THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 137

[2019/319]

Kennedy J.
Faherty J.
Ní Raifeartaigh J.

BETWEEN/

DANSKE BANK A/S TRADING AS DANSKE BANK
PLAINTIFF/RESPONDENT

AND
MARTIN SHORTT AND PAULINE SHORTT
APPELLANTS/DEFENDANTS

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 19th day of May, 2020

1. This is an appeal against the judgment and order of the High Court granting the plaintiff's ("the bank") application for summary judgment. The judgment of Noonan J. was delivered on 5th June, 2019 and the order granting judgment was perfected on 20th June, 2019. Judgment was in the amount of €1,368,279.10.

Background/Facts

2. The bank sought judgment against the defendants on foot of a guarantee in writing executed by the defendants on 21st July, 2005. By the terms of the guarantee, the defendants agreed to jointly and severally guarantee payment on demand of all sums due by a company (Blackwood Taverns Limited) to the bank. The defendants were husband and wife and were at all material times directors of the company. The guarantee provided that the total liability under the guarantee would not exceed €1.5m. The guarantee was executed (a fact not in dispute) and two subsequent facilities were granted by the bank. The first arose on foot of a facility letter on 6th April, 2010 and was for the sum of €50,000 being a renewal of an existing overdraft facility to assist with the general working capital requirements of the company. The security clause provided, among other things, for the provision of a letter of guarantee from the defendants in the sum of €1.5m. The facility letter was signed by the defendants as directors of the company. The second facility was entered into a month later on 6th May, 2010 and was for the sum of €1.5m for the purpose of restructuring an existing loan. Again, the security requirement included the provision of a letter of guarantee in the amount of €1.5m. The facilities also provided for various legal and equitable mortgages over certain properties including the premises known as "Dagwells Bar and Restaurant". The second facility letter was also executed by the defendants as directors of the company.

3. The monies were drawn down on foot of the two facility letters and have not been repaid. This is not in dispute.

4. A demand for payment issued to the company on 18th September, 2013, giving a period of 24 hours to make the payment. On the next day, 19th September, 2013 (apparently before the 24 hours had expired), the bank appointed a receiver over the property and assets of the company. On 18th October, 2013, the bank demanded payment of the sums due by the company from the defendants on foot of their guarantee.

5. Dagwells Bar and Restaurant ("Dagwells") was sold by the receiver on 16th May, 2014 and the net proceeds were credited to the account of the company.

6. The proceedings on foot of the signed guarantee were issued by way of summary summons by the bank on 25th February, 2015 and the motion for judgment before the Court issued on 12th December, 2016. Two affidavits were sworn by the first defendant, Mr. Shortt, in response to the claim and none by the second defendant. Mr. Shortt averred, among other things, that around the time the company wanted to purchase a large property portfolio, there was a meeting with employees of the bank, Mr. James Bradley and Mr. Jim Deeney, to discuss the terms of the original facility letters which relate to earlier facilities than those before the Court. Mr. Shortt says that during those meetings he questioned the necessity for the personal guarantees being sought and said that neither defendant would agree to sign them. He said that ultimately, in view of the fact that he was introducing business to National Irish Bank (the plaintiff's predecessor) and was not receiving commission, in lieu of commission and on the strict basis that he signed up to the personal guarantees, he was told that the guarantees would not be enforced against the defendants. He says that he received this assurance directly from Mr. Bradley and Mr. Deeney and that he relied upon it.

7. In his affidavits, Mr. Shortt also raised two other matters. Firstly, he said that at the time of the execution of the guarantee in July 2005, he was what he would describe as a vulnerable person and a patient in a mental hospital. He says that this was known to the bank and that by virtue of this, the guarantee was unenforceable. This was the only evidence offered on this point. Secondly, he complained that at a meeting between the bank and his solicitor after the company's default, it was agreed that he would voluntarily sell Dagwells and that his solicitor would have carriage of the sale; but that the bank breached this agreement by appointing a receiver and that the receiver went into possession of Dagwells before the twenty-four hours afforded by the letter of demand to the company had expired. He says that the appointment of the receiver was therefore defective and unlawful and that, as a consequence of this, the bank is liable to him in damages. He says that he is entitled to exemplary damages both against the bank and the receiver and that the damages due will exceed the plaintiff's claim.

8. In neither of his affidavits does Mr. Shortt suggest that these alleged issues were at any time raised with the bank prior to the swearing of his affidavits.

The High Court Judgment

9. In his judgment, Noonan J. summarised the position as being that the defendants claimed to have a defence to the claim on three grounds:

   (1) The bank had agreed that the guarantee would not be enforceable;

   (2) The bank and the receiver were in breach of the agreement concerning the sale of Dagwells which gives rise to a counterclaim on the part of the defendants which would exceed the value of the bank's claim;

   (3) The first defendant was, at the time of execution of the guarantee, a vulnerable person and a patient in a mental hospital and this rendered the guarantee unenforceable.

10. With regard to the first defence, Noonan J. observed that the most striking aspect of this was that the guarantee was signed on 21st July, 2005, because Mr. Shortt claimed that it was at a meeting *six months later* on 19th December, 2005 that it was agreed that the guarantee would not be enforced if the defendants signed it. He commented that this clearly could not be correct. The Court agrees with this comment at the level of principle. Clearly, an event which takes place *after* a contract cannot possibly be a promise which induces a person to *enter into* the contract.

11. Noonan J. went on to say that, even assuming that this alleged agreement on the part of the bank's officers was entered into before the guarantee was signed, the question would arise as to whether this could constitute an arguable defence. He pointed out that it had never previously been suggested that the guarantee did not bind the defendants for the reasons Mr. Shortt was now advancing to the Court, and that one would have expected any reasonable person faced with a call on a guarantee which had been agreed never to be enforceable to respond swiftly and firmly to that effect. He said that some three and a half years had elapsed before Mr. Shortt had raised the issue and this was only when facing a motion for judgment, which significantly undermined the credibility of the assertion. He referred to his own earlier judgment *AIB v. Kennedy* [2018] IEHC 381, in which a similar type of defence had been raised and considered that the points therein applied with equal force to the case before him. I will return to the *Kennedy* case below. However, I pause to note that I would characterise the criticisms made by Noonan J. in this regard as criticisms concerning the credibility or sufficiency of the evidence.

12. Turning to the second issue, the counterclaim arising from an alleged breach of the agreement concerning the sale of Dagwells, Noonan J. said that this suffered from the same credibility problems as the previous defence. Several years had now passed since the receiver was appointed and had sold the premises. All of that had happened without any challenge by the defendants or the company. No steps were taken at the time to impugn the appointment of the receiver, to restrain him from taking possession of the premises, or to restrain him from selling the premises. It was very difficult to see how this transcended a "mere assertion" unsupported by any corroborating evidence and it was quite inconsistent with a sequence of events that actually transpired. Also, no attempt had been made by Mr. Shortt to explain how the alleged breach of contract by the bank

had given rise to a loss suffered by the company or what the quantum of that loss might be, other than simply asserting that it exceeded the plaintiff's claim. Noonan J. distinguished between a cross-claim which amounts to a defence by way of set-off and an independent claim for damages, referring in this regard to this distinction drawn by Clarke J. (as he then was) in *Moohan & Bradley Construction v. S&R Motors (Donegal) Limited* [2008] 3 IR 650. Applying what was said in that case, Noonan J. said that it was clear that the alleged counterclaim was unrelated to the guarantee on foot of which the bank claimed. It was a claim arising out of entirely different circumstances between different parties, namely the company and the receiver and possibly the bank. It therefore could not give rise to a defence of set-off and the only issue to be considered by the court would be whether or not, if the plaintiff was entitled to judgment, that judgment should be stayed while the cross-claim was litigated. He said he was not persuaded that it should. The cross-claim was "to put it mildly, vague in the extreme". Mr. Shortt had made no effort to explain how a loss arose, what that loss might be and why it had taken three and a half years to even intimate the existence of such a claim, never mind issue proceedings. Noonan J. was therefore satisfied that no arguable defence had been raised on this point. There would be no injustice to the defendants in this regard as they would remain perfectly free to litigate that issue should they wish to do so.

13. The third and final issue relating to Mr. Shortt's alleged vulnerability then arose. Noonan J. pointed out that this had no relevance to Mrs. Shortt, who was the second of the defendants. He noted that the question of how it amounted to a defence had not been in any sense explained or argued in submissions nor was it suggested that the bank had sought to exert some form of influence over Mr. Shortt arising out of his illness, which illness was unsupported by any medical evidence. Again, Noonan J. concluded that it amounted to no more than a "bare assertion" and could not give rise to any arguable defence.

14. In all the circumstances, Noonan J. was satisfied that the defendants had failed to meet the requisite threshold of establishing a fair or reasonable possibility of having a bona fide defence to the bank's claim and held that the bank was entitled to judgment in the sum claimed.

Grounds of appeal and submissions

15. The appellants appealed on the grounds that the trial judge erred: (i) in holding that they did not have a fair or reasonable probability of having a bona fide defence to the bank's claim; (ii) in holding that they had failed to show they had a substantial counterclaim against the plaintiff/respondent; (iii) in holding that they did not have a cross-claim amounting to a defence by way of set-off; (iv) in holding that the cross-claims arose out of entirely different circumstances between the parties; (v) in holding that even if the plaintiff/respondent was entitled to judgment, that should not be stayed while the cross-claim was litigated; (vi) in his application of the parol evidence rule; (vii) in his application of the principles applicable to the threshold for leave to defend proceedings; and (viii) when assessing the credibility of the appellants.

Appellants' submissions

16. The appellants submit that while the parol evidence rule dictates that oral evidence cannot be adduced to contradict the terms of a contract, there are special exceptions to this rule which apply to the present case. Citing the cases of *Revenue Commissioners v. Moroney* [1972] IR 372, *Black v. Grealy* (Unreported, High Court, Costello J, 10th November 1977) and *Whelan v. Kavanagh* (Unreported, High Court, Herbert J., 29th January 2001) in which the rule was not applied where the evidence either related to the determination of the consideration provided (*Moroney*) or showed that a party had waived the term of an agreement (*Black*), the appellants submit that parol evidence can be adduced in these proceedings as: (i) the evidence sought to be relied upon in the present case relates to the consideration provided for the relevant facilities, and (ii) an agreement had been reached that reliance on the personal guarantee was to be waived. The appellants further seek to distinguish *AIB v. Kennedy & Anor* [2018] IEHC 381, a decision of the trial judge upon which he relied in reaching his decision, on the basis that the assurance that the guarantee would not be enforced in this case was, unlike in *Kennedy,* explicitly agreed between the appellants and the bank and flowed from the benefit the bank received each time the first appellant recommended the bank to his clients.

17. The appellants submit that a guarantor, upon whom demand for payment is made, is entitled to raise any defence which would have been available to the principal debtor (in this case, the company) at the time demand was made. Therefore, while the appointment of the receiver is unrelated to the terms of the guarantee, the appellants submit that they are entitled to rely on the defence that they were not afforded a "reasonable" or "realistic" time period within which to make payment (as per the judgment of Hogan J. in *Belohn Ltd & Another v. Companies Acts* [2013] IEHC 157) in circumstances where the letter demanding repayment within 24 hours (dated 18th September, 2013) was not received by the appellants until two days later and the Deed of Appointment of the Receiver is dated 19th September, 2013 but does not specify a time. Moreover, relying on the decision of Baker J. in *Ryan v. Danske Bank* [2014] IEHC 236, the appellants submit that the respondent is obliged to act in good faith in appointing a receiver and that the 'officious bystander' test set out in that judgment could not have been satisfied by the conduct of the respondent in appointing a receiver without adequate notice to the appellants and in breach of an agreement to sell Dagwells.

18. Relying on the oft-cited passage of Clarke J. (as he then was) relating to the credibility of evidence in summary judgment proceedings (as set out in *IBRC v. McCaughey* [2014] 1 IR 749), the appellants submit that the trial judge erred in finding that the assertions of the appellants were not credible insofar as their assertions regarding the timeframe within which a receiver was appointed and the breach of agreement were not denied by the respondent.

Respondent's submissions

19. On the issue of whether the trial judge was correct in holding that the parol evidence rule applied in the present case, the respondents submit that this is of secondary relevance in circumstances where the trial judge had already concluded that the evidence sought to be

introduced regarding the alleged meeting in which it was decided that the guarantee would not be enforced was self-contradictory and not credible. Nevertheless the respondents submit that the trial judge *did* consider whether evidence of this alleged agreement could be admitted and this this was done by way of an alternative analysis as to how such evidence should be treated if it had not been made by way of a contradicted assertion. They submit that the trial judge was correct in finding that the reason for which parol evidence was sought to be adduced was to vary or amend the guarantee and that he was correct to apply his own decision in *AIB v. Kennedy & Anor* [2018] IEHC 381 in that regard.

20. The respondents submit that although the parol evidence rule can be subject to a number of exceptions, no such exception applies in the present case for the following reasons: (i) it was never argued before the High Court that the parol evidence sought to be relied upon related to the question of consideration for the loan facilities; (ii) alternatively, the trial judge concluded that the relevant loan facilities had already been drawn down and the guarantee given before the alleged oral representation was made; and (iii) even if the question of consideration had arisen, the cases of *Moroney and Kavanagh* are distinguishable on their facts. Regarding the appellants' submission that the parol evidence sought to be adduced in the High Court was for the purpose of showing that the respondent had waived reliance on the guarantee, the respondents submit that the appellants had in fact made the much narrower case that they would only agree to sign the guarantee if the respondent agreed not to enforce it against them and therefore, the evidence sought to be adduced was evidence to a pre-condition to entry into the guarantee as opposed to a waiver of any of its terms.

21. Relying on the principles set out by Clarke J. (as he then was) in *Moohan v. S & R Motors (Donegal) Limited* [2008] 3 IR 650, the respondents submit that the trial judge was correct in characterising the alleged cross-claim of the appellants to be one which arose from unrelated circumstances that could only give rise to an independent claim to be litigated in separate proceedings such that the appellants were not entitled to seek a set-off by way of defence. This finding, they say, is consistent with the appellants' concession in their own written submissions that the appointment of a receiver over Dagwells was unrelated to the terms of the guarantee. The respondent further submits that the appellants' submission that they are entitled to raise a defence is incorrect and ignores two key points. First, if any breach of agreement occurred in relation to the appointment of a receiver, that breach occurred in an agreement between the respondent and the company and is not actionable against the respondent by the appellants. Second, the company was not a party to the High Court proceedings and therefore, any defences available to the company which the appellants might have been entitled to avail of cannot arise.

22. Regarding the issue of whether the trial judge was correct to make a determination as to the credibility of the appellants, the respondent submits that the trial judge did not make findings in that regard but was entitled to assess the credibility of the assertions made by the appellants in deciding whether those assertions where capable of establishing an

arguable defence (they rely on the cases of *Promontoria v. Mallon* [2018] IEHC 145, *Allied Irish Banks p.l.c. v. Stack* [2018] IECA 128 and *IBRC v. McCaughey* [2014] 1 IR 749 in that regard). The respondent further submits that the defence raised by the appellants was based on assertions which lacked any substance or documentary evidence and therefore, the trial judge was entitled to reject the defence on the basis that it was untenable and lacking in credibility.

The second and third issues raised by the appellants on affidavit

23. The second and third issues can be swiftly disposed of. The Court is entirely in agreement with Noonan J. with regard to the counterclaim issue as described above and would uphold his decision in that regard, namely that there was no arguable defence on this ground for the following reasons given by him: (a) the alleged counterclaim was unrelated to the guarantee on foot of which the bank claimed, it being a claim arising out of entirely different circumstances between different parties, namely the company and the receiver and possibly the bank, and therefore could not give rise to a defence of set-off ; and (b) the claim itself was extremely vague; Mr. Shortt had made no effort to explain how a loss arose, what that loss might be and why it had taken so long to allude to its existence.

24. The Court is also in agreement with the reasons given by Noonan J. in respect of the issue raised in relation to Mr. Shortt's mental vulnerability and his conclusion that there was no arguable defence on this ground. The appellants never explained how it amounted to a defence, nor was the unspecified illness supported by any medical evidence. It amounted to no more than a "bare assertion" within the meaning of the authorities.

The first issue: the parol evidence rule and related matters

25. The substantial issue in the case was what the Court has titled the "first issue". The parties' submissions concerned matters relating to the parol evidence rule, collateral contracts, consideration in contracts, and the relationship between all of these matters. A considerable number of authorities were cited to the Court. Essentially, the appellants' position can be reduced to the following points:

    (i) the evidence of Mr. Shortt about his conversation with bank officials about the guarantee was admissible;

    (ii) it was admissible because it was being admitted to prove a collateral contract;

    (iii) alternatively, it was admissible because it came under an exception to the parol evidence rule concerning consideration in contracts; and

    (iv) the evidence was sufficiently cogent to reach the threshold requiring the matter to be remitted to plenary hearing.

26. As a preface to the analysis which follows below, the Court proposes to base its conclusion in this case on a rejection of point (iv) above (only). In other words, the Court will be reaching the conclusion that the evidence, *even if admissible*¸ was *not* sufficiently cogent or strong to meet (even the lowered) threshold of evidence to resist a summary judgment and have the matter remitted to plenary hearing. It will be explained below why

the Court proposes to reach the conclusion on this limited basis and not on any wider basis.

The parol evidence rule is an admissibility rule

27. It is important to note at the outset that the parol evidence rule is a rule in respect of the *admissibility* of evidence. A classic description of the parol evidence rule was given by Griffin J. (delivering the judgment of the Supreme Court) in *Macklin v. Graecen & Company Limited* [1983] IR 61, where he said, in the context of a dispute about a contract in writing for the sale of a public house license :

> "When (as in this case) a transaction has been reduced to writing by agreement of the parties, no evidence *may be given* to prove the terms of the transaction except the document itself, and extrinsic evidence is *inadmissible* to vary the terms of the document".

It may be noted that the rule therefore seeks to exclude evidence *in limine* by rendering it inadmissible.

The parol evidence rule is not always strictly applied

28. It is clear that the parol evidence rule is not always strictly applied; there are many examples of cases where the courts have heard or received oral evidence and, what is more, then gone on to find that there was an agreement or contract different from the written contract and/or that the particular terms of the written contract did not in reality express the agreement of the parties.

29. An oft-cited example in this regard is *City & Westminster Properties Limited v. Mudd* [1958] 2 All ER 733 where a landlord's claim to forfeit the lease failed because the evidence established that the tenant had executed the lease in reliance on a promise made to him that the covenant to use the premises for business purposes only would not be enforced against him. There have also been numerous cases in which the issue was raised in a banking context, which will be discussed further below. The appellants also cited a trio of cases, *Revenue Commissioners v. Moroney* [1972] IR 372*, Black v. Grealy* (Unreported, High Court, Costello J, 10th November 1977) and *Whelan v. Kavanagh* (Unreported, High Court, Herbert J., 29th January 2001), for the proposition that there is a special exception to the parol evidence rule relating to the "consideration" in a contract. Again, these will be referred to in further detail below, but for the moment it may be noted that oral evidence was indeed admitted in these cases to contradict the express terms of written documents (a deed, and contracts, respectively).

Collateral contracts and the parol evidence rule: Galvin and Tennants Building Products

30. The Court was also referred to the judgment of Finlay Geoghegan J. in *AIB v. Galvin Developments (Killarney) Limited* [2011] IEHC 314, where she discussed and succinctly summarised the concept of a collateral contract, as well as the relationship between collateral contracts and the parol evidence rule. This issue was further discussed in

Tennants Building Products v. O'Connell [2013] IEHC 197 by Hogan J. who put forward a theory as to what was common to exceptions to the parol evidence rule. At paragraph 19 of his judgment in the latter case, Hogan J. said:

> "19. The defendant's contention is in effect that he executed the contract following an assurance or representation that the guarantee would be not be unilaterally enforced without his consent. If we assume for a moment that this is what actually happened, could the defendant escape liability on foot of the guarantee? The traditional argument against a defence of this kind is that to do otherwise would be inconsistent with the parol evidence rule. By virtue of this rule, the parties to a written contract are presumed to have reduced the entirety of their agreement to writing and that to permit one party to introduce new oral evidence which in effect contradicts the terms of the written agreement would be destructive of legal certainty.
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> 20. It is certainly true that a party cannot be allowed to lead evidence as to what he or she subjectively believed the contract to mean: see, *e.g*., the Supreme Court's decision in *Macklin v. Graecen & Co*. [1983] I.R. 61. Yet the full rigour of the parol evidence rule has been consistently diluted by doctrines such as *non est factum*, misrepresentation and the collateral contract rule. If the parol evidence rule were to be applied with remorseless and unbending logic, it might create a form of immunity for those who would carelessly, recklessly and perhaps even falsely misrepresent the terms of the written agreement, often to the disadvantage of the weaker party, thus undermining the very public policy on which the very existence of the parol evidence rule rests. While perfect consistency is impossible, the courts have nonetheless sought to strike a balance between the certainty of the written word on the one hand and guarding against the possible injustice which would be visited on those who entered into written agreements on the basis of an incorrect and even deliberately false representation on the other. This would be especially true where (as here) the written document has been prepared by one side for execution by the other."

31. Hogan J. then referred to the Supreme Court's decision in *ICDL GCC Foundation FZ-LLC v. European Computer Driving Licence Foundation Ltd* [2012] IESC 55 where Fennelly J. emphasised that a court will always commence with an examination of the words used in the contract and that the parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract. Hogan J. also referred to *Lac Minerals Ltd v Chevron Mineral Corporation* (Unreported, High Court, Keane J., 6th August 1993) where Keane J. (as he then was) stated that evidence of surrounding circumstances but not of subjective intentions may be admitted to explain the subject-matter and even what particular words used should be understood as referring to. Hogan J. continued:

> "22. In that respect, therefore, it is plain that evidence can be given of the surrounding circumstances which led up to the execution of the guarantee. If Mr. O'Connell

could establish that he only executed that agreement on the express assurance of the plaintiff's agent that the guarantee was merely an empty formula designed to placate his head office, then in such circumstances he could obtain relief either for misrepresentation or by reason of the existence of a collateral contract or, for that matter, on the basis that the parties had not actually intended to create legal relations."

32. Hogan J. contrasted the decisions in *Galvin and Ulster Bank v. Deane* [2012] IEHC 248 (discussed at paragraph 38 of this judgment) with each other and then went on to say:

> "27. The effect of this case-law may be said to be that while the courts will permit a party to set up a collateral contract to vary the terms of a written contract, this can only be done by means of cogent evidence, often itself involving (as in *Mudd* and in *Galvin*) written pre-contractual documents which, it can be shown, were intended to induce the other party into entering the contract. By contrast, generalised assertions regarding verbal assurances given in the course of the contractual negotiations will often fall foul of the parol evidence rule for all the reasons offered by McGovern J. in *Deane*."

33. I would describe the above comments of Hogan J. in *Tennants Building Products* as the advancement of a general or unifying theory as the underlying rationale for the non-applicability of the parol evidence rule in a variety of types of case, including but not limited to cases involving an alleged collateral contract.

The usual evidential threshold in applications for summary judgment continues to apply

34. It is important to observe that the case before Hogan J. in *Tennant's Building Products* was not a summary application and his reference to "cogent evidence" must be read in that context. It could not be said that his observations in any way displace the usual principles governing applications for summary judgment as set out in *Aer Rianta v. Ryanair* [2001] 4 IR 607, *Harrisrange v. Duncan* [2003] 4 IR 1, *G. Capital Woodchester Ltd. v. Aktiv Kapital* [2009] IEHC 512 or *IBRC v. McCaughey* [2014] 1 IR 749. Indeed, this emerges clearly from *McCaughey* itself. At first instance, the High Court (Kelly J.) remitted part of the case (regarding some of the loans) to plenary hearing on the basis that the low threshold had been achieved; a triable issue had been raised as to the possible existence of a collateral agreement. In that case, there was evidence not only from the defendant but also from the manager with Anglo Irish Private Bank, who had organised the loans for the defendants, that the basis on which (some of) the loans were provided were explicitly confirmed by him as being for the duration of the investment, contradicting the express terms of the facility letters, which described them as demand facilities. There was also material which had been presented to the credit committee which antedated the signing of the formal contracts. Further, on appeal to the Supreme Court (reported at *IBRC v. McCaughey* [2014] 1 IR 749) in respect of the remainder of the loans, it was held that the test for remitting to plenary was also satisfied in respect of some further loans ("the New York Hotel loans") and the appeal was allowed to that extent. Accordingly, it is clear that the normal principles as to the evidential threshold to

be reached by a defendant to a summary application for judgment continue to apply, even where the claim is one of collateral contract.

The "banking" cases and the parol evidence rule

35. I turn now to a number of High Court decisions where defendants claimed the existence of collateral contract in response to the applications of banks for summary judgment, including those judgments upon which Noonan J. placed particular reliance in the present case. The Court believes that the approach in each of these cases is somewhat similar, and that approach will be summarised at the conclusion of this section.

36. By way of general background, it seems fair to say that since the banking crisis of 2008, the Irish courts have witnessed numerous cases in which claims of collateral contracts have been advanced by defendants, frequently in summary proceedings to enforce security such as guarantees. Usually these are variations on the same theme; that bank officials had made representations to the customer/borrower, either before or after the signing of a loan or execution of a mortgage or guarantee, that the written contract would not be fully enforced in its own terms, i.e. that recourse would be limited in some way, or the guarantee would not be enforced at all. The frequency of this type of claim was alluded to by Barniville J. in *Promontoria (Arrow) Ltd v. Burke* [2018] IEHC 773 when he observed that some forty-three authorities had been cited to the Court on the issue of parol evidence. It is perhaps not surprising that the courts have, as Barniville J. said at paragraph 113 of his judgment, become somewhat "sceptical" of defences sought to be raised on the basis of oral representations which were not supported by contemporaneous documents and which are inconsistent with the express terms of a written contract signed by the parties.

37. The three cases on which this court wishes to focus are *Ulster Bank v. Deane* [2012] IEHC 248, *Promontoria (Arrow) Ltd v. Mallon & Anor* [2018] IEHC 145 and *AIB v. Kennedy & Anor* [2018] IEHC 381.

38. In *Ulster Bank v. Deane* [2012] IEHC 248, the defendants claimed that they were entitled to defend the case on the basis of a collateral or side agreement reached between the plaintiff and each of the defendants to the effect that the loans were not demand loan facilities (as appeared on their face) but instead were long-term loans to be paid for by the sale of various properties. At paragraph 6 of his judgment, McGovern J. said that the defendants had not produced any written documentation to support this claim and that the parol evidence rule prohibited them from seeking to alter the terms of the facility letters by means of parol evidence, citing *Macklin v. Graecan* [1982] IR 61 and *O'Neill v. Ryan (No. 3)* [1992] IR 166. He went on, at paragraph 7, to say that the defendants were making "a further argument" that they were entitled to rely on a collateral or side agreement, relying on the *Mudd* case and on *Galvin*. McGovern J. considered that both cases could be distinguished on their facts, referring to the specific evidence in each of those cases to support the alleged collateral contracts. In contrast, the defendants had offered "no evidence other than verbal discussions which they say altered the terms of the facility letters, but such evidence is inadmissible, being in breach of the parol

evidence rule". At paragraph 12, he said that "the defendants have simply not been able to point to any written document or any facts which go any way near to establishing a collateral agreement." It seems to me that the main basis for his conclusion that the defendants had no arguable defence was the paucity of evidence of any kind, although some of his comments seem to suggest that a collateral contract could never be established on oral evidence and/or that the obstacle facing the defendants was the parol evidence rule.

39. McGovern J again rejected the proposition that the defendant had an arguable defence in *Promontoria (Arrow) Limited v. Mallon & Anor* [2018] IEHC 145. In proceedings for summary judgment, the second defendant argued that the plaintiff was estopped from relying on the terms of the facility letter and letters of amendment on the basis that there was an oral agreement between the parties that there would be no recourse to the defendants personally in respect of the borrowings. McGovern J. referred, *inter alia*, to his own judgment in *Ulster Bank v. Deane* [2012] IEHC 248 and to *Tennants Building Products v. O'Connell* [2013] IEHC 197, and said (at paragraph 18) that although the threshold for leave to defend proceedings was a low one, "it still has to be crossed and the courts are entitled to look at the defence raised and assess its credibility in the light of all the surrounding facts, including contractual documents." If the defence was based on mere assertion, was wholly implausible, and inconsistent with or contradicted by documentary evidence, then the Court may reject the defence on the basis that it is "untenable or lacking in credibility". He went on to consider and subsequently rejected an argument founded on estoppel. At paragraph 33 of his judgment, he said:

> "The defence raised by the defendant lacks credibility and flies in the face of the written documents signed and accepted by the defendant. For reasons of public policy, the courts will not permit oral evidence to be admissible if it introduced for the purpose of contradicting the terms of a written agreement between the parties. The defence based on an alleged oral agreement made on 30th June, 2006, cannot succeed because it would be in breach of the parol evidence rule."

40. Finally, I come to *AIB v. Kennedy & Anor* [2018] IEHC 381, the judgment extensively referenced by Noonan J. in his judgment in the present proceedings. Again, the context in *Kennedy* was an application for summary judgment brought by a bank against a defendant on foot of a guarantee. The dates are of relevance. The letter of loan sanction was dated 11th January, 2007 and the defendants executed written guarantees on 16th January, 2007. The funds were drawn down by the company on 18th January, 2007. There was some negotiation between the bank and the defendants concerning the terms of the loan and, in particular, concerning the payment of an arrangement fee in the sum of €10,000; apparently, it had been agreed that this would be waived and there was a hand-written note from the defendants' accountant to that effect. The term of the loan was subsequently extended in May 2009. On 2nd December, 2009, the bank wrote to the second defendant in his capacity as guarantor notifying him that the bank had agreed with the borrower to change the terms of the facility. The bank again wrote to him on 11th August, 2010 referring to a meeting of the same day where the loans were

discussed and requiring him to provide a statement of his net worth for the purpose of considering whether the bank would renew the company's facility. The second defendant replied stating that he did not think any purpose would be served by this, and he instead made proposals for putting the property up for sale with a view to discharging the loan. There was no mention in this letter, some four years after entering into the guarantee, that the guarantee was other than of full force and effect. The company ultimately defaulted on the loan and a demand for payment was made on 26th June, 2013 and on 18th September, 2013 on foot of the guarantee. A summary summons subsequently issued as well as a motion for summary judgment. The second defendant swore a replying affidavit on 2nd June, 2016 in which, for the first time, he suggested that he was not liable on foot of the personal guarantees for three reasons, one of which is relevant for present purposes. The claim was that an express representation had been made to him by the relevant bank official, Mr. Gerard O'Brien, which the second defendant understood to mean that the bank would not be relying on the guarantee. In this affidavit, the second defendant said that the conversation took place on 17th or 18th January, 2007 and that he had been told that the personal guarantees sought "would not be a problem". He said that he thought that the execution of the guarantee was merely a temporary measure to allow the drawdown of the funds and that a revised offer letter would shortly be issued by the bank which would not include the requirement for the guarantee. He said that this conversation took place on either 17th or 18th January, 2007. The guarantee itself was signed on 18th January, 2007.

41. Noonan J. rejected the submission on behalf of the second defendant that an estoppel arose in the circumstances. He said that the doctrine of promissory estoppel operates to prevent reliance by a party on his strict legal rights where a representation is made that they will not be relied upon and the party to whom it is made acts upon it to his detriment. He said it had no application to pre-contract negotiations in advance of the creation of any legal rights. He went on to say that what the second defendant was actually contending was that:

> "17. […] the contract included a term that the guarantee to be executed by him would never be relied upon by the bank and was thus devoid of any force or effect, in itself a total contradiction in terms and scarcely credible. What in reality the defendant seeks to do here is to amend the terms of the agreement by reference to this alleged oral representation. This is impermissible as *Promontoria v. Mallon* [2018] IEHC 145 demonstrates."

42. Noonan J. went on to quote from the judgment from of McGovern J. in the *Promontoria* case at paragraph 16. He then went on to say that while it was true that in a summary judgment application the Court looks at the issue of credibility on a much narrower basis than it might do at a substantive trial, this did not mean that issues of credibility were to be ignored at a fundamental level (referring to *Allied Irish Bank Plc v. Stack* [2018] IECA 128 and to paragraph 23 of *IBRC v. McCaughey* [2014] I.R. 749 in particular). Noonan J. commented that the second defendant sought to surmount the credibility hurdle by suggesting that his own evidence that there were oral discussions and agreement was

corroborated by the handwritten note which confirmed that the arrangement fee was waived by the bank. Noonan J. thought that far from corroborating his version of events, this document was entirely at odds with it. He pointed out that if such a fundamental term as waiver of the guarantee had been agreed between the parties on 18th January, 2007, it would be extraordinary that no note was made of it when there was a note concerning the arrangement fee, which was term of considerably less importance.

43. Noonan J. also said that the asserted terms of the contract must also be tested by reference to the subsequent conduct of the second defendant. He said that "[a]t every hand's turn", the defendant was presented with an opportunity to put forward the case which he now made, particularly when the bank was seeking information about his personal assets in 2010, but he had made no reference to the case which was raised now for the first time in his replying affidavit (the best part of a decade after the transaction was entered into). He concluded that on any view of the matter, this purported defence consisted of mere assertion, lacked any credibility and was contradicted by the documentary evidence. Accordingly, he reached the conclusion that no arguable defence had been made on this ground.

44. It seems to me that what is common to these three cases is an approach which, I would respectfully suggest, presents the following features: (i) the parol evidence rule is referred to, and referred to *as if* it were the reason for the conclusion; but (ii) the parol evidence rule was not *in fact* applied as the judge did consider the evidence in question; and (iii) the primary basis for the conclusion reached was that the evidence was *insufficient* (even by the standard of the lower threshold applicable to a defendant in an application for summary judgment). I might respectfully add that there may therefore have been a degree of conflation of 'admissibility' and 'weight' of evidence in those cases.

45. I would also suggest that the policy reasons referred to directly or indirectly in these judgments are indeed important; but their relevance in the present context is not by rendering the evidence *inadmissible*, but rather by the courts insisting on appropriate standards for testing such evidence ('cogent' evidence in the case of a full hearing; and the usual threshold test for remittal to a plenary hearing in an application for summary judgment). In other words, there are good reasons to be cautious about such evidence (once admitted); but these reasons do not justify the evidence being excluded from the outset.

A trio of cases concerning consideration and contracts

46. I turn next to three cases which were cited by the appellants to support the proposition that there is a separate and distinct exception to the parol evidence rule related to establishing the 'true' consideration in a contract.

47. In *Revenue Commissioners v. Moroney* [1972] IR 372, parol evidence was admitted to prove that a sum of money referred to in a deed was never paid notwithstanding that the deed contained assertions to the contrary. The father of the defendants had assigned certain leasehold premises to himself and his sons by deed dated 5th May, 1961 "in

consideration" of the sum of £16,000 and the deed contained a receipt clause by which the defendants' father acknowledged the payment to him of that sum. After the death of the defendants' father in 1964, the Revenue Commissioners claimed that two-thirds of the sum was a debt due to the father's estate and part of the property passing on his death, and that the defendants should pay the State duty chargeable upon that asset. At the hearing of the special summons, the High Court dismissed the summons. On appeal, the Supreme Court disallowed the appeal and held that the evidence established that the defendants had never owed any money to their father in connection with the assignment. The evidence contradicting the deed consisted of an affidavit of one of the defendant's sons, in which he described the circumstances in which the documents were executed and said that his father did not expect to be paid any of the purchase price, together with an affidavit of the solicitor (since deceased) who had dealt with the drawing up of the deed who averred that the sum was never paid to or demanded by the parent. The plaintiff objected to the admission of the affidavit and declaration on the basis that no evidence of extrinsic circumstances was admissible to add to, contradict, vary or alter the terms of a deed. Kenny J. in his High Court judgment noted this objection and commented that:

> "This rule however does not apply to the statement of the consideration in the deed […] because [according to Norton's Treatise on Deeds (2nd ed. 1928)] "the statement of the consideration forms no part of the terms of the deed, but is only a statement contained in the deed of an antecedent fact."

Kenny J. continued:-

> "Moreover, if no evidence was admissible to contradict, vary or alter the terms of the deed, the Revenue claim would fail because there is a receipt for the consideration in the deed. It is not necessary to give authority for the proposition that evidence may be given to show that, despite the receipt, the consideration was not paid. Similarly, evidence is admissible when it is relevant to explain the circumstances in which the deed was executed and to establish that the parties did not intend that the purchase price mentioned in the deed should ever be paid."

48. On appeal, Walsh J., delivering the judgment of the Supreme Court, adopted the following rationale:

> "In my view, the learned trial judge was correct in admitting the affidavit and, apart from the other reasons given by the learned High Court judge for admitting the evidence, I think it was admissible on the ground that it was relevant to explain the circumstances under which the deed was executed and to establish what in fact was the real intention of the parties. In his affidavit Mr. Robinson stated that there was never any intention on the part of the deceased that the sum of £16,000, or any sum, should be paid to him and that it was clearly understood that no money, or any other consideration, was to pass to the deceased from the defendants.
>
> In my view, the evidence establishes that the defendants were never indebted at any time to their father in respect of any sum of money arising out of this

transaction. The learned trial judge decided this case in favour of the defendants on the basis that the doctrine of promissory estoppel was applicable. It seemed to him that the deceased had represented to his sons, the defendants, that he would never seek payment of any part of the £16,000 and that they acted on this by signing the deed of assignment. The learned trial judge took the view that the defendants had made themselves legally liable to pay the money concerned but that, by reason of the deceased's representations, the trial judge was free to apply this doctrine of promissory estoppel. On this matter I take a different view from that taken in the High Court. The doctrine of promissory estoppel arises in a case such as the present one only when there is a liability in law to pay the money. In the present case it would arise if the sons are, in law and in fact, indebted to the father in the sum mentioned. On the view I have taken of this case on the evidence, I think there was never any indebtedness between the parties and therefore the question of the deceased's representation causing the defendants to enter into such a liability does not arise. I find it, therefore, unnecessary to express any view on the applicability of the doctrine of promissory estoppel to a case such as this if the position in law had been that the defendants were legally indebted to the deceased in the sum claimed. It is quite true that when the deed was signed legal relations were effected because, among other things, the legal estate in the property was transferred. To that extent the deceased bound himself and the form of the deed was sufficient without any consideration to achieve these objects. If in fact there was no consideration, that may be established in evidence notwithstanding a statement to the contrary in the deed. If this matter had been contested during the father's lifetime on the evidence upon which the matter has now to be decided, it would have been open to the court, even if the father had given evidence to the effect that the transaction was intended to be a real sale, to find against him. If the father had attempted to sue upon the deed and had admitted in the witness box that, notwithstanding the terms of the deed, there had never been any intention to sell the property or any intention to have a sale of any kind but simply to achieve a form of family settlement between himself and his two sons who were in fact the working partners in the business, with the intention of making them partners in law, a claim to recover the money by the father could not have succeeded. In the present claim the matter must be viewed from the same position and the fundamental question posed in this case, namely, whether the father would have been successful in an action brought by him against his sons immediately after the deed had been executed to recover any part of the £16,000 must be answered in the negative because the sons were never at any time indebted to the father for that sum or any sum of money by reason of the provisions of the deed in question. For that reason I would dismiss the appeal."

Budd J said:

"The learned trial judge held that the rule did not apply to a statement of the consideration in a deed because it forms no part of the terms of the deed but is only a statement contained in the deed of an antecedent fact. He also took the view

that evidence may be given to show that, despite the receipt clause, the consideration was not paid and that evidence is admissible to explain the circumstances under which the deed was executed and to establish that the parties did not intend that the purchase money mentioned in the deed should ever be paid. I agree with the views expressed by the learned trial judge."

49. Ó Dálaigh C.J. agreed with the judgments of both Walsh and Budd JJ. Having regard to the above quotations, the case seems to me to support at least two separate rationales for the admissibility of the evidence in question: (i) the statement in the deed concerning consideration was a statement of antecedent fact and did not form part of the deed in the strict sense; and (ii) the evidence was necessary to show the intentions of the parties (i.e. that it was never intended that the money mentioned in the deed be paid).

50. In *Black v. Grealy* (Unreported, High Court, Costello J., 10th November 1977), the parol evidence rule was not explicitly referred to and a slightly different analysis was put forward. The facts are somewhat complicated because of dishonesty on the part of some of the witnesses connected with the parties, and I do not think it is necessary to recite the facts in detail. It will hopefully suffice to say the following. The contract concerned the sale of a property known as Dalkey Manor and an issue was raised as to the Statute of Frauds. The issue was which of the following was enforceable: (a) an oral agreement (where the purchase price was £46,000) or (b) a memorandum of 6th October, 1976 (which recorded a purchase price of £40,000)? Costello J. said that this was a case in which the parties, through their agents, entered into an oral agreement for the sale of land and, as part of the agreement, decided that the full purchase price would not be disclosed but rather that the balance after payment of the deposit would be treated as the purchase price in the written memorandum. He said that it would not be apt to describe the result and written document as a memorandum "of" the oral agreement as it did not properly state the full consideration for the sale; rather it was a memorandum in accordance with one of the stipulations of the oral agreement, which was "not quite the same thing". Costello J. said that he did not think that the memorandum satisfied the Statute of Frauds. The Statute could not be used as an instrument of fraud and it would be a fraudulent use of the Statute if the Court permitted the defendant to avoid liability on foot of the oral agreement on the ground that the memorandum, which was prepared expressly in accordance with his wishes and for his benefit, was inadequate because it treated the balance of the purchase price as the purchase price (i.e. the full purchase price). The plea on the Statute therefore failed and the plaintiff was entitled to have the oral agreement enforced by way of specific performance. Here, the analysis appears to have proceeded not on the basis of any explicit discussion of the parol evidence rule, but rather on the basis of an assumption that the evidence was admissible to show what the "true" contract was. It is noteworthy that the case involved an element of dishonesty, particularly when one considers the *dicta* of Hogan J. in *Tennants Building Contracts*.

51. In *Whelan v. Kavanagh* (Unreported, High Court, Herbert J., 29th January 2001) , there was (the Court ultimately concluded) an element of dishonesty on the part of the defendant. In this case, the contract also concerned the sale of a property, in respect of

which the plaintiff sought specific performance. The defence was initially pleaded one way with regard to the consideration issue, and later amended by the defendant to allege entirely different facts on this issue. At the hearing, a number of witnesses gave evidence, including the plaintiff and defendant. The defendant swore that the purchase price shown in the memorandum of agreement was a fictitiously inflated price, that it was there at the insistence of the purchaser, and that it represented a stratagem by which the purchaser could obtain an additional sum of £10,000 with which to renovate the property. From comments made in the judgment, it is clear that the trial judge was not impressed by the evidence of the defendant and he found in favour of the plaintiff. In the course of his judgment, Herbert J. described the defence as one of illegality and said that a party who has executed a contract which is regular and lawful on its face should not lightly be permitted to impugn that contract, particularly to his or her own advantage, by pleading illegality as a defence to a claim for specific performance. The burden of proof lay upon that party to prove the alleged illegality and "[e]xtrinsic evidence, i.e., statements, facts or circumstances, outside the document, is admissible despite some older authorities to the contrary, to prove a smaller "real" consideration inconsistent with that expressed in the agreement". Ultimately, having referred to "untruths" told by the defendant, he found in favour of the plaintiff. For present purposes, what is interesting is his reference to the admissibility of extrinsic evidence to prove the "real" consideration inconsistent with that expressed in the agreement. The parol evidence rule was, again, not explicitly referenced.

52. As noted earlier, the appellants in the present case rely upon these cases to support the proposition that there was a special exception to the parol evidence rule relating to 'consideration' in contracts. For the reasons set out below, the Court does not propose to reach a conclusion on this issue as it considers it unnecessary for the purposes of this case.

Conclusions

53. Having regard to the authorities discussed above, it seems to the Court that a number of questions arise concerning the precise relationship between the parol evidence rule and collateral contracts. These include the following questions and issues:

a) The precise relationship between the parol evidence rule and collateral contracts;

b) Whether or not there is a special exception to the parol evidence rule concerning 'consideration' in contacts having regard, inter alia, to *Revenue Commissioners v. Moroney* [1972] IR 372, *Black v. Grealy* (Unreported, High Court, Costello J, 10th November 1977) and *Whelan v. Kavanagh* (Unreported, High Court, Herbert J., 29th January 2001);

c) the relationship between the cases cited at (b) with both the parol evidence rule and the principles relating to collateral contracts; more specifically, whether the 'unifying' theory proposed by Hogan J. in *Tennants Building Products v. O'Connell* [2013] IEHC 197 is correct and/or obviates the need for a special exception as described at (b); and

d) whether parol evidence, on its own, if sufficiently compelling, might ever be sufficient to establish a collateral contract.

54. The Court does not think that the present case is an appropriate one in which to seek to resolve these broader issues. The issues here arise in the context of an application for summary judgment, and the case is (in the Court's view) easily decided on the ground of 'sufficiency of evidence' without the need to wade into the deeper waters identified above. Further, the Court understands the position to be that the argument as to a 'special exception' based on 'consideration' was not made in the High Court and was only raised for the first time on appeal.

55. Accordingly, for present purposes, the Court thinks it is sufficient to say the following:

a) The usual evidential threshold applies in summary judgment cases in respect of a defendant who seeks to have an issue in, and/or the entire case, remitted for plenary hearing. Accordingly, the evidence does not have to reach the threshold that would be required at a trial. This is as true in respect of the issue of a collateral contract as it is for any other issue. (*IBRC v. McCaughey* is an example of the evidence concerning an alleged collateral contract being measured against the evidential standard in a summary judgment case).

b) Nonetheless, and although the evidential foundation for establishing an arguable case is lower than the evidence required to establish a collateral contract at trial, a court may legitimately reach the conclusion, even on an application for summary judgment, that the evidence put forward by a defendant seeking plenary trial is so implausible, lacking credibility or otherwise thin that even that lesser standard has not been met in a particular case (examples of this are *Deane, Mallon* and *Kennedy*).

c) The present case falls into category (b) above.

56. In other words, the Court agrees with the trial judge that the evidence put forward by the first defendant/appellant (*even assuming it to be admissible*) did not reach even the low evidential threshold required for the remittal of an application for summary judgment to plenary hearing. The Court agrees for the following reasons.

57. First, Mr. Shortt's averments (that the conversation took place six months *after* he had signed the guarantee) on their face did not support the proposition he was putting forward (namely, that the conversation had induced him to sign the guarantee). That alone would have sufficed to dispose of the argument and indeed Noonan J. indicated as much in his judgment. On this appeal, counsel on behalf of the appellants submitted that Mr. Shortt had made a mistake when he had averred that the date of the signing was 19th December, 2005. The 'mistake' suggestion was not, however, averred to on affidavit, and it is significant that the first appellant had said on affidavit that this date of 19th December, 2005 was one he had arrived at from an examination of his own records.

58. But secondly, and even more importantly, I do not think that it makes any difference to the outcome, even if one were to accept that a mistake was made as to the date and that Mr. Shortt's contention is that the alleged promise was made before (and not after) the signing of the guarantee. As Noonan J. pointed out, there was no written note of the alleged conversation; it was disputed by the bank; and Mr. Shortt had first raised it in response to the application for summary judgment, having failed to raise it in the intervening years. The Court would therefore agree that the evidence was so scant in support of the alleged collateral contract that it failed to meet even the reasonably low threshold required for remittal to plenary hearing.

59. Accordingly and notwithstanding that the authorities cited above raise many interesting issues, the Court does not propose to decide the case on a basis that goes beyond what is strictly necessary because it considers that the evidence (even if considered admissible on whatever basis) was not in any event sufficient to have the matter remitted to plenary hearing and it is not necessary to identify the precise basis on which such evidence would be admissible as a matter of theory. This Court upholds the judgment of the High Court on the limited basis that the evidence was insufficient to meet the threshold required for remittal to plenary hearing, and not on any more general basis as to his comments about the admissibility of the evidence.

60. In those circumstances, the comments which now follow are *obiter dicta* on my part, based upon my consideration of the authorities and arguments presented in this case. First, I would suggest that in some of the judgments described there may have been a degree of conflation as between the *admissibility of evidence* (the subject of the parol evidence rule) and the *weight of evidence* in support of an alleged collateral contract, and this may explain why it may sometimes have been stated (particularly in some of the banking cases referred to) that the parol evidence rule prevented the establishment of a collateral contract despite the fact that the judge actually went on to consider the evidence in support of the collateral contract; such an exercise is, strictly speaking, a contradiction in terms because the parol evidence rule is an admissibility rule and would preclude the evidence being admitted in the first place.

61. Secondly, I would venture to suggest that the position regarding collateral contracts and the parol evidence rule is simply this: that where a person seeks to establish a collateral contract, the parol evidence rule will not operate to prohibit the admission of oral evidence in support of the alleged collateral contract. Whether one considers this an 'exception' to the parol evidence rule or simply a situation where the parol evidence rule does not apply in the first place may, perhaps, be no more than a semantic exercise. However, it can result in a situation where the explicit terms (or a term) of the written contract as appear on the face of the document are not ultimately enforced by the court.

62. Thirdly, a separate issue from the admissibility issue is whether the evidence is sufficiently cogent to establish a collateral contract; this is an issue concerning the weight of the evidence, and should be informed by the discussion in such cases as *Galvin* and *Tennant's Building Products*.

63. Fourthly, I find very interesting the *dicta* of Hogan J. in *Tennants Building Products*, suggesting an underlying unified rationale for cases where the parol rule has not been applied. It may ultimately provide a better explanation for decisions such as *Moroney, Black,* and *Whelan* than the explanation of a special 'exception' to the parol evidence rule based on 'consideration' in contracts. However, it is not necessary to consider this any further in the present case.

64. In view of the foregoing, I would dismiss the appeal.

Kennedy J: I have read the judgment and agree with it.

Faherty J: I have read the judgment and agree with it.