Neutral Citation No. [2014] NIQB 104

Ref: **HOR9345**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **18/08/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

BANK OF IRELAND (UK) PLC

Plaintiff;

-and-

DERMOT McLAUGHLIN

Defendant.

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HORNER J

Introduction

[1] The Bank of Ireland ("the Bank") seeks to recover £123,000 plus interest from Mr Dermot McLaughlin ("the defendant") on foot of a deed of Guarantee and Indemnity ("the Guarantee") whereby the defendant guaranteed the indebtedness of Magma Heat Limited ("the Company") up to the sum of £140,000 on 2 February 2007. The defendant has relied on a number of different grounds to defend this claim. These include:

(i) The defendant claimed that Mr Kane had presented forged and falsified documents designed to hoodwink the court and had given false testimony. Mr Patrick Kane, the Company's relationship manager with the Bank, and who dealt with the defendant throughout, had conspired with the defendant's brother-in-law, Mr McSwiggan, an employee of a subsidiary of the Bank, NIIB, to damage the defendant arising out of a dispute about the ownership of, inter alia, 29 Killymoon Street, Cookstown, and remuneration due to Mr McSwiggan's wife, the defendant's sister, Roisin McSwiggan, who was a former director of the Company.

(ii) Further the defendant signed the Guarantee under duress from members of the Bank's staff, and in particular Mr Kane and Mr McSwiggan, who were trying to ensure that Mr McSwiggan and his wife acquired the legal and beneficial title of 29 Killymoon Street, Cookstown.

(iii) The Bank's "unfair relationship" with the Company and/or the defendant is such that it falls foul of Section 140A-D of the Consumer Credit Act 1974 as amended ("the Act"). He also alleges other breaches of the Act including breach of Sections 86B, C, D and E. I also understand that he calls in aid Section 82 of the Act.

(iv) The defendant claims that money raised on foot of a mortgage in respect of 29A Killymoon Street in the sum of £132,108.25 lodged to the Company's current account was misappropriated by the Bank as it should have been lodged to reduce the level of indebtedness due on the Company's loan account.

(v) Finally the defendant complains that he was insured under a permanent health insurance policy for £160,000. He was unfit for work and therefore a claim should have been made under this policy and the proceeds used to pay off any liability which the Company (or the defendant) had to the Bank.

[2] The defendant also asked the court to find that the Bank should be found liable for the loss associated with the collapse of the Company including the loss of patents and trademarks. This was valued in total by the defendant in the sum of £2,300,000.00.

[3] The defendant, as a personal litigant, has acquitted himself well. The court has made due allowance for the fact that he has not had legal training and consequently has not required a strict or technical adherence to the Rules of Court and in particular to those relating to pleadings. The defendant has been allowed latitude in the case that he has wanted to make and has been permitted to adduce expert evidence which had not been served on the Bank and in respect of which there is no expert's declaration. Further he has been given such time as he required and an opportunity to inspect the documents on the Bank's main server. No reasonable restriction has been placed on him seeking to adduce such evidence as he thought necessary to assist him in the defence of his claim and the prosecution of his counterclaim. This has necessarily prolonged the course of the trial.
Mr Stevenson, counsel for the Bank, co-operated fully with the defendant in trying to ensure that the trial was conducted both fairly and efficiently. His written and oral submissions were both clear and comprehensive.

[4] I did say that I would give an extempore judgment before the end of term following the termination of the evidence but this did not prove possible because of

the pressure of other legal business. As is my normal practice I handed down a draft written judgment on my immediate return from holidays so as to give both sides an opportunity to draw my attention to any typographical errors etc. I made it absolutely clear that this was not an opportunity for further submissions on the law or on the facts or a chance to adduce further evidence. Unfortunately these strictures were ignored by the defendant. The court has received many submissions, both legal and factual, and an attempt has been made to adduce further evidence by way of these submissions. In the interests of fairness I decided I would revise my judgment for a variety of reasons:

(i) The defendant was a personal litigant and it would be wrong that he should be penalised because he may not have clearly articulated a legal point he wanted to make.

(ii) I considered a further brief clarification might assist the parties, and especially the defendant, understanding my reasoning.

(iii) An obvious mistake which I had noticed required correction.

However I was not prepared to receive further evidence or submissions on the facts.

The witnesses

[5] Mr Patrick Kane was the business manager with the Bank who acted as the relationship manager and who was responsible for the accounts of the defendant and his unincorporated business. He then assumed responsibility for the accounts of the limited liability Company, Premier Under-Floor Heating Limited when the original business was incorporated and then for Magma Heat Limited ("the Company") when Premier changed its name on 24 October 2005. He gave his evidence in a straightforward manner. Although I observed him closely when he was giving his evidence, I did not detect someone who equivocated or who was prepared to resort to the easy lie. I consider that he gave his testimony truthfully. I do not consider that he lied or tried to mislead the court. I do not accept that he conspired with others in the Bank as the defendant originally alleged to harm the defendant and profit the McSwiggans or indeed worked to help the McSwiggans in their battle with the defendant either on his own or in league with Mr McSwiggan. I reject any suggestion Mr Kane doctored the Bank's documents or produced false documents for the trial. The defendant failed utterly to establish the serious allegations levelled against Mr Kane that he had falsified documents to mislead the court. At no stage do I find that his actions were dictated by what was in the best interests of the McSwiggans in general, or Mr McSwiggan in particular. I considered Mr Kane to be a reliable witness.

[6] Mr McSwiggan is now the Asset Finance Manager with Danske Bank. At the relevant time he was employed by the NIIB, a subsidiary of the Bank. He also appears to have had other business interests outside of his work with NIIB. These

seemed to involve the development of land. They did not form part of his duties with NIIB (or the Bank). I am now informed by the defendant that for part of the period which the court was considering, Mr McSwiggan was employed by the Bank. I have no note of this being put to Mr McSwiggan and certainly this is not my recollection. The contemporaneous documents do refer to him as being an NIIB official and that is how he introduced himself to the court. For reasons which will become clear the identity of his employer does not affect my conclusions on liability. He was a less than satisfactory witness. There is no doubt that he harbours a deep antipathy toward the defendant whom he considers has behaved disgracefully, cheating him and his wife out of money which they were due and depriving them of an interest in land which he considered was rightfully theirs. He had some unaccountable lapses of memory. For example, he could not remember if he had been a partner in the defendant's business. Whether he and/or wife had been in partnership with the defendant in a business is something that he would have been unlikely to forget. I have no doubt that Mr McSwiggan would, to put it as neutrally as possible, not have encouraged his wife to help out in the Company's business at a crucial time in 2005/2006. The reason for this is that he genuinely feels that the defendant has exploited her. But whether Mr McSwiggan failed to instruct his wife to carry out her duties as a director in the Company or whether he actively encouraged her to desist from playing any role in the Company, he did so as part of a bitter inter-family dispute designed to improve the position of himself and his wife. The McSwiggans had gone into business with the McLaughlins and the result had been a disaster with there being a complete breakdown in trust and confidence. However, one thing is clear, Mr McSwiggan (and/or Mrs McSwiggan) in carrying on business with the defendant and his wife was not acting in the course of his employment with the NIIB (or the Bank). I find that he did not influence or exert pressure or conspire with Mr Kane. He may well have put pressure on Mrs McSwiggan. His motives and behaviour in many ways matched those of the defendant.

[7] I considered Ms Fox, the Assistant Business Manager, who dealt with the defendant after the Company experienced problems with its indebtedness, to be a model witness. She gave her evidence fairly and truthfully. She was someone in whom the court could repose trust and confidence. Mr Heanan, the expert witness, who advised the court in respect of issues arising from the recording of information on the Bank's main computer, fulfilled the obligations placed upon him by the expert's declaration. He gave his evidence in a straightforward and impartial manner.

[8] The defendant is not a dishonest man. However he is someone who is used to getting his own way and does not like to be thwarted. Dogged and determined, I note that he succeeded in recovering £91,000 compensation from one of his suppliers in legal proceedings. He is a man who is prepared to seek satisfaction if he believes that he has been wronged. However, his animosity towards Mr McSwiggan and his sister, Roisin McSwiggan to a lesser extent, was palpable. I have no doubt that this has coloured his views and his actions. It has prevented him from looking at matters

objectively and has led him to make allegations originally of a conspiracy involving many members of the Bank which he subsequently retracted during the course of the hearing when it became clear that it was untenable. However he did doggedly maintain to the end that Mr Kane had conspired with Mr McSwiggan and that this had led to Mr Kane putting pressure on the defendant and also falsifying and altering Bank documents. These allegations of foul play seem to have emerged from nowhere in the summer of 2013. I have no reason to doubt that the defendant now genuinely believes the claims that he makes against the Bank. However I consider them to be without substance. It is significant that they arose when the defendant must have realised he was in a parlous position. I did not consider him to be a reliable witness. His perception and recollection were coloured by his relationship with Mr McSwiggan and his testimony was consequently tainted.

[9] Kevin McLaughlin, a brother of the defendant, who was called to give evidence was truthful but added little to the issues between the Bank and the defendant. Mr Martin was an expert witness on behalf of the defendant, who despite not producing an expert report or signing an expert's declaration, gave his evidence in the manner expected of someone giving such expert evidence.

The family dispute

[10] The dispute between the defendant and Mr McSwiggan into which both their wives were drawn, relates to a number of matters and includes, inter alia:

(i) The purchase of 29 Killymoon Street, Cookstown.

(ii) The injection of capital into the defendant's unincorporated business.

(iii) The failure of the defendant to properly remunerate Mrs McSwiggan for the works that she did in the business.

(iv) The costs of the defendant providing plumbing at the McSwiggans new home.

(v) A subsequent agreement as to the split of the beneficial ownership of 29 Killymoon Street.

(vi) The failure to rent 29 Killymoon Street.

(vii) The use of the rental received for 29A Killymoon Street which is owned solely by the defendant.

(viii) Mrs McSwiggan's role in the running of the limited Company.

[11] I was told that these were the subject of other legal proceedings. I have certainly seen letters from the solicitors acting on behalf of the respective parties. I

note that alternative dispute resolution has been tried without success. I was given the final report prepared by Mr Kevin McLaughlin and Mairead Rice, joint adjudicators, which demonstrates the complex nature of the dispute and the radically different perspectives of the McSwiggans and McLaughlins. Nothing has been resolved and the bitterness it has caused has blinded both the defendant and Mr McSwiggan. There is one thing in respect of which this court is absolutely clear. The resolution of this family dispute is not something that involves the Bank and the Bank and its employees have not intervened to try and advantage Mr McSwiggan or his wife to the disadvantage of the defendant or his wife. In due course the determination of the various disputes that have caused this family crisis between the McLaughlins and the McSwiggans will have to be resolved in another court or in another forum. It is certainly not a task that this court should seek to undertake especially when it does not have all the evidence. The sole focus of this court is in respect of the dispute between the Bank and the defendant.

The Property Crash and Economic Downturn

[12] I should also pause to note that the defendant is also a victim of the economic crisis that first manifested itself in a catastrophic fall in property prices in Northern Ireland in the summer of 2007 and the further disaster that engulfed the commercial world when Lehmann Bros crashed in the summer of 2008 and which had profound consequences for the banking system. The defendant and his business suffered the full fallout of these economic catastrophes. The records show that the business had been trading successfully up until the end of 2007. The background and history of the Company's failure is set out of the Minutes of the Meeting of creditors which the defendant himself chaired. This recorded:

> "The business, which was originally a sole trader, had been trading for more than 20 years manufacturing and installing high quality advanced heating and energy management systems to both trade and domestic customers across all Ireland, their trademark being in under-floor heating. The Company's turnover in 2007 was £565,000. The Company reported a net profit of £18,000 in the year to 31 December 2007. This compared with a loss of £33,000 in 2006 and a profit of £28,000 in 2005. In recent months, the Director has seen a significant decrease in business within the Company. Whilst the Company continued to be approached to price for and tender for work, the level of orders placed by customers has decreased dramatically since beginning of 2009. The Director believes that this is due to overall slowdown in the construction sector and the economy as a whole. The Company has also noted

> that over past 6-9 months customers have been taking longer to pay and consequently the Company has fallen behind in payments to its creditors. Over the course of 2008 and into 2009 the director has monitored their financial situation. Some cutbacks were achieved including pay cuts and staff layoffs where possible. In early 2009 the Company's order book slowed down dramatically and expected orders were either cancelled or substantially delayed. As a result the Company was unable to sustain its level of overheads with the level of orders being placed."

[13] The defendant appears years later to be attributing this failure of the Company to the actions or inactions of the McSwiggans. My provisional view is that the failure of Mr or Mrs McSwiggan to assist in the administration of the Company had no real effect on the Company's health. I note that Mrs McSwiggan's absence after her resignation as a director did not affect the Company's ability to function and that no complaint was made at the time that her lack of engagement was harming the Company's business. However, whether the defendant is right or wrong in blaming Mrs (or Mr) McSwiggan is a matter for another court. The evidence in this case establishes that it has nothing to do with the actions of the Bank or any servants or agents for whom the Bank may be vicariously liable. I have no doubt from hearing the witnesses and looking at the contemporaneous documents that at the time of this separation of business interests in 2006, the defendant considered that he had a most satisfactory deal. As the new owner of 75% of the Company he was now in effective control. He retained the joint legal and beneficial ownership of 29 Killymoon Street. There had been a substantial cash injection into the Company's current account. The business prospects for the Company were favourable. His Guarantee had been reduced to £140,000 and his half interest in 29 Killymoon Street was no longer a security for the Company's indebtedness. He could look forward to the future with considerable optimism. It is only with hindsight, and the economic downturn, which had catastrophic consequences for the building industry, that his view has changed.

The Evidence

[14] The defendant ran a plumbing business under the tile of McLaughlin Plumbing and Heating. It is not necessary for me to make a finding as to whether Chris McSwiggan and/or his wife, Roisin McSwiggan, was a partner in that business or any other business involving the defendant. I note, for example, that the adjudicators found that there were four partners in the business, namely the McLaughlins and McSwiggans. In any event, the business was incorporated as Premier Under Floor Heating Ltd ("Premier") in 2001. At that time the defendant owned 29A Killymoon Street, a store. The McSwiggans invested £20,000 in the business which they had made from a property deal. Later the McSwiggans and the

defendant purchased 29 Killymoon Street, an office/house which backed on to 29A Killymoon Street. They all saw this as a development opportunity. They hoped to obtain planning permission for residential housing and sell it on. As I have found, Mr McSwiggan was not comfortable about carrying on this activity given his employment with NIIB and that is the likely explanation as to why it was put into his wife's name. It appears the McSwiggans made a substantial capital contribution and £60,000 was borrowed from the Ulster Bank. The property was also put in the name of the defendant although he did not make any financial contribution. Subsequently when the defendant was asked to take his name off the deeds, he refused and their relationship descended into bitterness and acrimony. The business banking credit application of 27 November 2002 records that Dermot McLaughlin owned 50% of the shares and Roisin McSwiggan owned 50% of the shares and they were both directors. It states:

> "The business was transferred to a limited Company in March 2001 when Dermot brought in his sister Roisin as director and 50% shareholder. Roisin takes an active part in the bookwork side of the Company on a part-time basis which she combines with her job as a nurse. She is also the wife of NIIB rep, Chris McSwiggan."

[15] The credit application of 30 May 2003 records that the Company had moved its enterprise to the defendant's premises at 29A Killymoon Street which had been refurbished and that substantial money had been spent on research and development. At that time the prospects for the future appeared good and Mr Kane recommended that the Bank should provide continuing support. The Bank required the defendant and Roisin McSwiggan to sign a letter of Guarantee in the amount of £160,000 counter covered by a first legal charge on the deeds to the store at 29A Killymoon Street and the offices at 29 Killymoon Street.

[16] The terms and conditions were recorded in a letter dated 15 July 2003 accepted by the defendant and Roisin McSwiggan when they signed it on 13 August 2003.

[17] By 25 June 2004 the Company was trying to develop its own dedicated range of Magma products and components "to grow its business through supplying other underfloor heating companies throughout the UK and Europe".

[18] On 30 June 2005 the credit application notes:

> "The business is continuing to grow and y/e Dec 2004 financials have shown profitability. All facilities operate well and I am recommending upgrade to grade 3 on the back of improving performance, good

account operation and demonstrated repayment capacity."

[19] On 25 May 2006 it is noted:

> "The existing security for PUH Limited Facilities was a joint and several L/G from R McS and DMcL countercovered by the business office premises at 29 Killymoon Street, pv £150K, registered owners RMcS and DMcL and the warehouse to the rear of the premises known as 29A Killymoon Street pv'd recently - £325K, registered owner DMcL. Magma Heat Ltd have requested release of the office premises from security currently held. **They plan to raise a separate BIMS mortgage on these premises and they will use part of the funds as a pay-off for RMcS and the remainder will be invested in MH Ltd by DMcL.** MH Ltd will pay a rent for the use of the premises initially. However, the immediate plan is to move the office premises to the warehouse at the rear and rent the house out to foreign workers.
>
> There is sanctioned on the basis that a fresh L/G will be taken from DMcL remaining director ifo MH Ltd countercovered by existing FLC over the warehouse premises at 29A Killymoon Street, pv'd at £325K LTV 44%." (emphasis added)

[20] There is a facility letter dated 25 May 2005 which Mr Kane says was an error as it should have been dated 25 May 2006. There is handwriting on it that it was accepted on 26 May 2006. The offer records the terms set out in the credit application. There is no copy signed by the defendant. I note that a business account mandate was opened on 26 May 2006 by the defendant. The court has no hesitation in concluding that an offer was made in the terms of the unsigned facility letter which had been dated in error, 25 May 2005, and was accepted on 26th May 2006. Under the terms of the offer, which I find was accepted by the Company and the defendant, the Company was obtaining an overdraft of £10,000 and a loan of £133,000. The security for this credit was a £140,000 letter of Guarantee from the defendant, a first legal charge on 29A Killymoon Street owned by the defendant and an assignment of a life policy in the name of the defendant with Norwich Union. This reflected that the facts that the defendant was now the sole director of the Company and that his 75% shareholding gave him complete control. The Company hoped to make good use of the favourable trading conditions. The defendant continued as joint legal and beneficial owner of 29 Killymoon Street and the sole owner of 29A Killymoon Street.

[21] On 2 February 2007 pursuant to the agreement reached with the Bank and as part of the security that he was obliged to provide the defendant guaranteed the indebtedness of the Company up to the sum of £140,000. There is a legend below the defendant's signature which states:

> "*I confirm that prior to executing the Guarantee, I was independently advised* on the nature, terms and effect of the Guarantee by Cousin Gilmore, Solicitors, and have signed this Guarantee voluntarily."

[22] On 2 February 2007 Cousin Gilmore sent a letter which states:

> "With reference to your letter of 10 January 2007 we are placed to confirm that we have given independent advice to our client generally in connection with the proposed Guarantee/security to be given to you securing liabilities of Magma Heat Ltd and in particular as regards the serious nature of the liability thereunder and the purpose of our involvement in this matter. We have explained the nature and effect of giving the security to our client in accordance with the guidelines set out in the case of Royal Bank of Scotland v Ettridge (sic) and have pointed out that he has the option to decline to sign the documentation. Although we are of course not in a position to certify that no undue influence has been asserted by anyone, we have no reason to doubt that he entered in to it of his own free will."

[23] The defendant now claims that he was coerced by the McSwiggans to enter the Guarantee and to take over 75% of the shareholding. It is significant that he had no difficulty in standing up to the McSwiggans' demand that he give up his one half ownership of 29 Killymoon Street. He even refused their compromise offer of a two thirds/one third split in the McSwiggans favour in respect of that property.

[24] A mortgage was taken out with BIMS secured on 29 Killymoon Street, which is owned jointly by the defendant and Mrs McSwiggan. The defendant claims that it was a condition of the mortgage and of his agreement with the Bank that the proceeds secured by this mortgage be used to pay off the loan to the Company. I reject this for a number of reasons which include:

(i) There is no note in the facility letter of any such requirement. If there had been such a condition I would have expected to find it in the facility letter.

(ii) Indeed there is no contemporaneous document of the Bank setting out just such a requirement.

(iii) The credit application of 25 May 2006 records:

> "They plan to raise a separate BIMS mortgage on these premises and will use part of the proceeds to pay off RMcS and the remainder will be reinvested in MH Limited by DMcC." (emphasis added)

(iv) It is inconsistent with the need for a guarantee of £140,000. If the loan was to be paid off, a guarantee for that sum would be otiose.

(v) The defendant as a 75% shareholder controlled the Company's accounts and he could, if he wanted, have used the proceeds to pay off a loan when they were paid into the Company's current account. The defendant's claim that he was unaware that the proceeds of the mortgage were paid into the Company's current account is preposterous. It was his Company. He had access to all the accounts. The money was paid in on 22 May 2006 and the money was used by the Company. The financial injection obviously assisted the Company's cash flow as the defendant well knew.

The court was given a sheet of paper purported to be from Cathal Gilmore, Solicitor, which is unsigned and not on headed notepaper. Limited weight can be attached to such a document. It is difficult to believe a Solicitor providing evidence to a court would not, at the very least, have provided a signed copy on headed notepaper. I find on the evidence it is more likely that the money was paid into the current account at the direction of the mortgagors. If I am wrong and there was an undertaking then it was to pay it into the current account. As I have stated there was no requirement on the part of the Bank as to what was to be done with the proceeds other than they were to be used to pay off RMcS and the balance invested in the Company.

[25] On 21 May 2007 on the credit application it was noted that:

> "The under floor heating market is forecast to grow significantly in the UK and Europe, as better products come on the market as better the stigma that was previously attached is being left behind."

It is also recorded that all facilities "operate well".

[26] In the annual report for the year ending 31 December 2007 it is recorded "the profit for the financial year is £18,476".

[27] There then seems to have been a downturn in business which is consistent with the difficult trading conditions reflected in the economy in general. On 21 April 2009 Cavanagh Kelly who specialise in advising on insolvency wrote to the Bank giving them notice of a creditor's meeting together with proof of debt and proxy forms. The proof of debt was returned in the sum of £137,427.37 on 27 April 2009.

[28] On 2 June 2009 the Bank wrote to the defendant reminding him of his liabilities as per the Guarantee and informed him that they had no response to recent correspondence. Subsequent to this, the defendant had made 17 payments of £1,000 each in respect of his liability under the Guarantee. He had made no complaints about the efficacy or validity of the Guarantee. There are various other communications from the Bank during this period of time reminding the defendant of his indebtedness. On 28 May 2013 C and H Jefferson, the Bank's solicitors, served a special endorsed Writ seeking payment of the sum of £133,620.76. This produced a response of 6 July 2013 from the defendant which stated:

> "Prior to Magma Heat having its affaires moved to Magherafelt, Christopher McSwiggan, one of the Bank managers in question was extremely friendly with Paddy Kane both socially and professionally. It has been brought to my attention that during the time in question Christopher McSwiggan forced Roisin McSwiggan who was director with management responsibilities in Magma Heat Ltd to stop performing her role in the management of Magma Heat Ltd, The effect of his action was to construct a set of circumstances which forced me to agree to reduce Roisin McSwiggan's shareholding in Magma Heat Ltd and in turn release her from all liability for Magma Heat Ltd and take this on myself. The only other alternative was to allow the stranglehold which was being exercised against the operation of the business to succeed and have the business close. This was due to the fact that no decisions could be taken without the co-operation of Roisin McSwiggan, who at that time was not allowed to carry out her lawful duties and responsibilities by Christopher McSwiggan. After I had carried out all the actions forced on me it took almost one year to allow the business to complete all transfer as Roisin McSwiggan said that Christopher McSwiggan did not allow her to perform her contractal duty. When Roisin eventually signed all the outstanding documents it took many more months or years to have the Bank complete all the required transfers.

This was due to Paddy Kane constantly asking the Companies solicitors to send documents which were already in the Banks possession.

At one point Paddy Kane asked me what did Christopher and Roisin think of some particular situation. Then he immediately retorted (in a slightly embarrassed way as though he had just got caught with his hand in the cookie jar) **not that this is any of my business**. I was concerned but did not really appreciate the significance of the remark or the slightly strange reaction until several months ago when Christopher McSwiggan began to harass me removed a considerable amount of furniture and equipment from 29 Killymoon Street and then blocked all access to a store at 29A Killymoon Street. This probably was the subject of the deed this property was the subject of the deed of Guarantee and indemnity to the Bank of Ireland.

It was during one of the instances of harassment that Christopher McSwiggan told me he had stopped Roisin McSwiggan from speaking to me. Christopher McSwiggan was of the mistaken belief that he owned the property at 29 Killymoon Street and had loaned me money. He also felt there was some issue with the running of Magma Heat Ltd but would not elaborate.

Christopher McSwiggan had a personal vendetta against me and at Magma Heat Ltd and behind the scenes was manipulating events so that he could take advantage of me and the Company. I contest that the close personal and profession relationship between him and Paddy Kane represented a clear conflict of interest. Paddy Kane should therefore have passed on the management of Magna Heat Limited.

Due to the clandestine actions of Christopher McSwiggan and the conflict of interest Paddy Kane's close relationship with Christopher McSwiggan represented, I believe I was constructively forced into signing the agreement of indemnity to the Bank of Ireland.

> … I contest the legitimacy of the agreement in which Bank of Ireland are relying to request that I pay them £133,620.76." (sic)

[29] It seems that this is when the allegations at the heart of the defendant's defence first emerge.

[30] As I have said, it has not been possible to reach a determination as to whether the defendant or Christopher McSwiggan or both, are lying about what happened. Both the defendant and Mr McSwiggan are blinded by mutual distrust and loathing. I have not heard from either wife or from Cathal Gilmore, the solicitor. But what I am absolutely satisfied about is that Mr Kane was not involved in assisting any alleged wrongdoing by Mr McSwiggan and that in so far as Mr McSwiggan may have been trying to put pressure on the defendant, he was certainly not doing so in his role as an official of NIIB. He was not acting in the course of his employment. The fact that he was a Bank official is entirely incidental to his role or interest in the Company. Mr McSwiggan was not doing something he had any duty to the Bank to do. His acts were not connected with his employment at all. This applies regardless of whether he was an official employed by the NIIB or the Bank. It would not be fair or reasonable or just to hold the Bank vicariously liable for these actions, even if he had carried them out: see Lister v Hesley Hall [2002] 1 AC 215 and see the discussion in Charlesworth and Percy at Chapter 3 Section 2 on vicarious liability.
Mr Kane did not conspire with Mr and Mrs McSwiggan to advantage the McSwiggans or disadvantage the defendant in his role as relationship manager with the Bank. I also reject the claim that Kane and McSwiggan were "extremely friendly both socially and professionally" on the evidence adduced. The claim of a conspiracy, which was made years after the events to which they relate, is without any factual foundation. As I have said I found Mr Kane to be a truthful and reliable witness.

The key facts I find are as follows:

(i) The facility letter of 25 May 2006 (mistakenly dated May 2005) records the terms of the agreement between the Bank and the defendant. It is not an invention or a forgery as the defendant alleges. I am satisfied from the Bank's expert that this is the same letter which is on the Bank's server and that it is an historic one. It has not been created for the purposes of these proceedings whether by Mr Kane or any other employee of the Bank.

(ii) While a signed copy of facility letter of May 2006 has not been located, it was the terms that are contained in this document which governed the relationship between the Bank and the defendant and reflected the agreement which had been reached between the Bank and the defendant orally.

(iii) The letter accords with the credit application of the defendant of 25 May 2006.

(iv) The defendant signed the Guarantee pursuant to the facility letter in February 2007. It was on foot of the facility letter/agreement that the defendant's obligation to enter into a Guarantee for a smaller sum of £140,000k arose. The defendant could have refused to sign this Guarantee for a lesser sum and remained liable for £160,000.

(v) I accept Mr Kane's evidence that the terms of the facility letter were accepted by the defendant on or prior to 26 May 2006 and this is why the business account mandate was executed on the same day.

(vi) The facility letter is reflected in the summary of securities accepted on 26 May 2006. I accept that it would be possible for a very computer literate person by a very convoluted process to make the documents appear to be historic when they were of recent invention. I have no doubt that Mr Kane (or any other Bank official) did not do so and was not a party to any action by any third party whereby this was done. I am satisfied that all the documents provided by the Bank were not invented for the purpose of the hearing or falsified for the purpose of the hearing. They are the same documents which are on the Bank's main server and had not been falsified by Mr Kane or anyone else in the Bank's employment or acting in the course of their employment.

(vii) The claims made by the defendant do not undermine the documents relied upon by the Bank.

(a) There are differences in the font size. This is something that might occur when a section is pasted in from another document. It does not prove a document is falsified. Indeed, if anyone was falsifying a document, then one would make doubly sure that the font size remained the same throughout.

(b) There are errors in the addresses according to the defendant. For example in the application of 27 November 2002 the address of the Company is given is 95 Orritor Road where the defendant lives. The defendant was a driving force of the business and one can understand why such an error might occur. It does not undermine the credit application. The defendant alleges that the McSwiggans gave an address of 7 Sherbourne Heights when they did not live there. But Mr McSwiggan has contradicted the defendant on this evidence.

(c) The defendant claims in the credit application on 30 May 2003 that the address of 29 Killymoon Street is wrong. He says that the Company did not move there until June/July 2003. The credit application actually refers to the Company as having just moved to that address. I find that the defendant is incorrect in his recollection. There may also be mistakes in personal information on the credit applications but that is because as Mr Kane says that information is uplifted from previous

applications and not necessarily updated. There is nothing sinister to be deduced from these errors

[31] The following conclusions can be set out:

(i) The defendant signed the Guarantee.

(ii) He did so with the benefit of advice from an independent solicitor.

(iii) He made no complaint about being under any duress or pressure at the time. The complaint of extortion emerged years later after the Company had failed because, the court finds, of difficult trading conditions.

(iv) The money from the BIMS mortgage was paid into the Company's current account and used by the Company.

(v) The defendant, despite his protests, knew that the money had been paid into the account and used by the Company in its trading. Indeed, it is likely that the defendant (and his co-mortgagor) directed that the proceeds of the mortgage were paid in the Company's current account.

(vi) There was no condition that the money would be used to pay off a loan to the Bank. If this had been the position there would have been a severe cash shortage and the Company would have had to stop trading much earlier than it did. The solicitors would have been placed under an undertaking to use the money to pay off the loan. The evidence of the Bank is that there was no such undertaking.

(vii) The defendant may complain about the behaviour of the McSwiggans and that this adversely affected the Company's trading. It cannot be denied that these complaints were raised for the first time years after the Company's demise. The complaints now made that the McSwiggans by failing to co-operate with the defendant caused the Company's demise are simply not credible.

(viii) The present case has been made by the defendant very late in the day. It does not reflect either the contemporaneous documents or his decision to attempt to pay off his liability under the Guarantee. It is undisputed that the defendant made payments of £17,000 comprising 17 instalments of £1,000 each over an extended period in respect of this liability.

(ix) The agreement whereby the defendant acquired 75% of the shares and control of the Company, reduced the amount of his Guarantee and the removal of a property as security in which he claimed a 50% beneficial

interest, was seen by the defendant to be to his advantage at the time. It is only the change of economic circumstances (which could not have been foreseen) caused inter alia by the property crash and the banking disaster that altered the way in which the deal had been viewed by both sides.

(x) The McSwiggans in whatever way they acted, were not acting as agents of the Bank or in the course of their employment. The Bank cannot be vicariously liable for the allegations made against Mr McSwiggan which had nothing to do with his employment as an official of NIIB or the Bank. I reject the suggestion that Mr Kane conspired with Mr McSwiggan or tried to assist the McSwiggans in their battle with the defendant.

Consumer Credit Act

[32] The Act is a most complex piece of legislation. As Lord Justice Clarke said in McGinn v Grangewood Securities Ltd [2002] EWCA Civ 522:

> "Simplification of a part of the law which is intended to protect consumers is severely long overdue so as to make it comprehensible to layman and lawyer alike. At present it is certainly not comprehensible to the former and is scarcely comprehensible to the latter.

[33] It is important to bear in mind two matters:

(a) The Act is largely there to protect consumers and not commercial companies who have obtained credit.

(b) Agreements under the Act which are protected are, in the main, those which comprise "regulated agreements". A regulated agreement under the definition in Section 189(1) of the Act is not one in which a Company is given credit.

[34] As I understand the defendant's final submission, he alleges that:

(i) The agreement for credit in May 2006 and which involved him giving a Guarantee was caught by the unfair relationship provisions in the Act, Sections 140A, B and C. Accordingly, he is entitled, as a surety, to relief under those provisions.

(ii) There has been a breach of Section 86B, C, D and E of the Act in respect of the notice of default.

(iii) He also seeks to rely on Section 82.

[35] Sections 140A, B and C provide:

> "140A *Unfair relationships between creditors and debtors*
>
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following-
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).
>
> (3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.
>
> (4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.
>
> (5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans).

140B *Powers of court in relation to unfair relationships*

(1) An order under this section in connection with a credit agreement may do one or more of the following-

(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;

(d) direct the return to a surety of any property provided by him for the purposes of a security;

(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;

(f) alter the terms of the agreement or of any related agreement;

(g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.

(2) An order under this section may be made in connection with a credit agreement only-

(a) on an application made by the debtor or by a surety;

(b) at the instance of the debtor or a surety in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement; or

(c) at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant.

(3) An order under this section may be made notwithstanding that its effect is to place on the creditor, or any associate or former associate of his, a burden in respect of an advantage enjoyed by another person.

(4) An application under subsection (2)(a) may only be made-

(c) in Northern Ireland, to the High Court (subject to subsection (6)).

(6) In Northern Ireland such an application may be made to the county court if the credit agreement is an agreement under which the creditor provides the debtor with-

(a) fixed-sum credit not exceeding £15,000; or

(b) running-account credit on which the credit limit does not exceed £15,000.

(7) Without prejudice to any provision which may be made by rules of court made in relation to county courts in Northern Ireland, such rules may provide that an application made by virtue of subsection (6) may be made in the county court for the division in which the debtor or surety resides or carries on business.

(8) A party to any proceedings mentioned in subsection (2) shall be entitled, in accordance with rules of court, to have any person who might be the subject of an order under this section made a party to the proceedings.

(9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.

140C *Interpretation of ss.140A and 140B*

(1) In this section and in sections 140A and 140B 'credit agreement' means any agreement between an individual (the 'debtor') and any other person (the 'creditor') by which the creditor provides the debtor with credit of any amount.

(2) References in this section and in sections 140A and 140B to the creditor or to the debtor under a credit agreement include-

(a) references to the person to whom his rights and duties under the agreement have passed by assignment or operation of law;

(b) where two or more persons are the creditor or the debtor, references to any one or more of those persons.

(3) The definition of 'court' in section 189(1) does not apply for the purposes of sections 140A and 140B.

(4) References in sections 140A and 140B to an agreement related to a credit agreement (the 'main agreement') are references to-

(a) a credit agreement consolidated by the main agreement;

(b) a linked transaction in relation to the main agreement or to a credit agreement within paragraph (a);

(c) a security provided in relation to the main agreement, to a credit agreement within paragraph (a) or to a linked transaction within paragraph (b).

(5) In the case of a credit agreement which is not a regulated consumer credit agreement, for the purposes of subsection (4) a transaction shall be treated as being a linked transaction in relation to that agreement if it would have been such a transaction had that agreement been a regulated consumer credit agreement.

(6) For the purposes of this section and section 140B the definitions of 'security' and 'surety' in section 189(1) apply (with any appropriate changes) in relation to-

(a) a credit agreement which is not a consumer credit agreement as if it were a consumer credit agreement; and

(b) a transaction which is a linked transaction by virtue of subsection (5).

(7) For the purposes of this section a credit agreement (the 'earlier agreement') is consolidated by another credit agreement (the 'later agreement') if-

(a) the later agreement is entered into by the debtor (in whole or in part) for purposes connected with debts owed by virtue of the earlier agreement; and

(b) at any time prior to the later agreement being entered into the parties to the earlier agreement included-

(i) the debtor under the later agreement; and

(ii) the creditor under the later agreement or an associate or a former associate of his.

(8) Further, if the later agreement is itself consolidated by another credit agreement (whether by virtue of this subsection or subsection (7)), then the earlier agreement is consolidated by that other agreement as well."

[36] Chitty in Volume 2 at 38-213 states:

> "The Consumer Credit Act 1974 contained provisions enabling the court to reopen a credit agreement if it found that the credit bargain was 'extortionate'. The threshold for intervention (that payments were **grossly exorbitant** or the bargain otherwise **grossly** contravened fair dealing) was very high and hence very few challenges on this basis were successful. The Consumer Credit Act 2006 repealed and replaced these provisions with new Section 140A-140D. The new provisions essentially lower the threshold to one of a relationship between the creditor and debtor (taking into account both the credit agreement and 'any related agreement') that is 'unfair to the debtor'."

[37] Goode on Consumer Credit Law and Practice states:

> "Agreement made before 6 April 2007:
>
> (a) If the agreement becomes completed before 6 April 2008, the debtor or surety has to apply to reopen under CCA 1974, ss 137-140 and cannot invoke ss CCA 1974, 140A-140D can do so at any time;
>
> (b) If the agreement has not become completed before 6 April 2008, the debtor or surety can apply to reopen under ss 137-140 but only if the debtor's originating application or the creditor's proceedings are commenced before 6 April 2008;
>
> (c) The debtor or surety can only apply to reopen under ss 140A-140D if the agreement has not become completed before 6 April 2008 and the application (or creditor's proceedings as the case may be) commences after 6 April 2008."

The Bank accepts that the facility letter between the Company and the Bank did not become complete before 6 April 2008 and therefore no time issue arises in respect of the defendant's reliance on these "unfair relationship" provisions.

[38] The defendant contends that the unfair relationship provisions apply on the basis, it would appear, that under Section 140A(1) the court is entitled to consider a credit agreement or any related agreement in determining whether a relationship is unfair. Further under Section 140C(4) a related agreement includes security provided in relation to the main credit agreement or any transaction linked to the main credit agreement. The defendant argues that the Guarantee and mortgage provided were security linked to the main agreement. Accordingly the court is entitled to consider the dealings in respect of the Guarantee (and the mortgage) in determining whether the relationship is unfair.

[39] There is a difficulty with this argument because in order for the credit agreement to be caught it has to be an agreement as defined by Section 140C(1). The problem is that the debtor here is a limited liability Company and it is not an individual as defined by Section 189(1) of the Act. Accordingly this is not a credit agreement caught by Section 140A-D and the unfair relationship provisions do not apply.

[40] If the court is wrong and the unfair relationship provisions do apply, it would seem that they can be challenged by a surety, such as the defendant.

> "An application that the credit or **related agreement** be reopened may be made by the debtor or a surety, even though no pleadings have been instituted by the creditor": see 38-224 of Chitty on Contracts and Section 140C(2).

There is some dispute about how Section 140B(9) should be construed which is the provision dealing with the onus of proof: see Carey v HSBC Bank Plc (2009) EWHC 3417 and Bivin v Datum Finance Limited (2001) EWHC 3542. In this case, I have no doubt on the basis of the evidence adduced that the credit agreement on its own or the credit agreement taken together with the Guarantee or the credit agreement taken together with the Guarantee and the mortgage was not unfair to the Company or to the defendant taking into account the factors which were set out at Section 140A(i)(a)-(c). The terms were not unfair, the way in which the Bank has exercised or enforced any of its rights under the agreement for credit facilitates or the Guarantee or mortgage was not unfair. Further there is no other matter which has been drawn to the court's attention which renders the relationship unfair to the Company or to the defendant. In conclusion if the "unfair relationship" provisions apply, there is no basis on the evidence before the court for concluding that the relationship between the Bank and the Company and between the Bank and the defendant was unfair.

[41] The second provision which the defendant relies on is Section 86(E) of the Act which states:

> "(1) This section applies where a default sum becomes payable under a regulated agreement by the debtor or hirer.
>
> (2) The creditor or owner shall, within the prescribed period after the default sum becomes payable, give the debtor or hirer a notice under this section.
>
> …
>
> (5) If the creditor or owner fails to give the notice under this section within the period mentioned in subsection (2), he shall not be entitled to enforce the agreement until notice is given to the debtor or hirer."

The defendant argues that because no default notice was validly served on the Company, the Bank cannot enforce the loan agreement: see Section 86E(5). This argument fails on a number of different grounds:

(a) Firstly this only applies if the agreement is "a regulated agreement" as defined by Section 189. A regulated agreement includes "a consumer credit agreement or a consumer hire agreement, other than an exempt agreement". In this case the court is not considering a consumer hire agreement. A "consumer credit agreement" is defined under Section 8 thus:

> "(1) A consumer credit agreement is an agreement between an individual ('the debtor') and any other person ('the creditor') by which the creditor provides the debtor with credit of any amount. …
>
> (3) A consumer credit agreement is a regulated agreement within the meaning of the Act if it is not an agreement an 'exempt agreement' specified in or under Section 16, 16A, 16B or 16C."

The agreement between the Bank and the Company is not a regulated agreement because the Company is not an individual: see above. Goode on Consumer Credit Law and Practice said:

> "Consequently, S189(1) of the CCA 1974 defined **individual** as including **a partnership or other unincorporated body of persons not consisting entirely of bodies corporate**. Hence the only two types of debtor to be excluded from protection of CCA 1974 would be a body incorporate, that is an association or body constituting a distinct legal entity and having perpetual succession and a common seal or a Company or a group or association consisting wholly of bodies corporate."

It is clear that the agreement entered into between the Bank and the Company is not a consumer credit agreement and is thus not a regulated agreement and therefore Section 86E does not apply.

(b) Secondly the Section only applies where a "default sum" is payable. This is defined under Section 187A. I accept the submission on behalf of the Bank that a default sum is, in essence, a penalty which is payable in the event of the breach of a regulated agreement by a debtor. No such sum is payable in the event of the breach of the terms of the Company's loan agreement with the Bank. Accordingly this section does not apply.

(c) Finally Section 8(2) of the Act stated:

> "(2) A consumer credit agreement is a personal credit agreement by which the creditor provides the debtor with credit not exceeding £25,000."

Section 8(2) was repealed in respect of agreements made on or after 6 April 2008. The facility letter between the Bank and the Company was made almost two years before and £25,000 limit would therefore apply. The amount of credit advanced by the Bank to the Company was in excess of £25,000. Therefore the facility letter is not caught by Section 86E.

[42] The defendant's claims to rely on Section 86B, C and D of the Act also fail for the reasons which are set out at paragraphs [41](a) and [41](c) above. The same also applies to any claim based on Section 82 which relates to regulated agreements only.

Further matters

[43] The defendant claims that there was an insurance policy which should have paid out £160,000 in the event of his ill-health. However he did not pursue this ground. No evidence was adduced by him that the Bank did anything which affected the validity of any policy which he may have taken out with an insurance company. Indeed no evidence has been adduced about the policy or of any illness suffered by the defendant, which would have entitled him to claim under it. There is no evidence before the court to make the Bank legally responsible in any way for any failure by any insurance company to pay out on any policy which the defendant may have had.

[46] The defendant has submitted a counterclaim. But he has chosen not to adduce any evidence whatsoever in respect of the claims made thereunder which relate to a number of matters including trade debtors and patents. No attempt was made to quantify any of these losses or to link any of these losses to any wrongful act or omission on behalf of the Bank, its servants or agents. In any event, they appear on their face of it, to be losses of the Company and not those of the defendant.

Conclusion

[47] In the circumstances the court finds that the Bank's claim against the defendant for £123,000 plus interest (to be calculated and agreed), is proven. The defendant has not proved any of the grounds of its defence against the Bank, and I stress the Bank. Consequently I give judgment for the Bank on the defendant's counterclaim. I will hear the parties on the precise amount which I should enter judgment for on the date of this judgment being handed down and on the issue of costs on 5 September 2014.