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Supreme Court refuses to take business 'unfair relationship' case

Dermot McLaughlin v. Bank of Ireland (UK) PLC
UKSC 2016/0163

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Executive speed read summary
The Supreme Court of the United Kingdom has refused permission for a final appeal by the Mr McLaughlin. He was seeking to over-turn a decision handed down by the Court of Appeal in Northern Ireland last year. The Court of Appeal had upheld a sensible decision of a trial judge. Following a hotly contested trial at which 5 grounds of defence and a substantial counterclaim were raised, the judge struck out the counterclaim and granted judgment for the bank in full on its claim under its guarantee. Before the judge, Mr McLaughlin argued that the 'unfair relationship' provisions in sections 140A-D of the Consumer Credit Act 1974 applied to a guarantor of a limited company's indebtedness. That was rejected as a matter of law by the trial judge who also made a number of significant evidential findings that the relationship was not unfair because of the way the bank had handled matters. The judge also rejected claims in relation to the service of Notice of Sums in Arrears. The Supreme Court has decided there is no arguable point of law of general public importance which ought to be considered at this time. The Court of Appeal in London at an oral permission hearing in another case has also given exactly the same ruling on this point.

Dermot McLaughlin v. Bank of Ireland (UK) PLC
UKSC 2016/0163 31 January 2017
Supreme Court of the United Kingdom (Lords Kerr, Wilson and Toulson JJSC)

What are the facts?
The case concerned a family plumbing business which then moved into supplying Magma underfloor heating. Initially Mr McLaughlin was in business as a sole trader but then it incorporated as Premier Underfloor Heating later changing its name to Magma Heat Limited. By 2006/7 Mr McLaughlin was the sole director, had 75% of the shares and had effective control of the business.

In May 2006 the Bank issued a facility letter to the business granting it a loan for £133.000 and a £10,000 overdraft. This was to be secured by a £140,000 guarantee from Mr. McLaughlin, a 1st legal charge over the business premises and an assignment of a life policy. On 2 February 2007, Mr McLaughlin signed a guarantee. Before doing so, the Bank insisted following *Etridge* that he took independent advice. This was provided by Cousin Gilmore, Solicitors. They wrote to the Bank confirming Mr McLaughlin had been given independent legal advice and certifying that there was no undue influence.

There was then a property downturn in Northern Ireland and the economy crashed in UK from 2008/9 onwards. On 21 April 2009 insolvency practitioners called Cavanagh Kelly convened a creditor's meeting of the business. It was placed in liquidation. The Bank filed a proof of debt for over £137,000. The Bank sued Mr McLaughlin on his guarantee for £133,620.76.

What happened in the High Court?
The matter came on for hearing before Mr Justice Horner in the High Court in Belfast. He handed down his reserved judgment **[2015] NIQB 85** on 14 September 2015. There was also an earlier judgement in this case by Horner J on 18 August 2014 - **[2014] NIQB 104.**

Mr Laughlin raised these 5 defences:
- The bank had forged documents,
- His guarantee was signed under duress,
- There was an 'unfair relationship' under section 140A of the Consumer Credit Act 1974 (CCA) and the bank was in breach of the requirements to provide notices of sums in arrears,
- Funds raised by the Bank were misappropriated, and
- He had a valid permanent health insurance claim.

Mr McLaughlin also made a £2.3million counterclaim for loss of patents and trademarks against the bank.

What did the judge make of the witnesses?
Mr McLaughlin's brother-in-law, Mr McSwiggan, was also involved in the family business but by day he was employed by NIIB which is a subsidiary of the Bank of Ireland. The trial judge found the bank's 2 witnesses to be truthful saying:
- '*I did not detect someone who equivocated or who was prepared to resort to easy lie'*, and
- '*She was someone in whom the court could repose trust and confidence'*.

On the other hand the judge was not impressed with Mr McLaughlin, his family or his witnesses recording as follows. In relation to Mr McSwiggan, he found he was a '*less than satisfactory witness'* and had

'*some unaccountable lapses of memory*'. As to Mr McLaughlin, the judge found that '*he is someone who is used to getting his own way and does not like to be thwarted*', that he was '*dogged and determined*' and that he did '*not consider him to be a reliable witness*' because '*his testimony was … tainted*'. Neither wife was called to give evidence.

There was an acrimonious family fall out with a dispute over another jointly bought property and its beneficial ownership, rental income and the running of the business. Whilst the trial judge noted all this, he said it was not relevant to the dispute between the guarantor and the bank.

In his judgment, the trial judge did not mince his words noting that '*Mr McSwiggan had gone into business with Mr McLaughlin – the result has been a disaster – complete breakdown of trust and confidence*' and that it was '*not possible to reach a determination as to whether the Defendant or Mr McSwiggan or both are lying about what happened*.'

Were documents forged or not?
As to whether documents had been forged or not, on the evidence the judge disbelieved the guarantor's evidence on this and preferred the Bank's witnesses and contemporaneous documents which did not bear this out. Mr McLaughlin had independent legal advice and made no complaint about duress at the time. He knew the money went into his business bank account, that Mr McSwiggan was not acting as an agent of the bank and this defence was raised very late in the day.

The Judge found applying the 2002 House of Lords decision in *Lister v. Hesley Hall* that it would not be fair or reasonable or just to hold the Bank liable for these actions even if Mr McSwiggan had carried them out.

Was there an 'unfair relationship'?
The trial judge said that the CCA 1974 '*is a most complex piece of legislation*' and agrees with Lord Justice Clarke in *McGinn* that simplification of the law is severely overdue. The judge noted, correctly, that the CCA is there to protect consumers and not commercial companies who have obtained credit.

The judge observed that under CCA section 140(C)(4) a '*related agreement*' includes security provided in relation to the main credit agreement or any transaction linked to the main credit agreement. Mr McLaughlin submitted that his guarantee and/or mortgage were security linked to the main (credit) agreement.

However the trial judge ruled that the 'unfair relationships' provisions under section 140A-D of the CCA do not apply because in order for a credit agreement to be caught it has to be an '*agreement*' as defined by section 189(1) and accordingly the credit agreement between the limited company business and the bank is not a credit agreement caught by sections 140A-D. This meant that the 'unfair relationship' provisions did not apply to guarantors of corporate liabilities.

However the trial judge ruled that if he were wrong on that, then he would not have found unfairness anyway because:

- The credit agreement and guarantee was not unfair to the company,
- The terms were not unfair,
- The way in which the bank exercised or enforced its rights were not unfair, and
- No matter was drawn to the court's attention which rendered the relationship unfair.

Did the bank need to serve Notices of Sums in Arrears (NoSiAs)?
On the NoSiA point under section 86E of the CCA, again the trial judge ruled that this submission failed because this provision only applies to regulated consumer credit agreements. This was not because:

- The business was a limited company,
- credit provided in 2006 was over £25,000, and
- No '*default sums*' as such were due or demanded by the bank.

Similarly the defences under sections 86B, 86C and 86D of the CCA all fell away for the same reasons.

What happened in the Court of Appeal?
Mr McLaughlin appealed on a narrow ground to Her Majesty's Court of Appeal in Northern Ireland. This appeal was limited solely as to whether the '*unfair relationship*' provisions applied to a guarantor of a

corporate liability. By a short reserved judgment dated 5 May 2016, Lord Chief Justice Morgan, Lord Justice Weatherup and Lord Justice Weir dismissed the appeal - **[2016] NICA 33.**

Weatherup LJ gave the judgment noting that both Mr McLaughlin and his counsel had *'showed much ingenuity but all to no avail'*. On the 'unfair relationship' issue, Weatherup LJ ruled that '*this court is in agreement with Horner J on the application of the unfair relationship provisions of the 1974 Act. In essence the unfair relationship provisions do not apply to this facility because credit was extended to a company and did not amount to consumer credit. In any event it has not been established that there was an unfair relationship.*'

What had the Court of Appeal in London decided on this point?
In *Bank of Scotland plc v. Ahmad* **[2013] EWCA Civ 1814** Lady Justice Arden had to consider this very same issue at an oral permission hearing on 4 December 2013.

She noted that '*credit*' is defined in section 9(1) of the CCA 1974 as including '*a cash loan and any other form of financial accommodation*.' The guarantors tried to submit that the grant of financial accommodation to their companies could be financial accommodation for the purposes of the meaning of 'credit agreement'. However Arden LJ ruled that the point '*is not arguable because it is not financial accommodation given to the guarantors at that point in time*'.

The guarantors also tried to submit that under the terms of their guarantees, their obligations were immediately due and payable and because there had to be a deferment until the monies were called in, there had to be '*financial accommodation'* for the purposes of section 9 of the CCA . This submission was also rejected by Arden LJ on the construction of the guarantees before her ruling that '*there cannot be an immediate obligation arising but from the part of the guarantors*'.

In *McGuinness v. Norwich and Peterborough Building Society* **[2011] 1 WLR 613** Mr Justice Briggs expressed the view that in the case before him both the provision for payment by the guarantor on demand and the provision that the guarantor's obligations are those of a principal debtor were in the guarantee before him. Briggs J concluded that a guarantee '*does include a debt obligation'* and that the effect of the clause is not to enable the creditor to proceed without first claiming against the principal debtor. Arden LJ ruled that there was '*nothing in them which suggests that the debt, if there is one by virtue of the principal debtor clause, is one which is immediately payable and that is the crucial question for the purposes of the meaning of "*credit*"*'. Arden LJ ruled that this question must ultimately be one of the construction of the guarantee.

What happened in the Supreme Court?
Mr McLaughlin sought permission for a final appeal which if it were granted, he would then be seeking to over-turn the judgement of both the Court of Appeal and High Court. However on 31 January 2017 a panel of 3 Supreme Court Justices has refused permission for a final appeal on the basis that '*the application does not raise an arguable point of law of general public importance which ought to be considered at this time bearing in mind that the case has already been the subject of judicial decision and reviewed on appeal*.'

Are there any comments to note?
The CCA 1974 is a UK wide piece of legislation. We now have 2 decisions from the Court of Appeal – one in London and the other in Belfast – that the '*unfair relationship'* provisions do not apply to guarantors of corporate liabilities. It is telling that the Supreme Court has refused permission noting that there is no arguable point of law on this.

The High Court decision on NoSiAs is also a useful one. Given the litigious history of this case, if Mr McLaughlin or his counsel though this point was arguable on appeal they would have taken it.

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