Neutral Citation No: [2018] NICh 22 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **GIR10753** *Delivered:* **12/10/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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2013 No: 62743

BETWEEN:

ULSTER BANK LIMITED

Plaintiff

and

EAMON CALDWELL

First Defendant

and

BRIDGET CALDWELL

Second Defendant

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THE RT. HON. SIR PAUL GIRVAN

Introduction

[1] This is an action brought by the Ulster Bank ("the Bank") against Mr and Mrs Caldwell, the first and second defendants, in which the Bank claims monies due on an overdraft, allegedly the joint and several debt of the defendants, and on foot of a guarantee allegedly entered into by the two defendants guaranteeing the indebtedness of a limited liability company called Caldwell Builders Limited ("the Company"). The Bank claims that it is entitled to a security for the indebtedness of the defendants on foot of both their personal liability and the monies allegedly due under the guarantee. It is the defendant's case that on 8 January 2003 the defendants and each of them deposited with the bank land certificates in respect of folios in Co Londonderry LY20640, LY14001, LY1395 and TY40312. It is the Bank's case that it is entitled to an equitable mortgage in respect of the folios referred to in those land certificates. It is common case that the title deeds are currently in the physical possession of the Bank.

[2] It is not in dispute that the defendants jointly and separately owe to the bank the sum of £52,163.25 on foot of an overdraft. The Bank is entitled to judgment in that sum against the defendants jointly and severally.

[3] In respect of monies alleged to be due on foot of a guarantee there is in existence a document dated 14 June 2007 which each of the defendants accepts bears their signature. The Bank asserts that the document signed was a guarantee. Under the alleged guarantee the guarantors Mr and Mrs Caldwell and their sons Stephen and Anthony are said to have guaranteed to discharge on demand the obligations of the Company up to a sum not exceeding the total of £800,000 together with interest from the date of demand. It is not in dispute that the Bank demanded payment of the allegedly guaranteed sum on 18 January 2011. While an issue did arise as to the correct rate of interest payable the Bank is prepared to agree to accept a rate of libor rate plus 2%, this sum is in ease of the defendants and I shall proceed on the basis that that is the interest rate payable. The amount due with interest on foot of the alleged guarantee, if binding on either or both of the defendants, is £958,631.23. It is clear that at the date of demand the Company owed the Bank a sum in excess of £1.2m.

[4] The questions for determination in the action are (a) whether the defendants or either or both of them is or are bound by the guarantee alleged to bear their respective signatures and (b) whether the Bank has a valid security on foot of an equitable charge on the lands in the folios or any of them binding on either or both of the defendants.

[5] Mr Caldwell represented himself in the course of the hearing though he had been represented at an earlier stage. In his pleaded defence he denies that security was provided by way of deposit of land certificates. He denies that the guarantee is binding on him and asserts that he never agreed to provide a guarantee. He says that on 14 June 2007 he was presented with documents to sign. The bundle of documents included the guarantee and a waiver of legal advice. He claims to suffer from dyslexia and that he had reasonably relied on Mr Tierney, the bank manager, to ensure that he was signing documents in line with what he had agreed (which he asserts did not include the guarantee). Alternatively, he asserts that the guarantee was entered into by mistake and he relies on the defence of *non est factum*.

[6] I am satisfied that Mr Caldwell did deposit the title deeds by way of security to secure his liabilities direct and indirect, present and future including liabilities as a guarantor. The Bank relies on a document described as a deposit schedule in the core bundle. It is signed by Mr Martin Gormley, the relevant bank manager. It records the deposit and alleges that the record of the deposit was read to Mr and Mrs Caldwell on 8 January 2003. That statement is hearsay evidence and is admissible evidence but it is a matter for the court to decide what weight should be put upon it. It is clear that Mr Gormley was available as a witness and indeed he was in attendance on the first day of trial but he was released and not called by the Bank. Neither Mr Caldwell nor Mr McCaughey for Mrs Caldwell required him to

attend to be cross-examined on the contents of the hearsay statement in the document. The evidence of the reading of the deposit was important evidence to support the equitable deposit of title deeds as security. The fact that the Bank did not call him leads to an inference the Bank did not consider that Mr Gormley's own evidence on this issue would advance the Bank's case. By the same token the fact that neither Mrs Caldwell or Mr Caldwell sought to challenge the evidence by cross-examining Mr Gormley (who had been available) leads to an inference that they did not consider the cross-examination of Mr Gormley would advance the defence. A reasonable inference is that Mr Gormley had no real recall of the circumstances of the signing of the document. While there is a presumption of regularity this piece of evidence must be scrutinised in the context of the whole case. It is entirely probable that Mr Caldwell agreed to the terms of the deposit as shown in the deposit. The reference to reading the document to Mrs Caldwell, however, must be scrutinised in the light of the rest of the Bank's evidence which shows gross irregularity on the part of this branch in dealing with the execution of documents. There was a clear disregard of the Bank's procedures as we shall see and a cavalier attitude as to whether Mrs Caldwell and the defendants' sons really understood the significance and meaning of the documents that they were being asked to sign on a later occasion. The fact that in this branch such serious and blatant irregularities were happening in transactions involving huge sums of money plants in my mind a real question as to whether I can be satisfied that Mr Gormley did indeed read out the terms of the schedule to Mrs Caldwell. Mrs Caldwell asserts that it was not read to her nor was she asked to sign confirmation that she was aware of the terms of the deposit of the land certificate. It was open to the Bank to call Mr Gormley to satisfy me that he did take her through the document. The Bank has failed to do so.

[7] I conclude accordingly that it has not been proved that Mrs Caldwell agreed to the deposit of the title deeds as security for the debt which she is liable for as accepted. If she did not agree to the deposit of the title deeds (as I have found has not been proved) the Bank may be able to obtain an enforcement order charging her interest in the lands but that is a matter for another day. I do, however, find that Mr Caldwell appreciated that the deeds were indeed deposited as security for his debt. They had been previously used as security in relation to accounts operated with earlier banks in which accounts were held. The deeds were indeed left with the Bank and Mr Caldwell did not seriously dispute that he understood that the Bank had a security on the title deeds. I am satisfied that as far as Mr Caldwell is concerned the Bank on transfer of the account to it held the land certificates as security. I reject Mr Caldwell's evidence that he never deposited the title deeds on the 15 acres in Folio 13951 Co Londonderry. I conclude that he opportunistically picked up on what was an error in a bank document which mentioned security over 120 acres. The same document referred earlier to security on 135 acres. He sought to rely on that to suggest that the 15 acres was not covered by the security but I am satisfied that he knew all along that the security over four land certificates included the 15 acres. I am satisfied that Mr Caldwell tailored his evidence to suit the case he was trying to make. I am not convinced by his claim not to understand business transactions or business documents. I find that he greatly exaggerated his evidence

in relation to reading difficulties. He had no difficulty in reading out details from the document at page 76 of the trial bundle and the figures therein stated. He was a shrewd enough businessman who saw opportunities in relation to land development just as he had been in relation to his business with diggers before he went into construction. He displayed a detailed recall of buying a digger in March 1996 and of the outbreak of BSE on 22 March 1996. He demonstrated a detailed recall of the cost of hiring diggers and of the profitability of his business before BSE. The defendant accepted that he had signed loan agreements with the Bank. When it was put to him that they amounted to £1m he was quick enough to correct the amount to say that it was closer to £850,000.

[8] In an affidavit sworn by Mr Caldwell opposing the Bank's application for a notice to deposit to be registered against the land certificates he accepted that he had deposited the land certificates with AIB to secure advances made by that Bank. He accepted that these were passed over to the Bank of Ireland as security. He asserted in paragraph 4 that in 2007 he asked Martin Gormley if his home and farm would be used as security for the debt and Mr Gormley allegedly said "no, they would not be taken them as security" against the loans to Caldwell Builders Limited. A number of points must be made on this piece of evidence. Firstly, it is inconsistent with his evidence that there had been *no* discussion about security with Mr Gormley. Secondly, the affidavit recognised that the land certificates had been deposited as security for personal indebtedness with AIB and the Bank of Ireland. There is no logical reason why when he agreed to transfer his accounts to Ulster Bank the land certificates would not continue to provide security for the indebtedness taken over by the Ulster Bank. Thirdly, in any event the recorded conversation, even if it did take place (which I do not accept), was not inconsistent with the Bank's claim to rely on the security for the personal indebtedness of the Caldwells which would include personal indebtedness on foot of a guarantee. The Bank was not relying on the security as security against the Company debt per se.

[9] In making his case Mr Caldwell made an allegation against Mrs Hegarty alleging that she had been guilty of improper conduct in advancing the interests of her husband who was selling land at Glenmorran to Mr Caldwell. This was an unpleasant allegation to make and I am satisfied that there was no substance to it as Mrs Hegarty was not working in the branch when the documents were drawn up and signed.

[10] I conclude in relation to the case made against Mr Caldwell that he has not made out a case that he is not bound by the guarantee. For *non est factum* to apply as is shown in Saunders v Anglia Building Society [1970] 3 All ER 961 the burden lies on the defendant to show that he acted with reasonable care. This plea is one that can rarely be established by a person of full capacity. As that case shows the plea is rarely available to a person's signing a document without informing himself as to its meaning. I am satisfied that Mr Caldwell knew he was signing a guarantee, that he signed the document in order to secure the loans he needed for the business and that he knew that the security to which the Bank held would cover a liability arising on

foot of the guarantee. He was no doubt expecting no problem in view of the apparently healthy growth of land values at the time. The property crash caused an unexpected loss but that was a risk of the business which the defendant was in. I accordingly hold that he is liable on foot of the overdraft and the guarantee and that the bank is entitled to a declaration that his interest in the lands in the folios covered by land certificates is well charged.

[11] I have already rejected the Bank's case that Mrs Caldwell was bound by the deposit of title deeds the Bank having failed to produce sufficient evidence to satisfy me that she was a knowing participant in the provision of the title deeds as security against her share of the lands. It is the Bank's case that she knowingly signed the guarantee and is accordingly bound by it. Her case is that she was ignorant of the nature of the loan being advanced to the Company by the Bank; that she had no real involvement in the husband's business; and that she did not understand the guarantee document which was never explained to her and which had entirely different effect from the information provided by her husband. She was allegedly in a vulnerable position at the time, her youngest child being very ill and disabled. Her husband had ascendancy over her and she was subservient to him. The documents she signed were signed in a rushed and pressurised set of circumstances. Subsequent to the meeting on 14 June 2007 Mr Tierney, the bank manager, pressed her to sign other documents coming to a car park with the documents for signature on one occasion and to a football ground on another. She claims not to have realised that she had been made a director of the Company and resigned when she found out. She claims to have been told by her husband that she was releasing a loan for £200,000-250,000 to the Company. At the meeting on 14 June no mention of a guarantee was made, she was not told she could or should obtain separate representation and she was not asked to sign in the absence of her husband. The waiver of legal advice document was not explained to her and she did not recall when she signed the document. The date on it was inserted by Mr Tierney and it could have been signed subsequent to 14 June on one of the other occasions when she was asked to sign documents.

[12] The manner in which Mrs Caldwell came to be involved in the signing of the document breached proper banking procedures which were set out in the Bank's own letter to the branch on 6 June which correctly set out the steps to be taken in ensuring that the documents were properly executed. The letter stated that the guarantee documents should be signed by the guarantors separately but this was entirely disregarded. There was no suggestion at the meeting on 14 September of separate meetings. The meeting took place in a small room when all 4 guarantors were present. The letter further stated that on no account should the guarantee or waiver be signed other than at a formal meeting and following the prescribed procedures. The failure to follow the procedures would, according to the letter, result in fresh documentation being required. Mrs Caldwell was not strongly recommended to obtain legal advice. Indeed there is no evidence that she was recommended to obtain legal advice at all. The letter stated that the guarantor

should be encouraged to take time to read the guarantee. This did not happen in the case of Mrs Caldwell or the sons. The Bank did not reaffirm that all guarantors should obtain independent advice. The evidence does not satisfy me that the parties were given the waiver of legal advice document to read. The Bank did not check the state of knowledge of Mrs Caldwell on the loans or on the guarantee and she was not informed as to the extent of the Company's liabilities. The letter further stated that if the guarantor was happy to proceed without independent legal advice and the Bank was satisfied that the guarantor fully understood the commitment being entered in to the guarantee could be signed with the waiver. I am totally unpersuaded that Mr Tierney satisfied himself that Mrs Caldwell or the sons fully understood the commitments they were undertaking. Having heard and seen Mrs Caldwell and the sons giving evidence I am satisfied that they did not. The breaches of banking protocols in this instance were glaring and disturbing. The clear impression I gain from the evidence is that both Mr Caldwell and Mr Tierney steamrollered Mrs Caldwell and the sons into signing documents which were presented for signature with no explanation and no discussion as to what was being undertaken and the whole process was driven forward by Mr Caldwell's clear intention of ensuring that the loans would be capable of being drawn down so that he could carry on with his business of acquiring sites. In the case of the sons they were very young men, barely literate, certainly not worldly wise and quite incapable of understanding what they were committing themselves. The very word "waiver" was beyond their understanding. Mr Tierney must or should have appreciated that they had a total lack of experience and knowledge in business matters. The fact is that he was content to leave it to Mr Caldwell to ensure that they came to sign the documents and when further documents were required he, Mr Tierney, turned up out of bank premises at car parks and in the case of one of the sons at an agricultural field with documents to sign. I am satisfied that he did nothing to explain to those from whom he was seeking signatures what was involved in the documents. Mr Tierney kept no note, no memorandum and no record of the events of 14 June or the subsequent events relating to the signing of other documents. The dating of the documents may or may not be accurate and we do not know whether Mr Tierney inserted dates at a later stage. The evidence satisfies me that he was in a hurry saying that he was keen to go and play golf. The way in which the Bank dealt with the advances of huge sums of money to Mr Caldwell, a man of little education and no real business expertise, is a sad demonstration of how dysfunctional the Bank had become at the height of the property boom, a boom brought about by inter alia the easy supply of money by banks to inexperienced speculators, bad banking practices, and a lack of commercial discipline.

[13] Breaches of proper banking procedures do not of themselves prove undue influence by Mr Caldwell or that he induced the signing of the guarantee by misrepresentation or causing Mrs Caldwell to be acting under mistake. The Bank's failure to enforce its proper procedures, however, does mean that the Bank cannot rely on the defence of acting innocently and being unaware of any undue influence or pressure on the part of the husband if in fact he did exercise undue influence or misrepresented the position to Mrs Caldwell. I am satisfied that Mr Caldwell did in

fact pressurise his wife and sons to sign the guarantee document. His wife had pressing domestic duties not least to her ailing daughter. Her role in the business was entirely peripheral being that of someone who tidied up disorganised papers and tried to put some order on invoices left about the house by her husband. She cannot be portrayed as being "the brains" of the business with her husband being the "brawn". Mr Caldwell was an individual who drove the deals and the business. He rushed at things and he pushed his wife and sons in to going to a rushed meeting at the Bank at which nothing was done to make clear exactly what was being expected of the wife and sons. I infer that a number of unexplained documents were put in front of Mrs Caldwell and the sons to sign. This was done in a way that deprived them of any meaningful opportunity to reflect on what they were doing and the bank manager at the meeting contributed to this sense of rush and pressure. I am not satisfied on the evidence that they were given any opportunity to read the complex and closely worded provisions of the documents. I am not even satisfied that Mrs Caldwell was shown the whole document containing the guarantee as it is entirely likely that she was presented with the signature page and shown where to put her signature. I am satisfied that Mr Caldwell exercised undue influence and pressure on her to sign the document and the other documents at the meeting. I am satisfied that he misrepresented the total liability of the Company indebtedness so that if Mrs Caldwell was induced to sign a guarantee her signature was induced by misrepresentation as to the extent of potential liability on foot of the guarantee. The Bank has not satisfied me that it was unaware of the undue pressure exerted by Mr Caldwell on Mrs Caldwell and her sons and, indeed, the bank manager contributed significantly to that pressure.

[14] In the result I hold Mrs Caldwell is not bound by the guarantee.

[15] I will hear counsel on the issue of costs and in relation to the form of the order to be made.