

THE HIGH COURT

[2017 No. 464S]

BETWEEN

STAPLEFORD FINANCE DAC

PLAINTIFF

AND

YVONNE TUTHILL AND ALISON TUTHILL

DEFENDANTS

JUDGMENT of Mr. Justice MacGrath delivered on the 23rd day of January, 2020.

1. Proceedings in this matter were instituted by way of summary summons issued on 16th March, 2017. The plaintiff claims, in total, the sum of €143,364.86 against the defendants on foot of guarantees provided by them on the 22nd March, 2001, in respect of the debts of Adson Salons Limited ("*Adson*") to whom monies were advanced by way of facility letter dated 22nd March, 2001 by Anglo Irish Bank Corporation. The sum advance to the company was €250,000 to be repaid by instalments over 84 months.
2. It is claimed that by virtue of the provisions of the Credit Institutions (Stabilisation) Act 2010, the assets of Irish Nationwide Building Society were transferred to Anglo Irish Bank Corporation Limited on 1st July, 2011. Through a series of transactions and mergers, the Irish Banking Resolution Corporation ("*IBRC*") was created and this went into liquidation pursuant to the Irish Bank Resolution Corporation Act 2013 (Special Liquidation) Order on 7th February, 2013. Further, it is claimed that by virtue of a loan sale on 28th March, 2014, the special liquidators of IBRC assigned and transferred the benefit of the securities to the plaintiff.
3. Letters of demand were issued to the company on 7th December, 2015 seeking immediate repayment of the sum which was then due of €134,760.44. On 16th December, 2016 the plaintiff served a demand on the defendants in respect of their alleged liability for sums due on foot of the guarantees.
4. By application pursuant to notice of motion dated 5th April, 2018 the plaintiff seeks an order pursuant to O. 37 of the Rules of the Superior Courts for judgment against the defendants in the sum of €143,364.89.
5. The application is grounded on the affidavit of Mr. John Burke, director of the plaintiff. He outlines the history of the creation of the loan to the company, the guarantee provided by the plaintiffs and the transfer of the securities to the plaintiff. Mr. Burke exhibits relevant documentation including the facility letter of 22nd March, 2001, signed by the defendant as directors of Adson and by resolution of the same date, authorising the company to borrow the money.
6. In a replying affidavit sworn on 3rd May, 2018, the first named defendant raised an issue that the letter of guarantee upon which the plaintiff was seeking to rely had not been deposed to by Mr. Burke and it was nowhere exhibited in the proceedings. In a further affidavit of 9th November, 2018, the first named defendant on her own behalf and on behalf of the second defendant averred that she did not accept that the guarantee was

capable of being transferred or assigned to a third party in the manner in which is alleged to have occurred in this case.

7. By way of affidavit of 17th December, 2018, entitled "*Affidavit of Debt*", Mr. Burke, updated the amount of the claim and in a further affidavit sworn by him on 2nd April, 2019, which has been filed pursuant to leave granted by the court, he avers that the defendant admitted liability in a letter of 12th December, 2015. He also exhibits letters dated 19th December, 2016 and 22nd December, 2016 which it is maintained are attempts to resile from the admission contained in the letter of 12th December, 2015.
8. Importance has been attached to the letter of 12th December, 2015, which was written in reply to the plaintiff's letter of 7th December, 2015, in which the plaintiff purported to call in the guarantee. Ms. Yvonne Tuthill expressed surprise at receiving the letter of 7th December, 2015 because: -

"it was my clear understanding that Anglo Irish Bank had agreed to remove my name as a Guarantor on the facility which was granted to Adson Salons Limited and, not to myself as indicated in the first paragraph of your letter.

The release was requested by me in 2009 after my own company, Inishbirch Limited, had ceased trading and it was my personal shareholding in Inishbirch which had formed the security for the original guarantee offered to Anglo Irish Bank."

9. Ms. Tuthill, in further correspondence replying to letters sent to her on the 15th and 16th December, 2016, referred to her letter of the previous year advising and reiterated that she had no liability. That she was written to one year later seeking payment within seven days was, as she described, unacceptable as she was a retired person living on a pension. She denied any liability and advised that "*their own records will confirm this*".
10. The denial of liability was reiterated in the letter of 22nd December, 2016, in which Ms. Tuthill stated that she never signed a personal guarantee and that in fact the only security afforded to Anglo Irish Bank was her shareholding in Inishbirch Limited, a position which was understood and accepted by Anglo Irish Bank when the relevant loan facility was granted in March, 2001.
11. In a replying affidavit sworn on 12th April, 2019, Ms. Tuthill states that any suggestion that she had admitted liability in the letter dated 12th December, 2015 was entirely misconceived and that in fact the letter stipulated that it was her shareholding in Inishbirch Limited which formed the security for the guarantee and Inishbirch Limited was dissolved on 20th January, 2012.
12. Ms. Tuthill positively avers that she never signed a personal guarantee. She states that this is also the position of the second named defendant and maintains the plaintiff's claims are based on a bald assertion that a personal letter of guarantee was executed on 22nd March, 2001. No letter of guarantee has ever been produced to the court and she

avers that any documentary evidence before the court is entirely consistent with her position.

13. In submissions to the court, counsel for the plaintiff, Mr. Hayes B.L., contends that the denials of the defendants amount to no more than bald assertions and that no legal basis for the proposition that the guarantee is not capable of transfer has been made on affidavit. Significant emphasis is placed on the first named defendant's letter of 12th December, 2015, as an admission of liability on foot of the guarantee. It is further submitted that it is implicit from the contents of that letter of 12th December, 2015 that the guarantee had been executed by the first defendant and that no issue arose in relation to the transfer of the interest in the guarantee to the plaintiff. It is also submitted that the first named defendant has failed to refer to any documentation in support of her contention that she was removed as guarantor. It is also argued that certain payments in the sum of €1500 were made on 27th March, 2013 which payment constitutes an admission of the defendant's liability to repay the debt. Those repayments are evident from the statements issued by IBRC in respect of Adson's loan.
14. I have considered those bank statements. It appears that payments were made into the account of the company between 2012 and 2015. But it seems to me that the importance of this cannot be overstated in the context of the claims on foot of the alleged guarantee, given that repayments were made in respect of the company's debt.
15. Counsel for the defendant submits that the plaintiff has failed to produce to the court the guarantee upon which it relies and which it is alleged has been executed. Insofar as it is contended that what is contained in the body of the facility letter constitutes the guarantee, counsel submits the plaintiff has not provided satisfactory proof as required by the provisions of s. 2 of the Statute of Frauds 1965 and, he further submitted that there is no term or condition in the guarantee which confers a right to assign or transfer the benefit of the guarantee to a third party.
16. The facility letter of 22nd March, 2001 is directed to the directors of the company, under the heading "*borrowers acceptance*", it contains the signature of the defendants. In fact, their signatures appear in a number of places on that document. Thus, there is a signed acknowledgement and confirmation of the directors understanding of the terms of the agreement. Signatures are provided on behalf of the company. The second part of that page is signed by the defendants confirming that they had read the facility letter and the bank's general conditions which were stated to form part of the agreement between the borrower and the bank. They confirmed that they fully understood the terms of the agreement and acknowledged that they were guaranteeing the performance by the borrower of its obligations under the agreement to the bank. They also acknowledged that they had been given due opportunity to take independent legal advice on the effect of the agreement and had waived the opportunity to take such advice.
17. Clause 3 of the facility letter provides that the security should be: -

- a) *the personal guarantee of Mrs. Yvonne Tuthill supported by her 90% shareholding in Inishbirch Ltd; and*
- b) *the personal guarantee of Ms. Alison Tuthill.*

(together the "Security Documents")"

18. Turning then to the general conditions of the agreement, condition number 8 is entitled "security" and provides at clause 8.1 that: -

"as security for the obligations of the Borrower to the Bank hereunder, the bank requires the Borrower to furnish the security set out in the Facility Letter, which security shall be in form and substance acceptable to the Bank and its solicitors."

19. Clause 8.2 provides that the security set out in the facility letter from time to time shall secure all sums now or from time to time due and owing by the borrower (the company) to the bank, whether such liabilities arise from the borrower's own borrowings or from its liability as guarantor of other borrowings from the bank. Clause 16 provides for joint and several liability on the part of the borrower.
20. There is no disagreement between the parties as to the principles applicable in an application such as this. As described by Irvine J. in *AIB v. Stack* [2018] IECA 128, the court must be satisfied that it is very clear that the defendant has no defence of the proceedings, otherwise the case ought to be adjourned for plenary hearing. She also stated that the threshold which the defendant must achieve in order to satisfy the court to transfer the case to plenary hearing is a low one. Nevertheless, the suggested defence must amount to more than a mere assertion. There must be substance to the proposed defence and it must be based on facts which, if true and established, would amount to a defence. It also must be credible.
21. Applying these principles, the defendants contend that the defence which they wish to advance is demonstrably stateable as a matter of law.
22. Reliance is placed on the decision in *Boyle v. Lee* [1992] 1 I.R. 555 where the Supreme Court clarified that in order to satisfy the requirements of s. 2 of the Statute of Frauds an agreement must contain all of the essential terms which have been agreed. It is submitted that what is described as a "seven line paragraph" which the plaintiff relies upon in the document does not contain the material terms and is no more than a general acknowledgement of the security to be provided. Therefore, it is submitted that there has been a breach and non-compliance with s. 2 of the Statute of Frauds. Significant emphasis in this regard is placed on the plaintiff's failure to produce the guarantee. It is submitted that this is a necessary proof which has not been satisfied. It is further submitted that the logical interpretation of the agreement is that the guarantee was to be a stand-alone document, distinct from the facility letter and that it is not appropriate for the plaintiff to attempt to argue that the seven line paragraph, is in fact a letter of guarantee. It is submitted that an attempt to rely on this paragraph, containing no

material terms, as constituting a guarantee to secure a commercial loan is completely implausible. Reference is made by the defendants' to situations where a separate guarantee and indemnity was executed by the parties. It is therefore submitted that the loan facility contains no more than an acknowledgement of the security to be provided, something which is distinct from the security itself.

23. It is also submitted that it is clear from the description of the security in the special conditions of the facility letter that a distinct letter of guarantee was to be prepared by IBRC bearing in mind clause 3 of the facility letter which stated that the first named defendant's guarantee was to be supported by her 90% shareholding in the other company. The seven line paragraph upon which reliance has been placed, it is submitted, makes absolutely no reference to that company or of the first named defendant's shareholding in that company. There is no explanation for this omission. Therefore, it is submitted that the plaintiff has failed to verify its claim or to discharge the obligations of the Statute of Frauds.
24. In *Danske Bank a/s trading as National Irish Bank v. RQB Ltd (formerly known as Redquartz Boundary Ltd)* [2010] IEHC 347, McGovern J. reiterated that the guarantee must be strictly construed with ambiguities being resolved in the guarantor's favour. Counsel for the defendants submits that the terms of the guarantee must therefore be strictly construed. Ambiguities ought to be resolved in favour of the guarantor. It is impermissible for the plaintiff to attempt to read the terms of the facility letter into the guarantee. There are essentially two entirely distinct contracts and s. 2 must be strictly construed. Similar type guarantees were considered in *Stapleford Finance v. McEvoy* [2018] IEHC 99 where separate guarantees were executed. It is thus contended that as with the case of many loan facilities, this facility contains a mere acknowledgement of the security to be provided as distinct from constituting a guarantee in itself. It is contended that the alleged guarantee upon which the plaintiff purports to rely in this case omits to include matters such as the limited nature of the guarantee, whether it extends to interest and costs over and above that limit, whether the guarantee is offered jointly and severally, the timing and the manner for the calling in of the guarantee, whether it is one of a continuing nature, the general conditions applicable and the role of the defendant's shareholding in Inishbirc Limited. This latter consideration, in turn gives rise to the question of whether the first defendant could have any personal liability on foot of the alleged guarantee. Further, it is contended that a term conferring a right to transfer the benefit of the facility letter and the guarantee to the plaintiff, is material and ought to have been set out in the guarantee itself, in accordance with the decision in *Boyle v. Lee*.
25. It is further disputed that the first named defendant made any admission of liability and if anything, it is submitted the correspondence is to the contrary. It is further denied that any repayment of the principal debtor cannot constitute an acknowledgement of liability on foot of the guarantee.
26. In my view, this latter submission must be correct. On the basis of the evidence now before the court of the principal debt having been paid, cannot be construed as evidence

of admission of liability on foot of the guarantee. Indeed, these payments appear to have been made in advance of the liability alleged to arise on foot of the guarantee by virtue of the demand issued on 16th December, 2016.

27. Having considered the submissions of the parties, and the authorities upon which reliance has been placed, it is clear that the terms of the guarantee, as a matter of law, that any ambiguity or lack of clarity surrounding the guarantee ought to be resolved in favour of the guarantor. In this case, the guarantee upon which the plaintiff seeks to rely is that which is contained in a document which, in sequence, appears and arises immediately after the main facility letter, prior to that part of the document which contains the resolution executed by the company and also prior to where the general conditions are contained. The facility letter states that if there is any conflict between the terms of the facility letter and the general conditions, the terms of the facility letter shall prevail. The general conditions do not appear to make any specific reference to the terms of the guarantee and it seems to me, on the face of it, it is arguable that given the reference to the facility letter under the heading "*borrowers acceptance*", that they must be read together. That being the case, there is a potential for a conflict between the wording of the guarantee as relied upon by the plaintiff, and clause 3 of the facility letter. The court does not have to be satisfied that this is a case which will ultimately be made out at trial, merely that it is arguable. Bearing in mind the constitutional rights of the first named defendant to defend proceedings brought against her, I am not satisfied that it is clear that the defendant has no arguable defence either as a matter of law or as a matter of fact. The position of the second named defendant is somewhat less clear. She has not sworn any affidavit but it seems to me that in the interests of justice the entire matter should be referred to plenary hearing where all issues concerning the liability of the defendants and the validity of the guarantees can be agitated.
28. In all the circumstances, I must refuse the relief sought and transfer the matter to plenary hearing.