THE HIGH COURT

[2016 No. 9712 P.]

BETWEEN

BRENDAN O'DONOGHUE

PLAINTIFF

AND

PATRICK MARTIN AND NOEL MARTIN

DEFENDANTS

AS CONSOLIDATED BY AN ORDER OF THE HIGH COURT DATED 3RD APRIL, 2017

THE HIGH COURT

[2016 No. 11154 P.]

BETWEEN

BRENDAN O'DONOGHUE

PLAINTIFF

AND

PATRICK MARTIN, NOEL MARTIN AND BEN GILROY

DEFENDANTS

JUDGMENT of Ms. Justice Pilkington delivered on the 24th day of July, 2019

1. By notice of motion dated the 17th day of April, 2018, the first and second named defendants seek the following reliefs: -

(a) A declaration that the first and second named defendants do not require the leave of this Honourable Court to deliver and serve the amended defence and counterclaim in the within proceedings on National Asset Loan Management DAC ("NALM");

(b) In the alternative, insofar as this Honourable Court may deem necessary, an order granting the first and second named defendants leave to bring an application pursuant to s. 182(2) of the National Asset Management Agency Act, 2009 in respect of the non-damages reliefs sought against NALM in the amended defence and counterclaim herein;

(c) Further, an order pursuant to s. 182(2) of the National Asset Management Agency Act, 2009, permitting the first and second named defendants to seek reliefs in the amended defence and counterclaim herein other than for damages against NALM and to deliver and serve the amended defence and counterclaim on NALM.

2. To initially set out the background facts and circumstances: -

(a) The defendants and counterclaimants Patrick Martin and Noel Martin together with Mardon Property Developments Limited ("Mardon") had been extended loan facilities between March 2007 and September 2008 by Bank of Ireland. Patrick and Noel Martin are also the guarantors of Mardon.

(b) All of those loan facilities were acquired by NAMA in 2010.

(c) In April and May 2015, the plaintiff receiver was appointed by NALM over the interests of Mardon, Patrick and Noel Martin over certain commercial and residential properties in counties Monaghan and Louth.

(d) There has been significant interaction between Mardon, the first and second named defendants and NALM from the acquisition of the loan facilities by NALM in 2010, the appointment of the plaintiff receiver and thereafter. This interaction is considered below. The first and second named defendants rely upon certain events that occurred within this timeframe to contend that they were furnished with certain binding assurances by NALM upon which they relied and on foot of which they expended monies such as would preclude the appointment of the plaintiff receiver. More importantly, for this application, they argue that these assurances raise significant issues as to the entitlement of NALM to pursue the first and second named defendants personally or as guarantors of Mardon, in respect of any residual indebtedness.

(e) These proceedings issued in 2016 and essentially seek orders in respect of alleged trespass by the defendants, accounts for rents and profits, delivery up of certain items and an order confirming the validity of the appointment of the receiver. The proceedings were issued in November 2016. No reliefs arising from any indebtedness of the first and second named defendants is sought within those proceedings.

(f) These proceedings then necessitated certain injunctive reliefs sought by the plaintiff receiver against Patrick and Noel Martin in one set of proceedings and Patrick Martin, Noel Martin and Ben Gilroy in respect of a second set of proceedings (relating to the Martins' residential and commercial property interests respectively). These reliefs were granted by the High Court following a fully contested hearing on the 7th day of February, 2017.

(g) On 3rd April 2017, an application to consolidate the proceedings was granted by the court.

(h) The defence was filed in May 2017 in respect of these consolidated proceedings. There was no counterclaim.

(i) The first named and second named defendants together with the third named defendant to the second proceedings Mr. Ben Gilroy were acting without legal representation in respect of the matters set out above. In or about October 2017 the first and second named defendants retained solicitor and counsel.

(j) In January 2018, an application by the defendants Patrick and Noel Martin to adjourn a proposed hearing date in order to advance their counterclaim was granted.

(k) The amended defence and counterclaim was delivered to the plaintiff on the 2nd March 2018, service of the pleading was accepted. NALM was served with the defence and counterclaim on the 6th March, 2018. On the 12th March, 2018, solicitors on behalf of NALM wrote pointing out the requirement to seek leave of the court pursuant to s. 182 of the National Asset Management Agency Act, 2009 ("the NAMA Act") in order to advance the counterclaim. Thereafter, following interparty correspondence, it was agreed that rather than initially move the application ex-parte as provided for within the legislation that NALM would be on notice of it from the outset.

3. The notice of motion as set out above issued on 17th April, 2018 and is grounded upon: in chronological order, the grounding affidavit of Patrick Martin sworn on 16th April, 2018, a replying affidavit of Renee Duggan of 1st May, 2018, a second affidavit of Patrick Martin of 9th May, 2018, a replying affidavit of Stephen McHugh on 17th May, 2018, a further affidavit of Renee Duggan on 23rd May, 2018 and a third and final affidavit of Patrick Martin on the 12th April, 2018.

The NAMA Act

4. Section 181(1) of the Act provides: -

"(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."

5. Section 182 of the NAMA Act provides: -

" (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."

6. Within s. 4 (the interpretation section) of the NAMA Act, as amended, "legal proceedings" are defined as: -

"includes any form of binding dispute resolution, and in particular includes arbitration;"

"Bank asset" is defined as including: -

"(a) a credit facility,

(b) any security relating to a credit facility,

(c) every other right arising directly or indirectly in connection with a credit facility,

(d) every other asset owned by a participating institution,

(dd) an asset owned by the Central Bank, and

(e) an interest in a bank asset referred to in any of paragraphs (a) to (dd)."

7. One noteworthy feature of the defendants' counterclaim is the joinder of an additional party. The counterclaimants are the defendants above, namely Patrick Martin and Noel Martin, the defendants to the counterclaim comprise Brendan O'Donoghue and National Asset Loan Management DAC. NALM was not a party to these consolidated proceedings prior to its joinder within the counterclaim.

8. Accordingly, pursuant to the terms of s. 182 of the NAMA Act, a claim giving rise only to a remedy in damages that does not affect the bank asset can be instituted without leave of the court. Subsection (2) states that a person may apply for an order in seeking a remedy other than that permitted within subs. (1) (i.e. a remedy in damages).

9. However, any non-damages based remedy (if I may describe it as such) requires the leave of the court pursuant to s. 182(2).

10. Subsection (4) of s. 182 requires that it will not be granted unless the court is satisfied that the application raises a substantial issue, that application for leave is made within 30 days (it is common case that this application was not made within 30 days) and finally, provided that the court is satisfied if outside of the 30 day time limit that there are substantial reasons why the application was not made within the period and the just and equitable criteria as to whether to grant the relief. Linked to this is the requirement at subs. (6) that no order should be made were damages to be an adequate remedy.

11. In the case of *Daly & ors. v. NALM & ors*. (unreported, High Court, 12 September, 2011) ('*Daly*'), Peart J. had to consider what constituted a "substantial issue" as set out in s. 182. He considered it in these terms; -

> "Before this Court may grant leave to the plaintiffs to seek any reliefs based on the nature of the loan facilities in 2007 and 2008, it must be the application of the principles in *McNamara v. An Bord Pleanála* be satisfied that a substantial issue has been raised – in other words an issue that is reasonable, arguable and weighty, and not one that is trivial or tenuous. Carroll J., when annunciating these principles, emphasised also that she was concerned with whether the ground raised was a substantial ground, and not whether each argument made in support of such ground was substantial or meritorious. I respectfully agree that it is the substance of the issue raised which must be examined, and that will usually mean that there must be a *bona fide,* real and substantial factual basis put forward by the plaintiff on affidavit to support the issues in question, and not mere assertion or speculation which may be dependent for substantiation upon material which may emerge later through a course of discovery of documents, or which may depend for survival upon an overstrained or contrived interpretation of documents or other material."

12. Before determining whether a substantial issue has been raised, it is necessary to consider s. 181 of the NAMA Act, specifically whether the defendants' counterclaim comes within its provisions as applying "in relation to legal proceedings…."

13. The applicants contend that they do not come within s. 182(1) as their proceedings by way of counterclaim are not tantamount to "legal proceedings" as defined by that section.

14. The text *Delany and McGrath on Civil Procedure* (Biehler, McGrath and McGrath – 4th ed.) set out the following characteristics of a counterclaim: -

(a) It sets up a cross-action which is independent of the plaintiff's claim.

(b) It has the same effect as a cross-action enabling the court to pronounce a final judgment in the same action both on the original and on the counterclaim;

(c) They continue (para. 5.59): -

> "As stated, the counterclaim sets up a cross-action which is independent of the plaintiff's claim. Therefore, if the action of the plaintiff is stayed, discontinued, or dismissed, the counterclaim may nevertheless be proceeded with."

(d) RSC O. 21, r. 10 permits a defendant to make a counterclaim against a person other than a plaintiff, such as in this case.

(e) It is possible that a counterclaim might raise matters which are entirely unrelated to the plaintiff's claim, but which could conveniently be dealt with in conjunction with it.

(f) The assertion (para 13.49) that it is possible to seek security from a defendant in relation to a counterclaim where the defendant is effectively the plaintiff in the proceedings. They point as an example where a plaintiff's claim has been adjudicated upon, but the counterclaim has yet to be determined.

(g) They further point out that where a counterclaim is put forward in respect of a matter wholly distinct from the claim that the counterclaimant may be ordered to provide security for costs if resident outside of the EU.

15. As set out above, the definition of "legal proceedings" within s. 4 of the NAMA Act is broad ranging and essentially defines it as including any form of binding dispute resolution and in particular arbitration. In my view, that is an attempt to broaden rather than narrow the concept of legal proceedings. Based upon the matters set out above it is clear that a counterclaim constitutes a separate and distinct claim brought within the same proceedings. I am satisfied that this counterclaim within these proceedings comes within

the definition of "legal proceedings" as defined by s. 181. In this case the claims made within this counterclaim are entirely separate and distinct from the matters advanced by the plaintiff within their statement of claim.

16. It has also been pointed out by counsel on behalf of NALM that, as they were joined by means of the counterclaim, were s. 181 not to apply to that pleading then the clear option open to any litigant seeking to circumscribe the provisions of s. 182 of the NAMA Act, 2009 would be simply to join that entity by way of counterclaim. A counterclaim is a legal proceeding as defined within s. 181 and accordingly, I must now consider s. 182.

17. In considering s. 182 of the NAMA Act, I must initially consider whether: -

> (a) I am satisfied that the application (in this instance portion of the counterclaim) raises a substantial issue for determination; and
>
> (b) It is made within the requisite time limit; or
>
> (c) The court is satisfied that there are substantial reasons why the application was not made within time and that it is just an equitable to grant leave having regard to the interest of any affected person.

18. Within the counterclaim there are clearly pleadings that solely seek damages and therefore do not come within the rubric of s. 182. Therefore, certain reliefs with the counterclaim cannot be impugned on this basis.

19. The paragraphs within the counterclaim which do not relate solely to a claim in damages are those within paragraphs. 7 – 10 inclusive of the counterclaim which are in the following terms: -

> "7. A declaration that NALM acted in breach of contract in purporting to enforce security over the properties in or around April/May 2015;
>
> 8. Further, or in the alternative, a declaration that NALM was estopped from enforcement of the alleged loans and/or the alleged security over the properties, including by appointing the receiver over the properties, or any of them, whether in April/May, 2015 or at any time;
>
> 9. A declaration that the purported appointment of receiver over the properties, or any of them, is null and void and of no legal effect;
>
> 10. A declaration that NALM is estopped from pursuing the borrowers, or any of them, in respect of any residual debt remaining after realisation of the alleged security."

20. The grounds that may constitute the "substantial issue" relied upon are advanced within the affidavits sworn by Patrick Martin and within the counterclaim itself.

21. Patrick Martin within his second affidavit, particularly at para. 31 states that express representations were given to them (Patrick and Noel Martin) outside of the formal documentation which had been exhibited in the affidavit of Ms. Duggan (on behalf of NALM).

22. At paragraph 73 of the counterclaim, it is claimed that the Martins always engaged in the ongoing management, maintenance, improvements and completion of the properties, on the basis that if there was a residual debt upon their completion and disposal, that this residual debt would be forgiven as against them and that this belief was cultivated and encouraged by NALM, its servants and agents and relied upon in such circumstances. The estoppel case is based upon these representations.

23. Specific reliance is placed upon: -

> (a) contacts with Mr. Vincent Carragher of the Bank of Ireland on behalf of NALM., from about 2012, to the effect that if all assets were disposed of that the borrowers would be expected to discharge the balance of the loans only in circumstances where they were in a position to do so, failing which, no recovery action would be taken against them.
>
> (b) In the years 2013 – 2014 meetings with Shane Donnelly Bank of Ireland on behalf of NALM, to a similar effect, supported in turn in meetings with Stephen Allen also Bank of Ireland on behalf of NALM.

24. The minutes of a meeting of 28th May, 2014 between Patrick and Noel Martin and Stephen Allen and Nicky Cantwell (Bank of Ireland on behalf of NALM);

> "Pat asked about endgame. He was advised if properties were managed and rents remitted, and property prices increased there would be not residual debt."

With regard to that sentence, I do not construe it as being a representation or undertaking that NALM would not pursue the defendant counterclaimants for any residual debt. It appears suggestive of the proposition that if all went according to plan with a rise in the property market and the remittal of rental monies that there would be no question of any residual debt in such circumstances. Even if that interpretation is incorrect, there is no representation that I can construe that any residual debt would not be pursued. Also, it is subject to certain provisos within the statement itself (with the use of the word 'if').

25. It is further contended that these representations were reinforced by statements from Mr. Stephen McHugh on behalf of NALM in or around October 2015 at a meeting in the receiver's offices in Dublin where Mr. McHugh stated that NALM would not be seeking "to get blood from a stone." This appears to be the latest representation (in time) relied upon by the counterclaimants. The borrowers placed reliance on the statements and as a basis for their belief that NALM would not pursue the borrowers for the residual debt and in particular that they would not pursue bankruptcy proceedings against them. It appears to me that these are two very different matters; the residual debt and potential bankruptcy proceedings.

26. In this regard, Mr. McHugh has sworn an affidavit stating that he had the day to day responsibility from September 2015 of managing the borrowings of Patrick and Noel Martin and the corporate entities connected to them which responsibilities were taken over by Renee Duggan in or around March 2017.

27. After his confirmation of the matters within Ms. Duggan's affidavit, specifically that no express or other representations were

given to the effect that the residual debt would not be pursued against the Martins, at paragraph 7 he deals with the specifics of a meeting that took place in October 2015 at the receiver's office.

28. All appear to be agreed that the meeting took place on the 7th October, 2015 and that the issue of the Martin's residual debt was specifically discussed. Two attendance notes of that meeting are furnished; one exhibited to the affidavit of Mr. McHugh is signed by himself and Alan Woods on behalf of NAMA, the second exhibited to the final affidavit of Mr. Martin, taken by a Mr. Henry Stagg, who I understand was employed by the Martins as their financial advisor. With regard to the residual indebtedness, Mr. Stagg's attendance note records: -

> "People want to get on lives – residual – can't get blood from a stone – 23.4 million is current debt.
>
> Statement of affairs with proposals on residual.
>
> External assets search company.
>
> [address and phone number for Mr. McHugh]
>
> Debt reduction/file closed within two years."

29. Mr. McHugh's memorandum also noted a residual debt element in the amount of some €23.4 million and quoted Mr. Stagg to say that "he considers there will be a significant amount of debt outstanding post-sale of the assets." There is then a request that the debtors make a written submission and relation to their residual debt position and that they would also be required to submit a SSOA (sworn statement of affairs) each along with details of their income. The note continues: -

> "SMH (McHugh) also stated that the debtor's loans had not been marked for a "loan sale" at the current time that stated that given NAMA's accelerated disposal timeline of he only had visibility over the planned disposals in the coming six months.
>
> Both PM and NM (a reference to the Martins) noted this and both debtors commented on RBS's professionalism but highlighted their concerns over K-Tech…."

30. Taking that correspondence and considering the points advanced within the memo compiled by Mr. Stagg on behalf of the Martins at its height, I can see nothing within its contents that confirms or indeed even suggests that the entire residual debt will be forgiven. The reference to blood from a stone is suggestive of a possibility that ultimately NAMA (NALM) might ultimately adopt a position but the extent of that position is not in any sense clarified. Both memoranda are clear that the residual debt at that time was noted at €23.4 million – a considerable sum and I can find nothing within either document to suggest an entire debt forgiveness of the type contended for by the Martins.

31. In accordance with the matter set out within that memorandum, Mr. Stagg on behalf of the Martins on 29th October, 2015 forwards, as requested, a comprehensive statement of affairs in respect of Patrick and Noel Martin.

32. Within Mr. McHugh's affidavit, he exhibits two separate letters both dated 13th October, 2015 to Noel and Patrick Martin arising from that meeting. Again, as at the meeting, it seeks a formal submission in writing to NAMA/NALM in respect of a residual debt repayment proposal no later than close of business on 29th October, 2015 "setting out how you propose to meet your liabilities under each of the facilities/guarantees in respect of which you have obligations." Details of what is expected within the documentation is set out. It is also stated that in the event that those requirements are not met that NAMA may consider the following: -

> "Seeking judgment against you;
>
> On seeking judgment, the attachment of the judgment to your assets, including the assets subject to any impugned transfer to related parties and
>
> Petitioning the High Court to have you declared bankrupt and issuing legal proceedings against you seeking the reversal of the asset transfers."

33. The sentiment in the passage quoted above was reinforced by the fact that in April 2015, letters of demand with regard to the outstanding indebtedness and in respect of the guarantee were issued in April 2015 and the receiver appointed thereafter.

34. As set out above the defendant counterclaimants also rely upon the interaction between themselves and NALM from its acquisition of the indebtedness onwards.

35. Following NALM acquiring Bank of Ireland's interest in the loan facilities and related security in or about 28th October, 2010, the Martins (on their own behalf and on behalf of Mardon) entered into a series of seven successive management agreements; the first stated 1st December, 2011 and the last, 26th March, 2014. It is clear these agreements were operative over that time and their renewal over that period demonstrates the working relationship between the parties.

36. Counsel for NALM has pointed to and lays emphasis upon the fact that within each of the management agreements, the Martins collectively and individually sign in the following manner (it may vary somewhat dependent upon whether they are signing on their own behalf or on behalf of the Mardon) but insofar as they sign individually, it states as follows: -

> "I confirm that I have read and fully understand the terms of this letter and agree to comply with the terms thereof. I and the Connection have each taken such legal advice in that respect as I and the Connection have determined as being necessary. I further confirm that all information has been disclosed and provided to NAMA and I confirm the accuracy of all such information and we understand that in the event of additional material information or assets, or any inaccuracies in information provided, being subsequently discovered by NAMA, NAMA reserves its rights to take whatever action it deems appropriate, including the termination of any support it may provide to the Connection."

The connection is defined as including Patrick and Noel Martin and Mardon.

37. What follows is certain correspondence from Capita Asset Services (Ireland) which is then managing the loans on behalf of NAMA and NALM. They had written in 2015 expressing concern with regard to the outstanding indebtedness. In essence, this process

culminated in the letters of demand issued on 20th April, 2015, issued against Patrick and Noel Martin and also Mardon and to the Patrick and Noel Martin in their capacity as guarantors of that entity.

38. Matters then took a significant turn when on 1st February, 2017, a demand and notice requiring repayment of the debt due, prior to issue of bankruptcy summons, issued against Patrick Martin and Noel Martin respectively. The sum of €9,451,977.65 was sought in respect of each.

39. The bankruptcy summons was issued on 24th July, 2017. The standard terms of the bankruptcy summons issued by Order of Costello J. merit attention: -

> "You are hereby warned that unless within fourteen days after the service of this summons on you, you do pay to…. You will have committed an act of bankruptcy, in respect of which you may be adjudged a bankrupt on a petition being presented against you by the said National Asset Loan Management DAC unless you have within the time aforesaid applied to the court to dismiss this summons, on the ground that you are not indebted to the said National Asset Loan Management DAC in any sum or that you are indebted to National Asset Loan Management DAC in a sum of €20,000 or less or that before service of this summons upon you, you had obtained the protection of the court."

40. As I understand it, the bankruptcy summonses could only be served on Patrick and Noel Martin, subsequent to an order for substituted service, in October 2017. In any event, it is quite clear that fourteen days after its service that sum had not been discharged and accordingly both Patrick and Noel Martin have committed an act of bankruptcy.

41. It appears that around the same time the bankruptcy summons was served that (and this is averred by Patrick Martin) in October 2017 they engaged the services of solicitor and counsel. Up until then, they had acted on their own behalf and with the assistance of Mr. Gilroy, the third named defendant in the second set of consolidated proceedings. Mr. Martin then avers that between October 2017 and January 2018 there were certain discussions between his legal advisors and NALM which did not yield any positive outcome.

42. In or around January 2018, the petition proceedings were issued seeking to adjudicate Patrick and Noel Martin bankrupt. This has been adjourned from time to time within the Bankruptcy list pending adjudication of this notice of motion. An application was made to court on 16th February, 2018 to vacate the hearing date to these proceedings and to, thereafter, serve the amended defence and counterclaim in the form set out above.

43. In my view, it would be unrealistic not to perceive a link between the bankruptcy process and the timings with regard to the amended defence and counterclaim. That of course is not to say that the Martins are not entitled to bring the reliefs that they seek but clearly, were the Martins ever to be adjudicated bankrupt then any matters thereafter (including one assumes this litigation) would have to be brought with the consent of or in the name of the Official Assignee in bankruptcy. Paragraph 9 of their counterclaim is to the effect that the only manner the counter claimants can avoid adjudication as bankrupts is to demonstrate to the court "that NALM's efforts to adjudicate us bankrupt is in breach of the agreements and representations made by it throughout the last 9 years, and to obtain declarations from this Court that it cannot proceed, or, alternatively to obtain damages in sufficient time and sufficient amount, in our own capacity, to discharge the alleged debt claimed in bankruptcy."

44. The Martins felt and continue to feel aggrieved that in the letters of 20th April, 2015, NALM sought repayment of the full loan monies notwithstanding the previous years of dealing and cooperation between the parties. They feel particularly aggrieved that their well prepared and extensive proposals, particularly in their letter of 20th March, 2015 have not been properly or fairly assessed. In a letter from Drumgoan (a development company of Patrick and Noel Martin) by Patrick and Noel Martin to Capita Asset Services of 23rd April, 2015, the following encapsulates their view. Under the subheading 'Residual Debt Proposal', they state the following: -

> "It was previously our opinion, on foot of previous discussions with Bank or Ireland, that Bank of Ireland/NAMA did not want to accelerate any residual shortfall, preferring to see this shortfall reduce by virtue of market price recovery. However, if the lenders preference is to sell the entire portfolio then why do we not now attempt to find a buyer. We would happily work with you in this regard but would seek assurances (as implied by Bank of Ireland in the past) in relation to how any shortfall would be handled. We will be forced to rely upon the promises of past officers of Bank of Ireland should constructive engagement and clarity not be provided in advance of proceeding along these lines.
>
> As previously stated, we have managed the properties for NAMA via Bank of Ireland for six years with no possibility of financial gain to ourselves. This was done on the belief that our efforts in maximising the rental income and in turn increasing the asset values leading to the eventual consensual sale of the properties would lead to our fair treatment with regard to the residual debt.
>
> At all times, the overview of the accounts by Bank of Ireland, CBRE and FM Accountants demonstrated that all rents were being remitting to the charge accounts and that no additional income was being generated to go towards capital write-down. Since the appointment of Capita and the aggressive and disinterested tactics employed by you, this well-established relationship has obviously failed to continue, and we would suggest will result in a less good result for NAMA/Bank of Ireland – your employer.
>
> Notwithstanding the above, we are committed to and acknowledge our obligation as debtors and feel the immediate disposal of the properties as a going concern represents the best options to all parties without the appointment of a receiver."

45. The defendant counterclaimants contend that within its counterclaim the pleadings demonstrate that the applicants were led or induced to expend millions of euro in the management, improvement and maintenance on the property (which monies they seek as part of the damages claim) but also that in doing so, they would not be pursued for any residual debts. They seek to restrain NAMA by way of estoppel from breaching those agreements or binding representations.

46. Counsel on behalf of the counterclaimants also submitted that valuable court time would be wasted in not having the counterclaim determined in these proceedings which would in turn result in those matters having to be ventilated before the bankruptcy judge in the adjudication of the Martins as bankrupts within that proceeding. The criteria and adjudication within the bankruptcy process are entirely separate and distinct from the adjudication and criteria to be employed here and must be considered separately.

47. Counsel for the counterclaimants rely upon the decision of Cregan J. in *National Asset Management Limited v. Moloughney & anor*. [2015] IEHC 865 ('*Moloughney*') where the learned judge stated: -

> "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."

48. Unsurprisingly, the interpretation of the statement by Cregan J. in *Moloughney* to the effect that a pleading of estoppel, laches and delay does not require leave as contended for by counsel for the defendant counterclaimants is not accepted by counsel for NALM. NALM's counsel contends that Cregan J. was seeking to distinguish on the facts of that case that certain estoppel claims were being made "directly" against NAMA – as opposed to those estoppel claims being made "indirectly" against NAMA on the basis of alleged representations made by the participating institution (AIB). They further contend that the latter form of claim is precluded by the provisions of s. 101 of the NAMA Act save in limited circumstances, with the former direct claim of estoppel not being caught by s. 101 at all but being within the ambit of s. 182 of the NAMA Act. I agree with that interpretation.

49. In construing s. 182, I can see nothing within the statute which precludes a claim of estoppel, laches or delays from being advanced pursuant to this amended defence and counterclaim.

50. Finlay Geoghegan J. in the case of *Treasury Holdings & ors. v. NAMA & ors*. [2012] IEHC 66 ('*Treasury*') stated at para. 17 of her judgment that: -

> "Section 182 applies to all types of proceedings and is not confined to judicial review."

In my view, that is absolutely clear upon a reading of the section. My interpretation of it is that all types of actions are subject to its terms and I do not accept any suggestion (to the extent that *Moloughney* even makes such a suggestion) that that pleading of estoppel within this counterclaim is in some way precluded from consideration.

51. Within the *Daly* case, Peart J., having set out the criteria for the term "substantial issue", then went on to clarify his views on the issue as follows: -

> "The plaintiffs must at the leave stage be able to *substantiate* what he or she is alleging in order to raise the level of argument from that of mere arguability as would be the threshold under normal Order 84 judicial review rules to that of substantial grounds. Falling short of that level of substance is to leave a ground vulnerable to the charge of lacking weight and being trivial or tenuous. Whether or not an issue is or is not a substantial issue may be affected by also what evidence and argument is put against the plaintiff's arguments by the other side. The weight to be attached to the facts sworn by the plaintiff must be considered by reference to what opposing facts put on affidavit by the defendant. The Court cannot of course on an application of this kind resolve finally any evidential conflicts, but it can and must, it seems to me, consider the facts put in opposition, when reaching a conclusion as to whether or not the plaintiffs have raised an issue or issues of real substance. Without facts of substance, all the legal submissions in the world will be of very limited assistance, no matter how skilfully made."

52. Counsel for the counterclaimants noted that a decision had been made in the circumstances of this case not to amend the defence. I infer from these submissions that, when the counterclaimants acquired legal representation they decided to leave the defence 'as is' in all the circumstances and to seek to plead the reliefs now sought within the counterclaim.

53. The counterclaimants have clearly recorded the representations upon which they rely. The question is whether these are tantamount to raising a substantial issue to in turn ground the estoppel for which they contend. The definition of substantial issue as set out in *Daly* is quoted above.

54. With regard to any form of estoppel, on the facts of this case, there must be a clear an unambiguous assurance which is intended by the defendants (in this case the counterclaimants) to be relied upon and that it is in fact relied upon.

55. The various assurances have been set out above. One of those quoted is Mr. Vincent Carragher and it is noteworthy that he was a party to the management agreements also dealt with above. In addition to the matters quoted above, each management agreement contains the following: -

> "Neither the issue and acceptance of this letter nor any discussions leading to the issue of this letter constitute a waiver or amendment to the terms of (or the rights of any party under) any of the documents or otherwise under any applicable law and all such rights, including the right to enforce any security held by NAMA, are expressly reserved and may be exercised without further notice. Any time, indulgence, delay or failure to take any action by NAMA and/or Bank of Ireland shall constitute any waiver of any contravention of the documents or any waiver of any such rights. For the avoidance of doubt, any facilities to the connection currently in default remain in default."

56. The chronology of matters set out above, particularly with regard to the matters that transpired from early 2015 onwards, being the end of the management agreements and the dispatch of the "end of process" letters and the letters of demand, demonstrate that NALM / NAMA were now beginning a process beginning, what I might call, the "recovery phase" in respect of the Martins' outstanding debt, both individually and as guarantors of Mardon.

57. The representations of Mr. Stephen McHugh have been dealt with by his affidavit sworn in these proceedings. As set out above, I am far from satisfied that even if the representations were made as contended for by Patrick and Noel Martin, in and of themselves creates any estoppel.

58. By analogy, counsel for the plaintiff argues that in cases involving the defence to summary judgment claims that the Martins would not even reach what is a lower threshold of arguability in respect of those matters let alone demonstrating a substantial issue for the purposes of s. 182.

59. In *NALM v. Breslin* [2017] IECA 283 ('*Breslin*'), in a defence to a claim for summary judgment, the defendant claimed he was induced into guarantees on foot of representations made by Mr. Feeney, a director of the original lender, Anglo Irish Bank. After quoting the express provisions within the guarantee documentation, the Court of Appeal stated: -

> "Insofar as the appellant relies on direct quotations attributed to Fergal Feeney same are vague, indistinct and incapable of displacing the express language of Clause 22.6 of the guarantee and indemnity duly executed by the appellant. The language in Clause 22.6 is clear and unambiguous. The instrument was not ultimately executed by the appellant until 5th

> November, 2008. He accordingly had ample opportunity to consider the guarantee and indemnity instrument. It was open to him to amend or vary the clause if it did not reflect the concluded agreement he now asserts he had reached with Anglo. There is no evidence to support this claim beyond the bare assertion of the appellant. It is not consistent with any contemporaneous documentation. The appellant has put forward no credible basis for this contention. It is wholly inconsistent with Clause 22.6 aforementioned."

60. In *Promontoria v. Mallon & anor.* [2018] IEHC 145, McGovern J. stated: -

> "Estoppel by representation requires evidence that a party by his words or conduct made a clear and unequivocal promise or assurance which is intended to affect the legal relations between him and the other party or as reasonably understood by the other party to have that effect. Such representation should be freely given."

61. Counsel for the plaintiff also make to the point that no argument of this type was raised when the end of process letters and letters of demand were forwarded in April 2015.

62. In my view, one has to have some regard to the fact that these defendants (for whatever reason) had, as submitted by their counsel, formerly relied upon the advices of the third named defendant to the second set of proceedings and had not themselves obtained legal representation until October 2017. I have had regard to this fact in respect of their overall submissions.

63. In the case of *Ulster Bank v. Deane* [2012] IEHC 248 (*'Deane'*), McGovern J., in dealing with an argument based upon the assertion of a collateral or side agreement reached between the parties, stated the following: -

> "The defendants make much of the fact that they were assured that the Bank only expected payment out of the proceeds of sale of dwellings which were being constructed by the defendants' company…. The defendants understood that this was a long-term relationship…. I am quite satisfied that this was the understanding of the parties when they entered into the agreement, but there is nothing to suggest that such an understanding had acquired the status of a legal obligation. It was merely aspirational. The monies were lent on the basis of facility letters which were clear on their face…."

64. Of course, in making an argument based upon estoppel, the courts have long accepted that documentary evidence may not be required. That point was discussed by Costello J. (quoting *Doran v. Thompson* [1978] IR 223) when in *Tyrell v. Wright* [2017] IEHC 92, she stated: -

> "The [defendant] has not identified a clear and unambiguous promise or assurance made by the representatives of Pepper to him. He has not identified that the discussions and understandings he refers to were intended to affect the legal relationships between Launceston and the first named defendant. It is of course true that documentary evidence is not required to support a case for promissory estoppel however, it is significant that none of the documentation from 2016 adverts to or supports the promise or representation contended by the first named defendant. Furthermore, some of this documentation emanates from the first named defendant's own solicitors and is indeed inconsistent with the case he now advances. It does not raise the issue of an estoppel."

65. It is clear that the Martins considered, following their meeting in October 2015 when significant documentary material and proposals was sought to deal with the outstanding indebtedness, that this meant that discussions were ongoing. Counsel for the counterclaimants contend that a considerable degree of time, effort and energy was expended in submitting this documentation to NALM and I accept this. The counterclaimants, therefore, feel very strongly that NALM were, at the same time as considering the documentation submitted (and the counterclaimants are far from certain that this was the case) were thereafter intent upon seeking recovery of the outstanding indebtedness. However, it is not unusual for these matters to proceed upon parallel lines; one seeing the extent to which matters might be resolved, the other pursuing what I have described as the recovery process.

66. The plaintiff contends that in respect of the entirety of matters ventilated within the counterclaim that this may necessitate an application that these matters be determined separately. That is not a matter for this Court.

Conclusion

67. In my view, the provisions of s. 181 do not apply to the counterclaimants for the reasons set out above. Therefore, they are required, pursuant to s. 182(2), to seek an order of this Court in relation to those portions of their counterclaim to which the provisions of s. 182(1) do not apply.

68. Paragraphs 7, 8, 9 and 10 of the defendants' counterclaim come within the purview of s. 182(2) as claims not giving rise only to a remedy in damages.

69. The criteria for leave are assessed pursuant to s. 182(4) and in that assessment I am required to initially consider whether a substantial issue for the court's determination has been raised.

70. In dealing with that question, the counterclaimants claim that the matters giving rise to their pleadings raise substantial issues against the party they seek to join, namely, NALM. It is noteworthy that the majority of the reliefs that they seek within that portion of the counterclaim I am considering are directed against a party whom they are also joining pursuant to that pleading.

71. The documentation passing between the parties has been set out in full. The assurances and representations relied upon, both oral and written, have likewise been properly set out. Undoubtedly over time the parties discussed the issues outstanding between them; one of those issues was the issue of the residual indebtedness. In considering the affidavits, draft pleading and the written and oral submissions I can discern no argument that reaches the threshold criteria of substantial issue as to any alleged breach of contract by NALM in enforcing its security or its entitlement to appoint the plaintiff receiver. None of the written documentation establishes any basis in contract for the issues raised by the counterclaimants.

72. Neither can I discern any promise or assurance such as would ground as estoppel as contended for by the counterclaimants (not to pursue the residuary debt) which reaches or satisfies the criteria of reasonable, arguable or weighty as Daly defines 'substantial issue.'

73. I cannot discern any estoppel being raised to meet the threshold criteria of a substantial issue on the basis of any of the representations or assurances made; obviously to raise the estoppel one does not begin with the counterclaimants beliefs as to the substance of any assurance or representation made, but to the actual assurances or representations themselves. In my view none

amounts to raising a substantial issue as defined within *Daly*. None comprises any assurance or representation that NALM would not pursue any residuary debt ultimately owing in respect of the various facilities. In my view none of the assurances or representations constitute a form of legal obligation as required by McGovern J in Deane. As set out above none of the documentation supports the contentions relied upon by the counterclaimants and I can see no other representation, written or oral, which displaces those documents as required by the Court of Appeal in *Breslin*.

74. As the proceedings were not brought within the 30-day period I am also satisfied that there were no substantial reasons why the application was not made within that period and in my view, there is no just and equitable criteria advanced to grant leave having regard to the interests of any affected persons.

75. In that regard, in considering the phrase "good reason" (a lesser standard than "substantial reason"), the Supreme Court, in the case of *Dekra Éireann Teoranta v. Minister for the Environment* [2003] 2 IR 270, adopted the good reason standard enunciated by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] IRLM 301 as follows: -

> "The phrase "good reasons" is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show… is that there are reasons which both explain the delay and afford a justifiable excuse for the delay."

76. I have already noted that these counterclaimants were without legal representation for a considerable period. Whilst I have regard to this, in my view that is not in and of itself sufficient to amount to a 'substantial reason.' The chronology of events discloses, in my view, that NALM were contemplating what I have described as the recovery process from at least April 2015, specifically when the letters of demand and end of process letters issued. These present proceedings arise from alleged actions taken by Patrick and Noel Martin (and Mr. Gilroy) after the appointment of the receiver. The grounds upon which the relevant portions of this counterclaim were advanced existed well before these proceedings were even issued. For this reason, in my view no substantial reason has been advanced.

77. Whilst I have primarily considered the criteria within s. 182(4) of the NAMA Act, I have also considered whether damages constitute an adequate remedy on the fact of this case in accordance with s. 182(6). The counterclaimants point to the penal nature of a bankruptcy adjudication and they are correct. However, what I have to consider is whether, on the basis of the matter pleaded within the relevant portion of the counterclaim (not its implications elsewhere), damages constitute an adequate remedy. The bulk of the counterclaim is a claim for damages and I am satisfied that the matters coming within s.182 (2) of the NAMA Act would be properly also be met with an award of damages.

78. On the matters pleaded within their counterclaim, the documentation exhibited to the affidavits and the arguments advanced within them, together with the written and oral submissions before this Court, I am not satisfied that a substantial issue has been raised by the counterclaimants within the matters pleaded in paras. 7, 8, 9 and 10 of their counterclaim, such as would be sufficient for them to be entitled for leave pursuant to s. 182 of the NAMA Act 2009. Moreover, in my view there is no basis for reliefs to be granted within s. 182 (4)(b). Whilst I have based my judgment upon the criteria advanced within s. 182(4), I am also satisfied that damages would constitute an adequate remedy pursuant to s. 182(6) of the NAMA Act.

79. I shall hear the parties as to any subsequent orders and reliefs required.