THE HIGH COURT

CIRCUIT APPEAL

[2017 No. 35 C.A.]

BETWEEN

AIB MORTGAGE BANK

PLAINTIFF

AND

REGINALD HAYES AND TERESA HAYES

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 25th day of October, 2017

1. This is an appeal from an order of the Circuit Court (His Honour Judge O'Brien) made on the 8th February, 2017, whereby the plaintiff (the Bank) was granted an order for possession of the defendants' family home at Rathpeacon, Mallow Road, Cork.

2. In mid 1991, the defendants entered into an endowment mortgage with the Bank's predecessor in title. The amount of the mortgage was IR £70,000 and the term was 20 years and 3 months. In or about the same time, the endowment insurance policy was entered into by the defendants with Hibernian Insurance, now Aviva. The benefit of the insurance policy was assigned to the Bank. The policy was designed to mature at the same time as the mortgage. At the time such arrangements were entered into, the expectation was that the encashment value of the policy at maturity would equal or exceed the principal amount due on foot of the mortgage, the defendants having during the term of the mortgage paid interest only as it accrued.

3. In the early 1990s when investment markets were buoyant, it was anticipated that investing in such financial products was likely not only to discharge the amount due on foot of the mortgage but also to yield a surplus benefit to the policy holder. As everyone knows, all of that changed dramatically following the financial crisis that commenced in 2008. These financial products were promoted by banks through the medium of insurance companies either owned by those banks or in which they had a significant interest. It was a win win situation, or so everyone thought.

4. When the defendants' policy matured in 2011, the inevitable occurred and the value on maturity was only about €55,000 leaving the unfortunate defendants with a very substantial shortfall in respect of the capital sum due on the mortgage, now of the order of €100,000.

5. Naturally enough, this was a source of great anxiety and distress to the defendants, a retired couple, who having faithfully paid both the mortgage interest payments and insurance premia for some twenty years found themselves with a substantial debt to the Bank. Because the defendants were unable to discharge the outstanding balance, it was referred to the debt recovery section of the Bank where it was initially dealt with by the Bank's Mr. Paul Byrne, an officer in that section. Ultimately this interaction culminated in a number of phone calls that took place between the first defendant and Mr. Byrne on the 4th, 5th and 6th of March, 2013. A contemporaneous note of these calls was made by the first defendant.

6. Essentially, the first defendant proposed that he would pay over the encashment value of the endowment policy and in addition, a sum of €4,000 in full and final settlement of the debt. The first defendant says that Mr. Byrne agreed to this proposal on behalf of the Bank, having received approval from his superiors, in a final phone call at 2.15 pm on the 6th March, 2014. Although there was initially an amount of prevarication about the Bank's evidence in that regard, the Bank now recognises, somewhat belatedly, that such an agreement was made. It says however that Mr. Byrne had no authority to make it. Consequently, following further correspondence between the Bank and the defendant's solicitors, the Bank wrote to the defendants on the 15th July, 2013, stating that there was no agreement and it could not consider the defendants' proposal until a standard financial statement had been provided by them. This is alleged to be a requirement of the Central Bank.

7. As I have said, it is now conceded by the Bank that this agreement was made. The Bank says however that it is not an enforceable agreement because it is not supported by any valuable consideration. That is the sole point in this appeal.

8. Both sides agree that the law in this regard is fairly clear. Payment of part only of a debt cannot amount to valuable consideration in law unless there is some collateral advantage to the creditor. Counsel for the defendants has sought to argue that such a collateral advantage did indeed arise in this case because the bank were getting something other than a payment of money, i.e. the benefit of an insurance policy, which could not be equated with a payment of money. I cannot accept that submission. In reality there was no benefit accruing to the Bank because it was already entitled to the proceeds of the policy by virtue of its assignment to the Bank at inception. There was no requirement for the defendants to consent to the payment of the policy to the Bank and clearly therefore no collateral advantage accrued to the Bank as a result.

9. A fortiori, the same applies to the payment of €4,000 which could not on any view be seen as other than a part payment of a larger debt. In my view therefore, the defendants have no defence in law to this claim.

10. However, that is not the end of the matter because the defendants further say that an estoppel arises in their favour by virtue of the now acknowledged agreement made with the Bank and in equity, it would be unconscionable to allow the Bank to resile from that agreement. A similar issue arose for consideration in *The Barge Inn Ltd v. Quinn Hospitality* [2013] IEHC 387.

11. The defendant in that case was the landlord of commercial premises of which the plaintiff was the tenant. The parties entered into a lease in 2009 at a rent of €400,000 per anum but as a result of the subsequent adverse economic environment, the tenant got into difficulties in paying the rent and sought a voluntary reduction. Laffoy J. held that an agreement was concluded between the parties to reduce the rent to €273,000 per annum.

12. The landlord sought to forfeit the lease on the basis of arrears of the original higher rent, claiming that the agreement was not enforceable in law for the same reasons as arise in the present case. The tenant relied on the doctrine of equitable estoppel, the principles of which were analysed by Laffoy J. in the course of her judgment, citing with approval a passage from *Delaney on Equity*

and the Law of Trusts in Ireland. Laffoy J. observed (at p. 42):

> "[68.] As Delany remarks in the course of her brief outline of the doctrine [*of promissory estoppel*], it is often considered in a contractual context and fuller treatment of it is to be found in leading texts in that area, citing Clark *op. cit* . and McDermott on *Contract Law* (2001). Having considered both, I think it is true to say there is little divergence as to the current state of Irish law on the doctrine between the authors. McDermott lists the key ingredients of promissory estoppel as being the following:
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> (a) the pre-existing legal relationship between the parties;
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> (b) an unambiguous representation;
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> (c) reliance by the promisee (and possible detriment);
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> (d) some element of unfairness and unconscionability;
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> (e) that the estoppel is being used not as a cause of action, but as a defence; and
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> (f) that the remedy is a matter for the Court."

13. Laffoy J. further went on to approve a passage from the 32nd ed. of Snell's Equity at p. 44 of the judgment:

> "[72.] In Snell's *Equity* (32nd Ed.) the editors deal with the effect of promissory estoppel and, in particular, the relief which can be afforded when it is established as follows (at para. 12 – 014):
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> 'The effect of the doctrine of promissory estoppel can be either temporary or permanent. But it is usually temporary. Where the promise or assurance is more than a temporary concession, [the promisor] will be entitled to withdraw the concession in accordance with its terms. Even where the promise or assurance cannot be construed as a temporary concession [the promisor] will usually be entitled to withdraw the promise on giving reasonable notice and the promise will only become final and irrevocable if [the promisee] cannot resume his or her former position. In this sense the doctrine of promissory estoppel has much in common with the principle of waiver of rights which permits a party to revoke any waiver upon reasonable notice to the other party.' "

14. In analysing whether or not the facts as found by the court gave rise to an estoppel, Laffoy J. concluded, with regard to ingredient (c), that the tenant did act in reliance on the promise and expended time, energy and money in maintaining the business carried on in the property and in improving and upgrading the property. Accordingly she concluded that the tenant had demonstrated that it had relied on the promise to its detriment. Accordingly she granted the relief sought by the tenant against forfeiture of the lease.

15. In the present case, I have no doubt that the defendants believed, and were correct to so believe, that they had entered into a final agreement with the Bank. It has to be said that the Bank's conduct in relation to this matter is regrettable and has given rise to a great deal of unnecessary worry and distress on the part of the defendants for whom I have great sympathy.

16. However, it seems to me that there is nothing evident from the affidavits before the court that suggests that the defendants relied on the agreement in the sense of having positively acted on foot of it, whether to their detriment or not. There is certainly no evidence to show that they acted to their own detriment in any real sense.

17. For those reasons therefore, it seems to me I am obliged to hold that the Bank is not bound either in law or in equity by the terms of the agreement referred to, subject to the misgivings I have identified. I therefore must conclude that the learned Circuit Court judge was correct in his finding that the Bank was entitled to an order for possession and I must therefore dismiss this appeal.