

**THE HIGH COURT**

**COMMERCIAL**

**2009 4196 S**

**BETWEEN**

**DERMOT O'ROURKE**

**PLAINTIFF**

**AND**

**THOMAS CONSIDINE, PATRICK SWEENEY AND**

**GERARD PRENDERGAST**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 10th day of May, 2011**

1. The plaintiff is a businessman who seeks judgment against the defendants in the sum of €21,978,000, together with interest on the said sum at the rate of 32% from 9th August, 2009, to the date of judgment.

2. The essential facts in the proceedings are not in dispute. The plaintiff, with a Mr. Gerry Conlon, controlled two companies, Bandenberry Ltd. and Maplefern Holdings Ltd., which owned lands at Naas, County Kildare, known as the Millennium Park. In August 2006, the defendants agreed to purchase Millennium Park by the purchase of the shares in Bandenberry Ltd. and Maplefern Holdings Limited. The total purchase price was €315 million.

3. In order to facilitate the defendants in raising sufficient monies to complete the purchase, the plaintiff, *inter alia*, entered into a loan agreement in writing dated 9th August, 2006 ("the Loan Agreement"), according to which he agreed to provide a loan to the defendants in the sum of €10 million. The sum was drawn down on 9th August, 2006. The repayment date was specified as 9th August, 2009. In accordance with clause 7 of the Loan Agreement, the principal and all accrued but unpaid interest was to be repaid by 9th August, 2009.

4. The defendants did not repay the loan and accrued interest on 9th August, 2009. On 28th August, 2009, the plaintiff, through his solicitors, demanded immediate repayment of the sum of €21,978,000, failing which it was stated that proceedings would be issued. A summary summons was issued on 5th October, 2009.

5. In the meantime, on 27th February, 2008, the plaintiff entered into a deed of assignment and charge with Bank of Scotland (Ireland) Ltd. (BOSI), pursuant to which it assigned absolutely to BOSI, *inter alia*, the Loan Agreement as security for certain liabilities of the plaintiff to BOSI.

6. The plaintiff brought an application for leave to enter the Commercial List and for summary judgment against the defendants. By order of the High Court (Kelly J.) of 7th December, 2009, the proceedings were entered into the Commercial List and the application for summary judgment adjourned to allow the defendants put in a replying affidavit. An affidavit was sworn and filed by the third named defendant.

7. There were, at the same time, proceedings brought by Bank of Scotland Ireland against the plaintiff before the High Court and it appears both applications for summary judgment were then adjourned to 18th December, 2009, and the plaintiff was given liberty to bring a motion seeking the joinder of BOSI in the present proceedings. On 18th December, 2009, the court was informed that BOSI had declined to consent to be joined, even though an indemnity was offered. By agreement, the defendants were given leave to defend and directions given for the exchange of pleadings and other pre-trial matters.

8. A defence was delivered by the defendants on 18th January, 2010, which raised, as a preliminary objection, the entitlement of the plaintiff to sue on the Loan Agreement by reason of its assignment to BOSI, the acknowledgement which the defendants were required to give at the time of the assignment and the fact that BOSI had not issued any request to the defendants under the Loan Agreement. The defendants also contested the entitlement of the plaintiff to recover interest at 30% per annum upon the ground that the interest rate was unconscionable and that the court, in its equitable jurisdiction, should intervene in relation to the interest rate. Finally, it contended that the additional rate of 2% above the rate of 30% which applied on any sum unpaid at the repayment date was a penalty, and as such, not recoverable.

9. A reply to the defence was delivered on 5th February, 2010, putting in issue all of the above.

10. On 25th June, 2010, the plaintiff entered into a deed of reassignment with BOSI whereby BOSI purported to reassign to the plaintiff all of BOSI's rights, title, benefit and interest in the Loan Agreement and monies to be received thereunder. The plaintiff, through its solicitors, made a further demand on the defendants on 2nd July, 2010, and thereafter, delivered an amended summary summons. There were amended defences and amended reply to defences delivered.

11. The consent of the defendants to the deed of reassignment was not sought. The defendants contend that clause 16 of the Loan Agreement does not apply to a reassignment of the Loan Agreement to the plaintiff as the original lender, and hence, no consent in writing of a majority of the defendants is required for the reassignment.

**Issue**

12. The first issue to be determined in these proceedings is whether, upon the above facts, the plaintiff was, at either the date of commencement or hearing of the proceedings, entitled to seek recovery from the defendants of the amounts due on the Loan

Agreement. It is not in dispute that the defendants have failed to repay the loan they received and interest thereon in accordance with the Loan Agreement. There is a secondary dispute as to the rate at which interest is payable pursuant to the Loan Agreement.

#### Relevant Contractual Terms

13. In the Loan Agreement, the plaintiff is defined as "the Lender". The defendants are the Borrowers. The Repayment Date is stated to be 9th August, 2006, or "such other date as the Lender and the Borrowers may agree in writing". No such other date was agreed. The "Loan" is the aggregate principal amount borrowed and was €10 million. The Loan Agreement is defined and referred to as the "Letter". The "Finance Documents", as the Letter and any other document from time to time agreed in writing by the parties to be a Finance Document. There was no other such document referred to in evidence. The Loan was to be repaid on the Repayment Date and clause 8 provided that the Borrowers are not entitled to prepay the Loan or any part of it prior to the Repayment Date. Clause 13, insofar as relevant, provided:

#### "GENERAL COVENANTS

13.1 So long as the Facility is available for drawing (whether or not subject to preconditions) or remains outstanding, the Borrowers shall

. . .

13.1.2 furnish to the Lender such information about the business, assets and financial condition of the Borrowers as the Lender may reasonably require."

14. Clause 16 restricted the Lender's entitlement to assign in the following terms:

#### "ASSIGNMENT

The Lender may not assign or transfer the whole or any part or parts of his rights and benefits in respect of the Finance Documents and the Facility without the prior written consent of a majority of the Borrowers. The consent of such majority of the Borrowers to an assignment or transfer must not be unreasonably withheld or delayed. Such Borrowers will be deemed to have given their consent hereunder five Business Days after the Lender has requested it unless such consent is expressly refused by such Borrowers within that time. Each Borrower undertakes to enter into such agreements and other documents as may be necessary or desirable to give effect to any such participation, assignment, transfer, novation or other disposal. For the purpose of any such actual or proposed participation, assignment, transfer, novation or other disposal the Lender may not disclose any information of a confidential nature concerning any Borrower without first obtaining from such person a written undertaking in a form reasonably satisfactory to the Lender and such Borrower to keep such information strictly confidential. The expression the "Lender" wherever used herein shall, to the extent of his interest for the time being herein, include every successor, assignee, transferee, novatee or party to whom a disposal is made as aforesaid who shall be entitled to enforce and proceed upon and exercise all rights, powers and discretions under the Finance Documents as if named therein in place of or in addition to the Lender."

15. In February 2008, the defendants were requested by the plaintiff to consent to the assignment to BOSI and did so in writing, signed by all three, in the following terms:

"Dear Mr. O'Rourke,

We refer to the Loan Agreement and your letter to us dated 19 February 2008.

Terms defined in the Loan Agreement shall have the same meaning when used herein.

We hereby confirm that we irrevocably consent to the assignment of the whole of your rights and benefits in respect of the Finance Documents and the Facility to Bank of Scotland (Ireland) Limited.

This letter is governed by and shall be construed in accordance with Irish law."

16. On the same day, the plaintiff gave notice of the assignment to the defendants in the following terms:

"Dear Sirs,

I hereby give you notice that by an assignment (the "Assignment") dated 2008 I have assigned to Bank of Scotland (Ireland) Limited (the "Assignee"), which term includes its successors and assigns) all my right, title, benefit and interest in and to the facility letter from me to you dated 9 August 2006 (the "Letter") between myself and yourselves.

Henceforth all monies that may be payable by you under the Letter shall be paid to the euro account no. 851773/102 held by me with the Assignee unless and until the Assignee otherwise directs, whereupon you are authorised to comply with the Assignee's directions.

Please note that the Assignee has been irrevocably appointed by myself as my true and lawful attorney to do (*inter alia*) all acts and things which I could do and to act in relation to the administration or enforcement or attempted enforcement of the Letter and you are required to follow all instructions that the Assignee may give to you in accordance with the terms of the Letter.

Please also note that these instructions are not to be revoked or varied without the prior written consent of the Assignee.

This letter is governed by Irish law.

Please confirm your agreement to the above by sending the attached acknowledgement to the Assignee with a copy to ourselves."

17. The acknowledgement referred to in the previous document was also executed by the defendants and was in the following terms:

"Dear Sirs,

We acknowledge receipt of a Notice of Assignment dated 26th February 2008 (the "**Notice**") relating to an Assignment (the "**Assignment**") between Dermot O'Rourke (the "Assignor") and you. We acknowledge that the Assignment is effective to confer on you all the rights, title, benefit and interest of the Assignor under the facility letter dated 9 August 2006 from the Assignor to us (the "**Letter**"). We have not received any notice of any interest of any third party in the Letter.

We hereby agree that we shall pay to the euro account no. 851773/102 held by the Assignor with you or to any such account which you may nominate all amounts from time to time payable by us under the Letter.

We agree that we shall not recognise the exercise by the assignor of any of its rights and powers under the letter unless and until requested to do so by you."

#### **Continuing Entitlement of the Plaintiff to sue Post-Assignment**

18. The first submission made on behalf of the plaintiff is that he continued to be entitled to sue in his name and his name alone for the repayment to him of the unpaid principal and the interest due on the Loan, notwithstanding the assignment of 27th February, 2008. It was not in dispute between the parties that the assignment effected was a legal assignment complying with the requirements of s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877, as it complied with the four conditions:

- (a) The assignment was of a debt or other legal chose in action.
- (b) The assignment was absolute and was not by way of charge only.
- (c) It was in writing under the hand of the assignor.
- (d) Express notice in writing thereof was given to the debtors.

19. Whilst counsel for the plaintiff did not dispute that there was a legal assignment, he did seek to rely on clause 3.1 of the Deed of Assignment to suggest that the plaintiff had a continuing interest by reason of the equity of redemption provided therein. This clause provides:

"As security for the Secured Liabilities the Assignor as legal and/or beneficial owner hereby assigns absolutely to the Assignee all its present and future rights, title, benefit and interest in and to the Assigned Assets and the Receivables and hereby charges as a first fixed charge in favour of the Assignee all of its present and future right, title and interest in and to the Receivables Account and the Receivables Account Balance PROVIDED THAT upon irrevocable payment and discharge in full of the Secured Liabilities the Assignee will forthwith at the request and expense of the Assignor re-assign or release (as appropriate) the Security Assets to the Assignor."

For the purposes of the Deed of Assignment, the Loan Agreement of 9th August, 2006, between the plaintiff and the defendants is referred to as the "Promoter Facility Letter". It is also included as one of the assets referred to as "the Assigned Assets". There are other assets which make up the Assigned Assets.

20. In my judgment, clause 3.1 effects an absolute assignment of the Loan Agreement of 9th August, 2006, as an "Assigned Asset", but gives, as a matter of contract, to the plaintiff, a right to have such asset reassigned to him in the event that there was a full discharge of all the secured liabilities.

21. In my judgment, neither clause 16 nor the documents entered into between the plaintiff and the defendants in February 2006 may be properly construed so as to preserve to the plaintiff a right to sue the defendants for recovery of monies due by them on the Loan Agreement prior to the reassignment to him of the Loan Agreement. It follows that at the date of commencement of these proceedings, the plaintiff had no right to sue the defendants.

22. The second submission made by counsel for the plaintiff, and, I think it is fair to say, more vigorously pursued, was that clause 16, when construed in accordance with the principles applicable to the construction of a commercial contract, does not restrict a reassignment by BOSI of the Loan Agreement to the plaintiff as the original lender. The parties are in substantial agreement as to the applicable principles of construction. They differ in their emphasis and in their application to clause 16 of the Loan Agreement. It is commoncase that, in construing clause 16, the court may not have regard to events subsequent to its execution. Accordingly, the documents entered into in February 2008, referred to above, are not taken into account for the purpose of construing clause 16.

23. In *Kramer v. Arnold* [1997] 3 I.R. 43, at p. 55, Keane J. stated:

"In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances."

24. Both parties also rely upon the judgment of Geoghegan J. in *Analog Devices v. Zurich Insurance* [2005] 1 I.R. 274, where he quoted with approval the principles set out by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 W.L.R. 896 at p. 912:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of

subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; see *Mannai Ltd. v. Eagle Star Ass. Co. Ltd.* [1997] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania S.A. v. Salen A.B.* [1985] A.C. 191, 201:

'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."

25. The plaintiff also relied upon the identification by Lord Steyn in *Mannai Ltd. v. Eagle Star Ass. Co. Ltd.* [1997] A.C. 749, at 771, of a similar principle:

"In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language."

26. The defendants drew attention to the limitation on the court in construing agreements, including commercial agreements, as set out by the Supreme Court in the judgment of Murphy J. in *Igote Ltd. v Badsey Ltd.* [2001] 4 I.R. 511 by reference, in particular, to what was stated by May L.J. in *Plumb Brothers v. Dolmac (Agriculture) Ltd.* [1984] 271 E.G. 373. At p. 518, Murphy J. stated:

". . . The intention of the parties may be gleaned only from the document ultimately concluded by them, albeit construing it in the light of surrounding circumstances but not ascertaining their intentions from such circumstances. Such a process would be justified only where one or other of the parties claimed rectification of the document executed by him: that is not the present case."

27. Similarly, on the facts herein, neither party has claimed rectification of the Loan Agreement.

28. Both parties relied on the decision of the House of Lords in *Linden Gardens Trust Ltd. and Others v. Lenesta Ltd.* [1993] W.L.R. 408, and in particular, the speech of Lord Browne-Wilkinson. That decision and the related appeal concerned a restriction on assignment in a building contract. Issues of construction of the particular clause 17 arose. In addition, there were issues considered and determined as to whether prohibition on assignment was void as being contrary to public policy and also whether the assignments (although prohibited) were effective to transfer the relevant chose in action (a cause of action) to the assignees.

29. The speech of Lord Browne-Wilkinson is of assistance insofar as it makes clear that the construction of a clause purporting to restrict the assignment of the benefit of a contract is a question which "in each case must turn on the terms of the contract in question". There are no special rules of construction which apply. On the two remaining issues, the speech identifies a genuine commercial interest in a party to a building contract seeking to ensure that he is in contractual relations only with the person whom he has selected as the other party to the contract. Whilst this identification is made in the context of a building contract, counsel for the plaintiff seeks to rely on this as the purpose of clause 16 in the Loan Agreement in support of his submissions.

30. On the third issue, the conclusion was that an assignment of contractual rights in breach of a prohibition against such assignment is ineffective to vest the contractual rights in the assignee. The explanation is succinctly stated at p. 424:

"Therefore, the existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights. I regard the law as being satisfactorily settled in that sense. If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz., to ensure that the original parties to the contract are not brought into direct contractual relations with third parties."

## Conclusion

31. Applying the above principles to the construction of the Loan Agreement, I have reached the following conclusions. The assignment by the plaintiff to BOSI in February 2008 of the whole of his rights and benefits under the Loan Agreement meant that subsequent to that date, BOSI was a "Lender" for the purposes of the Loan Agreement. This follows inexorably from the final sentence of clause 16 as it is expressly stated to "include every successor, assignee . . ." Thereafter, BOSI was, in accordance with the express terms of clause 16, "entitled to enforce and proceed upon and exercise all rights, powers and discretions under the Finance Documents as if named therein in place of or in addition to the Lender".

32. It also follows that BOSI was thereafter bound by the terms of clause 16. What it purported to do in June 2010 was to assign either the whole or a part of its rights and benefits under the Loan Agreement to the plaintiff. Whilst the deed has been referred to as a "reassignment", it is an assignment within the meaning of clause 16.

33. Clause 16, in the natural and ordinary meaning of the words used, cannot, in my judgment, be construed so as to exclude its application to an assignment to be made to the plaintiff, as the original Lender and party to the Loan Agreement, or to any subsequent lender. In accordance with the words used, it applies, irrespective of the person to whom the assignment is to be made.

34. Counsel for the plaintiff does not dispute that clause 16 applied in general to BOSI subsequent to the assignment to it in February 2008. However, he submits that there is nothing in clause 16 which warrants construing it as applying to a proposed assignment from BOSI to the plaintiff as a person who was the Lender and a party to the Loan Agreement. He further submits that such a construction would be contrary to the legitimate commercial purpose of clause 16 and would be a commercial absurdity.

35. He submits that the purpose of clause 16 is to prevent the defendants, as Borrowers, being forced into contractual relations and, in particular, an obligation to repay a loan to third parties in respect of whom they might have a legitimate objection. He also referred to the requirement in clause 13 to provide financial information and the requirement in clause 16 seeking to preserve confidentiality for the defendants as Borrowers. He finally submitted that there would be a commercial absurdity which would flout business commonsense in restricting an assignee's right to reassign the benefit of the Loan Agreement back to the person who, in the first place, had granted the loan.

36. Counsel for the defendants submits that there is nothing in clause 16 which permits the court to give clause 16 the construction for which the plaintiff contends. He submits that, if the court were to so construe it, it would do violence to the plain and unambiguous words used by the parties in clause 16. He further submits that there is a legitimate commercial purpose throughout the continuance of the contract in not forcing the defendants to enter into contractual relations with a person without their consent. He submits that positions may change, such that the defendants could have a legitimate objection to being required to re-enter into a contractual relationship with the original lender..

37. I wish to make clear that in entertaining this latter submission, I am not having regard to any evidence given of any deterioration in the relationship between the plaintiff and the defendants. I am not making any finding in relation to same, as it is unnecessary. It is common case that the court should not construe the contract by reference to any subsequent events. That is different to identifying a commercial purpose which may last throughout the period of the contract.

38. In accordance with the authorities cited, the court is obliged to favour a commercially sensible construction in determining the meaning of the language of the contract (*Mannai Investments Company Ltd. v. Eagle Star Assurance Company*). However, it is also clear from the decisions that the primary obligation of the court is to construe the words used in the way in which a reasonable commercial person, with knowledge of the background circumstances, would construe them (see Lord Steyn in *Mannai*). In a case such as this, where clause 16, in accordance with the natural and ordinary meaning of the words used and not any semantic or syntactical analysis of the words used, means that the restriction in clause 16 applies, irrespective of who is the intended assignee, then it appears to me that that is the meaning the court should give it, unless there is something in the background circumstances or matrix of fact which permits the court to conclude that something must have gone wrong with the language used, such that if the court were to construe the clause in accordance with the words used, it would be to attribute to the parties an intention which they plainly could not have had. Further that any such intention would have to be an intention attributable to both parties or to put it another way a probable common intention..

39. In my judgment, it is not open to the court, taking into account the background facts relating to the making of the loan, the purpose of the loan, the period of the loan, the interest rates agreed to, and the wording of clause 16, to conclude that if construed so as to restrict all assignments, including a re-assignment to the original lender, the court would be attributing to all the parties to the Loan Agreement, an intention which they plainly could not have had. There is, in my judgment, a reasonable argument in favour of the existence of a legitimate commercial purpose in the Borrowers being entitled, at the relevant time, to have their consent sought to an assignment of the benefit of the Loan Agreement, irrespective of the identity of the proposed assignee.

40. Accordingly, I have concluded that clause 16 must be construed as applying to BOSI in June 2010, when it purported to reassign the Loan Agreement to the plaintiff. Hence, in accordance with the 'settled law' as referred to by Lord Browne-Wilkinson in *Linden Gardens* at p. 424 in the passage set out above, the purported assignment by BOSI was ineffective to vest in the plaintiff the benefit of the Loan Agreement. It follows that the plaintiff's claim herein against the defendants must fail as he was not the person entitled to the benefit of the Loan Agreement, even at the date of the hearing.

41. The above conclusion does not, of course, exempt the defendants from a continuing obligation to repay the loan in accordance with the Loan Agreement to the person entitled to the benefit of the Loan Agreement.

#### **Interest**

42. By reason of my above conclusion, it is not strictly necessary for me to determine the dispute in relation to the claim for interest in accordance with the express terms of the Loan Agreement. However, it appears to me that I should briefly express my views, as they are very similar to the conclusion reached above.

43. The Loan Agreement is a commercial agreement between businessmen. The defendants are not consumers. They were not of unequal bargaining power with the plaintiff. In such circumstances, the equitable principles in relation to 'unconscionable bargains' do not apply. The Loan Agreement must be applied in accordance with the interest terms agreed, set out in clause 6.

#### **Relief**

There will be an order dismissing the plaintiff's claim.