

**THE HIGH COURT**

**COMMERCIAL**

**[2012 No. 1209 S]**

**[2012 No. 80 COM]**

**BETWEEN**

**BANK OF IRELAND**

**PLAINTIFF**

**AND**

**PHILIP STAFFORD, PAULA STAFFORD AND MARIAN STAFFORD**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 28th day of November 2013**

1. In this action, the plaintiff claims €5,358,026.12, together with interest and costs, on foot of a loan facility advanced by the plaintiff on 21st December, 2005, to the first, second and third named defendants and to Francis Gerard Stafford (Deceased) late of Kerlogue House, Kerlogue, County Wexford ("the Deceased").

2. On 26th February, 2013, the first and second named defendants (who are husband and wife) settled the plaintiff's claim against all the defendants by paying the sum of €3,506,776.06 plus interest and costs. The first and second named defendants served a notice of contribution and indemnity dated 25th March, 2013, on the third named defendant in her personal capacity, and on Mr. John O'Connor and Mr. Kieran Byrnes as executors of her late husband, Francis Gerard Stafford ("the Deceased"). It was subsequently agreed that the third named defendant would take over the proceedings on behalf of the executors.

3. The third named defendant denies any liability, either on her own behalf or as a representative of the estate of the Deceased on the following grounds:

(a) The proceedings are time-barred by virtue of s. 8 and s. 9 of the Civil Liability Act 1961;

(b) that the loan was a limited recourse loan, being limited to the security provided in respect of the asset comprising a car park at Paul Quay, Wexford;

(c) undue influence had been exerted on the defendant, and by extension, the third named defendant by the first named defendant;

(d) the Deceased did not have the mental capacity to execute the loan agreement and did so without the benefit of independent legal advice;

(e) if the third named defendant has a liability to the first and second named defendants, such contribution should be measured on a basis which is "fair and equitable" in accordance with the provisions of s. 21(2) of the Civil Liability Act 1961.

4. Before dealing with each of these issues in turn, it is necessary to look briefly at the background to the loan facility which was granted.

5. For many years prior to his death on 17th July, 2008, the Deceased and the first named defendant (who were brothers) carried on a number of joint business ventures. In or about 1999, they each acquired an equal share in Streamline Properties Ltd., an off-the-shelf company bought for the purpose of holding property. This company owned a site comprising approximately 1.75 acres at Paul Quay in Wexford. The company was granted planning permission to build a development comprising 73 apartments, approximately 40,000 sq. ft. of retail space, office space and a multi-storey car park containing 312 car park spaces. The project was to be funded by a bank loan and by capital invested by the defendants. The defendants were advised to purchase the car park site from the company for its market value and to employ the company to develop the site. The car park was purchased by the Drinagh Family Partnership, the Deceased and the third named defendant. The Drinagh Family Partnership comprised the first and second named defendants (who are husband and wife) as trustees of the Drinagh Family Trust (the beneficiaries of the trust being the first and second named defendants and their children). The Drinagh Family Partnership owned 80% of the property, with the Deceased and the third named defendants each owning 10%.

6. The plaintiff agreed to fund the development and negotiations were entered into with the plaintiff with regard to the provision of a limited recourse loan facility in 2003. It was envisaged that the limited recourse loan facility would be drawn down by Stonebridge Car Park Partnership. The partners were the three defendants and the Deceased. But it was ultimately agreed that the facility would be drawn down by the company. The car park was transferred to Stonebridge Car Park Partnership because there were significant capital allowances available on the building of multi-storey car parks and the first and second named defendants believed they would be able to use that vehicle to shelter other income from the rest of the development.

7. The defendants and the Deceased agreed to act as sureties for the company on the basis that their liability to the plaintiff was limited to the value of the site itself and the car park constructed on it. However, the Loan Sanction Committee of the plaintiff would not agree to an express stipulation in a letter of loan offer that the guarantees would be limited recourse only. The plaintiff agreed to issue loan facility letters providing that the borrower and sureties were jointly and severally liable to repay the loan in full and to

provide side letters to indicate the true nature of the guarantees. The defendants claim that they were led to believe that their liability as sureties would be limited to the value of the car park.

8. It was understood that the car park would be completed by the end of 2005, and that the ownership of the car park would transfer to Stonebridge Car Park Partnership. The company agreed with Stonebridge Car Park Partnership to borrow the working capital necessary to fund the development and thereafter to invoice the partnership once the car park had been completed.

9. The construction of the car park was completed in December 2005, and it became necessary for the partners to raise finance to pay to the company the price of the construction. In particular, the partners were advised that it would be necessary to repay the company before the end of 2005 in order to avoid certain VAT liabilities which would involve a saving of approximately €750,000. Thus, it became necessary to arrange the loan in a short space of time.

10. An urgent request was made for a loan facility in the sum of €5,306,125. The request was made on 20th December, 2005, by way of an overdraft loan facility. The loan facility was advanced pursuant to a letter of offer dated 21st December, 2005, by way of a three-month loan facility for the purpose of paying the amount then due to Streamline Properties Ltd. for the construction of the car park. The three defendants and the Deceased accepted the terms of the loan facility letter and duly signed the form of acceptance on 22nd December, 2005.

11. The first named defendant says that he and the other defendants (including the Deceased) thought that the monies were advanced on the basis of limited recourse to the value of the car park. The first named defendant, having received legal advice, eventually accepted that this was not so, and that the loan was recoverable from the defendants (and the estate of the Deceased) jointly and severally on a full recourse basis. When he received this advice, he decided to settle the action, discharging the debt in full, and he now brings these proceedings against the third named defendant by way of contribution or indemnity in respect of her share and the share of the Deceased.

12. The letter of offer dated 21st December, 2005, had conditions attached. Clause 10 of the conditions provided for "events of default" and one of the events of default is the death of the borrower. The Deceased died on 17th July, 2008, and the third named defendant argues that the death was an event triggering default. She relies on s. 8 and s. 9 of the Civil Liability Act 1961.

13. Section 8 provides as follows:

*"8.—(1) On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate.*

*(2) Where damage has been suffered by reason of any act in respect of which a cause of action would have subsisted against any person if he had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of subsection (1) of this section, to have been subsisting against him before his death such cause of action in respect of that act as would have subsisted if he had died after the damage was suffered."*

14. Section 9 provides:

*"9.—(1) In this section "the relevant period" means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.*

*(2) No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either—*

*(a) proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or*

*(b) proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires."*

The Deceased died on 17th July, 2008, and the summary summons was issued on 29th March, 2012. The first and second named defendants argue that the plaintiff's claim against the Deceased and/or the first and second named defendants' claim against the Deceased were not claims that survived against his estate within the meaning of the Civil Liability Act 1961. They rely on *Bank of Ireland v. O'Keefe* [1987] I.R. 47, in which Baron J. held that the plaintiff's claim on foot of a guarantee made against the estate of a deceased was not time-barred since the demand was made after the death of the Deceased and it was not a claim that survived against the Deceased's estate within the meaning of the 1961 Act. He held that the plaintiff's claim was triggered by the demand that was made after the Deceased's death. Therefore, the limitation period prescribed by s. 9 of the 1961 Act did not apply. It seems to me that this is what occurred in the present case. The demand for payment was made after the Deceased's death and was not a claim subsisting at his death or one that survived against the Deceased's estate within the meaning of the 1961 Act. The monies did not fall due and were not repayable at any time prior to the Deceased's death.

15. So far as the claim for contribution or indemnity against the Deceased is concerned, that claim could only arise after the plaintiff lawfully demanded repayment of the loan.

16. I reject the defence of the third named defendant based on the argument that the claim is time-barred. It is worth noting that when the Deceased's estate was being administered, this debt was shown as a liability on the estate.

17. The facility letter of 21st December, 2005, showed that the borrowers were the defendants and the late Gerard Stafford. The sum of €5,306,125 was offered by way of a three-month loan facility in order to pay the outstanding amount to Streamline Properties Ltd. in respect of the building of the car park. The offer letter also stated that the facility would run off at 31st March, 2006, and that a restructure of capital plus interest was to be agreed in advance of this date. The security for the loan included a legal charge over the completed car park. The form of acceptance of the offer in the facility letter was signed by each of the defendants and the Deceased on 22nd December, 2005.

18. The original loan in respect of the car park was made on foot of a facility offered by the plaintiff in 2003. The loan facility was €5.1m and was part of an overall approval of €10m to fund the Paul Quay development. The 2003 facility was advanced to Streamline Properties Ltd. and was secured by way of a first legal charge over the entire site at Paul Quay. The car park site was owned by the

defendants and the Deceased and the remainder of the site was owned by Streamline Properties Ltd. The Bank, therefore, required that the defendants and the Deceased would guarantee the sum of €5.1m borrowings of Streamline Properties, but limited the guarantee to the value of the site at Paul Quay.

19. While that may have been the position up until December 2005, it is clear that the facility granted on 21st December, 2005, was not a limited recourse facility.

20. The facility of 21st December, 2005, set out the security for the loan but did not state that the personal liability of the borrowers was limited to that security. The position appears to have been that the parties intended entering into a further arrangement in the following year but such an arrangement was not put in place because it was realised that the car park was not performing as well as anticipated. There is nothing ambiguous about the terms of the facility letter, and while all the borrowers may have understood or believed that it was a limited recourse loan, the evidence establishes that this is not in fact the case.

21. I now go on to consider the claims by the third named defendant that undue influence was exerted on the Deceased and, by extension, the third named defendant by the first named defendant and that the Deceased's mental capacity was insufficient to fully understand the agreement which he entered into on 22nd December, 2005.

22. The Deceased suffered from Depression and a Bipolar Disorder. There was ample evidence to show that this was quite severe at times, although in recent years it appears to have been reasonably well controlled by medication. As a result, the Deceased's last hospital admission was as far back as 1989. A lot of the credit for this must go to the third named defendant, Mrs. Marian Stafford. From the time of her marriage to the Deceased, it is clear that she cared for him assiduously and lovingly and she gave vivid evidence of how he would be affected by dark moods from time to time, and that while in such a state, he would spend long periods in bed or withdrawn from the world. I accept her evidence on this aspect of the case.

23. However, there was ample evidence from a number of witnesses from different walks of life who engaged with the deceased professionally and who said that he was at all times a gentleman and very conscientious in the manner in which he approached his business affairs. There was convincing evidence to show that when he was presented with business or legal documents, he took time to consider them carefully and frequently asked questions of his advisors, showing that he had a complete grasp of the business in hand. Apart from a number of witnesses who dealt with the Deceased in a professional capacity, the court heard evidence from a long-standing friend who was aware of his debilitating illness but stated that he was sound in his everyday activities and decisions although he was aware of his limitations and was careful to follow the medical regime ordained by his medical advisors. This witness never found any diminution in the Deceased's mental capacity in the latter years of his life. The witness informed the court that after the Deceased married the third named defendant, he seemed more settled and relaxed in his approach to life. A statement of evidence of Mr. Christopher Dillon OSB, the Abbot *emeritus* of Glensal Abbey, was admitted in evidence without the necessity of him being called. Abbot Dillon said that he always found the Deceased to be "*extremely lucid and shrewdly cautious*" about his proposals which involved funding various undertakings in Glensal Abbey. He stated that the Deceased informed him of his gradual withdrawal from the pressures of hands-on management of certain business enterprises and was concerned that his brother (the first named defendant) was burdened with managing businesses they jointly owned. He did not receive any impression that the deceased was pressurised by his brother in any way. On the contrary, he felt that they had a warm and loving relationship.

24. The first named defendant himself gave evidence of the relationship he had with his only sibling (the Deceased) and I am satisfied that it was a warm and loving relationship and that the first named defendant at all times looked out for the Deceased and took proper care of his interests.

25. I find no evidence to support the allegation of undue influence or lack of capacity on the part of the Deceased to understand the obligations he was assuming on accepting the terms of the facility offered on 21st December, 2005. Although a psychiatrist was called to give evidence, she said that she was unable to comment on the Deceased's mental condition when he engaged in business affairs.

26. The third named defendant says that if she is found to be liable to the first and second named defendants that any contribution should be measured on the basis that it is "*fair and equitable*" in accordance with s. 21(2) of the Civil Liability Act 1961.

27. I am satisfied that the first named defendant has established on the balance of probabilities that the settlement which he reached with the Bank on behalf of all the borrowers was reasonable. In these proceedings, he seeks no more from the third named defendant than to recover the proportion of the liability to the Bank which the third named defendant and the Deceased would have had under the terms of the partnership arrangement. In those circumstances, what he is claiming is fair and equitable.

28. The parties have agreed the figures that apply if the first named defendant recovers on the basis claimed by him. They are as follows:

20% of amount drawn down by the first named defendant from Bank of Ireland on foot of a new facility, having settled with the plaintiff. This sum is €701,355.21.

One-third of the interest accrued to Bank of Ireland from the date of drawdown to date (€13,711.97) giving a liability of €4,570.66.

One-third of legal costs in putting in place security required by Bank of Ireland (Liam Hipwell & Co. €55,768) which amounts to a sum of €18,588.50.

The total of these figures is €724,514.37.

29. The first named defendant is entitled to contribution in such sum from the third named defendant.