. So far as the specific cases that were before the House of Lords are concerned, they fell into three different categories. Three cases, those of *Harris, Wallace* and *Moore* did not go beyond the interlocutory stage, the wives' pleadings having been struck out as disclosing no defence to the bank's claim for possession. There were four cases, *Etridge, Gill, Coleman* and *Bennett* which proceeded to trial and in which at trial and/or on appeal the wife was unsuccessful. Then there was the final case, that of *Kenyon-Brown* in which the wife was suing her solicitor for damages for breach of duty. The appeals in the case of *Harris, Wallace* and *Moore*, the interlocutory cases, were successful as was the appeal in Bennett and the appeal by the solicitor in *Kenyon-Brown*. The appeals in *Etridge, Gill, Coleman* were unsuccessful.

30. Given the complexities involved in a case involving eight appeals falling into three categories and in respect of which some succeeded and some failed it is convenient to set out what was said in the head note.

> "Where a wife sought to impugn a transaction into which she had entered on the ground of her husband's undue influence their relationship did not fall within a special category of case where an irrebuttable presumption of trust and confidence arose. If she was able on the facts of the particular case to establish that she had placed trust and confidence in her husband in the management of her financial affairs and that the impugned transaction was not explicable in the ordinary way she could rely on a presumption which, as an evidential forensic tool, shifted the burden of proof to her opponent and could be rebutted on appropriate evidence by that party. Since the fortunes of husband and wife were ordinarily bound up together, a guarantee given by the wife with the charge on her interest in the matrimonial home to secure her husband's debts was not plainly to her disadvantage so as to be explicable only on the basis that the transaction had been procured by his undue influence.
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> Whenever a wife offers to stand surety for the indebtedness of her husband or his business, or a company in which they both had some shareholding, the lender was put on inquiry and was obliged to take reasonable steps to satisfy itself that she had understood and freely entered into the transaction. The steps reasonably to be expected of a lender in relation to past transactions were to bring home to the wife the risk she was running by standing surety, either at a private meeting with her or by requiring her to take independent advice from a solicitor on whose confirmation the lender might rely that she had understood the nature and effect of the transaction. In respect of future transactions the lender should contact the wife directly, checking the name of the solicitor she wished to act for her and explaining that for its protection it would require his confirmation as to her understanding of the documentation to prevent her from subsequently disputing the transaction. The lender should not proceed until it had received an appropriate response from the wife and should in every case receive the written confirmation from the nominated solicitor. Subject to the husband's consent to disclosure, without which the transaction could not in any event proceed, the lender should routinely furnish to the nominated solicitor financial information relating to the facility and the husband's existing indebtedness to enable a proper explanation to be given to the wife. The nominated solicitor should require confirmation that the wife wished him to act for her, and he might, so long as no conflict of duty or interest arose and he was satisfied that it was in her best interest to do so, also act for the husband or the lender. His advise should be given at a face to face meeting in the absence of the husband, and its contents need not be directed to the commercial wisdom of the transaction but should include, as a core minimum, an explanation of the documentation, its practical consequences and inherent risks based on the financial information provided by the lender: he should also state that the choice whether to proceed was to be exercised by her and should check that she wished to continue and if so, he should obtain her consent to his giving the confirmation required by the lender. Since in so advising her the solicitor assumes professional responsibility to the wife he did not act as agent for the lender, who is entitled to assume that he had acted properly, and in consequence, knowledge of the contents of advice given to the wife, whether negligently or otherwise, was not to be imputed to the lender."

31. The outcome of the individual appeals that were dealt with together in the House of Lords in *Etridge* shows that these cases are very fact specific. Clearly, there is room for much debate as to what circumstances would put a bank on inquiry and for even more debate as to what can be expected of a bank that has been put on inquiry. However, these issues arise only if there has been undue influence. In my view the facts of the present case are particularly clear cut. There is, as Kelly J. pointed out in *IBRC v. Quinn*, no basis for suggesting that there is here a presumption of undue influence. The fundamental question in this case is has an arguable case been made out that Ms. Fox executed the guarantee under the undue influence of her husband. In other words have the defendants and in particular the second named defendant produced any credible evidence on a *prima facie* basis, going beyond mere assertion which gives rise to the prospects that it might be established at trial that her husband so overbore her mind (i.e. exerted undue influence upon her), that it could be said that she did not freely and willingly undertake the obligations to the bank under the guarantee which she signed. In my view as I have already indicated the facts of the present case are particularly clear cut and there can be no doubt about the answer to the question. It was for Ms. Fox to adduce evidence that she in fact acted under undue influence. That, she has singularly failed to do. Far from there being evidence of undue influence all the evidence in the case is the other way. The evidence is clear that Ms. Fox is an experienced business woman with a long history of interaction with the plaintiff bank. The high watermark of the defence case is a mere assertion, in the nature of a formal pleading, that Ms. Fox acted under undue

influence. A mere assertion does not provide a basis for resisting an application for summary judgment. In that regard the bald but unsubstantiated averment, and it has to be said somewhat self serving averment by Mr. deKretser that he exerted undue influence upon his wife, adds nothing to the weight of the evidence adduced by the defendants in resisting the application for judgment.

32. The present case calls to mind the observations of Lord Hobhouse of Woodborough in relation to the appeal of Mrs. Etridge. He commented:

> "This was a case which after some delay and contested interlocutory proceedings went to trial before Judge Behrens. The wife gave evidence. The judge found that, on the evidence, she had not been the victim of any actual undue influence. However, he went on to deal with the case on the basis of presumed undue influence. On appeal, the Court of Appeal upheld the judge's finding of no actual undue influence: nor did she at either level obtain a finding in her favour that she had been induced to sign by any misrepresentation. Accordingly, on the correct view of the law, her case failed *in limine* and none of the other points arise. Judgment was rightly entered for the bank. On this ground, I agree that this appeal should be dismissed. This case provides an object lesson in the dangers of attempting a summary resolution of issues of mixed law and fact without having ascertained the facts."

For my part I find these remarks of Lord Hobhouse entirely apposite.

33. In this case the appellants have identified an interesting and developing legal issue, but in my view they have failed to engage with the facts and what the outcome of the individual appeals that were dealt with in the House of Lords in *Etridge* shows, is that these types of cases are very fact specific.

34. The appellants cannot escape from the fact that they had a long history of interaction with the bank and that the bank clearly knew that Ms. Fox was an experienced business woman in her own right, with a long history of commercial interaction with it.

35. Against the specific prior knowledge that the bank had in relation to its dealings over a number of years, is pitted a mere assertion by Ms. Fox on affidavit in these proceedings – an assertion never raised by her at any time prior to the proceedings – that in relation to the last of the guarantees she was under the undue influence of Mr. De Kretser such that she ought not to be found to have any liability whatever.

36. The task of the trial judge on the plaintiffs motion for judgment when it came before him was, as I have already stated by reference to the judgment of McKechnie J. in *Harrisgrange* to consider the affidavit evidence and to determine whether Ms. Fox had raised an arguable case that she had acted under the undue influence of Mr. De Kretser such that a plenary hearing was required in order to determine that issue. Put another way, the judge was entitled to grant the bank's motion for summary judgment against Ms. Fox only, if he was satisfied that it was clear that she had no defence to the claim. It is of course the case that merely because a judge felt that the bank would in all likelihood succeed at a plenary hearing and that the defence would likely fail would not be a sufficient basis for denying a party the right to defend the case.

37. A judge should be slow to grant summary judgment, but that did not mean that he was obliged to ignore what had been put on affidavit by the bank as to its state of knowledge of Ms. Fox's business background and her previous dealings with the bank and to which she had made no reference in her own affidavit. Insofar as Mr. De Kretser had filed an affidavit corroborating her averment that he had put her under undue influence to sign the guarantee, the trial judge was entitled to place very little, if any, weight on what on any view had to be seen as a self serving assertion.

38. I do not doubt that Ms. Fox and Mr. De Kretser would have preferred had the bank not sought the security they did. There must be few borrowers who would not prefer if their lenders would advance funds to them while seeking less security or perhaps on a non recourse basis altogether. However, that is very far from saying that the party agreeing to provide the security sought was not acting as a free agent and was subject to the undue influence of another.

39. If the situation were otherwise and one party was a dominant business person and the other partner entirely without business expertise the situation might indeed be different. However, that is far from the case here. The facts here could scarcely be more different than those that were considered by Clarke J. in *Ulster Bank Limited v. Roche and Buttimer*. Here the situation is that two people experienced in business were requested to provide security in a particular form when they sought funds from a bank. They made a decision to provide that security.

40. In my view the trial judge was correct when he determined that the defendants, and in particular the second named defendant had not raised an arguable defence to the claim on the basis of undue influence. Other grounds have been mentioned, including the defence of *non est factum,* but were not seriously pressed. In my view the trial judge was correct in determining, as he did without any difficulty, that these did not give rise to an arguable defence. I note what Hogan J. has to say and I agree with him that this is not a case where the defence of *non est factum* is made out. The main focus of the defendants' arguments here was on the undue influence issue. Interesting as the legal issue that they sought to raise is, the facts are clearly against them. In those circumstances the judge was entitled to grant liberty to enter final judgment and so in those circumstances I would favour dismissing their appeal.