APPROVED

THE HIGH COURT

[2024] IEHC 198

High Court Record No. 2023/103CA

Circuit Court Record No. 717/17, County Galway

BETWEEN/

BWG FOODS UNLIMITED COMPANY

Plaintiff

-AND-

SEAN GLYNN AND BERNADETTE GLYNN

Defendants

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 8th day of April 2024

INTRODUCTION

Background

1. This is the Defendants' appeal from the judgment of the Circuit Court (His Honour Judge Eoin Garavan) dated 10th May 2023 entering summary judgment in the sum of €63,655.87 plus costs in favour of the Plaintiff against the Defendants. As this is a Circuit Court appeal, this court's jurisdiction is governed by the statutory provisions and Rules of Court which apply to the Circuit Court.

2. Mr. Simon White BL appeared for the Plaintiff. Mr. Michael O'Higgins SC and Mr. John F. Fahy BL appeared for the Defendants.

3. The Plaintiff is a company which sells food in the retail and wholesale sectors. The First and Second Named Defendants are a married couple. The First Named Defendant solely operated and ran a Spar Supermarket at Unit 1, Bluebell Woods, Oranmore, County Galway. The Second Named Defendant operated her Solicitor's Office next door to the Spar Supermarket. The Defendants were directors of a company, Glynnco Limited ("the Company"), which ceased trading in around 27th February 2017.

4. The essence of the dispute centres on events which occurred in the 11 days which followed 1st April 2005. As set out below, key dates are 1st April 2005, 4th April 2005, 5th April 2005 and 11th April 2005.

1st April 2005

5. By a written agreement dated 1st April 2005, the Defendants, on behalf of the Company, entered into a five year Trading/Credit Agreement with the Plaintiff, then known as BWG Foods Limited, whereby in consideration of the Plaintiff *inter alia* supplying food products to the Company, the Plaintiff would supply such goods on credit to the Company, on terms set out in the Trading Agreement. For example, it was provided that goods delivered from the Plaintiff's warehouse would be payable with interest three weeks after delivery, and goods invoiced through the Plaintiff's central billing operation would be payable four weeks after delivery. This contract was signed by Mr. Seán Carter on behalf of the Plaintiffs and by the Defendants who accepted its terms on behalf of the Company.

4th April 2005

6. It is common case between the parties that the Defendants signed a Personal Guarantee on 4th April 2005 which was erroneous, because the first sentence of the Guarantee stated *inter alia* that "*[i]n consideration of your agreeing at my request to supply (Company Name) Bernie and Sean Glynn of (Registered Office) Spar, Unit 1, Bluebell Woods, Oranmore, County Galway (hereinafter called the "Principal Debtor") with goods in accordance with your current price list and terms and conditions of business then prevailing*", *etc*. The error or mistake arose because the Defendants were guaranteeing to pay their debts as opposed to that of Glynnco Limited.

5th April 2005

7. An Application for Credit Facilities for Glynnco Limited was signed by the Defendants as Directors of the Company on 5th April 2005. Under the section with the sub-heading "*SECURITY GIVEN OR PLEDGED*" a personal guarantee is ticked "*Yes*" and the planned opening date is 6th May 2005. Under the section with the sub-heading "*FINANCIAL REQUIREMENTS CHECKLIST*" a document completed in manuscript by Seán Carter sets out the "*Background/retailer's Plan for the business/Comments (to be completed by the Area Sales Team)*" and the sub-heading "*DETAILS COMPLETED BY*" is signed by Seán Carter and dated 1st April 2005.

11th April 2005

8. Again, it is common case between the parties that the error in the Personal Guarantee previously signed by the Defendants on 4th April 2005 was corrected on 11th April 2005, when the Defendants signed a Personal Guarantee which was witnessed by Seán Carter and provided *inter alia* as follows:

> "*In consideration of your agreeing at my request to supply (Company Name) Glynnco Ltd (Registered Office) Spar, Unit 1, Bluebell Woods, Oranmore, County Galway (hereinafter called the "Principal Debtor") with goods in accordance with your current price list and terms and conditions of business then prevailing and/or with grants, loans, or any other form of financial accommodation for whatever purpose (hereinafter called 'capital contributions"):*

I/We hereby agree with you as follows:

1. I/We shall pay you on demand, and hereby guarantee the repayment to you on demand, all monies which may become due to you from the Principal debtor for all such goods as you may from time to time supply and/or all capital contributions as you may give from time to time to the Principal Debtor.

2. The agreement shall be a continuing guarantee to you for all debts whatsoever and whensoever contracted by the Principal Debtor with you in respect of goods to be supplied and capital contributions given to the Principal debtor and my liability hereunder shall not be affected by your giving time or any other indulgence.

3. This Guarantee shall be binding upon me or in the event of my death upon my Personal Representative. I reserve the right for myself or for my Personal Representative by two months notice in writing expiring on any day to revoke this Guarantee in respect of all future dealings by the Principal Debtor with you after the expiration of the said notice, provided however, that such notice shall not operate to release me or my Personal Representative from any obligations arising hereunder prior to the said date of expiration.

4. Where the context so admits, any reference in this Guarantee to the singular number shall include the plural number

I have read and understand the terms of this Guarantee and agree to be bound thereby.

Yours faithfully,

[The Defendants' signatures, addresses and dates witnessed by Seán Carter on behalf of BWG Foods Ltd with his signature, address of BWG Foods Ltd and date, are then set out.]

NOTE: Two Company Directors Signatures are required."

9. As averred by the Defendants, the Spar Supermarket opened to the public in early May 2005 (the Application for Credit Facilities on 5th April 2005 refers to the opening date as 6th May 2005) and traded for a number of years, continuing the arrangement after the initial period of five years in the Trading/Credit Agreement.

10. However, in or around 9th March 2017, nearly 12 years later, the Company ran up arrears for goods supplied and charges applied by the Plaintiff which amounted to €63,655.87.

11. The Plaintiff's Solicitors wrote to each of the Defendants by letters dated 24th May 2017 stating as follows: "*[r]e: BWG Foods Unlimited Company v Sean Glynn and Bernadette Glynn Amount now due: €63, 655.87*", and further stating that they "*… have been instructed by our client that you are indebted to them in the above sum on foot of a Personal Guarantee Agreement dated 11th day of April, 2005 whereby you*

guaranteed certain payments to BWG Foods Unlimited Company. We wish to advise you that Glynnco Limited have now defaulted on payment. We are further instructed to call upon you to pay this amount, in accordance with the terms of the Personal Guarantee signed by you, directly to this office within the next 7 days. Should we fail to hear from you within that time we will commence legal proceedings without further notice. Should legal proceedings be necessary, we have instructions to enforce the Judgment by Registration and Publication in the Trade Gazettes, and to take whatever action is necessary to protect our Client's interest".

12. Proceedings subsequently issued. The Notice of Motion was dated 7th January 2020 (with an initial return date of 22nd February 2021) and was grounded on the Affidavit of Mr. Seán Carter, former Spar Regional Manager, sworn on 29th September 2020 (which was also in response to the contents of the initial Defence delivered on 26th September 2019). This was later supported in the first Affidavit of Mr. Don Kilmartin, Credit Manager of the Plaintiff, sworn on 11th December 2020, for the purposes of grounding the motion for summary judgment. The Defendants swore joint Affidavits on 17th February 2021, 8th February 2022 and 16th January 2023. The supplemental Affidavit of Don Kilmartin sworn on 24th January 2023 addressed the issue of the Personal Guarantee post-dating the Trading/Credit Agreement.

13. As stated above, after hearing the application, the Circuit Court (His Honour Judge Eoin Garavan) entered summary judgment on 10th May 2023 in the sum of €63,655.87 plus costs in favour of the Plaintiff against the Defendants.

SUMMARY OF THE PLAINTIFF'S POSITION

14. Insofar as the application for summary judgment is concerned, *inter alia*, the following points are emphasised on behalf of the Plaintiff: (i) it is contended that there is no dispute about the *calculation* of the sum of €63,655.87 (though the Defendants make the point that they do not owe that sum and that if it *is* owed (which the Defendants deny) they contend that it is owed by Glynnco Limited); (ii) by reference to the chronology set out above, it is submitted that the Plaintiff's proofs for summary judgment in accordance with Order 28, rr. 1 and 5 of the Circuit Court Rules are in order (including the Personal Guarantee dated 11th April 2005) and therefore the sum of €63,655.87 should be entered against the Defendants; (iii) while it is the Personal Guarantee signed on 11th April 2005 which is relied on in this application for summary judgment, the Personal Guarantee (albeit initially with an error) was signed by the Defendants on 4th April 2005, *three days* after signing the Trading/Credit Agreement on 1st April 2005; (iv) on 5th April 2005, an application for Credit Facilities for Glynnco Limited was signed by the Defendants, as Directors of the Company, and under the section with the sub-heading "SECURITY GIVEN OR PLEDGED" a reference to a Personal Guarantee is ticked "Yes"; and (v) having regard to (iii) and (iv), and because the Trading/Credit Agreement was signed within three days of the Personal Guarantee, the Plaintiff contends that the Personal Guarantee was in *consideration* of the Training/Credit Agreement and was for the same account number and same Credit Agreement, *i.e.*, the *consideration* for the Personal Guarantee was the invoices and goods delivered since 11th April 2005.

SUMMARY OF THE DEFENDANTS' POSITION

15. The Defendants *inter alia* state that: (i) the Trading/Credit Agreement of 1st April 2005 was a standalone contract/agreement which contains the elements of the consideration (*inter alia* agreeing to supply the Company with goods in accordance with the price list and on credit terms) and does not refer to, and was not conditional on, the Defendants signing Personal Guarantees, and that the Plaintiff made no mention or reference to any requirement for Personal Guarantees prior to, or at the time of, the signing of the Trading/Credit Agreement on 1st April 2005; (ii) on 4th April 2005 when Mr. Carter (on behalf of the Plaintiff) came to the Defendants' private residence and in response to a query from the Second Named Defendant as to why Personal Guarantees were being sought at this late stage, Mr. Carter stated that it was only for a short while as the business was a start-up business with no credit rating. The Defendants' position is that having been assured by Mr. Carter that the Personal Guarantees were for a short period only, namely 2/3 years, they signed the Personal Guarantee on the assurances and representations of Mr. Carter and not otherwise; (iii) further, on 11th April 2005, Mr. Carter again called, in the late afternoon, to the Defendants' private residence seeking to have the Personal Guarantees signed again, as the Personal Guarantees signed on 4th April 2005 mistakenly referred to Glynnco Limited and not the Defendants. The Defendants stated that they signed the amended Personal Guarantees in reliance on the same assurances as given on 4th April 2005 and that in the absence of such assurances, the Personal Guarantees would never have been signed; and (iv) there are, in summary, therefore, two main aspects of Defendants' Defence – first, the Defendants contend that the Plaintiff seeks to rely on a Personal Guarantee dated 11th April 2005 which

was obtained by alleged misrepresentation (inducement) from Mr. Carter, *i.e.*, that the Personal Guarantees were "… *only for a short while as the business was a start-up business with no credit rating*"; second, it is contended on behalf of the Defendants that the Personal Guarantee of 11th April 2005 was void and unenforceable for want of consideration and that past consideration was no consideration, and in this regard it is contended that the Trading/Credit Agreement of 1st April 2005 was a stand-alone agreement which contained the terms of the consideration.

RULES & APPLICABLE PRINCIPLES

Order 28 of the Circuit Court Rules: summary judgment

16. The summary judgment procedure in this application is provided for in Order 28 of the Circuit Court Rules ("CCR").

17. O. 28 r. (1)(a) CCR provides that where the Plaintiff's claim in a Civil Bill is for a debt or liquidated demand in money, and a Defendant has entered an Appearance or has delivered a Defence, the Plaintiff may apply to the Court for summary judgment against such Defendant in accordance with the provisions of O. 28 CCR.

18. O. 28, r. 3 CCR *inter alia* provides for an application to be made by motion on notice in accordance with the prescribed form scheduled to the CCR and grounded on an Affidavit made by the Plaintiff, or by some other person on its behalf who can swear positively to the facts verifying the Plaintiff's claim "… *and stating that in the Deponent's belief the Defendant has not a bona fide defence to the Plaintiff's claim,*

and that the Appearance has been entered and the Defence (if any) has been delivered solely for the purpose of delay."

19. O. 28, r. 5(a) and (b) CCR provides that upon the hearing of such application, judgment may be ordered to be entered for the Plaintiff unless the Defendant: (a) satisfies the Court that *prima facie* it has a good defence to the Plaintiff's claim; or (b) pays into Court to abide the result of the action such sum as may be deemed sufficient to entitle it to defend.

Legal principles

20. The well-settled legal principles in this application remain those set out by Hardiman J. in *Aer Rianta cpt v Ryanair Ltd (No.1)* [2001] 4 I.R. 607 and McKechnie J. in *Harrisrange Limited v Duncan* [2003] 4 I.R. 1.

21. In its recent judgment in *Leinster Leader Limited (In Liquidation) v Formpress Publishing Limited* [2024] IECA 15 at paragraph 30 of the judgment, the Court of Appeal (Woulfe J., Faherty J., and Haughton J.; judgment delivered by Haughton J.) summarised those principles as follows:

> "… *the well-established principles of law relating to when the court should grant summary judgment, or should send a claim, in whole or in part, to plenary hearing, were not in dispute in either court, and it is not necessary to restate them here at any length. They are the principles as enunciated by Hardiman J. in Aer Rianta cpt v Ryanair*

Ltd (No.1) [2001] 4 I.R. 607, and McKechnie J. in Harrisrange Limited v Duncan [2003] 4 I.R. 1. The power to grant summary judgment should be exercised with "discernible caution" and the test is whether there is a "fair and reasonable probability of the defendants having a real or bona fide defence". As McKechnie J. observed, "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." As Hardiman J. expressed it, the question is "is it "very clear" that the defendant has no case?". However "mere assertion" does not give amount to a bona fide defence. It was also accepted that the court can give judgment for part of the amount claimed and send the balance for plenary hearing where an arguable defence is demonstrated".

22. In *AIB Mortgage Bank and Everyday Finance DAC v Heffernan* [2022] IECA 288, the Court of Appeal (Woulfe J., Murray J. and Ní Raifeartaigh J.; judgment delivered by Woulfe J.). at paragraph 30 of the court's judgment similarly set out the principles as follows:

"*The Legal Principles*

30. In Promontoria (Arrow) Limited v. Burke [2018] IEHC 773, Barniville J. set out the following very useful summary of the applicable legal principles, which I gratefully adopt:-

"14. The legal principles governing the exercise of the court's jurisdiction to grant summary judgment are "well settled" (per Clarke J. in the Supreme Court in IBRC Limited v. McCaughey [2014] 1 I.R. 749 ("McCaughey")). They have been set out, discussed and applied in numerous judgments of the Superior Courts in recent years. I think it is fair to say that there was no real dispute between the parties as to the test to be applied.

15. The essence of the test was succinctly stated by Hardiman J. in the Supreme Court in Aer Rianta CPT v Ryanair Limited [2001] 4 I.R. 607 ("Aer Rianta"), as follows:

> *'...the fundamental questions to be posed on an application such as this remain: "Is it very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?' (per Hardiman J. at 623).*

16. Having noted that earlier cases such as First National Commercial Bank Plc v Anglin [1996] 1 I.R. 75 ("Anglin") focused on the issue of the credibility of the defence raised by the defendant in ascertaining whether there was a "fair or reasonable probability" of the defendants having a "real or bona fide defence", Hardiman J. noted that the issue of credibility arose very starkly in the cases referred to in Anglin and that ultimately the fundamental questions to be determined on an application for summary judgment were as set out by him.

In the Supreme Court in McCaughey, Clarke J. reemphasised what is meant by the "credibility" of a defence. He stated:

'(22) A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in Aer Rianta...be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the Court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in McGrath v. O'Driscoll...[2007] 1 ILRM 203, the Court may come to a final resolution of such issues. That the Court is not obliged to resolve such issues is also clear from Danske Bank a/s (t/a National Irish Bank) v. Durkan New Homes [2010] IESC 22... (Per Clarke J. at para. 22, p. 759).'

Clarke J. continued:-

'[23] Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them

> *to be. The sort of factual assertions which may not provide an arguable defence are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in Aer Rianta... it needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant.' (Per Clarke J. at para. 23, p. 759).*
>
> *This approach, derived from well-established authority, has been regularly and consistently applied by the Superior Courts.*"

23. Whilst the requirement placed on the Defendants of establishing a fair and reasonable probability of having a defence is a relatively low threshold (and accepted by the parties to be so), it is nevertheless a threshold. Accordingly, in assessing the Plaintiff company's claim for summary judgment in the amount of €63,655.87, I have to assess whether or not it is a straightforward claim or one that is required to be determined by a full trial/hearing in the Circuit Court (and if the latter, the consequences for costs, time and court resources: see the judgment of the Court of Appeal (Baker J., Whelan J., and Collins J.; Baker J. delivered the principal judgment with which Whelan J. agreed and Collins J. delivered a concurring judgment) in *Promontoria (Aran) Ltd. v Burns* [2020] IECA 87, per Collins J. at paragraph 4.

ASSESSMENT & DECISION

24. The issue in this case centres on the Personal Guarantees agreed to and signed by the Defendants and the respective, and differential, positions of the parties on 1st, 4th, 5th and 11th April 2005.

25. In considering these matters, I am entitled to look at substance of the matters and events which occurred on *inter alia* 1st April 2005 (Trading/Credit Agreement), 4th April 2005 (first signed Personal Guarantee (albeit erroneously), 5th April 2005 (application for Credit Facilities for Glynnco Limited signed by the Defendants in their capacity as Directors of the Company) and 11th April 2005 (corrected Personal Guarantee signed) as part of a single transaction or a series of inter-related and mutually supportive linked transactions: see Andrews and Millet, *Law of Guarantees* (Sixth Edition (2011) at paragraph 2-11).

Real or bona fide defence?

26. The Defendants signed Personal Guarantees on 4th April 2005 and 11th April 2005 and as mentioned, it is the Personal Guarantee which was signed on 11th April 2005, among other proofs, that grounds the Plaintiff's application for summary judgment.

27. In assessing, cautiously and carefully, the Plaintiff's application for summary judgment in this case, I am of the view, for the following reasons, that there is a fair and reasonable probability of the Defendants having a real or *bona fide* defence on the facts and in law, and in such circumstances the Plaintiff's application for summary

judgment is refused, *i.e.*, it is 'not very clear' that the Defendants have no defence, and in such circumstances, the matter should go forward to a trial/full hearing in the Circuit Court.

28. First, the question of whether the alleged claim by the Defendants that the Personal Guarantee dated 11th April 2005 was obtained by alleged misrepresentation from Mr. Carter on 4th and 11th April 2005 arising from a query by the Second Named Defendant, *i.e.*, that the Personal Guarantees were allegedly for a short period as the business was a start-up business with no credit rating, (which Mr. Carter denies), and its effect, if any, on the contractual relationship between the parties, involves a mixed question of fact and law. On the question of fact, the counter-assertions from the Defendants, on the one hand, and from Mr. Carter and Mr. Kilmartin, on the other hand, about what was said between 1st April to 11th April 2005 involves issues of fact which may in themselves be material to success or failure and raise issues which are not simplistic or easily determinable and are suitable for oral evidence at a full hearing/trial in the Circuit Court (see paragraphs 9(iv), (v) and (vi) of the judgment of McKechnie J. in *Harrisrange Ltd v Duncan* [2003] 4 I.R. 1, at pages 7 to 8). In *Aer Rianta cpt. v Ryanair Ltd* [2001] 4 I.R. 607, Hardiman J. referred with approval to the observations of Sir Peter O'Brien C.J. in *Crawford v Gillmor* [1891] LR Ir 238 that "*… final judgment should not be given on a motion for final judgment in any case where any serious conflict as to matter of fact or any real difficulty as to the matter of law arises.*"

29. Second, McKechnie J. in *Harrisrange Ltd v Duncan* [2003] 4 I.R. 1 (at paragraphs 9(i) and (ii)) referred to the fact that in assessing an application for summary

judgment, the court should look at the entirety of the situation and should assess not only the Defendants' 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. Such a situation arises here in the Affidavit of Seán Carter and in the replying Affidavits of the Defendants in relation to the context and substance of the Personal Guarantee and their differing views as to what took place on the evening of 4th April 2005 and 11th April 2005 and between the initial transaction in relation to the Trading/Credit Agreement on 1st April 2005 and the Personal Guarantee on 11th April 2005. This is further exemplified by the Plaintiff's emphasis on asserting that this is a essentially a 'documents case' and the submission on its behalf that in the event of the matter going to trial, a judge would be bound to reject the Defendants' evidence on the basis of the parol evidence rule: see *Macklin v Gracean & Co*. [1993] I.R. 61 and *O'Neill v Ryan* [1992] 1 I.R. 166 and the Plaintiff refers to the decisions of the High Court (Eagar J.) in the joined cases of *Deutsche Bank AG v H.B. Dennis Motors (Fairview) Ltd and Peter Dennis* [2019] IEHC 331 and in the High Court decision (McGovern J.) of *Ulster Bank Ireland Limited v Deane* [2012] IEHC 248.

30. The Defendants' position stands in direct contradiction. They assert that not only is the *sequence* of documentation not dispositive of the dispute but that the first document in time – the Trading/Credit Agreement dated 1st April 2005 – is a standalone contract which contains the consideration and is silent about the Personal Guarantee. Further, and perhaps more significantly in this context, is the Defendants' assertion that the Personal Guarantee that was signed by them on 11th April 2005 (and previously on 4th April 2005), during a visit to the Defendants' private residence,

was so signed solely on the basis of the alleged representations and assurances from Mr. Carter on 4th and 11th April 2005 that the Personal Guarantee was "… *only for a short while as the business was a start-up business with no credit rating*."

31. While there is a distance along the legal spectrum between alleged documentary evidence/the no parol rule, at one end, and alleged misrepresentation at the other end, my inquiry does *not* involve the weighing and final determination of competing facts (as per Baker J. in the High Court in *ACC Loan Management Ltd v Dolan* [2016] IEHC 69), but rather an analysis of (access to) the Affidavits (and exhibits) in order to assess whether a defence, that might reasonably be an answer to the Plaintiff's claim, has been made out *i.e.*, whether or not the Defendants have made out a *bona fide* or credible defence, and in this case I find that the Defendants' alleged assertions that they were assured that the Personal Guarantee was "… *only for a short while as the business was a start-up business with no credit rating*" meets that test of having made out a *bona fide* or credible defence: see *National Asset Loan Management Ltd v Barden* [2013] IEHC 32; [2013] 2 I.R. 28.

32. Third, and by way of further elaboration, it is important to bear in mind that in considering these matters, I am *not* assessing whether the Defendants have a defence which will probably succeed or whether its success is not improbable or the alleged strengths and weaknesses of any particular witness because of that person's legal experience. Rather, I must satisfy myself that it is "very clear" that the Defendants have no defence *i.e.*, I must look at "the credibility" of the defence.

33. In assessing this matter, I am therefore not engaging in any qualitative assessment of the cogency of whatever evidence may be advanced by the Defendants in its defence. Rather, the assessment is a bifurcated one, assessing first, whether the Defendants have established a fair and reasonable probability of a defence on the basis of facts known *at the time of this application* and second, whether there is a prospect that some material support for the Defendants' case would emerge if the case proceeded to a full hearing in the Circuit Court with oral evidence. In this regard, therefore, while there was some uncertainty as to the circumstances and timing of the delivery of the Defendants' Amended Defence (which I deem to have been delivered), it is clear that in their opposition to the Plaintiff's claim for summary judgment, the Defendants have contended, by way of Affidavits, that the Personal Guarantee of 11th April 2005 is void and unenforceable for want of consideration and that past consideration is no consideration and in this regard the Trading/Credit Agreement of 1st April 2005 was a stand-alone agreement. The question of consideration is a matter which requires further legal argument and evidence at full hearing before the Circuit Court. Whilst the decision of the Court of Appeal (Peart J., Irvine J. and Cregan J.; judgment delivered by Irvine J.)) in *Northern Bank Limited t/a Danske Bank v Michael Quinn and Brigid Quinn* [2016] IECA 96 is binding on this court, it is not very clear for the purpose of this application that the Defendants will not be able to distinguish that decision in *Northern Bank Limited t/a Danske Bank v Quinn & Anor* in a number of ways at a full hearing in the Circuit Court, including reliance on the principle that a point not argued is a point not decided (see *Laurentieu v Minister for Justice* [1999] IESC 47; [1999] 4 I.R. 26 at page 59, where Denham J. (as she then was) referenced *The State (Quinn) v Ryan* [1965] I.R. 70 (120)).

34. In this regard, Mr. O'Higgins SC (for the Defendants), for example, makes the point that the facts and arguments made in this application are very different to that argued in *Northern Bank Limited t/a Danske Bank v Quinn & Anor*, for example, the defendants in that case were litigants-in-person and did not argue the points which are made in this application including *inter alia* that the requirement for a Personal Guarantee for a bank loan was flagged from the beginning in *Northern Bank Limited t/a Danske Bank v Quinn & Anor* whereas in this application it is contended that it was raised after the Trading/Credit Agreement was entered into (albeit three days later (though erroneously)). It is further submitted, for example, that some of the legal authorities involving banks as litigants can be distinguished on the basis that the requirement for a Personal Guarantee was front and centre when the core transaction was being made whereas in this instance it is alleged that the request for a Personal Guarantee 'came out of the blue', during visits to the Defendants' private residence, and was a purported 'add-on' after the main Trading/Credit Agreement had been reached on 1st April, 2005 and that the Personal Guarantee was allegedly only signed by the Defendants on the express assurance from Mr. Carter that the Personal Guarantees were for a short period only, namely 2/3 years. Further, it is argued that the circumstances in this case are different in that there was either no consideration or past consideration in this case and where it is argued by the Defendants that the consideration referred to in the Personal Guarantee dated 11th April 2005 was exactly the same as that contained in the Credit/Trading Agreement signed previously on 1st April 2004, whereas in *Northern Bank Limited t/a Danske Bank v Quinn & Anor* the consideration was stated on the face of the guarantee, namely the bank's stated willingness to make or continue to make advances or otherwise give credit or afford

making further banking facilities to Cloughvalley Stores (N.I.) Limited of which company Michael Quinn and Brigid Quinn were directors.

Potential Oral Evidence

35. Fourth, there is also a prospect that some material support for the Defendants' case could emerge if the case proceeded to a full trial in the Circuit Court with oral evidence, including in relation to the following matters: (i) the Spar Trading/Credit Agreement dated 1st April 2005 does not contain any express reference to the requirement for a Personal Guarantee when it was signed by Seán Carter (on behalf of BWG Food Limited), Sean Glynn (on behalf of Glynnco Limited) and Bernie Glynn (on behalf of Glynnco Limited); (ii) the statement by Don Kilmartin (Credit Manager of BWG Foods Unlimited Company) in his Affidavit sworn on 24th January 2023 that "*[f]or the avoidance of any doubt, I say that the Plaintiff would not have signed the Credit Agreement but for the Defendants agreeing to sign a Guarantee (albeit eleven days later) and that good consideration was given by the Plaintiff to the Defendants in this regard*", *i.e.*, the Plaintiff's position is that without a Personal Guarantee (signed three – and (as corrected) eleven – days after the Trading/Credit Agreement) no business would be transacted between the parties, notwithstanding that a Trading/Credit Agreement had been signed on 1st April 2005; and (iii) the question of the context and period of duration of the Personal Guarantee which the Defendants assert was signed on the basis of the alleged assurance from Mr. Carter that it was only for short period (alleged as 2-3 years) as the business was a start-up business with no credit rating, whereas the duration of the Trading/Credit Agreement was for a period of five years and, further, paragraph 2 of the Personal Guarantee signed by the

Defendants on 11th April 2005 *inter alia* stated that "*[t]he agreement shall be a <u>continuing guarantee</u> to you for all debts whatsoever and whensoever contracted by the Principal Debtor with you in respect of goods to be supplied and capital contributions given to the Principal debtor and my liability hereunder shall not be affected by your giving time or any other indulgence.*" [Emphasis added].

36. Fifth, and finally, the recollection of the Second Named Defendant in relation to the discussion surrounding the Personal Guarantee on 4th April 2005 cannot, in my view, be characterised as 'mere assertion'. While the Defendants were involved in a "start-up" business, which at that time, had no track record, the disagreement between the parties arises, in particular, from their respective understandings of what was said or not said in the context and time period for the Personal Guarantee given by the Defendants on 11th April 2005 (and previously on 4th April 2005), which is at the heart of this application. In terms of assessing the credibility of a defence(s) in the context of an application for summary judgment – here alleged misrepresentation and alleged no or past consideration – a defence is not incredible simply because a court might not be inclined to believe it. Rather, it must be *clear* that the Defendants have no defence and, in this case, it is *not clear* to me that the Defendants have no defence. Again, in the context, and for the purposes of an application for summary judgment, subject to the exception of factual assertions amounting to unsupported mere assertions (which, in my view, are not applicable in this instance) the facts put forward by the Defendants must be taken at their height and these can be the subject of oral evidence and testing at a trial/full hearing in the Circuit Court.

37. I, of course, express no general view as to the credibility of the evidence posited by the Defendants and nothing is to be construed in this judgment as indicating any view.

CONCLUSION & PROPOSED ORDER

Decision

38. As I have determined that there is a fair or reasonable probability of the Defendants having a real or *bona fide* defence, for the reasons set out above, I shall set aside the Order of the Circuit Court (His Honour Judge Eoin Garavan) dated 10th May 2023 entering summary judgment in the sum of €63,655.87 and awarding costs in favour of the Plaintiff, refuse the Plaintiff's application for summary judgment and remit the matter to a full hearing before the Circuit Court.

Proposed Order

39. Accordingly, I shall set aside the Order of the Circuit Court (His Honour Judge Eoin Garavan) dated 10th May 2023 entering summary judgment in the sum of €63,655.87 and awarding costs in favour of the Plaintiff, refuse the Plaintiff's application for summary judgment and remit the matter to a full hearing before the Circuit Court in Galway.

40. I shall hear the parties further on the precise terms of the proposed Final Order and for that purpose I will put the matter in for mention before me on 19th April 2024 at

10.30, when I will address any further ancillary or consequential matters, including the question of costs as per O. 28, r. 9 CCR.