Neutral Citation No. [2014] NICh 29 | *Ref:* **DEE9473**

Judgment: approved by the Court for handing down | *Delivered:* **04/12/2014**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION 2014/13556

GERALDINE PATRICIA O'NEILL

And

ULSTER BANK LIMITED

DEENY J

[1] In regard to the application before me today I note that it relates not only to an insolvency matter but a personal insolvency which would be imminent if the court were to reject the application of the appellant before me and I therefore conclude that it would be best if it were dealt with by this extempore judgment.

[2] On 13 January 2014 Mr Corbett on behalf of the Ulster Bank caused to have served on the appellant, Geraldine Patricia O'Neill of 17A Ballymacpeake Road, Portgenone, Co. Antrim, BT44 8LW a statutory demand in the sum of £1,338,020.44. Mrs O'Neill then applied to the Chancery Division of the High Court to set aside that statutory demand by an application brought by her solicitors, Messrs Harrisons, on 31 January 2014.

[3] The matter came before the Master in Bankruptcy who refused to set aside the statutory demand on 4 September 2014. I observe that it seems that the matter was perhaps more fully argued before me than it was before the learned Master. Following her refusal Mrs O'Neill appealed to this court on 11 September 2014. The matter was listed for hearing today 4 December 2014. On 2 December 2014 the appellant applied to take the case out of the list and for leave to file additional evidence. I refused those applications for the reasons set out in the course of that hearing on 2 December.

[4] Mr William Gowdy of counsel appeared for the Ulster Bank and presented a timeous and succinct skeleton argument. The skeleton argument for the appellant was very belated but the court did hear helpful oral arguments from not only Mr Gowdy but from Mrs Moyne Anyadike-Danes QC who appeared with Mr McCausland for the appellant and whose skeleton argument was of assistance when received.

[5] The application of Mrs O'Neill is based on her affidavit of 31 January 2014 and I shall just briefly summarise the case which she sought to make in that affidavit. She is the wife of Mr Gerard Patrick O'Neill, they have 5 children at the relevant time two of those were her elder sons, Patrick Gerard O'Neill and Garrett Brian O'Neill. She went on to have 3 daughters, one of whom was still an infant, later a young girl at the time of these dealings with the Ulster Bank. Her husband was a self-employed builder from 1 May 1989 and on her affidavit of evidence carried out "renovations for clients and occasionally one off new builds". She would have helped with the paperwork at an earlier stage but later that was taken over by her daughter and a nephew. She says at paragraph 5 of her affidavit:

> "At no point did I have any decision making power or any involvement in the management of the company.
>
> [6] Throughout the relevant period, my primary role has been that of a full-time mother and housewife. As such, I place substantial reliance upon and trust in my husband to look after our financial affairs. This included the conduct of his business and the management of our family home. I believe that he would act in both of our best interests."

[6] She acknowledges that there was correspondence showing that she was introduced as a partner into a partnership her husband set up trading as Glenone Partners in or about 2005. But she avers that at no point did she receive any independent advice either financial or legal regarding the partnership or involvement in it. Her two elder sons were partners too. She says at paragraph 8 of her affidavit:

> "I remember saying that I did not want to be in a partnership. I was told by my husband that I was preventing progress and that the decision to form a partnership was to the benefit of the family."

[7] In support of her case, which is primarily one of undue influence by her husband which has exposed her to the very large claim by the Ulster Bank, she has averred that her husband provided her with £200 per week for housekeeping and looking after the family and nothing more. Counsel drew attention to that contrasting with a letter from Park Madden & Co, Chartered Certified Accountants,

exhibited to the affidavit of Mrs O'Neill. This letter is of 14 December 2011, which is about the time of a facility letter to which I will turn in a moment, but before any proceedings have been brought by the bank and it is interesting to compare that letter which records Mrs O'Neill as receiving £22,690.00 as her share of the partnership income in the year ending 30 April 2006 with her evidence that all she received was the £200 a week with nothing more. The appellant relies on this as establishing that she was a nominal partner and was not in truth involved in the partnership and that it was being driven by her husband. She does not and I think it is to her credit, although of course one would hope all persons would do this, she does not seek to deny her signatures wrongly. She admits that she has signed a number of documents with regard to the bank she says as follows at paragraph 10:

> "As regards my dealings with the creditor, to the best of my knowledge it was my husband who negotiated and concluded any loans throughout the relevant period. I can recall attending a meeting with the representatives of the creditor on only one occasion. I do not recall the subject of that meeting or when it occurred. I attended along with my husband at premises located in High Street, Ballymena. On that occasion I believe that a photocopy of my licence was taken by representatives of the creditor. At no point was I advised independently of my husband, either by a representative of the bank or the solicitor. At no point was the nature of documentation I was signing explained to me. At no point was I was informed of any personal liability that I was being exposed to. I was in the company of my husband for the duration of the meeting."

[8] Mrs Anyadike-Danes took me to the documents disclosed by the bank so far in exhibits to their affidavit to which I will turn shortly and she pointed out that there was a document which bore out the appellant's recollection and which she would not have seen at the time of swearing that affidavit showing that she did attend or apparently attended the bank, certainly signed a document and indeed appears to have produced her driving licence as the bank recorded. The bank it should be said at no stage denies those facts. As I will explain in a moment their case here is based not on any dispute as to these particular facts. I observe that the documents would point to her having been in possibly 2004 but no later than 2005, the papers are somewhat mixed up and it is hard to be dogmatic about this and nor is it necessary to do so at this stage. Suffice to say that her visit was at that time and not at a later date when very substantial loans were made to this alleged partnership. Mrs O'Neill goes on later to point out that the level of indebtedness to the bank increased markedly as late as 30 April 2006. After this partnership account had been taken out the loan level was still at £107,310. But by the year ended 30 April 2007 it had increased to £1,259,700. I will have a word more to say about that in a moment.

[9] So the position is that the appellant alleges that really in signing these documents she was acting under the undue influence of her husband. She again candidly admits, she does not try and claim that the bank had any actual knowledge of that and so on the authorities, to which I will turn in due course, she must show constructive knowledge and the real issue in the hearing before me was whether in the context of a setting aside of a statutory declaration what view the court should form of that. The defendant, in response to the application, lodged an affidavit from Ms Karen Murphy, a bank manager in the Global Restructuring Group of the Ulster Bank, and I have taken into account her submissions. She exhibited an important document, the facility letter on which the bank in effect relies, for saying this debt is owing and that they are entitled to in effect enforce it by serving the statutory demand and then if it is not met or set aside by proceeding to petition for this lady's bankruptcy.

[10] It is a very interesting document and it is quite lengthy. I am not going to read it all out, obviously. It is dated 15 February 2011 so clearly it is not the earliest facility letter between the parties. It is addressed to the borrower meaning Gerard Patrick O'Neill, Geraldine Patricia O'Neill, Patrick Gerard O'Neill and Garrett Brian O'Neill, ie the appellant's husband, the appellant and their two sons, that is the borrower. The first facility which the bank maintains is an overdraft on the borrower's current account at the Ballymena Branch of the bank up to the sum of £15,000, once £5,000. The purpose of that is for "financing the borrower's working capital". So that is consistent with the modest working capital of a small builder renovating houses or perhaps building a one-off occasionally as Mrs O'Neill said. Demand Loan B is of a different character and it is in the sum of £425,300.00 and the purpose of it is as follows:

> "The facility will be made available to the borrower for the sole purpose of land bank and development costs on the site at Halfgayne Road, Maghera." (My emphasis).

[11] So the borrower, this man, his wife and two young men in their twenties, are now engaging in land bank and development costs on a much larger scale and I may return to that later. Demand Loan C is for £260,000 for the purpose of "purchasing site at Innishrush, Portglenone". Demand Loan D is in the sum of £838,280.00 and it is for the purpose of "purchasing site at Mullaghdun Lane, Dungannon". Demand Loan E is also of interest because it is a Demand Loan of £30,000 "for the sole purpose of interest provision". So clearly the borrower, this hitherto small builder and his two sons and his wife, were not in a position to service these large loans and the bank was lending them the money to pay the interest on the other loans. The security for these loans is given at the section marked 'Terms and Conditions applicable to the Facility' and part of the security is the dwelling house and home of the parties, or certainly of Mr and Mrs O'Neill, where they still live and the bank were to have a second legal charge over "the borrower's property at that address "pledged by Gerard O'Neill". Mr Gowdy, from the Bar, said that the property was

in fact still in the sole name of Mr O'Neill although the appellant seems to have thought that she had some title to it. Rather the reverse, says Mr Gowdy, she signed a Deed of Postponement some 17 years ago and that may, of course, prove of importance in the time to come but I need not address that now.

[12] Now what is indisputably true is that internal page 15 of this document is signed not only by two representatives of the bank but by the four O'Neills including this appellant, although I notice that there is a date opposite Gerard O'Neill's signature but none opposite the signatures of the other three putative partners. But as I say this lady does not deny that she signed things but she says as one has heard before that she was told to sign them by her husband without appreciating the nature of the documents. The bank's deponent helpfully exhibits title to a number of properties for which loans were advanced and I just want to make a brief reference to those because it is important. As I say the initial loan seems to have been a modest £15,000 but then on 7 February 2007 Folio LY90370 Co Londonderry was purchased in the sum of £175,000. Mr Gowdy lays stress on the fact that the four persons named as borrower were the four persons in whose name the title was registered. There was a charge of the same date in favour of the bank. The property was apparently at the time of this affidavit still in the ownership of the four O'Neills.

[13] Furthermore, there were details of Folio LY10286 Co Londonderry, and here we find that there was a purchase again by the four O'Neills in the sum of £245,000 and again a charge of the same date 23 February 2007 in favour of the Ulster Bank Limited. It appears that since then the title has been registered in the name of another gentleman in consideration of the sum of £15,000. Then thirdly, there is the land certificate for Folio TY68402 Co Tyrone and the borrower paid £770,000 for an area under one hectare the Land Register says. Again the bank had a charge on the same; well in fact the bank's charge is of 13 November 2007 which is indeed the date of registration of the O'Neill's interest. Again, I observe this property has since been sold, on 17 June 2013 in the sum of £125,000.

[14] Now I will turn to counsel's submissions in a moment. The test is helpfully set out and is not in dispute and it is common case that the court is applying Rule 6.004 of the Insolvency Rules (Northern Ireland) 1991 and that is the Rule under which it is brought and the hearing of this application relies on 6.005(4) and I will set that out in full if the judgment is reduced to writing.

"6.005 (4) The court may grant an application if –

(a) The debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or

(b) The debt is disputed on grounds which appear to the court to be substantial; or

(c) …. or

(d) The court is satisfied, on other grounds that the demand ought to be set aside."

The key point is 6.005(4) (b), namely that the court may grant the application to set aside if "the debt is disputed on grounds which appear to the court to be

substantial". Mrs Anyadike-Daynes relied on the judgment of Mr Justice Girvan as he then was in Moore v The Commissioners of Inland Revenue [2002] NI 26 and at pages 8 and 9 of his judgment the Learned Judge said:

> "To deprive an alleged debtor of an opportunity to litigate his dispute a fair statutory demand procedure requires that the creditor spells out clearly and accurately what his debt is, establishes that the debt is due and gives the debtor a full opportunity to show cause why in the interests of fairness and practice he should have the opportunity to defend the claim by litigation.
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> In summary judgment applications the plaintiff must show that the defendant has no arguable case. In an application to set aside regularly obtained judgment the test appears to be whether the defendant in the interests of judgment should be permitted to defend the action. In either set of proceedings it is clear that if a defendant has in reality no defence to the plaintiff's claim allowing the defendant to defend would be unjust to the plaintiff. Refusing leave to defend would not be unjust to the defendants since it would merely delay the enforcement of the plaintiff's indisputable right and send to trial an indefensible case.
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> Although at first sight the wording of Rule 6.005 and some decided cases may suggest that a debtor served with a statutory demand bears a heavier burden than is borne by a defendant in summary judgment applications or applications to set aside judgment and that an onus of proof is thrown on him, in reality the test applicable should be no different. This is particularly so in light of Article 6 and in the light of the severe consequences flowing from a decision not to set aside a statutory demand."

[15] Ms Anyadike-Danes relies on the judgment of this court in Allen and Burke Construction [2010] NICh 9 and [2011] NIJB 62 where I pointed out that the prevailing view was, as she conceded in this hearing that if I refused this application the appellant does not have another opportunity in which to raise this defence but will be made bankrupt and she also quoted from my judgment in the case:

> "The court is not holding a full trial of the matter; it must only decide if the grounds appear to be substantial. They must be genuine. The grounds of dispute must not consist of some ingenious pretext invented to deprive a

> creditor of its just entitlement. It must not be a mere quibble."

[16] She also relied on the judgment of Mr Justice Girvan, as he then was, in Sheridan Millennium Ltd and Odyssey Property Company [2003] NICh 7 and I think I need not quote from it. So I have to decide whether the debt is disputed on grounds which appear to the court to be substantial and that I will propose to do. The appellant's case is that the bank should have been aware that the husband was the driving force and the true operator of this business and that there was a risk of the wife being subject to his undue influence in exposing herself to potentially unwise and hazardous legal commitments. That that was so initially but even if the court was not persuaded [of that] there was sufficiently a notice, they should certainly have known so when the dealings with the bank moved from the modest working capital of £15,000 for a jobbing builder to sums infinitely larger in order to buy "a land bank".

[17] The bank's position was succinctly stated by Mr Gowdy in his written and oral submissions. His contention is that this was a joint loan by the bank to one of four joint owners and that she benefited from it because she obtained equal title with the other three partners or co-owners in the properties that were bought with the loans from the bank. He submits that on the authorities therefore no constructive knowledge should be attributed to the bank and therefore there was no need for it to take further steps. The court in approaching the case law helpfully outlined by counsel accepts the factual basis set out by Mr Gowdy at this time as I just summarised it. The court must also take into account the plaintiff's case at its height for the purposes to seeing whether there is an arguable case that appears to be substantial and in that regard I have to conclude that the husband here was the builder and that the wife was a housewife and mother. I have to accept her evidence at its height at this stage that she only ever once went to the bank and therefore I have to infer that he was bringing in signed documents to the bank managers who were not meeting this lady and it might be thought that that might certainly contribute to alerting a careful banker or a banker conscious of his or her duties under the law to the possibility that she was not aware of the nature of these transactions which were imposing this onerous burden on her.

[18] But in particular I take into account the very marked increase in this scale of lending here and the nature of that lending. As I have said it moved from modest working capital of £15,000 to loans of well over £1m. I find the use of the words "land bank" in the bank's own document concerning; certainly it is of a completely different character from the work of a small jobbing builder. "Housing development" is perhaps not quite as extreme but even it was a step upwards for this small jobbing builder and I take into account the other matters advanced on behalf of the appellant and the respondent. Both counsel agree that the leading case in the matter is that of the Royal Bank of Scotland Plc and Etridge No 2 [2002] 2 Appeal Cases 773 and it is also agreed that the key initial paragraphs are those of Lord Nicholls of Birkenhead at paragraphs 48 and 49:

> "48. As to the type of transactions where a bank is put on enquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on enquiry. On the other side if the line is the case where money is being advanced or has been advanced to a husband and wife jointly. In such a case the bank is not put on enquiry unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in CIBC Mortgages Plc v Pitt [1994] 1 AC 200.
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> 49. Less clear cut is the case where the wife becomes surety for the debts of a company whose shares are held by her and her husband. Her shareholding may be nominal or she may have a minority share in a holding or an equal shareholding with her husband. In my view the bank is put on enquiry in such cases even when the wife is a director or secretary of the company. Such cases cannot be equated with joint loans. The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business."

[19] Now pausing there, here counsel divide, with Mr Gowdy saying well she is not a surety here, she is the legal co-owner of the lands purchased with the money, whereas Mrs Danes is submitting, I hope I paraphrase her not unfairly, that there may be some analogy between her joint partnership here and being a minority shareholder in a limited company. Mr Gowdy points out that a limited company is a separate legal person as opposed to a partnership. The Etridge case is, of course, of great interest. Their Lordships were seeking to strike a balance between the need to protect wives from the impact of potentially disastrous decisions obtained by misrepresentation or undue influence in the power in particular of husbands though conceivably others as well but at the same time not to impose an unreasonable burden on banks whose role, a necessary part in society to-day, is to provide loans for homes and housing in particular in this context. I am not going to read extensively from the judgment but I do note paragraph 87 of the judgment of Lord Nicholls and also, which was not in fact opened in this case, Lord Clyde at paragraph 92 where he warns of or doubts the wisdom of it "attempting to make classifications of cases of undue influence". That reminds me, although I do not think I need to quote from it, of the observations of Lord Walker of Gestingthorpe, a distinguished Chancery lawyer, in the Thorner cases regarding estoppel that the categories of equitable relief are not best served by rigid sub-divisions.

[20] I turn to page 125 of the judgment and that was a case of a Mrs Wallace and counsel for the bank submits this is one of the series of some 8 cases looked at by the

House of Lords in that compendious judgment, none of which he submits gave any assistance to this lady. In the particular case of Wallace he points out the money was advanced to the husband, albeit on property jointly owned by them, and he submits that is clearly not this case and so he submits about all the other illustrations and says that none of those therefore assist Mrs O'Neill. I do not think it is necessary for me to through the facts of each of them but Mrs Anyadike-Danes in reply turned to a case which the court had raised earlier with counsel and that is the case of UCB Home Loans Corporation Ltd v Moore which is most extensively dealt with in this judgment in this decision by the judgment of Lord Scott of Fosscote at paragraph 294 and following. I think I should briefly read from that at 294:

> "This case comes to Your Lordships house on an appeal by Mrs Moore against an order striking out her defence to UCB's claim to possession of Pangbourne Lodge, Tidmarsh Road, Pangbourne, Berkshire."

[21] Pausing there, therefore this is coming on an interlocutory basis to the House of Lords which is of assistance to me because a number of the other cases were after a full trial. To return to the judgment:

> "The relevant facts, therefore must be taken to be those pleaded by Mrs Moore, supplemented by such facts as are common ground between the parties. Mrs Moore and her husband, Mr Moore, were, in 1998, the joint owners of Pangbourne Lodge, their matrimonial home. Mr Moore carried on business during the meeting with a company, Corporate Software Ltd. The company had 5,000 issued shares of which 2,557 were held by Mr Moore and 2,443 by Mrs Moore, they were both directors. The conduct of the business however was under his control and although Mrs Moore worked for the company in a secretarial and administrative capacity, she did so under her husband's direction."

[22] At 297 Lord Scott went into the nature of the borrowings which included at (iv) that the loan was required partly to refinance existing borrowings charged on Pangbourne Lodge and partly for the business purposes of Corporate Software Ltd and other purposes are named. He goes through the matter in considerable detail and in his opinion he considered and found that Mrs Moore's appeal should be allowed and this case must go to trial. Those are the words of the Learned Judge with whom the other members of the court agreed. I take that matter into account.

[23] I will finally refer to one of the two other cases cited to me namely CIBC Mortgages Plc v Pitt HLE [1994] 1 A.C. 200 and I turn to pages 210 and 211 in that decision which was delivered on the same day in 1994 as the decision of the House of Lords in Barclay's Bank Plc v O'Brien. And at 210-211 Lord Browne-Wilkinson

cites at length from the judgment of Lord Justice Peter Gibson in the Court of Appeal and agrees with the conclusion there and Mr Gowdy relies on that and I note his submissions in that regard. But I note what the learned law Lord goes on to say at 211(d):

> "So far as the plaintiff was aware, the transaction consisted of a joint loan to husband and wife to finance the discharge of an existing mortgage on 26 Alexander Avenue and as to the balance to be applied in buying a holiday home. The loan was advanced to both husband and wife jointly. There was nothing to indicate to the plaintiff that this was anything other than a normal advance to husband and wife for their joint benefit. (My emphasis).

He goes on:

> "Mr Price, for Mrs Pitt, argued that the invalidating tendency which reflects the risk of their being Class 2(b) undue influence was in itself sufficient to put the plaintiff on enquiry. I reject this submission without hesitation, it accords neither with justice nor with practical common sense. If third parties were to be fixed with constructive notice of undue influence in relation to every transaction between husband and wife such transactions would become almost impossible. On every purchase of a home in the joint names, the building society or bank financing the purchase would have to insist on meeting the wife separately from her husband, advise her as to the nature of the transaction and recommend her to take legal advice separate from that of her husband."

[24] Now stopping there Mr Gowdy relied on Lord Browne-Wilkinson's judgment there and said therefore the clear cut off was against Mrs O'Neill. My conclusions are otherwise. It seems to me at least arguable that a court, first of all, might find that a loan to a partnership including a wife is analogous to a loan to a company and therefore that the decision of the House of Lords in the relevant part of Etridge relating to Mrs Moore is applicable to a situation such as this. I fully appreciate that there is a legal difference of significance between a partnership and a company but it appears to me that there is an arguable case there and that there is an issue of substance to be tried. I need not go so far as to conclude and do not conclude that if, as Mrs Danes was instructed, the bank itself sought a partnership deed that it might have encouraged the applications of loans in this way.

[25] Obviously, if at an action it emerged on discovery that this did emanate from the bank then that would give rise to the worrying suspicion, or perhaps worse, that

the bank was in fact trying to circumvent the decision of the House of Lords in Etridge by inviting borrowing husbands to form partnerships rather than to borrow the money in their own name and merely ask their wives to act as surety. It is not necessary for me to do that. It is sufficient to say that it seems to me arguable that Mrs O'Neill might bring herself within the ____Moore category of the Etridge decision. But in any event and furthermore what seems to me clearly arguable here is that this was in Lord Browne-Wilkinson's words in Pitt "anything other than a normal advance" to this husband and wife. It clearly was not anything of the sort. This was not a house purchase, it was not a purchase to buy a holiday home or build a swimming pool. This was converting this small builder into some kind of putative developer at, as it happens, exactly the wrong time and it seems to me that the change in the character of the lending as well as the marked change in the scale of it may have put the bank on notice that this lady, although her signature was on the documents they were being given, was at risk of acting to her manifest disadvantage, although that is not an essential pre-requisite now, by entering into these weighty obligations under the influence of her husband when really the loans were to her husband and for his own, as it transpired, foolish ambition to become a property developer late in life. I am satisfied therefore that that does create a genuine and substantial defence here and that it is consistent with the views expressed by Lord Bingham indeed at the beginning of his judgment [in Etridge]where he says:

> "It is important that lenders should feel able to advance money in run of the mill cases with no abnormal features, on the security of their wife's interest in the matrimonial home in a reasonable confidence that, if appropriate procedures had been followed in obtaining the security, it will be enforceable if the need for enforcement arises."

[26] That is not this case, this is, at least arguably, a different case. I therefore grant the application of Mrs Geraldine O'Neill.