David Bowden Law

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Bank of Ireland (UK) plc v. McLaughlin

Do "unfair relationships" apply to guarantors of corporate liabilities?

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Bank of Ireland (UK) plc v. McLaughlin

Do "unfair relationships" apply to guarantors of corporate liabilities?

This is Northern Ireland High Court case heard by Mr Justice Horner J with his reserved judgment[1] handed down on 18th August 2014.

It deals with issues under the CCA – both on "unfair relationships" and notices of sums in arrears ("NoSiAs" as they are commonly known). The CCA is a UK wide piece of legislation. This decision is from a superior court of record – so as a matter of judicial comity lower courts in England & Wales should follow this decision.

The case concerned a family plumbing business – which 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 – a loan for £133k and a £10k overdraft. This was to be secured by a £140k guarantee from Mr. McLaughlin, a 1st legal charge over the business premises and an assignment of a life policy. On 2nd February 2007, Mr. McLaughlin signed a guarantee. Before doing so – the Bank insisted following *Etridge*[2] 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 21st April 2009 insolvency practitioners – Cavanagh Kelly – convened a creditor's meeting of the business. It was placed in liquidation. The Bank filed a proof of debt for over £137k. The Bank sued Mr. McLaughlin on his guarantee for £133,620.76.

Five (5) defences were raised:

- Bank forged documents,
- Guarantee signed under duress,
- Unfair relationship and breach of NoSiA requirements,
- Funds raised by the Bank were misappropriated, and
- PHI claim.

To cap it all Mr. McLaughlin made a £2.3million counterclaim for loss of patents and trademarks.

Whilst the facts are very interesting – they are not overly relevant for the "unfair relationship" finding – so I will just pull out the relevant ones. Mr. McLaughlin's

[1] www.bailii.org/nie/cases/NIHC/QB/2014/104.html
[2] www.bailii.org/uk/cases/UKHL/2001/44.html

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.

The Judge found the bank's 2 witnesses to be truthful:

- "I did not detect someone who equivocated or who was prepared to resort to easy lie"
- "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:

- **Mr. McSwiggan**: "less than satisfactory witness", "some unaccountable lapses of memory"
- **Mr. McLaughlin**: "he is someone who is used to getting his own way and does not like to be thwarted", "dogged and determined", "I do not consider him to be a reliable witness" and "his testimony was … tainted"
- Neither wife was called to give evidence

There was an acrimonious family fall out – a dispute over another jointly bought property and its beneficial ownership, rental income and the running of the business. The judge notes all this – but says it is not relevant to the dispute between the guarantor and the bank. The judge does not mince his words:

- "Mr. McSwiggan had gone into business with Mr. McLaughlin – the result has been a disaster – complete breakdown of trust and confidence" and
- "not possible to reach a determination as to whether the Defendant or Mr. McSwiggan or **both** are lying about what happened."

DEFENCES

(i) Forged Documents

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,
- Mr. McSwiggan was not acting as an agent of the bank, and
- This defence was raised very late in the day.

(*There were other reasons too*)

The Judge found – applying the 2002 House of Lords decision in *Lister v. Hesley Hall*[3] 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.

(ii) Consumer Credit: Unfair Relationships

The judge says: "The Act is a most complex piece of legislation" and agrees with Clarke LJ in *McGinn*[4] that simplification of the law is severely overdue. The judge notes, correctly, that the CCA is there to protect **consumers** and not commercial companies who have obtained credit.

[3] www.bailii.org/uk/cases/UKHL/2001/22.html
[4] www.bailii.org/ew/cases/EWCA/Civ/2002/522.html

The judge notes that under 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 judge rules that the "unfair relationships" provisions under 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 – and therefore the UR provisions do not apply to guarantors of corporate liabilities.

But the judge rules that if he is wrong on that – then he would not have found unfairness because:

- 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.

(iii) Consumer Credit: NoSiAs

On the NoSiA point under section 86E of the CCA – again the judge rules that this submission fails because this provision only applies to **regulated** consumer credit agreements. This was not because:

- Business was a limited company,
- Credit provided (in 2006) was over £25k, and
- No "default sums" as such were due or demanded by the bank.

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

(iv) Other defences and counterclaim

There was no evidence provided of PHI insurance or in relation to the counterclaim – so the judge dismissed the counterclaim and gave judgment in full for the bank on its claim.

Comments

So overall this is a very good decision. I have three comments to make on this case. Firstly, UR cases depend on the evidence. Here the bank's evidence and records were very good; whilst the Defendant's evidence was not believed. Secondly, the judge struggled to reconcile the burden of proof in *Bevin*[5] and *Carey*[6] – but seemed to lean towards the commentary in *Chitty* on the threshold.

Finally, we have the decision of Lady Justice Arden in the Court of Appeal in an oral permission hearing from December 2013 (*Ahmad v. Bank of Scotland*[7]) where she rules that a guarantee is not the provision of financial accommodation at the time of the guarantee and is not therefore a regulated credit agreement.

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[5] www.bailii.org/ew/cases/EWHC/Ch/2011/3542.html

[6] www.bailii.org/ew/cases/EWHC/QB/2009/3417.html

[7] **[2013] EWCA Civ 1814**. The case is not on BAILII but is on Westlaw and LexisNexis.