**THE HIGH COURT**

**[2015 No. 1658 S]**

**BETWEEN**

**ALLIED IRISH BANKS PLC**

**PLAINTIFF**

**AND**

**GROVE OIL (ROSCREA) LTD, CONLETH O'SULLIVAN AND OLIVE LYNCH**

**DEFENDANTS**

**JUDGMENT of Mr. Justice MacGrath delivered on the 26th day of November, 2018.**

1. This is the plaintiff's application for summary judgment against the third named defendant. The plaintiff claims that certain sums are due on foot of two guarantees executed by the third named defendant in respect of the debts of the first named defendant company. It is pleaded that by letter of 10th May, 2011, the plaintiff made available to the first named defendant company a loan facility in the amount of €105,700 for the purpose of restructuring existing facilities. This was subject to certain terms and conditions including the requirement that the second and third named defendants execute letters of guarantee. These guarantees were executed on 11th May, 2011, by the second and third named defendants, and provided that the total amount recoverable from the second and third named defendants should not exceed €135,700 together with interest thereon. The guarantee was stated to be in addition to, and not in substitution for, any other guarantees or security for the obligations of the first named defendant given by the second and third named defendants. As of 15th December, 2014, the sum due on foot of the loan facility was €110,016.78.

2. A second guarantee was executed in respect of overdraft and other facilities provided by the plaintiff to the first named defendant on 31st July, 2012. The guarantee was executed on 30th August, 2012 by the second and third named defendants in consideration of the plaintiff agreeing to give time or make or continue advances, or otherwise give credit or afford banking facilities to the first defendant. This guarantee provided that the total amount recoverable from the third named defendant should not exceed €55,000 together with interest thereon and was stated to be in addition to, and not in substitution for, any other guarantee or security for the obligations of the first named defendant. A similar guarantee was executed by the second named defendant. As of 16th December, 2014 the total due on foot of this facility, inclusive of interest, was €52,869.54.

3. Letters of demand were served on 13th October, 2014 and 23rd June, 2015 on the first named defendant in respect of the principal sums due. Letters of demand dated 16th October, 2014 and 16th April, 2015, were served on the second and third named defendants in respect of their alleged liabilities on foot of the guarantees.

4. The plaintiff claims a total sum of €162,886.32 from the third named defendant. By notice of motion dated 8th May, 2017 the plaintiff has brought this application for liberty to enter final judgment against the third named defendant in that sum.

5. This application for summary judgment is grounded on the affidavit of Mr. Brian McGuinness, a manager employed by the plaintiff in its litigation management department. He avers to the facts outlined above.

6. Each of the guarantees state in a foreword, under the heading "*WARNING*" that "*[b]efore you sign this guarantee you should get independent legal advice*". The guarantee of 11th May, 2011 was signed by the third defendant and witnessed by a bank official. The guarantee of 30th August, 2012 had an identical warning and was witnessed by the same bank official, having been signed by the third defendant. There was a further guarantee executed by the third named defendant on 26th July, 2012 which is the subject of other proceedings which have been instituted in the Circuit Court. The guarantee was executed in the context of personal liabilities of Mr. O'Sullivan.

7. The letters of loan facilities were signed by the second defendant on behalf of the first defendant. A resolution of the first defendant company to accept the facilities was passed on 11th May, 2011 and signed by the second defendant and a Ms. Kavanagh who was described as chairperson of the company. The first defendant defaulted in its loan repayments. Demands were made of the first defendant; and then of the second and third defendants.

8. Counsel for the third named defendant, Mr. Hickey B.L. emphasises that the plaintiff does not seek judgment against the first or second named defendant. Counsel for the plaintiff, Mr. Walker B.L. submits that the liability of the third named defendant is a separate and independent liability and is not dependent upon the plaintiff proceeding against the first or second named defendant. Having considered the guarantees, for the purpose of this application and in the circumstances outlined, I accept Mr. Walker B.L.'s submissions on the facts as pleaded.

9. The third named defendant does not deny that she executed the guarantees but she submits that she is not liable thereon by reason of undue influence allegedly exerted on her by the second named defendant. She further alleges the plaintiff had, or should have had, constructive notice of this alleged undue influence.

10. Further, as security for the guarantee, the second and third named defendants executed a deed of mortgage on 11th May, 2011 in respect of property at Roscrea, Co. Tipperary. On 10th May, 2011, the plaintiff posted to both the second and third named defendants, at different addresses, a letter in the following terms:-

> *"Re: Grove Oil (Roscrea) Limited*
>
> *Facility: Overdraft €30,000.*
>
> *Loan €105,700*
>
> *Dear Ms. Lynch*
>
> *Our above named customer has nominated you as guarantor for the above facilities and I enclose a copy of the terms of the facilities to be guaranteed.*
>
> *Your guarantee is to be secured by the following items of security:*
>
> *Legal Charge over property on 7.8293 hectares at Knock, Roscrea, Co Tipperary*

*I also enclose two copies of the guarantee form, one for you to sign and return to AIB, and the other for you to keep. Your signature to this guarantee will need to be witnessed by either your solicitor or an AIB bank official. In either case, you should bring along personal identification, such as your driving licence or passport. You are advised to obtain independent legal advice before signing the guarantee. I would also suggest that you keep copies of the guarantee, this letter and the terms of the facilities for future reference.*

*Please return the guarantees, duly signed and witnessed, to me at the above address."*

The words "*You are advised to obtain independent legal advice before signing the guarantee*" were emboldened.

11. The third named defendant, Ms. Lynch had been in a relationship with the second named defendant. They have a son who was born in 2005. In a replying affidavit sworn on 23rd October, 2017, she avers that she worked as a shop assistant and as a factory worker/general operative. She has no special training or business acumen. Mr. O'Sullivan effectively ran the company. He ran a filling station and retail business together with a garage, car sales and repairs business. He also had an interest in farming and in property speculation. While Ms. Lynch was in a relationship with him, she states that she never participated in his business affairs. She is not now, nor was she ever a shareholder or a director of the first named defendant.

12. Ms. Lynch avers that following the birth of their child in 2005, she became a full time homemaker. In May, 2011 while she was still living with Mr. O'Sullivan, he informed her that money was required for the business of the first named defendant. He did not go into detail or elaborate on what he was doing. At that time their relationship was under stress and Ms. Lynch avers that she was totally dependent on him.

13. Ms. Lynch further states that on the morning of 11th May, 2011, before they attended at the branch office of the plaintiff, she was told by Mr. O'Sullivan: "*don't ask questions, just sign the papers*". When they were asked by an official of the plaintiff if they had received legal advice, she states that Mr. O'Sullivan said that they had been with a solicitor in Roscrea the previous week. Ms. Lynch avers that that meeting related to signing a mortgage and had nothing to do with the loans or guarantees.

14. At para. 7 of her affidavit Ms. Lynch avers that she had never previously seen a letter of guarantee nor did she know what it was. She recalled the second defendant saying that he required €30,000 to stay afloat. She believed the loan was in respect of an overdraft on the garage. She queried the bank official as to why the figures stated on the guarantee were larger than the figures indicated to her by Mr. O'Sullivan and she states that "*this servant or agent left the room telling us to sort it out amongst ourselves*". She says that Mr. O'Sullivan assured her that it was "*just written that way*" and that his property portfolio would cover the loans and "*the paperwork would cover the shortfall*". The bank official then returned to the room and presented her with the guarantee which she signed without inquiry. She then left the room while the second defendant remained to discuss what she describes as other issues.

15. With regard to the second guarantee which was signed on 30th August, 2012, Ms. Lynch avers that Mr. O'Sullivan brought her to the plaintiff's bank in Roscrea. He did all the talking. They met with the same official as they had met the previous year, when the final guarantee was signed. She avers that the same circumstances apply to each of the guarantees executed by her.

16. Ms. Lynch maintains that she received no legal advice as to the meaning and consequence of the guarantee. She was unaware that she would be personally liable for the loans taken out by the first and/or second named defendant and avers that she did not openly and freely agree to sign the guarantees. She states that she signed these guarantees due to the dominion and/or undue influence of the second named defendant. She maintains, in retrospect, that the plaintiff knew from her circumstances that she was a homemaker without income, was totally dependent on Mr. O'Sullivan and that he was a person in total dominance and in charge of all matters. It is her case that it was Mr. O'Sullivan who at all times dealt with the plaintiff and she was never asked by the plaintiff or Mr. O'Sullivan to participate in dealings with the plaintiff in respect of the advance of monies or the provision of any security it required.

17. The relationship between the second and third named defendant has broken down and she is now in receipt of social welfare allowances and a small income from supplying fire wood to local shops.

18. In an affidavit sworn on 13th December, 2017, Ms. Jackson, solicitor for the plaintiff, emphasises that no issue has been taken in relation to the amount of the guarantees or that they were signed by the third named defendant. He emphasises that the third named defendant (together with the second named defendant) attended with a solicitor prior to the execution of the guarantee in May, 2011.

19. While Ms. Jackson has averred that it was a condition of the loan facility that a mortgage be executed by the second and third named defendants, it appears that this mortgage was required as security for the guarantee. A charge was registered on 17th May, 2011. A judgment mortgage was also registered by a local credit union on foot of a judgment dated 21st November, 2011 against the interests of the second and third named defendant in that property. It is unclear whether this judgment was in respect of private family finances. There is no specific averment that it is in respect of company indebtedness. Ms. Jackson emphasises the contents of the letter of 10th May, 2011 which was sent to the parties. She further avers that similar letters in respect of the second guarantee were sent to the second and third named defendants on 3rd August, 2012. She also points to the fact that those letters indicated that the first defendant had nominated the second and third named defendant as guarantors and the guarantees were secured over the folio. In addition to the overdraft facility of €30,000, there were bank guarantees for two sums of €5,000 and €20,000 respectively which were given to two other companies, one of which provided for a counter indemnity. She also refers to the proceedings in the Circuit Court, which seem to relate to a guarantee provided in respect of Mr. O'Sullivan's personal indebtedness and not that of the company. She contends that this highlights that the first named defendant had nominated them as guarantors and further that the guarantee continued to be secured over the folio in question. The plaintiff relies on these letters and the various documents executed by the third named defendant as evidence that she is incorrect when she states that she was never asked to participate in dealings with the first and second named defendant.

20. Ms. Lynch in a supplemental affidavit sworn on 19th February, 2018, denies that she had seen the loan offer or letter of restructuring. She states that she was neither party, nor privy, to any arrangement between the plaintiff and the first and second named defendants. She avers that the first time she saw the letter of loan offer dated 10th May, 2011 was when she was made aware of the contents of Mr. McGuinness' affidavit sworn in these proceedings. She stresses that she signed these letters of guarantee when she was not a free agent and was under the control and influence of the second defendant. She was a homemaker at the time with a dependent child and no income and was totally dependent on him for her upkeep. She also believes that the second named defendant may have intercepted the letter of 3rd August, 2012. She states that the first defendant had the habit of collecting the post and she did not see the letter at that time. It was suggested in submissions that this could not be the case

because the addresses on the letters were different although counsel for Ms. Lynch emphasised that the parties resided together at the address to which Ms. Lynch's letter was sent, at that time.

21. Ms. Lynch contends that the plaintiff knew or ought to have been aware of her circumstances and that she had no involvement with the business. In so far as she attended at the office of a solicitor in Roscrea on 11th May, 2011, he was the second defendant's solicitor. She was requested by the second defendant to sign the mortgage deed which she did without questioning. She reiterates that she was not aware that she was signing a mortgage deed as security for the guarantee for the loans being drawn down. She states that the second defendant informed her that he was receiving a loan of €30,000 from the plaintiff and that she was required to sign the papers in the solicitors' office. She further avers that she received no legal advice as to the meaning and consequence of the guarantee. She was not aware that she would be personally liable for the loans taken out by the first and/or second named defendant and the terms and consequences of entering into a guarantee were never explained to her. She did not openly and freely agree to sign the guarantees but did so due to the dominion and/or influence of the second defendant.

22. Mr. Hickey B.L. submits that the third defendant should be given leave to defend and that the proceedings should be transferred to plenary hearing. He submits that his client has made out an arguable defence that she was unduly influenced by the second defendant and that the plaintiff knew or ought to have been aware of this and was therefore put on inquiry.

23. Before addressing the principles of law applicable where a defence such as this is raised, it is also important to recall that the court is here concerned with an application for summary judgment.

24. In *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607, Hardiman J. observed that leave to defend should be granted unless it was very clear that the defendant had no defence, not even one which could be described as arguable. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 at p. 7, McKechnie J. observed:-

> *"(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."*

25. Thus leave to defend ought to be granted unless it is very clear that there is no defence. Leave should not be granted where the only relevant averment is a mere assertion of a given situation which is stated to form the basis of the defence.

26. Mr. Hickey B.L. places emphasis on the averments of the third named defendant in her affidavit of 23rd October, 2017 that the second named defendant told her not to ask questions but just to sign papers. She queried the bank official as to why the figures stated in the guarantee were larger than the figures indicated to her by the second named defendant. She also avers that the response of the official was to leave the room and to tell the parties to "*sort it out amongst themselves*". These averments have not been controverted.

27. The averment of Ms. Lynch at para. 6 of her affidavit that Mr. O'Sullivan informed the bank official on 11th May, 2011 that the meeting with the solicitor in Roscrea had occurred the previous week, that it concerned the signing of a mortgage and had nothing to do with the loans and guarantees, is not very convincing. If Mr. O'Sullivan informed the bank official of this then it would appear to be incorrect. The mortgage deed was in fact executed on 11th May, 2011 and not the week prior to the transactions under consideration – as is apparent from the affidavit of Ms. Jackson sworn on 13th December, 2017. The letter of loan offer was dated 10th May, 2011, and not the previous week.

28. Nevertheless, while issues of credibility and/or reliability may arise in relation to certain aspects of the third named defendant's averments, it seems to me that the issue which I have to determine is whether the case put forward by the third defendant, when viewed in totality and in context, is capable of giving rise to an arguable defence or whether it falls on the other side of the line and is no more than an assertion of a defence of undue influence; and an assertion that the bank should have been put on inquiry.

29. That a defence of undue influence might succeed in a case such as this has been established. In *Ulster Bank (Ireland) Ltd. v. Roche and Buttimer* [2012] 1 I.R. 765, the second defendant Ms. Buttimer, was a partner of the first named defendant, and although she was the director of a company, Roche Motors Limited, her involvement was very limited. She was a hairdresser on a modest salary. It was contended that she had executed a guarantee under duress, not duress occasioned by the bank, rather that which was exerted by her partner. Proceedings were commenced by way of summary summons. Judgment was obtained against Mr. Roche. The case against Ms. Buttimer was transferred to plenary hearing. Clarke J. was not, therefore, concerned with the principles applicable to summary judgment applications, rather, he was considering a substantive defence at full hearing.

30. The importance of this decision is that it established that a bank may be on constructive notice of undue influence exerted by a third party such that it is put on inquiry. Clarke J. emphasised a number of important features of the relationship between the defendants in that case. They included the following:-

> (i) Although she was a director, Ms. Buttimer was not a shareholder. This would suggest at least a significant possibility of a non-commercial aspect to the situation.
>
> (ii) The bank had some knowledge of the fact that Mr. Roche and Ms. Buttimer were in a personal relationship.
>
> (iii) There was some evidence which suggested that the bank may have been aware that both Mr. Roche and Ms. Buttimer operated from the same address.
>
> (iv) In the circumstances the court was satisfied that Mr. Roche and Ms. Buttimer were in a relationship before the discussions between the company and the bank took place. These were conducted by Mr. Roche – a fact which of itself would not, in Clarke J.'s view, be sufficient to place the bank on inquiry of whether others, who had been involved in the venture and were asked to provide security as a guarantee, may have been the subject of undue influence.

Nevertheless, at p. 780 Clarke J. observed:-

> *"However, in circumstances where a person who is required to offer security is not a shareholder and where there is no evidence to suggest that the bank was aware of any active involvement of that party in the business, then it seems to me that the personal relationship between the parties emerges as a much more significant factor."*

31. Where undue influence is alleged to have been exerted by a third party, the approach of the courts on an application for summary judgment was addressed by Irvine J. in *Bank of Ireland v. Curran* [2016] IECA 399. At para. 32 of her judgment, having referred to *Bank of Scotland plc v. Hickey* [2014] IEHC 202, she stated:-

> *"…it is clear that in order to establish a defence of undue influence at a plenary hearing Mrs. Curran would first have to satisfy the court that but for the undue influence exerted upon her by her son she would not have executed the guarantee and second that the bank, i.e. the creditor, had actual or constructive notice that the guarantee was procured by the undue influence. That being so, in order to resist summary judgment, Mrs. Curran had to satisfy the low threshold standard by establishing on affidavit that she might credibly argue in the course of a plenary hearing that she had executed the guarantee as a result of the undue influence. It is only relevant to consider whether it is arguable that the bank was obliged to make inquiries to ascertain whether, having regard to her connection with the company, she fully understood and was freely entering into the guarantee, if she could first establish a credible or arguable case on the facts that she executed the guarantee in circumstances of undue influence. In turn, that required her to set out on affidavit the type of facts, details and circumstances upon which she would rely at the trial to establish that her will was overborne by her son, Michael Curran, when she executed the guarantee."*

32. On the facts, the court was not satisfied that the defendant had placed before it sufficient evidence to meet the relatively low threshold required to have the case remitted to plenary hearing. There was an absence of evidence to demonstrate that undue influence was brought to bear upon her by her son. Mrs. Curran also failed to demonstrate on affidavit that the bank should have been on inquiry to satisfy itself that she understood the nature of the guarantee proposed and that she was executing it otherwise than under her son's influence. While there were a number of matters raised as a potential defence to the proceedings (including evidence on affidavit that Mrs. Curran had been advised by the bank officials at the time she signed the guarantee that she did not require legal advice, whether Mrs. Curran had played an active role within the company and whether legal advice carried over from when she executed mortgages in respect of her joint borrowings with her son earlier in the year), Irvine J. stated that these did not fall to be considered in the absence of factual evidence to support the undue influence alleged.

33. In *Bank of Scotland plc v. Hickey* [2014] IEHC 202, Ryan J. granted summary judgment where the only evidence of undue influence advanced was an averment that the defendant "*executed the relevant documents at the behest and direction of Mr. Porter*". No further details were provided. Counsel had attempted to argue that this amounted to, and should be interpreted as, a claim of undue influence. This was not accepted by Ryan J. He also noted that the defendant was at all times represented by a solicitor. If there was any question of seeking separate advice, this was a matter for the defendant and not for the plaintiff "*unless there were some circumstances that brought into operation the principles established in Etridge (No. 2)*".

34. Another example of a case where the defence did not go beyond a mere assertion is *Bank of Ireland v. Curran and Ors* [2016] IECA 399 to which I have referred above.

35. In *ACC Loan Management Ltd v. Connolly* [2017] IECA 119 the court emphasised that it was necessary to establish a defence of undue influence, going beyond a mere assertion, before proceeding to consider whether the bank should have had been on constructive notice, or ought to have been put on inquiry thereof. There was no evidence before the court on which it could be concluded that an arguable defence of undue influence of a son on a father could be made out. In the absence of such an arguable defence being made out, there was no separate obligation on the bank in such circumstances. At para. 28, Finlay Geoghegan J. stated as follows:-

> *"My conclusion is by reason first of the absence of any evidence by or on behalf of the appellant that he executed the first guarantee by reason of the undue influence or any other wrongful act of his son, the principal debtor. There was no evidence before the High Court upon which it could be concluded that an arguable defence of undue influence or other wrong by the son was made out. Further, I am not satisfied that, in the absence of the father making out an arguable defence that he gave the guarantee under the undue influence of his son (or because of any other alleged wrong such as misrepresentation), there is any arguable defence available in Irish law to him that the bank was under an obligation by reason of the known fact that he, the proposed guarantor, was the father of the principal debtor to take steps to*

*ensure that he received independent legal advice or otherwise ensure that the guarantee was freely entered into such that the failure of the bank to take such steps is an arguable defence to the enforcement of the guarantee against him."*

36. In *ACC Bank plc v. Walsh* [2017] IECA 166, Peart J. reaffirmed that a mere assertion by the appellant of undue influence will not suffice and observed that the court may consider all of the surrounding circumstances. At para. 29 he stated:-

> *"There must be other facts to which she can point which, if proved at trial, would likely support her assertion of undue influence. In considering the facts relied upon the court may consider all the surrounding circumstances."*

He was satisfied that the defendant had established by her own evidence and from the surrounding circumstances that she had at least an arguable case that she had been under her husband's undue influence. In considering the second issue, Peart J. stated that while the bank was aware of the relationship between the husband and wife, although not that there was any difficulty in that relationship, it could be taken to have known that she had no direct involvement in the business, albeit that she was a nominal director. While there were certain inconsistencies in her defence, nevertheless the court felt that the case should be transferred to plenary hearing. He continued:-

> *"44. I am not to be taken for one moment as suggesting that the appellant's case is a strong one, or even likely to succeed. That is not the test on a motion for summary judgment as I have already stated. I make no judgment in that regard. That is a matter to be determined only in the light of all the evidence heard at a full plenary hearing, which will be confined to that particular issue. The threshold of arguability on a motion for judgment which a defendant must surpass has already been referred to above by reference to what the trial judge stated, reflecting the principles in Harrisrange and in Aer Rianta v. Ryanair.*
>
> *45. But it is in my view at least arguable (and that is all that the appellant must establish at this stage) that in the circumstances and on the facts of this case established thus far on affidavit, the appellant could have a defence to the claim being made by the bank in respect of the 2004 loan since it must be taken to have constructive notice of her husband's undue influence, and was on inquiry in that regard, requiring it to take some reasonable steps such as to ensure that the appellant received independent legal advice, and failed to do so. That is at least arguable by way of a defence to the bank's claim against her, notwithstanding that the cases to which I have referred addressed undue influence in the context of the enforcement of a spouse's guarantee, and not the primary debt."*

37. It seems to me, therefore, that the task of the Court, in the first instance is to assess the evidence put forward by the third named defendant of how it is alleged that undue influence was brought to bear by Mr. O'Sullivan on her. Such evidence must amount to more than a mere assertion of such undue influence. If the Court is not satisfied that there is such evidence, then judgment should be entered. If the Court is satisfied that there is such evidence which goes beyond a mere assertion, then the next issue which the Court has to determine is whether there is evidence amounting to more than a mere assertion that the bank was on constructive notice such that it should have been put on inquiry to satisfy itself that the second defendant understood the nature of the guarantee proposed and that she was executing it otherwise than under her partner's influence.

38. Applying the relevant principles and the manner of their application in the cases to which I have referred, it seems to me that there are certain aspects of the evidence on affidavit put forward by Ms. Lynch which are less than satisfactory. I have already referred to para. 6 of her affidavit, sworn on 23rd October, 2017, regarding the date of her meeting with the solicitor in relation to the mortgage. She does not in her affidavits seek to clarify or correct the date upon which this meeting took place. Thus, there may be contradictory evidence, but as Peart J. acknowledged in *Walsh*, this in and of itself, does not mean that the case should not be permitted to proceed to a full hearing.

39. A further unsatisfactory aspect of the affidavit evidence advanced is that in so far as other guarantees are concerned, Ms. Lynch essentially relies upon the same averments that she makes in respect of the 2011 guarantee and does not seek to introduce any fresh or other particular circumstances relevant to the 2012 guarantee. At para. 8 of her affidavit, she states that she was asked by the second defendant to sign the second guarantee the subject of these proceedings on 13th August, 2012, that the second defendant brought her into the plaintiff's bank and that he did all the talking. She met the same agent of the bank that she had met in the previous year and she was "*in and out of the bank in a minute*". The plaintiff states that she received no legal advice as to the meaning or consequence of the guarantee and that she was not aware that she would be personally liable for the loans taken out by the first and/or second named defendant.

40. But while there are some unsatisfactory aspects of the evidence advanced by Ms. Lynch, the question which I must address is whether in all the circumstances, sufficient evidence has been adduced on affidavit such as to raise an arguable defence. It is a defence which may not succeed at hearing. But that is not the test.

41. There is no significant evidence that Ms. Lynch had any involvement in the day to day business of the first named defendant company. There is no evidence of her involvement when the original company loans were drawn down. She is neither director nor shareholder of the company. She is a housewife with very little independent income and was financially dependent on Mr. O'Sullivan. While she attended with a solicitor in relation to the execution of the mortgage, apart from such attendance, nothing has been put before this Court to suggest that the guarantee was discussed or advised upon. She has stated that she was reliant upon and under the dominion of the second named defendant. While on one view this might be viewed as an assertion, it has not been controverted by evidence adduced by or on behalf of those personally involved from the plaintiff's perspective. There is an uncontroverted averment that the bank's agent left the room and asked the second and third defendants to "*sort it out amongst themselves*" when an issue arose about the third named defendant's understanding of what was going on. There is evidence of a lack of any further inquiry on the bank official's return. There is also, in my view, evidence of what Clarke J. referred to as the "*non-commercial*" nature of her involvement with the first defendant. This must be viewed in context of the facts and circumstances surrounding the relationship between the second and third named defendant. In the circumstances I am satisfied that the evidence adduced on affidavit by the third named defendant goes beyond a mere assertion of undue influence and is such that I should proceed to consider whether the allegation that the bank ought to have been put in inquiry is itself a mere assertion.

42. There is no evidence to suggest that the plaintiff had any significant involvement with the company at any stage, and particularly before she executed the guarantee in 2011. Nothing which I have seen suggests or implies that she was ever aware of the state of the company's finances. No evidence was adduced by the plaintiff on this application as to whether, and why, the bank official in question left the room when there was, what appears to have been, an expression by Ms. Lynch of at least a misunderstanding as to the amounts involved. The evidence adduced by the plaintiff is from deponents who had no personal involvement in the transactions. The third named defendant avers as to her dependent and fiscal situation. This too has gone uncontroverted by the plaintiff's central participants. Given the totality of the circumstance, while I may have some doubts as to whether her defence will succeed, it seems

to me that on the material before the Court, the third defendant's response to the application for summary judgment falls on the arguability rather than the "*mere assertion*" side of the threshold line.

43. In coming to this conclusion, I have borne in mind *dicta* of McKechnie J. in *Harrisrange* that the overriding determinative factor, consistent with the constitutional rights of the parties to access to justice, is to attempt to achieve a just result.

44. Taking all matters into account, including not only what is averred to by Ms. Lynch, but also the surrounding circumstances, I conclude that the third named defendant has satisfied the threshold and that her affidavits go beyond that of mere assertion in relation to both the question of undue influence and the plaintiff's potential constructive notice thereof. Nothing in this decision is to be taken as an indication of the potential strengths or weaknesses of the defence raised or the likely outcome. I must therefore refuse the plaintiff's application, direct that the defendant be given leave to defend and that the matter be transferred to plenary hearing.