THE HIGH COURT

COMMERCIAL

[2017 No. 2440 S.]

BETWEEN

PROMONTORIA (ARROW) LIMITED

PLAINTIFF

AND

CATHAL MALLON AND MICHAEL SHANAHAN

DEFENDANTS

JUDGMENT of Mr. Justice Brian McGovern delivered on the 22nd day of March, 2018

1. The plaintiff's application is for summary judgment against the second named defendant arising out of a loan facility provided by EBS Building Society (EBS) to the defendants on foot of a facility letter dated 28th June, 2006. The agreed facility was €1,800,000 and was for the purchase of a one acre site for development at Mill Lane, Shankill, Co. Dublin (*"the property"*). The facility letter of 28th June, 2006, was amended by further letters of 7th November, 2008 and 24th March, 2009, extending the term of the loan.

2. On 4th August, 2006, 2nd December, 2008 and 9th April, 2009, the defendants accepted the term of the facility letter and amendments thereto respectively.

3. Pursuant to the powers of the National Asset Management Agency Act 2009, National Asset Loan Management Limited (NALM) became legally and beneficially entitled to the facility and other rights connected therewith. On 11th December, 2015, the plaintiff acquired the rights of NALM to the loan.

4. The plaintiff sent the defendants a letter of demand on 7th July, 2016, in the sum of €2,044,306.23, being the sum then due and owing under the facility letter.

5. Over a period of time, discussions took place between the plaintiffs and the second named defendant concerning the repayment of the debt. The first named defendant has not taken part in any discussions and the proceedings against him stand adjourned. In the course of this judgment, the second named defendant will be referred to as simply "*the defendant*".

6. While the defendant raised a number of defences in his first affidavit sworn on 15th January, 2018, he has abandoned some of them and has crystallised his opposition to summary judgment in a further affidavit sworn on 8th March, 2018. He raises two issues which he argues constitute a defence to the claim for summary judgment, namely:-

> (i) that the loan was on the basis of limited recourse being the value of the property; and
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> (ii) that the plaintiff is estopped by convention or representation from relying on the terms of the facility letter and letters of amendment.

He also raises a subsidiary point that the matter should proceed to plenary hearing to allow discovery which will assist him in establishing his defence.

7. The defendant contends that the letter of sanction of 28th June, 2006, as amended, does not comprise the whole of the agreement between the defendants and EBS concerning the borrowings which are the subject matter of these proceedings. He states that there is another key term of the agreement which was not reduced to writing but which was agreed between himself on the one hand and Mr. Conor Boyle and Mr. Philip Butler on behalf of EBS on the other hand. This agreement was to the effect that EBS was to have no recourse to the defendant personally in respect of the borrowings. He says that he made it clear that he would not have borrowed the monies if there had been any personal risk or liability associated with the facility and this was agreed by Mr. Boyle and Mr. Butler as a fundamental and underlying term of the agreement prior to the drawdown of funds. While he accepts that the facility letter and amendments thereto describes the facility as a personal loan with no reference to limited recourse, this was not the whole agreement. In his second affidavit, the defendant avers that the original loan terms were discussed in mid-June 2006 on the basis of recourse limited to the security. He describes a meeting which took place at approximately 9am on 30th June, 2006 at EBS Head Office at which Mr. Boyle and Mr. Butler explained to him that the credit committee of EBS were unlikely to approve the loan facility unless there was an element of personal recourse to him available to EBS. This was two days after the date which appears on the facility letter.

8. In the same affidavit, he avers that the facility letter of 28th June, 2006, was only sent by fax to his advisers, Messrs. BDO at approximately 10:55am on 30th June, 2006, being the morning of the meeting. While he accepts that the letter of sanction does not reference the terms of the agreement as being limited recourse, he states in his affidavit that when he received the letter of sanction he *"…was only concerned to check whether the same included a provision in respect of a guarantee – which would denude the arrangement of its non-recourse basis – or whether the credit committee of EBS had agreed to accept a revised deposit and reduced borrowings in place of having recourse to me personally"*. As he was satisfied the latter arrangement had been approved he did not concern himself with the fact that the letter of sanction did not express that it was a limited recourse facility because that had already been agreed.

Legal Principles Applicable to the Issues

9. The legal principles applicable to applications for summary judgment are well established and were drawn together by McKechnie J. in *Harrisrange v. Duncan* [2003] 4 I.R. 1, when he listed twelve factors to be considered when deciding to make an order for summary judgment or to remit the matter to plenary hearing:-

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
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> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of*

each individual case, there being several ways in which this may best be done;

(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;

(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

10. In *GE Capital Woodchester Limited v. Aktiv Kapital Asset Investment Limited* [2009] IEHC 512, Clarke J. stated:-

> *"It is clear that the mere assertion of a defence is insufficient. Insofar as factual issues arise it is ordinarily necessary for a defendant to place affidavit evidence before the court setting out facts which, if true, would arguably give rise to a defence. However, that proposition should not, in my view, be taken over literally. For example, the factual basis on which a defendant may wish to oppose a plaintiff's claim may not derive from facts within the defendant's own knowledge."*

Legal Issues Raised

(A) Is the facility one of limited recourse?

11. Clause 11 of the facility letter states that the borrower's liability shall be joint and several. Clause 12 of the standard commercial loan conditions provides that the lender "*…reserves the right to terminate its commitment to lend hereunder and to call for immediate repayment of all monies outstanding including accrued interest…*". Although the facility letter was amended on 7th November, 2008 and 24th March, 2009, no changes were made to the provisions relating to the borrower's liability. Neither the facility letter nor amendments provided for limited recourse. The defendant concedes that a limited recourse contract for which he contends is one that was agreed orally.

12. The principles of interpretation have no application to the facility letter and amendments as there is no ambiguity in them and they speak for themselves.

13. Although the defendant argues that the facility letter(s) does not represent the entire agreement it is clear that the defendant is seeking to imply a contractual term of limited recourse into the agreement. In *Flynn v. Breccia* [2017] IECA 74, the Court of Appeal considered the test for implying terms into a contract and adopted the decision of the Supreme Court in *Sweeney v. Duggan* [1997] 2 I.R. 531, in which the following view of Lord Wilberforce in *Liverpool C.C. v. Irwin* [1977] A.C. 239, was adopted:-

> *"… Whether a term is implied pursuant to the presumed intention of the parties or as a legal incident of a definable category of contract it must be not merely reasonable but also necessary. Clearly it cannot be implied if it is inconsistent with the express wording of the contract …"*

14. In *Zurich Bank v. Coffey* [2011] IEHC 26, Finlay Geoghegan J. rejected a claim that a term should be implied into a contract to the effect that the plaintiff had no recourse to the defendant other than in relation to the security provided. The facts of that case are strikingly similar to this case which I have to decide.

15. In *Danske Bank v. Mulvaney* [2014] IEHC 45, Birmingham J. rejected a defence that a loan facility was non-recourse and referred to the fact that the facility letter as issued by the bank and accepted by the defendant was absolutely clear and unequivocal and was "*entirely inconsistent with any suggestion that the loan was a non-recourse one".*

16. In *Ulster Bank v. Dean* [2012] IEHC 248, this Court rejected the defendant's contention that a collateral contract had varied the express terms of a loan facility. At para. 6, the court stated:-

> *"…The defendants have not produced any written documentation to support this claim. It appears, therefore, that they are seeking to alter the terms of the facility letters which are clear on their face by means of parol evidence. This is not permissible. For reasons of public policy, the courts have not permitted oral evidence to be admissible if it is introduced in an attempt to contradict the terms of a written agreement between the parties. This is known as the 'parol evidence' rule. See Macklin v. Graecen & Co. [1983] I.R. 61 and O'Neill v. Ryan [1992] 1 I.R. 166. In short, a party is not permitted*

to adduce evidence which, in effect, contradicts the reasonable construction of words used in a written agreement."

17. In *Tennants Building Products Limited v. O'Connell* [2013] IEHC 197, Hogan J. at para. 13 summarised the modern jurisprudence on collateral contracts as follows:-

> *"The effect of this case-law may be said to be that while the courts will permit a party to set up a collateral contract to vary the terms of a written contract, this can only be done by means of cogent evidence, often itself involving (as in Mudd and in Galvin) written pre-contractual documents which, it can be shown, were intended to induce the other party into entering the contract. By contrast, generalised assertions regarding verbal assurances given in the course of the contractual negotiations will often fall foul of the parol evidence rule for all the reasons offered by McGovern J. in Deane."*

18. Although the threshold for leave to defend proceedings is a low one, it still has to be crossed and the courts are entitled to look at the defence raised and assess its credibility in the light of all the surrounding facts, including contractual documents. If, at the end of the day, the defence raised is based on mere assertion, is wholly implausible, and inconsistent with, or contradicted by, documentary evidence which is admitted by the defendant, then the court may reject the defence contended for on the basis that it is untenable or lacking in credibility. See *Irish Life and Permanent v. Hudson* [2012] IEHC 11, *ACC Loan Management v. Dolan* [2016] IEHC 69.

(B) Estoppel

19. The defendant raises two issues under the mantel of estoppel namely estoppel by convention and estoppel by representation.

20. Estoppel by convention only arises if it is based on a common and not a unilateral assumption or behaviour of the parties. See *Ulster Investment Bank v. Rockrohan Estate* [2015] 4 I.R. 37. At para. 24 of the judgment delivered by Charleton J., he stated:-

> *"Estoppel can arise, however, through an assumption shared by those interacting… This requires some demonstrable action, behaviour or representation by the party who is to be bound by the altered state of affairs. It is insufficient, to establish estoppel, merely for the party later pleading that defence to conclude that matters must be so. There must, instead, be a foundation in the behaviour of the party who is to be estopped from asserting a legal entitlement, either pursuant to contract or otherwise."*

21. While the court cannot resolve conflicts of evidence at a summary judgment hearing, the affidavits may assist in determining whether there are assumed facts. In this case, Mr. Conor Boyle has sworn an affidavit in which he specifically rejects the contention of the defendant that there was any agreement reached whereby the facility would be limited in its recourse to the secured property. Without seeking to weigh the affidavits against each other what does emerge is that there is no agreed statement of facts, the truth of which has been assumed by the parties. This is also established by the amended loan offers which confirm the terms of the original facility letter concerning the liability of the borrowers.

22. In *NALM v. McMahon & Ors* [2014] IEHC 71, Charleton J. stated at para. 20:-

> *"Estoppel can arise pursuant to an oral or written representation, and that is the normal situation. It can also arise by virtue of an assumption, perhaps tacit, shared by parties. In that instance, however, there must be conduct which establishes an objective state of affairs whereby the party otherwise bound by the legal relations is placed in circumstances whereby it is understood that a new state of affairs governs the relations between the parties. This clearly requires some action or behaviour or representation by the party who is to be bound by the new state of affairs. People cannot just jump to conclusions that matters must be so, with no foundation in the behaviour of the party whose rights in law are to be estopped, and then claim what is in essence an altered state of obligation. Estoppel is not based on bare assumption. Estoppel is based either on representations or on situations of behaviour that, reasonably construed, clearly withdraw or alter the strictures of legal obligations in such a way that it would be unfair to later enforce these. Where the matter is one of representation, it should be easy to identify the legal term supposedly altered and the representation directed in this regard. Where it is a matter of both parties proceeding on the basis of a common understanding, the mutual convention of the parties may suffice as a foundation for estoppel. If it is so, it is because of that common understanding."*

23. Estoppel by representation requires evidence that a party by his words or conduct made a clear and unequivocal promise or assurance which is intended to affect the legal relations between him and the other party or as reasonably understood by the other party to have that effect. Such representation should be freely given. While there is a clear dispute between the parties as to whether there was any clear or unequivocal promise in this case it does not follow that the dispute must go to plenary hearing. The court is entitled to look at all the circumstances as they exist and ascertain whether there is credible evidence to support the defendant's contention that a clear and unequivocal promise was made that the loan would be non-recourse.

(C) Discovery

24. The final point made by the defendant is that the matter should proceed to plenary hearing to allow the defendant obtain discovery which would assist the defendant in establishing his defence. He argues that it would be unjust and premature in the absence of discovery to grant summary judgment to the plaintiff where the true relationship between the parties may well be advanced or clarified through the process of discovery.

25. These matters were considered by Baker J. in ACCLM v. Dolan [2016] IEHC 69. In that case, the learned judge stated that the defendants had produced very little documentation supportive of their assertion that there was an agreement for the long-term or indefinite stay on the recovery of the debt by the bank. The height of the argument was that there existed and exchange of emails. At para. 79 of her judgment, Baker J. stated:-

"I cannot adjourn the matter to plenary hearing on account of an argument that discovery may assist the parties, unless some rational basis is put to me as to the class of documents which might so avail the parties, and as to why it is asserted they are in the hands of the plaintiff only, and given the nature of the documentation some at least of it must be in the hands of, or within the procurement of, the defendants."

26. The weight to be attached to the defendant's argument based on discovery must be considered in the light of the existing facts which are that the agreement that the loan would be non-recourse is based on oral representations at a meeting in June 2006.

Discussion

27. The facility letter and amendments are clear in their terms. The loan was made to the defendants personally. Initially it was for a two year period and that was extended by amended loan offers dated 7th November, 2008 and 24th March, 2009. Those extensions are stated to be at the request of the borrowers. The loan agreement provides that upon expiry of the loan, the principal balance shall be repaid in full and the security for the loan is stated to be a first legal mortgage over the property. The amended loan offers each state that all other terms and conditions of the offer letter dated 28th June, 2006, to the borrower shall remain unchanged. There is no dispute as to the terms of the facility letter and the amended loan offers each of which was accepted and signed by both defendants.

28. There is no limited recourse provision in the loan agreement as amended. The defendant has been unable to produce any documentary evidence in support of his contention that the loan was limited in recourse to the value of the property and there is no evidence of a common assumption that the loan was to be non-recourse. The defendant claims that the written loan agreements do not contain the entire agreement and that the court must read into the agreement, the oral representations made at the meeting on 30th June, 2006, between the defendant on the one hand and Mr. Philip Butler and Mr. Conor Boyle on the other hand. That meeting post dated the written agreement although the defendant says that he only received it during the meeting. The evidence establishes that the original facility letter was not signed and accepted by the defendants until after the meeting of 30th June, 2006. The defendant says he signed the facility letter once he satisfied himself that there was no provision contained in it in respect of a guarantee. This is a rather strange statement because the question of a guarantee would never have arisen in circumstances where the loan was a personal one. Be that as it may, he signed the agreement and if he had taken the trouble to read the document, it would have been immediately clear to him that there was no provision for non-recourse or limited recourse. The written agreement accepted by the defendant is entirely inconsistent with an alleged agreement containing a non-recourse provision agreed orally at a meeting on 30th June, 2006. In *ACC Bank plc v. Kelly & Anor* [2011] IEHC 7, Clarke J. stated at para. 7.5:-

> *"By signing a commercial banking arrangement, a borrower agrees to be bound by the terms of that arrangement and if the borrower has not taken the trouble to adequately read the document or be adequately informed as to its meaning then the borrower must accept the consequences of having signed a commercially binding agreement in those circumstances."*

29. On 7th July, 2016, a letter of demand was made on the defendant for payment of the sum of €2,077,309.23, being the full amount of principal and interest claimed to be owing at close of business on 3rd July, 2016. The defendant did not respond to that letter and, in particular, did not raise the issue that the loan was without recourse to the defendant but limited to the value of the property. Significantly the first named defendant submitted a replying affidavit in which no claim was made that the loan was limited in recourse to the value of the property. Furthermore, the defendant in his affidavit of 15th January, 2018, sets out in some detail negotiations he had with the plaintiff with a view to settling his liability and this included making an offer in excess of the value of the site.

30. In para. 11 of his affidavit sworn on 8th March, 2018, the defendant states that at the meeting which took place on 30th June, 2006, it was explained to him by Mr. Boyle and Mr. Butler that the credit committee of EBS were unlikely to approve the loan facility unless there was an element of personal recourse to him available to EBS. This is not a credible statement. Even if the facility letter of 28th June, 2006, was not presented to the defendant until 30th June, the terms upon which the EBS were prepared to advance the funds were set out in the facility letter which can only have occurred if the credit committee had approved the loan. There is nothing in the facility letter which says it is subject to approval by the credit committee. In fact, the facility letter commences with the words "*we are pleased to inform you that EBS Building Society (EBS) has approved loan facilities in favour of Cathal Mallon and Michael Shanahan (the borrower) on the terms and conditions detailed below and in the attached schedule of standard commercial loan conditions*". Accordingly, the assertion by the defendant in para. 11 of his affidavit is not only inherently implausible but flies in the face of the clear wording of the facility letter.

31. When the amended loan offer letters of 7th November, 2008, and 24th March, 2009, were sent to the defendant, he accepted those offers on 2nd December, 2008 and 9th April, 2009, respectively. Each of those letters confirmed that the other terms and conditions of the offer of 28th June, 2006, "*shall remain unchanged*". Therefore, on three separate occasions, the defendant accepted the facilities on terms involving personal liability requiring the principal balance to be repaid in full upon expiry of the loan.

32. In summary, the following issues arise on the defence contended for on behalf of the defendant:-

> (i) If the court accepts his contention that the facility letter (as amended) does not comprise the whole of the agreement but also includes another term which was not reduced to writing, one is left with a contract containing irreconcilable terms. The written contract is a full recourse loan but that part of the contract which the defendant contends was orally agreed provides for a contract which was not on a full recourse basis.
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> (ii) The defendant accepted not only the facility letter but the two subsequent amendments to it, all of which contradict the defendant's contention that the contract was for limited recourse.
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> (iii) The defendant's conduct in trying to negotiate a settlement supports the position set out in the facility letter and amendments thereto.
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> (iv) The first defendant's replying affidavit makes no mention of the fact that the loan was non-recourse or limited recourse.
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> (v) There is no satisfactory evidence of a common understanding or underlying assumption between the parties that the loan was a non-recourse or limited recourse loan.
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> (vi) There is no satisfactory evidence of a clear and unequivocal promise made on behalf of the plaintiff to the defendant that the loan was non-recourse or limited recourse in nature. The evidence so far as it goes, is based on the plaintiff's belief or understanding of the situation but is not supported by any written evidence, and the defendant's own conduct after the letter of demand and his attempt to settle the liability in excess of the value of the property is plainly inconsistent with his contention on this point. The same could be said of the fact that the two amended facility letters were sent out after the alleged oral agreement reiterating the terms of the original facility letter so far as the personal liability of the defendant was concerned and the full recourse nature of the loan.
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> (vii) So far as the question of discovery is concerned, one has to ask the question "*discovery of what*?". The limited recourse defence is based on an oral agreement.

Decision
33. The defence raised by the defendant lacks credibility and flies in the face of the written documents signed and accepted by the defendant. For reasons of public policy, the courts will not permit oral evidence to be admissible if it introduced for the purpose of contradicting the terms of a written agreement between the parties. The defence based on an alleged oral agreement made on 30th June, 2006, cannot succeed because it would be in breach of the parol evidence rule.

34. There was no evidence to support a defence based on estoppel either by convention or by representation and the contention of the defendant on this issue is inherently improbable having regard to the surrounding facts.

35. The requirement to allow the matter to proceed to plenary hearing on the basis that discovery would assist the defendant is not a plausible argument as the defence is based on an alleged oral agreement.

36. The defendant has failed to raise an arguable defence or meet the threshold required in order to have the matter remitted to plenary hearing.

37. The plaintiff is entitled to summary judgment and I will hear counsel on the amount of the judgment and any ancillary issues that arise.