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THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2020] IECA 211

Court of Appeal Record No 2019/198

The President

Costello J

Collins J

BETWEEN

ALLIED IRISH BANK PLC

Plaintiff/Respondent

AND

SEAN CUDDY

Defendant/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on the 30th day of July, 2020

PRELIMINARY

1. On 1 April 2019 the High Court (Keane J) granted summary judgment to the Plaintiff/Respondent (hereafter "*AIB*") against the Appellant (hereafter "*Mr Cuddy*") in the sum of €1,500,000 on foot of a guarantee dated 3 September, 2009.

2. Mr Cuddy appeals that judgment, contending that he has an arguable defence to AIB's claim on two grounds and that the claim ought therefore to be remitted for plenary hearing. The two grounds relied on by Mr Cuddy are as follows:

    - that AIB's claim is statute-barred ("*the Limitation Ground*")

    - that Mr Cuddy entered into the guarantee on foot of an earlier (and continuing) representation to the effect that his liability as guarantor would be limited to recourse to a warehouse owned by him in Oranmore, County Galway and that there is a binding collateral contract to that effect ("*the Limited Recourse Ground*")

3. For the reasons set out in this judgment, I would allow the appeal, set aside the judgment entered by the High Court and remit AIB's claim for plenary hearing, but limited to the Limited Recourse Ground only.

FACTS

4. Mr Cuddy was owner, and he and his wife were directors, of Cuddy Development Limited ("*the Company*"). In January 2003 AIB issued a letter of sanction to the

Company offering two facilities in the combined amounts of €2,291,000. The Company accepted the facilities on 29 January 2003. The funds were advanced to finance *inter alia* the purchase of a property at Barna, County Galway ("*the Barna property*"). As security for the loan the Company was required to charge the Barna property in favour of AIB.

5. In 2007 the Company required further finance to complete the development of apartments on the Barna property. On 13 November 2007 there was a meeting attended by the appellant, accompanied by his son and also attended by the appellant's financial advisor, Mr. Tom Comerford, on behalf of the Company and Mr. Fiachra Garvey and Mr. Liam Byrne from AIB.

6. Mr Cuddy says on affidavit that, at that meeting, Mr Garvey and Mr Byrne indicated that AIB might require additional security and asked whether Mr Cuddy would be willing to offer his warehouse in Oranmore as security. Mr Cuddy says that he made it clear that he was not prepared to put his personal assets, particularly his family home, at risk and says that he was assured that additional security required was *"limited to the warehouse and nothing else*". That warehouse was, he says valued at approximately €1 million at that time. As a result of this meeting and certain further exchanges between his financial advisor (Mr Comerford) and the Bank, Mr Cuddy says that it was his clear understanding that the Bank's recourse on foot of any guarantee would be limited to the Oranmore warehouse. That was, he avers, his understanding "*at all material times*" and he says that it was on the basis of AIB's

representations to that effect that he and his wife executed a form of guarantee on 1 October 2008.[1]

7. Mr. Comerford states on affidavit that, at the meeting on 13 November 2007, Mr. Byrne and Mr. Garvey:

> *"specifically stated that the Bank's recourse to the Defendant would be limited to the warehouse premises and that he would not be personally liable for the company's debts beyond that asset. I recall the Defendant reluctantly agreed to offer the warehouse as additional security if it was absolutely necessary."*

8. Mr Garvey and Mr Byrne swore affidavits in response by in which they address the meeting of 13 November 2007. Mr Garvey states that he does *"not specifically recall discussing a Guarantee with Mr Cuddy or Mr Comerford."*. He goes on to explain that neither he nor Mr Byrne "*had authority to either offer or agree such a limited recourse guarantee even if this was discussed*." His role was simply to prepare and submit an application to AIB's credit committee whose function it was to determine if a loan would be sanctioned and if so on what terms.

9. For his part Mr Byrne states that he is "*certain that neither Mr Garvey nor I made any representations to Mr Cuddy, or anyone else present at that meeting, that the*

[1] It appears from the affidavits that the Cuddys executed an earlier guarantee, in March 2008 but that is not the guarantee relied on by the Bank in these proceedings.

Plaintiff was agreeing to limit its recourse to the Warehouse only." But it is not clear to what extent that certainty is the product of any actual recollection of the meeting. Mr Byrne explains that neither he nor Mr Garvey had authority to offer or agree any limitation on recourse. Such a request would have to be made to and approved by credit committee. It appears to be on that basis that Mr Byrne's stated certainty rests. He did not have the authority to make, and therefore did not make, any representation. "*Rather* [so Mr Byrne continues]:

> *"at its very height, I would have advised Mr Cuddy that this would be requested in the loan application to go the Credit Committee. Ultimately, as is apparent from the Letters of Sanction issued by the Plaintiff, any such request was not granted by the Plaintiff."*

In any event, it will now be a matter for the High Court to determine, on the basis of whatever evidence that it may hear (including cross-examination) what was said at the meeting on 13 November 2007.

10. On 3 December 2007 AIB issued a letter of sanction offering *inter alia* two facilities in the combined amounts of €5,113,000. The letter required that all security was perfected prior to draw down and it specified the security required which included:

> *"3. Letter of guarantee for €1,500,000 in favour of AIB Bank to be signed by Sean and Philomena Cuddy in respect of the obligations of Cuddy*

Developments Limited, supported by: 7,200 sq. ft. commercial unit at Oranmore, Galway vesting in the joint names of Sean and Philomena Cuddy."

11. Mr Comerford says on affidavit that after he had sight of the letter of sanction he telephoned Mr Byrne to discuss this requirement and that he questioned the inclusion of a guarantee in the letter of sanction in circumstances where it had not previously been discussed. He avers that Mr. Byrne specifically informed him that the commercial lending department of the respondent requested that the deal be structured in this way (a personal guarantee supported by a mortgage over the warehouse) and that Mr Byrne "*assured me that the paperwork relating to the guarantee would state that same was limited to the warehouse and that the Bank would have no further recourse"* against Mr Cuddy.

12. To this Mr Byrne re-iterates the point above regarding the limited authority that he had. Again, he is "*certain*" that, in any conversation he may have had with Mr Comerford after the November meeting, he made it clear that his only role was to pass any request to the credit committee and he "*had no authority to alter the terms of a Letter of Sanction … once issued."* Again, it is not clear from Mr Byrne's Affidavit whether or not he actually recollects any phone conversation with Mr Comerford concerning the letter of sanction. That is a matter that can be explored at trial.

13. It is common case that there were no further negotiations between the parties and that no revised letter of offer issued from AIB. That is, understandably, relied on by the Bank.

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14. In March 2008 the Company accepted the letter of sanction in the form issued in December 2007 and executed the required mortgage debenture. Mr Cuddy and his wife also executed a guarantee in favour of AIB in respect of the liabilities of the Company which provided that:

> *"The total amount recoverable from the guarantee shall not exceed the sum of €1,500,000 together with interest thereon from time to time....from the date of demand by the bank upon the guarantee for payment until full discharge."*

There is no dispute but that recourse under the form of guarantee executed by Mr and Mrs Cuddy was not limited to the Oranmore warehouse. Execution of the guarantee by them was witnessed by their solicitor, Miss Clare Campbell. Mr and Mrs Cuddy also accepted the letter of sanction and executed the mortgage debenture on behalf of the Company in their capacities *qua* its directors. Again – understandably – the Bank places significant emphasis on the fact that Mr Cuddy executed these documents without raising any issue about the scope of the guarantee.

15. The facilities were subsequently drawn down by the Company.

16. Mr Cuddy says that on 1 October 2008 he and his wife executed a further form of guarantee in favour of AIB. He says that Mr. Byrne attended at their home and at the time Mrs. Cuddy was seriously ill, and continues:

> *"I acted on foot of the bank's representations and in all the circumstances, I trusted that the content of the document reflected by discussions with the bank that security was limited to the warehouse in Oranmore, County Galway."*

The reference to "*representations*" here must, I think, be read as referring back to the representations said to have been made at the meeting in November 2007 and on the subsequent telephone call between Mr Comerford and Mr Byrne. For his part, Mr Byrne agrees that he witnessed the execution of a further guarantee by Mr Cuddy on 1 October 2008 but says that to the best of his knowledge it was not signed by Mrs Cuddy. Mr Byrne says that he is not clear why a further guarantee was required in October 2008 but speculates that it may have been because the March 2008 guarantee "*was not immediately to hand."* In any event, Mr Byrne emphasises, AIB is not relying on any guarantee of 1 October 2008 in these proceedings. That guarantee, it may be noted, does not contain any provision limiting AIB's recourse to the Oranmore warehouse.

17. As of August 2009, the Company required further funds. A further letter of offer issued on 17 August providing for further funding of development on the Barna property. The facilities provided for in that letter were repayable *"[on] demand and*

at the pleasure of the bank subject to clearance in full by 16/12/2009 from full net of vat sale proceeds from sale of apartments at Cappagh Road, Barna, County Galway." That offer letter stipulated as a required item of security:

> *"Letter of guarantee for €1,500,000 in favour of AIB Bank from Sean Cuddy for the obligations of Cuddy Development Limited, supported."*

18. That letter was accepted on behalf of the Company by Mr Cuddy and his son (who had become a director of the Company following the death of Mrs Cuddy). On 3 September 2009 Mr Cuddy executed the guarantee upon which AIB seeks judgment in these proceedings ("*the Guarantee*"). The Guarantee is for the obligations of the Company to AIB and is for the sum of €1,500,000. It does not contain any provision limiting AIB's recourse to the Oranmore warehouse.

19. In light of the argument about the Limitation Ground, Clause 12 of the Guarantee should be noticed. It provides as follows:

> *"This guarantee shall apply to all monies in fact borrowed from the bank by or debited to the account of the borrower notwithstanding that such monies (or part thereof) may not be or may cease to be recoverable from the borrower by reason of:*

> *...(iii) The operation of the Limitation Acts or of any provision of any enactment for the time being in force in relation to liquidation, bankruptcy, insolvency or dissolution.*
>
> *And if and so far as any such monies may not be recoverable by the bank from the borrower the guarantor shall indemnify the bank in respect thereof and shall be liable therefore as principal debtor."*

20. On 15 September 2009 Mr Cuddy executed a mortgage over the Oranmore warehouse in favour of AIB, witnessed by a solicitor. The mortgage was registered as a charge on Folio 26121F Co. Galway the following month.

21. By letter of demand dated 7 April 2014 AIB demanded "*the immediate payment of €1,500,000 plus additional interest accruing in accordance with the guarantee until the date of payment of the said sum in full at the rate or rates provided for in the guarantee".* It should be noted, however, that this letter was not before the High Court and the evidence before that Court suggested that AIB first demanded payment on foot of the Guarantee on 10 January 2017. The significance of these dates will become apparent in due course.

22. The Oranmore warehouse was sold in 2014. The net proceeds amounted to €213,941 and that amount was remitted to AIB in reduction of the Guarantee liabilities. No credit was allowed for that reduction when these proceedings issued in April 2017 and the credit was not brought to the attention of the High Court Judge as it ought to

have been. Consequently, the Judge gave judgment against Mr Cuddy in the full amount of the guarantee (€1,500,000) when, on any view, AIB was not entitled to judgment in that amount.

THE JUDGMENT OF THE HIGH COURT

23. Keane J gave a lengthy *ex tempore* judgment in which set out in detail his reasons for granting summary judgment. He identified the relevant test as that set out in the Supreme Court's decision in *Aer Rianta v Ryanair Limited* [2001] 4 IR 607 and referred also in that context to the judgment of the High Court (McKechnie J) in *Harrisrange Limited v Duncan* [2003] 4 IR 1. Keane J identified the two grounds maintained on Mr Cuddy's behalf as to why AIB's claim should be adjourned for plenary hearing (another ground had been advanced but in the course of argument it was accepted that it could not succeed), which are the two grounds relied on before this Court. He examined the affidavit evidence in very considerable detail, though emphasising that he was conscious of the need to take the evidence of Mr Cuddy and Mr Comerford at its height.

24. The Judge first addressed the Limitation Ground. He noted the submission of counsel for Mr Cuddy that the Company's facilities were repayable not later than 16 December 2009 (that being the date specified in the facility letter for repayment in the absence of any prior demand) and that, accordingly, any claim that AIB had against the Company for the repayment of the facilities had become statute-barred in mid-December 2015, well before AIB demanded payment on foot of the Guarantee

by its letter of 10 January 2017 (as already mentioned, the earlier letter of demand dated 7 April 2014 was not before the High Court). However, the Judge held that this did not provide any arguable defence, essentially on the basis that, having regard to the decision of the High Court in *Bank of Ireland v O' Keefe* [1987] IR 47, time began to run for the purposes of AIB's guarantee claim only from the date of the demand (and therefore the guarantee claim was not statute-barred) and that, having regard to the "*express and unequivocal*" terms of Clause 12 of the guarantee (already set out above), AIB was entitled to enforce the Guarantee against Mr Cuddy regardless of whether its claim against the Company was statute-barred.

25. The Judge then considered the Limited Recourse Ground. Noting the submission made on behalf of Mr Cuddy that the affidavit evidence was sufficient to give rise to an arguable defence, the Judge indicated that *"the difficulty that Mr Cuddy runs squarely into I'm afraid in this regard is the established train of jurisprudence that deals with the application of the parol evidence rule*." The Judge then referred to a number of authorities which had been relied on by AIB, including *Ulster Bank v Deane* [2012] IEHC 248, *Tennants Building Products Ltd v O' Connell* [2013] IEHC 197 (both decisions of the High Court) and the decision of this Court in *Allied Irish Bank v O' Toole* [2018] IECA 93. In the Judge's view, these authorities established as a general principle that the evidence relied on by Mr Cuddy for the purpose of establishing the Limited Recourse Ground (namely the affidavit evidence of himself and Mr Comerford) was not admissible because it was excluded by the *parol* evidence rule. The Judge went on to reject submissions made on Mr Cuddy's behalf that any exception to the *parol* evidence rule was applicable. In Keane J's view, the

circumstances bore no comparison with those at issue in *Revenue Commissioners v Moroney* [1972] IR 372 (where *parol* evidence was received to show that what appeared to be a sale was in fact intended to be a gift) or *Grahame v Grahame* (1877) 19 LR (Ir) 249 a case cited in McDermott, *Contract Law* (2nd ed; 2019) paragraph 7.30 as authority for the proposition that *parol* evidence may be admitted in order to explain the purpose of a transaction (there, a guarantee). While not doubting the *bona fides* of Mr Cuddy, the Judge concluded that it was *"simply a case where he has no defence to raise that does not fall directly foul of the parol evidence rule".* From that conclusion, so expressed, it is clear that the operation of the *parol* evidence rule was the central element in the High Court's rejection of the Limited Recourse Ground.

THE APPEAL

26. On appeal, the parties largely rehearsed the arguments that had been made in the High Court. However, a new argument was advanced by Mr Cuddy in relation to the Limitation Ground, namely that Clause 12(iii) of the Guarantee was contrary to public policy. The factual context within which the Limitation Ground falls to be considered by this Court also differs from that in the High Court in that the Court has before it a further affidavit from Brian McGuinness (who swore the affidavit grounding AIB's initial application for summary judgment). That affidavit, sworn on 27 June 2019, was admitted on consent and it (inter alia) exhibits a letter of demand in relation to the Guarantee which dates from 7 April 2014, significantly before the letter of 10 January 2017 which the High Court Judge was led to understand was the first demand.

DISCUSSION

27. This is an application for summary judgment pursuant to Order 37. In a short concurring judgment in *Promontoria (Aran) Limited v Burns* [2020] IECA 87 I stated that:

> *"1. Within its proper parameters – as to which see, for instance, the helpful synthesis of the jurisprudence in Harrisrange Ltd v Duncan [2003] 4 IR 1, at pages 7-8 - Order 37 of the Rules of the Superior Courts is intended to provide a relatively expeditious and inexpensive mechanism for recovering judgment for debts or liquidated demands which are clearly due and owing.*
>
> *2. It is obviously in the public interest, as well as the interests of creditors, that there should be such a mechanism and that it should operate effectively. It is not in the interests of the public - or in the interest of the parties - that straightforward claims for debt or liquidated demand should require to be determined by plenary hearing, with the additional delays and cost that such a hearing involves and the additional burden thereby placed on the resources of the justice system."*

28. The "*proper parameters*" of the Order 37 procedure provide the critical guardrails for the appropriate resolution of this appeal. A defendant against whom summary judgment is granted is thereby deprived of a full hearing on the merits. Ordinarily, they will not have an opportunity to cross-examine the deponent(s) for the plaintiff, will not be able to compel third parties to give evidence by way of *sub-poena* and will have no opportunity to seek discovery or avail of any of the other litigation tools available to parties in plenary proceedings. That is justified and proportionate where – and only where – "*it is very clear that there is no defence*": *Harrisrange*, paragraph 9(ix). That summary judgment should not be granted where there is any *arguable* defence – there being no requirement to show a *prima facie* defence, less still a defence that will probably succeed at trial – has been emphasised by a long line of authorities, many of them analysed by McKechnie J in *Harrisrange*. The decision of the Supreme Court in *Irish Bank Resolution Corporation (in special liquidation) v McCaughey* [2014] IESC 44, [2014] 1 IR 749 reaffirms the continuing vitality of these authorities, as well as emphasising the very limited role of the court at summary judgment stage in making any qualitative assessment of the credibility of a defence.

29. As regards issues of law, while such issues may in principle be resolved on an application for summary judgment, a court should only do so "*where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment*": per Clarke J (as then he was) in *McGrath v O' Driscoll* [2006] IEHC 195, [2007] 1 ILRM 203 (at page 210), cited with approval by

the Supreme Court (Denham J) in *Danske Bank t/a National Irish Bank v Durkan New Homes* [2010] IESC 22.

30. With these observations in mind, I turn to address the two grounds of defence relied by Mr Cuddy and will do so in the same sequence as the High Court Judge.

The Limitation Defence

31. As to the limitation issue, the essence of Mr Cuddy's argument is that any guarantee liability on his part could not be pursued unless payment on the guarantee had been demanded before AIB's claim against the Company became statute barred. Mr Cuddy argued that the Company's debt had become statute-barred on 16 December 2015 and, on the basis that the letter of demand relied on by AIB was dated 10 January 2017, he argued that AIB's claim against him was statute-barred also (though, as Mr Bredin observed in his submissions on behalf of AIB, this may be something of a misnomer as the argument was not really that the guarantee claim was statute-barred strictly speaking but rather that, in the absence of a demand made while AIB's claim against the Company was still enforceable, AIB was not entitled to enforce the guarantee).

32. An immediate difficulty with this argument is that *Bank of Ireland v O' Keefe* [1987] IR 47 is clear authority for the proposition that liability on foot of a guarantee that is repayable on demand (as were the various guarantees entered into by Mr Cuddy here, including the Guarantee on foot of which judgment is sought) only arises when

demand for payment is actually made of the guarantor (the position appears to be different where the guarantee does not expressly require a demand). No argument was made to this Court that *Bank of Ireland v O' Keefe* was wrongly decided or should not be followed. It follows that a guarantee can remain valid and enforceable for a long period: *Bradford Old Bank Limited v Sutcliffe* [1918] 2 KB 833.

33. It would also appear to follow that (depending on the terms of the loan and the timing of any requisite demand) the liability of a borrower may become statute-barred before ever time begins to run in respect of any guarantee claim. As a matter of principle, given that a demand is necessary in order to trigger a liability to pay on the part of a guarantor (at least where the guarantee is one payable on demand) and therefore (for limitation purposes), no cause of action against the guarantor accrues until demand is made, it is not immediately obvious why the fact that any claim against the borrower for repayment of the principal amount is statute-barred ought in itself to provide a defence for the guarantor.

34. Andrews & Millett, *Law of Guarantees* (7th ed; 2015) states in this context (at para 6-026) that in *"a case where the claim against the principal is time-barred but the claim against the surety is not, the surety will remain liable on the guarantee."* The authority cited for this proposition is a decision of the Court of Appeal of England and Wales, *Carter v White* (1884) LR 25 Ch D 666, which concerned bills of exchange. Mr McCarthy SC, for Mr Cuddy, suggested that *Carter v White* does not really address the issue of limitation. I do not think that that is correct. The limitation issue is addressed directly – if briefly – in the judgment of Lindley LJ (at page 672)

and it is also appears to be addressed by Cotton LJ in his judgment, albeit expressed in terms of the *laches* of the creditor not operating to discharge the borrower (at page 670). Earlier in his judgment (at page 669) Cotton LJ had noted that the statute of limitations had run against the bills of exchange at issue, so it seems very likely that it was this point that he was addressing later in his judgment.

35. In any event, the Guarantee here expressly provided (in Clause 12) that it applied to all moneys in fact borrowed from AIB "*notwithstanding that such moneys (or part thereof) may not be or may cease to be recoverable from the Borrower by reason of"* [*inter alia*] "*the operation of the Limitation Acts ...."* Keane J in the High Court considered that this provision was a complete answer to the argument advanced on Mr Cuddy's behalf to the effect that the Guarantee could not be enforced against him because AIB's entitlement to recover from the Borrower had become statute-barred. An argument was advanced in the High Court on Mr Cuddy's behalf that this provision was – at least arguably – inconsistent with Clause 14 of the guarantee which provided that monies due under the guarantee would become due and payable forthwith upon written demand made by AIB. Keane J did not see any force in that argument and neither do I.

36. Before this Court, an entirely new argument was made in relation to Clause 12, namely that the clause is unenforceable as being contrary to public policy as a form of improper contracting out from the Statute of Limitations 1957. A number of US State court decisions were cited in support of this submission. It was accepted on behalf of Mr Cuddy that it was permissible for parties to agree to suspend the running

of time in particular cases (so called standstill or tolling agreements) but it was submitted that this could not be validly done *a priori*, in advance of any claim actually arising.

37. AIB objected to this argument being advanced at this stage of the proceedings in circumstances where it had not been made before the High Court. It is, of course, well-established that, as a general rule, parties will not be permitted to advance an argument on appeal that was not made in the court below. The rationale for such a rule is discussed at length in the judgment of O' Donnell J for the Supreme Court in *Lough Swilly Shellfish Growers Co-op Society Limited v Bradley* [2013] 1 IR 227 and in the earlier authorities considered in his judgment. The rule is not, however, an absolute one: see per O' Donnell J at paras 26-28 and in *IBRC v McCaughey* [2014] 1 IR 749, at para 24, Clarke J suggests that, while the courts will be reluctant to allow a different or additional case to be run on appeal in summary judgment proceedings, some flexibility may be necessary in order to achieve proportionality between the consequences of granting summary judgment and the rigour with which the general rules ought to be enforced.

38. In the circumstances here, I do not think it is necessary or appropriate to come to a view on whether Mr Cuddy should be permitted, exceptionally, to rely on the public policy argument. The difficulty from Mr Cuddy's point of view is that, on his own analysis, this argument cannot avail him. Even assuming that the limitation period applicable to any claim by AIB against the Company was six years – a point to which I shall return – the evidence before this Court clearly establishes that a demand for

payment on foot of the guarantee was in fact made by AIB of Mr Cuddy on 7 April 2014, well within that period. For reasons that are unclear, that letter was not before the High Court but it was put before this Court on foot of an application to adduce additional evidence which was dealt with by consent. The letter of 7 April 2014 is, in my opinion, fatal to Mr Cuddy's limitation argument.

39. In these circumstances, the public policy argument simply does not arise and I express no view on it other than to observe, firstly, that Clause 12 does not – at least in express terms – affect the limitation period applicable to an action to enforce the guarantee obligations of Mr Cuddy (rather it provides that the guarantor's liability is not affected by the fact that the lender's right to recover from the borrower has become statute barred); secondly, that it is well-established that the fact that a right to recover a debt is statute-barred does not mean that the debt is extinguished and, thirdly, that provisions to the effect that the liability of a guarantor is to be not affected by events that may affect the liability of the principal debtor – such as the discharge of the debtor by the lender or the giving of additional time for payment of the principal debt – are a common feature of guarantees in this jurisdiction: see the discussion in Donnelly, *The Law of Credit and Security* (2nd ed; 2015) at 19-46 and following.

40. Before leaving the limitation issue, I would add that, in the event that Mr Cuddy had been permitted to rely on the public policy argument before this Court, it would in my view have been inappropriate to consider that argument without also considering afresh the limitation period applicable as between AIB and the Company in relation

to the underlying loan liabilities. It appears that, in the High Court, the parties (and, accordingly, the Judge) proceeded on the premise that the applicable limitation period was six years. At the hearing of this appeal, Mr Bredin for AIB suggested that, in fact, the relevant limitation period was twelve years, on the basis that the liabilities of the Company were secured by mortgages/charges on land and that, on that basis, section 36(1)(a) of the Statute of Limitations 1957 applied.

41. There was no significant discussion of this point before the Court. As Barniville J observed in *Promontoria (Arrow) v Burke* [2018] IEHC 773 (where the claim was against principal borrower rather than guarantor) there appears to be no authority on the scope of application of section 36(1)(a) or its interplay with section 11(1)(a) of the Statute of Limitations: at para 91. In those circumstances, Barniville J was persuaded that a sufficient issue arose as to the effect of section 36(1)(a) so as to warrant the limitation defence advanced in that case being remitted for plenary hearing. It would be inappropriate to express any view as to application of that provision on the facts here, particularly as the Company has not been heard on this issue. It is also unnecessary to consider whether, in the circumstances here, the limitation period applicable to the AIB's claim against Mr Cuddy might in fact be twelve years rather than six years (by reason of the fact that the guarantee liability here was also secured by a mortgage or charge) as nothing turns on that point on the facts.

42. In conclusion, I am of the view that no arguable defence has been established by Mr Cuddy on the basis of the Statute of Limitations and that no risk of injustice to him arises by the refusal of leave to defend on that basis.

The Limited Recourse Defence

43. I will next address the contention that the evidence before the Court sufficiently discloses a potential defence that Mr Cuddy was induced to enter into the guarantee in favour of AIB by a representation to the effect that his liability under that guarantee would be limited to recourse to his warehouse in Oranmore, County Galway, thus giving rise to a collateral contract to that effect.

44. The starting point for an analysis of this submission is what is said in *Aer Rianta v Ryanair Limited* and the other decisions of the Superior Courts as to the appropriate approach that is to be adopted to applications for summary judgement.

45. It is clear from these authorities that, subject only to certain very limited exceptions, it is *not* part of the courts' function at summary judgment stage to engage in any qualitative assessment of the cogency of whatever evidence may be advanced by the defendant by way of asserting a defence. Equally, it is *not* part of the courts' function to engage in any form of comparative assessment of the evidence adduced by the respective parties, insofar as there are material conflicts on that evidence. Issues of

fact are not suitable for resolution in a summary judgment application: *Harrisrange*, paragraph 9(v). As was stated by Clarke J (as then he was) in *IBRC v McCaughey*:

> "*[22] It is important, therefore, to reemphasise what is meant by the credibility of a defence. 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….*
>
> *[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.*"

Here, there is affidavit evidence from Mr Cuddy to the effect that identified officers of AIB assured Mr Cuddy that recourse on foot of the guarantee that AIB was seeking from him would be limited to his warehouse unit in Oranmore "*and nothing else*". Significantly, the essential thrust of that evidence is supported on affidavit by Mr Comerford, the person who was acting as Mr Cuddy's financial advisor at the relevant time.

46. Mr Comerford also swears that when he queried the reference in the sanction letter issued to the Company to a guarantee being required from Mr Cuddy, he was told by Mr Byrne that the Bank's Lending Department had requested that the deal would be set up in that way and that the paperwork relating to the guarantee would be limited to the warehouse and that AIB would have no further recourse against Mr Cuddy. As a matter of fact, of course, the guarantees subsequently executed by Mr Cuddy were not limited to the Oranmore warehouse but Mr Cuddy avers that he believed that those documents reflected the discussions he had had with the Bank.

47. These averments are not directly denied but both AIB officers aver that they did not have authority to offer any assurance to Mr Cuddy and invite the court to infer that they did not do so. At most (so it is said), Mr Cuddy was advised that any request to limit AIB's recourse on the guarantee to the warehouse would be included in the loan application to AIB's Credit Committee and "*as is apparent from the Letters of Sanction issued by [AIB], any such request was not granted by [AIB]*." AIB also points out what it considers to be discrepancies and inconsistencies between the evidence of Mr Cuddy and Mr Comerford and emphasises the absence of any written

evidence supporting the contention that such representations were made and the fact that Mr Cuddy, in his capacity as a director of the Company, signed a number of facility letters which stipulated AIB's requirement for a personal guarantee from him in the amount of €1.5 million and then subsequently entered into a series of guarantees, over an extended period of time, for that amount, none of which limited AIB's recourse to the Oranmore warehouse, all of this being done in circumstances where, AIB says, it is clear that legal advice was available to Mr Cuddy.

48. As I understand the authorities, in determining whether it is appropriate to grant summary judgment to AIB, the evidence adduced by and on by behalf of Mr Cuddy is to be taken at its height and the essential question is whether, on that basis, *"it is very clear that there is no defence."*

49. Here, the High Court Judge did not find against Mr Cuddy on the basis of any assessment of the probative force of his evidence. Rather, he took the view that such evidence, and the argument advanced on foot of that evidence, fell foul of the *parol* evidence rule. His finding that no arguable defence had been established on the Limited Recourse Ground followed from that conclusion.

50. In my opinion, the Judge erred in his analysis and, in particular, was wrong to take the view that the *parol* evidence rule operated to render inadmissible the evidence of Mr Cuddy and Mr Comerford or precluded him from having regard to that evidence. So far from that clearly being the law, the weight of authority is to the contrary effect.

51. The decision of the High Court (Kelly J) in *IBRC v McCaughey* [2014] IEHC 230 is perhaps an appropriate starting point. It was an application for summary judgment. The defendant argued that he had a good defence to the claim on the basis that there was a collateral contract that the facilities sought to be enforced by the plaintiff – which were on their face payable on demand – would remain in place for the duration of certain investments made by the defendant which had part-funded by the facilities. At paragraph 18 of his judgment, Kelly J sets out, with evident approval, a passage from *Chitty on Contracts* (31st ed) ("*Chitty*"). As the editors of *Chitty* explain in that passage, while there are older cases in which oral evidence was considered to be admissible to establish an agreement in respect of a matter on which the written contract is silent but not to establish an agreement contradicting the express terms of such a contract, *"more recently the courts have admitted evidence to prove an overriding oral warranty or to prove an oral promise that the written contract will not be enforced in accordance with its terms."* (*Chitty*, para 12-103)

52. That statement is repeated in the current (33rd) edition of Chitty and once again illustrated by reference to *City of Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 where a landlord was held to an oral assurance that he would not enforce a covenant in a lease limiting the user of premises to business use, and excluding user as a sleeping quarters, where that assurance was given in order to get the tenant to enter into the lease. That oral assurance constituted a collateral contract from which the landlord would not be permitted to resile. The editors go on to observe that a "*collateral contract or warranty may be oral or informal even though the main*

contract is one which is required by law to be in or evidence by writing": (para 13-116)

53. The principal Irish authorities on collateral contracts appear to be consistent with the analysis in *Chitty*. In *AIB v Galvin* [2011] IEHC 314 (which was considered by Kelly J in *IBRC v McCaughey*), the High Court (Finlay-Geoghegan J) held that the defendants had established a collateral contract by which AIB had limited its right of recourse to the defendants to 50% of the debt. That collateral contract did not take the form of a written amendment to the facility letter but was constituted by representations made by AIB before the facility letter was signed. It is clear from the High Court's judgment that it heard oral evidence concerning those representations. It also had before it – and there is no doubt that this was a very significant factor in the court's conclusions – written heads of terms which had been provided to the defendants and which indicated that they would be liable for 50% only of the debt. But there is no suggestion in the judgment of Finlay-Geoghegan J that, as a matter of principle, a finding of a collateral contract can be made only where supporting documentary material is available and, as I have said, it is clear from the judgment that the court heard oral evidence in addition to having the heads of terms. It is also clear that the evidence of the heads of terms was evidence outside the four corners of the contract in the same way as was the evidence of pre-contract meetings.[2]

[2] Despite its name, the operation of the parol evidence rule *"is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing, such as drafts, preliminary agreements and letters of negotiation*" (*Chitty* (33rd ed), at para 13-109 (footnotes omitted)).

54. *AIB v Galvin* was in turn referred to by the High Court (Hogan J) in *Tennants Building Products Ltd v O'Connell* [2013] IEHC 197 (which was also considered by Kelly J in *IBRC v McCaughey*). In *Tennants Building Products Ltd v O'Connell* (which was referred to in detail in the Judge's judgment), it was argued that a guarantee could not be enforced against the defendant because it had been entered into on foot of representations that it was required for *"presentational purposes*" and would never be used. While that argument failed on the evidence, it is evident from the judgment that Hogan J was of the view that, if the defendant could establish that he only executed the guarantee on the express assurance that it was an "*empty formula*", he would be entitled to relief (inter alia) on the basis of the existence of a collateral contract: para 22. While there had been documentary evidence in *AIB v Galvin* and in *Mudd* (the authority referred to in *Chitty*), in Hogan J's view the absence of written evidence was "*not fatal to an otherwise compelling case*" though, objectively, the absence of such evidence weakened the case: para 29.

55. At paragraph 27 of his judgment, Hogan J sought to synthesise the case-law as follows:

> *"The effect of this case-law may be said to be that while the courts will permit a party to set up a collateral contract to vary the terms of a written contract, this can only be done by means of cogent evidence, often itself involving (as in Mudd and in Galvin*) *written pre-contractual documents which, it can be shown, were intended to induce the other party into entering the contract. By contrast, generalised assertions regarding verbal assurances given in the*

course of the contractual negotiations will often fall foul of the parol evidence rule for all the reasons offered by McGovern J. in Deane."

56. It is important to record that *AIB v Galvin* and *Tennants Building Products Ltd v O'Connell* were decisions given after a full plenary hearing of the actions, on oral evidence. Hogan J's reference to "*cogent evidence*" must therefore be understood as referring to the evidential threshold at trial. He was not dealing with an application for summary judgment and was clearly not addressing the threshold test for granting summary judgment or giving leave to defend.[3]

57. The decision of the High Court (Baker J) in *AIB Mortgage Bank v Hayes* [2016] IEHC 280 was also given after a full hearing of the action. The facts need not detain us. For present purpose, the importance of Baker J's judgment is its clear statement (at para 31) to the effect that "*the parol evidence rule does not exclude the argument that express assurances can have contractual force*", as well as the following passage at para 33:

"*I consider the analysis of Hogan J. of the relationship between the pure parol evidence rule as explained by McGovern J. in Ulster Bank Ireland Ltd. v. Deane, and the finding of a collateral contract as was done by Finlay Geoghegan J. in Allied Irish Banks Plc. v. Galvin Developments (Killarney) Limited & Ors., to point to the power of the court to recognise the existence*

[3] It follows that the High Court was in error in stating in the course of its ruling that *Tennants Building Products Ltd v O'Connell* involved an application for summary judgment.

> *of a collateral or preliminary contract arising from a promise intended to have contractual effect made in the course of negotiations. The written contract may not always contain the whole of the evidence of the terms on which the parties have contracted, albeit this may arise in exceptional cases and only where the evidence is clear. As Hogan J. said in Tennants Building Products Ltd. v. O'Connell, the finding of such a collateral contract is not the norm, and will require cogent evidence, often found in pre-contract documents.*"

58. These decisions all appear to point to the conclusion indicated in *Chitty*, namely that, as a matter of principle, a collateral contract can be set up, on the basis of oral representations or assurances, which may then affect the operation of a written contract. That is so notwithstanding the *parol* evidence rule. I did not understand Mr Bredin (for AIB) to dispute this general proposition.

59. In my view, neither *Ulster Bank Ireland Ltd v Deane* [2012] IEHC 248 nor *AIB v O' Toole* [2018] IECA 93 – the other decisions referred to in this context by the Judge – point to a different conclusion. In *Ulster Bank v Deane*, two defences were advanced by the defendant. One was to the effect that there had been an understanding that loan facilities that were, on their fact, demand facilities were in fact "*long-term loans*." McGovern J rejected that argument on the basis that it sought to alter the terms of the facility letters, contrary to the parol evidence rule. The second argument made by the defendant was to the effect that there was a collateral agreement to the same effect. As I read the judgment of McGovern J, that argument

was rejected not because he considered that the parol evidence rule excluded it but because there was no credible evidence to support it, with McGovern J contrasting the evidence before him with the nature of the evidence that had been adduced by the successful defendants in *City of Westminster Properties (1934) Ltd v Mudd* and *AIB v Galvin Developments.*

60. The decision of this Court in *AIB v O' Toole* similarly appears to have turned not on the application of the *parol* evidence rule but on the Court's view that the evidence that had been adduced by the defendant that there was a collateral contract was not sufficient to establish an arguable defence: see paras 13-15 of the judgment of Peart J.

61. For the purposes of this appeal, I do not think that it would appropriate to express any concluded view as to whether the *parol* evidence rule applies to collateral contracts. I do not think that this question is one that can properly be determined "*within the somewhat limited framework of a motion for summary judgment*". In my view, however, the High Court Judge was wrong to proceed on the basis that he did. It is, to put it at its lowest, clearly arguable that a collateral contract may, in principle, be established by oral evidence, notwithstanding the *parol* evidence rule. In fact, the weight of existing High Court authority is clearly to that effect. In my view, the High Court should have so held and then proceeded to consider whether the evidence on which Mr Cuddy sought to rely to assert the existence of a collateral contract in these proceedings met the threshold identified in the case-law.

62. The real issue in relation to this aspect of the appeal is, it appears to me, not one of the *admissibility* of oral evidence *per se* but rather that of the *weight/credibility* of such evidence. In some of the cases, a certain blurring of this distinction is evident but it is important that issues of admissibility and weight should not be conflated. Where a party seeks to set up a collateral contract the effect of which is to alter the effect of a written contract, oral evidence is either admissible or it is not. The question of admissibility cannot, in my view, depend on an assessment of the cogency of that oral evidence and/or the extent (if any) to which it is supported by documentary material.

63. Equally, it does not follow from the fact that oral evidence may be admissible – and, in principle, may be sufficient – to establish such a collateral contract, that any bald assertion of the existence of such a contract is enough to establish an arguable defence to a claim such as AIB's claim here, such as to warrant the remittal of the claim to plenary hearing.

64. As Barniville J observes in *Promontoria (Arrow) Limited v Burke*, at para 113, the courts "*are sceptical of defences sought to be raised on the basis of oral representations which are not supported by contemporaneous documents and which are inconsistent with the express terms of a written contract signed by the parties*." Such scepticism is entirely appropriate. Where parties have entered into a written agreement that, *prima facie*, comprehensively governs their legal relationship, it is reasonable to assume that such agreement is binding and enforceable in accordance

with its terms. Significantly more than a bare statement to the contrary is required to displace that assumption.

65. Nonetheless, it is, in this context, important to avoid conflating the threshold that a defendant seeking to resist summary judgment is required to surmount (a threshold that all the relevant authorities emphasise is a low one) on the one hand and the burden that will rest on such a defendant in the event that summary judgment is refused and leave to defend is granted. It appears to me that any suggestion that Mr Cuddy is required to produce "*cogent evidence*" supporting his collateral contract claim in order to get leave to defend does precisely that. In my opinion, the application of such a threshold test at summary judgment stage would necessarily involve the substitution of a new and materially different test that would not be consistent with the well-established test set out in *Aer Rianta* and the other authorities to which I have referred.

66. Equally, I cannot identify any basis on which the availability of supporting documentary evidence could properly be applied as some form of threshold test for giving leave to defend. If, in principle, a defendant can succeed at trial even without supporting documentary evidence (as both *Tennants Building Products Ltd v O'Connell* and *AIB Mortgage Bank Ltd v Hayes* – as well as *Chitty* – appear to suggest), then it seems to me to follow that there can be no basis for any *a priori* requirement for such documentary evidence as a condition for giving leave to defend.

67. The relevant test is not, at this stage, one of "*cogent evidence*" and/or "*written evidence*". It is, rather, whether "*credible*" evidence is before the Court in the particular sense indicated in the authorities. That is not to suggest that the absence of such documentary evidence is irrelevant; it may be a factor, and an important factor, in assessing the credibility of a defence but the absence of documentary evidence does not necessarily require that the court refuse leave to defend.

68. In addressing that test, it is evident from the authorities that mere "*assertion*" is not sufficient. Where precisely the line between credible evidence and mere assertion is to be drawn cannot, I think, be delineated *a priori*. Rather, a case-by-case assessment has to be made to decide on which side of the line any given case properly falls.

69. Ultimately, what the Court must ask itself is whether it "*very clear*" that there is no defence disclosed on the material before it. In my opinion, that is *not* very clear and accordingly I would grant leave to defend on the Limited Recourse issue (and, for the avoidance of doubt, on that issue only).

70. It is obviously appropriate to explain the basis for that conclusion but, given that I believe that there ought to be a full hearing on this issue, I will do so as briefly as possible and in terms that are not intended to prejudge in any way the outcome of such a hearing.

71. The starting point is to ask whether, on the premise that the circumstances in which Mr Cuddy entered into the various successive guarantees were as set out in the

affidavits sworn by him and by Mr Comerford, Mr Cuddy might succeed in establishing a defence to AIB's claim?

72. In this context, it is clear from the authorities that Mr Cuddy does not have to establish as a matter of probability that he would succeed; it is enough that he establishes an *arguable* defence in the sense explained in *Aer Rianta*, namely *"a fair or reasonable possibility of having a real or bona fide defence*".

73. It appears to me that, on the premise identified above, a court *could* find that there was a collateral contract the effect of which was to limit AIB's recourse to the Oranmore warehouse, thus precluding AIB from any further recovery from Mr Cuddy on foot of the Guarantee (the warehouse having already been sold and the proceeds having been received by AIB). Mr Bredin fairly accepted that this was the case, though he made submissions on the nature and quality of the evidence hereto which I next refer.

74. AIB disputes whether the evidence before the Court (which is of course in the form of affidavits rather than oral evidence *stricto sensu*) is sufficient to warrant remittal to plenary hearing. It characterises that evidence as "*bare assertion*" and, in the course of his submissions, Mr Bredin emphasised the absence of any documentary evidence that supports the "*assertion*" on which, in his submission, this ground of defence is founded. Mr Cuddy must, it was said, be able to point to some document that supports the collateral contract claim and, in the absence of any such document or documents, no defence to the summary judgment claim was established. For the

reasons set out above, I do not think that there is any such general rule, though I readily accept that the presence or absence of supporting documentary material may be highly material to the court's assessment, even at summary judgment stage.

75. There are likely to be "*formidable obstacles*" in the way of Mr Cuddy's defence (as Birmingham J considered that there were in *IBRC v Kelly* [2014] IEHC 160), not least by reason of the matters referred to in paragraph 47 above. However, it is not, in my opinion, clear that Mr Cuddy has no defence. I have commented on the evidence above and I do not consider it appropriate to say much more about it, other than to observe that (i) the detail of what is said by Mr Cuddy and Mr Comerford; (ii) the availability of the evidence of Mr Comerford (a factor which, in itself, is of very significant weight in my view) and (iii) the fact that the sole security sought by AIB in connection with the guarantee was in respect of the warehouse lead me to conclude – with some hesitation – that that the evidence here is more than mere assertion and, exceptionally, is sufficient to warrant leave to defend being given on the Limited Recourse Ground, even in the absence of supporting documentary material.

76. Accordingly, I would allow the appeal and make an order pursuant to Order 37, Rule 7 of the Rules of the Superior Courts adjourning AIB's claim to plenary hearing and giving Mr Cuddy leave to defend that claim limited to the Limited Recourse issue. I would hear the parties in relation to any consequential orders.

77. By way of postscript, I note that since the hearing of this appeal, this Court has given a number of judgments which have considered the evidential requirements for establishing a collateral contract and in particular the question of whether the *parol* evidence rule applies in that context. In *Danske Bank A/S v Shortt* [2020] IECA 137 the Court dismissed an appeal from an order of the High Court granting summary judgment. The judgment of Ní Raifeartaigh J (with which Kennedy and Faherty JJ agreed) emphasises the distinction between admissibility of evidence and issues as to the cogency of that evidence and the weight to be given to it. It also emphasises the distinction between the evidential threshold in summary judgment cases and that applicable at trial. *Begley v Damesfield Limited* [2020] IECA 171 was, in contrast, an appeal from a full action heard in the High Court in which the Court had awarded damages to the plaintiff for breach of a collateral contract concerning the removal of rocks adjacent to a marina. While the appeal was successful on procedural grounds, it is clear from the judgment of Donnelly J (with which Faherty and Ní Raifeartaigh JJ agreed) that the Court considered that, as a matter of principle, a collateral contract can be established by oral evidence, though emphasising the requirement for cogent evidence and observing that it is *"an important aspect of public policy that the certainty inherent in reducing contracts to writing should not easily be set aside by an assertion of a collateral contract.*"[4]

78. The view of the law expressed in this judgment is, in my opinion, entirely consistent with these decisions.

[4] At paragraph 45.

Birmingham P:

1. I have had an opportunity to read drafts of the judgments prepared by Costello J and Collins J and I agree with both judgments. I would simply add the observation that for me, it was the evidence of Mr. Comerford, referred to in some details in the course of the judgment of Collins J, which led me to conclude that the defendant had satisfied the low threshold to see the matter remitted to plenary hearing.