THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED

Neutral Citation Number [2021] IECA 213
Record Number: 2018/187
High Court Record Number: 2015/1757S

Noonan J.

Haughton J.

Pilkington J.

BETWEEN/

OCM EMRU DEBTCO DAC

PLAINTIFF/RESPONDENT

-AND-

GEORGINA APPELBE

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 26th day of July, 2021

1. This appeal is brought by the defendant from the judgment and order of the High Court of the 23rd April, 2018 in these summary summons proceedings whereby the High Court granted judgment to the plaintiff in the sum of €3,488,127 together with its costs. The plaintiff is the successor in title to the original lender, Allied Irish Banks. The claim is brought against the defendant, first, as a personal borrower on foot of an overdraft and a loan account, and secondly as a joint guarantor with her husband, Fergus Appelbe, of the liability

of a company called Algadorn Limited, of which the defendant and her husband are directors and shareholders.

2. The defendant's personal borrowings relate to a letter of sanction issued by AIB on the 23rd April, 2007 by which AIB offered two facilities. The first ("Facility 1") was an overdraft in the sum of €100,000 for the purpose of personal expenses, subject to a review one year later. The second facility ("Facility 2") was a loan in the sum of €277,000 which related to the acquisition of business premises at Ballycurreen Industrial Estate, Cork. This loan was to be an interest only loan until the 29th August, 2008 when it fell due for review. The amount claimed to be due on foot of these facilities was stated to be €327,877.95 in both the summary summons and the motion for summary judgment.

3. The second part of the plaintiff's claim relates to a guarantee dated 29th March, 2007 whereby the defendant and her husband guaranteed the liabilities of Algadorn Limited up to a maximum of €5,810,000. The amount claimed in both the summons and motion in respect of the guarantee is €3,885,935.84.

4. The original proceedings which issued on the 11th September, 2015 were brought by National Asset Loan Management Limited who acquired the loans and guarantee from AIB. The plaintiff herein was substituted for National Asset Loan Management Limited by order of the High Court of the 16th January, 2017.

Evidence

5. The affidavit grounding the application was sworn by Gearóid Bennis, an asset recovery manager with NALM. In relation to the defendant's personal borrowings, he avers that an event of default occurred under the terms of the loan leading to a demand by NALM on the 31st August, 2015 of the sum then due of €327,877.95.

6. He then deals with the guarantee and notes that by letter of sanction of the 25th July, 2007, AIB approved various advances to Algadorn Limited totalling €4,890,416. He notes that the facility letter was accepted by the company and the funds drawn down. Mr. Bennis says that this was a refinancing of ongoing facilities granted by AIB to the company. He avers that in consideration of the granting of ongoing facilities to the company, AIB required that the defendant and her husband enter into a joint and several guarantee. This is reflected in the terms of the facility letter which refers at item three under the heading "Security" to the guarantee of the 29th March, 2007.

7. In her first replying affidavit, the defendant raises a number of issues. First, with regard to the facility letter of the 23rd April, 2007, she does not dispute its validity or that she signed it. In relation to the €100,000 overdraft, her complaint is that this appears to have been used to pay interest payments on other loans due by her husband which she says were not her responsibility. She avers that as of the 12th September, 2008, the amount overdrawn was €32,293.16, which she appears not to dispute, but after that date the amount due increased very substantially in consequence of interest charges being added to it, due solely by her husband, for which she bears no liability.

8. Secondly, regarding the facility of €277,000, she notes that the amount due on this facility as of the date of issue of the proceedings was €181,172.69. She also avers that a payment of €115,153 was credited to this account on the 24th December, 2015 with the word "Coolfadda" appearing opposite the credit. She notes that receivers had been appointed over the company's assets, with whom she has had correspondence and the credit may relate to the sale of the Ballycurreen premises. She makes various complaints about the conduct of the receivership in a general sense.

9. Thirdly, with regard to the guarantee, she avers that any facility offered by AIB to the company was on foot of a letter of sanction of the 1st December, 2005, replacing an earlier letter, and that this was supported by a letter of guarantee in the amount of €5,600,000 from her husband. At para. 16, the defendant avers that she believes that no additional funds may have been advanced to the company following the guarantee that she signed, but if such funds were advanced, she was not involved. At para. 19, she refers to the fact that the facility letter in respect of the company relied upon by the plaintiff is the letter of sanction of the 25th July, 2007 but which post-dated the relevant events.

10. While this appears to raise an issue concerning consideration for the guarantee, separately she complains that she was not in fact asked to provide the guarantee and when she attended at the bank with her husband she signed two documents which she had not seen before and these documents were not explained to her, other than being described as "routine" documents. She says she was not offered an opportunity to meet in private with the bank official to discuss the matter nor did she get any cooling off period nor was she alerted to the fact that she should obtain independent advice.

11. It should be noted in that regard that she does not dispute executing a letter of waiver attached to the guarantee by which she confirmed that she was invited and afforded the opportunity to obtain independent legal advice and had decided not to do so. In addition, the defendant suggests that she was not kept informed of the progress of the facility and never understood herself to be guaranteeing the amounts claimed herein. She avers that she was a director and shareholder of the company in name only, and all affairs of the company were looked after by her husband who is a solicitor. She says that AIB knew at all times that she was a homemaker and a housewife.

12. Affidavits in reply on behalf of the plaintiff were sworn by the bank official who witnessed the plaintiff's signature on the guarantee, the receiver, Michael O'Regan of PWC and a further affidavit of Mr. Bennis. Mr Bennis deals with the various figures that are queried by the defendant and in respect of the guarantee, he avers that on the face of it, contrary to what the defendant avers, it is self-evident that extra funding was made available to the company. The original sanction of the 1st December, 2005 was for €3,368,000 whereas the subsequent sanction of the 25th July, 2007 increased this to €4,890,416. Finally, he notes that in respect of the full balance due and owing on one of the personal loan accounts in the amount of €154,554, the plaintiff is not seeking judgment in respect of interest charged post 10th September, 2008 with the effect that this sum is reduced to €32,293.

13. Three further replying affidavits were sworn by the defendant which I think it is fair to say are focused primarily on issues around the receivership in which various complaints are made about the management of the secured properties, their disposal, the receiver's fees and costs, alleged failures by the receiver to deal with matters relating to Capital Gains Tax resulting in losses and so forth. Each of these affidavits are replied to in turn by the plaintiff.

Hearing in the High Court

14. At the hearing before the trial judge, the primary focus of the submissions of counsel for the defendant was on the reliability of the figures put forward by the plaintiff and various alleged inconsistencies in these figures. No particular issue appears to have been raised regarding consideration for the guarantee beyond what was contained in the affidavits to which I have referred. The only issues raised about the guarantee appear to have been those of a potential *non est factum* or, alternatively, a material change with regard to the underlying borrowings which might invalidate the guarantee. The material change alleged to have

occurred was, on counsel's argument, based on the manner in which the secured properties were dealt with.

15. The trial judge gave an *ex tempore* judgment on the 23rd April, 2018 in which he held that the defendant had not reached the threshold of arguability on a number of issues.

16. First with regard to the suggestion that she did not know what she was signing when she executed the guarantee, the judge noted that the defendant was shown to be competent in managing her own affairs and was not naive. He noted that she was a director of the company that she was guaranteeing and that it was not credible to suggest that she did not know what she was signing or its significance.

17. He said that the authorities establish that there is no entitlement to independent advice and noted that she had executed a waiver of this entitlement in any event. With regard to Facility 1, the judge noted that the plaintiff had elected not to proceed with the claim concerning her husband's interest payments to which the defendant had taken objection. With regard to the amount of the second facility, the judge considered that these had been properly explained and accounted for by both the receiver and Mr. Bennis. In those circumstances, his view was that no arguable defence had been raised and he was obliged to give judgment for the amount claimed.

The Appeal

18. In her notice of appeal, the defendant again raises discrepancies in the figures to which she says the trial judge failed to have proper regard. Similarly it is said that the trial judge failed to have proper regard to the circumstances of execution of the guarantee and that the judge erroneously applied the test for summary judgment. A reading of the defendant's written submissions on the appeal shows that many of the issues agitated therein were not

the subject matter of argument in the High Court. It need hardly be said that as a general rule, parties to appeals are confined to the issues that were raised and decided by the High Court.

19. It is true that there is what has been described as a "spectrum" of cases where new evidence or arguments might be permitted on appeal – see *Lough Swilly Shellfish Growers Cooperative Society Limited & Atlanfish Ltd v Bradley and Ivers.* [2013] 1 IR 227. However, as recently noted by this court in *Promontoria (Arrow) Limited v Mallon and Anor.* [2021] IECA 130, it remains the position since *K.D. v M.C.* [1985] 1 IR 697 that save in exceptional circumstances, an appellate court will not hear and determine an issue which has not been tried and decided in the High Court. There are many reasons for this as explained in that judgment with particular reference to the judgment of the Supreme Court in *Ennis v Allied Irish Bank Plc* [2021] IESC 12.

20. In her written submissions, the defendant identifies what are described as eight discrete discrepancies in the figures claimed by the plaintiff before the High Court. With one exception, so-called Error Two, none of these alleged discrepancies were raised in or considered by the High Court and cannot be raised on this appeal.

21. Error Two is alleged to be the reduction of the claim on Personal Facility No. 1 from €154,554 to €32,293. I do not believe that this can be properly characterised as an error but rather an election by the plaintiff to accept the defendant's contention that she should not be made liable for the amounts accrued on this account beyond the date for which she appears to accept liability, namely the 12th September, 2008. It will be recalled that the defendant complained in her first affidavit that the amounts charged subsequent to this date were referable to her husband only in respect of interest payments on other loans due by him. I can see no valid reason why the plaintiff was not entitled to waive its claim to the disputed

amount. This is not an "error" in the figures but rather an election by the plaintiff to simply concede the point rather than potentially having to pursue it at plenary hearing. There is no objection in principle to such a stance being taken by a party to litigation. It seems to me that parties should be encouraged to make such concessions in the interests of the efficient disposal of litigation rather than being compelled to flog what might otherwise be dead horses. I am therefore satisfied that no error on the part of the trial judge has been demonstrated in this regard.

22. The allegation of mismanagement by the receiver, based *inter alia* on a number of hearsay averments by the defendant, is a not uncommon complaint of defendants in summary proceedings. In general, the remedy for such complaints lies against the receiver rather than the lender. However, in the present case, the trial judge was clearly satisfied that the plaintiff and the receiver had responded fully to the complaints made which never transcended the level of mere assertion.

23. As regards the purported *non est factum* defence, this appears to me to be quite unstateable. The trial judge held that the defendant was not a "naive abroad" as he described it, and gave his reasons for coming to that conclusion and also to the conclusion that it was not credible to suggest that she would not have known what she was signing when she executed the guarantee. These are findings of fact to which this court must lend due weight. Of course in trials on affidavit, findings of fact made by a trial judge may not have the same degree of sanctity as in a plenary hearing under the *Hay v O'Grady* [1992] 1 IR 210 principles. The authorities suggest that even in trials on affidavit, such findings are not to be disturbed lightly unless they are clearly untenable – see *Ryanair v Billigfluege* [2015] IESC 11.

24. The same comments apply with equal force to the contention that there is some frailty in the guarantee based on a want of independent advice. It is important to note that nothing in this case suggests that the defendant is a person of limited intellect or education or is somehow impoverished so as to make her in some way vulnerable. There is, for example, no suggestion of undue influence here. Nor could it realistically be suggested by the defendant, at least to a level transcending mere assertion, that when she signed the waiver of independent advice, she did not understand the document. The authorities on *non est factum* make clear that one of the essential constituents is that there was no negligence by the signatory of a document, such as by a failure to read it before signing it. It seems to me therefore that the trial judge was perfectly correct in reaching the conclusion he did on this aspect.

25. In fairness to counsel for the defendant, on the hearing of this appeal, whilst not abandoning these arguments, she focused her oral presentation on two aspects of the claim, the first being the question of consideration for the guarantee and the second, the alleged absence of sufficiently clear evidence of the sum claimed to warrant the court giving summary judgment.

26. Taking these in reverse order, in the High Court, counsel in oral argument placed much emphasis on the alleged discrepancy between the figure initially claimed on Facility 1 of €154,554 and the subsequent reduction of that figure to €32,293. I have already explained why I consider this not to be an error or discrepancy, so-called, and the trial judge was entitled to come to the same view. The other complaint advanced in the High Court about the quantum of the figures claimed related to an alleged failure to properly explain the distribution of the proceeds of the receivership. That of course is a different issue to the

accuracy of the figures concerned but I am satisfied that the trial judge was entitled to conclude that the receiver and Mr. Bennis had together properly explained these figures.

27. A final affidavit was sworn on behalf of the plaintiff by its solicitor, Ciarán Leavy, which appeared to give different figures but it was not filed in court or relied upon by the plaintiff for the simple reason that the plaintiff accepted that the figures were incorrectly set out therein. The defendant sought to exploit this at trial as amounting to a further absence of clarity on the part of the plaintiff as to what was actually due by the defendant. The trial judge implicitly rejected this contention and was in my view entitled to do so in circumstances where an error was made by the deponent, it was realised before reliance was placed on the affidavit containing the error and it was withdrawn.

28. Although much effort was made by counsel for the defendant in the High Court to suggest that the plaintiff's figures gave rise to discrepancies in the sums claimed, at the end of the day the judge accepted the submissions of counsel for the plaintiff that when properly analysed, the discrepancies contended for by the defendant were simply not there.

29. Similar arguments were addressed to this court on appeal with counsel for the defendant placing reliance on the judgment of the Supreme Court in *Bank of Ireland Mortgage Bank v O'Malley* [2019] IESC 84 which of course post-dated the hearing of this matter in the High Court. In that judgment, the Supreme Court drew attention to the fact, occasionally somewhat overlooked, that despite the fact that many of the authorities on summary judgment concentrate on the need for a defendant to transcend the level of mere assertion to establish a *bona fide* defence, that obligation cuts both ways and a plaintiff is still required to adduce sufficient evidence to establish a *prima facie* case with sufficient particulars before a defendant can be called upon to answer it. That does not seem to me to give rise to any particular issue in this case where on the facts, the trial judge was satisfied

that sufficient evidence of the particulars of the plaintiff's claim had in fact been adduced, a conclusion with which I agree.

30. The final issue is the question of consideration for the guarantee. The starting point is that as the guarantee is not a deed under seal, for it to be valid it must be supported by consideration. The onus is on the plaintiff to show what that consideration was before judgment can be entered on a summary basis, even in the absence of any specific allegation by the defendant concerning the guarantee.

31. The defendant did raise the issue in her first affidavit concerning whether or not additional funds had been advanced to the company on foot of the guarantee she signed. She pointed to the fact that the facility of the 1st December, 2005 in the amount of €3,368,000 was supported by a guarantee of her husband only and she had never previously executed a guarantee of the company's debts. The same facility letter also indicates that it was to be interest only for a term of 12 months with a full review thereafter. It also refers to the fact that it was to be cleared by way of further property disposals and/or investor equity. Given the fact that this facility predated the guarantee by approximately a year and four months, and was in any event subject to a 12 month review, it seems clear that this cannot be regarded as providing consideration for the guarantee.

32. No particular evidence was adduced by the plaintiff regarding the company's position as of the date of the guarantee and in particular, how or in what circumstances any continued affording of facilities to the company was subject to that guarantee. Were it, for example, the case that the company was in default at the date of the guarantee and this provided a basis for a forbearance to sue on the part of the bank, that could well amount to good consideration in the circumstances. There is, as of yet however, no evidence of that.

33. The defendant in this appeal placed considerable reliance on the judgment of the High Court (McDermott J.) in *AIB plc v Maguire* [2018] IEHC 561. In that case, the second and third defendants executed a guarantee in respect of the borrowing of their cousin, the first defendant. At the time the loan was advanced to the first defendant, it was envisaged that it would be secured by a guarantee of the second and third defendants but in the event, the guarantee was not actually executed until some years after the original loan. The defendants submitted that there was no valid consideration passing at the time of execution of the guarantee and there was no evidence of any additional advances or forbearance at that time.

34. McDermott J. referred to the earlier judgment of the High Court (Charleton J.) in *ACC Bank Plc v. Dillon & Ors* [2012] IEHC 474 in which Charleton J. in turn endorsed the principles set out by the Supreme Court of Victoria in *McKay & Anor. v National Australia Bank Limited* [1998] 1 VR 173: -

> "5. Furthermore, 'past' consideration is not sufficient consideration. A guarantee given to secure a debt already incurred, but unsupported by any further consideration, will fail for want of valuable consideration… if it is evident that the guarantee was intended to be limited to past transactions alone, for example, because the surety knew that the principal debtor was already indebted to the creditor in an amount exceeding the limit of the surety's guarantee, the guarantee will be void as being given without consideration."

35. That an existing debt does not provide good consideration for a subsequent guarantee is also evident from a decision of the Northern Ireland Court of Appeal in *Provincial Bank of Ireland v Donnell* [1934] NI 33, also cited by McDermott J. In the latter case, Andrews LJ stated: -

> "… The real defence argued was that as the guarantee was not under seal it must, like other simple contracts, be supported by a valuable consideration. The mere existence of debt is not sufficient to support the surety's promise to the creditor. A past or executed consideration, unless moved at the defendant's request, was not binding without some new consideration. An agreement by a creditor to forbear to sue for a past debt was a sufficient consideration: as was actual forbearance at the request, express or implied of the defendant."

36. In reaching his conclusions on the arguability of the defence raised by the defendants, McDermott J. observed (at p. 11):

> "16. I am satisfied that the second and third defendants have on the facts set out above raised an arguable point of defence on this aspect of the case. The issue of past consideration is a mixed question of fact and law. The plaintiff has chosen not to give a full account of the course of dealing between the parties in this case concerning the delay in seeking the guarantees from the two defendants for a number of years after the money was drawn down and the purchase of the property was completed. There is no evidence of how or why the further credit agreements were made annually or why or how the special condition in respect of furnishing the guarantee was required and repeated in these agreements or, to what extent, if any, the two defendants were involved in these transactions. I am satisfied that an arguable defence has been raised sufficient to meet the low threshold applicable and to require me to send the case to plenary hearing. This does not mean that I consider that the defence will succeed, merely that the relevant test has been met."

37. It must be accepted that the trial judge did not expressly consider this issue in reaching his conclusions but in fairness to him, it seems to me that the point that is now raised in

respect of past consideration was not one explicitly advanced in argument before him, although to some extent by implication in the affidavits to which I have referred. However, the plaintiff has not raised as an issue in this appeal the question of whether this point was agitated in the court below and it is therefore appropriate that this court should consider it.

38. In the present case, the guarantee was executed by the defendant on the 29th March, 2007. It is suggested by the plaintiff that the consideration for this guarantee was the subsequent facility granted to the company on the 25th July, 2007 for various sums approaching €5m. Whilst it is true to say that the correspondence from AIB sanctioning the company's facility expressly contemplates the guarantee as security, the plaintiff has, at this juncture at any rate, adduced no clear evidence to demonstrate that the guarantee was executed in consideration of a facility which did not come in into being until some four months later. Had there been a contemporaneous execution of the guarantee and facility letter, an inference might thus arise that one was in consideration of the other, but it seems to me that the delay of four months in this case, at a minimum, calls for explanation by the plaintiff and so far, there is none.

39. I do not feel it necessary to explore the test for the grant of summary judgment which is by now so well known as not to require repetition. To cite the oft quoted dicta of Hardiman J. in *Aer Rianta v Ryanair* [2001] 4 IR 607, it must appear to the court that it is clear that the defendant has no defence. In the present case, for the reasons explained, I am unable to reach that conclusion and therefore consider that the defendant has, on this single discrete issue, reached the threshold of arguability that entitles her to have the issue canvassed at a plenary hearing.

40. I would therefore propose the following order in substitution for the order of the High Court. The plaintiff is to have judgment for the sum of €97,920 being the amounts due on

foot of Facilities 1 and 2 of the plaintiff's personal borrowings. With regard to the balance of €3,390,207 this will be remitted for plenary hearing before the High Court, such hearing to be confined to the single issue identified, whether the guarantee executed by the defendant dated the 29th March, 2007 is supported by valuable consideration. As this issue is very net, there is no necessity in my view for the delivery of a statement of claim and the defendant should deliver her defence within a period of three weeks with the plaintiff's reply, if necessary, a further three weeks thereafter.

41. With regard to costs, the defendant has partially succeeded on one of the multiple issues raised in the appeal, albeit that this issue is in terms of quantum by far the largest. However, it must be said that this issue, whether raised on affidavit or not, was not pursued in oral argument before the High Court, nor were any relevant authorities drawn to the High Court's attention, noting that the decision in *AIB v Maguire* post-dates the judgment of the High Court. In those circumstances, the justice of the case would in my provisional view be met by an order directing that the costs of this appeal should be costs in the cause before the High Court. If either party wishes to contend for a different order, they will have liberty to deliver a short written submission not exceeding 1,000 words within 14 days and the other party will have a similar time to respond. If such submissions are made but a different order does not result, the unsuccessful party may be responsible for any additional costs that may arise.

42. As this judgment is delivered electronically, Haughton and Pilkington JJ. have indicated their agreement with it.