Neutral Citation: [2014] IEHC 342

THE HIGH COURT

COMMERCIAL

[2014 No. 774 S]

BETWEEN

NATIONAL ASSET LOAN MANAGEMENT LIMITED

PLAINTIFF

AND

HENRY A. CROSBIE

DEFENDANT

JUDGMENT of Mr. Justice Keane delivered on the 18th June 2014

Introduction

1. In these proceedings, the plaintiff seeks summary judgment against the defendant in the sum of €77,095,090.59, together with interest and costs.

2. The plaintiff is a company formed by the National Asset Management Agency ("NAMA"), in accordance with the powers conferred on NAMA under the National Asset Management Agency Act 2009 ("the NAMA Act").

3. The defendant is a company director.

4. The defendant acknowledges that the sum at issue remains outstanding in respect of a number of personal loan facilities he received from, and personal guarantees he executed in favour of, Allied Irish Banks plc ("the bank"). The bank is a "participating institution", as s. 4 of the NAMA Act defines that term, and the debts due by the defendant to the bank pursuant to those loan agreements and guarantees have been transferred to the plaintiff, as a subsidiary of NAMA.

5. By letter dated the 10th March 2014, the plaintiff demanded payment by the defendant of the various sums due.

6. The defendant avers that he has a full defence to the plaintiff's claim. His defence is that he entered into a solemn and binding written agreement with the plaintiff in August 2012, under which it was agreed that - in consideration of the defendant providing security interests in certain assets to the plaintiff, and of his divesting himself of certain other assets - the plaintiff would no longer have recourse to the defendant's remaining assets, including the defendant's family home, his son's home and a business carried on by the defendant's wife.

The test for summary judgment

7. There is no issue between the parties on the test to be applied.

8. In *First National Commercial Bank v Anglin* [1996] 1 I.R. 75 at 79, the Supreme Court (*per* Murphy J., Hamilton C.J. and Denham J concurring) endorsed the following test laid down in *Banque de Paris v de Naray* [1984] 1 Lloyd's Law Rep 21, which had been referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v Daniel* [1993] 1 W.L.R. 1453:

> "The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or *bona fide* defence."

9. Murphy J. continued:

> "In the National Westminster Bank case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-
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> > 'I think it right to ask, using the words of Ackner L.J. in the *Banque de Paris* case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or *bona fide* defence?' The test posed by Lloyd L.J. in the *Standard Chartered Bank* case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.' "

10. Murphy J. prefaced the Court's adoption of that test by stating (at pp. 78-9 of the report):

> "For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the *bona fides* of the defendant or to doubt whether the defendant has a genuine cause of action (see *Irish Dunlop Co. Ltd. V Ralph* (1958) 95 I.L.T.R. 70)."

11. In considering the Anglin test in *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607, McGuinness J. pointed out that it is not for the Court to weigh the affidavit evidence adduced by the parties or to attempt to resolve any factual contradictions contained within it, before stating (at p.615):

> "In deciding whether the defendant may have a "credible" defence, the court must concentrate its attention on the matters put forward in the defence itself. The court does not ask whether [the defendant's] account of events is

probable, or likely to be true; nor does it ask whether [the plaintiffs] account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible."

12. In the same case, Hardiman J. examined the historical antecedents of the present summary judgment procedure, locating the origin of its modern form in the Judicature Acts. Hardiman J. cited the following passage from the judgment of Lord Esher in *Sheppards and Co. v Wilkinson and Jarvis* (1889) 6 T.L.R. as the most clear expression of the criteria for the exercise of the power (at p. 13 of the report):

> "...The rule which had always been acted upon by this Court in considering cases under [the relevant Order] was that the summary jurisdiction conferred by that order must be used with great care. A defendant ought not to be shut out from defending unless it was very clear indeed that he had no case in the action under discussion. There might be either a defence to the claim which was plausible, or there might be a counter-claim pure and simple. To shut out such a counter-claim if there was any substance in it would be an autocratic and violent use of [the relevant Order]. The Court had no power to try such a counter-claim on such an application, but if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded."

13. Hardiman J. found Lord Esher's statement of the rule to be perfectly consistent with the following observation of Lavery J. in *Prendergast v Biddle* (Unreported, Supreme Court, 31st July, 1957):-

> "The procedure by summary summons was provided in order to enable speedy justice to be done in particular cases where there is either no issue to be tried or the issues involved are simple and capable of being easily determined."

14. Hardiman J. also quoted, with approval, the following statement of O'Brien C.J. in *Crawford v Gillmor* (1891) L.R. Ir. 238:

> "I think, however, that final judgment should not be given on a motion for final judgment in any case where any serious conflict as to matter of fact or any real difficulty as to matter of law arises."

15. Considering these cases in conjunction with more recent Irish authority, Hardiman J. noted (at p. 621) "that the defendant's hurdle on a motion such as this is a low one and that the jurisdiction is to be used with great care", before concluding (at p. 623):

> "In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable case?"

16. A very helpful distillation of the principles to be derived from the jurisprudence is set out in the judgment of McKechnie J. in *Harrisgrange Ltd. v Duncan* [2003] 4 I.R. 1 (at pp. 7-8):

> "From these cases, it seems to me that the following is a summary of the present position:-
>
> 1. the power to grant summary judgment should be exercised with discernible caution;
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> 2. in deciding upon this issue the court should look at the entirety of the situation and consider the facts of each individual case, there being several ways in which this may best be done;
>
> 3. in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
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> 4. where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;
>
> 5. where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;
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> 6. where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;
>
> 7. the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as it is sometimes put, "is what the defendants says credible?", which latter phrase I would take as having against the former an equivalence of both meaning and result:
>
> 8. the test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient that there is an arguable defence;
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> 9. leave to defend should be granted unless it is clear that there is no defence;
>
> 10. leave to defend should not be refused only because the court has reason to doubt the *bona fides* of the defendant or has reason to doubt whether he has a genuine case of action;
>
> 11. leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally:
>
> 12. the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

17. Mindful of the test the court is required to apply, I now proceed to consider the facts of this particular case.

Background

18. Much of the evidence adduced on behalf of the plaintiff for the purpose of the present application is uncontroverted by the defendant.

19. Mr. Bernard McLoughlin, an asset recovery manager with NAMA, swore an affidavit on behalf of the plaintiff on the 19th March 2014. He avers that the bank made a number of loan facilities available to the defendant and companies connected with him for the purpose of the acquisition and development of various properties, including the Bord Gáis Energy Theatre (formerly, the Grand Canal Theatre) and the development of a commercial, retail and residential development known as the Point Village. Mr. McLoughlin refers to the defendant and those companies collectively as "the Connection." Mr. McLoughlin avers that, as of the 16th February 2014, the Connection's indebtedness to NAMA totalled €431,535,659.59.

20. The defendant's personal indebtedness to NAMA under the facility agreements and guarantees that he entered into with the bank is limited in a number of respects, including by reference to assets secured by him and the Connection.

21. That indebtedness derives from four distinct sources. The first is a letter of sanction dated the 3rd May 2011 ("the personal facility letter"), consolidating eleven separate loan facilities, upon which the total sum of €55,175,508.35 was outstanding on the 16th February 2014. The second is a facility agreement dated the 27th January 2010 (as amended by a letter of amendment dated the 29th March 2011), primarily associated with the construction and start up of the Grand Canal Theatre ("the GCT facility letter"), upon which a total sum of €13,369,774.51 was outstanding on the 16th February 2014. The third source comprises a guarantee executed by the defendant, dated the 27th June 2000 ("the Shoal guarantee"), up to a limit of Ir£1,000,000 (or €1,270,000) in respect of monies loaned to a company named Shoal Trading Ltd, the indebtedness of which stood at over €3 million on the 16th February 2014. The final source of the defendant's indebtedness is a guarantee executed by the defendant, dated the 2nd May 2008 ("the OPML guarantee"), in respect of monies loaned to a company named Ossory Park Management Limited, the indebtedness of which stood at €7,279,807.73 on the 16th February 2014.

22. Each of the relevant facilities has expired, such that each of the sums identified above is now due and owing by the defendant to the plaintiff.

23. Mr. McLoughlin avers that the bank also advanced a facility for a sum of €353,720,957.45 to the defendant in connection with the development of the Point Village by a facility agreement dated the 14th January 2008 (as amended and restated) ("the Point Village facility"). The plaintiff's recourse against the defendant under that facility is limited to certain assets granted as security and an additional personal recourse amount. Mr. McLoughlin goes on to aver that significant realisations from the security granted have been applied against the defendant's indebtedness under the Point Village facility, including the sum of €27,005,582 from the sale of the defendant's shareholding in a company named Amphitheatre Ireland Limited, which operates the Bord Gáis Energy Theatre and the 02 venue. The plaintiff does not seek judgment against the defendant in respect of any outstanding liabilities under the Point village facility.

24. Mr. McLoughlin divides the engagement that has taken place between the plaintiff and the defendant into four broad phases. The first phase began in May 2010, prior to the acquisition by NAMA of the defendant's loans but in anticipation of that event. NAMA agreed to provide the defendant with additional funding to complete the Point Village development, thereby hoping to protect and enhance the value of those assets, which formed part of the security for the Point Village facility. NAMA requested the submission of a business plan by the defendant on or before the 30th September 2010, although it did not receive one until February 2011. In accordance with its normal procedures, NAMA engaged an independent business reviewer ("IBR") to assess the plaintiff's business plan. The IBR was critical of the defendant's strategy for the secured assets and NAMA concluded that it was not in a position to support the plan. That decision was communicated to the defendant at a meeting on the 19th July 2011. Nevertheless, NAMA chose not to take enforcement action at that point. Instead, it decided to attempt a consensual development and disposal of the relevant assets.

25. The second phase of engagement commenced with extensive correspondence between NAMA and the defendant between June 2011 and January 2012, the purpose of which was to establish the commercial terms that would govern the continuing relationship between the parties. Mr. McLoughlin avers that the deficit between the forecast value of the secured assets and the amount owing by the Connection was such that, in NAMA's view, any consensual strategy had to be based on the defendant granting additional security over his unencumbered assets in exchange for NAMA's on-going support. That phase culminated in the execution of a memorandum of understanding between NAMA and the defendant in January 2012, which was subsequently amended in March 2012. The memorandum provided that NAMA would consider, at its sole discretion, forbearing from enforcement action for a stipulated period; would release certain security; and would provide remuneration to the defendant for his services, in exchange for the defendant granting certain additional security and committing to continued co-operation in the work-out strategy for the realisation of the secured assets. The memorandum was expressed to be subject, *inter alia*, to the continuing and on-going full and complete disclosure by the Connection of all of its assets and of all financial information in relation to it.

26. The third phase of engagement began when, by letter dated the 3rd August 2012, NAMA's solicitors wrote to the defendant's solicitors notifying the defendant of the termination of the memorandum of understanding. This was based on the asserted failure of the defendant to comply with his obligation to make full and complete disclosure of his assets to NAMA. Specifically, NAMA relied upon eleven enumerated instances of alleged non-disclosure and one instance of non-cooperation, each of which was described in that letter.

Mr. McLoughlin avers that "[n]othwithstanding the termination of the [memorandum], NAMA afforded the Connection a further opportunity to reduce its indebtedness through the consensual disposal of secured assets." It is the plaintiff's case that in the period from August 2012 to February 2013, NAMA met with the defendant and his professional advisers on several occasions and engaged in extensive correspondence, in an attempt tore establish the working relationship that existed between the parties prior to the termination of the memorandum.

27. The fourth phase of engagement began in February 2013 when, still dissatisfied with the defendant's level of co-operation and engagement, NAMA concluded that the assets might be better managed and developed through the appointment of receivers. After an exchange of correspondence between the parties in February 2013 on that contemplated course of action and further exchanges in March and April of that year, the plaintiff appointed receivers over various assets of the Connection, including certain assets of the defendant, in April and May 2013.

28. One of the assets in respect of which receivers were appointed was the defendant's shareholding in Amphitheatre Ireland Limited. The receivers subsequently arranged to sell it to the other shareholder in the company for €35 million. The sale realised the sum of €27,005,582 net of tax, which was duly applied to reduce the defendant's indebtedness under the Point Village facility. As already noted above, that indebtedness is separate and distinct from the indebtedness that is the subject of the present proceedings.

29. Mr. McLoughlin avers that, although the receivers have now taken control of all of the secured assets to which they were appointed, it is clear that there will be a significant shortfall between the realisations from the secured assets and the Connection's

indebtedness.

30. On the plaintiff's case, this was the background to the letter of demand, dated the 10th March 2014, for payment of €77,095,090.59; that being the aggregate sum due and owing by the plaintiff to the defendant, as of the 16th February 2014, on foot of the personal facility, the GCT facility, the Shoal guarantee and the OPML guarantee.

31. Mr. McLoughlin specifically avers that the plaintiff is anxious to obtain judgment against the defendant "with a view to securing the judgment against those assets owned by the defendant, whether in this country or abroad, which are not currently secured in favour of any third party." Mr. McLoughlin goes on to aver to NAMA's understanding that: there is equity in defendant's interest in the "Vicar Street" music venue; that the defendant owns valuable antiques; that the defendant has an interest in unencumbered properties located in France; and that the defendant made voluntary transfers of €2,945,700 in cash during the period from 2008 to 2011 that the plaintiff would be better placed to investigate having first obtained judgment in respect of the defendant's indebtedness.

The defence advanced

32. The defendant swore an affidavit in response on the 23rd April2014. He contends that he has a full defence to the plaintiffs claim "based on the fact that [he] and NAMA, and by extension the plaintiff, entered into a solemn agreement in August 2012...under which it was agreed *inter alia* that, in consideration of his providing the plaintiff security interests in certain assets, in respect of which the plaintiff has no legal or equitable interest or claim, and control over a number of companies (trading and non-trading), the plaintiff agreed that it would no longer have recourse over [his] remaining assets, including his interest in his family home, his son's home and a business carried on by his wife."

33. The defendant contends that the terms of what he describes as a "comprehensive agreement" between him and the plaintiff are to be found in the text of a letter dated the 241h August 2012 from his solicitor, Mr Liam McCabe, a partner in the firm of solicitors acting for the Connection, to Mr Tom Dane, a partner in the firm of solicitors acting for NAMA ("the McCabe letter"). That letter commences in the following terms:-

> "I refer to recent meetings and negotiations concerning the above.
>
> As requested by your client, I now attach the following documentation which is furnished to you based on our client's understanding which is summarised in the points set out below. Accordingly, your client may not use or rely on these documents if it is of the view that the summary below is incorrect or does not accurately reflect the agreement."

34. There follows an itemised list of documents, evidencing the resignation and replacement of the defendant, his wife and his son as directors of 12 identified companies that formed part of the Connection, together with a list of documents relevant to the defendant's shareholding in Amphitheatre Ireland Ltd and his interest in Point Village Development Ltd. The text of the letter then continues:

> "Our client Harry Crosbie has instructed us to confirm that subject as stated above, he will on or before 31 August 2012 appoint both Auke VanderWerff and Pearse Farrell jointly as his attorneys (subject of course to their willingness to act as such) with power to assist NAMA in the development and disposal of those of Mr. Crosbie's assets as are charged to NAMA. We are instructed to agree the text of this with [NAMA's solicitors] within that time frame.
>
> We are instructed that in consideration of the delivery ofthe enclosed documents, NAMA has agreed as follows with Harry Crosbie:-
>
> 1. On or before 1 March 2014 will release its charge and any claim to Mr. Crosbie's home at Hanover Quay, Dublin 2 and the property at 126 Booterstown Avenue, Blackrock, Co. Dublin, being the home of Simon Crosbie.
>
> 2. The business of Storecon Limited and Automation Transport Limited will be transferred to Simon Crosbie for nominal consideration within a month of this date subject to the prior sale by Storecon Limited of its site in Dublin Port with the proceeds of sale (net of any taxes payable thereon) being paid to NAMA. We understand that NAMA has agreed that the entire share capital in Storecon and Automation Transport will be transferred to Simon Crosbie free from encumberance for nominal consideration. In the interests of certainty, we are requiring that this also be done within a month of the date hereof.
>
> 3. Harry Crosbie agrees to sell his property in Dublin Port to Dublin Port Company by way of contract for sale the draft of which has already been furnished to [the defendant's solicitors]. Please note that Edward Spain of this office has confirmed comments on this documentation earlier today to [NAMA's solicitors] and these points would require to be negotiated with Dublin Port in good faith over the coming days. We do not anticipate any difficulty in resolving any of these points as they are really matters of detail in the overall context.
>
> 4. Mr Crosbie agrees to have no further engagement with Dunnes Stores or Margaret Heffernan concerning the ongoing litigation at the Point Village.
>
> 5. Without prejudice to Mrs Rita Crosbie's claim to full ownership of the property in Eze, France, Harry Crosbie will endeavour to procure a sale of a 50% interest in the apartment within 18 months from the date hereof. NAMA will not object to the proceeds of such sale being applied in discharge of any indebtedness relating to Mrs. Crosbie's house in Wexford.
>
> 6. NAMA will endeavour to settle Harry Crosbie's indebtedness to both KBC Bank and ABN AMRO on a pari passu basis upon the value of the assets that would be available for a distribution on an assumption that Mr. Crosbie was on this date declared bankrupt.
>
> 7. We understand that NAMA has no interest in the property or business of Cafe H and will cooperate in procuring the unencumbered transfer of the lease(s) of that premises to its current operator, Fastwell Limited or Mrs Rita Crosbie or her nominee (excluding Harry Crosbie). We appreciate that this may require the consent of the landlord which is of course a matter that Rita Crosbie will have to deal with.
>
> 8. As regards the three interlinked apartments in Villefranche sur Mer, France, Harry Crosbie agrees to appoint a sales agent to dispose of these properties on terms that the agent is required to disclose all relevant information to NAMA and will have a duty of care to NAMA. Harry Crosbie agrees that he will procure that 45% of the sales proceeds (net oftaxes

> and costs) in his hands shall be remitted to NAMA. This represents Mr Crosbie's shareholding in the company that owns the apartments.
>
> You will appreciate that Harry Crosbie is concerned that the disposal of his assets may give rise to tax liabilities for him personally. We appreciate that this will be managed sensibly such that these are minimised. However, we require your client's confirmation that such liabilities are (sic) will be discharged out of the proceeds of sale. We trust that this is all in order and you might please confirm accordingly. If any query arises, please let me know and feel free to contact me ...at any stage."

35. The defendant avers that the McCabe letter "sets out the basis of an agreement between the parties in respect of my indebtedness, which was understood by all of the parties to preclude the plaintiff from seeking to enforce against me in the manner envisaged in these proceedings." The defendant points to subsequent correspondence from the plaintiffs solicitors confirming agreement with the proposals in the McCabe letter and avers that "this correspondence evidences the existence of the Comprehensive agreement determining the parties mutual obligations and entitlements and gives rise to a full Defence to the proceedings against me."

36. Later in the same affidavit, the defendant refers to the text of the McCabe letter as demonstrating "the full and wide ranging nature of the final agreement come to between the parties in respect of my indebtedness." Later still, the defendant avers that the plaintiff accepted the contents of the letter as "an operative, effective and legally binding compromise between the parties."

37. The defendant has sworn that it is his intention to file a full defence and counterclaim seeking declaratory relief regarding the status of the "Comprehensive agreement" and injunctive reliefs or specific performance of the "Comprehensive agreement", or both, against the plaintiff. The defendant contends that, in bringing the present application for summary judgment (which he refers to as "enforcement proceedings") against him, the defendant in resiling from the legal obligations imposed upon it pursuant to the terms of the "Comprehensive agreement."

38. Mr Liam McCabe swore an affidavit on the 31st March 2014 in support of the defendant's case. In that affidavit, Mr McCabe asserts that the plaintiff is not entitled to bring these proceedings by reference to the terms of the agreement evidenced by the McCabe letter. Mr McCabe avers that the present application for summary judgment is brought "in the teeth of [that] agreement."

39. Mr Ciaran Fitzpatrick, a senior manager in the firm of accountants engaged by the defendant to advise him, swore an affidavit on the 23rd April 2014, in support of Mr McCabe's affidavit. Mr Fitzpatrick avers that he was part of the process of negotiation that culminated in the McCabe letter, which - according to Mr Fitzpatrick- captures the consensus and agreement between the parties. Having in substance stated that the agreement set out in that letter speaks for itself, Mr Fitzpatrick then asserts:

> "I say and believe that the context of this agreement was that, in consideration of the Defendant agreeing to divest control of and charge the assets in question in favour of the Plaintiff, that it was my understanding the Plaintiff had come to a settlement with the Defendant in respect of the Defendant's indebtedness."

40. Mr. Fitzpatrick further avers:

> "I say and believe that it was an essential component of the Defendant's interaction with the Plaintiff leading up to the offer in question that financial certainty would be achieved for the Defendant such that the Plaintiff would not pursue proceedings against the Defendant or any other enforcement proceedings against him in respect of the family and other third party secured assets to be retained by him."

41. In a second affidavit sworn by Bernard McLoughlin on the 12th May 2014, the plaintiff joins issue with the defendant on whether NAMA agreed to give up its discretion to deal with the defendant's significant indebtedness by waiving any recourse that it had to him personally beyond the assets that he had secured in its favour. Mr McLoughlin avers that the McCabe letter evidences an agreement on the part of NAMA to do no more than to forbear from taking immediate enforcement action against the plaintiff and that it emphatically does not evidence an agreement between the parties in full and final settlement of NAMA's claims against the defendant, whereby NAMA was to take no further steps in any circumstances to pursue the defendant personally. Mr McLoughlin asserts that, in view of the significant shortfall between the sum that is likely to be realised from the disposal of the assets charged as security for the defendant's indebtedness and the amount of the outstanding debt, an overarching compromise- whereby NAMA agreed not to pursue the defendant personally- could only have been reached on the clearest possible terms. The acceptance of any such proposal would have required formal authorisation at the appropriate level within NAMA, but no such internal authorisation was ever requested because debt forgiveness was never sought by the defendant and was never contemplated by NAMA.

42. The defendant swore a further affidavit in response on the 13th May 2014 in which he reiterates his claim that the purpose of the agreement evidenced by the McCabe letter was to achieve a "defined settlement" between the parties. In the concluding paragraph of that further affidavit, the defendant reaffirms his contention that "there is a valid and subsisting dispute between the parties in relation to the meaning and import of the Comprehensive agreement."

The arguments

43. As noted earlier in this judgment, the test to be applied on an application for summary judgment is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence to the plaintiff's claim. The defendant submits that he has a full defence to the plaintiff's claim which is that there is an agreement in force between the parties, in the terms set out in the McCabe letter, that precludes the plaintiff from seeking judgment against the defendant in the sum at issue.

44. In the course of argument, the defendant placed some reliance on the existence of an issue of fact concerning whether the agreement set out in the McCabe letter is still in force between the parties. The defendant pointed to the averment at paragraph 28 of Mr McLoughlin's second affidavit that it is the plaintiff's position that the defendant did not perform that agreement. The defendant also directed the court's attention to a letter written by the plaintiff's solicitors on the 18th March 2014, which refers to the "purported agreement" between the parties. On behalf of the defendant, it was submitted that these assertions demonstrate the existence of a clear controversy of fact between the parties- specifically, one concerning whether that agreement continues in force or has been discharged by the breach of one or more of its conditions - that the summary judgment procedure is plainly unsuitable to resolve.

45. However, on behalf of the plaintiff it was expressly conceded, for the purpose of the present application only, that the terms of the agreement set out in the McCabe letter continue to bind the parties. The plaintiff's argument on the present application is that

the terms of that agreement cannot, on any possible construction, give rise to a fair or reasonable probability of a real or *bona fide* defence to the plaintiff's claim. Whether that is so is therefore the question that the Court has to consider.

46. Before addressing that question, it is appropriate to digress briefly to deal with a number of other arguments and assertions that have featured in the application. The first of those concerns the status of the parties. In opening the application, it was suggested on behalf of the plaintiff that, in considering the test for summary judgment, the Court should have regard, *inter alia*, to the fact that the plaintiff is a public body being financed from the public purse. Presumably, this submission rests on the proposition that the objectives of expeditiousness and cost effectiveness in the administration of justice take on greater weight in the balance where public monies are at issue. In response on this point, the defendant submitted that any such consideration is completely immaterial to the test the court must apply and should not influence the court in any way. As Counsel for the defendant put it, the fact that the plaintiff is a state agency and has important work to do is irrelevant. I accept the defendant's submission on this point and would add only that, just as I do not think the identity of the plaintiff and the nature of its activities are relevant to the question of whether monies are properly due and owing to it by the defendant, I also do not believe that the identity of the defendant or the nature of his prior commercial activities are relevant to the question of whether there is a fair or reasonable probability that he has a real or *bona fide* defence to the plaintiffs claim.

47. Several other issues have been raised in the context of the present application. They include: whether the defendant was in breach of the memorandum of understanding entered into between the parties by failing to make full and frank disclosure of his assets; whether the plaintiff or NAMA, or any of their servants or agents, acted inappropriately or inconsistently in their dealings with the defendant; and whether there can be any legitimate concern about the designation of Grand Canal Theatre loan facility as within one of the classes of bank asset (eligible for acquisition by NAMA) within the terms of s. 69 of the NAMA Act 2009. However, none of those issues is relevant to the single ground advanced by the defendant as establishing a fair or reasonable probability that he has a real or *bona fide* defence to the plaintiffs claim and it is therefore unnecessary - indeed, it would be inappropriate - to consider any of those issues further for the purposes of the present application.

48. I now return to deal with the single ground of defence advanced on behalf of the defendant, *viz* that there is an agreement in force between the parties, in the terms set out in the McCabe letter, that precludes the plaintiff from seeking judgment against the defendant for the sum at issue.

49. The first observation that I would make in considering the unique facts of this particular case is that the question of whether there is a fair or reasonable probability of a real or *bona fide* defence is one that is clearly illuminated by - to borrow the phrase used by Hardiman J. in *Aer Rianta v Ryanair Ltd* (*supra* at p. 623) to describe the circumstances in which the same issue arose in *First National Commercial Bank v Anglin* - "the indisputable documentation of a commercial transaction." Indeed, the affidavits filed on behalf of the defendant in this case are replete with repeated references to the terms of the McCabe letter as constituting "a solemn and binding written agreement", "a comprehensive agreement", a "final agreement", and "an operative, effective and legally binding compromise." It follows that whether the defendant can establish a fair or reasonable probability of a real or *bona fide* defence is, in the particular circumstances of this case, a matter of construction of the terms of the agreement set out in the McCabe letter.

50. In *McGrath v O'Driscoll* [2007] 1 ILRM 203, Clarke J. identified the correct approach as follows (at p. 210 of the report):

> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there no real risk of injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

51. This dictum was endorsed by the Supreme Court (per Denham J., Hardiman and Finnegan JJ. concurring) in *Danske Bank a/s v Durkan New Homes* [2010] IESC 22 (at para. 16), subject to the significant clarification (at para. 20) that there is no obligation to resolve issues of law (or, presumably, issues of construction) on an application for summary judgment and that the test remains whether the defendant has established an arguable defence. The Supreme Court was satisfied that, by reference to the particular factual matrix in which the parties specifically negotiated the contract in that case, an arguable defence arose on the construction of the loan agreement between the parties.

52. I am satisfied that the issue of construction that arises in this case is relatively straightforward. As defined by the defendant, it is whether there is a fair or reasonable probability of establishing as a real or *bona fide* defence that there is an agreement in force between the parties, in the terms set out in the McCabe letter, that precludes the plaintiff from seeking judgment against the defendant for the sum at issue. Accordingly, I propose to address that issue by reference to the principles that govern the construction of express and implied contractual terms. In doing so, I propose also to consider whether there is any real risk of injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment

53. In considering the applicable principles of law on the interpretation of express contractual terms, I have derived great assistance from the relevant portions of the judgments of both Fennelly J. and O'Donnell J. in *ICDL v European Computer Driving Licence Foundation Ltd* [2012] 3 I.R. 327. Both of those judgments confirm that the best modern statement of those principles is to be found in the following passage from the judgment of Lord Hoffman in *I.C.S. Ltd v. West Bromwich B.S.* [1998] 1 W.L.R. 896 at pp. 912-3:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as 'the matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is

what the parties using those words against the relevant background would reasonable have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason have used the wrong words or syntax; See *Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd* [1977] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one nevertheless concludes from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Campania S.A. navierav. Salen Rederiena A.B.* [1985] A.C. 191,201:-

> 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."

54. Fennelly J. prefaced his endorsement of the foregoing principles by noting that they had been approbated in the judgment that Geoghegan J. delivered on behalf of the Supreme Court in *Analog Devices B.V v. Zurich Insurance Company* [2005] IESC 12, [2005] 1 I.R. 274, which had also referenced the well known 'matrix of fact' dictum of Lord Wilberforce in *Reardon Smith Line v. Young Hansen-Tangen* [1976] 1 W.L.R. 989. Fennelly J. then commented (at pp. 350-1 of the report). :

> "[66] These various dicta are notable for their emphasis on the potential admissibility of background knowledge or what Lord Wilberforce famously described as the 'matrix of fact'. Emphasis on those admissible aids to interpretation should not, however, mislead us into forgetting that a contract is, in the first instance, composed of the words used by the parties. It is of note that Geoghegan J. in his judgment in *Analog Devices B.V v. Zurich Insurance Company* [2005] IESC 12, [2005] 1 I.R. 274 cited at p. 280 a passage from the judgment of Griffin J. in *Rohan Construction v. I.C.I* [1988] I.L.R.M. 373 at p. 377, a case concerning an insurance policy, to the following effect:-
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> > 'It is well established that in construing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The court must not speculate as to their intention apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at and not merely a particular clause'.
>
> [67] Geoghegan J. went on to note that Griffin J. had explained his reference to 'surrounding circumstances' and that he had cited the following passage from the speech of Lord Wilberforce in *Reardon Smith Line v. Young Hansen-Tangen* [1976] 1 W.L.R. 989 at p. 996:-
>
> > 'When one speaks of the intention of the parties to the contract, one is speaking objectively- the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have had in mind in the situation of the parties....What the court must do is place itself in thought in the same factual matrix as that in which the parties were.'

55. Having endorsed Lord Hoffman's five principles, Fennelly J. then added the following helpful gloss (at p. 352):-

> "[69] This passage, particularly para. 4, should not be misunderstood as advocating a loose and unpredictable path to interpretation. A court will always commence with an examination of the words used in the contract. Moreover, words will, as Lord Hoffman emphasises, normally be interpreted in accordance with their "natural and ordinary meaning...". Business people will be assumed to know what they are doing and will normally be bound by what they have signed. The exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract. Keane J. summarised the law briefly but comprehensively in the High Court in *Lac Minerals Ltd. v. Chevron Mineral* [1995] 1 I.L.R.M. 161.
>
> [70] Evidence of the surrounding circumstances, but not of subjective intentions, may be admitted to explain the subject-matter and even what particular words should be understood as referring to. Such evidence will not normally be allowed to alter the plain meaning of words."

56. I find myself in respectful disagreement with the headnote to the report of the Supreme Court decision in *ICDL v European Computer Driving Licence Foundation Ltd.* (*supra*) insofar as it suggests that O'Donnell J. was dissenting from the view of the majority in addressing the principle of interpretation *contra proferentem* when he stated (at p. 377 of the report):

> "I also agree that the principle of interpretation, *contra proferentem*, may usefully be applied not just to exemption clauses but to a contract in general but normally only as a last resort in the case of ambiguity and not as a general approach. As has been observed, the purpose of the principle is to resolve ambiguity, not to create it."

57. It is clearly the position that Fennelly J. (for the majority) was also satisfied that the principle applies only to the extent that there is ambiguity in a disputed contractual provision. It might, I suppose, be suggested that the majority was satisfied that the principle should be applied as a primary tool of construction, rather than as a measure of last resort, although it is by no means clear to me that the judgment of Fennelly J. must be read in that way. However, as will become evident, nothing turns on the point in the circumstance of the present case.

58. I now turn to apply the principles I have just described to the evidence in the case at hand.

59. Both sides accept that the agreement at issue forms part of a substantial train of commercial and legal correspondence between the parties. That correspondence and the history of the engagement between the parties summarised earlier in this judgment encapsulate the background knowledge that would have been available to them. Therefore, that is the background against which the Court can decide what the McCabe letter would have conveyed to the reasonable person equipped with that knowledge.

60. What must be excluded from a proper consideration of the background are the contents of the previous negotiations of the parties and their declarations of subjective intent. Thus I cannot have regard to any of the various averments of Mr McLoughlin on behalf of the plaintiff, or of the defendant himself, Mr McCabe or Mr Fitzpatrick on the defendant's behalf concerning the negotiating

stance or subjective intent of either of the parties prior to the conclusion of the agreement recorded in the McCabe letter.

61. Before turning to that part of the background that forms an admissible aid to interpretation, I must first consider the words used by the parties, since the words in which the parties have themselves chosen to express their meaning are the first place I must look in seeking to establish the intention of the parties, and the cardinal rule is that the intention of the parties must prevail.

62. The defendant submits that he has established an arguable defence that the McCabe letter can be construed as an operative, effective and legally binding compromise between the parties that precludes the plaintiff from seeking judgment in respect of the sum at issue, which sum the defendant accepts is otherwise lawfully due and owing to the plaintiff by him.

63. There are no words in the McCabe letter to the effect that it records either a full and final settlement or compromise of all claims between the parties; or a comprehensive agreement between the parties (in the same sense); or any equivalent form of agreement. While the court is not entitled to consider the substance of the previous negotiations between the parties as an aid to interpretation, the plaintiff points out that the prior train of correspondence between the parties establishes that the defendant (through his legal advisors) was well familiar with the significance of phraseology such as 'an agreement in full and final settlement of the defendant's loans'. Even if words could be identified in the McCabe letter - and they have not been- that on one possible interpretation might express or imply that the agreement was intended to represent a comprehensive settlement, those words would have to be construed *contra proferentem* in circumstances where it is common case that the letter was prepared by the defendant's legal advisors.

64. In response to the plaintiff's submission that the McCabe letter is incapable of being construed as a debt forgiveness agreement or one releasing the defendant from his guarantees, Counsel for the defendant argued that the defendant's does not make such a case. Rather, the defendant submits that the McCabe letter evidences an agreement whereby, in various formulations assayed on the defendant's behalf, the plaintiff bound itself "not to sue or to bankrupt the defendant"; "not to enforce the defendant's personal liability in the manner being attempted in these proceedings"; or "that the defendant's remaining assets would not be attacked and would be set aside."

65. However, there are no words in the McCabe letter to the effect that the plaintiff will refrain, or forbear, from seeking a money judgment against the defendant in respect of the monies lawfully due and owing by the defendant to the plaintiff under the facility letters or the guarantees, or both, or that the plaintiff will refrain, or forbear, from taking enforcement action against the plaintiff generally.

66. There are no words in the McCabe letter to the effect that the plaintiff is to have no personal recourse to the plaintiff, beyond that represented by the security thereby (or previously) obtained by the plaintiff from the defendant.

67. Taking the relevant provisions of the agreement at their high water mark from the defendant's perspective, as I must for the purpose of the present application, it seems to me they are capable of establishing the following binding obligations on the part of NAMA and the plaintiff (although, of course, I must not and do not express any concluded view in the matter):

> (a) That, on or before the 1st March 2014, NAMA was to release its charge over, and any claim to, the defendant's home and the property in which the defendant's son resides. I am prepared to accept (indeed, I believe I am obliged to accept for the purpose of the present application) that this term implies as its corollary that neither NAMA nor the plaintiff would seek to take any enforcement action against the defendant or his son involving either property, for as long as they were bound by that agreement.
>
> (b) That certain businesses were to be transferred, respectively, to the defendant's son and the defendant's wife. Again, I must accept, for the purpose of the present application, that this term implies as its corollary that neither NAMA nor the plaintiff would seek to take any enforcement action against the defendant, or his wife or son in respect of the assets represented by those businesses, for as long as they were bound by that agreement.
>
> (c) That NAMA was to make no objection to the application of the defendant's interest in the proceeds of sale of a property in France to discharge any indebtedness in relation to a house in Ireland owned by the defendant's wife. I am prepared to accept for the purpose of the present application that this term implies as a necessary corollary that neither NAMA nor the plaintiff would seek to take any enforcement action in respect of the defendant's interest in that French property, or in respect of the funds resulting from the sale of that interest, for as long as they were bound by that agreement.
>
> (d) That NAMA would endeavour to settle [the defendant's] indebtedness to two specified banks on a *pari passu* basis based upon the value of assets that would be available for distribution on an assumption that the defendant was at the 24th August 2012 declared bankrupt.

68. I have considered this last provision most carefully, not least because significant reliance was placed upon it on the defendant's behalf in opposing the present application. In binding NAMA to use its best endeavours to settle the defendant's indebtedness (as between itself and two other significant creditors of the defendant) on a *pari passu* basis by reference to an assessment of the defendant's available unsecured assets were he to be declared bankrupt that day, I am prepared to accept, for the purpose of the present application, that the term concerned implies a further term, as a necessary corollary, that neither NAMA nor the plaintiff would petition for the defendant's bankruptcy, at least during the currency of the agreement or until NAMA had used its best endeavours to settle with those two creditors concerning the appropriate division between them of the defendant's available assets.

69. However, I cannot accept that the terms of the McCabe letter are capable of conveying to any reasonable person who considers them, with the benefit of the background knowledge available to the parties, that any broader or wider agreement in the defendant's favour is established thereby. In particular, I do not accept that, taking the agreement at its high water mark as an agreement not to seek enforcement against certain identified assets and not to petition for the defendant's bankruptcy for as long as the agreement applies, it is capable of being construed as an agreement not to seek a money judgment against the defendant.

70. I am reinforced in that view by the averments of Mr. McLoughlin concerning the purposes for which the plaintiff is seeking judgment in this case, which averments I have already summarised at paragraph 31 *supra*. Those averments disclose that the plaintiff has identified, correctly or not, a number of other unsecured assets of the defendant, quite separate from those referred to in the McCabe letter, that the plaintiff wishes to secure judgment against. In response, the defendant has averred, in substance, that since these matters were known to NAMA and the plaintiff prior to the agreement at issue, they can have no relevance to the present application and amount to no more than a 'rehash and recycle of old information.'

71. It seems to me that it would be a strained- indeed, an untenable construction of the McCabe letter to assert that, in agreeing to release the security that it held over certain identified assets of the defendant, the plaintiff was also agreeing *sub silentio* not to seek security over any other unsecured personal assets of the defendant during the currency of that agreement and, therefore, not to seek a money judgment against the defendant whether as the basis for seeking such security or to confer standing upon NAMA or the plaintiff to further investigate the defendant's assets.

72. I pause here to consider briefly the legal test by reference to which terms may be implied into a commercial agreement, independently of any statutory requirement. As Murphy J. put the matter in *Sweeney v. Duggan* [1997] 2 I.R. 531 (at 538):

> "There are at least two situations where the courts will, independently of statutory requirement, imply a term which has not been expressly agreed by the parties to a contract. The first of these situations was identified in the well known case, *The Moorcock* (1889) 14 P.D. 64 where a term not expressly agreed upon by the parties was inferred on the basis of the assumed intention of the parties. The basis for such a presumption was explained by MacKinnon L.J. in *Shirlaw v. Southern Foundries* (1926) Ltd. [1939] 2 K.B. 206 at p. 227 in an expression, equally memorable, in the following terms:-
>
> > '*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh of course".'
>
> In addition there are a variety of cases in which a contractual term has been implied on the basis, not of the intention of the parties to the contract but deriving from the nature of the contract itself. Indeed in analysing the different types of case in which a term will be implied Lord Wilberforce in *Liverpool C.C. v. Irwin* [1977] A.C. 239 preferred to describe the different categories which he identified as no more than shades on a continuous spectrum."

73. A common reformulation of the test just described in the context of commercial contracts is the 'business efficacy' test, specifically; is it necessary to imply the term contended for into the contract at issue in order to give the contract the business efficacy that both parties must have intended for it?

74. In *Meridian Communication v. Eircell Ltd.* [2002] 1 IR 17, O'Higgins C.J. set out the following synopsis of the principles that emerge from the applicable jurisprudence and the commentary upon it:

- "before a term will be implied in a contract and must be necessary to do so, and not merely reasonable;
- the term must be necessary to give business efficacy to the agreement;
- it must be a term which both parties intended, that is, a term based on the presumed common intention of the parties;
- the court will approach the implication of terms into a contract with caution;
- there is a presumption against importing terms into a contract in writing and the more detailed the terms agreed in writing the stronger is the presumption against the implication of terms;
- if the term sought to be implied cannot be stated with reasonable precision, it will not be applied."

75. I am satisfied that, in applying either the 'officious bystander' or the 'business efficacy' test to the agreement set out in the McCabe letter, as informed by the principles just described, it is not possible to imply any term into it of the sort contended for on behalf of the defendant in this case.

Conclusion

76. Having considered the entirety of the situation and the facts of this particular case in the manner set out above, while being conscious of the obligation on the court only to exercise the power to grant summary judgment with discernible caution, I have come to the conclusion, for the reasons I have already set out, that the issue of construction on which the sole ground of defence advanced on behalf of the defendant depends is relatively straightforward and does not require fuller argument than I have heard in the context of the present application. Accordingly, I do not believe that there is any real risk of injustice being done by determining that question within the framework of a motion for summary judgment.

77. In all of the circumstances, the defendant has failed to satisfy me that he has a fair or reasonable probability of having a real or *bona fide* defence. Bearing in mind the constitutional basis of the right of access to justice of both plaintiff and defendant, I therefore conclude that the plaintiff is entitled to liberty to enter judgment in the terms of the endorsement to the Summary Summons herein.