THE HIGH COURT

[2012 No. 821 S]

BETWEEN

NATIONAL ASSET LOAN MANAGEMENT LIMITED

PLAINTIFF

AND

PAT MOLOUGHNEY AND PHILIP DE VERE HUNT

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 11th day of December, 2015.

Introduction

1. In this application, brought by the defendants, the administratrix of the estate of the second defendant, ("the second named defendant"), is seeking the following orders:

> (1) An order that s. 182 (3) of the National Asset Management Agency Act, 2009 does not require that leave of the High Court be obtained in order to permit the delivery by the second named defendant of a draft defence and counterclaim.
>
> (2) To the extent that the second named defendant does require the leave of the High Court, an order of the High Court granting the second named defendant leave to serve the draft proposed defence and counterclaim pursuant to s. 182 (3) of the National Asset Management Agency Act, 2009.

Background to the current application

2. In order to understand how the current application came to be made it is necessary to consider the background to this application.

3. The plaintiff alleges that the defendants were party to a loan agreement dated 24th June, 2010 with Allied Irish Bank plc whereby AIB advanced funds to the defendants in the sum of approximately €30 million. It is alleged that the defendants accepted the terms and conditions of the said loan agreement, that the defendants failed to comply with the terms and that they failed to repay the monies advanced to them by AIB as agreed.

4. The plaintiff's case is that, pursuant to the provisions of the National Asset Management Agency Act, 2009 ("the 2009 Act"), the plaintiff acquired the rights and obligations of AIB in respect of the loan agreement, that AIB was then designated as a service provider to the plaintiff to assist in the administration of the loan, and that by letter dated 25th July, 2011, AIB, acting on behalf of NALM called upon the defendants to repay the loans but that the defendants refused to do so.

5. As a result, the plaintiff issued summary proceedings against the defendants on 2nd March, 2012 seeking summary judgment in the sum of approximately €31 million (to include interest). The defendants entered an appearance on 13th March, 2012.

6. Mr. Gerard O'Driscoll (a bank manager employed by AIB, the service provider to the plaintiff), swore an affidavit on behalf of the plaintiff to ground the application for summary judgment against the defendants. In this affidavit Mr. O'Driscoll set out the background to the loan agreement and the history of the dispute between the parties. Mr. O'Driscoll also stated that on 20th December, 2010 all the bank's rights on foot of the loan agreement were transferred to the plaintiff pursuant to the 2009 Act.

7. At para. 8 of his affidavit, Mr. O'Driscoll states that:

> *"A follow up meeting was held between the defendants, their advisor, Mr. Donal Morrissey, Mr. Jim O'Mahony and your deponent on 10th June to discuss the business plan decision and to clarify what would be required going forward. The defendants indicated that while they were broadly in agreement with the majority of the conditions outlined, they would under no circumstances pledge any unencumbered assets to support the debt due to the plaintiff claiming that the facilities were advanced on the basis that recourse was restricted to the secured assets supporting the debt and also on the basis that their partnership agreement would not allow them to pledge personal assets in support of the partnership debt."*

8. At para. 10 Mr. O'Driscoll states:

> *"The plaintiff was concerned to fully investigate a complaint which was being raised by the defendants that the sums which had been advanced to them on foot of the loan agreement were advanced on terms which would not allow the bank to have recourse to the defendants personally beyond specified assets which had been provided as security for the loans."*

9. At para. 11 Mr. O'Driscoll states that:

> *"The claim and the supporting documentation had to be reviewed in detail and the plaintiff advised of the position. The plaintiff was anxious that proceedings would not be issued unless it was satisfied that there was full recourse against the defendants as it felt it would be improper to do so. It was accordingly necessary to carry out a fresh due diligence involving a thorough search of all the banks records both at its Cashel branch and its business banking in Cork and a review of all documentation found to ensure that there was nothing to support the vendor's assertions. In addition it was necessary for the legal advisors to the bank to carry out interviews with the relevant bank staff who were involved*

in the sanctioning of the facilities to the defendants. Following a complete review the legal advisors to the bank formed the opinion that there was no merit to the claim and that the facilities were in fact full recourse."

10. It is however, in my view, of some significance that the defendants have at all times maintained their position that the loans which they had agreed with AIB were loans which only involved limited recourse and were in fact secured on particular assets which were ring fenced within the loan agreement. This position was stated by them at the outset and has been maintained steadfastly by them in the course of these proceedings.

11. On 2nd April, 2012 the plaintiff issued a motion to have the proceedings admitted into the Commercial List and to seek summary judgment in the sum of €31 million approximately against the defendants.

12. On 16th April, 2012 the High Court (Kelly J.) made an order admitting the proceedings into the Commercial List and directing an exchange of affidavits in the application for summary judgment.

13. On 30th April, 2012 the first defendant swore a lengthy replying affidavit in response to the plaintiff's application for judgment. This affidavit runs to some 32 pages and has 32 exhibits. It is not necessary for the purposes of this judgment to set out in great detail the case being made by the defendants. However, in summary, the defendants' position is that the AIB loan facilities advanced to them consisted of a number of separate loan facilities, that each loan facility was secured by specific assets which were described in each separate loan facility, that each loan was "ring fenced" to the security specifically provided by the defendants under each loan and - most importantly - they say that there was to be no personal liability or recourse to either the first or the second defendant in respect of any of the loans.

14. Mr. Moloughney states at para. 17 of his affidavit:

"I would observe that it was never proposed or suggested that part of the security required by AIB would consist of personal recourse outside of the assets mentioned in the security arrangements. If there had been any suggestion or proposal, the second named defendant and I would simply not have banked with AIB."

15. Again at para. 18 he says as follows:

"The agreement reached by the parties concerning the facilities offered by AIB was that not only were the facilities ring fenced to the securities provided but also that each facility was project specific, being that it was agreed that in the event of disposal of a specific asset or security only the borrowings associated with that specific asset were to be repaid."

16. He also states at para. 20 of his affidavit that:

"As with the Letter of Sanction of 20th November, 2007 discussed above, Philip De Vere Hunt and I signed the revised letters of sanction and personal guarantees on the basis of the agreement regarding the limitation of recourse to the bundle of assets in question. In this regard we believe that the documentation proffered for signature duly embodied the agreement of the parties in this regard. At no stage did AIB ever suggest or contend otherwise."

17. At para. 22.1, he states that:

"It was our belief and understanding that the agreement reached in 2007 as to the limited recourse nature of the facilities to BPD continued unchanged; as AIB well knew neither Philip De Vere Hunt nor I would have countenanced any alteration of this fundamental aspect of our banking relationship with AIB".

18. At para. 38 he says:

"I say and believe that the agreement made with AIB at all material times (as recognised inter alia in a meeting of 5th November, 2007 and at the meeting in December 2007 at the Firgrove Hotel) was that AIB would have no recourse to the personal assets of Philip De Vere Hunt and/or me for facilities offered to BPD…….. I also say that the plaintiff was at all times aware of this agreement and I specifically confirmed the agreement to them in my telephone calls with Mr. O'Driscoll (in September 2010 and May 2011 mentioned above and again at the meeting of 10th June, 2011 to Mr. O'Mahony and Mr. O'Driscoll).

19. At para. 39 he states:

"At all material times Philip De Vere Hunt and I believed that this agreement (which was fundamental to our acceptance of AIB's facilities) was properly represented by and embodied in the facility letters referred to above. In particular Philip De Vere Hunt and I believed that, in accordance with our agreement with AIB, the security referred to in the facility letters delimited the liability of Philip De Vere Hunt and myself, AIB knew or must have known that we entered into facilities on the basis of our agreement and on the basis of this understanding. If AIB actually believed that the facilities were full recourse or if AIB actually was seeking full recourse to Philip De Vere Hunt and me it never said so. Rather it allowed us to enter into the facilities based upon what would have transpired to be either an operative mutual or unilateral mistake which mistake it was fully aware".

20. The second defendant, Mr. Philip De Vere Hunt, also swore a replying affidavit on 30th April, 2012. In his affidavit he said that he had read the affidavit of Pat Moloughney and that he agreed with and adopted the averments contained therein.

21. The matter came before the Commercial Court again on 17th May, 2012. In the interim, there had been an exchange of correspondence between the parties in relation to the applicability of s. 182 of the 2009 Act. Counsel for the defendants indicated to the Court that they wished to bring a motion to seek the leave of the Court, if that were necessary, to file a proposed defence and counterclaim. The Court directed that such a motion should be brought before the Court on 25th June, 2012.

The current motion

22. On 1st June, 2012 the defendants brought the current motion seeking the leave of the Court, if necessary, to permit the delivery of the draft proposed defence and counterclaim.

23. The application is grounded upon the affidavit of Eamon Jones dated the 1st June, 2012. In Mr. Jones' affidavit he exhibited a

draft defence and counterclaim which the defendants wished to file. He also exhibited the exchange of correspondence between the parties whereby it appears that the plaintiff is of the view that the leave of the Court was required before such a defence and counterclaim could be filed, and that the plaintiff was not consenting to such leave being granted.

24. A supplemental affidavit of Eamon Jones was sworn on 7th June, 2012 setting out further matters which the defendants believed were relevant to their application.

25. Mr. Gerard O'Driscoll swore an affidavit on 20th June, 2012 on behalf of the plaintiff opposing the defendants' application. One of the averments in this affidavit is that the acquisition schedule relating to the loan agreement was served by the plaintiff on AIB on 17th December, 2010. He also avers that "the representation, undertaking or obligation alleged by the defendants in relation to the loan agreement (that it would be of limited recourse contrary to the explicit terms of the loan agreement) was not disclosed in writing to NALM before the service of the acquisition schedule".

26. He also stated, at para. 7, that he had reviewed the records of the bank relating to the loan agreement and that there was no note and memorandum in writing recording or referring in any way to the alleged representation, undertaking or obligation.

27. Events moved on between June 2012 and November 2012 in that the first named defendant was adjudicated bankrupt in the United Kingdom. Mr. Jones then swore a further affidavit on behalf of the defendants on 30th November, 2012. The application was now being made on behalf of the second named defendant alone. In addition Mr. Jones stated that it had been agreed between the plaintiff and the second defendant that inspection of the relevant files of AIB could take place with a view to identifying documents for the purpose of s. 101 (1) of the Act and in particular s. 101 (1) (c) of the 2009 Act. He stated that he had conducted that review and he set out within the affidavit the documents upon which the second defendant would place reliance for the purpose of s. 101 (1) (c). He also stated that the second defendant would place reliance on the entire affidavit evidence submitted on behalf of the defendants' including the affidavits sworn by the second defendant and the first defendant on 30th April, 2012.

28. In particular, Mr. Jones said that the second defendant would be relying on a letter handed to Mr. Callanan of AIB by the defendants at a meeting of 19th December, 2007 a copy of which was exhibited by Mr. Pat Moloughney in his first affidavit. Mr. Jones also stated that in his inspection of the papers and documents made available to him by the solicitors for the plaintiff (and AIB) he did not find a copy of this letter of 19th December, 2007. He also says that the circumstances of the delivery of that letter to Mr. Callanan were set out in the affidavits of the first and second defendants sworn on 30th April, 2012 (- and in particular, paras. 19 and 20 of the affidavit of the first named defendant and at paras. 4 and 5 of the affidavit of the second defendant). Mr. Moloughney (at paras. 19 and 20 of his affidavit) stated that on the morning of 19th December, 2007 he prepared a letter confirming BPD's (the partnership between the first and second defendant) position and that this letter was in accordance with what he had agreed in a telephone conversation with Mr. Callanan that morning confirming that the personal guarantees would be tracked back to the basket of assets of BPD. Mr Moloughney states: "I personally handed this letter to Mr. Callanan at the meeting in the Firgrove Hotel." The plaintiff stated in its affidavit that they had "no record or memory of receiving this letter". However Mr. Moloughney notes that no sworn evidence of Mr. Callanan had been put before the Court in circumstances where the plaintiff appears to cast doubt on receipt of the letter in question. Mr. Moloughney also exhibited the letter at exhibit PM15 of this affidavit.

29. This letter of 19th December, 2007 is a letter on "BPD Capital" headed stationery. It is a letter addressed to John Callanan, Lending Manager, AIB dated 19th December, 2007. It states:

> *"re: New Facilities Pat Moloughney and Philip De Vere Hunt trading as BPD Capital, Aptus 378 and Aptus 379.*
>
> *Dear John,*
>
> *Further to our earlier telecoms, in particular regarding personal guarantees from both Philip and myself, I confirm we will both be in the Firgrove Hotel later to meet with you. As discussed, you will provide a side letter in respect of the personal guarantees confirming that as agreed with our BPD Capital partnership borrowings where our personal liability is ring fenced and limited to the partnership securities as set out from time to time for this and future facilities, our personal guarantees are also ring fenced and limited to the same securities. I confirm LTV's will be as per agreed for this and future facilities from time to time as projected and discussed. Final DTZ valuation report will issue in the next day or so.*
>
> *Yours sincerely,*
>
> *Pat Moloughney".*

30. Mr. De Vere Hunt in his affidavit of 30th April, 2012 stated at para. 4.4:

> *"Pat Moloughney handed Mr. Callanan the BPD letter as confirmation of our understanding of the agreement referred to at para. 20 and exhibited at PM15 of Pat Moloughney's affidavit. Pat Moloughney asked Mr. Callanan to confirm that the letter was in line with our understanding of the agreement with AIB and he confirmed that it was."*

31. The significance of this affidavit evidence is that, in my view, it provides evidential basis for the defendants' plea in their proposed defence that the parties were operating either under a mutual mistake or a unilateral mistake in respect of the agreement which they entered into and/or in respect of the securities for the loan facilities. That is a matter for the trial of the action. It is however clear that the defendants have provided on affidavit and in exhibits, evidence and documentary evidence upon which they can make a plea of mistake and not simply a plea of misrepresentation. This plea of mistake is a plea that the parties were not "ad idem" in respect of the agreement which they entered into at the relevant time.

32. It appears that the current application seeking leave, pursuant to the provisions of s. 182 of the 2009 Act, was listed for hearing before the Commercial Court on 18th December, 2012. However the application did not proceed at that time following the death in tragic circumstances of Mr. Philip De Vere Hunt.

33. The matter next came before the Commercial Court on 13th May, 2013. Given that the first defendant had been adjudged bankrupt in the United Kingdom on 7th November, 2012, the plaintiff applied for and obtained judgment as against the first defendant in the sum of €31 million.

34. As a consequence of Mr. De Vere Hunt's death the proceedings were adjourned from time to time. After a number of adjournments in the Commercial List the proceedings were, on 17th June, 2013, adjourned generally with liberty to re-enter pending progress with

the administration of the estate of the deceased.

Letters of Administration
35. The plaintiff subsequently alleged, that prior to his death in December, 2012, Mr. De Vere Hunt transferred unencumbered property to his son Robert De Vere Hunt for natural love and affection. The plaintiff is of the view that this conveyance is one which is voidable pursuant to the 2009 Act and/or the Land and Conveyancing Law Reform Act, 2009. As at November 2014, because no steps had been taken to extract letters of administration in respect of the estate of Mr. De Vere Hunt, the plaintiff made an application to extract limited letters of administration for the purposes of appointing an administrator ad litem for the purpose of defending intended proceedings which would seek a declaration that the said conveyance was void and also for the purpose of reconstituting the within proceedings so that they could be defended on behalf of the estate of Mr. De Vere Hunt.

36. This application came before the High Court (Baker J.) on 17th November, 2014. On that date an application was made on behalf of the widow of the deceased to allow her to take out a limited grant in order to defend the voidable conveyance proceedings. Baker J. adjourned the application to 20th November, 2014 on which occasion evidence was given, on behalf of the widow of the deceased, that a limited grant had been extracted for the purpose of defending the voidable conveyancing proceedings. However, no grant had been extracted for the purpose of defending the within proceedings. However, Baker J. noted that no grant was necessary given that the proceedings were in being and she observed that it was only when the proceedings had concluded that it might be necessary to compel the estate to deal with any order which might be granted against the deceased.

Motion to re - enter
37. By Motion dated 30th January, 2015 an application was brought to re-enter the motion into the Commercial List and directions as to the hearing of the s. 182 applications.

38. On 27th February, 2015 WB Gavin and Co Solicitors were appointed to act as solicitors for the second defendant in place of the pre-existing solicitors. Mr. Barry Gavin swore an affidavit on 9th March, 2015 in which he stated he was the solicitor acting on behalf of the administratrix ad litem on behalf of the second named defendant. He stated that when the matter came before the High Court on 3rd March, 2015 counsel for the administratrix for the second defendant sought time to consider the proceedings and to review the defence and counterclaim which she wished to file and to update it in the light of events since June 2012. The Court granted a week to the second defendant to carry out this review. During this time the second defendant's legal team drafted a new proposed draft defence and counterclaim which she wishes to file in these proceedings.

39. It is therefore the second draft defence and counterclaim filed on behalf of the administratrix ad litem of the second named defendant which is now the subject matter of the current application.

The nature of the proposed draft defence and counterclaim
40. The proposed draft defence and counterclaim on behalf of the second defendant is a complex document running to some fifteen pages. It consists of three separate parts. These are:

(a) Preliminary points

(b) A draft defence

(c) A draft counter claim

41. No issues arise in relation to the preliminary points or the proposed draft defence and the second defendant is entitled to make the pleas set out in the preliminary section and in the draft defence.

42. The counterclaim runs from para. 23 to para. 49. Paragraphs 23 to 25 raise no particular issues. However it is the pleas set out thereafter which are the subject of the current application and the current dispute and I will now turn to consider these.

The Plea on Mistake in Paras. 26-29
43. In para. 26 the plaintiff pleads:

Mistake:

"To the extent that the plaintiff contends that any facility was entered into between Mr. De Vere Hunt and AIB which does not (when properly construed) limit the recourse of AIB and/or the plaintiff to the real property expressly referred to therein but instead permits AIB and/or the plaintiff to have recourse to the estate of Mr. De Vere Hunt, it is alleged that the parties to the said facility entered into the facility on foot of an operative, common and/or mutual mistake inter alia as follows:"

44. Paragraph 26 then sets out detailed particulars in paras (a)-(k), many of them matters which had previously been set out in the affidavits sworn on behalf of the defendants filed earlier in these proceedings. It is not necessary for the purposes of this judgment to set out this plea in full. The essential plea is that set out at sub- paras 26(I)-(K) and paras 27-30.

"(I) On or about 19th December 2007, the defendants and/or each of them and AIB by its servants and/or agents agreed that the guarantees being sought were tracked back to BPD and that there was no personal liability in respect of the facilities outside of the BPD assets which were being given to AIB as security. The said agreement was evidenced in writing".

(J) At all material times, any agreement reached with AIB by the defendants and/or each of them (and the common intention of the parties) was that any facility agreed with AIB was not only ring fenced to the securities expressly provided but that any sub facility within the overall facility would be project specific such that, in the event of disposal of a specific asset or security, only the borrowings associated with that specific asset would be repaid.

(K) At no material times thereafter did AIB its servants or agents suggest or contend that any document extending the term of any agreement between the parties operated to alter the foregoing terms and modify them in any way."

"27. Further and/or in the alternative the foregoing constituted a unilateral mistake on the part of the defendants and/or

each of them that inter alia any facility (and the common intention of the parties) was that recourse on the part of AIB would be limited to the assets expressly referred to as security in any facility letter or letters and that neither the defendants or each of them or the estate of Mr. De Vere Hunt would have any personal liability to AIB.

28. Further and/or in the alternative AIB through itself its servants and/or agents including Mr. Callanan, Mr. Daly and/or Ms. Gibbons knew the intention and belief of the defendants and/or each of them.

29. By reason of the foregoing the estate of Mr. De Vere Hunt is entitled (if necessary) to the declarations and/or rectifications sought below."

30. Further and in the alternative any such agreement is void ab initio and/or Mr. De Vere Hunt or his estate is entitled to rescind and has in fact rescinded any such agreement."

Paragraph 32 – the claim in estoppel
45. The next proposed plea made by the second defendant in his draft counterclaim is that if the plaintiff acquired any obligation and/or any right, the same is limited to the non recourse issue set out above and the plaintiff is estopped from contending otherwise.

Breach of Duties/Breach of Contract – paragraphs 33- 34
46. Paragraphs 33 and 34 of the draft counterclaim although headed "breach of duties", is in fact a breach of contract claim. This breach of contract is pleaded in the alternative to the plea of mistake. The breach of contract plea is that it was an express and/or implied term of any agreement between AIB (and consequently the plaintiff as acquirer of the right/obligation) to record the terms of any agreement and/or any representation, consent, undertaking or obligation and that, in breach of the express and/or implied terms, AIB (and consequently the plaintiff) permitted the defendants to enter into facilities which were ambiguous, failed to advise the defendants that the facilities were ambiguous and/or failed to advise the defendants in clear terms of the interpretation contended for by AIB or of the mistake under which the defendants were labouring.

47. In essence, this is a breach of contract claim and the essential claim is that AIB (and consequently, it is alleged, the plaintiff) failed to record in their written records or in their facility letters or loan agreements the terms of the agreements and any representation, consent, undertaking or obligation made to or given to the defendants.

48. I note that it is precisely these terms – representation, consent, undertaking or obligation which are mentioned in s. 101 of the 2009 Act.

The Plea of Misrepresentation – paragraphs 35 – 36 – first sentence of 37
49. The plea at paras. 35, 36 and the first sentence of para. 37 is essentially a plea of misrepresentation and/or a plea of negligent misstatement. The draft counterclaim pleads that

"35. AIB stated to the defendants and/or each of them inter alia

(a) That no recourse would be had to any asset other than the assets referred to in facility letters

……

36. In the alternative AIB did not state and/or failed to warn the defendants and/or each of them that recourse would be had to assets other than those referred to in negotiations and/or any facility letter and/or did not advert to any term or interpretation which was unusual or which would be relied upon to allow recourse to be had to assets other than those referred to and by virtue of their silence on these issues were guilty of misrepresentation.

37. The plaintiff (as purported acquirer of each and every obligation relating to the facility letter dated June 2010) assumed responsibility for each and every representation made to the defendants and/or each of them by AIB in relation to any such facility letter."

50. This is clearly a plea of misrepresentation as against AIB and only against the plaintiff as purported acquirer of each and every obligation relating to the facility letter dated June 2010.

The claim in misrepresentation against NAMA directly – paragraph 37 – (second sentence) & paragraphs 38-40
51. However the second sentence of paragraph 37 and paragraphs 38 – 40 is a different plea. This provides:

"Further and/or in the alternative the plaintiff by itself, its servants and/or agents represented that the plaintiff would continue to provide banking services to the defendants and/or each of them."

52. This is a plea of misrepresentation directly against the plaintiff itself rather than AIB.

The claim in estoppel, laches and/or delay – paragraphs 42 – 46
53. The second defendant also pleads that the plaintiff withheld its consent to the defendants filing a defence and counterclaim immediately, that by reason of the foregoing it was necessary to bring an application pursuant to s. 182 of the NAMA Act, that the defence of the proceedings has been gravely prejudiced by reason of the stance taken by the plaintiffs and the resultant delay (including death as aforesaid of Mr. De Vere Hunt), and, by reason of the foregoing, the rights of Mr. De Vere Hunt and/or his estate and/or the administratrix pursuant to the rules of court and/or the European Convention of Human Rights have been breached. These are pleas made against the plaintiff directly.

Unconstitutionality of sections of the NAMA Act – paragraphs 48 and 49
54. At paras. 48 and 49 in the draft counterclaim the second defendant pleads that s. 101 and/or s. 182 of the 2009 Act - to the extent that they are to be construed as depriving the estate of Mr. De Vere Hunt of rights/remedies which were enjoyed by the late Mr. De Vere Hunt at the time of the enactment of the 2009 Act and/or at the date of the alleged acquisition of loans to Mr. De Vere Hunt - are repugnant to the provisions of the Irish Constitution and in particular to the right of access to the courts and/or to the right to equality and/or the right to property rights and/or the right to earn a livelihood.

THE LEGAL CONTEXT

The relevant provisions of the 2009 Act
55. A number of provisions of the 2009 Act have been opened in court and are relevant to a consideration of the issues raised in this application.

56. I set out below the relevant provisions of the Act.

Section 101 provides:

> *"101.—(1) If in relation to a bank asset that NAMA or a NAMA group entity has acquired—*
>
> *(a) it is alleged that a representation was made to, a consent was given to, an undertaking was given to, or any other obligation was undertaken (by agreement or otherwise) in favour of, the debtor or another person by the participating institution from which the bank asset was acquired or by some person acting or claiming to act on its behalf,*
>
> *(b) no such representation, consent, undertaking or obligation was disclosed to NAMA in writing, before the service on the participating institution of the relevant acquisition schedule,*
>
> *(c) the records of the participating institution do not contain a note or memorandum in writing of the terms of any such representation, consent, undertaking or obligation or do not contain a record of any consideration paid in relation to any such representation, undertaking or obligation, and*
>
> *(d) the representation, consent, undertaking or obligation, if made, given or undertaken, would affect the creditor's rights in relation to the bank asset,*
>
> *then that representation, consent, undertaking or obligation—*
>
> *(i) is not enforceable, and cannot be relied on, by the debtor or any other person against NAMA or the NAMA group entity,*
>
> *(ii) is enforceable, and can be relied on, by the debtor or any other person, if at all, only against a person other than NAMA or a NAMA group entity, and*
>
> *(iii) is not enforceable, and cannot be relied on, by NAMA or the NAMA group entity against the debtor.*
>
> *(2) A claim based on a representation, consent, undertaking or obligation referred to in subsection (1) gives rise only to a remedy in damages or other relief that does not in any way affect the bank asset, its acquisition, or the interest of NAMA or the NAMA group entity or (for the avoidance of doubt) any property the subject of any security that is part of such a bank asset.*
>
> *(3) The Court shall not make an order under section 182 in*

relation to a claim to enforce a representation, undertaking or obligation referred to in subsection (1).”

Section 102 provides:

“102.—(1) Subject to the provisions of this Act, after a bank asset is acquired by NAMA or a NAMA group entity, the terms and conditions of the bank asset are unchanged.”

Section 105 provides:

“105.—(1) Nothing in this Act renders NAMA or a NAMA group entity liable for any breach of contract, misrepresentation, breach of duty, breach of trust or other legal or equitable wrong committed by a participating institution.

(2) No legal proceedings shall be brought against NAMA or a NAMA group entity in relation to any legal or equitable wrong referred to in subsection (1).

(3) Nothing in this Act deprives any person of a remedy in damages against a participating institution in relation to a legal or equitable wrong referred to in subsection (1).”

Section 106 provides:

“106.—Nothing in this Act relieves NAMA or a NAMA group entity of any obligation, at law or in equity, except to any extent to which this Act specifically provides otherwise.”

Section 180 provides:

“180.—In this Part:

“Court” means the High Court;

“court” includes an arbitrator;

“defendant” includes a respondent in arbitration proceedings;

“plaintiff” includes an applicant in arbitration proceedings.”

Section 181 provides:

“181.—(1) The provisions of this Chapter apply in relation to legal proceedings commenced on or after 30 July 2009 by a person who is a debtor, associated debtor, guarantor or surety in relation to a bank asset, or a participating institution in connection with a bank asset if the bank asset is specified (whether at the commencement of the proceedings or afterwards) in an acquisition schedule.

(2) The provisions of this Chapter apply in relation to legal proceedings referred to in subsection (1) on and from the time at which the bank asset concerned is specified in an acquisition schedule.”

Section 182 provides:

“182.—(1) Subject to subsection (2), a claim to which this Chapter applies gives rise only to a remedy in damages or other relief that does not in any way affect the bank asset, its acquisition, or the

interest of NAMA or the NAMA group entity or (for the avoidance of doubt) any property the subject of any security that is part of such

a bank asset.

(2) A person may apply for an order that the person may apply

for a remedy other than or in addition to that permitted by subsection

(1) in relation to a claim to which this Chapter applies.

(3) An application for an order mentioned in subsection (2) shall

be made only by leave of the Court. An application for such leave

may be made ex parte.

(4) Leave shall not be granted to apply for an order under subsection

(2) unless the Court is satisfied that the application raises a substantial

issue for the Court's determination and—

(a) the application for leave is made to the Court within 30

days after the later of—

(i) the notification by the participating institution to the

relevant debtor, associated debtor, guarantor or surety

under section 96, and

(ii) the accrual of the cause of action in respect of which

the legal proceedings arose,

or

(b) the Court is satisfied that—

(i) there are substantial reasons why the application was

not made within that period, and

(ii) it is just and equitable in all the circumstances to grant

leave having regard to the interests of any affected

person.

(5) If the Court grants leave to apply for an order under subsection

(2), the applicant shall serve on NAMA the order granting leave

and the application.

(6) The Court shall make an order under subsection (2) if and

only if the Court is satisfied that if the applicant's claim were established,

damages would not be an adequate remedy.

(7) For the avoidance of doubt, this Chapter applies to proceedings

in being at the time of specification in an acquisition schedule

of a relevant bank asset.

(8) Nothing in this section prevents a party—

(a) defending proceedings in rem in respect of a bank asset

instituted against it by NAMA, a NAMA group entity, a

participating institution or a statutory receiver, in a manner

which might affect the bank asset, its acquisition by

NAMA or a NAMA group entity or any property the

subject of any security, or

(b) in the defence of such proceedings, making any claim in

relation to such a bank asset.

(9) Nothing in the section affects the operation of the Family

Home Protection Act 1976." (Emphasis added).

Application of law to the pleas in the draft counterclaim
57. I turn now to consider the application of these statutory sections to the pleas in this case.

(1)The Plea of Mistake
58. The first plea to consider is the plea of mistake in the draft counterclaim. It is set out earlier in my judgment. It is, in my view, a matter which has been pleaded with great particularity. Moreover, given the history of these proceedings it is also set out in affidavit evidence and documentary exhibits which provide evidential support for this plea of mistake. Clearly, whether this plea will be successful or not is a matter for the trial of the action. The only issue which I have to consider is whether the leave of the Court is required for such a plea and, if so, whether leave should be granted.

Section 101
59. The main ground upon which the plaintiff argues that the second defendant should not be allowed to plead mistake is because the plaintiff contends that, in essence, what the second defendant is pleading is misrepresentation - not mistake - and s. 101 of the 2009 Act provides that any such representations, consents, undertakings or obligations are not enforceable and cannot be relied upon by the debtor or any other person against NAMA.

60. However the second defendant contends that its plea is a plea of mistake - and not misrepresentation - and that therefore it is not caught by the 2009 Act and therefore he does not require the leave of the Court to so plead.

61. I have set out above the provisions of s. 101 of the 2009 Act above. In essence, s. 101 provides that where it is alleged that a representation was made to, a consent was given to, an undertaking was given to, or any other obligation was undertaken (by agreement or otherwise) in favour of the debtor or another person by the participating institution from which the bank asset was acquired or by some person acting or claiming to act on its behalf, then that representation, consent, undertaking or obligation is not enforceable against NAMA. It is enforceable by the debtor against any person other than NAMA.

62. However, s. 101 is specifically limited to representations, consents, undertakings or obligations by the participating institution. Section 101 specifically provides that such representations, consents, undertakings or obligations are not enforceable as against NAMA.

63. It is however, noteworthy that s. 101 does not include within its scope any plea in relation to mistake.

64. The doctrine of mistake in the law of contract is quite different to the doctrine of misrepresentation in the law of contract or indeed tort. As Chitty on Contract states (volume 1, 31st ed., pp. 485- 486):

> *"The doctrine of mistake in the law of contract deals with two rather different situations. In the first, the parties are agreed on the terms of the contract but have entered it under a shared and fundamental misapprehension as to the facts or the law. Cases in this category are now usually referred to as 'common' mistake, for normally the mistake is legally relevant only if both parties have contracted under the same misapprehension. In the second, there is some mistake or misunderstanding in the communications between the parties which prevents there being an effective agreement (for instance, if the parties misunderstand each other) or at least means that there is no agreement on the terms apparently stated (for instance, if one party in an offer states terms which the other party knows the first party does not intend, but nonetheless the other purports to accept). This second category of mistake, which can generally be referred to as 'mistake in communication', includes 'mutual misunderstanding' where each is mistaken as to the terms intended by the other, and 'unilateral mistake', where only one of the parties is mistaken, over the terms of the contract or the identity of the other party".*

65. However in Chitty on Contract at p. 574, the learned authors, in discussing Misrepresentation, state as follows:

> *"The traditional rule is that a misrepresentation must be a false statement of fact, past or present, as distinct from a statement of opinion, a statement of intention or a mere commendatory statement…"*

66. Thus there is a clear difference, as a matter of law, between the concept of mistake and the concept of misrepresentation. The concept of mistake may prevent an effective agreement being reached between the parties because there is a lack of consensus ad idem; the concept of misrepresentation, by contrast, relates to a representation made by one party upon which the other relies.

67. Moreover it could not be said that where a person is alleging mistake that this constitutes a "consent" or an "undertaking" or an "obligation" within the meaning of s. 101 of the 2009 Act. A plea of mistake is a plea that the parties were operating under a mutual or unilateral mistake to such an extent that there was no consensus ad idem. Thus there could be no proper consent, undertaking or obligation within the meaning of s. 101 of the Act.

68. The plaintiff seeks to argue that the defendant's plea of mistake is in fact a plea of misrepresentation within the meaning of s. 101. However, whilst it is of course the case that a plea of mistake arises in the context of an alleged contract, it is a plea which contends that the parties did not have the necessary consensus ad idem to actually reach an agreement or consent or undertaking or obligation. The essence of s. 101 is that allegations of consents, undertakings, or obligations cannot be made against NAMA whereas in this case by virtue of a plea of mistake the second defendant is seeking to argue that there never was any such consent, undertaking or obligation in existence.

69. I would conclude therefore that because the second defendant wishes to make a plea of mistake and because s. 101 of the 2009 Act only provides that representations, consents, undertakings and/or obligations of the participating institution are not enforceable

and cannot be relied on by the debtor against NAMA, that s. 101 has no application to the second defendant's plea of mistake.

70. As I am of the view that the plea in mistake is not captured within s. 101 of the 2009 Act it is not necessary for me to consider whether the conditions set out in s. 101, subs. 1(b), (c), and (d) are fulfilled in this case.

Section 102
71. I have also considered s. 102(1) of the 2009 Act which provides that after a bank asset is acquired by NAMA the terms and conditions of the bank asset are unchanged. However, in my view, s. 102(1) does not affect this particular issue because what is in dispute between the parties is what precisely are the terms and conditions in relation to the bank asset and whether there was a mutual or unilateral mistake in respect of the terms and conditions of the contract such that there was no proper consensus ad idem between the parties in respect of those terms.

Sections 105 & 106
72. I have also considered s. 105(1) - which provides that nothing in the Act renders NAMA liable for any breach of contract, misrepresentation, breach of duty, breach of trust or other legal or equitable wrong committed by a participating institution - and s. 105(2) (which provides that no legal proceedings shall be brought against NAMA in relation to any legal or equitable wrong referred to in subs. (1)).

73. However, the plea in mistake as made by the second defendant is not a plea of breach of contract or a plea in misrepresentation, or a plea in respect of breach of duty or breach of trust, or a plea in respect of any other "legal or equitable wrong committed by a participating institution" in this case, AIB. A plea of mistake is a plea that one or either parties have been operating under a mutual or unilateral mistake.

74. I have also had regard to s. 106 of the Act which provides:

> *"Nothing in this Act relieves NAMA or a NAMA group entity of any obligation, at law or in equity, except to any extent to which this Act specifically provides otherwise."*

75. As I am of the view that the plea in mistake is not restricted by s. 101 or s. 105 then, in my view it is permissible under s. 106 of the 2009 Act.

Sections 180 - 182
76. I have also considered sections 180, 181 and 182 of the 2009 Act.

77. Section 181 provides that the provisions of this chapter apply in relation to legal proceedings commenced on or after 30th July, 2009 by a person who is a debtor in relation to a bank asset. These proceedings are clearly within s. 181(1) of the Act.

78. I turn now to a consideration of s. 182 of the 2009 Act. Section 182(1) provides that a claim to which this Chapter applies gives rise only to a remedy in damages or other relief that does not in any way affect the bank asset, its acquisition or the interests of NAMA, or any property the subject of any security that is part of such a bank asset. It is clear on the facts of the present case that the second defendant's claim about mistake is a claim which could affect the bank asset or any property the subject of any security that is part of such a bank asset. However, s. 182(1) specifically states that this general provision is subject to ss. 182(2) of the 2009 Act.

79. Section 182(2) provides that a person may apply for an order that the person may apply for a remedy other than, or in addition to, that permitted by ss. (1) in relation to a claim to which this chapter applies. Hence the reason for the current application.

80. Section 182(4) provides that leave shall not be granted unless the Court is satisfied that the application raises a substantial issue for the Court's determination and that the further conditions set out at s. 182(4)(a) or (b) are fulfilled.

81. As Carroll J. stated in McNamara v. An Bord Pleanála [1995] 2 I.L.R.M. 125

> *"What I have to consider is whether any of the grounds advanced by the appellant are substantive grounds for contending that the Board's decision was invalid. In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result would be. I believe I should go no further than satisfy myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial."*

82. I am satisfied under s. 182(4) that the application in this case to be allowed to make a plea of mistake does indeed raise a substantial issue for the Court's determination. There is no doubt that the second defendant's plea of mistake is the central issue in these proceedings; there is also no doubt that the first and second defendant have made this issue of mistake an issue from the very start of the proceedings - and indeed in correspondence before proceedings even issued; thirdly the defendants have put forward significant affidavit and documentary evidence to back up their assertion of a mutual or unilateral mistake. Therefore in my view, this application does indeed raise a substantial issue for the Court's determination.

Section 182 (4) (a)
83. It is common case, - and the second defendant accepts – that he cannot satisfy the Court that he has fulfilled the conditions required under s. 182(4)(a) i.e. the application for leave has not been made to the Court within 30 days after the notification by the participating institution to the relevant debtor and the accrual of the cause of action.

Section 182 (4) (b)
84. Therefore the Court must be satisfied that the conditions set out at s. 182(4)(b) are fulfilled i.e. that there are:

> *"1. Substantial reasons why the application was not made within that period and*
>
> *2. It is just and equitable in all the circumstances to grant leave having regard to the interests of any affected person."*

85. Having considered the facts in this case and the procedural background, I am satisfied that there are substantial reasons why the application was not made within the period set out at s. 182 (4) (a). These reasons are that the parties engaged in detailed legal correspondence to try to resolve matters before proceedings were instituted, that NAMA and AIB carried out a detailed review of the

documents and records at AIB and interviewed various personnel in respect of this matter, that summary proceedings were issued rather than plenary proceedings, that there was a full exchange of affidavits wherein the defendants sought to establish that they had good grounds for the defence of the proceedings, and, that the second defendant died in tragic circumstances and therefore the proceedings had to be reconstituted.

86. Having regard to all of these matters I am satisfied that the conditions set out at s. 182 (4)(b)(1) are satisfied.

87. I am also satisfied that it is just and equitable in all the circumstances to grant leave because:

> (1) The defendants and each of them have maintained from the very start that AIB made a mistake and/or both parties were operating under a mistake as to the precise terms of the agreement;
>
> (2) Both defendants have filed extensive affidavits in the summary proceedings setting out in great detail the factual reasons as to why they claim there was a mutual or unilateral mistake;
>
> (3) The defendants have also put before the Court documentary evidence and correspondence which backs up their assertion;
>
> (4) There does not appear to be any replying affidavit filed on behalf of NAMA by the relevant person within AIB (Mr. Callanan) denying the assertions made by the defendants despite ample opportunity to do so.
>
> (5) It would, in my view, be entirely unjust and inequitable in all the
>
> circumstances of this case for the second defendant to be shut out from making the case which he clearly wished to make from the very outset (i.e. that AIB and/or both parties)made a mutual and/or unilateral mistake in relation to the precise security which was been offered in respect of the loan. This issue of mistake is clearly at the very heart of the dispute between the parties.

Section 182 (6)
88. I have also had regard to s. 182(6) of the Act and I am satisfied that if the second defendant's claim were established, damages would not be an adequate remedy. If the second defendant is successful in establishing his case on mistake then the plaintiff's case would not be successful. In such a case it would be entirely inappropriate for the plaintiff to obtain judgment against the second defendant and/or his estate in the sum claimed; it would be unjust for the plaintiff to have the apparent vindication of a Court judgment as this would, in effect, establish that the second defendant was in breach of contract with all the reputational damage which would result. If the second defendant's plea is successful, then the plaintiff may not be entitled to any finding by a Court that the defendant was in breach of contract, or any judgment in the sum sought. I am of the view therefore that damages would not be an adequate remedy for the second defendant if he were prevented from pursuing a counterclaim.

89. For all these reasons, I am of the view that leave should be granted to the defendants to plead mistake.

(2) The Plea in Estoppel (paragraph 32 of the draft counterclaim)
90. The essential part of the plea of estoppel at para. 32 is that if the plaintiff acquired any obligation from AIB then this obligation is limited to the non-recourse security agreed between the parties. It follows therefore from what I have decided above, that if the second defendant is permitted to make a plea of mistake then he must also be allowed to plead that the contract is limited to the non-recourse security between the parties.

(3) The Claim for Breach of Duties/Breach of Contract
91. As was stated above, the second defendant's counterclaim at paras. 33 and 34 although headed "Breach of Duties" is in fact a breach of contract claim. Moreover, it is a breach of contract claim which is expressly stated to be a breach of contract by AIB. The second defendant pleads that AIB breached the contract and consequently the plaintiff as purported acquirer of each and every right and obligation in relation to the contract, also breached the contract.

92. However, it is clear from the provisions of the 2009 Act that such a plea cannot be permitted.

93. Section 101 provides that where it is alleged that representations were made to, consents were given to, undertakings were given to or any other obligation was undertaken in favour of the debtor, by the participating institution then such representations, consents, undertakings or obligations are not enforceable and cannot be relied on by the debtor as against NAMA.

94. In my view the express and/or implied obligations set out at paras. 33 and 34 of the draft counterclaim are clearly alleged "obligations" or "undertakings" in favour of the debtor by the participating institution. As such they are not enforceable against NAMA.

95. Section 101(3) provides that the Court shall not make an order under s. 182 in relation to a claim to enforce a representation, undertaking or obligation referred to in ss. (1).

96. I also note that s. 105 provides that nothing in this Act renders NAMA liable for any breach of contract or breach of duties committed by a participating institution.

97. I also note that s. 105(3) provides that nothing in the 2009 Act deprives any person of a remedy in damages against a participating institution in relation to a legal or equitable wrong referred to in subsection 1. Therefore if the second defendant wishes to pursue a breach of duty or breach of contract claim against AIB then he may sue AIB directly.

98. Insofar as s. 182 may be invoked in respect of the plea for breach of duty/breach of contract, I am of the view that leave should not be granted to permit the second defendant to make this case against NAMA as I do not believe that the application in respect of this part of the draft counterclaim raises a substantial issue for the Court's determination. Moreover, I do not believe that it would be just and equitable in all the circumstances to grant the second defendant leave to issue a counterclaim which includes such a plea when the second defendant can and should more properly make such a claim against AIB directly, if he so wishes.

(4) The Claim in Misrepresentation against AIB (paras. 35, 36 and the first sentence of para. 37)
99. The plea at paras. 35, 36 and the first sentence of para. 37 is essentially a plea of misrepresentation and/or a plea of negligent

misstatement against AIB. The plea is that AIB made certain statements and/or representations to the defendant and that the plaintiff as purported acquirer of each and every obligation of AIB assumed responsibility for each and every representation made to the defendants by AIB in relation to the loan facility.

100. In my view however, it was precisely to avoid this situation that s. 101 of the 2009 Act was enacted. Section 101(1) provides that if it is alleged that a representation was made in favour of the debtor by the participating institution then that representation is not enforceable and cannot be relied on by the debtor against NAMA. However the Act also provides in s. 101(1)(ii) that it is enforceable and can be relied upon by the debtor against a person other than NAMA (in this case AIB).

101. Any claim or any plea in respect of misrepresentation should more properly be made against AIB rather than NAMA. On those grounds I am of the view that the second defendant should not be permitted to make a plea of misrepresentation on the part of AIB as against NAMA. In my view to permit the second defendant to do so would be contrary to the provisions of s. 101 of the 2009 Act.

102. I also note again that s. 105 provides that nothing in this Act renders NAMA liable for any misrepresentation committed by a participating institution. I also note that s. 105(3) provides that nothing in the 2009 Act deprives any person of a remedy in damages against a participating institution in relation to a legal or equitable wrong referred to in ss. 1. It is clear therefore that the second defendant's proper remedy is to sue AIB for any such alleged misrepresentation if he so wishes.

103. Insofar as s. 182 is invoked by the second defendant I am of the view that leave should not be granted for an order under s. 182(2) because I am not satisfied that the application in respect of misrepresentation raises a substantial issue for the Court's determination nor am I satisfied that it is just and equitable in all the circumstances to grant such leave.

(5) The Claim in Misrepresentation as against NAMA
104. However, there is a separate and distinct plea in the draft counterclaim for misrepresentation as against NAMA directly. This is set out at para. 37 (second sentence) and paras. 38 to 40. This is a plea that NAMA itself made certain representations to the defendants.

105. Likewise, s. 105 is limited to providing that nothing renders NAMA liable for any misrepresentation committed by a participating institution. The Act is silent however in respect of any claims of misrepresentation made against NAMA directly. Moreover, the defendants are only seeking damages in respect of this claim for misrepresentation and therefore it does not appear that s. 182(4) is of any application to this plea.

106. In my view, there is nothing in the Act which prohibits any party from making a claim of misrepresentation directly against NAMA or any of its associated companies. In the circumstances therefore this plea can be maintained and it does not require the leave of the Court so to do.

(6) The Claim in Estoppel, Laches and Delay
107. Various miscellaneous claims of estoppel, laches and delay are made as against NAMA directly (from paras. 42 to 46 of the draft counterclaims). Again as these are all claimed against NAMA directly (rather than AIB) there does not appear to be anything in the 2009 Act which prevents a counterclaimant from maintaining such claims directly against NAMA. Therefore leave of the Court is not required in respect of these claims.

(7) The Unconstitutionality of Certain Sections of the 2009 Act
108. The challenges to the constitutionality of certain sections of the 2009 Act are clearly not prohibited under the 2009 Act. Therefore these pleas may be maintained in the draft counterclaim by the second defendant. Leave of the Court is not required for such pleas.

Procedure
109. Another issue which arose in the course of this application was whether the correct procedure was

> (a) To file a defence and counterclaim and then to bring an application to seek the leave of the court to continue with certain pleas in the counterclaim, or
>
> (b) as was done here, to file a draft defence and counterclaim and seek the leave of the court to file such a defence and counterclaim.

110. The matter is not free from doubt. However I note that s. 105 (2) of the 2009 Act provides that "No legal proceedings shall be brought against NAMA or a NAMA group entity in relation to any legal or equitable wrong referred to in ss. (1)."– which referred to breaches of contract and misrepresentations, breaches of duty, breaches of trust or other legal or extricable wrongs committed by a participating institution.

111. In my view therefore a defendant in a position such as the defendant in the present case should file his defence in the normal way. He does not need the leave of the court so to do. In addition he should also file a counterclaim where he is counterclaiming matters where the leave of the court is not necessary. If he does not need the leave of the court to plead certain matters (for example misrepresentation against NAMA directly) then there is no reason why he cannot file such a counterclaim at the same time as he is filing his defence. However where a defendant wishes to make claims against NAMA where leave of the court is required then perhaps the more appropriate procedure is to file a defence and counterclaim (which includes claims where the leave of the court is not necessary) and also to bring an application to file a proposed draft amended counterclaim (with the additional reliefs being sought against NAMA). Whilst this is a cumbersome procedure, it is nevertheless one which I believe is required by the provisions of the 2009 Act, and especially because of s. 105 (2) and s. 182 of the Act.

Conclusion

> 1. I would therefore grant leave to the second defendant to make a plea on mistake in the counterclaim (and to maintain their plea on estoppel in respect of mistake);
>
> 2. I would not grant the second defendant leave to plead a breach of contract claim against NAMA; such a claim should be made against AIB directly if the second defendant so wishes;
>
> 3. I would not grant leave to permit the second defendant pursue an "AIB misrepresentation" claim against NAMA; such a claim should be made against AIB directly if the second named defendant so wishes;

4. However the second defendant may pursue a misrepresentation claim against NAMA directly and he does not require the leave of the court to do so;

5. Moreover, leave is not required to allow the second defendant pursue a claim for estoppel, laches and delay directly against NAMA and this plea is permissible;

6. Leave is also not required to permit the second defendant to plead the unconstitutionality of certain sections of the NAMA Act and this plea is also permissible.