Neutral Citation: [2013] IEHC 420

THE HIGH COURT

COMMERCIAL

[2013 No. 1388 S]

[2013 No. 97 COM]

BETWEEN

BANK OF SCOTLAND PLC

PLAINTIFF

AND

DAVID KENNEDY

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 11th day of September, 2013

1. This matter comes before the court by way of Notice of Motion seeking summary judgment on foot of personal guarantees entered into by the defendant in favour of the plaintiff on dates between 20th June, 2006, and 21st August, 2007, relating to borrowings by four companies: Davitt Road Developments Limited, Rimley Limited, Eirmur Limited and Florence Investment Properties Limited (the "Guarantees").

2. The defendant is a businessman, having an address in Jersey. The defendant does not dispute the fact that he executed the Guarantees, and does not seek to challenge their efficacy on their face. The plaintiff served letters of demand in relation to the Guarantees on dates between 21st March, 2013, and 13th April, 2013. The total liability asserted against the defendant amounts to €7,500,000, together with interest, accruing on an ongoing basis.

3. The defendant asserts that he reached an arrangement in the summer of 2012, through negotiations with Mr. Andrew Seaton and Mr. Colum Breslin, officers of the plaintiff, to the effect that, in consideration of the plaintiff's forbearance from seeking to recover under the Guarantees, the defendant would employ his best endeavours to procure the payment down of the unrelated borrowings of two companies, Great Banner Limited and Muscadet Limited.

4. These two companies are managed and administered through the vehicle of a trust based in Jersey, known as the Kennedy Family Discretionary Trust Settlement. The defendant is not a trustee or beneficiary of this trust, and claims to have no control over the trust save that he from time to time advised the trustees as to trust investments. The defendant claims that he was to be released from his obligations under the Guarantees upon the liabilities of Great Banner Limited and Muscadet Limited being discharged.

5. The defendant further contends that, in pursuance of this agreement, he approached the directors of the two companies and requested that they consider paying down the facilities, which were not in default at the time. The defendant deposes that the liability of Great Banner Limited, which had amounted at draw down in September 2007 to the sum of €18,207,000, had been reduced at the time of the hearing to €2,950,004.21. The defendant states that refinancing arrangements are at an advanced stage of completion with regard to the outstanding sum. The defendant's evidence is that the liabilities of Muscadet Limited to the plaintiff, in the sum of STG£2,400,000, has been entirely discharged, although the timeframe in which this had been achieved is not specified in his affidavit.

6. Mr. Seaton's account of this purported agreement, contained in his replying affidavit, filed on behalf of the plaintiff, varies very significantly from that of the defendant. The deponent states that while discussions had taken place, these related not only to the liabilities of Great Banner Limited and Muscadet Limited, but also to those of Eirmur Limited, Florence Investment Properties Limited and Ms. Patricia Kennedy. These discussions had not, on the plaintiff's case, led to a concluded agreement on the release of the Guarantees, which would have been subject to credit committee approval. Furthermore, Mr. Seaton avers that the defendant had undertaken to arrange for the discharge of these liabilities on or before 31st December, 2012, and to furnish a sworn statement of affairs in the plaintiff's standard form. The plaintiff contends that the defendant failed to satisfy these conditions.

7. In addition, the plaintiff questions the credibility of the defendant's assertions, submitting that he failed to raise the terms of the purported agreement in subsequent discussions with the officers of the plaintiff relating to the Guarantees, yet went on to raise this argument in the context of these proceedings.

Legal Issues Arising

8. The defendant submits that this application for summary judgment should be refused on the basis that he has established *prima facie* the defence of promissory estoppel.

9. While there are clearly significant divergences in the accounts of the facts furnished by the parties, the court is invited by the plaintiff to consider the defendant's case at its height on the facts, submitting that even on his own account he has not established a defence in law.

10. Therefore, it seems to me that the legal issues falling for consideration in this application are as follows:-

> (a) Would the defendant's evidence, taken at its height, be capable of successfully grounding a plea of promissory estoppel?
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> (b) Taking account of the evidence and submissions in their totality, is this application an appropriate one upon which to

adjudicate by way of summary judgment?

Promissory Estoppel

11. It is submitted on behalf of the plaintiff that the defendant has failed to establish a fundamental ingredient in the defence of promissory estoppel: that he acted in reliance upon the plaintiff's representations to his personal detriment.

12. In *Doran v. Thompson Ltd.* [1978] IR 223, Griffin J. stated the basis of promissory estoppel as follows at p. 230:-

> *"Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance."*

13. The foregoing statement of the law was considered by Keane C.J. in *Ryan v. Connolly* [2001] 1 IR 627, where he added at p. 632:-

> *". . . Griffin J. had pointed out that . . . it was not necessary that the representation should be one 'positively incapable of more than one possible interpretation'.. A party seeking to rely on the principle cannot, in other words, rely on a strained or fanciful interpretation of the words used, he must show that it was reasonable in the circumstances for him to construe the words used by the other party in a sense which would render it inequitable for that party to [resile from them]."*

14. In *Industrial Yarns Ltd v Leo Greene and Arthur Manley* [1984] ILRM 15, Costello J held at p. 23:-

> *"But to establish that an estoppel has arisen the representee must show that what was said or done by the representor influenced both the belief and conduct of the representee to his detriment."*

15. In *Daly v. Minister for the Marine* [2001] 3 IR 513, Fennelly J., speaking for the Supreme Court, affirmed this position, strongly reiterating that a the party seeking to raise a promissory estoppel must establish that he had relied upon an unambiguous representation to his or her detriment, at p. 529:-

> *"It is the fact that it would be unconscionable for one party to be permitted to depart from a position, statement or representation, upon which the other party has acted to his detriment, that justifies the courts in intervening to restrain him from doing so. If the recipient of a promise or representation, is to be dispensed from any obligation to demonstrate reliance, the doctrine would be more than exceptionally generous. It would be a virtually ungovernable new force affecting potentially not only equity but the laws of contract and property and, as here, the exercise of administrative powers."*

16. The nature and extent of the detriment sufficient to ground a promissory estoppel was considered by Kinlen J in *McGuinness v. McGuinness* (Unreported, High Court, 19th March 2002), holding at p. 7:-

> *"The Court is satisfied having regard to all the authorities that the alleged detriment has not been proven. It must be pleaded and proved. It must be substantial although not necessarily confined to monetary considerations. It must be tested against the principle that it would be unjust or inequitable to allow the assurance to be disregarded."*

17. The defendant places reliance upon McDermott's analysis in his text on '*Contract Law'* (2nd Ed, 2010, Lexisnexis Butterworths) at para. 2.111:-

> *"It is generally accepted that A's representation will not give rise to any estoppel unless B has altered his position in reliance on the promise. In his judgment in Re Lavia O'Flaherty J stated that 'the whole idea of a promise is that it has to make an impression on the mind of the promisee'. Whilst detrimental reliance is an essential feature and requirement of proprietary estoppel, there is some debate as to whether it is a requirement of promissory estoppel. The better view is that detriment is not required to raise a promissory estoppel. Robert Goff J stated the principle as follows in The Post Chaser [1982] 1 All ER 19 at 27:-*
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> > *'The fundamental principle is that stated by Lord Cairns LC, viz that the representor will not be allowed to enforce his rights 'where it would be inequitable having regard to the dealings which have thus taken place between the parties'. To establish such inequity, it is not necessary to show detriment; indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights. Take the facts of Central London Property Trust Ltd v High Trees House Ltd (1946) [1956] 1 All ER 256, [1947] KB 130, the case in which Denning J breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist on his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a court might well think it right to conclude that only after reasonable notice could the lessor return to charging rent at the higher rate specified in the lease. Furthermore it would be open to the court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice. But it does not follow that in every case in which the representee has acted, or failed to act, in reliance on the representation, it will be inequitable for the representor to enforce his rights for the nature of the action, or inaction, may be insufficient to give rise to the equity…"*

18. The author goes on to state at para. 2.113, however:-

> *"… In reality the distinction between detriment and reliance is probably more semantic than one of any real importance. This is because an estoppel can only be raised if it would be inequitable to allow the representor to go back on his representation. As Burrows has noted 'The point is that if the promisee's position has not changed at all as a result of*

the promise it will not normally be inequitable for the promissor to resile from it' Mee makes the same point when he suggests that '[i]f one interprets acting to one's 'detriment' to mean conduct which would make it unconscionable for the representor to withdraw the representation, then this difference seems to disappear".

19. It is clear, therefore, that whether one is to characterise it as "*detriment*" or "*reliance*", there must be conduct on the part of the party seeking to raise a promissory estoppel such as to render it unconscionable for their counterparty to resile from representations purportedly altering the state of legal relations between them. Indeed, the authorities opened by the plaintiff make it clear that it is incumbent upon the representee to demonstrate that his conduct on foot of the representation caused him a detriment that is, in the words of Kinlen J in *McGuinness v. McGuinness*, "*… substantial although not necessarily confined to monetary considerations. It must be tested against the principle that it would be unjust or inequitable to allow the assurance to be disregarded*".

20. It cannot be said that the defendant has altered his position to his detriment. He was liable on foot of the Guarantees. By procuring the payment of the Muscadet facility, and substantial but not full payment of the Great Banner facility, he cannot be released from the guarantees. Even aside from the dispute as to the number of facilities to be paid down and the existence or otherwise of a time limit for repayment, the defendant, on his own case, has merely requested that the trustees of the two companies consider paying down the facilities. While it is claimed on behalf of the defendant that the early payment of the facilities caused the companies to incur a facility fee and a higher rate of interest, even if the court were to accept this contention, it would not amount to a detriment to the defendant. The defendant's actions were not, even on the most sympathetic reading of the case proffered on his behalf, of such character as might operate on the conscience of the plaintiff so that it would be estopped from resiling from the purported terms of the agreement.

Appropriateness of Summary Disposal
21. I must now consider whether, in all of the circumstances, it is appropriate to grant summary judgment in this case. In *Danske Bank v. Durkan New Homes* [2010] IESC 22, Denham J. (as she then was) distilled the relevant law as follows:-

"13. Order 37r.7 of the Rules of the Superior Courts, 1986 provides:-

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

14. Several cases were opened before the Court which have addressed this jurisdiction. These included Bank of Ireland v. Educational Building Society [1999] 1 I.R. 220 where Murphy J. emphasised that it was appropriate to remit a matter for plenary hearing to determine an issue which is primarily one of law where a defendant identified issues of fact which required to be explored and clarified before the issues of law could be dealt with properly. He stated at p.231:-

'Even if the position was otherwise, once the learned High Court Judge was satisfied that the defendant had 'a real or bona fide defence', whether based on fact or on law, he was bound to afford them an opportunity of having the issued tried in the appropriate manner'.

15. In Aer Rianta c.p.t. v. Ryanair Limited [2001] 4 I.R. 607, Hardiman J. reviewed Irish cases and concluded at p.623:-

'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?'

16. In McGrath v. O'Driscoll [2007] 1 ILRM 203, Clarke J. described the law as follows, at p.210:-

'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'."

22. In *First National Commercial Bank plc v. Anglin* [1996] 1 I.R. 75, Murphy J cited with approval at page 76 the following summary of the test set out in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep 21:-

"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."

23. My findings on the character of the defence of promissory estoppel, which argument formed the gravamen of the purported defence raised on behalf of the defendant, lead to the conclusion that it is "*very clear*" that the defendant has no case. While there are undoubtedly conflicts of fact between the parties, which could be teased out at plenary hearing, even were every fact at issue as appearing at this juncture to be determined in favour of the defendant, this would not be sufficient to establish a defence.

24. Furthermore, it seems clear to me that the agreement as alleged by the defendant is incapable of being enforceable on its terms. I reach this conclusion on the basis, firstly, that the various Guarantees contain extensive clauses precluding the release or discharge of the defendant's liabilities thereunder, including by way of:-

"[A]ny grant of time, indulgence, waiver or concession granted to, or any arrangement with, the Principal or any other person".

25. No deed of variation of the Guarantees or concluded agreement purporting to modify same was produced to the Court. Nor, indeed, does the defendant seek to challenge their efficacy. Therefore, I must conclude that the Guarantees are enforceable.

26. Secondly, it seems to me that the alleged terms of the agreement, even on the defendant's evidence, are insufficiently precise,

particularly having regard to the defendant's purported obligations to procure the payment down of unrelated facilities by corporate entities managed by a trust in which he had no interest.

27. It was submitted on the defendant's behalf that his obligations merely involved using his "*best endeavours*" to put a business case to the trustees for the payment of the Great Banner and Muscadet facilities. In *Walford v. Miles* [1992] 2 A.C. 128, Lord Ackner held that an agreement to use "*best endeavours*" may be enforceable:-

> *"The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. The uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for termination of negotiations?"*

28. However, I would distinguish the use of the term "*best endeavours*" in the above authority from the instant case on the basis that in *Walford v. Miles*, the matter at issue was the conduct of negotiations in contemplation of a quite specific goal; namely, the purchase of property. In that case, it would have been entirely within the power of the parties to engage in negotiations in good faith, even if they were not to reach a conclusion. In this case, however, we find an alleged agreement to employ best endeavours to influence the conduct of a third party in its dealings with the plaintiff. The parameters of the obligation are nebulous to the extent that it is impossible to discern how the defendant could have gone about discharging it. Furthermore, on the defendant's own case, no time limit was stipulated for the payment down of the facilities in question.

29. Finally, it must be noted that, notwithstanding the actions of the defendant, even the two facilities which were, on his evidence, within the contemplation of the parties in reaching their purported agreement were not paid down in full. It is the plaintiff's evidence that any agreement required not merely the use of "*best endeavours*" but the full repayment of the facilities in question before 31st December, 2012, and that negotiations with regard to these facilities took place between Mr. Seaton and Ms. Margaret Murray of the Discretionary Trust Settlement, with the defendant having no further part.

Conclusion

30. In summary, therefore, I conclude that the defendant has not, and indeed could not, establish the defence of promissory estoppel, as the acts taken on foot of the alleged agreement between the parties were taken by two corporate third parties, with the defendant's only role being to suggest the course of action to the directors of these companies in his role as advisor or consultant. Even if the terms of the alleged agreement were precisely as stated by the defendant in his affidavits, although this is contested, he has not established that he had acted to his personal detriment on foot of the agreement.

31. In adjudicating upon this application, the issue to be addressed is whether the defendant's affidavits disclose an arguable defence. This is not the same as whether affidavits disclose a dispute on the facts. Having considered the motion in its entirety, as well as the net question of law as to the character of the defence of promissory estoppel, I see no "*fair or reasonable probability*" of the defendant establishing a real or bona fide defence at trial. Equally, I see no defect in the plaintiff's case that should cause me to refuse the relief sought. I am satisfied that the issues for determination are relatively straightforward and that no injustice will be done to the defendant by my granting summary judgment.

32. For the foregoing reasons, the plaintiff is entitled to summary judgment as against the defendant in the amount sought. I will hear the parties as to the calculation of interest, costs and any ancillary orders.