

THE HIGH COURT

COMMERCIAL

[2012 No. 1741 S]

[2012 108 COM]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

PHILIP STAFFORD

DEFENDANT

AND

MARIAN STAFFORD

THIRD PARTY

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

1. This matter comes before the court as a third party issue wherein the defendant seeks contribution from the third party in respect of a settlement reached with the plaintiff.
2. The third party is the widow of Gerard Stafford (Deceased) late of Kerlogue House, Kerlogue, County Wexford who died on 17th July, 2008. In these proceedings, she represents the interests of the Deceased.
3. These proceedings are linked with proceedings bearing High Court Record Number [2012 No. 1209 S] [2012 80 COM] between Bank of Ireland, plaintiff and Philip Stafford, Paula Stafford and Marian Stafford, defendants ("the related proceedings"). Those proceedings concern a separate liability incurred by the defendants to the plaintiff but a number of issues common to both sets of proceedings arise herein, and both actions were heard together.
4. In these proceedings, the plaintiff claims the sum of €1,030,941.18 pursuant to a credit agreement facility dated 14th March, 2007. This facility was taken up by the defendant and the Deceased in order to fund an investment in an equity fund offered by the plaintiff and known as the "Newgrange Fund".
5. At the end of 2006, the defendant and the Deceased had valuable property which was not producing a great deal of income. They decided to utilise these assets as security for a loan to invest in a managed share investment portfolio, and having taken professional advice, decided to invest €5m in the Newgrange Fund. At the time, this represented less than 5% of their estimated net worth. At the time when the investment was made, it was anticipated that the return would be in the region of 15% net of management fees with the possibility of later returns. Unfortunately, after the investment was made, the value in the fund fell sharply down to something in the order of 40%.
6. The defendant and the Deceased borrowed €5m repayable over 60 months by way of four annual interest only payments of €237,000 each and one capital and interest repayment of €5,237,000.
7. As security for the loan, the borrowers were obliged to assign their respective shares in the Newgrange Fund. They were also required to give the plaintiff security over lands valued in excess of 60% of the loan. The lands selected by the defendant and the Deceased were the lands contained in Folio WX12610 which were owned by them as tenants in common and equal shares.
8. It was agreed that all correspondence relating to the credit agreement would be sent to the borrowers at the address of the defendant at Drinagh House, Wexford which was the address from which he carried on his business activities. This was the address given in respect of both the defendant and the Deceased. At all material times, it was the defendant who took the leading part in negotiations and I am satisfied that this was with the consent of the Deceased, having regard to the evidence which was given in relation to this matter and the loan which is the subject of the related proceedings.
9. On 29th May, 2008, the defendant and the Deceased each paid €127, 187.87, being their respective shares of the interest due on that date. Due to a sudden and significant drop in the value of the fund shortly afterwards (something in the order of 40%), a deferral of interest was negotiated by Mr. Kieran Byrnes, accountant, the financial adviser of the borrowers.
10. The Deceased died on 17th July, 2008, and no interest was paid from 12th March, 2008, to 12th March, 2009. On 16th April, 2010, the defendant made a further interest payment representing his half of the interest arising on the account but the third party failed to pay the Deceased's share of the interest on that date. The defendant made a further interest payment on 25th May, 2011.
11. On 7th March, 2012, seven days before the expiry date of the loan, a demand was served on the defendant. No demand was made on the estate of the Deceased, but this was not necessary as the loan was joint and several. The loan expired on 14th March, 2012, whereupon the sums advanced by the plaintiff became due and owing. The defendant had authorised the plaintiff to liquidate his share in the fund in February 2012. This realised the sum of €2,194,970 which was applied in reduction of the defendant's indebtedness to the plaintiff. The plaintiff then exercised its rights over the Deceased's share in the Newgrange Fund and a sum of €2,248,510 was realised in this regard on 18th March, 2012. This left a shortfall remaining in respect of the liability of the defendant

and the Deceased on foot of the loan facility amounting to €1,030,941.18 as of 12th June, 2012. The loan was advanced on the basis of joint and several liabilities (Clause 15.1 of Conditions).

12. These proceedings were instituted against the defendant by summary summons on 9th May, 2012. The Deceased's estate was not joined as a defendant. On 2nd July, 2012, the defendant was granted an order giving him liberty to issue and serve a third party notice on the third party in her capacity as executor and upon Mr. Kieran Byrnes and Mr. John O'Connor as fellow executors. The third party notice was served on 5th July, 2012, and the third party subsequently agreed that she would represent the estate of the Deceased and the action was not pursued against Mr. Byrnes or Mr. O'Connor.

13. The third party knew nothing about the arrangement surrounding the Newgrange Fund. She claims that the Deceased would not have had the capacity to enter into the agreement and that he was subject to the undue influence of the defendant. At the time when he signed the agreement, the Deceased did so in the presence of the housekeeper, Ms. Patricia Codd. She said that when she was asked to witness his signature, the Deceased asked her in a perfectly normal manner. She said *"himself and Philip were there and I just went into the sitting room where they were and they just said 'would you mind signing this as an independent witness?'"* On further questioning, she said that they seemed to be carrying on their business meeting in a normal way.

14. On the second day of the hearing, the defendant gave evidence concerning the capacity of the Deceased to enter into the agreement and I accept his evidence. I am quite satisfied from his evidence that at the time when the Deceased entered into the agreement, he had the capacity to do so and he also had the benefit of professional advice from Mr. Kieran Byrnes, accountant. With regard to his capacity generally in business matters, I have dealt with this issue in greater detail in the judgment given in the related proceedings. In summary, my conclusion is that while the Deceased suffered from Depression and a condition of Bipolar Disorder, his condition was well managed by medication. While he undoubtedly had many dark periods in his life when he would not be able to function normally, the evidence from a substantial number of witnesses who dealt with him professionally was to the effect that in his business affairs, he was conscientious and methodical and would take great care to read documents before signing them. I reject the defence of the third party based on lack of capacity.

15. I also reject the third party's defence based on undue influence, having regard to the matters to which I have alluded in the judgment in the related action and having regard specifically to the evidence of the defendant and a number of witnesses, whose evidence establishes that while the defendant was the prime mover in the joint business affairs of himself and the Deceased, they were close siblings and had a warm relationship. The evidence offered by the third party on this issue was mainly concerned with periods when the Deceased was not involved in business transactions. Insofar as her evidence touches on the period around March 2007, I prefer the evidence of the first named defendant and a number of witnesses who dealt with him in a business context, as to his capacity to enter into the agreement.

16. The third party also claims that the action by the defendant for a contribution or indemnity is time-barred. In my view, it is not. The Deceased died on 17th July, 2008. At that date, the repayments on foot of the loan were not in arrears. The demand was made after the date of death of the Deceased. Even if the Deceased's death was an event triggering a default, it did not give rise to a subsisting claim against the Deceased at the time of his death. I have dealt with this issue in greater detail in the related proceedings and it is not necessary to repeat what I said there. No demand was made on foot of the loan until after the death of the Deceased. But even if the death was a triggering event, it does not bring into play the provisions of sections 8 and 9 of the Civil Liability Act 1961, and the claim is not time-barred.

17. It is worthy of note that when the Deceased's estate was being administered, this debt was shown as a liability on the estate. Having considered the evidence, I conclude that the defendant acted reasonably in settling the liability on foot of the agreement and he has made a claim on the estate of the Deceased which is fair and equitable. I would allow the defendant's claim for contribution against the third party. The parties have agreed (subject to liability) the quantum of the claim under this hearing as follows:

Amount paid to plaintiff on behalf of the
Deceased's estate on 19th July 2013: €536,520.00
Interest thereon to 10th November 2013 @ 2.25%: €17,101.58
50% of costs claimed by plaintiff in respect of the
Newgrange proceedings: €21,944.25
TOTAL: €575,656.83

18. The defendant is entitled to judgment in the said sum against the third party.