[2019] IEHC 758

THE HIGH COURT

[2013 No. 804 S]

BETWEEN

AIB LEASING LIMITED

PLAINTIFF

AND

NIALL QUIN & PETER CANTWELL

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 13th day of November, 2019

Introduction

1. This is an application brought by the plaintiff seeking summary judgment in the sum of €92,496.09 against the first defendant on foot of a contract of guarantee allegedly entered into by him on 18th April, 2008, whereby he guaranteed the repayments due from a company called Colinwell Systems Limited (hereinafter "the company") to the plaintiff in respect of a leasing agreement concerning goods allegedly used in the fit out of the company's showrooms.

2. The first defendant and the second defendant were Directors of the company. The second defendant also signed the leasing agreement and the contract of guarantee dated 18th April, 2008. On 16th March, 2016, the second defendant consented to judgment in favour of the plaintiff against him in the sum of €92,429.09, with no Order being made as to costs against him.

3. In resisting this application, the first defendant has made a number of serious allegations against the plaintiff and some of its employees. In summary, he alleges that the leasing agreement between the company and the plaintiff was a complete sham, in that it did not relate to goods which were required for the fit out of the company's new showroom as alleged in the agreement, but was in fact a means of providing working capital whereby the company could buy stock for sale in the ordinary course of its business. The first defendant has stated that he was unaware of the true nature of the leasing agreement until he was furnished with the relevant invoices in the course of the current proceedings. The first defendant further alleges that the evidence furnished to the Court by an employee of the plaintiff, Ms. Sandra Hempenstall, to the effect that she witnessed him signing the leasing agreement and the guarantee, is untrue, as he was not on the company premises on the day that she called out to it and as a result the document was left on his desk and he signed it at some later time when Ms. Hempenstall was not present. The first defendant further alleges that the alleged agency agreement allegedly dated 1st November, 2007, was a complete fabrication and was created at a time some number of months later. In all of these circumstances, the first defendant has submitted to the Court that it is not appropriate to grant the plaintiff summary judgment, but instead the matter should be remitted to plenary hearing.

4. There was a total of eleven affidavits filed in the course of this application. There were six affidavits filed on behalf of the plaintiff; the first defendant filed four affidavits sworn by him and one further affidavit sworn by a former bookkeeper of the company, in support of his case. It is not necessary to go through each of these affidavits in great

detail. However, given the seriousness of the allegations made by the first defendant, it is necessary to set out hereunder the broad parameters of the areas that are in contention between the parties.

The Plaintiff's Case

5. The plaintiff's action herein commenced by issuance of a summary summons on 14th March, 2013, seeking judgment in the sum of €92,496.09 on foot of the guarantee furnished by the first defendant on 18th April, 2008, in respect of the liability of the company under a leasing agreement of the same date, whereby the company leased goods which had been purchased by the plaintiff for use by the company in the fit out of its new showrooms. After entry of an appearance by a solicitor on behalf of the first defendant, the plaintiff issued a motion seeking summary judgment in the amount claimed in the summary summons by notice of motion dated 9th July, 2014. That application was grounded on an affidavit sworn by Ms. Dymphna Kenny on 3rd July, 2014. Subsequently, it was necessary for the plaintiff to submit a fresh grounding affidavit due to the fact that the previous deponent, Ms. Kenny, had not specified which averments in her original affidavit were made from her own knowledge and which were made from her examination of the books and records of the plaintiff. As Ms. Kenny had left the employment of the plaintiff, a fresh grounding affidavit in more or less identical terms to that sworn by Ms. Kenny, was sworn by Mr. Gordon Hill on 17th October, 2016.

6. The plaintiff's case as set out in the affidavits sworn by Ms. Kenny and Mr. Hill is reasonably straight forward. It was alleged that at all material times the defendants were Directors of the company, which used the trading name of Instacom. That company specialised in the provision of high-end audio and visual equipment. The plaintiff's case was that by agency agreement dated 1st November, 2007, the company as agent, agreed to lease from the plaintiff goods which were to be used in the fit out of a showroom, which goods were to be purchased by the bank at a price of €120,714.17. Under that agreement the company, as the bank's agent would purchase the goods on behalf of the bank. That agency agreement was signed by the second defendant on behalf of the company.

7. The plaintiff alleges that on 15th April, 2008, the company presented the bank with original invoices from the suppliers of the goods. These were exhibited in the affidavit sworn by Mr. Hill. On the same date, the company presented the bank with an invoice for the total price of the goods, being invoice number 21319. As appeared therefrom, the total price of the goods was €120,714.17.

8. It was alleged by the plaintiff that the company's accountant confirmed by letter dated 18th April, 2008, that the company had paid for and fully owned all the items on invoice number 21319. That letter was signed by Mr. Ger Gill, who described himself as "*Instacom Accountant*". It confirmed that all the items on the stated invoice were fully paid for and were fully owned by the company. It also confirmed that the goods were unencumbered.

9. By leasing agreement dated 18th April, 2008, the bank agreed to lease the goods to the company for a period of six months on the terms and conditions contained therein. Under those terms the company as lessee, agreed to keep the goods at all times in its possession and control and further agreed not to sell, assign, mortgage or otherwise dispose of or deal in or encumber the goods or any interest therein. The terms and conditions further provided that if there was a failure on the part of the lessee to comply with any of the terms of the agreement, the lessor was entitled to terminate the agreement. The terms further provided that it was expressly understood that ownership of the goods did not pass to the lessee by virtue of the agreement and that the lessee had no right to purchase the goods or otherwise to acquire the property therein. The leasing agreement was signed by both defendants.

10. By way of a guarantee and indemnity contained within the leasing agreement, the defendants in their personal capacity, jointly and severely agreed to pay on demand any sum due to the plaintiff under the leasing agreement which remained unpaid in breach of the terms of the agreement and to indemnify the plaintiff against all loss in connection with the leasing agreement. The leasing agreement was exhibited to the affidavit.

11. Mr. Hill averred that on or about 18th April, 2008, the plaintiff paid the company the sum of €118,036.20 on foot of invoice number 21319. He exhibited a statement of account in this regard. He went on to state that in breach of the terms and conditions of the leasing agreement the company failed to make the agreed rental payments on specified dates. In accordance with the terms and conditions of the leasing agreement, by notice addressed to the company dated 31st March, 2010, the plaintiff terminated the leasing agreement. A liquidator was appointed to the company on 26th May, 2010. Mr. Hill averred that the bank had not recovered possession of any of the goods.

12. It was stated that as of the date of termination of the leasing agreement the total sum of €92,496.09 remained due and owing by the company to the plaintiff pursuant to the leasing agreement. By letter dated 5th March, 2013, the plaintiff's solicitors demanded that the first defendant pay the bank the said sum, representing the full amount then due and owing by him to the plaintiff on foot of the contract of guarantee/indemnity. He exhibited copies of the letters of the demand that had been sent to each of the defendants.

13. Mr. Hill went on to state that despite the demand made, the defendants had failed, refused and/or neglected to pay the sum of €92,496.09, or any part thereof, due under and pursuant to the indemnity. He stated that that sum remained due and owing by the defendants to the plaintiff.

14. That is the plaintiff's case against the first defendant. The remaining affidavits that were sworn on behalf of the plaintiff, were sworn in response to allegations and issues raised by the first defendant in his replying affidavits, so it is appropriate to deal with these affidavits later in the narrative, when dealing with the first defendant's case.

The First Defendant's Case

15. As the first defendant has sworn four affidavits in response to this application, it is appropriate to take his main grounds of defence in a summary form, rather than go through each of the affidavits in turn.

16. The essence of the first defendant's defence is that he was unaware until he received the various invoices as exhibited to Mr. Hill's affidavit, that the leasing agreement and the contract of guarantee, both of which he signed on 18th April, 2008, were a sham transaction and as such were a fraud perpetrated on him. He states that the alleged agency agreement which was allegedly dated 1st November, 2007, could not have come into existence at that time, but was drawn up at a later date so as to support the contention that the leasing agreement was a *bona fide* leasing agreement in respect of goods purchased by the company for the fit out of their new showroom. He pointed to the fact that the date which had been initially typed in at the top of the agency agreement read the *"[blank] day of [blank], 2008".* The year had subsequently been written over so as to read *"2007".*

17. He further alleges that the leasing agreement which he signed simply described the goods as follows: "*Fit out of new showrooms as per invoice no 21319 dated 15/04/2008 from Colinwell Systems Limited*". The first defendant stated that at no time prior to the proceedings herein, did he have sight of invoice number 21319. When he was furnished with that invoice, when it was exhibited to the original grounding affidavit sworn by Ms. Kenny, it was clear to him that the goods documented therein were not the type of goods that one would purchase when fitting out a new showroom, but were in fact stock in trade that the company would purchase and sell on to its customers in the usual course of its business.

18. In response to that allegation, an affidavit was sworn by Ms. Sandra Hempenstall, an employee of the plaintiff, on 9th November, 2017. She stated that she had prepared the documents which were central to the proceedings herein, being the leasing agreement and the guarantee. She stated that she met with the defendants and witnessed the signatures of the defendants on both the agency agreement and the leasing agreement. She denied that the guarantee and indemnity, which had been furnished by the first defendant had been obtained from him by any false representation or fraudulent promise. She stated that it was apparent from the agency agreement that the company acted on behalf of the plaintiff in purchasing the assets required for the fit out of their premises. The company following purchase of the goods invoiced these assets to the plaintiff. The company were paid for the assets by the plaintiff and the assets were leased back to the company through the leasing agreement. The defendants had submitted the invoices to her on the basis that the invoices were for the fit out of the company's new audio/cinema showroom. It was based on the representation that had been made to her by the defendants, that she fitted out the leasing agreement by describing the goods in the manner contained therein. She stated that there was no suggestion of any kind made to her that the goods being purchased by the plaintiff were in fact stock. In this regard she referred to the clauses in the leasing agreement which prohibited the company from selling or otherwise disposing of the goods the subject matter of the agreement.

19. She stated that she had relied solely on the representations of the defendants, which were made on behalf of the company and she relied on their word when she was shown around the premises, that the goods described in the invoices had been used to fit out the company's new showroom. She explicitly denied that she was aware of the fact that the goods described in the invoices provided were stock, rather than the constituents of a showroom fit out, as alleged by the first defendant. She stated that the defendants had represented to her that the goods purchased were used and would be retained by them, as fit out of a new showroom and she believed what she had been told by them. The company issued an invoice to the plaintiff for the assets which also meant that the assets were no longer the company's to sell.

20. Ms. Hempenstall stated that the plaintiff does not provide funding for stock and certainly does not purport to lease stock to any party. The conditions of the Leasing Agreement reflected that position, since it would not have been possible for a lessee to comply therewith, if they were to sell the goods the subject of the agreement. She further stated that as the leasing agreement included the indemnity and as these were the first such agreements that the company and the defendants had entered into with the plaintiff, she was absolutely sure that she would have explained each and every section of the agreement and the indemnity to the defendants prior to their execution of same.

21. An affidavit was sworn on the same date by Mr. Matt Grimes, an employee of the plaintiff, wherein he set out efforts that he had made to reclaim possession of the goods upon termination of the leasing agreement. He stated that in a telephone call which the first defendant had with Mr. Cliff Kenny, the repossession agent employed on behalf of the plaintiff, the first defendant informed Mr. Kenny that all of the stock was gone and that there was nothing to recover. He exhibited a copy of the note of that telephone conversation. He also took issue with the description by the first defendant that he was primarily engaged in "*sales*" within the company and that he had little involvement in the finance elements of the company's business. He stated that that was surprising in light of the fact that the first defendant signed off on the company's accounts and was one of two signatories on the company's current account.

22. In his subsequent affidavits, the first defendant denied absolutely that he had signed the leasing agreement or the guarantee in the presence of Ms. Hempenstall. He described the circumstances in which he signed those agreements in his fourth affidavit sworn on 10th July, 2018. He stated that in or about April 2008, he had returned to the company's premises in Clondalkin after-hours from major company contract works in county Clare. He found the leasing agreement on his desk and he signed it in four locations, including in the space relating to the guarantee/indemnity. He stated that Ms. Hempenstall was not present in his office when he signed the leasing agreement or the guarantee. He stated that she never explained anything to him concerning that agreement. The leasing agreement was not accompanied by any other document when he signed it.

23. The first defendant averred that he did not deal with Ms. Hempenstall and he did not meet her at any time in relation to the transaction the subject matter of these

proceedings. He stated that he never submitted any invoice to Ms. Hempenstall. He never made any suggestion or representation to Ms. Hempenstall at any time concerning the goods. He did not conduct any negotiations with Ms. Hempenstall.

24. There is a very clear dispute between the first defendant and Ms. Hempenstall in this regard. In a further affidavit sworn by her on 14th May, 2018, she averred that the first defendant had signed the leasing agreement in four places to indicate his acceptance of the terms and conditions therein. He had never denied that he had signed the document in multiple places. She then stated: "*He signed the leasing agreement in my presence and I am absolutely certain of that.*". Later in the same affidavit she stated *"I am also absolutely certain each of the defendants signed the leasing agreement and indemnity in my presence.*". She stated further "*furthermore, I specifically recall dealing with both defendants when dealing with their application for funding by way of leasing agreement*".

25. In that affidavit she went on to state that it was not correct for the first defendant to assert that the plaintiff had "*called out*" to the company premises in an effort to *"sell money*". She stated that in fact, the company had approached Allied Irish Banks PLC seeking to finance the fit out of their premises and was referred to the plaintiff by Allied Irish Banks PLC to arrange for finance by way of a leasing agreement. She averred that if the defendants had sought funding for stock, Allied Irish Banks PLC could have progressed an application for a business loan facility. No leasing agreement would have been offered unless there were goods to lease.

26. On 9th July, 2018, an important affidavit was sworn on behalf of the first defendant by Mr. Gerard Gill. He was employed as the office and accounts manager by the company at the time of the transactions the subject matter of these proceedings. He had worked for the company for the preceding five years. His affidavit contains a number of significant averments. Firstly, he stated that the company commenced doing business with Allied Irish Bank PLC when it opened a company account with them on 6th March, 2008. He stated that AIB had made a number of attractive facilities available to the company to entice them to switch their business from another bank to AIB. This included increasing the overdraft facility to €100,000. He said that at that time the company wanted approximately €120,000 by way of additional finance to effectively replenish the working capital of the company, which had been spent on the fit out of the Clondalkin premises. He stated that he did not meet with the plaintiff, or its servants or agents until sometime after 6th March, 2008, in relation to this transaction. His recollection was that Allied Irish Bank PLC decided on the leasing finance option and that as a result of that Ms. Hempenstall became involved and visited the Clondalkin premises. He stated that he showed Ms. Hempenstall around the Clondalkin premises, but that had been in the nature of a general introductory tour of the company's premises and was not about and was not for the purpose of indicating any items that would be become the subject matter of a leasing agreement.

27. Mr. Gill stated that Ms. Hempenstall arranged for a meeting to sign documents in April 2008 at the company's offices. Mr. Gill and the second defendant were there when Ms.

Hempenstall arrived. She produced the documents that required signing. The second defendant signed them at that time. However, the first defendant was not in attendance, as he was away from the offices working at a customer's premises, which Mr. Gill believed were in county Clare. He stated that after the agreement had been signed by the second defendant, Ms. Hempenstall left the leasing agreement with Mr. Gill and he placed it on the first defendant's desk for his signature on his return.

28. Mr. Gill gave the opinion that the agency agreement was a fabrication, which had been created by the plaintiff and dated and filled in by the plaintiff in or about April 2008, or at a later date and only after he had provided a series of invoices and documents to the plaintiff on or about 18th April, 2008. He stated that the sum of €120,714.17 as a total amount, or sum of money did not exist and was not calculated until 15th April, 2008. This arose because Ms. Hempenstall explained to him that the advance could only be made once paperwork was produced by the company that would back a figure of approximately €120,000, which was the amount of the intended advance. The only requirement was that the sum would relate to cases where the company had already paid suppliers for goods. Mr. Gill stated that as a result of that, he worked with the company's computer accounts programme on 15th April, 2008, and extracted a list of substantial stock invoices that the company had paid for during the previous six months, which amounted in total to the sum of €120,714.17, inclusive of VAT. He stated that he also signed a letter dated 18th April, 2008, which had not been in his own words, but was in a format and with content, as had been directed by the plaintiff. Mr. Gill stated that many of the details contained in handwriting in the so called agency agreement and in the leasing agreement could only have been filled in by the plaintiff on or after 18th April, 2008.

29. Mr. Gill averred that the plaintiff, its servants or agents, knew at all material times that the agency agreement was a doctored fabrication created by the plaintiff and that the leasing agreement and stock invoices were a sham method of securing loan finance business between the plaintiff and the company and giving further effect to the transfer of the company's banking business to AIB bank. He stated that excluding the meeting described above, at which the second defendant signed the documents and at which Mr. Quin was not present, he was not aware of any other meeting or discussion or negotiation or communication between Ms. Hempenstall and either of the defendants in relation to the transactions the subject matter of these proceedings.

30. Finally, in his fourth affidavit sworn on 10th July, 2018, the first defendant outlined the history of the relationship between the company and Allied Irish Banks PLC. In essence, he stated that the company only switched its business to Allied Irish Banks PLC on 6th March, 2008, as a result of overtures that had been made to it by servants or agents of AIB. In this regard, he exhibited a statement from the business current account plus held by the company with AIB, which showed that the account was opened on 6th March, 2008. He went on to state that as far as he was concerned the company did not initially seek out leasing type finance from AIB. Rather, AIB Bank PLC decided that leasing type finance was the most appropriate option for the bank to provide further financing to the

company. He stated that in these circumstances, Ms. Hempenstall as an employee of the plaintiff, would have first visited the company premises in Clondalkin only after 6th March, 2008, in relation to this transaction. He stated that the company did not and could not have entered into any business relationship, or any contract, or any agreement or any arrangement whatsoever with the plaintiff prior to 6th March, 2008. For this reason, he alleged that the so called agency agreement dated 1st November, 2007, was a complete fabrication. He stated that it could have only have been created and produced by the plaintiff after 6th March, 2008, to suit what the plaintiff required as paperwork and could only have been completed by the plaintiff in its handwritten monetary amount after 15th April, 2008.

31. The first defendant stated that the plaintiff had purposely provided leasing finance to the company in the full knowledge that the entire arrangement was a sham involving stock, which could not and would not be retained by the company in the ordinary course of its trade.

Conclusions

32. The approach which the Court should take to an application such as this, is well settled in law. The relevant test was set down by the Supreme Court as far back as 1996 in *First National Commercial Bank v. Anglin* [1996] 1 IR 75. In that case Murphy J., giving the judgment of the Court, endorsed the following test laid down in *Banque de Paris v. De Naray* [1984] 1 Lloyd's Law Rep 21, which had been referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank PLC v. Daniel* [1993] 1 WLR 1453:

> *"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 defendants having a real or bona fide defence."*

33. The test set down in the *Anglin* case has been applied in a number of cases in the intervening years. The appropriate test was more recently set out in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 IR 607 in which case Hardiman J. stated as follows at page 623:

> *"In my view 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 defendants affidavits fail to disclose even an arguable case?"*

34. In *Harrisrange Limited v. Duncan* [2003] 4 IR 1, McKechnie J. having analysed the relevant case law, set out a helpful summary of the relevant principles. It is not necessary to set these out in this judgment, as they are very well known. The Court has had regard to all of these cases and to the principles set out in *Harrisrange* in reaching its determination herein.

35. The Court has also had regard to the dicta of Moriarty J. in *Allied Irish Banks v. Killoran* [2015] IEHC 850, where he warned that the Court should not accord substantive relief to defendants in summary judgment motions who raise spurious, fanciful or conjectural contentions to resist judgment. He advised that courts must be alert to defendants who seek merely to defer the evil day on the basis of arguments that do not pass muster, and must remain mindful of the *de minimis* rule in assessing summary judgment applications, see paragraph 56 of the judgment.

36. In reaching its conclusion on this application, the Court has had regard to the serious factual disputes that arise on the affidavits. The first of these concerns whether Ms. Hempenstall was present, as she alleges she was, when Mr. Quin signed the leasing agreement and guarantee/indemnity. Ms. Hempenstall has been very clear in her sworn affidavit evidence that she was present when the document was signed in four places by the first defendant. The first defendant has been equally clear in his affidavit evidence that she was not present when he signed the document. He states that he only signed the document upon his return to the company's premises after business hours, when he had returned from a site visit down the country. His account in this regard is supported by the affidavit of Mr. Gill. The Court must give significant weight to the averments contained in Mr. Gill's affidavit. While Mr. Gill was a relatively high ranking employee of the company for a number of years leading up to the transaction the subject matter of these proceedings, the company has been in liquidation for many years, so Mr. Gill would derive no financial or other benefit from failing to give an accurate and honest account of his recollection of the matters in issue between the parties. For the purpose of this application, the Court must take Mr. Gill at face value, as being an independent third party who provides significant supporting evidence to the first defendant in relation to his assertions concerning who was present when he signed the agreement.

37. Mr. Gill also gives significant evidence in relation to the veracity of the agency agreement dated 1st November, 2007. Even leaving aside the typographical error that has been corrected in handwriting concerning the year on which the agreement was purportedly drawn up, Mr. Gill has stated that it would not have been possible for the figure which is contained in handwriting in that agreement to have been inserted thereon in November 2007, for the simple fact that it was based on invoices that did not come into being until some months later, largely between December 2007 and March 2008. There seems to me to be considerable substance in this point.

38. The discrepancy that arises between the handwritten sum entered into the agency agreement of 1st November, 2007, and the subsequent invoices furnished some months later, tend to support his averments as to how he came to supply the various invoices and how the figure of €120,714.17 was arrived at, as set out at paragraph 8 of his affidavit sworn on 9th July, 2018.

39. The Court has also had regard to the content of the invoices as set out in invoice number 21319 as furnished by the company on 15th April, 2008. In argument before the Court, the first defendant stated that the majority, if not all, of the goods specified in that

invoice were normal stock in trade of the company, rather than the usual types of items that would be involved in the fit out of a new showroom. While counsel for the plaintiff in the course of a very able and detailed submission, argued that some of these goods may have been items used for display, they would therefore be regarded as goods required to fit out a showroom for a company engaged in the line of business that the company was engaged in. I am not sure that that argument holds good in respect of the bulk of the material set out in that invoice. This is a matter on which oral evidence will be necessary to explain what the items were and whether or not they were of a type that would be normally used in the fit out of a new showroom.

40. In the course of argument, the plaintiff's counsel, Ms. Connaughton-Deeny B.L., submitted that even at its highest, the assertions put forward by the defendant did not establish an arguable defence to the plaintiff's claim herein. Even if the Court accepted that the leasing agreement entered into between the company and the plaintiff was a sham leasing agreement, in that it related to stock rather than to fit out goods for the showroom, as alleged by the first defendant, that did not provide any defence to the plaintiff's action against him on foot of the contract of guarantee/indemnity.

41. In this regard she relied on the decision in *Yeoman Credit Limited v. Latter* [1961] 1 WLR 828. In that case a finance company had let a car on hire purchase to an infant. When the infant defaulted under the hire purchase agreement, the finance company sued the second defendant, who was an adult, under the contract of indemnity/guarantee. It was argued on behalf of the defendant that the agreement in question was a guarantee which, since it guaranteed a void contract, was itself void. The Court held that while the contract between the finance company and the infant was void having regard to the provisions of the Infant's Relief Act 1874, the contract entered into between the adult defendant and the finance company was a contract of indemnity, rather than a contract of guarantee and as such, it was enforceable against him and was not vitiated due to the fact that the contract between the infant and the finance company was void. Counsel submitted in this case, that even if the Court were to find that the agreement between the company and the plaintiff was a sham, insofar as it related to goods that were stock rather than goods to be used in the fit out of the new showroom, that did not vitiate the contract of guarantee/indemnity between the first defendant and the plaintiff.

42. While acknowledging the force of the argument based on the decision in the *Yeoman Credit* case, there is also authority for the proposition that where there has been misrepresentation, a surety will not be bound by his contract. In *Rowlatt on Principal and Surety*, 6th Edition, it is stated as follows as paragraph 5 – 05:

> *"A surety is not bound by his contract if it was induced by any misrepresentation by the creditor whether fraudulently made or not of any fact known to him and material to be known to the surety. Where the contract is voidable on this ground, the surety may have the contract set aside and any security pledged thereunder returned. It is no defence to claim that the surety might have found out the truth by making proper enquiry."*

43. In *Law of Guarantees*, 4th Edition, by Andrews & Millet, the learned authors give the following opinion at page 132:

> *"There are dicta which suggest that because of the nature of the contract of suretyship, it may only take a relatively minor misrepresentation to enable the surety to avoid the contract. In Davies v. London & Provincial Marine Insurance Company [1878] 8 Ch. D. 469 at 475 Fry J. expressed the view 'very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid'. However, it is clear that in the case of misrepresentation by concealment, or non-disclosure, only misrepresentation or concealment of matters which were material to the risk of the surety and which ought to have been disclosed will make the contract voidable. It is likely that the same standard of materiality would be applied to positive misrepresentations: if the misrepresentation is not material to the risk, the probabilities are that the Court would find that the surety was not induced by it to enter into the contract of suretyship."*

44. A broadly similar statement of the law in this jurisdiction is to be found in *The Law of Credit and Security*, 2nd Edition, by Mary Donnelly at paragraphs 19 – 81 *et seq*. Having regard to these general statements of the law, the Court cannot find that should the facts asserted by the first defendant be found to be correct; he would have no arguable defence to the plaintiff's claim herein.

45. Having regard to the disputed evidence and the discrepancies outlined earlier, the Court is satisfied that the first defendant has shown that he has an arguable defence that this transaction may not have been a normal leasing agreement in respect of goods purchased for the fit out of a showroom, but was rather a financing arrangement put in place to effectively provide funds to enable the company to provide stock in trade, that was dressed up as being a normal leasing agreement. It is not possible for this Court to reach any conclusion as to whether that was so, based on the affidavit evidence before it. However, I am satisfied that having regard to the fairly low threshold that exists at Irish Law as set out in the *Aer Rianta* and *Harrisrange* cases, it is not appropriate for the Court to award the plaintiff summary judgment, but that the matter should be remitted to plenary hearing. Accordingly, I refuse the plaintiff's application for summary judgment; I remit the matter to plenary hearing; I direct that a statement of claim be delivered within a period of four weeks and a defence is to be delivered within four weeks of receipt of the statement of claim.