The High Court

Commercial

2012 No. 1029S

Between

National Asset Loan Management Limited

plaintiff

and

MKI Property Investments, Paul O'Brien, Greenband Investments and John Hegarty

defendants

The High Court

Commercial

2012 No. 1473S

National Asset Loan Management Limited

Plaintiff

and

Greenband Investments, John Costello, John Hegarty, Paul O'Brien and MKI Property Investments

Judgment of Mr Justice Charleton delivered on the 11th day of October 2012

1. This is an application for summary judgment by the plaintiff, a subsidiary of the National Asset Management Agency, against John Hegarty, who is the fourth defendant in the 2012 No. 1029S proceedings and the third defendant in the 2012 No.1473S proceedings. Mr Hegarty inherited a scrap metal business from his family and developed it so that he accumulated substantial wealth. Details of his approach to business as have been given in the affidavits before this Court indicate prudence. This application arises from land development loans granted by Allied Irish Banks, p.l.c. (A.I.B.)to a consortium of which Mr. Hegarty was a member and were in relation to the building and fitting out of a shopping centre in Clonmel and the purchase of development land in Maynooth. In consenting on the 21st of June, 2012 to the entry of a summary judgment against him to the sum of €15,515,678.50, John Hegarty made it clear that in respect of borrowings and guarantees by him for the Maynooth development he had no defence but that in the case of the liabilities arising from the Clonmel project, that his liability was limited by an express understanding between him and A.I.B.that recourse to him would be for only 50%; it is reasonable in that regard to include a sum for the fitting out of the centre which the bank also claims against him as part of this motion seeking €4,634,046.97.

Defence Claim

2. The defence of John Hegarty cannot be classified as weak or insubstantial. It applies to both sets of proceedings. In the course of a business meeting on the 30th of April, 2009, John Hegarty claims that he raised concerns with two representatives of A.I.B. about the unknown quantum of borrowings of the other defendants to which his enterprise was bound. Willie Madden on behalf of the bank allegedly confirmed that as Mr. Hegarty only had a 50% interest in the Clonmel development, he would only be pursued for 50% of any liability that would arise. It is claimed that the bank treated this as an agreement. A note by Frank O'Shaughnessy who used to work for A.I.B. but who was then advising John Hegarty sets out that " should the bank have to make a call for other borrowings of either party for any liability - in such a scenario the bank could only seek to recoup 50% of the Clonmel liability from either party". He has also sworn an affidavit to that effect. A credit committee report of a later date notes that "Mister Hegarty will guarantee the obligations of MKIPI [first defendant in the first proceedings], restricted to his interest in the site ...". Michael Fives, then senior manager of A.I.B. in Limerick, confirms in an affidavit before the court that his understanding was that the liability of John Hegarty would be 50% if it became necessary to pursue the parties. This was his understanding of the assurance allegedly given by Willie Madden. His account of matters is that this assurance was given in respect of any call that the bank might have to make "for other borrowings from either party" to the transaction in question. It suffices to note that in this and subsequent affidavits no definitive state of facts is arrived at such as could be relied upon definitively.

Summary judgment

3. The motion before the Court is based on the Rules of the Superior Courts 1986, order 37 rule 7:-

> Upon the hearing of any such motion by the Court, the Court may give judgement for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just.

4. The law as to entering judgment in a summary manner is clear. The Court is required to analyse whether the facts require the entry of judgment hereby or to instead remit the matter to a plenary hearing. To enter judgment now, it must be very clear that the defendants have no defence. Should an issue of law arise, the Court is entitled, but not bound, to decide that issue at this hearing. The mere statement of a defence in an affidavit is not necessarily enough to require a case to be sent to a full hearing; any defence must have sufficient credibility to have a reasonable prospect of success. Where a case is based on documents, a defendant must be in a position to show that the defence which they seek to make is not totally undermined by the contract at issue or by the

correspondence between the parties. Denham J. summarised the relevant law in *Danske Bank a/s v. Durkan New Homes Ltd.* (unreported, Supreme Court, 22nd April, 2010) [2010] IESC 22 at paragraphs 14-16 in this way:-

> 14. Several cases were opened before the Court which have addressed this jurisdiction. These included *Bank of Ireland v. Educational Building Society* [1999] 1 I.R. 220 where Murphy J. emphasised that it was appropriate to remit a matter for plenary hearing to determine an issue which is primarily one of law where a defendant identified issues of fact which required to be explored and clarified before the issues of law could be dealt with properly. He stated at p.231:-
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> > "Even if the position was otherwise, once the learned High Court Judge was satisfied that the defendant had "a real or bona fide defence", whether based on fact or on law, he was bound to afford them an opportunity of having the issued tried in the appropriate manner."
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> 15. In *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, Hardiman J. reviewed Irish cases and concluded at p.623:-
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> > "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 defence?"
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> 16. In *McGrath v. O'Driscoll* [2007] 1 ILRM 203, Clarke J. described the law as follows, at p.210:-
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> > "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 is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

5. I am applying these principles in this judgment. If any defence is reasonably capable of affecting the result, then leave to enter final judgment must be refused and, instead, the matter must be remitted for a plenary hearing on oral evidence. I have a discretion as to whether to decide complex issues of law on this hearing or to decline to decide such issues in favour of a fuller treatment of such issues in the course of a plenary hearing. It is clear that should this case be between A.I.B. and John Hegarty the defendant has raised sufficient controversy to require the Court to hear and resolve evidence. That is straightforward.

7. John Hegarty claims reliance on a representation by A.I.B. whereby the extent of his liability under a complex series of transactions was defined. The extent to which an overriding undertaking can undermine the terms of a written document can be considered in the context of a defence that a document was mistakenly signed, which is not the defence raised here, or whereby a misrepresentation redefined the liability of the parties so that a different consensus was arrived at should not be definitively stated here. That is a matter for trial. The objective principle in contract, however, should not favour a person who knows of the mistake of a party entering into a contract. Further, if a person has induced a mistake by some misrepresentation about a contract, liability can be avoided by the person so induced.

8. The plaintiff is not A.I.B., however. The plaintiff is a State financial management agency set up to take over problematic and non-performing loans from the problematic and ill-managed banks whose profligacy led to the guarantee by the Government of their debts in September 2008. As such, the plaintiff is claimed to have the benefit of s. 101 of the National Asset Management Agency Act 2009. This provides:

> (1) If in relation to a bank asset that NAMA or a NAMA group entity has acquired-
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> (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,
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> (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,
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> (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
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> (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-
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> (i) is not enforceable, and cannot be relied on, by the debtor or any other person against NAMA or the NAMA group entity,
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> (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
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> (iii) is not enforceable, and cannot be relied on, by NAMA or the NAMA group entity against the debtor.
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> (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.
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> (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).

9. The nature of this motion makes it imperative that this Court express no view beyond recording the existence of an argument on behalf of the defendant that, firstly, this section of the 2009 Act does not apply by reason of the parties proceeding on the basis of an assumed or agreed state of affairs, as opposed to by virtue of a representation and, secondly, that the section while presumed to be constitutional operates as an unjust attack on the property rights of borrowers. The issue for this Court is whether it is very clear

that neither would be a defence should the matter be remitted for a plenary hearing.

Constitution
10. The purpose of s.101 of the 2009 Act may be to ensure that impaired loans administered by the National Asset Management Agency are not subject to disputes that such loans are void or voidable or subject to a counterclaim in damages by reason of any "representation, consent, undertaking or obligation" given by the transferring bank at the time of making the loan. Such a claim is sustainable against the National Assets Management Agency only if on transfer it is notified by the transferring bank as being subject to collateral warranties that impair the performance of the contract. Banks, experience shows, are highly unlikely to admit any such thing. Further, the section requires that to be noted on the file and, whether in the alternative or disjunctively, a matter not to be now decided, subject to what seems to be a monetary consideration. Experience references no such case to date in all of the bank litigation with which this division of the High Court is concerned., The National Asset Management Agency argues that a defendant who wishes to plead that he or she was pulled unfairly into a loan by fraud, by negligent misstatement or by a mutual assumption later reneged on or by a mistake known to the lending bank and exploited by them, must submit to summary judgment and commence later proceedings against the bank. Meanwhile the National Asset Management Agency is entitled to their money and the subject of the banking misconduct is left to persuade lawyers to take a separate case for a contingency fee, to attempt to ward off bankruptcy and to somehow make a living on a perhaps unjustly impaired reputation.

11. Reasonable arguments can be made that s. 101 of the 2009 Act offends against the Constitution. Order 60 of the Rules of the Superior Courts envisages that the Attorney General be notified in short form of the argument against the constitutionality of any legislation. Where the representation point is blocked by that section, it follows that a defendant gains standing to make any relevant argument based on the Constitution once the court of trial is in the position of deciding in favour of that misrepresentation case and is constricted expressly by the legislation from a finding in his favour and no other non-constitutional point remains. One such point is that s.101 does not apply as the case made by the defendant is of estoppel.

Estoppel
12. The basic argument of counsel for the defendant John Hegarty is that s.101 of the Act of 2009 does not include estoppel. The classic formulation of estoppel is that a representation is made by an individual that reliance will not be placed on strict legal rights, such as the right to determine a contract for the sale of land which has been made subject to a notice making time for completion of the essence, that such representation has been relied upon by the party to whom it is held out, and that by reason of detriment or other factors it would be unfair to allow representor to return unchecked to the comfort of legal rights. That really seems to me to be the case that is made here. An estoppel dependant upon a representation thus seems clearly to be provided for in s.101.

13. Estoppel can also arise by a mutual assumption of the parties to a legal transaction. That is not necessarily always dependant on a representation though a case where some such representation by the party seeking to enforce legal rights is absent is very hard to imagine. Such is grist to the mill in this kind of litigation. In Treitel's *The Law of Contract* (13th Ed.) at 3.094 the following helpful explanation is given whereby it is clear that an estoppel by convention can arise either from a representation or from a mutual assumption:

> Estoppel by convention may arise where both parties to a transaction "act on an assumed state of fact or law, the assumption being either shared by both or made by one and acquiesced in by the other". The parties are then precluded from denying the truth of that assumption, if it would be unjust or "unconscionable" to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any "clear and unequivocal" representation or promise. It can arise where the assumption was based on a mistake spontaneously made by the party relying on it, and acquiesced in by the other party, though the common assumption of the parties, objectively assessed, must itself be "unambiguous and unequivocal".

14. *Courtney v. McCarthy* [2008] 2 I.R. 376 was a sale of land case. It illustrates the centrality of representation in this kind of case. The plaintiff agreed to sell a site in Ennis, Co Clare to the defendant. The sale was due to close on a particular day but the purchaser's solicitor was out of town. An agreement was made to complete the sale on the following day but then an enquiry was made as to why the purchaser's solicitor had not turned up on the day designated by the contract for the closing and the purchaser was told that the sale had been called off. The purchaser was granted an order of specific performance on the basis that where a party made, by words or conduct, a clear and unambiguous promise or assurance to another party which was intended to affect legal relations between them and was to be acted on accordingly, if such action was taken to the detriment of that party, the party giving the promise or assurance would be estopped from reverting to the previous legal relations between them. Giving the judgment of the Supreme Court, Geoghegan J. relied on the authority of *Amalgamated Property Co. v. Texas Bank* [1982] 1 Q.B. 84. At pages 389-390 he set out the law as follows:

> The case related to a bank guarantee given by a company the validity of which was being disputed by the liquidator of that company. A question arose as to whether even if the guarantee was not valid an estoppel had arisen by virtue of the conduct of the company which precluded denial of the guarantee. Brandon L.J., though forming the view that the guarantee was in fact effective, went on to consider the estoppel question in the event that he was wrong. Two main arguments against the existence of the estoppel had been put forward in the High Court and the Court of Appeal. The first was that since the bank held its mistaken belief as a result of its own error alone and that the company had at most innocently acquiesced in that belief which it also held, there was no representation which could found an estoppel. The second argument was that the bank was seeking to use the estoppel not as a shield but as a sword and that that was not permitted by the law of estoppel. Brandon L.J. rejected both arguments. He expressed the view that the particular estoppel relied on was of the kind described in Spencer Bower and Turner, *Estoppel by Representation*, (3rd ed., 1977). at pp. 157 to 160 as "estoppel by convention". He cited the relevant passage of that work as follows:
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> > "This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed."
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> In this particular case, both parties knew that the contract was lawfully rescinded and both parties accepted that that was to remain the position subject only to the proviso that both would act on the artificial assumption that the contract was still alive and enforceable if the sale was completed on a particular date and time.
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> Brandon L.J. then dealt with the second argument which, as I have already pointed out, was an argument which featured

heavily in this case and particularly in the High Court. Counsel for the plaintiff argued strongly that estoppel here was being used as a sword and not a shield. But this is what Brandon L.J. had to say in relation to this alleged principle at pp. 131 to 132 of *Amalgamated Property Co. v. Texas Bank* [1982] 1 Q.B. 84:-

> "In my view much of the language used in connection with these concepts is no more than a matter of semantics. Let me consider the present case and suppose that the bank had brought an action against the plaintiffs before they went into liquidation to recover moneys owed by A.N.P.P. to Portsoken. In the statement of claim in such an action, the bank would have pleaded the contract of loan incorporating the guarantee, and averred that, on the true construction of the guarantee, the plaintiffs were bound to discharge the debt owed by A.N.P.P. to Portsoken. By their defence the plaintiffs would have pleaded that, on the true construction of the guarantee, the plaintiffs were only bound to discharge debts owed by A.N.P.P. to the bank, and not debts owed by A.N.P.P. to Portsoken. Then in their reply the bank would have pleaded that by reason of an estoppel arising from the matters discussed above, the plaintiffs were precluded from questioning the interpretation of the guarantee which both parties had, for the purpose of the transactions between them, assumed to be true.
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> In this way the bank, while still in form using the estoppel as a shield, would in substance be founding a cause of action on it. This illustrates what I would regard as the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action, on which without being able to rely on that estoppel, he would necessarily have failed. That, in my view, is, in substance, the situation of the bank in the present case."

As I have illustrated earlier in this judgment that is exactly the position which pertains in this case.

15. I am not convinced that estoppel by mutual assumption without a founding representation can have anything to do with the facts of this case. The task of a court hearing a motion for summary judgment, however, is not focused on identifying reasonably arguable defences and dismissing unarguable defences. Instead, once any reasonably arguable defence is identified by a defendant, the matter is to be remitted to plenary hearing wherein the framing of the defence is a matter solely for the defendant.

Result

16. The defendant John Hegarty is given leave to remit this matter to plenary hearing, there being substantial grounds to argue that he was the victim of negligent misrepresentation and of an unfair resiling on the grounds of estoppel. If s.101 of the Act of 2009 bars that claim, provided he succeeds on the facts, he is entitled to challenge it on constitutional grounds. I order that the Attorney General be informed of the issues as to constitutionality by concise notice in accordance with Order 60 of the Rules of the Superior Courts and be entitled to argue that part of the case in a manner to be decided by the trial judge at an appropriate time, should the facts require the trial of that issue.