THE HIGH COURT

[2015 No. 404 S.]

BETWEEN

NATIONAL ASSET LOAN MANAGEMENT DAC

PLAINTIFF

AND

MICHAEL BRESLIN

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 26th day of May, 2017.

1. The plaintiff ("NALM") seeks summary judgment against the defendant in the sum of STG£9,048,360.41 with interest. The monies are claimed on foot of a guarantee in writing dated 2008 whereby the defendant expressly agreed as principal obligor, unconditionally and irrevocably, to pay and guarantee payment on written demand of all monies whatsoever, whether principle, interest or otherwise, which were then or, at any later date became, due and owing to Anglo Irish Bank Corporation plc. ("Anglo") by Car Park Solutions Ltd. ("the company").

2. In August and September 2007, Anglo made available two loan facilities to the company in the combined maximum amount of STG£21,400,000. These were short term loan facilities. The first facility ("facility 1") was made available on 31st August, 2007, in the maximum amount of STG£19,400,000 and was repayable on or before 31st March, 2008. The second facility ("facility 2") was made available on 13th September, 2007, in the maximum amount of STG£2,000,000 and was repayable within one month from drawdown (which was to occur in full by 30th September, 2007).

3. The facilities were not repaid by the due date. Following negotiations between Anglo and the company on 25th September, 2008, Anglo agreed to amend the terms of the facilities and certain conditions of the loan. NALM claims that, in consideration for extending the repayment date in respect of facility 1 from 31st March, 2008, to 31st March, 2009, Anglo required additional security in the form of "composite joint and several guarantees of Barry Breslin, Francis Smith and Michael Breslin". Similarly, the plaintiff claims that, in consideration for extending the repayment date in respect of facility 2 from one month from drawdown to 31st March, 2009, Anglo required additional security in the form of "composite joint and several guarantees of Barry Breslin, Francis Smith and Michael Breslin".

4. On 5th November, 2008, the defendant signed letters dated 25th September, 2008, in which he:-

> (i) acknowledged that he had read the said letters and Anglo's general conditions (which he acknowledged formed part of the agreement);
>
> (ii) confirmed that he fully understood the terms of the loan agreement;
>
> (iii) acknowledged that he was guaranteeing the performance by the company of its obligations under the loan agreement to Anglo; and,
>
> (iv) acknowledged that he had been given due opportunity to take independent legal advice on the effects of the loan agreement.

5. On an unspecified date in or around October 2008, the defendant executed a guarantee and indemnity ("the guarantee and indemnity") referred to at para. 1 above.

6. The facilities were not repaid by the extended repayment date. On 18th August, 2009, and again on 26th August, 2009, Anglo demanded repayment from the company of the monies then due and owing under the facility. While some assets were realised to reduce the company's indebtedness, a significant sum remained unpaid under the facilities. That is the sum claimed in these proceedings.

7. On 13th December, 2010, the facilities and related security (including the guarantee and indemnity) were acquired by NALM pursuant to the provisions of the National Asset Management Agency Act 2009 ("the NAMA Act").

8. On 18th February, 2015, NALM wrote to the defendant demanding repayment of the sum of STG£9,048,360.01 under the guarantee and indemnity, that being the sum then due and owing under the facilities. It is not in dispute that the defendant has not discharged that sum or any part thereof.

The Test on an Application for Summary Judgment

9. There was no disagreement between the parties as to the test applicable for summary judgment. These principles are to be found in a number of decisions which were drawn together in the judgment of McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 at pp. 7 – 8. I do not propose to set out those principles as they are well known.

10. In *McGrath v. O'Driscoll* [2007] 1 I.L.R.M. 203 at p. 210, Clarke J. stated:-

> "So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved.

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."

11. In this case, the defendant raises a number of defences to the claim for summary judgment (which are set out at para 16-20

below) and argues that the court should remit the matter to plenary hearing.

The NAMA Act 2009
12. In view of the issues raised by the defendant, there are a number of specific provisions of the NAMA Act which are relevant to this application.

13. Section 101 of the NAMA Act provides as follows:-

> "(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)."

14. Section 108 of the NAMA Act provides as follows:-

> "(1) NAMA or a NAMA group entity may certify under its seal or common seal, as the case requires, that NAMA or the NAMA group entity holds a bank asset specified in the certificate.
>
> (2) A document purporting to be a certificate issued in accordance with subsection (1)—
>
> (a) shall be taken to be such a certificate, and to have been certified under the seal of NAMA or the NAMA group entity, as the case may be, unless the contrary is proved, and
>
> (b) is conclusive as to the matters set out in it."

15. Section 190 of the NAMA Act provides as follows:-

> "In any proceedings for the recovery by NAMA or a NAMA group entity of money, a certificate in writing under the seal of NAMA or the common seal of the NAMA group entity that a specified sum of money was owing to NAMA or the NAMA group entity at the date of the certificate by a specified person on a specified account is, at any time within one month after the date of the certificate, evidence that the sum specified in the certificate is and remains owing to NAMA or the NAMA group entity by the person and on the account specified in the certificate."

Grounds of Defence Advanced by Defendant
16. The defendant advances a number of grounds of defence which he says are sufficient to warrant the action being remitted for plenary hearing. The first ground is based on an allegation that, at a meeting on 24th October, 2008, Mr. Fergal Feeney of Anglo expressly assured the defendant that, if he executed the guarantee and indemnity, Anglo would provide construction finance for what was known as "the Waterloo Road Project" in London.

17. The defendant further alleges that he had already obtained a full release and discharge from any obligations created by the guarantee or indemnity arising out of a meeting at the offices of IBRC on St. Stephen's Green on 7th March, 2012, between Mr. Dennis McDwyer, Solicitor, acting on behalf of the defendant and his wife, and Ms. Helen Rooney and Ms. Aisling Young acting on behalf of IBRC.

18. The third ground of defence is that the defendant asserts that NALM has not provided evidence of having acquired the guarantee and indemnity.

19. The fourth ground raised is that on 15th February, 2008, Anglo provided two floating charges over all of its assets in favour of the then Central Bank and Financial Services Authority of Ireland and that these floating charges included a negative pledge clause that

as of the date of transfer of the facilities and the guarantee and indemnity to NALM on 13th December, 2010, the negative pledge clause prevented the assets from being transferred to NAMA.

20. Finally, the plaintiff asserts that if he is precluded from raising the representation point by virtue of s. 101 of the NAMA Act, he wishes to challenge the constitutionality of that section.

Matters not in Dispute
21. The following matters are not in dispute:-

> (i) Anglo advanced the sum of STG£21,400,000 to the company;
>
> (ii) in October 2008, the defendant executed the guarantee and indemnity whereby he agreed to guarantee the debts of the company to Anglo;
>
> (iii) the defendant does not dispute the terms of the guarantee and indemnity;
>
> (iv) the company failed to repay on demand the sums due and owing to Anglo;
>
> (v) the defendant received the letter of demand from NALM;
>
> (vi) the defendant does not dispute the sums claimed by NALM on foot of the guarantee and indemnity; and,
>
> (vii) the defendant has not repaid all or any of the sums demanded of him.

22. The defendant has raised the defences already indicated in this judgment and argues that the matter should proceed to plenary hearing. In extensive written submissions (going well beyond the limit allowed for by Practice Direction HC68 by some 5,567 words without the leave of the court) the defendant has sought to raise many issues which he says are complex and neither simple, relatively straightforward or easily determinable.

23. The raising of complex arguments in answer to an application for summary judgment will not avail a defendant unless those arguments address the basis of the claim and provide an arguable defence to the claim as pleaded. Just as mere assertions, without proof, do not afford a defence to a claim for summary judgment, neither will the raising of complex issues of fact or law afford a defence unless they are referable to the claim made and raise issues suitable to be determined by plenary hearing having regard to the jurisprudence to be found in *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75; *Harrisrange v. Duncan* [2003] 4 I.R. 1; *McGrath v. O'Driscoll* [2007] 1 I.L.R.M. 203; and other related jurisprudence referred to in those decisions.

The Guarantee
24. The starting point for any assessment of the plaintiff's claim to summary judgment must be the guarantee which was signed by the defendant. Paragraph 22.6 of the guarantee states:-

> "The Guarantors by this Deed acknowledge that they have not relied on any warranty or representation made by or on behalf of the Bank to induce them to enter into this Deed and that they have made and will continue to make without reliance on the Bank their own independent investigation of the financial condition and affairs of the borrower and assessment of the credit worthiness of the borrower and the Guarantors further acknowledge that the Bank has no duty or responsibility either now or in the future to provide them with any information relating to the financial condition and other affairs of the borrower."

25. On the signature page, the following clause appears:-

> "IMPORTANT
>
> The Guarantor by this Deed confirms that:
>
> (a) he is fully aware of the nature of this Deed, the effect of which has been explained to and understood by him;
>
> (b) he has been advised to take and has been given due opportunity to take separate independent legal advice on the effect of this Deed;
>
> (c) he has taken/has declined the opportunity of taking such legal advice;
>
> (d) he is now willing to be legally bound by the terms of this Deed;
>
> (e) he has received a copy of this Deed."

26. There is no ambiguity in the text of these clauses. In *ACC Bank plc. v. Kelly* [2011] IEHC 7 Clarke J. made the following observations in relation to the terms of a loan which were expressed in unequivocal and clear terms, at para. 7.3:-

> "I am not satisfied that any person taking the trouble to read the clause in question could have any difficulty in understanding what it meant. Even if someone had such difficulty then it is encumbent on such a person to take advice. It must be remembered that these are not consumer transactions. The Kellys were involved in quite a significant business and had borrowings in excess of €7m. This was, therefore, a commercial banking transaction. Many people in such circumstances do take professional advice whether from accountants or lawyers. There is no obligation, of course, so to do. But someone who signs commercial banking documents without taking advice on them runs a risk which they must accept. They will be bound by the terms which they sign up to."

I accept these observations as a correct statement of the law in this jurisdiction.

27. In *McCaughey v. Anglo Irish Bank Corp. Ltd.* [2012] 4 I.R. 417, Birmingham J. said at 449:-

> "The validity and effectiveness of provisions similar to those contained in the commitment agreement have been

considered in a number of recent decisions, and in particular were the subject of detailed consideration by the Court of Appeal in the case of *Springwell Navigation Corporation v. J. P. Morgan Chase Bank* [2010] EWCA Civ 1221, (Unreported, Court of Appeal of England and Wales, 1st November, 2010), a case where an investor in derivatives of Russian federation bonds known as GKOs (an acronym for their full Russian name) had made representations to the effect that he had not relied on any representations and also accepted that other parties to the transactions had not made any representations or warranties with respect of the advisability of investing."

28. At 450 he stated:-

> "I have concluded that the effect of the provisions of the commitment agreement is that the plaintiff is precluded from pursuing claims other than those based on fraud. Insofar as the plaintiff has formulated a claim in tort, under various heads of claim, it must be recognised that this is a case where the parties have ordered their relationship on the basis of detailed, precise and elaborate contractual provisions. The effect of this is that the defendant's obligations in tort cannot be more extensive than what the parties have by contract determined should be the position. This much is clear from the judgment of the Supreme Court in *Kennedy v. Allied Irish Banks plc.* [1998] 2 I.R. 48."

29. These findings were upheld on appeal by the Supreme Court and I apply them in deciding the issues that arise on this motion.

30. The facilities and the security (including the guarantee) were acquired by NALM on 13th December, 2010. From that time on, the obligations of the defendant were owed to NALM and not Anglo or the Irish Bank Resolution Corporation ("IBRC"). As a matter of law, Anglo/IBRC had no rights in relation to the guarantee after 13th December, 2010. By letter of 19th October, 2011, both the defendant and his solicitor were told that the guarantee was now owned by NALM and in an affidavit sworn on 1st March, 2017, the defendant's solicitor says that he brought this matter to the attention of the defendant. On 7th July, 2016, Mr. Conor Cooke of NAMA swore an affidavit in which he exhibited a s. 108 certificate dated 24th June, 2015. The certificate reads as follows:-

> "This certificate is given pursuant to s. 108 of the Act. Terms used in this certificate will bear the same meaning as in the Act unless the context otherwise so admits or requires.
>
> Pursuant to s. 108 of the Act, National Asset Loan Management Limited (a NAMA group entity under the Act) hereby certifies that the bank assets (as defined in the Act) arising from the credit facilities by Anglo Irish Bank plc. ('Anglo') to Car Park Solutions Limited dated 31st August, 2007, 13th of September, 2007, as amended by two supplemental agreements dated 25th September, 2008 for a total amount of £21,400,000 (GBP) (and which include the credit facilities any security relating to such credit facilities, every other right arising directly or indirectly in connection with such credit facilities, every other asset owned by a participating institution, and any other interest in the bank assets) have transferred to it on 13th December, 2010, in accordance with Part 6 of the Act and that accordingly, that the assets are held by National Asset Loan Management Limited as at the date hereof."

31. That certificate is conclusive as to the matters set out in it and the court cannot look behind it. That was made absolutely clear in the judgment of Kelly J. (as he then was) in *NALM v. Cullen* [2013] IEHC 121 (see para. 37 – 39). It follows that the defendant cannot assert as a ground of defence that NALM has not provided evidence of having acquired the guarantee and indemnity and any attempt to do so is bound to fail.

32. The plaintiff's claim that he relied on a representation made by Mr. Fergal Feeney of Anglo on 24th October, 2008, does not stand scrutiny for a number of reasons. In the first place, it is inherently implausible. There is no record of such a representation and the first time it was ever raised was in the defendant's affidavit sworn on 1st March, 2017, when he describes same as a pivotal factor in his decision to sign the guarantee. For eight and a half years he never made this point. Furthermore, he is estopped from making that argument on the basis of the guarantee which he signed and in which he acknowledged that he had not relied on any warranty or representation made by or on behalf of the bank to induce him to enter into the guarantee. (See, clause 22.6)

33. Moreover, even if such a representation had been made it would not bind NAMA, in any event, by virtue of s. 101 of the NAMA Act. It follows that any defence based on alleged representation of Mr. Fergal Feeney on 24th October, 2008, to the within claim cannot succeed.

34. Insofar as the defendant contends that he has already obtained a full release and discharged from any obligations under the guarantee based on a meeting at the offices of IBRC on 7th March, 2012, this cannot afford him a defence to these proceedings. In his first affidavit sworn on 30th July, 2015, the defendant described the agreement in the following terms when he said he had:-

> "obtained a full release and discharge of all any of [sic] obligations created by (the Guarantee)…my wife and I obtained an agreement that had the effect of releasing me from (the Guarantee), which arose from a meeting at IBRC's registered office on St. Stephen's Green on 7 March 2012 between Dennis McDwyer, Solicitor, acting on our behalf, and Helen Rooney and Aisling Young, acting on behalf of IBRC."

But those negotiations related to joint borrowings of the defendant and his wife with Anglo which was secured by way of mortgage over what was known as the "Dunsany property". NALM did not acquire any interest in that property mortgage or related loan and it has no relevance to these proceedings.

35. The guarantee and indemnity was acquired by NALM on 13th December, 2010, and from that time on the obligations owed by the defendant on foot of the guarantee and indemnity were owed to NALM and not to Anglo or IBRC. At no time did NALM agree to release the defendant from his obligations under the guarantee and indemnity. Mr. Kevin Bradley of NAMA has sworn an affidavit in which he stated that NALM "did not direct, supervise, authorise, or even know about the purported agreement said to have been entered into as between the special liquidators of IBRC and Mr. Breslin and his wife (either directly, indirectly or in any other way)". (See para. 13 of his affidavit sworn 23rd October, 2015). The defendant issued separate proceedings against IBRC to enforce what he claims was an agreement made to redeem the mortgage in respect of the Dunsany property and did not joint NALM in those proceedings even though they were issued some time after he knew that the facilities and guarantee and indemnity had been acquired by NALM.

36. The defence raised on the ground that on 15th February, 2008, Anglo provided two floating charges over all of its assets in favour of the Central Bank and Financial Services Authority of Ireland cannot provide an answer to the plaintiff's claim. The defendant maintains that the floating charges included a negative pledge clause with the result that, as of the date of transfer of the facilities and the guarantee to NALM on 13th December, 2010, the negative pledge clause would have prevented the assets from being transferred to NAMA. In his submissions, the defendant states:-

> "The plaintiff's response was a legal (not a factual one). Accordingly, the affidavit evidence on behalf of the defendant in relation to the existence of a negative pledge clause is uncontradicted."

37. In so far as it is suggested that this provides an answer to the claim or raises an issue that can only be resolved at a plenary hearing I reject that argument. An application for summary judgment is concerned with establishing whether a defendant has an arguable defence which may involve consideration of issues of fact and of law. While the court may look at facts with a view to establishing whether they are plausible and establish an arguable defence, the court may also look at such legal issues as are relevant and which may establish that the defendant could have no arguable defence based on the legal principles applicable to the facts. While it is true that the plaintiff does not challenge the facts surrounding the floating charges, the plaintiff asserts a number of legal bases as to why this argument does not raise an arguable defence. In the first place, the plaintiff claims that the defendant is out of time for challenging the validity of the acquisition of the facilities and the guarantee and indemnity by NALM. The information relating to the floating charges was available to the defendant within the statutory period for challenging the acquisition of the relevant assets by NALM either pursuant to s. 182 (30 days) or s. 193 (one month). Furthermore, the defendant asserts that the s. 108 certificate remains conclusive evidence of the fact of acquisition and the defendant cannot look behind this. Even if the floating charge did contain a negative pledge clause which operated to restrain Anglo from transferring the facilities and the guarantee and indemnity to NALM, that transfer would be voidable at the election of the party to whom the floating charge was granted, namely the successor to the Central Bank and Financial Services Authority of Ireland. Finally, the plaintiff argues that even if the floating charge contained such a negative pledge clause, the statutory provisions of the NAMA Act operate to supersede any such contractual restrictions.

38. I accept those submissions and in particular the reliance on the s. 108 certificate which is conclusive and provides an absolute answer to the defence raised on the floating charge.

39. The further matter that arises for consideration is whether the defendant can raise a purported challenge to the constitutionality of certain provisions of the NAMA Act as a defence to this summary judgment application. The Act contains very strict time limits for challenging any decision of NAMA or a NAMA group entity including the acquisition of assets. There is a presumption of constitutionality in respect of the NAMA Act and if there is a challenge to the legislation is must be done either by judicial review or in appropriate circumstances by plenary proceedings and in either event is subject to the time limits set out in the Act. In the case of *National Asset Loan Management Ltd. v. Barden* [2013] 2 I.R. 28 Charleton J. stated, at 45:-

> "Despite it being generally possible to enforce public law rights through a plenary summons within the appropriate time limits, or again within the appropriate time limits through a counterclaim, it seems to me that s.193 has excluded that alternative procedure. No challenge to an action of the plaintiff by way of a public law remedy of *certiorari* or *mandamus* is possible except on the two conditions that are clearly laid out in that section. Firstly, an application for judicial review must be brought within a month of the relevant decision. Secondly, it is implicit that such an application must be brought to the High Court, a conclusion made explicit by the requirements that the judge hearing the application should not give leave to commence proceedings unless an applicant has 'a substantial issue for the Court's determination'. It would be easier to conclude that a plenary action is an alternative that is open to a party aggrieved by an administrative decision, where no limit is set on the discretion of the court hearing an application for leave to commence judicial review. The reality is, however, that unless the High Court decides that the case is substantial, no action by way of judicial review is mandated. Further, such a decision cannot be made by counsel signing a plenary summons. That is not their function under the Act of 2009 as it is expressly reserved to the High Court….The requirement that the High Court come to the conclusion that an application should be founded on a substantial issue before leave to commence judicial review proceedings is granted renders the alternative of a plenary proceeding incompatible with the intention of the Oireachtas."

40. At 46 Charleton J. noted that the NAMA Act was commenced in the public interest and in circumstances of a national emergency and it may be inferred that the intention of the Oireachtas was for reasonable certainty surrounding the property transactions of NAMA. He added:-

> "Such acquisitions are not made subject to the ordinary rules under the Statute of Limitations 1957, as amended. Instead, both as to claims for damages and public law challenges which would upset the transfer of assets to a responsible public body set up to reintroduce calm and certainty into the fractured economy, the legislature has required that any perceived wrongs should be litigated within clear time limits and under stringent conditions as to the commencement of judicial review. The courts are required to uphold that statutory intention through ruling out claims that have been brought outside the deliberately short time limits where no good reason is shown to offer indulgence."

41. It is clear that the defendant has known since 19th October, 2011, that the guarantee was owned by NALM and he has only now purported to raise a challenge to the constitutionality of the Act more than five years later.

42. I am satisfied that in *National Asset Loan Management v. Barden*, Charleton J. made it clear that the strict time limits in the NAMA Act applied to challenges to the legislation for the reasons I have already referred to and that the appropriate method of challenge is by way of judicial review or, in appropriate circumstances, by plenary summons. In *Dellway Investments Ltd. v. NAMA* [2011] 4 I.R. 1 the constitutional challenge to certain sections of the NAMA Act was initiated by means of the judicial review procedure.

43. The Defendant's purported constitutional challenge to the NAMA Act is principally based on s. 101. In so far as this relates to representations he is estopped by virtue of para. 22.6 of the guarantee from maintaining such a claim. In any event he is outside the time limit for challenging the provisions of the Act and has offered no explanation for his delay in raising this point.

Decision

44. In lengthy written and oral submissions to the court and in the raising of multiple issues on affidavit, the defendant has sought to persuade the court that there are issues which are not relatively straightforward and are not easily determinable in this summary procedure thereby purporting to satisfy the test for the remittal of these proceedings to plenary hearing. But in reality the defendant has failed to raise an arguable defence to the plaintiff's claim that he is liable on foot of the guarantee. I reach that conclusion having regard to the clear and unambiguous terms of the guarantee which were accepted by the defendant and also having regard to those provisions of the NAMA Act to which I have referred earlier in this judgment and which establish the transfer of the relevant loan and security documents to NALM. I have applied the test set out in *Harrisrange v. Duncan* and *McGrath v. O'Driscoll* and have reached this decision after exercising the discernible caution required in a motion for summary judgment. I am satisfied that the defendant has no answer to the plaintiff's claim and that the plaintiff is entitled to summary judgment.