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Judgment: approved by the Court for handing down (subject to editorial corrections) | ***Delivered:*** **11/03/13**

2012/0889900

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

TARA WELSH

Applicant

and

BANK OF IRELAND (UK) PLC

Respondent

MASTER KELLY

Introduction

[1] On 10th August 2012 the Applicant filed an application to set aside a statutory demand served on her by the Bank of Ireland ("the Respondent") in the sum of £835,231.40. The debt claimed by the Respondent purports to be on foot of a personal guarantee for £1m signed by the Applicant in respect of a company known as KB Developments Ltd. It is not disputed that the Applicant has no involvement in this company.

[2] The amount claimed on the Applicant's statutory demand is the sum of £1m less the value of securities held by the Respondent which it values at £164,768.61. It is not a matter of dispute that both the Applicant and her husband, Cathal McIntyre, executed identical personal guarantees to the Respondent; or that they were both advised by the same solicitor, at the same time, and in the presence of each other.

But while Mr McIntyre was also the subject of a statutory demand by the Respondent in similar circumstances, and also applied to set aside his statutory demand, his grounds for doing so differed from those of the Applicant. He did not succeed in setting aside his statutory demand and later submitted to bankruptcy.

[3] At the hearing Mr Warnock appeared for the Applicant and Mr Atchison for the Respondent. I would like to express my gratitude to counsel for their helpful written submissions and authorities which I have taken into consideration, even if I do not expressly refer to each one.

Background.

[4] The Applicant is self-employed and runs her own business manufacturing car seat covers. She says she has been doing this for some 20 years. This business appears to be operated from a yard adjacent to her home. She has some 4/5 employees. She describes this as something of a modest business. She describes her husband as a joiner who, in recent years, became involved in property development.

[5] According to the Applicant's affidavits of 9th August 2012 and 1st November 2012, she executed a personal guarantee in favour of the Respondent in the sum of £1m in or about 2005/2006. She contends that she thought she was executing the guarantee for a joint loan she believed her husband and a Mr Kieran Burns were seeking from the Respondent. The Applicant says that she understood that the purpose of this loan was to finance a housing development in Quarter Road Newry. While Mr Burns is a director of the principal debtor company, KB Developments Ltd, the Applicant's husband appears to be a sole trader. The Applicant says that her husband and Mr Burns had worked together on a number of building projects in or around 2002 and 2005/2006.

[6] The Applicant argues that she understood from her husband that he and Mr Burns were planning to purchase a piece of development land at Quarter Road Newry to develop jointly. She argues that she understood this would be a joint venture with a joint liability and a joint profit share. The Applicant goes on to say that while she understood her husband and Mr Burns to have met with the Respondent regarding a loan, she herself was not privy to any meetings. The Applicant says that her husband informed her that the Respondent was looking for security over the house and the yard (from where she runs her business) and that it was her understanding that without that security the loan would not proceed. The Applicant goes on to say that in or about 18th December 2006 her husband told her that she needed to attend Mr Tiernan's office to sign a personal guarantee. The Applicant denies that she instructed Mr Tiernan to advise her; and says she only attended with him to sign the guarantee because her husband told her to. The Applicant argues that Mr Tiernan did not properly advise her as to the guarantee, that the meeting with him only lasted around fifteen minutes, and that Mr Tiernan merely produced a card with a form of words on it and told her to copy the words

verbatim. The words referred to are those contained in the Personal Guarantors Certificate Concerning Independent Legal Advice which state:

> "I Tara Welsh confirm that prior to the execution of the above guarantee I was independently advised on the nature, terms and affect of the Guarantee by Thomas Tiernan Solicitor and I have signed this Guarantee voluntarily."

The Applicant does not dispute that she signed this Certificate or that the handwriting is hers.

[7] For the purposes of this application, the Applicant argues that the statutory demand should be set aside on the basis that the debt is disputed on grounds which are substantial. The Applicant's case is that she has a defence to the Respondent's claim, that defence being that the Respondent had constructive notice of alleged undue influence and/or misrepresentation by the Applicant's husband and that the Respondent was "put on inquiry" in these circumstances. In support of her application the Applicant relies on the principles set out in **Royal Bank of Scotland –v-Etridge (No 2)[2001]UKHL 44, [2002]2 AC 773, [2001]4 ALL ER 449.**

[8] In simple terms, the Respondent's case is that the Applicant signed the guarantee after receiving independent legal advice and that the Respondent is entitled to rely on that fact. The Respondent's case is made out in the affidavit of Mr Kieran Smyth sworn on 5th October 2012. Mr Smyth is a Senior Business Manager at the Respondent bank with responsibility for the account of KB Developments and the associated guarantees and indemnities. In his affidavit Mr Smyth, defending the Respondent's position, relies on the Personal Guarantors Certificate signed by the Applicant together with correspondence received from Mr Tiernan regarding the advice given to the Applicant in relation to the guarantee. Exhibited to Mr Smyth's affidavit are two letters from Mr Tiernan. The first, dated 20th December 2006, is addressed to the Respondent and follows the execution of the personal guarantee. This letter confirms Mr Tiernan's advice to the Applicant. The second letter, dated 20th September 2012, is addressed to the Respondent's solicitors. Mr Tiernan's letter of 20th December 2006 says:

> "We refer to the above matter and return herewith executed Guarantee together with Certificates of Title and Undertaking.
>
> We confirm that we have fully explained to the Guarantor the nature of the Guarantee and any supporting security that the Guarantor has been asked to give and the practical implications for the Guarantor of entering into these commitments.
>
> We confirm that the Guarantor has signed the documents voluntarily.

Yours faithfully"

Mr Tiernan's second letter of 20th September 2012 post-dates the Applicant's application. In this letter Mr Tiernan sets out over almost three pages the detail of his advice to the Applicant before she signed the guarantee. Mr Smyth refers to this letter at paragraph 5 of his affidavit:

> "This letter is a detailed explanation of the advice provided to Ms Welsh at the relevant time. Thomas Tiernan, solicitor vehemently denies the allegations set out by Ms Welsh in her correspondence and in detail confirms the advice provided to her in 2006. Mr Tiernan makes it patently clear that he explained the terms of the guarantee to Ms Welsh in "plain language". It is significant to note that Mr Tiernan identifies that he expressly emphasised to Ms Welsh on at least two occasions that she was not under any obligation to sign any document, in particular the guarantee, or execute any charge or security. Indeed, when informed that further financial checks could be conducted, Ms Welsh confirmed that she did not want him to do so and she confirmed that she understood the effect of the guarantee."

Mr Smyth goes on to argue that that Mr Tiernan was the Applicant's choice of solicitor and that he had acted for her and her husband before in the purchase of property at Damolly Road, Newry. These are not matters of dispute.

[9] When this application was listed for hearing, it was listed on the basis that it was a short contentious matter, as is customary with this type of application. This did not turn out to be the case. I do not intend to go into detail on the evidence given at the hearing. This is because the hearing at times ventured beyond the essence of the application and into a more inquisitive and substantive hearing. I will return to that issue later. For present purposes, it is enough to emphasise that the Applicant's case is that the she argues that she did not receive proper legal advice as to the guarantee; and that the Respondent had been put on inquiry in the circumstances of the case but failed to adhere to the core minimum requirements as set out in ***Etridge.***

[10] On the initial hearing date only the Applicant gave evidence. She more or less maintained her affidavit evidence except to add that during the meeting with Mr Tiernan she stated, "Sure, I don't have a million pounds" (to guarantee). However, in resisting the application, the Respondent sought only to rely on the letters from Mr Tiernan. Mr Warnock took issue with the evidence purporting to be from Mr Tiernan. He argued that the letter of 20th September 2012 appeared to have been written by Mr Tiernan's firm rather than Mr Tiernan personally and the matter adjourned to enable that letter to be proved. At the resumed hearing, not only had Mr Tiernan executed an affidavit to prove the letter, but he appeared in person to give evidence.

[11] In his evidence, Mr Tiernan robustly defended the allegations made against him by the Applicant. His evidence accorded with the detail in his letter of 20th September 2012 to the Respondent's solicitors. He specifically denied the Applicant's claim that the meeting at which the guarantee was signed only lasted 15 minutes; and that the Applicant was simply presented with a card with the appropriate wording she was to copy. His evidence included *inter alia,* that the meeting took around 45 minutes, that he recalled where it took place (in another solicitor's office), and that he advised the Applicant she was under no obligation to execute the guarantee. His evidence, however, did agree with the Applicant's evidence that she commented that she didn't have a million pounds (to guarantee); and his evidence was that he had to explain to her that the Respondent could pursue her assets in the event of default. While it must be acknowledged that this agreed fact does not support the Applicant's evidence that she received no advice at all from Mr Tiernan, it does suggest that at the point at which she made this comment, she did not understand the significance of the guarantee; particularly if, as claimed by Mr Tiernan, he needed to explain to the Applicant that she could lose her assets, including her home. Neither the Applicant's nor Mr Tiernan's evidence satisfactorily addressed what occurred between this comment and the Applicant's subsequent execution of the guarantee, which on both parties' evidence can only have been shortly thereafter.

[12] It must be also noted that Mr Tiernan gave his evidence without reference to his file or any contemporaneous notes of the meeting with the Applicant; and that the content of his letter of 20th September 2012 to the Respondent's solicitors in which he details his advice to the Applicant, differs significantly from the letter he wrote to the Respondent on 20th December 2006 following his advice to the Applicant and her execution of the guarantee. He also admitted in evidence that he was not familiar with the ***Etridge*** case. For present purposes that is a significant admission.

Consideration.

The relevant law.

[13] In simple terms, a debt is disputed as long as someone says it is. But, if a creditor elects to deal with the debt by way of a statutory demand, that creditor has selected the jurisdiction in which the debt is to be dealt with; and in doing so, has submitted to a jurisdiction where the principle governing disputed debts is a subtle one. It is also important to recognise that a statutory demand is not legal proceedings. For the purposes of the insolvency legislation, legal proceedings begin with the presentation of a petition. Therefore, where an application to set aside the statutory demand is made, and no bankruptcy petition has been presented, the creditor has not yet issued any proceedings in respect of the disputed debt.

[14] The grounds that would allow the Court to set aside a statutory demand are set out in Rule 6.005(4) of the Insolvency Rules (Northern Ireland) 1991 which states:-

> "The Court may grant the 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) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.001(6) is not complied with in respect of it, or the Court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
>
> (d) the Court is satisfied, on other grounds that the demand ought to be set aside".

[15] In the case of **Moore v Commissioners of Inland Revenue [2002] NI 26**, the question of what constitutes grounds which are "substantial" was considered by Girvan J who stated at page 6:

> "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 the light of Article 6 and in the light of the severe consequences flowing from a decision not to set aside a statutory demand".

In the more recent case of **Allen –v-Burke Construction Ltd [2010] NICh9, [2011] NIJB 62** Deeny J stated:

> "The grounds of dispute must be genuine. The grounds of dispute must not consist of some ingenious pretext invented to deprive a creditor of his just entitlement. It must not be a mere quibble."

In the case of **Sheridan Millennium Ltd-v-Odyssey Property Company [2003]NICh7, (**albeit this relates to a company), Girvan J states at para [8]:

> "If the company can show that there is a genuine dispute on grounds showing a potentially viable defence requiring investigation then the matter should be tried out by action and the issuing of a winding-up petition would be inappropriate and an abuse of process."

[16] Taken together, these authorities have established that for the purposes of insolvency law, the standard is really the same as that for summary judgment. An applicant debtor need only demonstrate a genuine arguable case, or a potentially viable defence to the dispute requiring investigation, to succeed in preventing legal proceedings issuing by way of insolvency proceedings. It follows therefore, that in the case of an application to set aside a statutory demand, the hearing is not for the purposes of a trial of the dispute; rather it is for the court to determine whether the applicant's grounds for disputing the debt constitute a potentially viable defence to the debt as per **Moore,** and **Sheridan Millennium***;* or amount to a "mere quibble" as per **Allen –v-Burke**. If it is the former, the statutory demand ought to be set aside. While the creditor cannot thereafter issue proceedings by way of bankruptcy proceedings, the creditor remains at liberty to issue proceedings in another forum; with the applicant entitled to defend those proceedings without the threat of bankruptcy and all its attendant consequences overshadowing them. If it is the latter, the application to set aside the statutory demand should be dismissed and the creditor entitled to present a bankruptcy petition against the debtor.

Potentially viable defence or mere quibble?

[17] The applicant's grounds for disputing the debt are founded on the principles of **The Royal Bank of Scotland –v- Etridge (No 2)**. The ***Etridge*** case, which was made up of a number of appeals, sought to address the vexed issue of husband and wife surety cases by setting out the circumstances when a lender is put on inquiry; and establishing core minimum requirements that lenders and solicitors must follow to ensure that they can rebut any presumption of constructive notice of undue influence; and for solicitors to avoid an action in negligence. While the focus of ***Etridge*** is the scenario of husband and wife borrowers, it is essential to note that the House of Lords extended these principles to all guarantees by individuals where the relationship between the guarantor and principal debtor is non-commercial. At paragraph [44] Lord Nicholls addressed the issue of circumstances when the bank is put on inquiry, the concept of which finds its origin in the case of **Barclays Bank plc –v-O'Brien ([1993] 4 ALL ER 417, [1994] 1AC 180, [1993] 3 WLR 802**), and was central to the issues for consideration in ***Etridge***. Lord Nicholls states at paragraph [44] of ***Etridge*****:**

> " {in O'Brien's case} The House set a low level for the threshold which must be crossed before a bank is put on inquiry. For practical reasons the level set is much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence. Lord Browne-Wilkinson said:
>
> *"Therefore, in my judgment a creditor is put on inquiry when a wife stands surety for her husband's debts by the combination of two factors (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction."*
>
> In my view, this passage read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts."

Lord Nicholls goes on to state at paragraph [54]:

> " the furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned."

Lord Nicholls then addressed the scenario where once put on inquiry a lender is unwilling to explain the implications of a transaction directly to the wife, but wishes to protect itself by relying on the wife being independently advised by a solicitor. At paragraph [79] Lord Nicholls sets out the core minimum requirements that a lender should take in those circumstances. These he described as a modest burden on the lender. These core minimum requirements are that the lender should:

> (i) Ask the wife directly for the name of her acting solicitor.
>
> (ii) Communicate directly with the wife, informing her that for its own protection the lender requires written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained the nature of the documents and the practical implications thereof.
>
> (iii) Inform the wife that she should be unable to dispute that she is legally bound by the documents in the future once she has signed them upon receipt of legal advice.

(iv) Ask the wife to nominate a solicitor whom she is willing to instruct to advise her, separately from her husband. Advise her that if she wishes, the solicitor may be the same as the one acting for her husband in the transaction.

(v) If a solicitor is already acting for the husband and the wife, ask the wife if she would prefer that a different solicitor act for her regarding the lender's requirements.

(vi) Not proceed with the transaction until the lender has received an appropriate response directly from the wife.

(vii) Provide the wife's solicitor with the financial information needed to advise the wife of the entirety of the financial transaction. This information will include the purpose for which the proposed new facility has been requested, the current amount of the husband's indebtedness, the amount of his current overdraft facility and the amount and terms of any new facility.

(viii) Disclose any unusual feature of the contract between the lender and the borrowers which makes it materially different in a potentially disadvantageous respect from what the wife might naturally expect.

(ix) Send a copy of the husband's loan/mortgage application form to the wife's solicitor if it was made solely by the husband. Obtain the consent of the lender's customer to the circulation of this confidential information. Without this consent, the transaction will not be able to proceed.

(x) Inform the wife's solicitor if the lender believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will.

(xi) Obtain a written confirmation to the effect of the advice from the wife's solicitor.

[18] At paragraphs [64] to [68] and paragraph [74], Lord Nicholls stated that the core minimum requirements of independent legal advice are that the solicitor should:

(i) Have a discussion with the wife at a face-to-face meeting in the absence of the husband.

(ii) When accepting instructions to advise the wife, assume responsibilities directly to the wife, both at law and professionally.

(iii) Explain the nature of the documentation and the practical consequences these will have for the wife if she signs them.

(iv) Use suitable non-technical language.

(v) Point out the seriousness of the risks involved.

(vi) State clearly that the wife has a choice.

(vii) Check whether the wife wishes to proceed. To this extent, she should be asked whether she is content that the solicitor should write to the bank confirming that he has explained the nature of the documents to her and the practical implications they may have for her.

(viii) Obtain any necessary information from the bank. If the bank fails to provide that information for any reason, the solicitor should decline to provide the confirmation sought by the bank.

[19] It is noteworthy that three of the appeals that made up the ***Etridge*** action arose from interlocutory proceedings, one of which was an application for summary judgment. These three appeals were allowed in favour of the wife. The Law Lords formed the view that the issues of undue influence, constructive notice and the obligations of solicitors and lenders were too complex to be dismissed summarily. This leads me to conclude that it follows therefore, that once a lender is put on inquiry, unless all the core minimum requirements imposed on both solicitors and lenders have been discharged and <u>all</u> can be clearly evidenced, the issues are too complex for summary judgment; in which case the same principle applies in the case of an application to set aside a statutory demand.

[20] Returning to the present application, the answer to the question that the court must determine lies not in any disparity in the evidence between the Applicant and Mr Tiernan as to the advice the Applicant received in relation to the guarantee. That in any case is a matter for a substantive hearing of the dispute. Rather, the answer lies in the core facts of the Applicant's case. These are not materially in dispute; and may be distilled and summarised as follows:

1. The applicant executed a personal guarantee in respect of a liability of KB Developments Ltd; a company in which she had no involvement.
2. The liability and guarantee related to a proposed joint property development venture between KB Developments Ltd and the applicant's husband who had his own business.
3. The applicant's knowledge of the proposed joint property venture and the debt she was standing surety for, was derived from her husband.
4. There was a commercial relationship between the applicant's husband and the principal debtor.
5. There was a non-commercial relationship between the applicant and the principal debtor.

6. There was no evidence of direct communication between the Applicant and the Respondent.
7. The applicant signed the personal guarantee along with her husband, and in the presence of her husband, who was advised by the same solicitor at the same time.
8. The content of Mr Tiernan's letter to the bank of 20th December 2006 regarding his advices differs substantially from the content of his letter dated 20th September 2012.
9. Both the applicant's and Mr Tiernan's evidence agreed that during the meeting the applicant commented on the fact that she did not have a million pounds (to guarantee). This suggests that as at this juncture the applicant did not appreciate the significance of the guarantee.

Conclusion.

[21] In determining this application, the starting point is the fact that the Applicant was in a non-commercial relationship with the principal debtor. This put the Respondent on inquiry and the ***Etridge*** requirements were engaged. The Respondent however, seeks to have the application to set aside the statutory demand summarily dismissed. In effect the test for this is the same test as that for summary judgment. In this case in order for the Respondent to succeed, the Respondent would have to demonstrate that the minimum core requirements of both lender and solicitor were discharged; and that the Applicant has no arguable case. The Respondent cannot, in my view, do this for two reasons. The first is that the Respondent's evidence does not disclose any direct communication with the Applicant as is required of a lender when put on inquiry; and the second, is that confirmation of the advice given by Mr Tiernan, set out in his letter to the Respondent of 20th December 2006, would not be sufficient evidence for the purposes of this application, that the core minimum requirements of ***Etridge*** were met by him. This leads me to conclude that for these matters to be properly determined a full trial of the issues is necessary. In the circumstances, I am satisfied that the Applicant has demonstrated a potentially viable defence to the debt, in which case the statutory demand should be set aside. I will now hear argument as to costs.