[2011] NIMaster 1

Ref:

Judgment: approved by the Court for handing down *Delivered:* **3/3/11**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Ulster Bank Limited as Security Trustee for the Finance Parties

Petitioner;

And

Michael Adrian Taggart

and

John Desmond Taggart

Respondents.

Master Bell

Introduction

[1] Ulster Bank Limited has issued two Writs against Michael Adrian Taggart and John Desmond Taggart. The first, Writ No 2009/59937, is a claim for the sum of £5,000,000 due on foot of the defendants' joint personal guarantee dated 8 August 2007 for the liabilities of Taggart Holdings Limited (a Northern Ireland registered company). The second, Writ No 2009/61625, is a claim for the sum of €4,300,000 due on foot of the defendants' joint personal guarantee dated 30 November 2007 for the liabilities of Taggart Homes Ireland Limited (a company registered in the Republic of Ireland).

[2] By summons, the Ulster Bank now seeks summary judgment under Order 14 of the Rules of the Court of Judicature (Northern Ireland) 1980. On

the hearing of the application Mr Horner QC appeared with Miss Simpson on behalf of the Ulster Bank. Mr McClaren QC with Mr Donaghy appeared on behalf of Michael and John Taggart. The court is indebted to counsel for their helpful written and oral submissions.

[3] The application arises in the following context. Michael Taggart and John Taggart ("the Taggarts") are businessmen and are directors and shareholders of a number of companies within the Taggart Holdings Group of companies which were involved in the acquisition and development of land. Their business initially operated as house builders in Northern Ireland. Michael Taggart, in his second affidavit, explained that his role was that of being responsible for Group strategy and all directors' responsibilities. He highlighted opportunities and helped negotiate deals for the purchase and sale of land and property. He was also involved with the banks at Group level and in this context relied on the Group's finance team for reporting detail. He also explained that John Taggart's main role was to ensure that the building operations were satisfactory from the perspective of HSE, progress, completion and after-sales. Michael Taggart explained that he held a 51% shareholding in the Taggart Holdings Group and his brother John held a 49% shareholding. The business prospered and, by the mid 2000's, the Group's operations had expanded to include the acquisition and development of land banks and the sale of property in the Republic of Ireland, the United Kingdom, Europe and the United States of America.

[4] The Ulster Bank's concerns in 2007 relating to the Taggart Group appears to be summed up in Richard Ennis's second affidavit in the following terms :

> "The Taggart Group were running excessive overheads: they had purchased two new offices, in Belfast and Dublin. There was also an office, I believe, in Manchester. Each of these offices had to be staffed and staff to be paid. The Taggarts themselves had a particularly lavish corporate lifestyle: I understand that Michael Taggart travelled by private helicopter, and I believe he had a dedicated pilot. In addition to this, the Taggart Group had pursued an aggressive strategy of buying land banks. Whilst these would have had a value, they were non income generating and a further draw on the resources of the business not just in terms of finance but in terms of management time and planning consents required or amended with associated fees and expenses. In addition the income-generating side of the Taggart Group's business (house building) was not keeping pace with the acquisitions/costs of loans and overheads etc. In effect the Taggart Group was significantly increasing the overall debt within the Group as it pursued its land bank strategy, but at

> the same time there was reduced income coming through from the Taggarts house building business with an increasing reliance on land sales."

[5] Lately, however, the companies have been placed in administration and the Ulster Bank has now initiated legal proceedings for the purpose of calling in two personal guarantees signed in connection with bank lending to their companies.

[6] A number of individuals have sworn affidavits in connection with this application. For convenience, I introduce them now and set out their roles :

(i) Michael Taggart : director and shareholder in the Taggart Holdings Group of companies
(ii) John Taggart : director and shareholder in the Taggart Holdings Group of companies
(iii) Ruth Glenn : solicitor in the firm of Arthur Cox which acts on behalf of the Ulster Bank in this application.
(iv) Richard Ennis : currently Director of Credit Risk, Northern Ireland for the Ulster Bank but at the time of the events which concern this application he was Director of Business Banking, Northern Ireland for the Ulster Bank.
(v) Gary Barr : an Associate Director in the employment of the Ulster Bank
(vi) Avril McCammon : solicitor and partner in the firm of John McKee & Sons which acted on behalf of the Ulster Bank
(vii) Henry Elvin : Head of Business Banking within the Ulster Bank

[7] A number of other individuals who have not sworn affidavits also feature in the events which are the subject of this application. For convenience I also introduce them and set out their roles :

(i) Fearghal O'Loan : solicitor in the firm of Tughans which acted for the Taggart Group of companies (as opposed to acting for Michael and John Taggart as individuals).
(ii) Maurice McHugh : employed by Taggart Holdings Group as its finance director. Mr McHugh left this employment at the end of 2007.
(iii) Frank McGuigan : employed by Taggart Holdings as a director.

Legal Principles

[8] The law on summary judgment applications is not a matter of dispute between the parties. Paragraph 14/1/2 of "The Supreme Court Practice 1999" ("The White Book") states that the purpose of Order 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to a claim. Both parties to this application are agreed that the test to be applied on an application for summary judgment is set out in *National Westminster Bank plc v Daniel and others* [1993] 1 WLR 1453. In that decision Glidewell LJ quoted with approval the words of Ackner LJ in *Banque de Paris et des Pays-Bas (Suisse) SA v de Naray* [1984] 1 Lloyd's Rep 21 where he said :

> "It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence."

Glidewell LJ then concluded :

> "I think it right to follow the words of Ackner LJ in the *Banque de Paris* case, or indeed those which amount to much the same thing (as I see it) of Lloyd LJ in *Standard Chartered Bank v Yaacoub*: is there a fair or reasonable probability of the defendants having a real or bona fide defence? Lloyd LJ posed the test: is what the defendant says credible? If it is not, then there is no fair or reasonable probability of him setting up a defence."

[9] Mr Horner therefore summarised the position regarding an application for summary judgment as being that it was not the task of the court to assess the credibility of each witness in the way that would be carried out by a trial judge. Rather, the court must stand back, look at the totality of the evidence, and assess the credibility of the defence as a whole.

Application in respect of Writ No 2009/59937

[10] Writ No 2009/59937 concerns a Guarantee referred to for convenience by both counsel as "the £5,000,000 Guarantee".

[11] The Taggarts' primary argument against the Bank's application for summary judgment is based on the foundation that the Guarantee which is the subject of this action was only intended to be a temporary guarantee until the Loan to Value ratio ("LTV") of the borrowing had fallen below 70%. Mr McClaren submitted that, if the court can be satisfied that the Guarantee was intended to be temporary, then three defences are open to the Taggarts :

(a) Estoppel : as the Taggarts executed the Guarantee in reliance on an assurance from the Bank that the Guarantee would only be temporary, the bank is therefore estopped from relying on the Guarantee;

(b) Misrepresentation : as the Taggarts executed the Guarantee in reliance upon a misrepresentation by the Bank that it would treat the Guarantee as being only temporary, the Taggarts are entitled to rescind the Guarantee on the grounds of misrepresentation; and

(c) Unilateral Mistake : the Taggarts executed the Guarantee under the mistake of fact that the bank would be treating the Guarantee as temporary in nature. If that mistake was known to the Bank, the Taggarts are entitled to rescind the Guarantee on the grounds of unilateral mistake.

[12] The starting point for determining whether the Guarantee was intended to be a temporary one is its own internal terms. The Guarantee is a 12 page written document. It contains an interpretation section defining the meaning of particular words and expressions. It contains clauses setting out the obligations of the Bank and of the guarantors. However the Guarantee contains within it no clause as to it being temporary in nature.

[13] This is not, of course, conclusive. I must also consider whether there was an agreement between the parties, external to the specific terms of the written Guarantee, as to it being temporary in nature. The principle on which Mr McClaren relies is that described in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 where Lord Denning MR described it in the following terms (p. 121):

> "If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it - on the faith of which each of them - to the knowledge of the other - acts and conducts their mutual affairs - they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not - or whether they were mistaken or not - or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it. …
>
> When the parties to a contract are both under a common mistake as to the meaning or effect of it - and

> thereafter embark on a course of dealing on the footing of that mistake - thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them."

[14] As one might expect with a financial arrangement of this importance, there are a number of pieces of documentary evidence which may be useful in determining the intentions of the parties. On 18 July 2007 at 5.36 pm Fearghal O'Loan sent an email to Avril McCammon. The email set out a number of points, including :

> "3. Michael Taggart is not around tomorrow to sign the PG; I am told Ulster Bank have agreed that John will sign tomorrow with Michael to follow next week or on his return – can you just check this is agreed by Ulster
>
> 4. limit on the PG of £5m on the nose – agreed, and thanks
>
> 5. unlimited duration of the PG – agreed, provided there is an express obligation on the Bank in the guarantee to review the need for the PG with the Taggarts on a three monthly basis; can you just check with Ulster
>
> …
>
> 7. signing will be in Belfast tomorrow – please copy me on the documentation and I will arrange with the guys to get things signed; no objection to copying documents to Hammonds for information as well"

It is significant to note the use of the words "express obligation" and the use of the preposition "in" contained in point 5. From this it must be understood that, even at this late stage, Mr O'Loan was seeking on behalf of his clients an amendment to the written terms of the Guarantee so as to include a formal review process. What was being proposed was not, therefore, the type of interpretation referred to by Lord Denning in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*.

[15] The email traffic exhibited to Ruth Glenn's affidavit then shows that Mr O'Loan's email lead to an email discussion between Avril McCammon and Gary Barr. Ms McCammon forwarded Mr O'Loan's email to Mr Barr at 5.53 am on 19 July 2007 and asked :

> "Are points 3 and 5 agreed – do you want the hassle of point 5"

[16] At 8.05 am on 19 July 2007 Mr Barr replied :

> "3 need to confirm with Credit
>
> 5 I think we should say no to this request"

[17] Twenty minutes later, at 8.25 am on 19 July 2007, Ms McCammon sent Fearghal O'Loan a reply in respect of the request for three monthly reviews of the Personal Guarantee. It rejected such an amendment, stating :

> "Here is the guarantee – 5m on the nose.
>
> The bank will not concede the three month review point."

[18] Later that day, at 6.00 pm, Fearghal O'Loan sent Avril McCammon another email. It included the statements :

> "Please note that the Taggarts are still in discussions with Ulster on the facility to be provided – accordingly, these documents should be held in escrow pending our respective clients' agreement."

and

> "the Personal Guarantee has been signed by John Taggart only. I understand the Bank have agreed that Michael can sign on his return next week."

[19] On 23 July 2007 the Ulster Bank sent a formal letter to the directors of Taggart Holdings Limited on behalf of both the Ulster Bank and the Bank of Ireland. It began :

> "Further to recent discussions, we would confirm that Ulster Bank Group and Bank of Ireland have obtained approval to draw-down £1,700,000 (£850,000 from each Bank) from the Group's land loan accounts to the current accounts held with the Ulster Bank subject to the terms and conditions outlined below which are in addition to and should be read in

> conjunction with previous facility letters entered into by the Group and the Banks."

The letter set out a number of conditions before continuing :

> "In advance of draw-down of the £1,700,000 the following pre-conditions must be fulfilled :
>
> Provision of joint and several personal guarantee for £5,000,000 by Michael Taggart and John Taggart
>
> LTV not to be in excess of 70%"

The letter of 23 July 2007 contained, however, no indication that the Bank had conceded that the Guarantee would be temporary in nature.

[20] On 8 August 2007 there was a meeting held between the parties. The affidavit evidence indicates that those present at the meeting included Michael Taggart, John Taggart, Richard Ennis and Gary Barr. The affidavits show a division of evidence in relation to what occurred at the meeting. Michael Taggart, in his second affidavit avers :

> "Throughout this period I had always resisted signing even a 'temporary' Guarantee but did so on 8 August on the basis that Mr Ennis stated that the Bank would not continue to work with the Group unless the Guarantee was signed. Mr Ennis confirmed on 8 August that the Guarantee was a temporary measure. John and I signed the Guarantees on that day only on the basis that they were temporary and required to cover any period when the LTV was in excess of the 70% for the Club bank facility."

[21] John Taggart's evidence in respect of this issue is of little assistance. In his second affidavit he avers that Michael Taggart "made the final decision on any issues about finance or legal documents." He then avers :

> "I have subsequently been informed by Michael that an agreement was reached with the bank that this Guarantee was a temporary measure to allow clarification of the LTV issue.

Despite being at the meeting, however, he does not aver that Mr Ennis confirmed that the personal Guarantee was a temporary measure.

[22] On behalf of the Ulster Bank there is a clear denial that the Guarantee was temporary in nature. In his second affidavit Mr Ennis avers :

> I would refute any suggestion that the Taggarts were informed that a further guarantee would be 'temporary'. Emails from Tughans queried whether the guarantees could be reviewed every three months. I understand from Avril McCammon's response that this was clearly rejected, and that the Taggarts were told of the details of the guarantees. There was no suggestion that they were ever 'temporary'…. I would again confirm to this Honourable Court that I did not and could not have told Michael Taggart" that the guarantee '*could be provided as a temporary measure…pending resolution of the LTV issue*'. The terms of the guarantee would have been sent out on 29 June 2007 and would have been examined by Tughans who would, I presume, have discussed this with the Taggarts thereafter. The terms of the guarantee did not change after issue on 29 June 2007 until the date of the Taggarts' signing of the guarantee on 8 August 2007. There is no reference to the guarantee being temporary in any of the documents signed."

[23] No party produced to the court formally drafted minutes to reflect exactly what occurred at this meeting. However Mr Ennis exhibits to his second affidavit a note, exhibit "RE5", which records the matters which were discussed. He asserts that the note is, in the main, contemporaneous. He believes that the two lines at the top of the note, which are written in a different ink to that used in the remainder of the note, were written the following day. The contemporaneous section of the note contains no reference to the Guarantee being temporary. Mr Ennis avers that, had there been any issue which had arisen as to a refusal by the Taggarts to sign the Guarantee, then he would have recorded this. The only reference in exhibit RE5 to the Guarantee is in the second line at the top of the note. It simply states : "PG – signed".

[24] On 6 August 2007 at 16.35 Mr Barr had sent Avril McCammon an email asking whether Michael Taggart had signed the £5,000,000 Guarantee a couple of weeks previously. On 7 August 2007 at 9.08 am Julie Huddlestone from John McKee & Son sent Mr O'Loan an email in Ms McCammon's absence. Mr O'Loan replied at 10.02 am on 7 August 2007 in the following terms :

> "I have been in contact with the Taggarts to chase up on this – I haven't seen anything come in from Michael so I assume he hasn't signed the pg. I will follow up and then get back to you."

He then sent a further email at 17.32 on the following day 8 August 2007 :

> "Michael and John Taggart have now signed a fresh copy of the £5m pg. Just so there can be no confusion as to whether there are two pgs for £5m, can you have the pg which John signed a few weeks ago returned to me and I will forward the pg as signed by both Michael and John ?
>
> Also, Avril was to have a letter signed by the Ulster Bank confirming that all existing pgs (other than the existing €4.3m pg on Kinsealy and this new £5m pg) were discharged (see attached draft). I understand from Avril that this was signed (or being signed) by Ulster, but I haven't seen the signed letter yet. Can you check if this has been done and then forward that to me as well ?
>
> Many thanks"

This email was clearly sent after the meeting held between the Taggarts, Mr Ennis and Mr Barr. Despite the claim by Michael Taggart that Mr Ennis had, in effect, finally made a major concession at the meeting by agreeing to the Guarantee being temporary, there is no reference to it in the email. Had such a concession been made by the Bank, one might have expected such a major concession to have been referred to in the email.

[25] There is no indication that there exists any other documentation which might throw a different perspective on matters concerning the £5,000,000 Guarantee. Mr McLaren submitted in respect of Writ No 2009/61625 that the summary judgement application regarding the Kinsealy Guarantee could not be disposed of fairly without access to documents in the possession of Tughans to demonstrate what representations were made to Michael and John Taggart. (As the companies are in administration the Taggarts do not have free access to the documentation held by those companies. In addition, Michael Taggart avers in his third affidavit that many of the relevant documents are contained only in the files of Tughans who have refused to grant access to them as the firm is owed fees by the Taggart Group in administration). Mr McLaren did not make that submission in respect of the £5,000,000 Guarantee application.

[26] In the light of the material set out above, Mr McClaren submits that discussions were ongoing as regards the Guarantee being temporary. However other than an assertion by Michael Taggart, there is no evidence, either in terms of documentary evidence or in terms of affidavit evidence from other witnesses, which persuades me that the Bank had ever re-opened its mind on this issue after Ms McCammon's email of 19 July 2007 had stated that it would not concede the review point.

[27] On 10 August 2007 Julie Huddleston, a solicitor in John McKee and Sons, sent a letter to Mr O'Loan of Tughans. It thanked him for his letter of the previous day enclosing the original Guarantee. It also enclosed an original letter dated 20 July 2007 signed on behalf of the Ulster Bank in respect of the discharge of the pre-existing Guarantees. The letter stated that, conditional only upon the execution and entry into the New Taggart Personal Guarantee by the Taggarts, the Bank irrevocably cancelled and discharged each and every one of the pre-existing Personal Guarantees which had been made by either or both of the Taggarts. The letter then went on to say :

> "For the avoidance of doubt, nothing set out herein shall prejudice or otherwise adversely affect the security constituted by the New Taggart personal guarantee or the Kinsealy Guarantee, both of which guarantees shall continue in full force and effect in accordance with their terms."

[28] Had there been fruitful discussions between the Bank and the Taggarts which had lead to an agreement that the Guarantee was temporary in nature, a reference to that agreement might reasonably have been expected to have been contained in this letter.

[29] I therefore conclude that, when analysed, the intended defence is inconsistent with the contemporary documents. With the exception of Michael Taggart's personal assertion, all the email traffic, postal correspondence, contemporaneous handwritten documentation, and the written terms of the Guarantee itself point conclusively in the direction that there is an insufficient factual basis on which a court could conclude that the Guarantee which is the subject of this action was only intended to be a temporary guarantee until the Loan to Value ratio of the borrowing had fallen below 70%. As a consequence, I am satisfied that there is no fair or reasonable probability of the Taggarts setting up a defence of Estoppel, Misrepresentation, or Unilateral Mistake.

[30] Although Mr McClaren's primary contention on behalf of his clients focused on the three defences referred to above, his skeleton argument specified that he did not abandon any previous defences advanced by them. I have therefore considered certain other matters raised before me in the affidavits of Michael and John Taggart and in the oral submissions made to me. I shall refer to four matters in particular.

[31] Firstly, the defendants' case is that they did not have the benefit of legal advice before they executed the Guarantee. Mr McLaren submitted that the Guarantee document is itself inconsistent with the defendants receiving any legal advice between the meeting on 8 August 2007 and the execution of the Guarantee. At the end of the Guarantee there is a "Certificate Concerning Legal Advice". The Certificate as typed provides two options. The first option

is that the person signing it certifies that they have received independent legal advice in connection with the giving of the Guarantee. The second option is that the person signing it has waived independent legal advice in connection with the giving of the Guarantee. The Certificate indicates that both John and Michael Taggart deleted the words of the first option and then each signed and dated the Certificate to show that each had waived independent legal advice in connection with the giving of the Guarantee.

[32] From the affidavit and documentary evidence before me it is clear that the Taggart Holdings Group received legal advice from a very reputable professional firm of Belfast solicitors. Mr McLaren made much of the fact that the Taggarts did not receive independent legal advice in the sense of legal advice independent of that provided by Tughans to the Taggart Holdings Group. I find no merit in this argument. Firstly, although it is true that Taggart Holdings Group is a separate legal entity from John and Michael Taggart as individuals, the brothers between them own 100% of the shares of the companies. Mr Horner made the point that the Taggarts were the sole owners of the companies and therefore did not require legal advice independent of that received by the companies. Secondly, it is not clear from the Guarantee what "independent legal advice" refers to. Does it mean legal advice independent from the Ulster Bank (since the Guarantee is an agreement between the Ulster Bank and John and Michael Taggart) or does it mean that the Ulster Bank, which had prepared the text of the Guarantee, had recognised that John and Michael Taggart might also wish to receive legal advice independent of that received on behalf of the legal entity ? I incline towards the first interpretation, namely that it should be taken as referring to taking advice which is independent of the Ulster Bank, who is the other party to the Guarantee, or of its servants and agents such as John McKee & Sons solicitors who acted for the Bank. The advice which the Taggarts received from Tughans was independent in this sense. Thirdly, even if I am incorrect in respect of my first and second conclusions, the Taggarts were fully entitled to waive the receipt of independent legal advice in the way that they so certified. Mr Horner described the Taggarts as "sophisticated users of financial services" and, given the size and complexity of their corporate operations, it is reasonable to so describe them.

[33] Secondly, Michael Taggart in his first affidavit deposed to the fact that he had arranged his wedding for 1 September 2007, a fact he believes was well known to the Ulster Bank. In connection with this he avers :

> "The events surrounding my wedding created intense pressure which impaired my capacity to have time to reflect on the significance of the Guarantee."

In her first affidavit Ruth Glenn refutes this suggestion by stating that the Ulster Bank had been in discussions with the defendants for a significant

period of time about the level of the companies' indebtedness. Mr Horner submitted that no legal authority had been offered on behalf of Michael Taggart that the pressure caused by his impending wedding was sufficient to vitiate his consent to the Guarantee.

[34] Thirdly, John Taggart has raised an issue in respect of his health. In his second affidavit he stated that, since 2002 he has suffered from a significant illness which has impacted upon his ability to recollect the events surrounding the Guarantees which are the subject of this litigation. Michael Taggart's second affidavit also deals with this matter. He stated that in June 2007 John handed over responsibility for his involvement in the Group's affairs to him and they discussed at length his exit from the Group due to illness. Although John did not want to do this, he considered that his health was more important. This followed many years of John suffering from a debilitating illness and undertaking a number of operations to investigate and address his medical condition. The condition caused him chronic pain leading to stress. On 30 December 2010 John Taggart swore a third affidavit in these proceedings exhibited to which is a letter from his general practitioner. I shall not refer to the contents of this letter save to say that it refers to a medical complaint which has existed since 2002. His doctor's conclusion is that the combination of the effects of his underlying condition and the anxiety/depression he suffered in late 2007 would have affected his ability to concentrate on all manner of work related issues.

[35] In her second affidavit Ms McCammon avers that she was not informed of any issues surrounding John Taggart's health and, in particular, of any serious health issues which would have prevented him from understanding or signing the Guarantees which are at issue in these applications. She also avers that she would have expected Mr O'Loan to have informed her immediately if he had any concerns about John Taggart's health as might have interfered with his ability to sign the Guarantees. Likewise in his second affidavit, Richard Ennis avers that he was never aware of any serious debilitating illness from which John Taggart suffered. He confirms that he does not recall John Taggart ever looking ill or believing that he was incapable of following matters relating to the Taggart Group because of an inability to concentrate. Henry Elvin in his affidavit and Gary Barr, in his second affidavit, also deny having any knowledge of John Taggart suffering from an illness.

[36] Fourthly, Michael Taggart refers in his affidavits to pressure placed upon him by the Ulster Bank to sign the Guarantee. In his first affidavit he deposes that at the meeting on 8 August 2007 the Taggarts were told by the Bank that if they did not sign the Guarantees "there and then", the bank would stop all cheques drawn on the Group's accounts and they would most likely "pull the plug" on the Group. He deposes that, against a background of pressure placed on them by the Bank, they reluctantly agreed to sign the

Guarantees on the understanding that these were temporary. In his second affidavit Michael Taggart refers to how they were put under "enormous pressure" to provide a personal guarantee. His affidavit refers a number of times to his resisting this pressure which the Bank "continued to increase". I have considered in respect of these averments the authorities offered to me in respect of "economic duress". In *Pao On and Others v Lau Yiu and Another* [1979] 3 All ER 65 Lord Scarman explained that :

> "Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J. in *Occidental Worldwide Investment Corporation v. Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293, 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent." This conception is in line with what was said in this Board's decision in *Barton v. Armstrong* [1976] A.C. 104, 121 by Lord Wilberforce and Lord Simon of Glaisdale - observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v. Horner* [1915] 3 K.B. 106, relevant in determining whether he acted voluntarily or not."

[37] The skeleton argument filed on behalf of the Ulster Bank referred me to paragraphs 4-116 to 4-120 of The Modern Contract of Guarantee by O'Donovan and Phillips (Sweet and Maxwell, 2003). That text states :

> "The basis of duress was originally considered to be founded on the fact that the will of the victim was overborne so as to vitiate any contractual consent. The modern view, however is not the lack of consent but 'the victim's intentional submission arising from a realisation that there is no other practical choice open to him.' Illegitimate pressure is applied to the victim, so he has no reasonable alternative but to submit to the demand. In determining whether or not a guarantee will be set aside on the ground of economic duress, a crucial question is when does the pressure extend beyond normal commercial hard bargaining and become 'illegitimate'….A defence of duress, although much less likely is not precluded because the

creditor's threat involves no breach of contract or other legal wrong., at least provided the threat is 'immoral or unconscionable'. "

[38] I do not find in any of the four matters raised by the defendants sufficient material to conclude there is a fair or reasonable possibility of the defendants establishing that they have a real or *bona fide* defence in this action.

[39] Accordingly, I therefore grant the Bank's application for summary judgment in respect of the £5,000,000 Guarantee which is the subject of Writ No 2009/59937.

Application in respect of Writ No 2009/61625

[40] This application concerns a Guarantee referred to for convenience by both counsel as "the new Kinsealy Guarantee". This Guarantee was signed by Michael and John Taggart on 30 November 2007 and personally guarantees the amount of €4,300,000.

[41] The Taggarts' primary argument against the Bank's application for summary judgment is based on the foundation that the new Kinsealy Guarantee, which is the subject of this action, was materially wider than a guarantee referred to by counsel as "the previous Kinsealy Guarantee" which it replaced. Mr McClaren submitted that, if the court can be satisfied that the new Kinsealy Guarantee was intended to be simply a re-taking of the previous Kinsealy Guarantee on a like-for-like basis, then three defences are open to the Taggarts :

(a) Misrepresentation : the Taggarts executed the Guarantee in reliance upon a misrepresentation by the Bank that it was merely re-taking the previous Kinsealy Guarantee whereas in fact the new Kinsealy Guarantee was materially wider than the previous Kinsealy Guarantee;

(b) Material non-disclosure : in breach of duty the bank failed to disclose certain unusual and unexpected features of the transaction, including (contrary to the background representations that this was merely a re-taking of the previous Kinsealy Guarantee and that the definition of "indebtedness" in the Guarantee was much wider; and

(c) Estoppel by convention : in circumstances where the parties dealt with each other on the basis of a common assumption/assumed facts, the bank is estopped by convention from asserting any claim

under the new Kinsealy Guarantee any wider than they would have been able to assert on the previous Kinsealy guarantee had the latter not been discharged.

[42] The Kinsealy Guarantees are so-called because of their connection with the purchase of lands at Kinsealy, County Dublin in October 2006 for an amount in the region of £19,000,000. A company, Taggart Homes (Kinsealy) Limited, was formed to facilitate this purchase. In her second affidavit Ms McCammon avers that the security taken by the Bank in connection with the loan facility used to purchase the lands was threefold :

(a) A mortgage debenture incorporating a Fixed Change on the Kinsealy site;

(b) The accession of Taggart Homes (Kinsealy) Limited into the Taggart group guarantee structure; and

(c) A joint and several personal guarantee from Michael and John Taggart. (This is the Guarantee referred to as "the previous Kinsealy Guarantee".)

[43] Ms McCammon avers that at the time of the execution of the previous Kinsealy Guarantee it was believed that Taggart Homes (Kinsealy) Limited was within the group of companies, the ultimate parent of which was Taggart Holdings Limited. Approximately one year later, in October 2007, Ms McCammon was, however, examining documents relating to the Group and she realised that Taggart Homes (Kinsealy) Limited was not part of the Taggart Holdings Group. This caused her significant concern because she believed this had implications as to whether an intra-group loan was lawful or whether it was a breach of section 31 of the Companies Act 1990 in the Republic of Ireland. Ms McCammon immediately contacted the Ulster Bank and explained the difficulty she perceived. Ms McCammon deposes to the fact that Mr O'Loan was also concerned, as the matter could have exposed the directors to the risk of criminal proceedings.

[44] Ms McCammon avers in her third affidavit to having taken advice from Gartlan Furey, a Dublin firm of solicitors. They confirmed that that the original security contravened section 31 of the Companies Act 1990 and that the regularisation of the position was to the benefit of both the Bank and the Taggarts. The solution adopted to remedy this situation included the movement of Taggart Homes (Kinsealy) Limited so that it became a subsidiary of Taggart Holdings Limited. The solution also involved the making of a new Kinsealy Guarantee.

[45] It was only late in the day in these proceedings that it was acknowledged on behalf of the Ulster Bank that there was a significant difference between the previous Kinsealy Guarantee and the new Kinsealy Guarantee. As Mr McClaren pointed out, even the further skeleton argument furnished by counsel for the Bank in preparation for the hearing stated ;

> "Nor has the actual liability of the Defendants under the guarantee been increased. It remains exactly the same."

I am satisfied, however, that, while the financial ceiling of the two Guarantees is identical at the sum of €4,300,000, there are clear differences between the two Guarantees and that the scope of the new Kinsealy Guarantee is wider than the scope of the previous Kinsealy Guarantee.

[46] In the previous Kinsealy Guarantee the definition of "Indebtedness" contained in the interpretation section of the Guarantee states:

> " 'Indebtedness means all amounts due or owing by the Principal to the Bank from time to time in respect of facility 11 together with all costs, charges and expenses (on a full indemnity basis) charged or incurred by the Bank perfecting or enforcing or attempting to enforce this Guarantee or any other security (and its rights thereunder) held by the bank from time to time.)"

In the new Kinsealy Guarantee the definition of "Indebtedness" contained in the interpretation section of the Guarantee states, however, that :

> " 'Indebtedness' means all the Principal's present or future indebtedness to the Bank on any principal Account (notwithstanding that there may be a credit balance on any other Principal Account) and all the principal's other liabilities whatever and wherever to the Bank…

[47] It is unclear to me whether the position taken on behalf of the Bank as to the ambit of the Guarantee represented the position of the Bank itself or simply a misunderstanding by counsel of a complex financial agreement. However this is not an important issue for the application. The critical issue is whether the Ulster Bank, or its solicitors acting on its behalf, ever represented to the Taggarts, prior to the signing of the Guarantee on 30 November 2007, that the ambit of the two Guarantees was exactly the same when, in fact, it was not.

[48] The affidavits and contemporaneous documentary material refer to the new Kinsealy Guarantee in a number of different ways. Ms McCammon states in her second affidavit:

> "However, eventually all parties agreed that the best way forward was simply to re-take the security ensuring that all the legal documentation complied with Republic of Ireland/Northern Ireland law."

In Ms McCammon's third affidavit she refers to :

> "…correcting the 'Kinsealy' security."

[49] Ms Glenn exhibits to her affidavit sworn on 10 May 2010 a two page letter dated 26 November 2007 from the Ulster Bank, headed as referring to the subject of "Personal Guarantees", and addressed to both Michael and John Taggart at what I assume are their home addresses. That letter refers to :

> "the new personal guarantee (the "New Kinsealy Personal Guarantee") in the amount of €4,300,000 to be made by (1) Michael Taggart and (2) John Taggart in favour of (3) the Security Trustee in respect of certain liabilities of Taggart Homes Ireland Limited."

and goes on to say that it has been agreed that Michael and John Taggart will execute and enter into the New Kinsealy Personal Guarantee and that the Bank will then irrevocably cancel and discharge the Existing Kinsealy Personal Guarantee. There is no suggestion in this letter that the New Kinsealy Personal Guarantee replaces the Existing Kinsealy Personal Guarantee on a like-for-like basis.

[50] In his second affidavit Michael Taggart avers :

> "Ms Glenn has referred in her affidavit to the 'previous Kinsealy Guarantee' and the 'new Kinsealy Guarantee' and I will do the same. The use of this description is in fact significant because Ulster Bank represented to Mr McHugh, Mr McGuigan and our advisers that the new guarantee related just to Kinsealy and was simply a replacement guarantee – as Miss Glenn puts it at paragraph 10 of her affidavit of 10 May, that the Kinsealy guarantee had to be 'retaken' along with the 'redoing' of a number of other security documents relating to Kinsealy."

He also avers :

> "I do recall a restructuring operation regarding Kinsealy in late 2007 – facility 12. I understood this to be necessary to correct an error in the security arrangements that had been

> put in place in 2006 and the directors of the Group were advised by Mr O'Loan that there was an obligation on the part of the directors to cooperate with the Club Banks, otherwise they would go to Court to get it done. This was presented to the directors as part of a tidying up operation rather than an expansion of the Group's liability or mine and John's personal liability to the Club Banks (which we would certainly not have agreed to at this time, not least because those banks and, chiefly, Ulster Bank, had made clear they wanted to 'work out' (ie run off) our financing arrangements and had been starving the Group of cash for some months.) "

Mr Horner made a strong submission that the description "tidying up operation" was not presented as having been used by a member of the Bank staff but was in fact used by the legal adviser to Taggart Holdings Limited, something for which the Bank cannot be held responsible. While I accept this, it does not conclusively settle the issue. Nevertheless, I observe that there is no affidavit evidence from Mr McHugh, Mr McGuigan or any other adviser of the Taggarts deposing as to what they were told by any member of the Ulster Bank's staff or the Bank's legal representatives. Nor is there an affidavit from Mr O'Loan confirming that he informed the Taggarts that the new Kinsealy Guarantee was simply a "tidying up" operation, and, if he did, whether this was a conclusion which he had reached as a result of what he had been informed by a member of the Ulster Bank's staff or a legal representative.

[51] In his third affidavit Michael Taggart goes much further in what he alleges. He explains that with the assistance of his solicitors he has been investigating the events surrounding the new Kinsealy Guarantee. This has involved obtaining an opinion from Whitney Moore, a firm of solicitors in Dublin, regarding issues of Irish law. After exhibiting what is referred to by Whitney Moore as preliminary advice, Michael Taggart avers :

> "This opinion confirms that it was not necessary for my brother and I even to 'retake' the personal guarantee relating to Kinsealy dated 27 October 2006 on the same terms to ensure compliance with Irish law, never mind enter into a much wider guarantee. It also confirms that there was no benefit to the companies or the directors (or my brother and I in our personal capacities) for us to enter into wider personal liability to plaintiffs in order to correct the flaw in the original Kinsealy security arrangements, nor was there any risk or liability to be avoided. This was not therefore a necessary 'retaking' or correction for the benefit of both parties but an exercise designed to substantially improve the Club Banks position. Of course, had the Club Banks asked us to enter into wider

> personal obligations purely for their benefit in November 2007 we would have refused."

It is unclear whether, in stating that this was "an exercise designed to substantially improve the Club Banks position", Michael Taggart is alleging commercial "sharp practice" by the Bank or is making an allegation that there was a criminal conspiracy between the Ulster Bank and the solicitors who acted for it and that the affidavits offered on behalf of the Ulster Bank in these proceedings contain perjured evidence as to why the new Kinsealy Guarantee was sought. (I should state at this point that, after a full and careful consideration of all the evidence, I am unaware of anything which would support either allegation. I also observe that this was not an argument pursued by senior counsel on behalf of the Taggarts.)

[52] Ms McCammon acknowledges in her evidence that the previous Kinsealy Guarantee and the new Kinsealy Guarantee are not identical. She deposes :

> "I do not believe that the obligations extended beyond that necessary to repair the breach. However even if it did so, then the Defendants did so with the full advice of Tughans. Secondly, the commercial circumstances of the Taggart Group and the quantum of banking facilities which it had by then drawn down, had changed, and to that extent the new security needed to be refreshed to reflect the up to date position. There was nothing wrong with this and it was the only logical way to proceed. Again, all of this was agreed with Tughans and the Taggart Group. The purpose was to perfect the security to cover the position as it then stood."

[53] I note, in parenthesis, that Ms McCammon's affidavit, as filed, stated "had not changed" in the paragraph set out above. After I had reserved my ruling I requested that the Masters' Secretary, Mrs Arthur, write to Arthur Cox to enquire whether the inclusion of the word "not" was a typographical error. I directed that a copy of her letter be copied to Cunningham and Dickey who act on behalf of the Taggarts and that Arthur Cox, when replying, should copy their reply to Cunningham and Dickey. Rather than having the application relisted and hearing counsel on the matter, I adopted this manner of dealing with the possible typographical error as an application of the overriding objective in the Rules of the Court of Judicature to save expense. On 17 February 2010 Arthur Cox replied to Mrs Arthur's letter stating that there had indeed been a typographical error and that the sentence should have read "had changed". The paragraph set out above therefore represents what Ms McCammon deposed, but without the typographical error.

[54] Mr McLaren argued that the previous Kinsealy Guarantee was limited to securing the debt of Taggart Homes Ireland Limited under Facility 11 and that Facility 11 was a facility entered into by Taggart Homes Ireland Limited for a limited and specific purpose, namely the purchase of the property at Kinsealy. Thus he submits that Facility 11 was entirely separated and effectively ring-fenced from the other facilities made available by the Ulster Bank. I do not accept this argument. Given the size and complexity of the Taggarts' business operations, together with the fluidly of the business, economic and legal environment, it would be unreasonable to expect that a like-for-like substitution of Guarantees would have been possible after twelve months had elapsed. It would therefore have been entirely reasonable for the Ulster Bank, in deciding what nature of Guarantee they required, to take a new strategic view of how the various aspects of the Taggarts' business empire were performing, and, if it now had greater concerns than it had had twelve months before, seek a Guarantee which would provide more protection for its shareholders. Even if I am incorrect in this conclusion, I do not consider that the language used by the Ulster Bank and its solicitors in any of the contemporary documentation was such as suggested that the new Kinsealy Guarantee and the previous Kinsealy Guarantee were represented as, or were designed to be, of an identical ambit.

[55] Mr Horner submitted that this was not a case of a misrepresentation having been made by or on behalf of the Bank. Instead it was a case where the well established principle contained in *L'Estrange v F Graucob, Ltd* [1934] 2 KB 394 applied, namely that when a document containing contractual terms is signed, in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether or not he has read the document.

[56] In the light of the evidence provided and submissions made on behalf of the parties, I have concluded that there is not a fair or reasonable probability of the Taggarts succeeding with an argument that the Bank or its solicitors represented the new Kinsealy Guarantee as being simply a re-signing of a document that was in exactly the same terms as the previous Kinsealy Guarantee.

[57] Although Mr McClaren's primary contention on behalf of his clients focused on the three defences referred to above, his skeleton argument specified that he did not abandon any previous defences advanced by them. I have therefore considered certain other matters raised before me in the affidavits of Michael and John Taggart and in the oral submissions made to me.

[58] The new Kinsealy Guarantee includes a Certificate Concerning Legal Advice. The Certificate as typed provides two options. The first option is that the person signing it certifies that they have received independent legal

advice in connection with the giving of the Guarantee. The second option is that the person signing it has waived independent legal advice in connection with the giving of the Guarantee. The Certificate indicates that both John and Michael Taggart deleted the words of the first option and then each signed and dated the certificate to show that each had waived independent legal advice in connection with the giving of the Guarantee.

[59] In his second affidavit Michael Taggart deposes :

> "The Guarantee states at the end that my brother and I waived independent legal advice. In fact we did not knowingly do so. It appears that we have signed the signature page of the document exhibited by the Bank and marked the deletion to indicate that we have waived legal advice, but I deny knowingly entering into a personal guarantee with the bank on that day or on any day in 2007. I cannot account for how signatures marked by me appear to indicate that we agreed to extend our personal liability to the banks by entering into the document the banks now rely on at this time when it was so clearly not in our interests not to do so. I did not know that this Guarantee existed until Ulster Bank notified us of its claim under it. All I was aware of was a restructuring of the Kinsealy security in November. I do not believe that I ever received the letter dated 26 November 2007 or that I had seen it before it was exhibited to Ms Glenn's affidavit of 10 May 2010. I note that this letter appears to have our own solicitor's reference details on it rather than those of the Ulster Bank or its solicitors and that it is not on Ulster Bank letterhead notepaper, although it has an isolated Ulster Bank logo on it. This letter does not look like other similar correspondence received from Ulster Bank."

[60] John Taggart in his second affidavit deposes ;

> "I do not have any recollection of visiting Tughans' offices on 30 November 2007 and I note that Michael was in Dublin that day, having attended a dinner the previous evening (as a guest of Tughans). I did however receive a text message from our finance director Maurice McHugh on 29 November 2007 which says "Michael and John I need u both to go into Tughans office tomorrow to sign urgent bank documents. Can u advise approx time". This would appear to be the "signature exercise" which included the 30 November 2007 Guarantee but I do not remember attending Tughans offices that day.

> I do not recall having received any advice in 2007 from anyone about personal guarantees and I would not knowingly have entered into a personal guarantee that substantially expanded my personal liability to the Club Banks for the Group's debt on 30 November 2007 given :
>
> a. I was seriously ill
> b. I was attempting (and had been for many months) to negotiate my exit from the Group due to illness;
> c. The Group was in a 'workout' situation with the Club Banks."

[61] The Taggarts were entitled to make a waiver of independent legal advice in connection with the giving of the Guarantee but if they did so the Bank is entitled to rely on their having made such a waiver.

[62] Mr McClaren submitted that this application could not be disposed of fairly without access to documents in the possession of Tughans regarding the Kinsealy restructuring to demonstrate what representations were made to the Taggarts by the Ulster Bank. He did not, however, indicate any specific document or group of documents which his clients considered necessary to produce to the court. Mr Horner observed that appropriate procedural mechanisms exist for obtaining any relevant and necessary documentation and that no application had been made by the Taggarts for a Khanna subpoena. I note that the summons in this application issued in December 2009. After replying affidavits, a change of solicitors and counsel, and further replying affidavits, the application was finally listed for hearing on 7 February 2011. The defendants therefore had had over twelve months in which to apply for a Khanna subpoena or make an application under Order 32 Rule 14 that a Master issue a summons requiring the attendance of a witness from Tughans and the production of documents. Neither application was made. In these circumstances, I am unpersuaded by the argument advanced by Mr McClaren.

[63] I have also considered in connection with this application the issues in respect of wedding stress, health, and economic duress considered earlier in this judgment. I do not find in any of these matters raised by the defendants sufficient material to conclude there is a fair or reasonable possibility of the defendants establishing that they have a real or *bona fide* defence in this action.

[64] Accordingly, I therefore grant the Bank's application for summary judgment in respect of the €4,300,000 Guarantee which is the subject of Writ No 2009/61625.