THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2017] IECA 283

[Appeal number 2017/279]

Ryan P.
Irvine J.
Whelan J.

BETWEEN

NATIONAL ASSET LOAN MANAGEMENT DESIGNATED ACTIVITY COMPANY LIMITED

PLAINTIFF / RESPONDENT

- AND -

MICHAEL BRESLIN

DEFENDANT / APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 26th day of October 2017

1. This is the defendant's appeal against the judgment of McGovern J. delivered on 26th May, 2017 and consequential orders made in the Commercial Court granting summary judgment pursuant to order 37 RSC against the defendant in the sum of £9,397,725.60, sterling and costs.

2. The appellant is a highly successful and experienced businessman. He has extensive corporate experience at chief executive level with various corporations in the United States of America since the 1980s and is, according to his affidavit sworn 30th July, 2015, president and chairman of a corporate group in New Jersey. He appears to have had prior experience and familiarity with the process of negotiating with lending institutions and personally guaranteeing a bank loan (appellant's affidavit 1st March, 2017, para. 26).

3. The respondent ("NALM") is a group entity within the National Asset Management Agency, a statutory body corporate established pursuant to the provisions of the National Asset Management Agency Act, 2009 ("the 2009 Act"). The appellant was sued in his capacity as a guarantor of the debts of Car Park Solutions Limited ("the company") to the failed banking entity formerly known as Anglo Irish Bank ("the Bank"). The company is a dissolved development company which had a registered office at Belturbet, Co. Cavan. In September 2007, the company acquired a property at Waterloo Road, London. The property was valued in September 2007, as a condition precedent to drawdown of the loan facility, at £25,700,000. Acquisition was financed in part by the bank by virtue of two on-demand loan facilities Facility 1 in the sum of £19,400,000 and Facility 2, a short-term bridging loan in the further sum of £2,000,000.

4. In 2008 the company sought an extension of the two loan facilities. The bank ultimately agreed to extend the loan terms to 31 March 2009 subject to certain prerequisites including, *inter alia*, that the appellant would execute a personal unlimited guarantee and indemnity in respect of the supplemental facilities. The alleged circumstances which led to the appellant executing the guarantee are in issue in this appeal.

5. The bank was taken into public ownership on 21st January, 2009 against a dismal economic background. In July 2011, it was restructured, with another bank entity, as Irish Bank Resolution Corporation ("IBRC"). Pursuant to Statutory Instrument No. 36 of 2013 IBRC was placed into special liquidation on 7th February, 2013. IBRC (in special liquidation) is successor in title to Anglo. NALM's position is that under the provisions of the 2009 Act, it acquired from Anglo the "bank assets" of the company on the 13th December, 2010. The company's liability to Anglo on foot of the loan facilities exceeded £22 million as of August 2009. The liability was ultimately reduced by the receivers' sale of the mortgaged property (by then with the benefit of planning permission) for £16,000,000 on 16th March 2011.

6. The appellant's notice of appeal, filed 12th June, 2017, sets out 54 distinct grounds of appeal. However, at the hearing before this Court on 28th July, 2017, counsel for the appellant indicated that he was proceeding on five essential grounds as follows:

> i. The appellant claims he was induced by the bank in October 2008 to enter into a guarantee of the debts of the company incurred mainly in the acquisition of the property on the basis of representations made by Fergal Feeney, director of UK lending at Anglo that construction finance would be furnished for the purpose of facilitating the completion of the building of a hotel and facilities at Waterloo Road, London SE1 ("the Waterloo Road project"). This alleged representation, he contends, operated as a condition precedent to the guarantee coming into effect. Since construction finance (estimated to be in the region of £40 million) was never advanced by the bank the appellant contends that he is not bound by his guarantee.
>
> ii. The appellant denies that an unlimited guarantee and indemnity executed by him on or about 5th November , 2008, for the debts of the company was acquired by NALM when the "bank assets" (as defined in the 2009 NAMA Act) arising from the credit facilities granted by Anglo to the company transferred to NALM on the 13th December, 2010 under the provisions of Part 6 of the Act. It is contended that the appellant's guarantee was not effectively acquired at that time by the respondent.
>
> iii. The appellant asserts that the guarantee was not validly created or is otherwise unenforceable having regard to the provisions of two floating charges created in February 2008 by Anglo in favour of the Central Bank of Ireland and Financial Services Authority of Ireland. The appellant relies on negative pledge clauses contained in the said floating charges as invalidating the guarantee.

iv. The appellant claims he has been released from the guarantee on foot of an agreement ("the American document") concluded between IBRC in special liquidation of the one part and the appellant and his wife Dolores Breslin of the other part. The appellant claims that notwithstanding that NALM was not a party to the American document, it is nonetheless binding on the respondent.

v. The appellant challenges the constitutionality of sections 101, 105 and 108 of the NAMA Act 2009.

History

7. Barry Breslin and Francis Smith, the appellant's brother and cousin respectively, were involved in the business of property construction and development in Ireland and the United Kingdom for over two decades. In the years prior to 2007 they carried out developments including through a company Keelagh Homes Ltd. In early 2007 the directors of Keelagh identified a potential property investment in London being a premises at Partnership House, 157 – 183 Waterloo Road, London SE1 ("the property"). In mid-July, 2007 Barry Breslin and Francis Smith met with Anglo representatives in Dublin to discuss the proposed acquisition and development of the property. At that time the total cost of acquisition of the property and its development as a hotel was estimated at around £61 million . In an affidavit sworn on 1st March, 2017 Francis Smith deposed:-

> *"I believed that the most likely option available to us was that the full finance, to include construction finance, would be granted by Anglo, because that was their area of speciality because they had an existing relationship with Barry Breslin, a shareholder in the company and Keelagh, and with the defendant herein."*

The appellant was never a shareholder or director of either company.

8. By letter of offer dated 31st August, 2007 Anglo offered the company an on demand loan facility in the maximum amount of £19,400,000 and otherwise subject to Anglo's general conditions, subject to the conditions set out in the letter of offer ("Facility 1"). The company duly accepted this offer in writing on the 5th September, 2007. The purpose of Facility 1 (as later amended) was expressed to be "To enable the borrower fund the purchase of 100% of the share capital in CEREP Waterloo Road Sarl being the limited partners in the Waterloo Road Limited Partnership." In effect, Facility 1 secured the acquisition of the premises for the proposed Waterloo Road project.

9. Facility 1 was to be drawn down by the 30th September, 2007 or such later date as determined by Anglo. A condition precedent required a valuation report from a nominated valuer confirming a minimum valuation for the property of £25,700,000. Clause 8 of Facility 1 provides:-

> *"The facility is repayable on demand which demand may be served at any time by the bank at its sole discretion and without stating any reason for such demand. Without prejudice to the demand nature of the facility, the facility shall be repaid on or before 31 March 2008. In the meantime interest is to be funded on a quarterly basis at the end of each calendar quarter."*

By letter of amendment dated 13th September, 2007, Anglo effected a number of changes to the terms of the facility and the security required. All the variations were accepted.

10. By a further letter of offer dated 13th September, 2007, Anglo offered the company an on demand loan facility ("Facility 2") in the maximum amount of £2 million subject to Anglo's general conditions and the conditions referred to in the facility offer. This was effectively bridging finance. The company executed acceptance of the offer on the same date. The security included a first legal charge over a deposit account held by the bank in the company's name with a balance equal to 6 months interest. Additional security included composite joint and several guarantees of Barry Breslin and Francis Smith. The facility was to be fully drawn down by 30th September, 2007. Facility 2 was repayable on demand and in any event was to be repaid in full on or before one month from drawdown.

Supplemental Facilities

11. The Company did not repay the principal monies in accordance with the agreed terms in respect of either loan. As regards facility 1, by a supplemental facility letter dated the 25th September, 2008, Anglo extended the loan term. The security now being required included *"the composite joint and several guarantees of Barry Breslin, Francis Smith and Michael Breslin."* A revised extended repayment date of 31st March, 2009 was agreed. The borrower's acceptance of the supplemental agreement to facility 1 was executed 29th September, 2008. Barry Breslin and Francis Smith executed their guarantors' acceptance on 29th September, 2008 along with the relevant guarantee and indemnity. The appellant initially executed the guarantee on 26th October, 2008 at the offices of Anglo in London. Later he re-executed the guarantee and indemnity in New York on 5th November ,2008.

12. Likewise facility 2 was extended by Anglo by letter dated 25th September 2008. A revised repayment date is identified in this agreement as follows:-

> *"The Facility is repayable on demand… Without prejudice to the demands nature of the Facility, the Facility shall be repaid as follows:*
>
> > *a. a minimum of US$3 million or such equivalent sum in pounds sterling as agreed by the bank on before 30 September 2008 and*
> >
> > *b. all outstanding balances on before 31 March 2009."*

The company accepted the supplemental facility 2 terms and executed same on 29th September, 2008.

13. The appellant's acceptance is signed and dated 5th November, 2008. The acceptance documents as executed by the appellant, in respect of each facility, provides as follows:-

> *"We have read this Supplemental Facility Letter of 25 September 2008 to Car Park Solutions Ltd and the bank's general conditions which form part of the agreement between the borrower and the bank (the "agreement") and confirm that we fully understand the terms of the Agreement and acknowledge that we are guaranteeing the performance by the Borrower of its obligations under the Agreement to the bank. We acknowledge that we have been given the opportunity to take independent legal advice on the effect of the Agreement and have taken/waived (delete one) the opportunity to*

take such legal advice.

Warning: as a guarantor of this loan, you will have to pay off the loan, the interest and all associated charges if the borrower does not. Before you sign this Agreement you should get independent legal advice.

In relation to the warning above, the "loan" means all amounts owing from the borrower to the bank from time to time not only amounts owing under the agreement."

14. As is acknowledged by the appellant, he executed the guarantee and indemnity instrument for the benefit of Anglo on or about 5th November , 2008. It provides, *inter alia* the following clauses:-

"2.1 In consideration of the Bank at the request of the Guarantors making continuing advances or otherwise giving credit or affording banking facilities to the borrower, each of the Guarantors as principal obligor not merely as surety by this deed unconditionally and irrevocably covenants to pay and guarantees payment on written demand by the bank of:

(a) all monies whatsoever be they principal , interests or otherwise which now are, or at any time after the date of this deed may become, due to the bank by the borrower….".

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

15. The instrument contains the bank's standard warning as outlined above at para.10 ante and on the page where the appellant's signature is appended there is the following:-

"*IMPORTANT the Guarantor by this Deed confirms that –*

a. he is fully aware of the nature of this Deed, the effect of which has been explained to, and understood by him;

b. has been advised to take and has been given due opportunity to take separate independent legal advice on the effect of this deed:

c. he has taken/has not taken the opportunity of taking such legal advice;

d. he is now willing to be legally bound by the terms of this Deed;

e. he has received a copy of this Deed."

16. The company defaulted on the loans. On 18th August, 2009, Anglo wrote to the company demanding repayment in the sum of £22,035,307.51 in respect of both facility letters, as amended by the supplemental facility letters outlined above. A subsequent demand addressed to the company dated 26th August, 2009 identified the indebtedness as £22,054,178.52.

17. The National Asset Management Agency Act 2009 came into operation on the 21st December, 2009. The Minister for Finance had announced the proposed establishment of NAMA on 7th April, 2009. NAMA was established on a statutory basis under the aegis of the National Treasury Management Agency to address the existential crisis the opening blows of which in 2008 threatened to shatter the state's fragile economy. The exigencies which engulfed the financial and banking sectors in the state in the wake of the global financial crisis primarily stemmed from distressed loans concerning property and development land. The disruption escalated significantly following the collapse of the US investment bank, Lehman Bros in mid September 2008. Under the scheme of the 2009 Act, participation in which was voluntary, NAMA purchased impaired loans from participating banks regarded as systemically important to the financial stability of the state for a "discount" reflecting their estimated long-term economic value.

18. On the 13th December, 2010 the respondent acquired from Anglo, by then a participating institution under the NAMA Act, the "bank assets", as defined in s. 4 of the NAMA Act, arising from the credit facilities advanced by Anglo to the company dated 31st August, 2007 and 13th September, 2007 as amended by the two supplemental agreements dated 25th September, 2008 and referred to above, for a total amount of £21,400,000. In a certificate issued pursuant to s. 108 of the NAMA Act dated 24th June, 2015, the respondent certified that the bank assets so acquired included:-

".the credit facilities, any security relating to such credit facilities every other right arising directly or indirectly in connection with such credit facilities every other asset owned by a participating institution, and any other interest in the bank assets…"

NALM relies on s. 108 (2) (b) of the 2009 Act which provides that a certificate issued thereunder is "conclusive as to the matters set out therein. The appellant denies that the guarantee was ever acquired by NALM.

19. The company having defaulted on the loans, a receiver was appointed under the mortgage instrument and the sale of the Waterloo Road property was effected. On the 23rd March, 2011 net proceeds of £15,613,662.90 were applied towards reduction of the loan debt. These proceedings concern the outstanding balance due on foot of the loans.

High Court Hearing and Judgment

20. The motion for summary judgment came on for hearing in the High Court before McGovern J. on the 3rd May, 2017. It is clear that the affidavits filed on behalf of the parties were opened to the court together with the detailed written legal submissions and booklets of authorities and the court considered the arguments advanced by counsel on behalf of both parties. Judgment was reserved.

21. A detailed and considered judgment was delivered on 26th May, 2017. After reviewing the facts as disclosed in the affidavits, the trial judge considered carefully the jurisprudence which identifies the appropriate test in an application for summary judgment including the judgment of McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R.1 and Clarke J. in *McGrath v. O'Driscoll* [2007] I.L.R.M. 203.

22. The trial judge rejected the proposition that the evidence advanced by the plaintiff supported a contention that at a meeting on 24th October, 2008, Mr. Fergal Feeney assured the defendant that if he executed the guarantee and indemnity Anglo would provide construction finance for the Waterloo Road project.

23. The judge noted in particular the terms of paragraph 22.6 of the guarantee instrument together with the confirmatory statements of the guarantor on the signature page. He found no ambiguity in the text of the relevant guarantee clauses. He noted it was not a consumer transaction and whilst there was no obligation on the plaintiff to take professional advice prior to its execution, someone who signs commercial banking documents without taking advice on them runs a risk which they must accept. He cited Clarke J. in *ACC Bank plc v. Kelly* [2011] IEHC 7 and *McCaughey v. Anglo Irish Bank Corp Limited* [2012] 4 I.R. 417, as upheld on appeal by the Supreme Court, with approval. The trial judge found that the appellant was estopped from advancing this argument on the basis of the guarantee which he signed and in which he acknowledged that he had not relied on any warranty or representation made by or on behalf of the bank to induce him to enter into the guarantee. The trial judge noted that there was no record of such a representation and also noted the substantial delays over many years on the part of the appellant in raising this assertion.

24. McGovern J. found as a matter of law, having regard to the provisions of the NAMA Act, 2009 that Anglo/IBRC had no rights in relation to the guarantee after 13th December, 2010. He determined that the certificate pursuant to s. 108 of the 2009 Act dated 24th June, 2015 was conclusive as to the matters set out therein and, in particular, as evidence of the fact that the guarantee together with the loan facilities and all security had been acquired by NALM on 13th December, 2010 and from that time onward the obligations of the defendant were owed to NALM and not Anglo or the Irish Bank Resolution Corporation (IBRC). The trial judge further accepted that a letter dated 19th October, 2011 from IBRC to Car Park Solutions Limited notifying it of the acquisition of the facility and the guarantee had been brought to the attention of the appellant by his solicitor.

25. Regarding the settlement agreement, the trial judge concluded that the negotiations related to joint borrowings of the defendant and his wife with Anglo which had been secured by way of mortgage over the "Woodbridge Stud/Dunsany property". He noted that NALM never acquired any interest in that property loan. Further, he was satisfied as a matter of law that, from the acquisition of the guarantee and indemnity by NALM on 13th December, 2010, the obligations owed by the defendant on foot of the guarantee and indemnity were owed to the respondent and not to Anglo or IBRC. He noted that the appellant had instituted proceedings against IBRC to enforce the alleged compromise at a time after he was aware that the facilities, guarantee and indemnity had been acquired by NALM yet did not join the latter party in those proceedings. He accepted the affidavit evidence of Mr. Kevin Bradley of NAMA who deposed that NALM *"did not direct, supervise, authorise or even know about the purported agreement said to have been entered into as between the special liquidators of IBRC and Mr Breslin and his wife (either directly, indirectly or in any other way)".*

26. McGovern J. rejected the appellant's contention that the negative pledge clauses contained in the floating charges provided by Anglo to the Central Bank and Financial Services Authority of Ireland on 15th February, 2008 would have prevented the assets in question from being transferred to NAMA. The trial judge was satisfied that the appellant was out of time for challenging the validity of the acquisition of the facilities and the guarantee and indemnity pursuant to the 2009 Act. He accepted the submissions on behalf of the respondent that a negative pledge clause at most rendered the transfer voidable at the election of the party to whom the floating charge is granted.

27. With regard to the issue of constitutionality, McGovern J. note dthat there is a presumption of constitutionality in respect of the NAMA Act 2009. The Act contains very strict time limits for challenging any decision of NAMA or a NAMA group entity including the acquisition of assets. In this regard he cited with approval Charlton J. in *National Asset Loan Management Limited v. Barden* [2013] I.R. 28. McGovern J. noted that the appellant's proposed constitutional challenge to the NAMA Act was principally based on s. 101 and stated :-

> "Insofar as this relates to representations he is estopped by virtue of paragraph 22.6 of the guarantee from maintaining such a claim. In any event he is outside the time limit for challenging the provisions of the Act and has offered no explanation for his delay in raising this point."

He concluded that the appellant had failed to raise an arguable defence to the respondent's claim. Applying the test set out in *Harrisrange v. Duncan* and *McGrath v. O'Driscoll* and after exercising the discernible caution required in a motion for summary judgment he concluded that the appellant had no answer to the respondent's claim and that the respondent was entitled to summary judgment.

28. The order of the court granting summary judgment against the appellant in the sum of £9,397,725.60 was made on 1st June, 2017.

Summary Judgment

29. This is an appeal against summary judgment and hence it is necessary to bear in mind that the court must be mindful that judgment can only be granted in clear cases and not , in the words of Murphy J in *Bank of Ireland v Educational Building Society*, [1999] 1 I.R. 220, at 231 "Where any serious conflict as to matter of fact or any real difficulty as to matter of law arises." The court should be satisfied that the Defendant raises no live issue of fact which can only be properly determined by hearing all the evidence and that the parties have had an adequate opportunity to address relevant points in argument. The mere assertion on affidavit of a defence is insufficient. The defence must, if the matter is to be remitted to plenary hearing, have some reasonable foundation. The court has to be satisfied, as Hardiman J. emphasised in *Aer Rianta cpt v. Ryanair* [2001] 4 I.R. 607, that it is very clear indeed that the appellant has no case. It is incumbent on the court, as McKechnie J. synthesised in *Harrisrange Limited v. Duncan*, in having regard to Ord. 37 r. 7 "to do that which best meets the justice of the situation". As the Supreme Court has indicated, where issues of law or construction are put forward as providing an arguable defence, the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law. I accept the principles set forth by Clarke J. giving judgment in the Supreme Court in *IBRC v. McCaughey* [2014] 1 I.R.749 where he states:-

> "subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be (…) It needs to be emphasised again that it is no function of the court in a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

Hence the appellant's hurdle on a motion such as this is a low one and the jurisdiction to grant summary judgment is one to be used with great care.

The 5 Grounds relied upon

Ground 1 - Alleged Representation

30. Though not referenced in affidavits sworn by the appellant on the 30th July, 2015 and 6th November, 2015 in a later affidavit sworn 1st March, 2017 the appellant deposes that:-

i. He executed the personal guarantee by reason of representations made by Anglo that the bank would finance the entire construction costs of the company for the Waterloo Road project;

ii. He was aware from telephone conversations with his aforementioned brother and cousin that the company had sought finance from Anglo to fund not only the purchase of the property but also for the construction of a hotel on the Waterloo Road site at a cost estimated to be in the region of £63,000,000.

iii. In 2008, before getting involved as guarantor for the purposes of securing an extension of the two loan facilities for the benefit of the company, he considered what he perceived to be the major risks including, apparently, Anglo's commitment to fund the hotel construction. By August 2008, Anglo had enquired with the company whether the appellant would provide a personal guarantee for the granting of an extension of the company's loan facilities which were in default. It appears that any extension of the loan facilities was predicated on the appellant's entering into the guarantee and indemnity.

iv. After completing his due diligence the appellant was *"…. quite satisfied that planning permission was likely only months away…"* He went on to state that*; "I was then open to helping the company getting the Supplemental Facility but if and only if Anglo provided its absolute assurance that the bank would provide the necessary finance package to complete the Waterloo Road Project."*

v. The appellant recalls a telephone conversation he had with Fergal Feeney, director of UK lending at Anglo. It occurred on or about the 23rd October 2008 in the presence of Mr. Sachdev of Shiva hotels. He states I his affidavit *"… I asked him to confirm to me that Anglo would provide the construction financing for the hotel. He confirmed that Anglo would do so and were "fully behind" the Waterloo Road project."* The words specifically ascribed to the banker are noteworthy.

vi. The appellant recalls a meeting on the 24th October 2008 at the offices of Anglo in London. His brother Barry Breslin and cousin Frances Smith were in attendance. He described the format of the meeting as *"casual".* He stated that; *"Fergal Feeney confirmed to all at the meeting that Anglo was fully supportive of the Waterloo Road project. He was aware of the current position in relation to the Heads of Agreement having been signed with Mr Sachdev and that the architects were preparing a revised planning application to be submitted to Lambeth Borough Council…"* During the meeting ,Fergal Feeney asked the appellant if he would sign a personal guarantee. The issue of the bank's financial stability was discussed.

vii. The appellant deposes; *"I was confident that Anglo would honour its commitments because the state had issued the bank guarantee at the end of September 2008. In my mind the financing of the project was now backed by the state."*

viii. The appellant continued *"Mr Feeney said that if I signed a personal guarantee, then the finance would be assured." "He said that if I signed a personal guarantee, a supplemental facility would not be a continuing issue, the construction finance for the hotel was assured.… He said that he was happy to finance the project in the short term on that basis pending receipt of planning permission." "I recall that one of the things that he said, that it was a deal that Anglo would do "all day long". I knew what the bargain was that he was putting forward for Anglo – if I agreed to sign the personal guarantee, then the company would get the construction finance."* Mr. Feeney stood up and slid the personal guarantee across the table for signature. *"I remember telling him that I hadn't signed a personal guarantee for years. I then signed a personal guarantee because of the representations made to me by him on behalf of Anglo on the basis of those representations were true. Mr Feeney then said something like "this secures the construction financing now that you're standing behind it"."*

ix. It appears that there were some defects in the guarantee and indemnity document executed by the appellant at the offices of Anglo in London on the 24th October, 2008. Later, at the request of Anglo, on 5th November 2008, he re-executed a fresh copy in New York which was witnessed by one of his work colleagues and this was returned by him to the bank. This turn of events afforded the appellant an opportunity to reflect on the commercial prudence of entering into the guarantee , to consider the precise terms of the guarantee instrument and to seek legal or other expert advice as he saw fit.

x. The appellant recounts meeting Fergal Feeney in London on Tuesday 24th March, 2009 a few days prior to a scheduled meeting of the bank's credit committee. The extensions granted in late 2008 in respect of both loan facilities were due to expire on 31st March, 2009. The final grant of planning permission had issued on the 16th February, 2009. The appellant deposes that Mr. Feeney reassured him that approval by the credit committee was a mere formality that the finance had been approved and the credit committee was not revisiting the loan but merely signing formally for the purpose of the record. The credit committee of Anglo was scheduled to meet on 26th March, 2009. Following the credit committee meeting on 26th March, 2009 the appellant received an email from Fergal Feeney stating; *"given the current position of the loan regarding its site value and its probable value at completion, it was decided that the bank would not fund the development in the current market." The appellant deposes; "This was a total breach of what I had been told by Mr. Feeney before and during the meeting on 24 October 2008."*

31. The appellant deferred responding in writing to Anglo for almost three weeks. In an email dated 16th April, 2009 to Fergal Feeney he describes himself as "… seriously disappointed" at the bank's decision.

Ground 2 - Acquisition by NAMA

The appellant disputes the acquisition of his guarantee and indemnity by NAMA.

Ground 3 - Negative Pledge

32. Some eight months or so prior to the appellant's meeting with Mr. Fergal Feeney on 24th October, 2008, Anglo created two floating charges containing negative pledge clauses in favour of the Central Bank of Ireland over all its assets. The appellant asserts that as a result Anglo had no beneficial interest in the guarantee and indemnity executed by him capable of being transferred to NALM pursuant to Part 6 of the NAMA Act on 13th December, 2010. Essentially, the appellant asserts the guarantee and indemnity was not owned by the participating institution, Anglo, as of 13th December, 2010 and as such was not within the eligible bank assets that

Anglo as a participating institution transferred to the NAMA group entity, the respondent, on the said date.

Ground 4 -The Alleged Compromise

The appellant retained property interests in Ireland where it appears his spouse resided and which operated as a stud farm (hereinafter "Woodbridge Stud/Dunsany") in Co. Meath. At the time of the financial crisis and the property crash in Ireland, Woodbridge Stud/Dunsany was valued at less than €1.1 million whereas the debt on the loan secured over it was in the region of €1.6 million. He deposes *"I instructed Mr. Mc Dwyer to offer to discharge the liability early and in full, but only in consideration of the bank acknowledging that it was in release of IBRC's claim that I might have some liability under the personal guarantee, despite Anglo's failure to honour its commitment and or its representations to me."*

Ground 5 - Constitutionality

33. The appellant, on 2nd May, 2017 served a notice pursuant to Order 60, Rule 1 of the RSC which stated that he was desirous of delivering a defence in these proceedings seeking declaratory relief concerning the validity of ss. 101 (1) (i), 105 (1) and 108 (2) (b) of the NAMA Act, 2009.

This Appeal

34. Having duly considered the affidavits and exhibits, the very detailed submissions before the High Court, the judgment and order of McGovern J., the detailed written submissions and extensive booklets of authorities submitted by the appellant and the respondent and the comprehensive submissions and arguments advanced by counsel for the parties in the course of the hearing of this appeal together with the transcript of the hearing of the appeal, I am satisfied that the trial judge's determination that the respondent is entitled to summary judgment should not be disturbed. I do so for the following reasons;

Ground 1 - The Representation

35. Having considered the precise words and quotations attributed to Fergal Feeney prior to the execution of the guarantee and indemnity by the appellant ,I am satisfied ,that at most, they amount to statements of opinion concerning future events on the part of Mr. Feeney and did not give rise to any representation which became a term of the contract with the appellant by way of a collateral warranty or otherwise. Undoubtedly the conversations had between the appellant and Mr. Feeney represented the general expectation of the parties but no binding legal obligations were created as between them regarding the granting of a further loan facility by Anglo to the company for a future construction project likely to be in excess of £40 million. The nationalisation of Anglo in January 2009, insofar as it may be of any relevance, would not appear to have been within the contemplation of either party as of 26th October 2008.

36. Exhibit FS23 to the affidavit of Francis Smith sworn 1st March, 2017 offers a glimpse into the course of dealings between the appellant and Anglo as of March 2009. David McGuinness of Anglo emailed the appellant on 4th March, 2009; "To assist us with our internal discussions can you send in an up to date development appraisal for the building including all monies spent?" The ensuing communications are consistent only with Anglo considering and appraising the feasibility study actually submitted (with assistance from Anglo) on behalf of the company on 16th March, 2009.

37. It is general knowledge that because of the liquidity crisis in 2008 and the ensuing credit crunch across the banking sector readily available credit had dried up in early 2009. Further, the letter written by the appellant on 16th April, 2009 to Fergal Feeney is consistent only with his acknowledgement that the credit committee of Anglo alone was the arbiter of credit extensions as well as all loan approvals. Nowhere in the letter is it asserted that Anglo had assumed a binding and enforceable legal obligation to advance a further sum likely to be in excess of £40 million to the company for construction costs or that such a legal obligation had been assumed in the context of a representation as is now contended. Further, far from seeking to repudiate the personal guarantee, in that letter the appellant makes reference to Anglo's options including its options "as the holder of security over the site."

38. Finally, the letter refers to the "personal guarantee given by me". Although the appellant reserves his position generally in relation to the guarantee pending legal advice at no point does he suggest that he was induced to enter into the guarantee on foot of representations. The appellant had deferred responding in writing to Anglo for almost three weeks. In an email dated 16th April, 2009 to Fergal Feeney he describes himself as "seriously disappointed" at the bank's decision. He references a background "of your repeated assurances of Anglo Irish bank's full support in providing the necessary finance to complete construction of the works." He then enquires "whether there is any particular level of cash investment which would make Anglo's continuing involvement in the project possible – including as construction finance lender" The letter continues; "If no cash investment would make Anglo's continuing involvement possible, then we will, as you say, "organise development funding elsewhere." It advances a proposal to Fergal Feeney seeking a 12 month extension on *"our current facilities totalling approximately £21.4 million and that we would discharge all interest payments during such 12 month extension period together with all carry costs associated with the property."* The tone of the email is upbeat and business like *"I do believe that given 12 months "breathing space" we will be able to source the required alternative funding to take out Anglo's position, and I would also suggest to you that our proposal would be to make full interest payments for the duration of the extension, Anglo's position would not be impaired in any way if an extension is granted – indeed, I would suggest that Anglo's position under my proposal would be significantly better than would be the case in the event of an extension not being granted and Anglo having to consider other options as the holder of security over the site."* It is then stated; *"I realise that your credit committee deals with credit extensions and I will wait to hear from you once your credit committee has considered the position further."*

39. There appears to be a clear acknowledgement of the limits of Fergal Feeney's authority and the central function of the credit committee once a credit extension was being sought. Nowhere does the letter suggest , expressly or otherwise , that there was a concluded binding legal agreement between Anglo and the company to advance the entire construction costs – particularly in circumstances where the company was in serious default in respect of its existing two loan facilities. There is no suggestion that the unequivocal decision of the credit committee had resulted in the appellant's guarantee being repudiated or otherwise having ceased to be enforceable nor that a legally enforceable right ,as distinct from an expectation, to a construction loan in the region of £40,000,000 existed for the benefit of the company. Negotiations with Anglo proved unsuccessful and ultimately a receiver was appointed over the property in September 2009.

40. The appellant relied on a deed required by Lambeth planning authority as offering evidence of a binding legal obligation on the part of the bank to advance £40,000,000 in respect of construction costs to the company. The deed created pursuant to section 106 of the Town and Country Planning Act (UK) 1990 pertains to the planning authority satisfying itself that the relevant parties with the legal and beneficial title to the property were on notice and supporting the planning application and does not constitute any evidence of a binding agreement on the part of Anglo to advance the construction costs for the entire development as was contended at the appeal hearing. This deed is exhibit FS 21 in the affidavit of Frances Smith sworn on 1st March 2017. Recital (c) of the deed provides as follows "The Mortgagee has a registered charge over the part of the Site registered at the Land Registry under title number SGL

33262 pursuant to a debenture dated 18 September 2007."

41. The net effect of the appellant's contention is that Anglo was irrevocably bound from 26th October,2008, to advance in due course a further sum likely to be in excess of £40 million. The sum, falling like ripe fruit into the hand of the company, represented the entire anticipated construction costs for the development. The argument is that the bank was irrevocably contractually obliged to advance this loan sum irrespective of the fact that the company was in complete and continuing default in respect of the extensions of credit afforded by the supplemental agreements facility 1 and facility 2 loans totalling £21,400,000. The company's liability to Anglo on foot of the loan facilities stood at in excess of £22 million by August 2009. It is noteworthy also that the value of the bank security over the property was depreciating and when the property was disposed of by the receivers in March 2011 , by then with the benefit of a comprehensive planning permission, it realised £16,000,000 a sum which left a significant shortfall outstanding on the mortgage.

42. Insofar as the appellant relies on direct quotations attributed to Fergal Feeney same are vague, indistinct and incapable of displacing the express language of Clause 22.6 of the guarantee and indemnity duly executed by the appellant. The language in clause 22.6 is clear and unambiguous. The instrument was not ultimately executed by the appellant until 5th November, 2008. He accordingly had ample opportunity to consider the guarantee and indemnity instrument. It was open to him to amend or vary the clause if it did not reflect the concluded agreement he now asserts he had reached with Anglo. There is no evidence to support this claim beyond the bare assertion of the appellant. It is not consistent with any contemporaneous documentation. The appellant has put forward no credible basis for this contention. It is wholly inconsistent with clause 22.6 aforementioned.

43. The principle set out by Moore Bick L.J in *Peekay Intermark v. ANZ Banking Group* [2006] EWCA Civ. 380 at paragraph 57 provides as follows:-

> "… It is common to include in certain kinds of contracts an express acknowledgement by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intentions clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in Colchester Borough Council v Smith. However, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: E.A. Grimstead and Son Limited v McGarrigan 1999 EWCA Civ 3029 (Unreported, 27 October 1999)."

This passage has been cited with approval in this jurisdiction by Birmingham J. in *McCaughey v. Anglo Irish Bank Corporation Limited and another* [2012] 4 I. R. 417. I respectfully adopt same as a correct statement of the law. Clause 22.6 of the guarantee and indemnity instrument offers a complete answer to the appellant's claim regarding the alleged representation.

44. Accordingly, *prima facie* evidence of a binding representation has not been made out by the appellant.

45. Quite separately, by virtue of s. 101 (1) of the 2009 NAMA Act, where a bank asset has been acquired under the Act and it is alleged that a representation was made or any other obligation was undertaken in favour of a debtor or another person by the participating institution from which the bank asset was acquired:-

> "(b) no such representation, (…) was disclosed to NAMA in writing, before the service on the participating institution of the relevant acquisition schedule,
>
> (c) the records of the participating institution do not contain a note or memorandum in writing of the terms of any such representation (…) and
>
> (d) the representation (…) if made, given or undertaken, would affect the creditor's rights in relation to the bank asset,
>
> then that representation…
>
> (i) is not enforceable, and cannot be relied on, by the debtor or any other person against NAMA or the NAMA group entity (…)
>
> (2) A claim based on a representation, consent, undertaking or obligation referred to in subsection (1) gives rise only to a remedy in damages or other relief and does not in any way affect the bank asset, its acquisition, or the interest of NAMA or the NAMA group entity or (for the avoidance of doubt) any property the subject of any security that is part of such a bank asset.

Section 4 of the 2009 Act defines a "debtor" as meaning "a person who is or was indebted or obligated to a participating institution under or in connection with the credit facility". At all material times from the execution of the guarantee and indemnity there was a cognate monetary obligation to Anglo on the part of the appellant requiring performance in the event of a default in relation to the two credit facilities and as such therefore the appellant was constituted a debtor for the purposes of the 2009 Act, certainly after the 31st March, 2009.

46. The respondent enjoys the protection of section 101 of the Act and any such representation is not enforceable against the respondent. Section 101 of the Act prevents the making of claims based upon estoppels, declarations or the performance of representations, consents, undertakings or obligations pertaining to an acquired bank asset where such representations were not notified to NAMA prior to service of an acquisition schedule and were not recorded in the records of the participating institution. By virtue of s. 101 (2) a claim based on a representation against a lending institution gives rise only to a remedy in damages or other relief against the participating institution. The claim does not in any way affect the bank asset or any property the subject of any security and does not bind NAMA or any NAMA group entity. This ground of appeal accordingly fails.

Ground 2 - Non Acquisition

47. Although the appellant disputes the acquisition of the guarantee and indemnity by NAMA, he has failed to put forward any credible basis to impugn the certificate pursuant to section 108 relied upon by the respondent.

48. The correspondence between IBRC and the company from the outset makes specific reference to "the connections" and the appellant is expressly identified as a constituent entity of "the connections" in relation to these loans.

49. The service of an acquisition schedule on a participating institution operated by virtue of the 2009 Act to effect the acquisition of each bank assets specified in the acquisition schedule by NAMA. There was no requirement under the Act to serve such an acquisition schedule on the debt or/borrower.

50. Section 4 of the NAMA Act defines *"bank assets"* as including, *inter alia*, *"a credit facility"* and *"any security relating to a credit facility"* along with *"every other right arising directly or indirectly in connection with the credit facility".* The section also defines *"security"* as including *"a guarantee, indemnity or surety"* and *any other means of securing – (i) the payment of a debt, or (ii)the discharge or performance of an obligation or liability"*

51. The effect of acquisition of bank assets is addressed in chapter 2, part 6 of the NAMA Act s. 99 provides as follows:-

> *"(1) After NAMA or a NAMA group entity acquires a bank asset, and subject to section 101 and any exclusion of obligations and liabilities from the acquisition set out in the acquisition schedule –*
>
> *(a)*
>
> *NAMA and the NAMA group entity each have and may exercise all the rights and powers, and, subject to this Act, is bound by all the obligations, of the participating institution from which the bank asset was acquired in relation to –*
>
> *(i) the bank asset,*
>
> *(ii) the debtor concerned at any guarantor, surety or other person concerned,…"*

52. In the text Dodd and Carroll *"NAMA The Law Relating to the National Asset Management Agency"*, at 8.16 the authors explain the effect of an acquisition under Part 6 of the Act thus;

> " this principle of stepping into the shoes of the participating institution applies not simply to rights and powers of the participating institution but also to the obligations of the participating institution, although this is expressed to be "subject to this Act"

53. The certificate given pursuant to section 108 of the Act, dated 24th June ,2015, is clear and unequivocal. The bank assets are expressly stated to include "The credit facilities and the security relating to such credit facilities, every other right arising directly or indirectly in connection with such credit facilities". It is clear from the face of the s. 108 certificate that the transfer was effected on the 13th December, 2010. Certificates are receivable in evidence by virtue of statutory provision as proof of a matter therein specified across a wide variety of circumstances. The provisions of section 108 of the NAMA Act are unexceptional particularly having regard to the purposes of the act as specified in section 2 which, it will be recalled, included *"(a) to address the serious threat to the economy and the stability of credit institutions in the State generally and the need for the maintenance and stabilisation of the financial system in the State,…"*

54. I am satisfied that the appellant's guarantee and indemnity was validly acquired by the respondent on 13th December, 2010 in accordance with the tenor of the s108 certificate date 24th June 2015. There is no credible basis advanced by the appellant that would call into question the validity of the section 108 certificate or for believing that evidence may be forthcoming to undermine its validity. As a matter of law the certificate is conclusive as to the matters set out therein pursuant to section 108 (2) (b) of the Act. Accordingly, this ground of appeal must fail.

55. A subsidiary issue was raised as to when the appellant became aware that NAMA had acquired the bank assets of Anglo in the company's loans. As a matter of law, the transfer was effected on 13th December, 2010 pursuant to Part 6 of the 2009 Act. Section 96 (1) of the Act provides that within 60 days the participating *institution "shall make reasonable efforts to notify each debtor, associated debtor guarantor surety in relation to the credit facility concerned of the acquisition of the bank asset by NAMA…"* The appellant asserts that Anglo, the relevant "participating institution" failed to notify him of the acquisition. However, it is clear from s. 96 (2) that neither NAMA nor the respondent is liable for any such omission. In any event it is clear that by late 2011 the appellant had possession of a letter dated October 2011 from IBRC, the legal successor to Anglo, confirming that the loan facility had been transferred to the respondent company's subsidiary of NAMA. The appellant and his fellow guarantors are expressly named in this correspondence. The appellant acknowledges that the communication constituted a letter of demand from the bank for the company's loans. The tenor of the letter made clear that IBRC was managing the facility on behalf of and for the benefit of NAMA/NALM. It is clear that by late December 2011 or early January 2012, at the latest, the appellant was taking legal advice in relation to his liabilities under the guarantee for the debts of the company from both his US attorney and his Irish lawyer Mr. Denis Mc Dwyer in Killeshandra, Co. Cavan. There is no evidence that any prejudice was suffered by the appellant even though he was not on notice of the acquisition by NAMA of the bank assets of Anglo relevant to the company loans until December 2011. It is clear that he took no step to directly engage with NALM to impugn validity or enforceability of the guarantee at any time from December 2011 until after the institution of these proceedings by NALM in 2015.

Ground 3 - Negative Pledge

56. Thomas B Courtney in *The Law of Companies*, (4th ed.) at 19.074 states:-

> "Debentures often contain so – called "negative pledge clauses" which provide that the chargor-company shall not create any other charges or mortgages without the chargee's permission. Negative pledge clauses seek to prevent chargors from creating subsequent fixed securities which would, in the absence of such clauses, have priority over the holders of a prior floating charge. Typically, a negative pledge clause will state, inter-alia, that:
>
> "The Company hereby covenants that it will not without the prior consent in writing of the Lender, create or attempt to create or permit to subsist any mortgage, debenture, charge or pledge upon or permit any lien or other encumbrance to arise on or affect the goodwill, undertaking, property, assets, revenue and rights hereby charged or any part thereof."
>
> "However such a clause in a debenture is only a contractual promise between a floating chargor and a floating chargee, and where the chargor acts in breach of it, e.g. by creating a subsequent charge, the prior floating charge will not, by virtue of the negative pledge clause, automatically have priority ahead of a subsequently created charge."

57. In the instant case no issue arises of priorities between charges. The guarantee and indemnity was executed by the appellant prior to the two floating charges being created encompassing the negative pledge clauses in question. There is no material privity between the appellant and the parties to the floating charges. In the circumstances, the trial judge correctly identified that "even if the floating charge did contain a negative pledge clause which operated to restrain Anglo from transferring the facilities and the guarantee and indemnity to NALM, that transfer will be voidable at the election of the party to whom the floating charge was granted, namely the successor to the central bank."

58. No arguable ground of defence is disclosed by the appellant in relation to the negative pledge clause. Accordingly, I would dismiss this ground of appeal.

Ground 4 -The Alleged Compromise

59. The appellant, a businessman with extensive experience, had been resident in the United States since the late 1980s. He also retained property interests in Ireland where it appears his spouse resided and which operated as a stud farm (hereinafter "Woodbridge Stud/Dunsany") in Co. Meath. He was registered as full owner of the lands comprised in Folio 5908 F and folio 67739F, of the register County Meath. A charge in favour of Anglo was registered in April 2004 for present and future advances. The appellant deposes that as of 2011 due to the financial crisis and the property crash in Ireland Woodbridge Stud/Dunsany was valued at less than €1.1 million whereas the debt on the loan secured over it was in the region of €1.6 million;

> "I expected that the bank would accept a significant discount from the loan and accept the value of the Woodbridge Stud/Dunsany Property in full settlement of the mortgage liability…". IBRC rejected this proposition in December 2011. The bank's position was that the loan facility on the Woodbridge Stud/Dunsany property had expired. The appellant further stated ;"I decided at that stage to make arrangements to terminate my relationship with the bank and discharge the debt." The contact point in IBRC in relation to the Woodbridge Stud/Dunsany mortgage was Helen Rooney.

60. The appellant deposed; " I instructed Mr. Mc Dwyer to offer to discharge the liability early and in full, but only in consideration of the bank acknowledging that it was in release of IBRC's claim that I might have some liability under the personal guarantee, despite Anglo's failure to honour its commitment and or its representations to me."

61. It is clear that Mr. McDwyer and his client, the appellant, were aware that the Woodbridge Stud/Dunsany mortgage of the appellant and his wife was not acquired by and had no connection with NALM. They had actual knowledge at latest in December 2011 that the company loans had been acquired by NALM on 12 December, 2010 under the 2009 NAMA Act. At no time did the appellant or his solicitor communicate with the IBRC/NAMA unit regarding a possible compromise of liabilities under the personal guarantee given for the benefit of the company. Apart from the bare assertion by the appellant regarding his instructions, there is no evidence that Mr. McDwyer communicated with the solicitors for IBRC any such instructions as outlined above or that the negotiations concerned not alone the Woodbridge Stud/Dunsany mortgage debt, but also release of the appellant from all liability as might arise under the guarantee and indemnity security executed by him for the benefit the company which Mr McDwyer and the appellant knew to have been acquired by NALM. However, whether he did so or not is in fact entirely immaterial to the issues in these proceedings for IBRC (in special liquidation) is not a party to these proceedings and I am satisfied it had no authority to bind NALM. The evidence offered by the appellant does not support his proposition. Helen Rooney engaged and corresponded with Mr McDwyer on behalf of IBRC but never on behalf of NALM. Correspondence from Helen Rooney ,who was an assistant manager at IBRC Group Recovery Management Unit based at 76 Lower Baggot Street in Dublin, dated 17th February, 2012 and addressed to Mr. McDwyer is headed "Our mutual clients: Michael and Dolores Breslin account number 0232 8810 – client ref 950 0060". It identifies the redemption figure on "the above account…" as €1,612,534.73. The response from Mr. McDwyer is the same date and is likewise headed "Our mutual clients: Michael and Dolores Breslin account number 0232 8810". It is material that the correspondence is headed in that manner by both Ms. Rooney and Mr. Mc Dwyer throughout the course of their dealings. It appears to expressly delimit the ambit of the negotiations to the Woodbridge Stud/Dunsany property. The letter states;

> "we now enclose herewith the vacate that we have received from Mr. and Mrs. Breslin's attorneys in New York which they have asked that you should compete."

The letter goes on to refer to the vacating of the mortgage. This document ("the American document") does not constitute a vacate in the conventional sense as is used to discharge a mortgage registered as a burden on part three of a folio in land registry. It provides, *inter alia*,:

> "Irish Bank Resolution Corporation Limited… As releasor, in consideration of the sum of 1,609,632.92 Euro and other valuable consideration received from Michael Breslin and Dolores Breslin… releases and discharges Michael Breslin and Dolores Breslin the releasees' heirs, executors and administrators, successors and assigns from all actions, causes of action, suits, debts to use sums of money, accounts, reckonings, bonds, bills, specialities, covenants, contracts, controversies, agreements, promises, variances, trespassers, damages, judgments, extents, executions, claims and demands whatsoever, in law, admiralty or equity, which against the releasee , the releasor, the releasor's successors and assigns ever had, now have or hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this release."

62. Quite separately and simultaneously, Mr. Mc Dwyer was communicating with Ms. Karen Burke the senior manager of the IBRC NAMA unit which was based at an entirely separate address in Stephen Court, St. Stephen's Green in Dublin. That correspondence was headed "Re-Car Park Solutions Limited NAMA ID 0498". A copy of the guarantee and indemnity documentation was supplied to the solicitor Mr. Mc Dwyer by the IBRC NAMA unit on the 28th February, 2012.

63. In an email dated 6th March, 2012 from Mr. Mc Dwyer to Helen Rooney it states:-

> "enclosed herewith you will find vacate which we would request be executed by your Bank and handed over to us to facilitate the sale of the premises to be concluded. We would also request that you be in a position to give us the Deed of Mortgage with the vacate sealed thereon for Land Registry purposes."

64. On 7th March, 2012, Ms. Rooney writes:-

> *"Re-our mutual clients; Michael and Dolores Breslin account number 0232 8810 – client ref 950 0060. Dear Denis, as per our telephone conversation, I confirm on receipt of cheque in the sum of 1,614,993.65 the above loan will be redeemed in full and the Bank will vacate its mortgage against property Woodridge Stud… without delay. I trust the above are satisfactory. Please do not hesitate to contact me should you have any queries."*

On the same date a similar letter is sent by Ms. Rooney stating additionally:-

> "Furthermore, the Bank will undertake to complete USA documentation as furnished by Denis McDwyer solicitors subject to the amendment of the amount of £1,640,993.65 and furnish same to you in due course."

65. On the 27th March, 2012, Mr. McDwyer's office emailed Helen Rooney stating "we would be obliged if you could as a matter of urgency let us have the Vacate Documents". On 4th May, 2012, IBRC, John Reid of the Recovery Management write to Mr. McDwyer as follows:-

> "We note that you have furnished the bank with a USA form of release which does not refer to the security created by Mr. Breslin over the property. It is unclear why you have furnished us with the aforementioned document given that the security and the related loan facility are both governed by Irish law. As you will note from Clause 7 of the mortgage dated 14 January 2004 in respect of the Property, the bank agreed, at the request and cost of Mr Breslin as mortgagor, to execute and deliver to the mortgagee "all such documents as may be necessary to release the security **created hereby or pursuant hereto**" (emphasis added).

66. This afforded Mr. McDwyer an opportunity to clarify the position and to convey any instructions that the appellant now characterises as "to offer to discharge the liability early and in full, but only in consideration of the bank acknowledging that it was in release of IBRC's claim that I might have some liability under the personal guarantee, despite Anglo's failure to honour its commitment and/or its representations to me." Such clarity is singularly absent.

67. In his response to that letter Mr. McDwyer on 24th May, 2012 makes no reference whatsoever to the company's bank guarantee or his client's liability thereunder or that he was seeking to obtain a release of liability is on foot of the guarantee for the benefit of his client. This is only understandable on the basis that all communication regarding the appellant's dealings with NALM were being dealt with separately through the IBRC NAMA unit in St. Stephen's Green.

68. By letter of 3rd August, 2012, IBRC confirm that they had formally revoked in writing the undertaking given by the bank to complete the US documentation "which was subject to the amendment of the amount of €1,614,993.65 on the basis that the incorrect amount referred to in the undertaking had not been amended and, further, that the form of US release provided was not appropriate and necessary in circumstances where Irish law governs security over a property located in Ireland was provided by your clients."

69. Proceedings were instituted in August 2012 (Michael Breslin and Dolores Breslin v. IBRC). Notwithstanding that the appellant and his solicitor were aware on his own admission since December 2011 that the company loans and guarantees had vested in NAMA no step whatsoever was taken at any time to join NAMA in the proceedings or to make them a notice party thereto or to apprise them of either the existence of the proceedings or the contention that Mr. Breslin's liability on foot of the guarantee had been discharged. The statement of claim delivered 13th September, 2012 references "the USA document" but makes no reference whatsoever to the 2008 guarantee and indemnity or the appellant's obligations thereunder. During the course of the litigation, on 7th February, 2013 the Irish Bank Resolution Corporation Act came into operation and special liquidators were appointed to the bank. Section 6 (2) of the latter act operated to stay litigation in being against IBRC as of that date.

70. In a "without prejudice" letter dated 10th October, 2014, Mr. McDwyer writes to Rachel Solanki solicitor in the firm Eugene F. Collins which acted at that time for IBRC. It references "without prejudice" conversations held between the solicitors. It states "In the adjournment period and in any event, not longer than 10 days from 9th inst., you will supply to us the signed and sealed "American document" and any **other** form of Discharge we require to discharge the Charge on our clients former folios 5908 F and 67739 F both Co Meath."

71. This is a curious statement. It could be construed as suggesting that the "American Document" was required to discharge the charges on the two folios. However, entries on the said folios show that the said charges had in fact been cancelled by Mr. McDwyer over a year previously on 18th July, 2012 and 19th April, 2012 respectively. The purchaser, Humphrine Limited had been registered as owner of both folios on 19th April, 2012. Nowhere in the correspondence does Mr. McDwyer suggest that the "American Document" is required to discharge the guarantee and indemnity executed by his client the appellant in 2008.

72. In an email dated 13th November, 2014 to Ms. Solanki, Mr. McDwyer states:-

"it is my understanding and you may correct me if I'm wrong that on Tuesday we reached an accord subject to approval by our respective clients and that was you would furnish the US document to me duly executed and I would accept a contribution towards my costs of whatever sum would not require credit committee approval…"

73. Ultimately, it appears that the litigation was compromised between the parties and a notice of discontinuance filed. The question arises as to whether there can be any legal basis for a contention that the respondent to this appeal is bound by any such compromise. The course of dealings involving Mr McDwyer and Helen Rooney and others acting for IBRC Group Recovery Management Unit, Rachel Solanki and Eugene F. Collins solicitors was the subject of extensive affidavit evidence but I am satisfied same is immaterial to the issues arising in this appeal. None was the agent of NALM for the purposes of dealing with any claims arising under the guarantee and indemnity or otherwise as between NALM and the appellant.

74. I am satisfied on the affidavits and exhibits that IBRC never asserted to the appellant or his solicitor that it had authority from NALM to deal with any issue concerning the guarantee and indemnity or any liabilities in respect of the company or its guarantors. Even if it had so asserted such unilateral conduct could not bind NALM as a matter of law. NALM had no knowledge of the negotiations. Even if it had done so, such unilateral conduct could not bind NALM as a matter of law.

75. The appellant has failed to adduce any cogent evidence to support his contention that either Helen Rooney of IBRC Group Recovery Management Unit or any successor members of that unit who were dealing with the Woodbridge Stud/Dunsany Property mortgage after her departure or the firm Eugene F. Collins, solicitors, who acted for IBRC (in special liquidation) in connection therewith ever held themselves out or represented that they had capacity or authority to act on behalf of the IBRC NAMA unit in respect of any matter or liability as concerned the appellant and in particular the guarantee and indemnity. Nor can it be asserted that any party involved in the negotiations or compromise of the litigation held themselves out as agent for a disclosed principal on behalf of NALM. Denis McDwyer solicitor had been communicating directly with the IBRC NAMA unit from December 2011 in parallel with his communications with IBRC on Baggot Street regarding redemption of the Woodbridge Stud/Dunsany mortgage for Mr and Mrs Breslin.

76. In an affidavit sworn on the 17th September, 2015 Kevin Bradley, asset recovery manager employed by the NTMA and assigned to NAMA deposes at paragraph 16, *"While he has not said so, the implication appears to be that the defendant will seek to suggest that the purported release was agreed to by the Bank or the Special Liquidators not only on their own behalf (insofar as the Woodridge Stud mortgage and related loan were concerned) but also on behalf of NAMA and/or the Plaintiff in connection with the Guarantee of the Company's debts. While I note that the Defendant has been careful not to argue this expressly, for the avoidance of any doubt or confusion, there is simply no basis in fact for it in any event. Nor does it appear from any of the documentation exhibited by the Defendant that it was ever represented to him by the Bank or the Special Liquidators that they were acting for NAMA and/or the Plaintiff. Even if they did so, I'm advised and so believe that this could not support the kind of agency claimed that is hinted at here. Neither NAMA nor the plaintiff had ever given the Defendant any reason to believe that the Bank or Special Liquidators had authority to negotiate with him in connection with his liabilities under the Guarantee. For the avoidance of doubt, the Plaintiff has no knowledge of, nor did it consent to or acquiesce in any purported release by the Bank or its Special Liquidators of the defendant's obligations pursuant to the Guarantee. As indicated above, the release of the Guarantee was never in the Bank or Special Liquidator's power to give."*

77. In his replying affidavit sworn 2nd October 2015 Denis McDwyer neither disputes nor contradicts the averments cited above. At paragraph 23 of his affidavit he deposes, referring to Mr. Bradley;

> "he has made no basis for his averments. For example, he does not claim that he is the manager within the plaintiff responsible for the Guarantee, but that he has reviewed certain notes. Mr Bradley has not demonstrated any basis for his statements, which remain mere averments without grounding or corroboration."

78. No probative evidence has been adduced by the appellant to demonstrate how any stateable argument could be made for the proposition that the respondent/NAMA are bound by any compromise. It is very clear that the respondent was not on notice of any negotiations or litigation or any compromises as have been deposed to and all rights and remedies in relation to same must inevitably operate as against IBRC in special liquidation alone. The proposition based on agency is not stateable. This ground of appeal does not succeed. This finding is entirely without prejudice to the rights of the appellant and his wife as against IBRC (in special liquidation) or any party other than NALM under the American document.

Constitutionality

79. The 2009 Act enjoys a presumption of constitutionality. The exigencies that brought forth the NAMA Act included a serious threat confronting the state's economy, the risks surrounding stability of credit institutions in the State generally and the need for the maintenance and stabilisation of the financial system in the state. As Peart J. stated in Daly v. NALM, (Unreported, High Court, 12th September, 2011) s. 2 *"sets out purposes which are public, truly national in their scope, and aimed at securing some advantage to the States economy and finances, and the stability of the banking sector."*

80. The European Commission, considering the legislation in the context of Article 107 (3)(b) of the Treaty on the Functioning of the European Union in its decision dated 26th February 2010: State aid N 725/2009 – Ireland, Establishment of a National Asset Management Agency (NAMA): Asset relief scheme for banks in Ireland at paragraph 86 states:

> "the commission acknowledged in its recent approval of a revised Irish guarantee scheme that the threat of a serious disturbance in the Irish economy continues and that measures supporting banks are suitable to address that threat. Further, the commission considers that the present scheme concerns the entire Irish banking market and does not dispute the analysis of the Irish authorities that concerns remain over the asset quality of financial institutions in Ireland. Indeed if these problems are not addressed, they will result not only in difficulties for the Irish banking sector but, owing to that sector's pivotal role in providing financing to the rest of the economy, they will also have a systemic effect on the Irish economy as a whole. Hence it finds that the scheme is apt to remedy a serious disturbance in the Irish economy."

81. It is noteworthy that the Commission, albeit from a state aid perspective, was satisfied that the measure encompassed in the NAMA Act was *"appropriate, necessary and proportionate."*

82. While the NAMA Act is exceptional, from an historical perspective it is not unique. The Landed Estates Court (Ireland) Act, 1858 , the Settled Land Acts, 1882 – 1890 and the Land Purchase Acts, 1870-1903 and indeed the Succession Act, 1965 each in their turn devised mechanisms, on grounds of public policy, which altered long established rights and overreached long assumed expectations in a manner considered necessary and expedient to address concerns affecting national stability.

83. I am satisfied that the trial judge was correct in his assessment that in substance the appellant's constitutional challenge is based principally on section 101 of the Act. The representations being relied upon are such, as set out above, that the appellant is demonstrably estopped by virtue of paragraph 22.6 of the guarantee for maintaining such a claim. Furthermore he is outside the time limit for challenging the provisions of the Act and has offered no explanation for his inordinate delays from December 2011 onward over many years in raising any constitutional or other issue questioning or challenging the acquisition by NALM of the guarantee. Throughout that time he was ably represented by Irish and American lawyers.

84. Insofar as it is relevant, I am satisfied that the provisions of sections 101 (1) (i), 105(1) and 108 (2) (b) are proportionate and fall well within the threshold of restriction permissible on the exercise of protected rights under the Constitution and are no more than a proportionate restraint on the exercise of protected rights having due regard to the exigencies of the common good sought to be protected by the provisions of the NAMA Act as set forth in section 10 of that Act. No valid basis has been made out that an extension of time should be granted.

85. The facts averred to in the various affidavits sworn by or on behalf of the appellant and the arguments advanced thereon taken at their highest do not establish any real or probable bona fide defence to the respondent's claim. The appellant has failed to put forward any credible basis for believing that evidence might be forthcoming to support any ground of appeal relied upon or proposed ground of defence advanced.

86. Accordingly, in my view, the appeal should be dismissed on all grounds.