THE HIGH COURT

[2022] IEHC 356

Record Number 2019/1051 S

BETWEEN:-

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

-AND-

BALFORD CONSTRUCTION LIMITED

DEFENDANT

_____

THE HIGH COURT

Record Number 2019/1052 S

BETWEEN:-

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

-AND-

PETER MCNICHOLAS AND NANCY MCNICHOLAS

DEFENDANTS

Judgment of Mr. Justice Cian Ferriter delivered this 2nd day of June 2022

Introduction

1. Peter McNicholas and Nancy McNicholas are husband and wife. They live in Swinford, County Mayo. They are both directors of a construction company, Balford Construction Ltd (the "company") which has its registered office in Swinford. Mrs. McNicholas is the secretary of the company. The company banked with Bank of Ireland (the "Bank"). The Bank advanced various facilities to the company and Mr. and Mrs. McNicholas entered various guarantees in respect of those facilities. The company also mortgaged its interest in property in Swinford on which the company developed a series of houses.

2. This judgment sets out my decision on the Bank's application for summary judgment in the sum of €2,661,194 against the company as claimed in proceedings High Court Record Number 2019/1051S between the Bank and the company ("the company proceedings"). It also set out my decision on the Bank's application for summary judgment against each of Mr. and Mrs. McNicholas in separate proceedings being proceedings bearing High Court Record Number 2019/1052S between the Bank and Mr. and Mrs. McNicholas (the "guarantor proceedings"). In the guarantor proceedings, the Bank seeks summary judgment jointly and severally against Mr. and Mrs. McNicholas in the sum of €1,082,501, and summary judgment in the amount of €250,000 against Mr. McNicholas only. Both applications were heard together on Tuesday, 10th May last.

Preliminary Matters

3. At this hearing, the company was represented by Marilyn McNicholas and Company, solicitors. The principal of that firm is Marilyn McNicholas, who is the daughter of Mr. and Mrs. McNicholas.

4. No solicitors came on record for Mr. and Mrs. McNicholas in the guarantor proceedings.

5. At the outset of the hearing, Mr. Alan Lynskey applied for an adjournment of the hearing of the application against Mr. McNicholas. Mr. Lynskey is husband of Marilyn McNicholas (and, accordingly, son-in-law of Mr. and Mrs. McNicholas). He is not a qualified lawyer.

6. It is necessary to set the adjournment application in context. The two sets of proceedings have had a prolonged procedural history with allegations being made on behalf of the Bank that the company and Mr. and Mrs. McNicholas had "*flouted*" directions made by the court at various points in respect of the delivery of replying affidavits, had repeatedly ignored correspondence from the Bank's solicitors which sought to advance the prosecution of the proceedings and had sought, in essence, to inappropriately drag the proceedings out.

7. The two applications had eventually been listed for hearing on 15th March 2022, and, when they did not get on for hearing on that date, on 16th March 2022. There again being no judge available to hear the applications on 16th March 2022, the applications were adjourned to 10th May 2022. When the matters did not get on for hearing on 16th

March, the court (Meenan J.) gave liberty to the company to deliver a further affidavit. Mr. McNicholas then swore a further affidavit on behalf of the company on 1st April 2022, in the company proceedings, which appears to have been delivered a couple of days later. He also swore an affidavit of the same date in the guarantor proceedings. The Bank replied to each of those affidavits with an affidavit of Paul Diggin, an official with the Bank.

8. When the matters came before me for hearing on 10th May 2022, Mr. Lynskey sought an adjournment on behalf of Mr. McNicholas in the guarantor proceedings on the basis that Mr. McNicholas was prejudiced in his ability to oppose the summary judgment application against him in light of receiving the Bank's further affidavit so late in the day. I ruled against Mr. McNicholas on the adjournment application. I was satisfied that Mr. McNicholas had had every reasonable opportunity to advance such grounds of arguable defence as he wished to and that he would not be unfairly prejudiced by the matter proceeding.

9. In circumstances where both matters were then proceeding to hearing, an application was made by Mr. Lynskey to make submissions on Mr. McNicholas' behalf. I was told by Mr. Lynskey that the Court of Appeal had previously permitted him to make submissions on Mr. McNicholas' behalf in separate proceeding. Mr. Lynskey had prepared ably marshalled written submissions which had been sent to the Bank just before the hearing (I should say for completeness that the Bank itself had delivered written submissions also just before the commencement of the hearing).

10. I gave permission to Mr. Lynskey to make submissions on behalf of Mr. McNicholas in circumstances where I wanted to ensure that Mr. McNicholas had every opportunity to present such arguments as he wished in opposition to the Bank's application for judgment against him. Mr. Lynskey made clear that he was not making submissions on behalf of Mrs. McNicholas. I allowed Mr. Lynskey to make submissions on behalf of Mr. McNicholas in the exceptional circumstances that arose at this hearing and I would not want the permission him in that regard to be taken as any form of precedent of wider implication.

11. I believe the correctness of proceeding with the hearing of both matters was borne out by the fact that the written submissions prepared by Mr. Lynskey on Mr. McNicholas' behalf were of assistance to the court during the course of the hearing, and the fact that Mr. Lynskey was well able to fully present any relevant arguments on behalf of Mr. Mr. McNicholas at the hearing of the matter.

12. As matters panned out at the hearing, Marilyn McNicholas and Mr. Lynskey divided their presentation of the issues between them which resulted in an efficient presentation of the matters as, in truth, there was a considerable degree of overlap on the issues arising as between both applications in any event. Ms. McNicholas also drew on Mr. Lynskey's written submissions when presenting her arguments at the hearing on behalf of the company.

13. In the circumstances, I do not believe there is any substance in the first ground of complaint articulated in the written legal submissions filed on behalf of Mr. McNicholas, to the effect that to proceed with the hearing for judgment against him in the guarantor proceedings would involve breaches of his rights under the European Convention on Human Rights and under the Constitution.

14. I should note for completeness that the company had issued a motion seeking an order striking out certain pleas contained in the summary summons in the company proceedings (to the effect that the 2009 facility and the 2010 facility were repayable on demand) on the grounds that the pleadings were said to be untrue and prejudicial to the fair trial of the action. The application appears to have been issued to advance a potential defence based on the Statute of Limitations. I was informed at the outset of the hearing that the solicitors for the company had advised the Bank that it was not proceeding with that application and the hearing proceeded without any further reference to that application. Ultimately, no Statute defence was sought to be maintained at the hearing before me.

15. I will turn therefore to address the Bank's application for judgment in each of the two proceedings.

Background

16. The Bank's claims for judgment in the company proceedings arise from facilities advanced to the company by the Bank on 27th July 2009, (the "2009 facility") and on 10th August 2010 (the "2010 facility").

17. The 2009 facility comprised two facilities, the first being a facility of €3,169,891 by way of "bridging term loan", whose purpose was stated to be the continuation of an existing facility (account number 53858158) previously accepted by the company plus "an additional €125,000 to assist with working capital requirements and restructuring of

overdraft facility". The second facility comprised in the 2009 facility was a loan of €104,000 "to assist with the restructuring of existing facilities".

18. The 2009 facility was signed on 14th August 2009 by both Mr. and Mrs. McNicholas. No issue is taken as to the fact of entry of this facility, although as we shall come to, an argument is raised as to an alleged absence of consideration for this facility.

19. In the "security held" section of the 2009 facility letter, various letters of guarantee were referenced including a letter of guarantee (dated 30 April 2003) from Mr. McNicholas guaranteeing the company's liabilities in the amount of €250,000, and letters of guarantee from Mr. and Mrs. McNicholas guaranteeing the company's liabilities in the total amount of €1,082,501. The latter reference is to some six separate guarantees jointly entered by Mr. and Mrs. McNicholas amounting to those sums.

20. There six guarantees which, on the face of it, were jointly entered by Mr. and Mrs. McNicholas are as follows:

    (i) guarantee dated 25th September 1980 guaranteeing the liabilities of the company in the amount of IR£35,000 (€44, 440.83) (the "first guarantee")

    (ii) guarantee dated 20th February 1984 guaranteeing the company's liabilities in the amount of IR£55,000 (€69,8355.59) (the "second guarantee")

    (iii) guarantee dated 9th October 1995 guaranteeing the company's liabilities in the amount of £27,000 (€34, 282.93) (the "third guarantee")

    (iv) guarantee dated 21st February 1996, guaranteeing the company's liabilities in the amount of £19,000 (€24,125.02). (the "fourth guarantee")

    (v) guarantee dated 5th August 1998 guaranteeing the company's liabilities in the amount of £244,000 (€309, 816.09). (the "fifth guarantee")

    (vi) guarantee dated 8th June 2002 guaranteeing the company's liabilities in the amount of €600,000 (the "sixth guarantee").

21. I will return later in the judgment to issues raised in relation to these guarantees.

22. The 2010 facility was in the sum of €3,154,488 "by way of bridging term loan (existing balance of €3,129,488 plus additional €25,000)".

23. The purpose of the 2010 facility is expressed to be "continuation of existing facility (account number 53858158) previously accepted by Balford Construction Ltd plus an additional €25,000 to assist with working capital requirements".

24. In the 2010 facility letter, the letters of guarantee in the total amounts €1,082,501 (for both Mr. and Mrs. McNicholas) and €250,000 (for Mr. McNicholas alone) are specified.

25. The 2010 facility was signed by Mr. and Mrs. McNicholas on 12th August 2010. Again, there is no dispute as to the fact that this facility letter was entered, although as with the 2009 facility, an argument is raised as to an alleged absence of consideration for this facility.

26. An appendix to the 10th August 2010 letter in respect of the 2010 facility specified the terms and conditions applying to the facility. These terms and conditions included, at clause 17, a term headed "Set off". This clause provided, *inter alia*, that:

> "The borrower may not set off any amounts payable by the Bank to the borrower against any matured obligation due from the borrower to the Bank. All payments made or to be made by the borrower will be calculated and made without, and free and clear of any deduction for, set off or counterclaim or any other deduction or withholding (including without limitation, any deduction or withholding for or on account of tax)."

27. There was no equivalent clause in the terms and conditions attaching to the 2009 facility.

28. The Bank, through an affidavit of Mr. Diggin, exhibited bank statements for the two loans, which went up to 30th April 2018. The Bank does not seek judgment in respect of any amounts that may be owing after 30th April 2018.

29. The company entered a mortgage with the Bank on 18th March 2008 ("the mortgage") which mortgaged property contained in folio MY46290F ("the secured property"). This folio related to a development of houses which had been developed by the company. The schedule to the mortgage specified the property in Folio 46290F Co. Mayo less a number of "parts already transferred", being identified site numbers of properties on which houses were being built.

30. During the course of 2013, the Bank and the company had negotiated a restructuring of the existing facilities and the terms of that proposed restructure were embodied in a letter issued by the Bank to the company on 22nd August 2013. The letter recorded the "*demand facility in the sum of €3,319,000… Loan Account Number 5385815*" as having been "*drawn down in full and is no longer available for drawing*." Ultimately, that facility letter was not agreed as the company changed the additional security required, by way of handwritten amendment to that letter, before signing the letter, and the Bank did not accept that change.

31. The loan facilities fell into arrears and the Bank made demands for the amounts outstanding on 25th March 2015. The defendants deny receiving these demands although it is accepted that follow-up demands of 10th April 2015 were received.

32. The Bank appointed a receiver, Kieran Wallace of KPMG, over the secured property on 20th April 2015.

33. The Bank petitioned to have the company wound up by petition to the High Court. The petition issued on 13th November 2015. The petition was struck out on 7th March 2016 on the Bank's application.

34. The secured property was sold in December 2018 for €1,026,000. Sums of €750,000 and €90,022 (total €840,022) were credited to the company's accounts in respect of the net proceeds of sale of the property less the costs of the receivership.

Test on application for summary judgment

35. The appropriate test to be applied on an application for summary judgment is well established and is not in dispute. In her judgment in *Aer Rianta v. Ryanair* [2001] 4 I.R.

607, McGuinness J. provided the following helpful summary of the law (at p. 614 and 615):-

"…the correct test to be applied in deciding whether to grant summary judgment in this case is that established by this court in First National Commercial Bank Plc v. Anglin… In that case Murphy J speaking for the court said...:-

"In my view the test to be applied is that laid down in Banque de Paris v. Naray… which was referred to in the judgment of the President of the High Court and reaffirmed in National Westminster Bank v. Daniel... The principle laid down in the Banque de Paris case is summarised in the headnote thereto in the following terms:-

'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of the defendant's having a real or bona fide defence.'

In the National Westminster Bank case, Glidewell LJ identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:

'I think it right to ask, in the words of Ackner LJ in the Banque de Paris case, at p.23, 'Is there a fair or reasonable probability of the defendant having a real or bona fide defence?' The test posed by Lloyd LJ in Standard Chartered Bank v. Yaacoub… 'Is what the defendant says credible?' amounts to much the same thing as I see it. If it is not credible then there is no fair or reasonable probability of the defendant having a defence".

36. I will turn now to address the various grounds of arguable defence contended for on behalf of the company and Mr. McNicholas to see whether the defendants have satisfied the requirement that there is a fair or reasonable probability of them having a real or bona fide defence.

No consideration arguments in relation to 2009 and 2010 facilities

37. Ms. McNicholas on behalf of the company advanced an argument to the effect that there was no valid consideration for either the 2009 or 2010 facilities such that those facilities, and the Bank's claims for judgment on foot of them, were void. If this contention

discloses an arguable defence, it also avails Mr. and Mr. McNicholas in defence of the summary judgement application against them in the guarantee proceedings.

38. The argument was expressed in Mr. Lynskey's written submissions filed on behalf of Mr. McNicholas as follows:

> "The Plaintiff's pre-existing contractual obligation to advance €1,895,000 to Balford Construction in return for a first charge over Folio MY46290F less plots 23,24,25,26,27,29,32,33,34,37,45 and 47 as marked on the land registry approved scheme maps numbered 490 and 498, meant that the money advanced following the signing of the 2009 letter of offer and the 2010 letter of offer was insufficient consideration for those offers."

39. In support of this alleged ground of defence, a facility letter of 19th February, 2008 from the Bank to the company (the "2008 facility") was relied upon. Under the 2008 facility, the Bank advanced €1,895,000 to the company by way of bridging term loan "*to finish development at Rathdubh, Swinford, County Mayo*". The 2008 facility letter noted as additional security required, "*first legal mortgage/charge over the property at Kilbride, Swinford, County Mayo (folio number: 46290F County Mayo) comprising 11 acres registered in the name of Balford Construction Ltd*". This security was a reference to the mortgage pursuant to which the company granted the Bank a first charge over land in folio 46290F less houses that had already been sold.

40. The company's contention was that, as evidenced by the transactions recorded on the bank statements exhibited by the Bank in these proceedings between 2nd December 2008 and 12th August 2010, the Bank advanced a total of €1,676,101.20 and that these sums should be treated as part of the €1,895,000 promised under the 2008 facility. The sums making up the figure of €1,676,101.20 comprised the following:

- 2nd December, 2008 – €996,456.54 (account 53858158)
- 24th August, 2009 – €103,907 (account 53858158)
- 12th August, 2010 – €25,000 (account 53858158).

41. The company further contends that a separate sum of €50,737.77 advanced on 24th August, 2009 to account 41850976 was not related to the €104,000 the subject of the second part of the 2009 facility but rather should be treated as part of the monies which the Bank had contracted to advance under the 2008 facility. The company adopted the argument made by Mr. McNicholas in his written submissions as follows:

> "The plaintiff was already contracted to advance a further €50,737.77 to the Company pursuant to the terms of the 2008 letter and accordingly this is not valid consideration for the 2009 letter of offer. The obligation to advance this money already existed and accordingly any such promise is illusory and of no effect."

42. The company makes a similar argument in respect of the 2010 facility contending that the Bank "never advanced any consideration that it was not already contracted to advance under the 2008 offer letter and accordingly this is insufficient to amount to valid consideration and accordingly the 2010 offer letter is unenforceable against [the company]" (to quote directly from the written submissions delivered by Mr. Lynskey on behalf of Mr. McNicholas).

43. In summary, the company submits, while it gave the required charge as part of the 2008 facility agreement, the Bank did not advance the full €1,895,000 it contracted to provide under the 2008 facility and therefore the sums in fact advanced following the entry of the 2009 facility (on 27th July 2009) and the 2010 facility (on 10th August 2010) should be treated as advanced under the 2008 facility such that there was no consideration in place in respect of the 2009 and 2010 facilities, rendering each of those latter facilities void.

44. The company relied in support of this argument on the decision of O'Hanlon J. in *Kenny v. An Post* [1988] 1 IR 285. O'Hanlon J. there held in the context of a contention that the plaintiff had become contractually entitled to a tea break which had been the subject of a practice negotiated by the trade union of which he was a member, that "*even were I to hold that the parties embarked on a process designed to alter the contract of service in the 1969/70 period, I would tend to the view that there was no consideration for the additional benefit offered to the employees, as they were making no promise in return. If this is the correct view, then the alleged agreement would, on this ground also, be unenforceable at the instigation of the employee*".

45. In my view, this *dictum*, even on its own terms, does not avail the defendants on an even arguable basis as there clearly was consideration provided in respect of both the 2009

and 2010 facilities and monies were in fact advanced by the Bank and accepted by the company after those facilities were entered into. The facts presented here are very different to those arising in the *Kenny* case.

46. The company and also sought to rely, in support of the "no consideration" contention, on the Court of Appeal decision in *AIB v. O'Brien* [2020] IECA 191. In that case, the High Court concluded, and the Court of Appeal agreed on appeal, that the defendants had raised an arguable ground of defence that loan agreements relied on by the plaintiff bank in an application for summary judgment against the defendants were void for want of consideration. On the facts of that case, there had been no drawdown of funds at all on the facility which was the subject of the claim for judgment and the defendant sought to argue that the provision of that facility amounted to no more than an internal bank exercise for which there was no valid contractual consideration.

47. The facts are very different here. Further sums were in fact provided by the Bank to the company after the entry of both the 2009 and 2010 facilities. The facilities themselves disclose consideration; in the 2009 facility, the Bank was continuing an existing facility and providing an additional €125,000 to assist with working capital requirements and the restructuring of the overdraft facility. The second part of the 2009 facility was expressed to be to assist with the restructuring of existing facilities. Sums were in fact drawn down by the company on foot of this facility on 24th August 2009 (the sum of €103,907 on the first part of the facility and a sum of €50,737.77 on the second part of the facility). After the entry of the 2010 facility, a sum of €25,000 (expressly referenced in the facility letter) was drawn down by the company.

48. In my view, the company's contention is fundamentally misconceived. In essence, it ignores the fact that the company in entering the 2009 facility brought an end to the 2008 facility and its terms. The fact that the entirety of the €1,895,000 available under the 2008 facility letter was not drawn down does not mean that such undrawn down amounts can be retrospectively invoked when the company agreed to replace that facility with a new facility, being the 2009 facility, which latter facility was subject to the terms and conditions set out in the 2009 facility letter.

49. It is not disputed that the company entered the 2009 facility. It is unarguable that sums were advanced on foot of this facility after 27th July 2009. Similarly, it is clear on the face of the 2010 facility that its purpose was both the continuation of the existing facility on account number 53858158 plus an additional €25,000 to assist with working capital requirements. This €25,000 was drawn down after the date of entry into this facility.

50. In the circumstances, I do not believe there is any arguable contention to the effect that the 2009 or 2010 loan facilities are void for want of consideration or are otherwise "illusory and have no legal effect" to deploy the company's formulation.

Failure to particularise alleged debt

51. The company and Mr. McNicholas next contend that the Bank failed to particularise the debt alleged to be owed in the proceedings.

Application to amend indorsement of claim in the two proceedings

52. As part of its applications against the company and Mr. and Mrs. McNicholas as the guarantors, the Bank sought to amend the special endorsement of claim in the summary summons in each of the proceedings to take into account the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2020] 2 ILRM 423 ("*O'Malley*"). The decision in *O'Malley* was delivered some weeks after the summary summons in each of the proceedings had issued.

53. In his judgment, in *O'Malley* Clarke C.J. stated as follows:-

> "A person confronted with a claim or a court confronted with a question of whether there is prima facie evidence for that claim is entitled to at least enough detail to know the basis on which the sum claimed is calculated. The defendant is entitled to that information to decide whether there is any point in pursuing a defence or, indeed, potentially expending monies on procuring professional advice in that regard."

54. Clarke C.J. also stated (at p.431):-

> "So far as the pleadings are concerned, it does seem to me that The more detail the borrower has been given in advance, the more it may be possible to justify a relatively shorthand way of describing how the amount due is calculated. But even there, it seems to me that it is necessary for a plaintiff, if they wish to rely on

previously supplied details, to at least make some reference to those details in its special indorsement of claim…".

55. In a separate case involving the company, *AIB v. Balford Construction Ltd* [2021] IECA 166, Donnelly J. emphasised the need for a practical approach to cases raising issues regarding the particularisation of a claim for summary judgment. Donnelly J. said as follows:

> "The judgment in O'Malley is certainly authority for the proposition that where a special indorsement of claim does not contain sufficient particulars of claim, the motion judge should consider whether the justice of the case will be met by adjourning to permit an application to amend the special indorsement of claim. The case also supports the proposition that the justice of the case may be fully met by the motion judge adjourning the case to permit further evidence to be furnished for the purpose of filling an evidential void."

56. The Bank, through an affidavit of Mr. Diggin, exhibited all the bank statements for the relevant accounts showing all the movements of monies on those accounts up to 30th April 2018 (no sums are claimed after that date). The Bank exhibited the entire of the account statements of account number 41850976 between 31st October 2003 and 30th April 2018 and the entire set of account statements for account number 53858158 between 30th November 2006 and 30th April 2018. The purpose of the proposed amendments sought in the amendment application was said to be to ensure that those statements of account are explicitly referenced in the Special Indorsement of Claim in each case.

57. The company sought to raise a delay argument in respect of the amendment applications. The Bank, in an affidavit of Mr Diggin, sought to explain the reason for the lapse of time in issuing the applications. In my view, the explanation was a reasonable one. More relevantly, none of the defendants could point to any prejudice whatsoever arising from the alleged delay.

58. The evidence demonstrates that the company has been sent regular, detailed statements of account which amply satisfy the level of particularity required by *O'Malley*.

59. Accordingly, I will make an order permitting the Bank to amend its indorsement of claim in each of the two proceedings to incorporate the particulars of debt as set out in detail in the bank statements served on the defendants.

Continuing failure to particularise?

60. Having made those orders, the contention as to the failure of the part of the Bank to particularise its debt in its pleadings no longer seems to arise. However, for completeness, I should make clear that I do not believe there is any arguable point of defence generated from the contention that the debt the subject of the claims is unclear to the defendants. Both the company and Mr. and Mrs. McNicholas have been in possession of documentation which fully particularises the amounts claimed since before the proceedings were initiated. Full statements for the loans in issue have since been provided on affidavit and those statements are now incorporated into the pleaded claims.

61. The defendants have not pointed to any aspect of the calculation of the sums said to be owed which they could not understand, other than the sum deducted from the overall amounts owing on foot of the amount received for the sale of the secured property. However, the Bank has set out on affidavit in some detail the amount received for the sale of the secured property, the receivership costs deducted from those proceeds and the net amount credited as a result against the loan accounts in issue. In the circumstances, I am quite satisfied that the requirement set out in O'Malley that the defendants have sufficient information and detail to know the basis on which the sums claimed are calculated and to decide whether there was any point in pursuing the defence, are met here.

62. Accordingly, I am satisfied that no arguable point of defence arises under this heading.

Receiver said to be invalidly appointed

63. Mr. McNicholas next sought to contend that the appointment of a receiver by the Bank over the property charged in folio 46290F (i.e. the secured property) was unlawful. Mr. Lynskey's principal argument on behalf of Mr. McNicholas in this regard was that the Bank had already issued a deed of discharge in respect of parts of the property it appointed a receiver over and that this rendered the appointment of the receiver void. Mr. McNicholas alleges that by the time the Bank appointed a receiver over the secured property in 2015,

it had given deeds of discharge in respect of 5 identified sites on the property and accordingly the deed of appointment of the receiver was invalid.

64. I must confess to having difficulty in understanding the infirmity said to invalidate the receiver's appointment. The receiver was appointed over the Bank's interest in folio 46290F being the property originally in that folio less certain parts of folio already transferred as set out in the schedule to the mortgage. Mr. Diggin deposed that the position was that by the time the receiver was appointed to the secured property those parts already transferred no longer formed part of the folio so that the receiver was appointed over the entire of the folio at that point. If certain parts of the relevant folio had been conveyed out of the folio prior to the receiver's appointment, it is difficult to see how any issue arises as his appointment would then have been over the property remaining in the folio and no issue is raised in respect of that property.

65. The receiver was appointed on 20th April 2015, which is now well over 6 years ago. No application was ever bought by the company challenging the validity of that appointment.

66. In any event, as a matter of law alleged infirmities in the receiver's appointment are irrelevant to the issue of the bank's entitlement to summary judgment. As McDermott J. held in *Danske Bank A/S v. Gillic* [2015] IEHC 375 (at page 8):-

> "*The issue of the appointment of a receiver is entirely irrelevant to the issues in this case. If the second defendant wished to challenge the appointment of a receiver he had ample opportunity to do so but did not. If he has any grievance in relation to the appointment or actions of the receiver or the decisions taken by him or any failure of duty on his part, he should properly pursue that matter with the receiver*."

67. A separate argument was advanced by Mr. Lynskey at the hearing to the effect that an arguable defence arises from the fact that the Bank sold the secured property as mortgagee in possession and not as receiver. In his written submission, Mr. McNicholas submitted that that there was no evidence to show that the receiver (Kieran Wallace) sold the asset over which he was appointed as receiver, and rather that the evidence (being the documentation filed with the PRA associated with the folio) showed that the property was sold by the Bank directly itself.

68. The Bank accepts that the conveyance of the secured property was executed by the Bank in its capacity as mortgagee thereof. There is nothing at all surprising, still less inappropriate, about a bank selling as mortgagee in possession a property which may also be the subject of a receivership appointment, particularly where the receiver does not have a power of sale. In his own affidavit, Mr. McNicholas sates that the 2008 mortgage deed included a power of sale for the Bank and also power for the Bank to appoint a receiver "of rents and profits of the mortgaged property" supporting the view that in the event the property was to be sold, the Bank would be the appropriate party to sell it. No arguable defence arises from this point.

69. Mr. McNicholas went on to contend that the Bank had failed to deal with the sale of the secured property in its pleadings and failed to set out the sums calculated or to refer to a document to show the sum was calculated.

70. This is factually incorrect. Mr. Diggin avers that the liabilities of the company have been reduced in accordance with all distributions arising from the receivership and the sale of the property. He exhibited a final outcome statement from the receivership to support this averment. This showed a breakdown of the sale proceeds for the property and the costs of the receivership. Mr. Diggin averred that the Bank received two distributions arising from the receivership and the sale of the property, the first being an interim distribution of €750,000 which was applied to loan account number 53858158 on 20th December 2018 and the second being a final distribution of €90,022 on 20th December 2019 which was applied to loan account number 301231341.

71. I am satisfied that no arguable issue arises in relation to this contention.

Alleged breach of duty by the Bank by sale of secured property at undervalue

72. The company and Mr. McNicholas next contend that the Bank breached its duty to the company as mortgagor by selling the mortgaged property at an undervalue.

73. In his written submissions in support of this argument, Mr. McNicholas stated as follows:

"*Instead of agreeing a right of way to achieve the best price for the secured asset the [*Bank*] took an approach where it wanted to achieve a right of way across the roads in folio 45885 by either getting them taken in charge or by maliciously petitioning the High Court to wind up Balford Construction. This approach did not result in a right of way and came at a huge cost financially and to the reputation of the Company."*

74. The reference to property in folio 45885 is to a piece of property owned by the company which surrounded the secured property and access over which was necessary to enable access to the houses built on the secured property. The company had transferred the property in in folio 45885 to Mr. Lynskey on 15th May 2015 i.e. just over a month after the Bank had demanded immediate payment by the company of its liabilities to the Bank (by letter of demand dated 10th April 2015) and less than one month following the appointment of the receiver (on 20th April 2015). The company's position appears to be that the Bank should have gone about procuring a right of way from Mr Lynskey in order to enhance the value of the secured property and that its failure to do so is a breach of the duty to obtain the best price. This is a rather remarkable proposition in circumstances where the transaction had been carried out by the company with a clearly connected party in the face of the Bank taking steps to enforce the loans and security.

75. Mr. Diggin on behalf of the Bank exhibited an independent "red book" valuation by O'Donnell & Joyce estate agents which valued the secured property at €1,020,000. This value expressly took into account that the secured property was landlocked and therefore a discount to what might otherwise be its market value was justified. The evidence before me is that the Bank sold the property at a price (€1,026,000) consistent with this independent market value.

76. Mr. McNicholas stated in an affidavit that "*I have been building and selling houses in the Swinford area since 1980 and I believe the true value of the subject property in 2018 was well in excess of €3.5 million*". This is a mere assertion. No prima facie evidence has been advanced as to why the independent valuation obtained by the Bank was incorrect or should not have been relied upon by the Bank or to otherwise support the contention that the sale was at an undervalue.

77. Accordingly, no arguable defence has been raised on this ground.

Presentation of Petition to wind up company alleged to be an abuse of process

78. The defendants next contend that the Bank's petition to wind up the Company in November 2015 was "*a malicious abuse of process*".

79. In its winding up petition, the Bank pleaded that since the receiver's appointment, it had come to its attention that there were certain dispositions of land made by the company which the Bank believed warranted further investigation on the basis that the nature of the transfers in question "*could have the effect of diminishing the value of the bank's security*". This is a reference to the transfer of property in folio 45885 by the company to Mr Lynskey shortly after the appointment of the receiver, as referred to earlier. The defendants contend that the sale of the property in that folio did not impact on the value of the Bank's security.

80. Mr McNicholas asserted that the bank's petition to wind up the company was used as a means of pressing the company for payment of an alleged debt and amounted to an abuse of process.

81. Mr. Diggin avers that the Bank elected of its own volition to apply to strike out the petition in order to facilitate without prejudice discussions which were taking place with the company. This averment is not the subject of challenge. It is clear from the order striking out the petition that the petition was struck out on the application on the Bank.

82. In my view, no stateable claim in actionable malicious abuse of process has been prima facie made out on any evidence tendered by the Company or Mr. McNicholas. Furthermore, no evidence has been provided, even on a *prima facie* basis, of the damage said to have been caused by the presentation of a winding up petition which was subsequently withdrawn by the Bank.

83. Accordingly, no arguable ground of defence arises under this heading.

Guarantees and s.2 Statute of Frauds

84. Mr. McNicholas asserts that "a number" of the guarantees on the face of it signed by his wife, Nancy McNicholas, were in fact signed by him without her authority. Under section 2

of the Statute of Frauds (Ireland) 1695, a guarantee must be in writing and must be signed by the guarantor. Accordingly, it is said that there is an arguable defence to the Bank's claims for summary judgment against Mr. and Mrs. McNicholas arising from this non-compliance with the Statute.

85. It is necessary to consider the evidence said to support this contention. In his affidavit of 5th April 2022, Mr Peter McNicholas averred that "*in the 30+ years [the company] was dealing with Bank of Ireland my wife was never in Bank of Ireland and nobody in the bank asked to meet her.. I signed my name and wrote in my wife's name on guarantees and letters of offer the bank managers were aware of this. I never had Nancy's authority to sign her name*". The only guarantee document he specifically identifies is the 1996 guarantee document (the fourth guarantee) where he says that he signed his name "*and using the same handwriting I wrote in Nancy's name and I repeated this at the bottom of the page and section concerning independent legal advice.*" He alleges that the Bank was aware he was doing this "but never asked for a letter of authority nor did they ask to meet with Nancy.". He also makes the allegation in respect of the 2008 facility (which is not the subject of the claims in these proceedings) saying that he signed both his own name and filled in his wife's name in his handwriting. Later in the same affidavit Mr McNicholas states in relation to the guarantees that "*a number of them were never signed by Nancy McNicholas or by any person with authority to sign on her behalf*."

86. In *Allied Irish Banks plc v. Stack* [2018] IECA 128 both the High Court and the Court of Appeal had been confronted with a bald assertion of forgery of a signature on a guarantee. Both courts concluded that the evidence was insufficient to warrant leave to defend being granted. Among the issues to which the Court of Appeal had regard were the absence of any obvious difference between the signature on the guarantee and other signatures which the defendant accepted were hers, as well as the absence of any expert evidence, with Irvine J. (as she then was) criticising the fact that the defendant did not "*make any effort to adduce evidence to support her bald assertion that the signature on the guarantee is not hers*" (at page 15). Irivne J. also pointed to the lack of any attempt to demonstrate the signature in question was demonstrably different from the defendant's signature on any other document and to the lack of handwriting expert evidence to support an otherwise bald assertion as to a forged signature.

87. The observations of Irvine J. seems to me to have particular force on the facts of this case. Mr. McNicholas' position is mere assertion. Having looked at the copy of the 1996 guarantee, it would not be in any way obvious to the objective reader that the signatures of Mr. McNicholas and Mrs. McNicholas were authored by the same person if that in fact was the case. Crucially, Mrs. McNicholas has sworn no affidavit at all in answer to the claims against her and tendered no affidavit to support the assertion that she did not sign

or authorise the signing on her behalf of any of the guarantees or why it was that she signed certain guarantees but refused to sign or authorise the signature of other guarantees.

88. Mrs. McNicholas was a director and secretary of the company at all material times. The company engaged in extensive correspondence with the Bank, following the 2009 and 2010 loan facilities falling into arrears, in which it was repeatedly emphasised to the Bank that the Bank had the benefit of the guarantees supplied by both Mr. and Mrs. McNicholas. It is difficult to understand why, if there was any substance at all to the contention that Mrs. McNicholas did not sign, or authorise the signing of, some of the guarantees, she did not swear an affidavit to set out which guarantees she alleged she did not sign and the circumstances in which she discovered that a signature which is not hers had apparently been put to those guarantees without her knowledge or authority. In circumstances where Mrs. McNicholas has been a director and secretary of the company for many years and where the evidence put before the court by the Bank on these applications is that Mrs. McNicholas regularly signed documents related to the company's affairs, the presence of her signature on guarantees without her knowledge or authorisation would clearly have called out for proper explanation if an arguable defence was to be disclosed. That was not done.

89. In those circumstances, in my view, no arguable defence has been disclosed under this heading.

Conclusion

90. For the reasons outlined above, I am satisfied that none of the defendants has raised an arguable defence to the Bank's claims for summary judgment in either of the two cases.

91. Mr Diggin deposed that as 29th April 2022, €2,661,194 remains due and owing by the company to the Bank, following all appropriate credits and allowances. That amount is comprised of the amount of €60,048 in respect of the 2009 facility, and the amount of €2,601,146 in respect of the 2010 facility.

92. I accordingly grant summary judgment to the Bank as follows:

(i) against the company in the sum of €2,661,194;

(ii) against Mr. and Mrs. McNicholas jointly and severally in sum of €1,082,501 and

(iii) against Mr. McNicholas alone in the sum of €250,000.