Neutral Citation Number: [2012] IEHC 220

THE HIGH COURT

[2011 No. 7023 P]

BETWEEN

CITYWIDE LEISURE LIMITED (IN RECEIVERSHIP), BLARNEY INN LIMITED (IN RECEIVERSHIP), BCGM LIMITED (IN RECEIVERSHIP), JRM HOTELS LIMITED (IN RECEIVERSHIP) AND ASPERE PROPERTY INVESTMENTS LIMITED

AND

PLAINTIFFS

IRISH BANK RESOLUTION CORPORATION LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 24th day of May, 2012

1. Two motions are brought before the court in this case. The plaintiff has brought a motion for leave to amend its statement of claim and the defendant has brought a motion for security for costs pursuant to s. 390 of the Companies Acts 1963 ("the 1963 Act").

Motion to amend Statement of Claim

2. The plaintiffs are a group of companies which owned and managed the following properties: the Holiday Inn Hotel in Pearse Street, Dublin; a restaurant in Temple Bar, Dublin; Tante Zoe's restaurant, Dublin; and the Blarney Inn Hotel, Kildare Street, Dublin along with an associated nightclub called Club Nassau in Dublin.

3. One of the plaintiff companies had a debt with the defendant but the debt was cross-secured on assets of the plaintiff companies as a whole. The loans were refinanced in 2008, but the defendant (formerly Anglo Irish Bank Corporation, otherwise "Anglo") called in the loans pursuant to the terms of the loan agreement, and when the plaintiffs were unable to pay the sums due, the defendant appointed a receiver to the companies.

4. In these proceedings, the plaintiffs challenge the appointment of the receiver and seek a declaration that the appointment of the receiver over the assets and undertakings of the plaintiffs or any of them is in breach of contract, void and otherwise invalid. The plaintiffs also claim damages for breach of contract and seek an order directing the taking of accounts and an inquiry as the Court may deem appropriate.

5. The statement of claim was delivered on 21st November, 2011, in accordance with case management directions given by Kelly J. The defendant delivered a full defence to the claim.

6. The plaintiffs seek to make three amendments to their statement of claim. One concerns an allegation that security documents were altered. The second amendment involves an allegation that there was a breach of s. 60 of the 1963 Act, in that assistance was given to the plaintiff companies by loans from the defendant for the purposes of the purchase of its own shares and that the defendant had constructive knowledge of this. The third amendment concerns what was described by counsel as "the NAMA point". The defendant does not contest the entitlement of the plaintiffs to be granted an order making the first and second amendments. Accordingly, I give liberty to the defendant to make those amendments. They are set out in the amended statement of claim as follows:

> *"41. The Plaintiffs further claim that the transactions set out at paragraph 6 hereof were executed in breach of section 60 of the Companies Act 1963 as amended an are thus voidable at the instance of the plaintiffs. The breaches of the Companies Acts were known to the Defendant. The appointment of receivers was made on foot of the said transactions and was therefore unlawful.*
>
> *42. Further the Defendant, its servants or agents, materially altered documents so as to give effect to certain securities. The said alteration was unlawful. As the appointment of receivers was made on foot of the said securities the appointment was unlawful."*

7. The amendment sought to be made in relation to the "NAMA point" is as follows:

> *"43. The Plaintiffs claim and assert that they have been subjected to a profound inequality of treatment and/or invidious discrimination by agencies of the State which constitute and continue to constitute a breach of their property rights guaranteed by the Constitution of Ireland.*
>
> *Particulars of breach of Property Rights*
>
> *(a) The defendant is a financial institution licensed in the State and fully owned and controlled by the State and/or its agents.*
>
> *(b) The State in recognising the need to address the serious threat to the economy and the instability of credit institutions in the State generally and the need for the maintenance and stabilisation of the financial system in the State and recognising the need to facilitate the availability of credit in the economy of the State, to resolve the problems created by the financial crisis in an expeditious and efficient manner and achieve a recovery in the economy and to contribute to the social and economic development of the State, enacted the National Asset Management Agency Act, 2009.*
>
> *(c) Under the terms of the said legislation the defendant has been designated as a participating institution. In that*

regard certain of the defendant's loans have been transferred to the National Asset Management Agency NAMA) and borrowers of those loans now deal with the Agency.

(d) The plaintiffs' loans, by reason of the fact that they do not exceed £20,000,000, were not transferred to the NAMA and remain on the balance sheet of the defendant.

(e) NAMA, in acquiring loans form the defendant, purchased same at a substantial discount to their face value.

(f) Having acquired the loans, NAMA requires each borrower to submit a business plan whose primary purpose is to present a complete account of its financial affairs and to provide a detailed plan of how and when all liabilities to NAMA will be repaid. It is to be noted that the liability to NAMA is represented by the discounted price paid by NAMA for the original loan.

(g) The borrower's business plan is reviewed by an independent business reviewer who assesses the reasonableness of assumptions used by the borrower, conducts a detailed analysis of cash flow projections and presents an independent critique of the plan. The plan and the associated independent business review are then considered by the NAMA board, credit committee, chief executive or senior management, based on a cascading system of delegated authorities approved by the board. Other factors to take into account at this stage include the degree of the borrower's co-operation with NAMA and the quality of its corporate governance arrangements.

(h) The business plan process leads ultimately either to approval of the borrower's business plan, possibly subject to changes and the imposition of certain conditions, or to enforcement. The latter applies in the case of borrowers who are unable to prove that they have the capacity to meet their debt obligations, even if re-structured, or where they have failed to co-operate with the process. NAMA has stated that enforcement is not its preferred option but that its stated objective is to try and achieve a consensual workout with as many borrowers as possible.

(i) Further, credit activity continues whilst this process of engagement with borrowers is under way. NAMA has provided significant credit to borrowers.

(j) The plaintiffs claim and assert that they are being treated in a manner which is both unequal to the way in which borrowers in NAMA are treated and further claim that were their loans to have been transferred to NAMA that NAMA would have accepted a business plan and would not have proceeded to enforcement.

(k) In those circumstances the plaintiffs claim that they have been discriminated against in such a way as to be unjustified and/or invidious. The plaintiffs further plead that there can be and is no legitimate reason for the inequality of treatment between borrowers such as the plaintiffs whose loans remain on the balance sheet of the defendant and the borrowers whose loans have been transferred to NAMA.

(l) Further, the plaintiff specifically plead that borrowers such as the plaintiffs whose loans have remained on the balance sheet of the defendant have been specifically targeted for enforcement by reason of the requirements placed upon the defendant to wind its operations down and/or to create cash flow or profit from which to discharge debts.

(m) In the circumstances the conduct of the defendant is such as to constitute a breach of the plaintiffs' property rights as a consequence whereof the plaintiffs have suffered and continue to suffer loss and damage.

(n) In particular the plaintiffs plead that the defendant has breached the plaintiffs' rights in the following manner but without prejudice to the plaintiffs' right to rely on further particulars:

1. Appointing receivers to the assets of the plaintiffs;

2. Appointing receivers when it knew or ought to have known that the receivers appointed would not act in the best interests of the plaintiffs;

3. Refusing or denying directors and managers of the plaintiffs from engaging in the management of the plaintiffs' assets and/or business;

4. Failing to negotiate in good faith or at all in respect of the plaintiff's indebtedness;

5. Determining to appoint receivers in circumstances where no proper opportunity was afforded to the plaintiffs to repay, renegotiate or refinance the debts;

6. Failing to give any or any adequate consideration to business plans submitted by or on behalf of the plaintiffs;

7. Permitting the loss of the 'Holiday Inn' brand;

8. Refusing to take such steps as were necessary to retain the 'Holiday Inn' brand;

9. Closing or causing to be closed the assets and/or business of the plaintiffs and dismissing the employees;

10. Failing to afford the plaintiffs proper or fair procedures in determining to move to enforcement;

11. Acting in a manner which in all the circumstances was unreasonable, unfair, irrational, capricious and unjustified;

12. Failing to take any or any adequate steps to protect the property of the plaintiffs."

8. The plaintiffs assert that this amendment is necessary to enable the court to deal with the real issues between the parties. The

plaintiffs state that they are borrowers of Anglo and that the only difference between them and borrowers whose loans were transferred to NAMA is the size of the plaintiffs' loans. The plaintiffs' loans were just short of the threshold required for transfer to NAMA. The plaintiffs claim that if their loans had been transferred to NAMA, they would have obtained continuing support, the loans would not have been called in, and the receiver would not have been appointed. The plaintiffs also claim that Anglo obtained its own independent expert report and if they followed its recommendations, the companies would have been supported and a receiver would not have been appointed.

9. While NAMA is a statutory entity and the defendant is not, the defendant is fully owned by the State and its solvency depends entirely on promissory notes provided by the Minister for Finance under the Credit Institutions (Financial Support) Act 2008, and its management is appointed by the Minister. Counsel for the plaintiffs argues that in those circumstances, while it is not technically a public entity, it enjoys all the hallmarks of a public entity fully owned by the State, fully controlled by the State, and its solvency is entirely dependent on the State. The plaintiffs claim that in dealing with the defendant, they are entitled to equality of treatment with borrowers whose loans were transferred to NAMA.

10. The plaintiffs claim that they are being treated in one way by a body which is wholly owned by the State and other persons or bodies whose loans have gone into NAMA are being treated in a fundamentally different way. The plaintiffs claim that they are entitled to equality of treatment with borrowers whose loans were transferred to NAMA.

11. The plaintiffs accept that the courts have a discretion as to whether to allow an amendment and that the discretion must be exercised judicially. Where an amendment can be made without prejudice to the other party, and thus enable the real issue to be tried, such an amendment should be allowed (see *Director of Public Prosecutions v. Corbett* [1992] ILRM 674).

12. Where there is delay, a party may not be entitled to amend pleadings. In this case, the plaintiffs argue that the proceedings commenced in 2011, and were entered into the Commercial List on 7th November, 2011. The plenary summons was issued on 29th July, 2011, and the statement of claim was delivered on 21st November, 2011. The defence was delivered on 8th December, 2011. On 16th January, 2012, the plaintiffs' solicitors wrote to the defendant's solicitors asking the defendant to consent to the delivery of the amended statement of claim. The letter did not enclose a copy of the proposed amendment or give any information as to its nature. By letter dated 23rd January, 2012, the defendant's solicitors responded, informing the plaintiffs' solicitors that no copy of the proposed amended statement of claim had been enclosed and requested that it be sent immediately with the proposed amendments. By letter dated 27th January, 2012, the draft amended statement of claim was delivered to the defendant's solicitors. The defendant's solicitors pointed out to the plaintiffs' solicitors that since an amended statement of claim was not delivered before 22nd December, 2011, the amendment could not be made without leave of the court pursuant to the provisions of O. 28, r. 2 of the Rules of the Superior Courts 1986 ("RSC"), and that an application would have to be made. That is the relevant timeline concerning the issue of delay.

13. It seems to me that there was no unreasonable delay in bringing that application to court, and I also got the impression from the manner in which the matter was argued by the defendant that it was not making a great deal about the issue of delay but was primarily relying on two other grounds on which the court should refuse this discretion, namely, (i) that on the issues raised in the amendment ("the NAMA point"), the plaintiffs' claim was bound to fail, and (ii) that the amendments were not necessary to determine the real issues between the parties.

14. The defendant argues that the amendments sought in para. 43 of the amended statement of claim should not be allowed because it does not deal with a real question in controversy between the parties and is a claim that on the face of the pleadings is bound to fail. If the amendment is of a type which is bound to fail, then it can be struck out under O. 19, r. 28 RSC (see *Woori Bank & Anor. v. KDB Ireland Ltd* [2006] IEHC 156; *Porteridge Trading Ltd v. First Active Plc* [2007] IEHC 313; *Cuttle v. ACC Bank PLC T/A ACC Bank* [2012] IEHC 105; and *Cornhill v. Minister for Agriculture* (Unreported, High Court, O'Sullivan J., 13 March, 1998)).

15. Both parties agree that the court should not assess the strength of the plaintiffs' claim, but rather, ask, *"Is it a claim that is bound to fail?"* If it is, then it should not be allowed.

16. I accept the following summary of the principles established by the authorities which have been set out by the defendant:-

> *"1. A party who applies for an order allowing it to amend its pleadings must furnish reasons as to why the court should exercise its discretion in its favour.*
>
> *2. The court is entitled to look at those reasons and the evidence adduced therefrom to inform the exercise of its discretion.*
>
> *3. Fundamentally, the exercise of that discretion involves an analysis as to whether the new claim involved the real issues in controversy between the parties.*
>
> *4. The court is entitled to look at other factors.*
>
> *5. The court can enquire if the new claim or new plea is bound to fail.*
>
> *6. The inquiry by the court as to whether the new claim is or is not bound to fail can involve analysis by reference to either or both of the tests set out in Order 19, rule 28 or the court's inherent jurisdiction.*
>
> *7. If the new claim fails to meet both these tests, then it is not one of the real issues in controversy between the parties.*
>
> *8. If the new claim was bound the fail, the amendment will not be allowed."*

17. The proposed amendment is based on the assertion that there is inequality of treatment or invidious discrimination between borrowers whose loans have been transferred to NAMA and other borrowers such as the plaintiffs, whose loans have not. The defendant claims that no evidence is adduced to support this allegation, nor is evidence adduced in support of the proposition that the plaintiffs' loans are capable of acquisition by NAMA pursuant to the National Asset Management Agency Act 2009 ("the 2009 Act"). It also argues that no evidence is adduced to support the proposition that a borrower whose loan has been acquired by NAMA has its liability reduced to the discounted price by NAMA, notwithstanding the provisions of s. 99 and s. 102 of the 2009 Act, and no evidence is adduced to indicate any basis for the proposition that NAMA would have entered into a restructuring or compromise with the plaintiffs had the plaintiffs' loan and security with the defendant been acquired. Nor do the plaintiffs state how such evidence

could be produced. On this basis, the defendant argues that the claim must fail. In the amendment proposed, the plaintiffs claim that NAMA legislation should have provided for loans of the plaintiffs' type and quantity to be included in it. If that is so, the defendant argues that the claim could only be made against Ireland and the Attorney General since the claim is based on an assertion that the NAMA legislation is itself a breach of constitutional obligations to ensure equality. This would be so because it either breaches Arts. 40 or 43 of the Constitution.

18. If such a claim is made, the defendant argues that it could only be made against the State on the basis that it had introduced a scheme that was discriminatory and which did not adequately protect the property rights of the plaintiffs. This is a challenge to the legislation. But such a challenge is not made in this case.

19. The plaintiffs contend that if their loans had gone into NAMA, their property rights would have been improved. But, the defendant argues, this is not something that can be laid at the door of the defendant. It is, in effect, a constitutional challenge to the 2009 Act, and the defendant says this would have to be an action against Ireland and the Attorney General and not against the defendant.

20. I agree with this submission. The plaintiffs' scheme under the proposed amendment is based on an assumption that borrowers whose loans are transferred to NAMA will have a liability represented by the discounted price paid by NAMA for the original loan. This is, in fact, incorrect. Sections 99 and 102 of the 2009 Act provide that the borrower's obligations to the bank remain the same as they were when the loan was transferred to NAMA. While NAMA may have paid a discounted price to the bank for the transfer of the loan, the full amount of the loan remains due and owing to NAMA by the borrower.

21. The claim made in the proposed amendment is bound to fail because there is no right to have an asset acquired by NAMA. The 2009 Act does not impose any benefit on a borrower nor is there any duty owed to borrowers, so the plaintiffs can have no claim in respect of any non-acquisition of their loan by NAMA. If there was such a claim, it is a challenge to the legislation and would require to be made against the State by naming Ireland and the Attorney General as defendants. Just because there is legislation (i.e. the 2009 Act) providing for a different entity and imposing different statutory obligations and duties on that entity, does not mean that another organisation such as the defendant in this case has to deal with plaintiffs in the same way as they might have been dealt with had their loans been transferred to NAMA.

22. A point was raised concerning the issue of whether the constitutional rights being claimed by the plaintiffs could be claimed by a corporation rather than a human person. The entitlement of corporate bodies to invoke the constitutional guarantee of private property rights was addressed by Keane J. in the High Court in *Iarnród Eireann v. Ireland* [1996] 3 I.R. 321. In that case, he held that it does not necessarily follow that the property rights of individual citizens which are protected against unjust attack by Art. 40.3 of the Constitution are confined to rights enjoyed by human persons. In any event, nothing turns on this point, because even if the plaintiffs did have property rights under the Constitution, the claim sought to be made in the amendment is, for the reasons I have already expressed, bound to fail.

23. That leaves a question of whether the amendment is necessary in order to enable the court to deal with the real issues between the parties. Counsel for the plaintiffs stated that the real issue in dispute between the parties is the defendant's appointment of receivers to the assets of the plaintiffs and the calling in of the loans. He claimed that no proper or adequate time was given after the demand and he says that the decision to appoint a receiver had been made and a receiver had in fact been appointed prior to the demand being made. He also asserts that there was a misrepresentation at the heart of the agreement between the parties when the plaintiffs borrowed money from the defendant in 2008, not knowing the true financial state of the defendant. He said that this was the essential issue in the case and the real controversy in the case had to do with the appointment of the receivers and that alleged misrepresentation. Counsel for the plaintiffs asserts that as part of their claim, the plaintiffs seek to prove that they have been subject to invidious discrimination. But if that is so, it is an attack on the legislation and is bound to fail for the reasons I have already set out earlier in this judgment.

24. The commercial relationship between the plaintiffs and Anglo gave rise to rights and obligations on both sides. No factual allegations have been made that would sustain a claim against the defendant for breach of the plaintiffs' constitutional rights. Insofar as complaint is made that there was no transfer of the plaintiffs' assets to NAMA, this is not a complaint which can be made against the defendant as it is not something for which the defendant could be held responsible. Therefore, matters set out in the proposed amendment and relating to this issue are not part of the real issues to be tried between the parties.

25. Since I am satisfied that the proposed amendment raises issues which are bound to fail and which are not necessary to determine the real issues between the parties, I refuse the application to amend the statement of claim in respect of para. 43. I now turn to the issue of security for costs.

Security for Costs

26. Section 390 of the Companies Act 1963 provides:

> *"Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."*

27. Counsel for the plaintiffs accepts that in the circumstances of this case, s. 390 applies, and that security for costs should be ordered unless special circumstances arise which will entitle the court to exercise its discretion not to order security. The defendant contends that it has a prima facie defence and this is not contested by the plaintiffs. Accordingly, the burden of proof is on the plaintiffs who must satisfy the court that "special circumstances" exist which would enable the court to exercise its discretion not to order security for costs.

28. The plaintiffs claim that there are a number of special circumstances and that they are as follows:

> (i) The defendant has caused the financial difficulties of the plaintiffs.
>
> (ii) The proceedings raise issues of public and/or legal importance.
>
> (iii) The existence of the proceedings bearing record number 3213S/2011 between *IBRC v. John Moran*, are a mirror image of these proceedings and that the consolidation of both actions and/or the hearing of both actions at the same time would mean that no extra costs in bringing these proceedings would be borne by either party.

29. In *Connaughton Road Construction Ltd v. Laing 0'Rourke Ireland Ltd.* [2009] IEHC 7, Clarke J. stated at para. 3.4 that in order for a plaintiff to succeed in proving that his inability to pay stems from the wrongdoing asserted, four propositions must necessarily be true:-

> *"(1) That there was actionable wrongdoing on the part of the defendant (for example, a breach of contract or tort);*
>
> *(2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;*
>
> *(3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example, by not being too remote); and*
>
> *(4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position. "*

30. In this case, the defendant points to compelling evidence to show that the plaintiff companies were unable to pay their debts as they fell due and that they were in financial difficulties in 2009 and 2010, long before the appointment of a receiver. There is clear evidence that the plaintiffs financial difficulties were due to the economic downturn and this was particularly so with regard to the first named plaintiff. Counsel for the plaintiffs says that the court should look at the plaintiffs' case in the round and that while they were suffering financial difficulties, these could be easily overcome, as evidenced in the accountant's report commissioned by the defendant. The burden of proof on this issue rests with the plaintiffs, and in my view, they have failed to show that there is any credible evidence to link their inability to pay costs with the conduct of the defendant.

31. The next ground urged by the plaintiffs for the court to exercise its discretion against making an order for security for costs relates to the claim by the plaintiffs that these proceedings raise an issue or issues of exceptional public or legal importance. Essentially, this relates to "the NAMA point". For the matter to be one of exceptional public importance it has to transcend the interests and considerations of the parties actually before the court (see *Lansford Ltd v. An Bord Pléanala* [1998] 2 I.R. 511).

32. Since I have refused to allow the amendment to the statement of claims so as to admit "the NAMA point", I must look at the proceedings without regard to that issue. The pleadings raise issues of an unexceptional nature arising out of the relationship between a bank and its customer including allegations of breach of statutory duty, breach of regulations, dishonesty, impropriety and fraud. But however serious such claims may be, they do not transcend the interests and considerations of the parties actually before the court, or raise interests of the common good requiring the law to be clarified for the public benefit. I see nothing in the matters before the court which would indicate that there is a point of law or issue of exceptional public importance that arises in this case.

33. The plaintiffs claim that these proceedings mirror other proceedings entitled *Irish Bank Resolution Corporation v. Johnny Moran* [2011 3213 S]. In those proceedings, the defendant, who is a director and shareholder of the plaintiff companies, seeks to avoid a claim of liability on foot of a guarantee given to IBRC and the plaintiffs in this action claim that he seeks to avoid liability on precisely the same grounds that the plaintiffs in these proceedings rely.

34. Mr. Moran is not a party to these proceedings. In the proceedings against him on foot of the guarantee, the claim is for a liquidated sum claimed to be due and owing to the plaintiffs by Mr. Moran. The guarantee proceedings have nothing to do with the appointment of receivers. I do not accept that the proceedings against Mr. Moran can be properly characterised as being a "mirror image" of these proceedings, or that they would constitute a special circumstance which could be taken into account by the court in deciding whether or not to make an order for security for costs.

35. The plaintiffs have failed to show any special circumstances as to why security for costs should not be directed in this case, and accordingly, I make an order directing that the plaintiffs furnish security for costs.