Neutral Citation: [2015] IEHC 169

THE HIGH COURT

COMMERCIAL

[2014 No. 1756 S.]

BETWEEN

NATIONAL ASSETS LOAN MANAGEMENT LIMITED

PLAINTIFF

AND

GARRETT KELLEHER

DEFENDANT

JUDGMENT of Mr. Justice Fullam delivered the 24th day of February 2015

1. This is an application for summary judgment by the plaintiff (NALM) against the defendant on foot of personal guarantees securing loan facilities advanced by Anglo Irish Corporation Plc ("The Bank") to a group of corporate entities known as "The Shelbourne Connection". The defendant was the beneficial owner of the Shelbourne Connection.

2. Under the Cratloe Facility dated the 16th June, 2005, the Bank advanced a maximum facility of €6.2 million to CWD Properties Ltd (CWD) in connection with the development of lands at Cratloe Woods, Co. Limerick.

This facility was secured by the defendant's guarantee also dated 16th June, 2005.

3. Under the Modillion Facility dated 19th December, 2007 the Bank advanced a sum of €299.4 million through three separate term loan facilities (A, B and C) to a number of Shelbourne corporate entities (the Modillion Borrowers)in connection with property development in Dublin and Belgium.

These facilities were secured by the defendant's guarantee also dated 19th December, 2007, under which, liability was limited to a maximum of €50 million. By an undated side letter in 2007, the Bank agreed to reduce the defendant's liability under the guarantee to €40 million to take account of monies recoverable under a separate guarantee from Royal Bank of Scotland (RBS).

Demand

4. On 11th March, 2014, NAMA decided to demand repayment of the Modillion and Cratloe Facilities. The defendant's solicitors were informed of the decision on 27th March.

5. By letters dated 27th March, 2014 the plaintiff demanded payment of €6,771,024.36 from CWD in respect of the Cratloe Facility and the sum of €250,352,315.10 from the borrowers under the Modillion Facility.

By letters dated 28th March, 2014 the plaintiff demanded payment from the defendant pursuant to the Cratloe guarantee of €6.7 million and the sum of €40 million in respect of the Modillion guarantee.

The plaintiff's claim against the defendant is for judgment in the sum of €46,834,427.35 together with continuing interest.

6. The execution of the guarantees, the granting of the loans, the default by the borrowers, the demands for repayment and the quantum of the defendant's indebtedness arising under the guarantees are not denied.

The Chicago Spire

7. To understand the defences put forward by Mr. Kelleher, it is necessary to set out some background concerning the development known as the Chicago Spire.

In 2006, the Shelbourne Connection acquired a development site at 400 North Lakeshore Drive, in Chicago at a cost of $80 million. The acquisition was financed, in part, by a loan from Anglo Irish Bank Plc. of $54.6 million.

It should be pointed out that neither this loan nor the underlying security forms part of the secured facilities the subject matter of these proceedings.

The site comprised 2.2 acres on the city's lake shore on which it was intended to construct a residential building (the Chicago Spire) designed by the architect Santiago Calatrava. The Spire, comprising 150 storeys with 1,194 units, was to be part of an integrated development covering seven acres.

At the time of its launch in January, 2008, the defendant states that the development had an "Enterprise Value" of $500 million against which there was outstanding bank debt of $54.5 million leaving an equity of approximately $450 million. The defendant says that the gross completed development value was projected by Savills of London at $3.47 billion with total projected costs of $2.1 billion.

Development on the Spire came to a halt in 2008.

In 2009/10, Bank of America took proceedings in Chicago against Shelbourne and the defendant for repayment of loans in connection with the Spire.

On the 2nd October, 2010, Anglo appointed a receiver over the property at which time the debt was $80 million. A month later, on 1st November, NALM acquired the Shelbourne Connection's loans and associated guarantees.

In January 2011 the plaintiff began to engage with the Shelbourne Connection in relation to its total indebtedness.

In 2011, US creditors instituted foreclosure proceedings in Chicago in respect of debts owing on the Spire by the Shelbourne Connection. These creditors included the plaintiff. On 16th September, 2011, the defendant signed an Interim Letter of Support, a condition of which required the Connection to agree to a Consent Foreclosure.

8. In March 2013, the plaintiffs began marketing the Spire loan which then had a par value of $92.8 million. The defendant makes a number of criticisms of the marketing process, not least, that the plaintiff should have waited until the foreclosure litigation had concluded and, more importantly, the marketing brochure indicated that the development lacked certain planning permissions when, in fact, they were extant. The plaintiff complains that he introduced a property billionaire, Andy Ruhan, who was prepared to pay par value for the loan, but Mr. Ruhan was excluded from the bidding process by the plaintiff.

9. On 31st May, 2013, the Chicago Spire was certified as an EB5 Regional Centre which the defendant says had a material and significant effect on its value.

10. In June, 2013, the Spire loan together with Mr. Kelleher's guarantees were sold to a company called RMW at a price believed to be $ 35 million.

11. On 26th March, 2014, the Chicago Foreclosure Court approved an agreement giving the defendant an option to pay RMW the sum of $109 million for the loan and the secured development site, on or before 31st October, 2014, or, at his option, in two stage payments, namely $22 million before 31st October, 2014 with a further payment of $92 million on or before the 31st March, 2015.

12. The defendant said that he had identified a purchaser, Atlas, who was prepared to acquire the loan at the asking price. Ultimately, Atlas did not provide assistance.

The Defendant's Case
1. Estoppel

13. The defendant relies on the private law defence of estoppel. The defendant maintains that at a meeting in mid- September 2009 in the Schoolhouse Bar, Northumberland Road, Dublin, Mr. John Mulcahy, who subsequently became part of NAMA's executive, represented to him that if he co-operated in helping NAMA obtain maximum value in realising the assets under its control, he would be dealt with equitably and NAMA would not enforce the guarantees against him. The defendant says that he informed Mr. Mulcahy at the meeting that he had been advised to file for bankruptcy in the United States.

14. The defendant says that Mr. Mulcahy repeated the representation of September, 2009 at a subsequent meeting at the Treasury Building Dublin on 2nd November 2010, as did other officials of the plaintiff at various meetings between 2009 and 2013.

The defendant says that he acted on the representations. He did not avail of the quick and easy option of US bankruptcy; instead he worked for the plaintiff for 4 years; he enhanced the value of the Spire by obtaining EB5 Certification, voluntarily provided additional security in the form of valuable *Dolmen* shares, and acted to his detriment, thereby fulfilling the precondition of co-operation required by the plaintiff.

The defendant submits he has met the ingredients for promissory estoppel as identified by Laffoy J. in *The Barge Inn Ltd. v. Quinn Hospitality Ireland Operation 3 Limited* [2012] IEHC 387.

The Fairness of the Plaintiff proceeding to enforcement

15. The defendant makes a linked but separate argument that the decision to enforce was not based on fair procedures. He submits the real reason and only commercial rationale for the plaintiff's decision, which only emerged in the affidavit of Mr Malbasha sworn on 9th September, 2014, was that the plaintiff believed that the defendant had hidden assets. That allegation, he says, was not put to him in the course of the enforcement decision process and he was not given an opportunity to address it in submissions to the plaintiff.

2. Damage to Value of Assets

16. The defendant says that ss. 10 and 11 of the Act impose a statutory obligation on NAMA to *"take all steps necessary or expedient to protect, enhance or realise the value of acquired bank assets including –*

> *(i) The disposal of loans in the market for the best achievable price…*
>
> *(iii) Holding, refinancing, realising and disposing of any relevant security."*

17. The defendant says that NAMA breached its statutory duty by failing to enhance or realise value of the Spire loan so as to obtain the best achievable price. The defendant submits that the plaintiff disposed of the Spire loan at *"a fire-sale price"*, as a consequence of which the defendant was deprived of the *"very real possibility"* of paying off his personal liabilities to the plaintiff.

The defendant submits that NAMA should have waited, prepared an integrated development of the area, (comprising seven acres), and ensured that there was sufficient time given for appropriate parties to bid for the area. Instead, the site was sold as a *"hole in the ground* "without planning even though it contained complex underground development costing $80m.

The defendant accepts that the obligation being imputed to NAMA is novel and goes beyond the recognised obligations of mortgagees and receivers, but states that is what the 2009 Act requires.

18. The defendant submits that it is not right as a matter of statutory construction, common sense, or having regard to the constitutional right to defend oneself, to construe s.193(1) as obliging the defendant to challenge the decision to enforce by way of judicial review within one month, and, in circumstances where the decision was not challenged, prohibiting the defendant from relying on the defence of estoppel in an application for summary judgment.

19. The defendant submits that proposition is extremely radical in suggesting that a defence that would be available against a private creditor is not available against NAMA and he further submits that, if that was what the legislation intended, it would have said so in express terms.

The Plaintiff's case
1. Estoppel

(a) The plaintiff submits that Mr. Mulcahy gave no such assurances or made such representations as alleged by the defendant. Furthermore the alleged representations made by Mr. Mulcahy in mid- September, 2009 are of no legal effect having been made prior to the commencement of the NAMA Act, 2009 and the acquisition by NAMA of the loans of the Shelbourne Connection and the defendant's guarantees.

The plaintiff submits that at all times in its dealings and correspondence with the defendant, that it reserved its entitlement to enforce the guarantees and any forbearance was conditional on the defendant's co-operation.

(b) The plaintiff says that by virtue of s.193 (1) of the Act, which prescribes a period of one month in which to challenge any decision of NAMA, the defendant is statue barred from challenging the decision to enforce the guarantees. Such challenge must be brought by means of judicial review and that position was acknowledged by the defendant's solicitor Mr. Smyth in his letter to the plaintiff on 2nd April, 2014.

(c) Even if the defendant's estoppel point is treated solely as a matter of private law, it does not meet the ingredients stipulated by Laffoy J. in the *Barge Inn* case.

Damage to the Value of Assets
20. The plaintiff disputes the defendant's interpretation of ss. 10 and 11 of the Act of 2009 that, in respect of bank assets acquired by it, NAMA owes a greater duty to persons affected than the duties owed by ordinary mortgagees and receivers.

21. The plaintiff submits that the obligation on NAMA is that of an ordinary mortgagee as stated by the English Court of Appeal in Silven Properties Ltd v RBS Plc[2004]2WLR997, and approved by the Supreme Court in *Dellway*.[2014] 4 I.R.1.

22. The Spire loans are unconnected to the Cratloe and Modillion guarantees with which these proceedings are concerned.

23. The defendant did not challenge NAMA's decision to sell the Spire loans, in accordance with the s.193 procedure, and, the plaintiff submits he cannot raise them in these proceedings.

24. The losses arising from the sale of the Spire loan were not suffered by the defendant personally but by a separate legal entity, Shelbourne North Waterstreet LP (SNWS) and accordingly those losses do not give rise to a defence or counterclaim for the defendant in these proceedings.

25. The figures set out by Peter Malbasha, at paragraph 12 of his affidavit sworn on 6th November, 2014, demonstrate that even if the defendant's claims concerning the valuation of the Chicago spire are correct, the Shelbourne connection would have remained indebted to NAMA in an amount far in excess of the defendant's liability under the Cratloe and Modillion guarantees.

The defendant contends that if NAMA had waited 18 months and engaged with the professional team he had in place, *"in a competent way"*, the Spire site would have a sale value of $350 million. The figures relied on by the defendant are inherently incredible when viewed in the light of his failure to raise the necessary funds by 31st October, 2014, to delay enforcement of the Spire Loan by RMW, either the full $109 million under the first option, or even the first instalment of $22 million, under the second.

The Law
Summary Judgment

The principles to be applied in an application for summary judgment have been set out by the Supreme Court in the well known cases of Aer Rianta v Ryanair [2001]4 I.R. 607 and Harrisgrange Ltd v Duncan[2003] 4 I.R. 1.

Promissory Estoppel

In The Barge Inn Limited v Quinn Hospitality Ireland Operations 3 Limited [2013] IEHC Laffoy J. said at par 68:

Mc Dermott lists the key ingredients of promissory estoppel as being the following:

(a) a pre-existing legal relationship between the parties;

(b) an unambiguous representation;

(c) reliance by the promisee (and possible detriment);

(d) some element of unfairness and unconscionability;

(e) that the estoppel is being used not as a cause of action, but as a defence; and

(f) that the remedy is a matter for the Court.

The Statutory Provisions – National Asset Management Agency Act,2009
Section 2 sets out the purposes of the Act:-

"(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, and

(b) To address the compelling need –

(i) To facilitate the availability of credit in the economy of the State,

(ii) To resolve the problems created by the financial crisis in an expeditious and efficient manner and achieve a recovery in the economy,

…

(iv) To protect the interests of taxpayers,

…

(viii) To contribute to the social and economic development of the State."

26. Section 10 sets out the purposes of NAMA:-

"(1) NAMA's purposes shall be to contribute to the achievement of the purposes specified in section 2 by –

(a) The acquisition from participating institutions of such eligible bank assets as is appropriate,

(b) Dealing expeditiously with the assets acquired by it, and

(c) Protecting or otherwise enhancing the value of those assets, in the interests of the State.

(2) So far as possible, NAMA shall, expeditiously and consistently with the achievement of the purposes specified in subsection (1), obtain the best achievable financial return for the State having regard to –

(a) The cost to the Exchequer of acquiring bank assets and dealing with acquired bank assets,

(b) NAMA's cost of capital and other costs, and

(c) Any other factor which NAMA considers relevant to the achievement of its purposes."

27. Section 11 sets out the functions of NAMA:-

"(1) In order to achieve its purposes, NAMA shall perform the following functions:-

(a) Acquire, in accordance with Part 6, such eligible bank assets from participating institutions as it considers necessary or desirable for achieving its purposes;

(b) Hold, manage and realise acquired bank assets (including the collection of interest, principal and capital due, the taking or taking over of collateral where necessary and the provision of funds where appropriate);

(c) Perform such other functions, related to the management or realisation of acquired bank assets, as the Minister directs pursuant to section 14;

(d) Take all steps necessary or expedient to protect, enhance or realise the value of acquired bank assets, including –

(i) The disposal of loans or portfolios of loans in the market for the best achievable price,

(ii) The securitisation or refinancing of portfolios of loans, and

(iii) Holding, refinancing, realising and disposing of any relevant security."

In the annotated version of the Act of 2009, authors Byrne and McIntaggart state at p.33: *"No guidelines are given in relation to a time limit for NAMA to deal expeditiously with an asset acquired by it."*

Further down, concerning s.11, they say: *"Having regard to the provisions of s11, it would appear that one way in which the best possible financial return can be obtained is by the disposal of loans or portfolios of loans n the market for the best achievable price (s11(1)(b) and (d)."*

Section 12 sets out the powers of NAMA.

28. Part 10 (ss. 180 – 195) deals with legal proceedings, commenced on or after 30th July, 2009, by "a person who was a debtor, associated debtor, guarantor or surety in relation to a bank asset".

29. Section 182 (8) provides:-

"Nothing in this section prevents a party –

(a) defending proceedings *in rem* in respect of a bank asset instituted against it by NAMA… in a manner which might affect the bank asset…or any property the subject of any security."

30. Section 193 limits the period for bringing an application for leave for Judicial Review of a decision to one month after the decision is notified to the person concerned.

The duties of a mortgagee

In Dellway Investments Ltd. v NAMA [2014] 4 I.R. 1, the Divisional High Court approved the statement of Lightman L.J. concerning the obligations of mortgagees in Silven Properties Ltd.v Royal Bank of Scotland plc [2004] 4 AER 484 [2004] 1WLR 997.

Silven concerned proceedings against receivers for allegedly selling properties at an undervalue; the receivers had investigated the possibility of adding value to some of the mortgaged properties by obtaining planning permission but eventually decided not to proceed with the applications and to proceed with the sales of the properties as they were. The mortgagors alleged that in order to obtain the best price obtainable the receivers were under a duty, before selling, to pursue planning applications and proceed with the grant of a lease, and to defer a sale until those goals had been achieved.

The English Court of Appeal, affirming the High Court, held that having regard to the fact that the primary duty of a receiver was to bring about a situation where the secured debt was repaid, the receiver had to be entitled as a matter of principle to sell the property in the condition in which it was, in the same way as a mortgagee could, and in particular without awaiting or effecting any increase in value or improvement in the property.

At paragraphs 13 to 20 of his judgment, Lightman L.J. considered the duties of mortgagees.

A mortgagee has no duty at any time to exercise his power as mortgagee to sell, to take possession or to appoint a receiver and preserve the security or its value or to realise his security.

A mortgagee is not a trustee of the power of sale for the mortgagor.

A mortgagee is entitled to sell the mortgaged property as it is .He is under no obligation to improve it or increase its value. There is no obligation to take any such pre-marketing steps to increase the value as is suggested by the claimants.

When, and if, the mortgagee does exercise the power of sale, he comes under a duty in equity (and not tort) to the mortgagor (and all others interested in the equity of redemption) to take reasonable precautions to obtain the "fair" or "the true market value" of, or, the "proper price" for the mortgaged property at the date of sale.

At page 77 in Dellway, after quoting paragraph 29 of the judgment of Lightman L.J., the Divisional Court said;

> *" the Court accepts that s148(7) of the Act is designed to bring clarity to the obligations of statutory receivers. The presence of that provision cannot be taken as in any way implying that the ordinary obligations which would apply as a matter of law, either to a bank selling as mortgagee, or a receiver appointed under a debenture, do not apply to NAMA or a non-statutory receiver appointed by NAMA."*

Discussion
Estoppel

31. The defendant relies on the private law defence of estoppel. The defendant alleges that the plaintiff is estopped from enforcing its legal right to seek indemnification under the Cratloe and Modillion guarantees by virtue of representations made by Mr. Mulcahy in mid-September, 2009 at a meeting at the Schoolhouse Bar and repeated on the 2nd of November, 2010 at a meeting at Treasury Building. The representation in essence was that if the defendant co-operated with NAMA, the guarantees would not be enforced. The defendant says he did co-operate and *"contrary to what they previously had agreed and what they had repeatedly assured and represented to (him), the plaintiff moved to enforcement against him personally on spurious grounds"*.

While the Dellway decision suggests that the plaintiff could not be bound by representations made to the defendant by Mr Mulcahy prior to the establishment of NAMA, there is no dispute that a meeting took place between the defendant and Mr. Mulcahy, who subsequently became a senior executive in NAMA, and that Mr Mulcahy discussed NAMA's likely approach to its dealings with persons affected by its decision to acquire assets.

32. The defendant's case is that he received repeated assurances and one of those occasions was on the 2nd of November, 2010 at a meeting with Mr Mulcahy in the Treasury Building. This meeting took place a day after NAMA acquired the Cratloe and Modillion loans together with the defendant's guarantees.

33. The defendant's version of representations made to him at these meetings and his various dealings with NAMA, has been consistent and it is clear that forbearance was being extended to him by the plaintiff with conditionality understood by both parties. The plaintiff's position is summarised at paragraph 35 of grounding affidavit of Mr. Malbasha :

> *"At all times, it has been clear from NAMA's correspondence that it would forbear from taking enforcement action and would support the Shelbourne Connection on condition of continuing co-operation and adherence to certain specified conditions."*

That correspondence includes an Interim Support Letter for the Shelbourne Connection dated 16th September, 2011 and signed by the defendant; and a Forbearance Letter dated 5th February, 2013 in which NAMA indicated *its "willingness to extend its forbearance and continued reservation of its rights under the facilities and security with the Connection (including personal guarantees) on the strict condition that the Connection meets the entirety of the conditions and requirements set out in the appendix to the letter within the deadlines specified"*. The defendant was invited to accept these terms by 15th February and recommended to obtain independent legal advice before doing so. The defendant responded by email on 15th February.

The correspondence also refers to discussions of a Memorandum of Understanding sought by the defendant.

34. The defendant alleges that non-cooperation effectively only emerged as a serious reason after the sale of the Spire loan in June, 2013 when the plaintiff no longer had need for his services, and the true reason only emerged in Mr Malbasha's affidavit of 8th September, 2014, a considerable time after the decision to enforce.

35. There is evidence of the ingredients of promissory estoppel as set out by Laffoy J. in the *Barge Inn Ltd*.

36. The only real dispute on the facts is whether or not the defendant met the pre- condition of co-operation.

37. It seems to me that the defendant has an arguable case on the private law defence of estoppel.

38. However, the plaintiff maintains that such defence is not open to the defendant here because the decision to enforce was a public law matter and the only remedy open to the defendant was by way of Judicial Review pursuant to s.193. The plaintiff cites the decisions in *NAMA v. Barden* (Charleton, J.) and *NALM v. Cullen* (Kelly, J.) as authorities for the proposition that s.193 applies to any decision made by NAMA. The plaintiff submits that as the defendant did not challenge the decision to enforce, notified on the 27th March, 2014, by way of judicial review or, alternatively, did not issue a plenary summons within the one month time limit prescribed by s.193, the defendant is now statute barred.

The plaintiff's submission is based on an extrapolation from the decisions in *Barden* and *Cullen*. Those cases primarily dealt with the failure to challenge NAMA's decision to acquire bank assets within the limitation period. It is notable that, in the *Barden* case, the defendant raised two defences, one based on estoppel and the other based on the invalidity of the decision to acquire the defendant's loans. Charleton J. dealt first with the estoppel argument on the merits. He ruled that, on the evidence, the defendant did not have an arguable defence. He then proceeded to consider the remaining point which was whether the acquisition of the defendant's loans by NAMA was unlawful.

39. In *Cullen*, the principal defence of the four defences raised, related to the unlawfulness of NAMA's acquisition of the defendant's loans. Kelly J. followed the decision of Charleton J in *Barden*.

NAMA's acquisition of loans and guarantees is not in issue in this case.

The only guide on the issue of law in this case is the separate treatment of the estoppel argument by Charleton J in Barden. While NAMA does not appear to have raised the s.193 point in Barden, the approach taken by Charleton J provides some prima facie support for the legal position advocated by the defendant in this case, namely, that he is entitled to raise the defence of estoppel in proceedings brought against him.

To require a person affected to use an estoppel as a cause of action by way of judicial review, in advance of any claim being made against him, puts him, to say the least, at a disadvantage by comparison with a private law debtor/guarantor, in particular having regard to the fact that defendant's obligations, in this case, commenced in a private law contract.

There is the further linked point on this issue in that the defendant alleges that the true reason for the plaintiff's decision to enforce only surfaced in the affidavit of Mr. Malbasha some six months after the decision was notified and five months after the limitation period expired.

40. The defendant has not sought to challenge the decision to enforce by way of judicial review but has sought to defend the plaintiff's claim for summary judgment on the issue of estoppel.

The estoppel issue in this case has become *"wrapped up"* in the plaintiff's s.193 objection and is not, in my view, an issue which is "simple and easily determined" and therefore not suitable for determination in an application for summary judgment. It is noteworthy that, in relation to Part 10 of the Act which deals with legal proceedings, Charleton J. said, after dealing with parts 8 and 9, said:-

> *"The provisions of part 10 of the Act are more difficult to understand."*

41. It seems to me that the defendant has an arguable case in relation to the private law defence of estoppel and an arguable case in relation to the plaintiff's objection that such defence is prohibited outside an application for judicial review.

Damage to Value of Assets

42. The defendant's case is that the plaintiff recklessly sold the Spire loan at a gross undervalue for a price of $35 million when the face value of the loan was in excess of $90 million. He says that had the matter been handled properly the site would have realised the sum of $350 million which would have enabled him to clear his indebtedness in respect of the Spire loan and also his liabilities under the Cratloe and Modillion guarantees. Instead, as a result of the sale of the Spire loan in June, 2013, he has been deprived of the opportunity to clear his indebtedness under the Spire loan and the Cratloe and Modillion guarantees.

43. The effect of the plaintiff's contention is that he has a counterclaim for damages which is more than sufficient to offset against any liability under the guarantees in these proceedings. To succeed with such a counterclaim, the defendant acknowledges that he has to establish that ss.10, 11 and 12 of the Act of 2009 impose obligations on NAMA which are more onerous than the normal duties of a mortgagee as set out in *Silven Properties* and approved by the Supreme Court in *Dellway*.

44. When asked by the Court to set out what the defendant contended was the proper approach in dealing with the Spire loan/site so as to achieve the best achievable price, counsel for Mr. Kelleher said in terms – the plaintiff should have waited, prepared an integrated development of the area (which comprised seven acres) and ensured that there was sufficient time given for appropriate parties to bid for the area in question. He says that instead the site was sold as *"a hole in the ground"* although it contained complex underground construction, involving an investment of $80 million. It was wrongly marketed as being without planning and, during ongoing Foreclosure litigation these factors were detrimental to achieving an optimum price. Had Mr. Kelleher been listened to, with time and appropriate management, he says the site would have realised a value in excess of $350 million a position, he says, is supported by independent evidence adduced on affidavit.

45. Mr. Murphy summarised the defendant's criticism of NAMA's handling of the Spire loan/site sale as being *"ultimately a question of marketing, timing, development, understanding of the true potential of the area itself, in a variety of ways, either for the purpose of developing it as the Spire or developing it in some other way".* He submitted that the evidence put forward by the defendant in respect of valuations demonstrates that the $35 million obtained by the plaintiff was a gross undervalue, and, that the alternative approach set up by the defendant demonstrated that he would have been in a position to redeem the guarantee the subject matter of these proceedings.

46. In Barden, Mr. Justice Charleton said at paragraph 22 :-

> *"The Act of 2009 was commenced in the public interest and in circumstances of a National emergency that continues down to the present time."*

At paragraph 20 he said:

> *"The purposes of the Act of 2009, which set up the National Assets Management Agency, are set out in section 2 thereof. Those purposes are all related to the economic collapse due to vastly overvalued real property prices that*

became starkly apparent in 2008. These included addressing the threat to the economy; returning the availability of credit to business; resolving the problems created by the financial crisis generated in the years 2000-2008; protecting the State support of improvident banks; protecting the tax payer; restructuring credit institutions; bringing certainty to the valuation of assets of banks; restoring confidence in the banking sector; and contributing to the development of the nation. Under section 10, those purposes are to be fulfilled through NAMA. This is to be done by acquiring bank assets; by dealing expeditiously with those loans; by protecting the value of what is acquired; and by achieving the best possible return from that process for the State."

47. The purposes of the Act of 2009 as provided for in s. 2 involve the protection of the interests of the State and of tax payers. No other interests are mentioned.

48. Section 10 sets out the purposes of NAMA.

Section 10(2) obliges NAMA, *"so far as is possible, to expeditiously and consistently obtain the best achievable financial return for the State, having regard to costs of acquisition, holding costs, cost of capital and any other factor that NAMA considers necessary for the achievement of its purposes"*.

Section 11 prescribes the functions which NAMA must perform in order to achieve its purposes. The section does not prescribe how NAMA is to perform its functions.

Section 12 provides that NAMA shall have all the powers necessary for its purposes and functions and at subsection (2) sets out an extensive non-exhaustive list of those powers.

NAMA has a wide discretion as to the manner in which it performs its functions.

The statement of the Divisional Court in *Dellway* at page 77 indicates that the statutory obligations imposed on NAMA are co-extensive with the ordinary obligations of a bank selling as mortgagee or a receiver appointed under a debenture. If it was the intention of the legislature to extend those obligations, it would have done so in express terms.

49. In my view, these provisions do not impose additional duties on NAMA towards debtors, guarantors or mortgagors over and above the duties of an ordinary mortgagee in respect of the management and realisation of bank assets.

50. The plaintiff engaged the reputable firm of Jones Lang LeSalle for the purpose of marketing the Spire loan. That process took place between March and June, 2013.

The footnote to the annotated legislation at page 33 states:

"Having regard to the provisions of s.11, it would appear that one way in which the best possible financial return can be obtained is by the disposal of loans or portfolios of loans in the market for the best achievable price (s.11(1)(b)(d))."…

51. The plaintiff does appear to accept that there was a "glitch" in its sales brochure so far as the description of the planning status of the site was concerned. The plaintiff submitted that the purchasers would have made their own inquiries, and, furthermore, the defendant has not quantified any loss arising as a result.

52. The plaintiff was entitled to sell the Spire loan as it was in 2013 without taking any steps to enhance the asset on which it was secured or waiting for the market to improve.

The Market

53. The defendant submits the value of the site is $350 million and has provided what he describes as independent evidence supporting the valuation in the affidavit of Mr. Barton DeLacy and the loan application valuation prepared by Messrs Landauer. This evidence raises the obvious question; if the site had that potential value in June, 2013 ,why did the auction sale of the loan giving control of the site not achieve a higher price, or, why was the defendant not able to persuade a partner to acquire the loan at a higher price?. This valuation should also be seen in the context an earlier offering by NAMA in June, 2011 of 11 loans, including the Spire, having a combined face value of €436,776 million with an *"expected acquisition price of E85 million".*

54. Furthermore, the defendant obtained a lifeline from the Foreclosure Court by way of an option to purchase the loan at its full face value of €109 million by 31st October, 2014 or alternatively in two stage payments, namely $22 million by 31st October, 2014 and a balance of $92 million by 31st March, 2015. The defendant had indicated that the Atlas Corporation was prepared to buy the loan at face value but ultimately did not do so.

55. This leads to the inescapable conclusion that no one in the market took the defendant's view of the value of the site.

56. In his supplemental affidavit sworn on the 6th November, 2014, Mr. Malbasha points out at paragraph 12 , that, even if the Spire property itself had been sold for $350 million (€277 million approx) and a value of €50 million was attributed to the secured assets of the Shelbourne Connection, that would still leave a net liability of €98 million in respect of the Shelbourne Connection, and therefore, on the defendant's own figures the Spire could not have generated sufficient monies to enable the defendant to avoid personal liability to NAMA.

Mr. Malbasha's calculations are based on gross figures and do not take into account taxation costs and costs of realisation.

It is clear from the evidence that, even if the Court accepted the defendant's submission, that the Act imposed additional obligations on the plaintiff, the sale of the Spire loan in June, 2013 could not have generated sufficient monies to enable the defendant clear his indebtedness arising from the guarantees subject of these proceedings.

In the circumstances, there is no reality in this defence.

Disposal

57. Using the test prescribed by Hardiman J. in *Aer Rianta v. Ryanair Ltd.* [2001] 4 I.R. 607:

"Is it very clear the defendant has no case?"

58. I answer that in the negative in respect of the estoppel defence and in the affirmative in respect of the counter claim for damage to assets.

59. I will remit the case for plenary hearing on the first issue, namely that of estoppel.