Neutral Citation Number: [2009] IEHC 568

THE HIGH COURT

COMMERCIAL

2009 4379 S

BETWEEN

RINGSEND PROPERTY LIMITED

PLAINTIFF

AND

DONATEX LIMITED AND BERNARD MCNAMARA

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 18th day of December, 2009

Background

This case was spawned by the purchase for in excess of €410,000,000 of the Irish Glass Bottle plant in Ringsend, Dublin 4. Those premises, which were owned by a company called South Wharf Plc, were bought by a consortium consisting of the Dublin Docklands Development Authority (DDDA), the second defendant (Mr. McNamara) and Derek Quinlan.

The purchase was effected by a company called Becbay Limited (Becbay) buying the entire share capital of South Wharf Plc. The plaintiff tells me that the purchase took this form in order to avoid paying the stamp duty which would have been exigible on a straightforward sale of land.

Each of the members of the consortium holds part of the share capital of Becbay. Mr. McNamara holds 41% of its capital through the first defendant which is his company. Mempal Limited representing the Quinlan interest holds 33% of Becbay. DDDA holds the remaining 26% of Becbay.

In order to finance Mr. McNamara's share of the equity contribution to the purchase of the Ringsend plant the first defendant issued loan stock. That loan stock offered the prospect of a very good return to investors. There was to be 14% annual interest and a 3% redemption premium payable to them.

Davy Stockbrokers were retained for the purpose of marketing the investment proposal. Davy did so by the use, *inter alia*, of an information memorandum dated November 2006. That document spoke about the transaction offering "*the opportunity of participating with one of the most prolific and successful developers in the country in the development of the largest and most high profile property to become available in Dublin 4 for decades*".

The information memorandum made it clear that no planning permission was in existence in respect of the proposed development. The memorandum said that the DDDA had "*confirmed that they will seek to have Section 25 of the Planning Acts applied to the site. If successful, this means that the development of the site will be an exempt development for the purposes of the Planning Acts*".

The information memorandum also made it clear that neither the information contained in it nor the fact of its distribution were to form the basis of any contract.

The terms on which investors subscribed for the loan stock are contained in an agreement of 29th January, 2007. It is called a "*Loan Stock Instrument constituting €62,550,000, 14% secured redeemable loan stock*" (the loan stock instrument). Under it, the investors subscribed for a total of €62,550,000 in loan stock of the first defendant.

The stock issued by the first defendant was held by Davy Property Holdings Limited as trustee and agent of the stockholders. By a transfer agreement of 18th September, 2008, the loan stock was transferred from that company to Davy Estates Limited. By loan stock transfer agreement of 27th March, 2009, the loan stock was transferred from Davy Estates Limited to the plaintiff which is a company registered in Jersey. The transfer of the loan stock to the plaintiff was registered by the first defendant on 24th July, 2009 and a loan stock certificate was issued by the first defendant to the plaintiff in the plaintiff's name on 24th July, 2009. It follows that the plaintiff acts as security trustee, trustee and agent of the stockholders and holds the stock on their behalf. Furthermore, the first defendant is entitled to communicate with the plaintiff and deal solely with it in relation to that defendant's obligations under the loan stock instrument.

It was envisaged that the investment would have a lifetime of seven years. But the loan stock instrument provided for the stock becoming immediately redeemable in certain circumstances resulting in accelerated repayment to the investors. It is that provision of the loan stock instrument which is pertinent to this application for summary judgment.

Accelerated Repayment

Clause 5 of the loan stock instrument is headed "*Accelerated Repayment*". Clause 5.1 is headed "*Immediate Payment*". It provides that the issued stock "*shall become immediately redeemable on the happening at anytime of any of the following events*". It then sets out a whole series of events which trigger the immediate redeeming of the stock. Only one of these events is relevant for the purposes of this application. It is contained in clause 5.1.19 (i).

Clause 5.1.19 (i) provided "*If, Becbay shall not have applied for all necessary Section 25 certificates from DDDA or*

alternatively received any planning permission required from Dublin City Council for the commencement of the development within 30 months of the date of this deed" then the issued stock became immediately redeemable.

It is common case that Becbay has not applied for Section 25 certificates from DDDA nor has it received any planning permission from Dublin City Council. As more than 30 months have elapsed since the date of the loan stock instrument (29th January, 2007) the plaintiff contends that it is entitled to have the loan stock redeemed and be paid €98,145,905.

Mr. McNamara

Mr. McNamara provided a personal guarantee in respect of the principal advanced by the plaintiff to the first defendant. It was always envisaged that he would do so and that fact was mentioned in the information memorandum issued by Davy. The memorandum did, of course, point out that at the time of its issue whilst Mr. McNamara was understood to have "*significant net worth there was no guarantee that that would be the case should the guarantee ever be called upon*".

Mr. McNamara accepts that he executed the guarantee on 29th January, 2007 and that in the event of judgment being entered in favour of the plaintiff against the first defendant, he has no defence to judgment being entered against him on foot of his guarantee. The amount involved in his case is €62,550,000. Originally he was sued for the same sum as the first defendant but it is accepted that he has no liability for interest. I give leave to amend the summons to reflect this.

Summary Judgment

Two decisions of the Supreme Court deal with the principles to be applied on an application for summary judgment such as this.

The first is the decision in *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75. There Murphy J. said as follows:-

> *"For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action… In my view the test to be applied is that laid down in Banque de Paris v. de Naray [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in National Westminster Bank Plc v. Daniel [1993] 1 W.L.R. 1453. The principle laid down in the Banque de Paris case is summarised in the headnote thereto in the following terms:-*
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> > *'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence.'*
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> *In the National Westminster Bank case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-*
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> > *'I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?' The test posed by Lloyd L.J. in the Standard Chartered Bank case, 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.'"*

In *Aer Rianta Cpt v. Ryanair Limited* [2001] 4 I.R. 607, McGuinness J. in the Supreme Court endorsed the test laid down in *First National Commercial Bank Plc v. Anglin*. She said:-

> *"Thus it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr. O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or bona fide defence… The court does not ask whether Mr. O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr. Byrne's account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible."*

Hardiman J. delivered a concurring judgment, in which he said the following:-

> *"I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the late nineteenth and early twentieth centuries. The formulation used in First National Commercial Bank plc. v. Anglin [1996] 1 I.R. 75 and the cases cited in that judgment are useful and enlightening expressions of the test, but I do not believe that this formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. The 'fair and reasonable probability of the defendants having a real or bona fide defence', is not the same thing as a defence which will probably succeed, or even a defence whose success is not improbable."*

He went on to say:-

> *"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?"*

These are the questions which I must pose to myself in considering this application for summary judgment.

I have also derived assistance from the judgment of Charleton J. in *Danske Bank v. Durkan New Homes and Others* [2009] IEHC 278, and in particular, his comments at paras. 15 through 17 on the summary judgment jurisdiction of this Court and its appropriateness in cases where legal issues arise which do not necessitate a plenary hearing.

Clause 5.1.19

The loan stock instrument contains twelve major headings, many of which are subdivided into multiple subheadings. It was prepared by solicitors with much experience in commercial and corporate law. The terms in which clause 5.1.19 are framed

are highly relevant.

The clause is wholly unconditional. It provides for immediate repayment of the investor's money if the Section 25 certificate has not been applied for or, alternatively, planning permission has not been obtained from Dublin City Council within 30 months of 29th January, 2007. The defendants accept that as a matter of fact the Section 25 certificate has not been applied for nor has a planning permission been received from Dublin City Council. Nonetheless they contend that they have shown an arguable defence sufficient to resist this application for summary judgment.

The Defences

Five lines of defence can be discerned from the affidavits and the submissions of counsel. I will deal with each of them in turn.

(1) Validity of assignment

At para. 19 of his replying affidavit, Mr. McNamara contends that a valid assignment from Davy Property Holdings Limited had not taken place. This contention was abandoned during the hearing and I need not deal with it further.

(2) Plaintiff's non-compliance with loan stock instrument

At para. 18 of his affidavit, Mr. McNamara contends that there was a failure on the part of the plaintiff to comply with the provisions of clause 4.1 of the loan stock instrument thereby disentitling it to make a successful claim against the first defendant with a consequent inability to recover against him on foot of his guarantee.

Clause 4.1 reads "*stock shall only be redeemed against surrender of the relevant certificates for cancellation*".

Clause 4.3 reads "*all stock redeemed by the company under the provisions of this deed shall be cancelled and the company shall not reissue the same stock*".

The defendants argue that the plaintiff has failed to comply with the provisions of the loan stock instrument because it has not sought to redeem by the surrender of the certificate but has simply made a demand for repayment. By so doing, it is said that the plaintiff has failed to comply with the provisions of clause 4.1 of the loan stock instrument. This argument completely ignores the terms of the demand.

The demand in question is dated 11th August, 2009. The penultimate paragraph of the letter of demand reads:-

> *"The loan stock certificate held by us in respect of the €62,550,000 14% secured redeemable loan stock shall be surrendered to the company for cancellation at the same time as payment of the entire amount due is made to us by the company."*

Given this statement in the demand letter, I find it difficult to understand how it can be said that any breach of clause 4.1 has occurred. Indeed, I asked counsel what had to be done in order to comply with clause 4.1. He replied that the certificates had to be proffered and surrendered before payment. I then asked if that meant that the certificates had to be cancelled before the monies were repaid. He indicated in the affirmative. When I inquired as to where the business efficacy in that proposition could be found he was unable to enlighten me.

It appears to me that the letter of demand, coupled as it was with a clear statement that the loan stock certificate would be surrendered for cancellation at the same time as payment of the amount outstanding was perfectly in order.

I am unable to discern any arguable defence under this heading.

(3) Frustration

The defendants seek to avoid the provisions of clause 5.1.19 (i) by invoking the doctrine of frustration. The basis for so doing is an interpretation which they place on the decision of Finlay Geoghegan J. in *North Wall Property Holding Company Limited v. Dublin Docklands Development Authority* [2009] IEHC 11. I will consider the defendants interpretation of that judgment later in this ruling. It is sufficient to note here that they contend that because of it, the DDDA is incapable of issuing a Section 25 certificate. Neither, it is said, can Dublin City Council grant a planning permission which is the alternative to the Section 25 certificate contemplated in clause 5.1.19 (i).

Assuming that the defendants are correct in those contentions as to the inability of both statutory bodies, the argument runs that the provisions of clause 5.1.19 (i) are frustrated.

My task on this aspect of the matter is to ascertain whether, assuming the defendants are correct in their submission as to the sterility of the DDDA and Dublin City Council, a defence of frustration is arguable.

The defence of frustration is one of limited application and narrowness. It arises in circumstances where performance of a contract in the manner envisaged by the parties is rendered impossible because of some supervening event not within the contemplation of the parties. As was said by Lord Radcliffe in *Davis Contractors Limited v. Fareham UDC* [1956] AC 696:-

> *"frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."*

His Lordship went on to state that:-

> *"it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."*

In this jurisdiction the doctrine of frustration was considered by Blayney J. in *Neville & Sons Limited v. Guardian Builders* [1995] 1 ILRM. In that case he quoted with approval from the speech of Lord Simon in *National Carriers Limited v. Panalpina (Northern) Limited* as follows:-

> *"Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."*

These quotations demonstrate the narrow scope for the doctrine of frustration to be invoked. As is said in *Chitty On Contracts* (30th Ed.) para. 23 – 003:-

> *"The courts do not wish to allow a party to appeal to the doctrine of frustration in an effort to escape from what has proved to be a bad bargain: frustration is 'not likely to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains'."*

There are many difficulties which confront the defendants in their attempt to invoke the doctrine. The first is the express terms of the loan stock instrument and, in particular, clause 5 thereof. That clause provides for an accelerated repayment of an immediate nature, in the event of any one of the provisions of the clause being satisfied. The contract expressly contemplated that an application for a Section 25 certificate might not be applied for within the specified time or alternatively that a planning permission might not be obtained from Dublin City Council within that time. The parties expressly provided that in the events contemplated in clause 5.1.19 (i), the risk of immediate repayment was to fall upon the defendants. As is said in Treitel on *The Law of Contract* (11th Ed.):-

> *"The object of the doctrine of frustration is to find a satisfactory way of allocating the risk of supervening events. There is, however, nothing to prevent the parties from making their own provisions for this purpose. Thus they can expressly provide that the risk of supervening events shall be borne by one of them and not by the other or they can apportion it or deal with it in various other ways. Such provisions exclude frustration; and the same is true of an express term which, though it does not precisely cover the supervening event, shows that the parties had contemplated it and allocated the risk of its occurrence."*

Thus, it can be seen that there are formidable hurdles which confront the defendants in attempting to invoke the doctrine of frustration. Notwithstanding those difficulties, it might still be said, however, that it is an arguable defence. But the defendants still have a further problem and in my view, an insuperable one.

If a defence of frustration is made out by the defendants, the contractual obligations are at an end. In such circumstances the plaintiffs will be entitled to repayment of the monies advanced. So even if successful in invoking the doctrine the defendants still remain liable to immediately repay the funds advanced. So the defence avails them nothing.

In these circumstances, the defendants have contended for what they call '*partial frustration*'. They seek to argue that clause 5.1.19 (i) has been frustrated, but that the remainder of the obligations under the contract continue to exist. Indeed, counsel for the defendants argued a most extraordinary proposition unsupported by any authority that clause 5.1.19 (i) although now frustrated, would, at some stage in the future, through some unexplained and, I suspect, inexplicable alchemy, revive itself, but framed differently, so as to exclude the 30-month period referred to in it. This part of the proposition is clearly devoid of substance.

As to '*partial frustration'*, it is considered in Treitel at paras. 50-07 and following. The author refers to some civil law systems where partial destruction of the subject matter of the contract can lead to the same type of relief in respect of that part as would be available in respect of the whole in cases of total destruction. He cites German law and provisions of the civil code in that jurisdiction. The author goes on "*these rules have no direct counterpart in English law, under which, in cases of partial impossibility, the contract is either frustrated or remains in force*. *There is no such concept as partial or temporary frustration on account of partial or temporary impossibility* . . .*the concept of partial discharge in English law is restricted to obligations which are severable, whether in point of time or otherwise*."

Thus, it can be seen that there is no concept of '*partial frustration'*, as such. It might apply if clause 5.1.19 (i) was capable of being severed from the rest of the loan stock instrument. But there is no arguable basis demonstrated for the severability of clause 5.1.19 (i) from the remainder of the contract. It is an integral part of the contract and not a standalone provision such as an arbitration clause.

It follows that there is no such defence of 'partial frustration' available to the defendants.

The plain fact is that the investors invested their money on terms that would entitle them to an immediate repayment if the events specified in clause 5 occurred. That has happened in the case of clause 5.1.19(i).

There is, in my view, no arguable basis for seeking to avoid the provisions of that clause by reference to either the doctrine of frustration or a concept called partial frustration. Accordingly, this alleged ground of defence is unarguable.

Mistake

The defendants contend that they can avail of the defence of mistake in response to the plaintiff's claim. The species of mistake which they say occurred here was a mistake of law.

Up to relatively recent times, the effect of a mistake of law did not afford a defendant a defence, but that has altered somewhat as a result of the decision of the House of Lords in *Kleinwort Benson Limited v. Lincoln City Council* [1999] 2

A.C. 349.

It is important to bear in mind precisely what is contended for here by the defendants. It is set out at paras. 24 and 25 of their written submissions as follows:

> *"The loan stock instrument was entered into by Donatex on the basis that the DDDA had the power to grant section 25 certificates and to guarantee that a plot ratio of at least 3:1 was attainable. Had those representations not been made by the DDDA, the purchase of the Irish Glass Bottle site by Becbay would not proceeded (sic).*
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> *The investors behind Ringsend Property are all experienced commercial investors and they agreed to lend the money to Donatex on the basis of a return that was predicated on the availability of a fast-track planning process under the 1997 Act, and also with the certainty of high plot density ratios, both of which were based on representations made by the DDDA to Donatex and Bernard McNamara prior to the acquisition of the Irish Glass Bottle site by Becbay . ."*

Even assuming all of this to be correct (and I will return to the judgment of Finlay Geoghegan J. later), it does not, in my view, give rise to an arguable defence on the basis of a mistake of law. If correct, it may give some basis for action at the suit of the first named defendant and Mr. McNamara for an action against the DDDA, but it does not provide a defence to this claim on the basis of the contract having been entered into under a mistake of law.

This case is nowhere near the situation which obtained in *Kleinwort Benson*, or indeed, any of the other decisions cited by the defendants.

The extremely limited circumstances in which the principles established in *Kleinwort Benson* might apply do not have any application here, and in my view, no arguable defence has been demonstrated under this heading either.

Implied Term

The final line of defence sought to be asserted is to invite me to imply a term into clause 5.1.19 (i) to the effect that the DDDA had the legal possibility of operating the Section 25 mechanism. I assume, for the purpose of this argument that the defendants are correct when they say that the DDDA did not have such. As stated already, I will return to this topic later in the judgment when considering the decision of Finlay Geoghegan J. already referred to.

The principal authority relied upon for seeking to imply such a term is the decision of the Commercial Court, Steyn J. (as he then was) in *Associated Japanese Bank (International) Limited v. Credit du Nord SA* [1988] 3 All ER 902. In that case, the judge considered the traditional and well-established test for implying a term into a commercial contract which is derived from the decision in the *Moorcock* [1889] 14 P.D. 64. He said this:

> *"In the present contract, such a condition may only be held to be implied if one of two applicable tests is satisfied. The first is that such an implication is necessary to give business efficacy to the relevant contract i.e. the guarantee. In other words, the criterion is whether the implication is necessary to render the contract (the guarantee) workable. That is usually described as the Moorcock test. It may well be that this stringent test is not satisfied because the guarantee is workable in the sense that all that is required is that the guarantors who assumed accessory obligations must pay what is due under the lease."*

Applying the *Moorcock* test to the present situation, it seems to me that there could be no basis for the implication of a term such as is contended for. The whole loan stock instrument, clause 5 of it and clause 5.1.19 (i), are perfectly workable and efficacious from a business point of view. Thus, there is no basis for implying a term applying the *Moorcock* test.

Steyn J. went on:

> *"But there is another type of implication, which seems more appropriate in the present context. It is possible to imply a term if the court is satisfied that reasonable men, faced with a suggested term which was ex-hypothesi not expressed in the contract, would, without hesitation say: yes, of course that is 'so obvious that it goes without saying': see Shirlaw v. Southern Foundries [1939] 2 K.B. 206, 227 per Mackinnon L.J.*
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> *. . .*
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> *Although broader in scope than the Moorcock test, it is nevertheless a stringent test, and it will only be permissible to hold that an implication has been established on this basis in comparatively rare cases, notably where one side is dealing with a commercial instrument such as a guarantee for reward. Nevertheless, against the contextual background of the fact that both parties were informed that the machines existed and the express terms of the guarantee, I have come to the firm conclusion that the guarantee contained an implied condition precedent that the lease related to existing machines. Again, if this conclusion is right, the plaintiff's claim against the defendants as guarantors, or as sole or principal debtors under clause 11, fails."*

In my view, it is not arguable as a defence that this broader, but, nonetheless, stringent test, has any application in the present case.

Why would the investors, as reasonable men, have regarded this implied term contended for as one so obvious as to go without saying? In signing up to the provisions of the loan stock instrument and in particular clause 5, dealing with accelerated repayment, they were ensuring that they would be entitled to immediate repayment prior to the seven-year term in the event of the conditions set out in clause 5 being met. It was a matter of complete indifference to them as to why clause 5.1.19 (i) had not been complied with. All they wanted to ensure was that if it was not, for whatever reason,

they were entitled to have their monies repaid and the stock redeemed. The risk in that regard was assumed by Becbay and the defendants. That is how the clause is drafted and no sensible businessman investing monies of the type involved here would, in my view, have even contemplated the implication of a clause such as is contended for.

Accordingly, I hold that there is no arguable ground of defence under this heading either.

The Judgment of Finlay Geoghegan J.

For the purposes of dealing with all of the preceding arguments, I have assumed the defendants to be correct in their contention concerning the judgment of Finlay Geoghegan J. in the North Wall litigation. Mr. McNamara interprets the decision as follows in one of his affidavits:-

> *"In that case, the High Court held that the DDDA was precluded from entering into any prior commercial agreement in advance of the determination of the application for such a certificate under Section 25. The court also made it clear that the DDDA was precluded from granting a certificate pursuant to Section 25 of the 1997 Act, in circumstances where it was also involved as a developer in that project. This judgment has not been appealed by the DDDA and has far-reaching and important consequences for the Irish Glass Bottle site. As a direct result of the decision, the DDDA is precluded from issuing a Section 25 certificate, as contemplated by the parties who had involvement in the Irish Glass Bottle site. Accordingly, the Irish Glass Bottle site cannot utilise the Section 25 certificate planning route."*

In the *North Wall* case, the decision of the DDDA to issue a Section 25 certificate to the notice party in respect of a development at North Wall Quay was challenged on a number of grounds. One of those was objective bias. The applicants argued that there was objective bias on the part of the DDDA when making the decision to grant the certificate because of the terms of an agreement entered into between the DDDA and the notice party after it had made an application for a Section 25 certificate, but prior to a decision on that application by the DDDA. Clause 6 of the agreement in question was to the effect that if the DDDA granted the Section 25 certificate, the notice party would transfer a portion of land, at no cost, to the DDDA to facilitate its plans for a public space in the area.

The judge held that the decision of the DDDA to grant the Section 25 certificate should be quashed on the ground of objective bias. The basis for that was that the existence of the agreement, and in particular clause 6, gave rise to a reasonable apprehension that the DDDA might have been biased.

Mr. McNamara's interpretation seems to ignore what was actually said by Finlay Geoghegan J. in her judgment, and in particular, what is contained at paras. 112 and 113. The judge said this:-

> *"Undoubtedly, the respondent (DDDA) has very wide powers given it to secure the development and regeneration of the Dublin Docklands Area. However, for the reasons set out earlier in this judgment, it appears to me that it has what is a separate and distinct power and obligation to adjudicate on applications for certificates under Section 25(7)(a)(i). In carrying out this function, it is, in the first instance, carrying out an adjudicative function as to whether or not a proposed development is consistent with the planning scheme for the area. If it does so, it may then decide to impose conditions which are closely related to the development function. By reason of its development function and obligations, the respondents may not present the appearance of strict impartiality required, for example, by a court administering justice in determining an application for a Section 25 certificate. It might be considered to have a predisposition towards granting a certificate. However, this being so, the principles set out so clearly by Keane J. (as he then was) in Radio Limerick One Limited v. Independent Radio and Television Commission apply, and the respondent is under an obligation to take practical steps to free itself in taking a decision on an application from (sic) a Section 25 certificate, not merely from actual bias, but the apprehension of bias in the minds of reasonable people. This appears to include having a procedure under which no commitment is given, not just by a member of the board itself, but by the executives, who can only be, or perceive to be, acting on behalf of the respondent, to any person as to the view to be taken, or a recommendation for view, on an application for a Section 25 certificate prior to the determination by the board. It further appears to me to require that the respondent does not permit any arrangements to be put in place carrying out its development functions which would create an impression that the respondent would be obtaining a benefit in the sense of something that it wishes to have or achieve for the purpose of its development functions if it grants a Section 25 certificate.*
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> *. . .*
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> *Accordingly, whilst it appears to me permissible for the executives of the respondent to enter into pre-Section.25 application discussions, as is their practice, it appears impermissible that those discussions would result in either a commitment given by the executives to make a formal recommendation, or in an agreement whereby the respondent would obtain area (sic) benefit in any sense in the event that it grants the Section 25 certificate. There is, I recognise, a thin line between what appears permissible, namely, discussions under which a developer might seek to ascertain from the executives whether or not they perceive any inconsistency with what is being applied for or a discussions (sic) about potential conditions with the type of formal commitment by the executives to make a particular recommendation which appears impermissible. The practical working of the Act of 1997, having regard to the development function, and the provision for Section 25 certificates, appears to require for its effective working some pre-application discussions and therefore must be considered as contemplated by the Oireachtas. However, it is important that the executives at all times make clear that they are not in a position either to commit themselves or the board to a particular course of action, nor should they seek any benefit (in the very general sense of the word) for the respondent, in the event of the grant of a certificate. What is permissible falls short of what was done in this instance."*

It is clear from that quotation from the judgment that the judge's decision does not have the wide implications described in the paragraph in Mr. McNamara's affidavit from which I quoted.

However, for the purposes of testing whether an arguable defence arises, either under the grounds of frustration, partial

frustration, mistake or implied term, I have assumed the position to be as stated by Mr. McNamara. The fact that it is not so, merely copper-fastens the lack of any arguable defence to this claim.

Some Final Comments

This case concerns a formal commercial contract entered into between the plaintiff and the defendants. At the time it was entered into, the parties knew that the venture was speculative because of the absence of any planning permission. They knew there was no planning scheme and they took the chance to proceed.

The investors advanced the money but did so on the basis that it would be repaid if one of the circumstances specified in clause 5 arose. The risks under clause 5 were entirely allocated to Becbay and the defendants, not to the plaintiff. If the requirements of s. 5.1.19(i) were not met, as they were not, then the parties contracted that the monies would be repaid immediately. Clause 5.1.19(i) could have been drafted in a different fashion so as to remove from or reduce the risk to Becbay, but it was not.

As was said by Lord Bingham of Cornhill in *Golden Strait Corporation v. Nippon Yusen* [2007] 2 A.C. 353:-

> *"As has long been recognised and recently reemphasized by the House of Lords, the principle of certainty is of great importance, especially in relation to commercial transactions."*

In support of that proposition, he quoted a line of authority going back to 1774, and up to and including 2005. The quotation from 1774 is from Lord Mansfield who, in *Vallejo v. Wheeler* [1774] 1 Cowp. 143, said:-

> *"In all mercantile transactions, the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other, because speculators in trade then know what ground to go upon."*

Insofar as attempts were made during the course of argument to refer to representations made to Mr. McNamara prior to the loan stock instrument and his guarantee being executed, they cannot be relied upon for a number of reasons. First, this is not a claim seeking rectification of the contract. Secondly, the representations were not made by the plaintiff or its assignors. Thirdly, the clause in question is unambiguous and no aid to interpretation by reference to the matrix of surrounding fact is required. Even if it was, its scope is limited, particularly having regard to the most recent observations of Lord Hoffman in *Charterbrook Limited and Another v. Persimmon Homes and Others* [2009] 3 W.L.R. 267, where he said at p. 280:-

> *"There is certainly a view in the profession that the less one has to resort to any form of background in aid of interpretation, the better. The document should, so far as possible, speak for itself."*

In my view, this document does speak for itself. There was a clear obligation on the part of the defendants to repay the monies in the circumstances identified in clause 5.1.19(i). Those circumstances have occurred and no arguable defence is made out.

There will be judgment in favour of the plaintiff as against the first named defendant for €98,145,905 and against Mr. McNamara for €62,550,000 on foot of his personal guarantee.