THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 76

Court of Appeal Record No. 2014/1238

[High Court Record Nos. 2012/1475S and 2012/4456S]

Donnelly J.

Pilkington J.

Owens J.

BETWEEN

SEAMUS DOWNES

APPELLANT/

DEFENDANT

AND

NATIONAL ASSET LOAN MANAGEMENT LIMITED AND PROMONTORIA (GEM) LIMITED

RESPONDENTS/

FIRST PLAINTIFF

BETWEEN

DENIS MCMAHON, PAUL O'BRIEN AND SEAMUS DOWNES

APPELLANT/

THIRD DEFENDANT

AND

NATIONAL ASSET LOAN MANAGEMENT LIMITED AND PROMONTORIA (GEM) LIMITED

RESPONDENTS/FIRST PLAINTIFF

JUDGMENT of Mr. Justice Alexander Owens delivered on the 16th day of March, 2021.

1. These appeals relate to loans and associated security transferred by Allied Irish Banks plc (AIB) to National Asset Loan Management Ltd (NALM) under provisions of the National Asset Management Agency Act 2009 (the 2009 Act) in late 2010. In 2011 and 2012 NALM sued Seamus Downes and connected borrowers and guarantors for amounts claimed to be outstanding on loan and guarantee commitments to AIB. Seamus Downes contested liability in two actions which were heard together in the Commercial Court.
2. Judgment was given on 16 January 2014. In the first action Seamus Downes was found liable to pay an amount in excess of €1,600,000. This related to a loan originally advanced by AIB to Seamus Downes, Denis McMahon and Paul O'Brien to finance the purchase of a shopping centre at Castletroy, County Limerick. They were in partnership as solicitors and they were also members and directors of Mount Kennett Investments (MKI) which is an unlimited company. In the second action Seamus Downes was found liable to pay €5,840,000 on a guarantee dated 13 June 2003 which they gave to AIB for MKI. The benefit of the facilities, securities, liabilities and judgments relating to Seamus Downes and the connected borrowers and guarantors has been transferred by NALM to Promontoria (GEM) Ltd.
3. The learned High Court judge concluded that any arrangements entered into between AIB and MKI and further separate guarantees given by Denis McMahon and Paul O'Brien for the liabilities of MKI to AIB in late 2010 did not result in discharge of the commitment of Seamus Downes to answer for liabilities of MKI to AIB under the 2003 guarantee. He also concluded that AIB and NALM were not estopped from relying on the 2003 guarantee against Seamus Downes, nor were they estopped from seeking repayment of the Castletroy loan. He rejected contentions that the benefit of these commitments had not been validly vested in NALM under the provisions of the 2009 Act. This appeal is brought against those findings.

4. I agree with these conclusions of the High Court. There was ample evidence to support the findings of fact. There was no evidence of any agreement between Seamus Downes and either AIB or NALM for release of his obligation to answer for the liabilities of MKI under the 2003 guarantee. Any arrangements made by AIB with MKI and with Denis McMahon and Paul O'Brien in 2010 did not result in discharge of this obligation. The challenge to the validity of the transfer by AIB to NALM of the Castletroy and MKI loans and related security and surety arrangements was not maintainable in this action and was out of time.

5. The learned High Court judge decided that the evidence was insufficient to establish that AIB or NALM acted towards Seamus Downes in a manner which estopped recovery on foot of the 2003 guarantee or the calling in of the Castletroy loan. I agree that the evidence did not establish any tenable basis on which Seamus Downes could rely on an estoppel defence. I am not persuaded that there is anything which would justify us in upsetting these conclusions.

6. Seamus Downes was aware of his 2003 guarantee. In 2009 he got confirmation from AIB that the guarantee was not being relied on against him in respect of borrowings by MKI relating to a property in Pembroke Road in Dublin. The guarantee was for repayment of all present or future advances by AIB to MKI and other commitments of MKI to AIB of any type and contained a series of provisions which gave AIB maximum flexibility in dealing with the principal debtor and any sureties, including any of the guarantors under that guarantee, without necessity to refer to or obtain the consent of any other guarantor or surety. It specified that the maximum amount recoverable from "the Guarantor" was €5,840,000 plus interest from date of demand.

7. On 5 August 2010 AIB made an offer in a facility letter to MKI to continue loan facilities with a review date for all facilities of 1 September 2010. This required three guarantees from Seamus Downes, Denis McMahon and Paul O'Brien for the obligations of MKI for €7,944,386.68 each. A further facility offer was made to MKI in a letter dated 22 October 2010 in similar terms. This time the review date was 1 March 2011 and the

guarantee sought from Seamus Downes was for €6,671,533.06. AIB sought guarantees for €7,893,541.68 from each of the others.

8. AIB sent a copy of the facility letter and a guarantee form to Seamus Downes with a covering letter requesting that he execute and return the guarantee. Some four years earlier he had terminated his partnership with Denis McMahon and Paul O'Brien. In 2010 he was still in the process of unwinding his business relationships with them and with MKI. He had engaged Dermot McEvoy in Eversheds to act as his solicitor in relation to these matters. When AIB requested the new guarantee in 2010 he sought advice from his solicitors. He decided not to give this guarantee to AIB. The others executed the new guarantees and returned them to AIB.

9. An Issue arose as to whether MKI had accepted the facility letter of 22 October 2010 and whether AIB had continued the MKI overdraft permission and other loans on that basis. The banking facilities of MKI were not withdrawn or treated as being in default and were continued by AIB. The learned High Court judge decided that it was not necessary for him to resolve the issue of whether any MKI banking facilities with AIB were extended under the 2010 facility letter.

10. I agree. There was no point in time at which MKI ceased to owe AIB the borrowings secured by the 2003 guarantee. Even if there had been a momentary satisfaction of all liabilities of MKI as a result of roll-over of AIB loan facilities to MKI at the end of 2010, this matter was covered by clause 2 of the 2003 guarantee which provides as follows:

> "This Guarantee shall not be considered as satisfied by any intermediate payment or satisfaction (by the Guarantor or the Customer or any other person) of the whole or any part of any sum or sums of money owing as aforesaid but shall be a continuing security and shall remain in force notwithstanding any disability or the death of the Guarantor and shall extend to any sum or sums of money which shall from time to time constitute the balance due from the Customer to the Bank upon any such account as is hereinbefore mentioned."

11. Irrespective of whether facilities as contemplated by the October 2010 facility letter were put in place, MKI remained indebted to AIB on various accounts relating to the lending facilities referred to in that letter.

The fact that it was understood between Seamus Downes and AIB that his guarantee was not being relied on as security for facilities provided to MKI relating to a Pembroke Road property and a development at Bedford Row in Limerick made no difference. This did not change the "all sums" obligation of Seamus Downes under the 2003 guarantee in relation to other borrowings of MKI into something different.

12. The 2003 guarantee allowed AIB to extend or continue facilities to MKI without reference to Seamus Downes. Seamus Downes was not a party to any lending agreement between AIB and MKI. AIB could waive any requirement that MKI procure a guarantee from him if that guarantee was not forthcoming. AIB was entitled to continue to rely on his 2003 guarantee, irrespective of whether the 2010 facility letter was agreed with MKI as applicable to the lending and irrespective of the fact that the facility letter did not refer to that guarantee. He could not assume that he was released from the 2003 guarantee because AIB chose to continue to extend facilities to MKI notwithstanding his refusal to provide a further guarantee.

13. If he wanted to crystallise his surety liability, he had the option of terminating the guarantee in accordance with clause 3.1 by giving six calendar months' notice in writing and paying at the end of that period the amount which would have been due from MKI plus the then amount of any future or contingent obligations of MKI to AIB at that date, subject to his maximum exposure of €5,840,000.

14. Clause 3.2 of the guarantee provides that "Save as is provided in 3.1 hereof the Guarantor's obligations under this guarantee can only be determined by agreement in writing to that effect made between the Bank and the Guarantor".

15. The guarantee also provides that it cannot be interpreted as coming to an end by merging in or being replaced by any subsequent guarantee or other security for the guaranteed liabilities. Clause 7 deals with this and other matters such as the right of AIB to take further guarantees and other security for the liabilities of MKI in the following terms:

"This guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the Bank for all or any part of the moneys hereby guaranteed, nor

shall such collateral or other security or any lien to which the Bank may otherwise be entitled or the liability of any person or persons not parties hereto for all or any part of the moneys hereby secured be in anywise prejudiced or affected by this present guarantee. The Bank shall have full power at its discretion to give time for payment to or make any other arrangement with any such other person or persons without prejudice to this present guarantee or any liability hereunder."

16. Guarantors are treated by the law as similar to insurers. Just as a number of insurance policies may cover the same risk, a number of guarantors may cover the same obligation either in one guarantee or in separate guarantees. The law ensures that each surety does not have to bear a disproportionate part of the loss by enabling that surety to recover from the other sureties any excess over a fair share.

17. Where a guarantee, which has been executed by a number of guarantors, contains a proviso limiting recourse against those sureties to a maximum sum which is less than the indebtedness of the principal debtor, the effect of taking further or replacement guarantees from some of the guarantors for a greater sum is to increase the personal individual exposure of the further guarantors. This may also alter the entitlement of any guarantor who has not provided an additional guarantee to look to the other sureties for contribution calculated by reference to the original surety obligations. It is doubtful that an increase in exposure of a co-surety could of itself adversely affect contribution rights of other sureties.

18. The terms of the first element of clause 7 which has been quoted supra are sufficiently wide to prevent a guarantor from being treated as released on grounds that the proportion of contribution which would otherwise be recoverable from co-sureties has been adversely affected by the action of the creditor in taking further guarantees from existing co-sureties. This permits AIB to take further guarantees or indemnities from any of the three guarantors or from anybody else for the liabilities of the principal debtor without reference to any guarantor not providing such additional security.

19. Clause 20 deals with the nature of the joint and several liability of co-guarantors as follows:

"Where this guarantee is executed by more than one individual the agreements and obligations on the Guarantor's part herein contained shall take effect as joint and several agreements and obligations and none of the Guarantors shall be released from liability hereunder by reason of this guarantee ceasing (by any means whatsoever) to be binding as a continuing security on any other Guarantor(s) and generally this Guarantee shall operate not only as a joint and several guarantee by all of the Guarantors but also as a separate guarantee by each of them."

20. Relevant parts of clause 6 provide as follows:

"The Bank shall be at liberty without obtaining any consent from the Guarantor and without thereby affecting its rights or the Guarantor's liability hereunder at any time:-

(i) to determine, enlarge or vary any credit to the Customer;

(ii) to vary, exchange, abstain from perfecting, release or allow the postponement of the priority of any securities (including guarantees) for or on account of the moneys intended to be hereby secured or any part thereof and held or which may hereafter be held by the Bank from the Customer or any other person (including any signatory of this guarantee and in in respect of any obligation whatsoever including all or part of the liability hereunder of any such signatory);

(iii) to renew bills and promissory notes in any manner;

(iv) to compound with, give time for payment to, accept compositions from and make any other arrangements with the Customer or any obligant on any bills, notes, obligations or securities whatsoever held or which may hereafter be held by the Bank for or on behalf of the customer; …"

21. Relevant parts of clause 11 provide as follows:

"So far as the law permits this guarantee shall be and continue to be binding and shall not be impaired or revoked nor shall the Guarantor's liability hereunder be affected by reason of:-

(i) any failure of or irregularity defect or informality in the security given by or on behalf of the Customer or any other person in respect of the liabilities hereby secured or any part thereof; or

(ii) any failure of any other person to execute this guarantee or to grant any security in respect of the said liabilities or any part thereof; …"

22. It is clear from these clauses that in dealing with any guarantor, including a co-guarantor where the guarantee has been executed by more than one person, AIB had complete flexibility. So long as it did not make any misrepresentations, it was not affected if some of the intended guarantors failed to execute the guarantee or if persons who were proposed as potential grantors of other security such as personal guarantees or charges over assets to secure the debt failed to provide such security. If there was some failure of the further guarantees given by Denis McMahon or Paul O'Brien as might happen if the bank gave no consideration for these guarantees, Seamus Downes could not rely on this as discharging his surety liability. AIB was also entitled to release individual guarantors from the 2003 guarantee without affecting the liability of remaining guarantors.

23. If the bank released Denis McMahon or Paul O'Brien from the 2003 guarantee or any other security which it held from them for the debts of MKI, these actions would not affect the liability of Seamus Downes under the 2003 guarantee. There is no evidence that AIB released Denis McMahon or Paul O'Brien from their liability under the 2003 guarantee. Even if they are to be treated as released from the 2003 guarantee on the basis of some implied agreement or estoppel arising from replacement of that guarantee by the 2010 guarantees, this does not avail Seamus Downes.

24. In 2010 Seamus Downes was not dealing with AIB on behalf of MKI. That was left to Paul O'Brien. He became aware that after he refused to provide a new guarantee, AIB continued facilities to MKI. The actions of AIB in getting new guarantees from his ex-partners or renewing or extending further facilities to MKI without reference to him could not of themselves result in release of the 2003 guarantee or give rise to any type of estoppel precluding AIB from relying on it against Seamus Downes.

25. There is no evidence that Seamus Downes or any solicitor acting on his behalf had any contact with AIB or NALM on the status of the 2003 guarantee. He gave evidence that his solicitors were dealing with the issue of the guarantee in the context of his relationship with his former partners. He also gave evidence that his solicitors advised that he had no liability on

the guarantee when facilities were provided to MKI following the October 2010 facility letter and his refusal to provide a new guarantee. A commercial mediation with his former partners resulted in heads of agreement which envisaged that he be indemnified by his former partners on any guarantee liability in respect of the Bedford Row and Pembroke Road facilities of MKI.

26. If Seamus Downes received legal advice that he was no longer liable on his 2003 guarantee, this came from his own solicitor and it was not an assurance from AIB or NALM. The furthest that the evidence went on advice or discussions between Seamus Downes and his solicitors on the status of any guarantee by him to AIB was the following answer in response to a question from the learned High Court judge on whether his solicitors came back and told him that AIB was no longer relying on his 2003 guarantee:

"Paragraph 7, sorry, paragraph F of my witness statement, I have dealt with it: 'My solicitor at the time…advised me that the facilities pursuant to the 2010 Facility Letter had been drawn down, and as a result it was no longer necessary for [my solicitors] to deal with AIB's request for a guarantee to be given by me. To the best of my knowledge, [my solicitors] and the solicitors for AIB, ceased at that point.' "

27. This is repeated at para. 7.5 of his witness statement. All this meant was that AIB had not insisted on his 2010 guarantee as a condition of affording facilities to MKI and that they had not pressed him to give that guarantee subsequently. This had nothing got to do with the status of the 2003 guarantee.

28. There is no evidence in his witness statement for the Commercial Court that he raised or discussed the status of the 2003 guarantee with his solicitors or received advice or assurances that the 2003 guarantee could not be relied on, either in connection with the events following the facility letter dated 22 October 2010 or when Dermot McEvoy had a discussion with him in early 2012 on whether it was appropriate for Eversheds to act on behalf of NALM in view of their previous involvement on his behalf.

29. This is remarkable as the 2003 guarantee was the only basis on which Seamus Downes could have direct liability to AIB or NALM for the liabilities of MKI. He needed to get out of the guarantee in order to disentangle

himself from liability to AIB for MKI. He could only do this by approaching AIB and NALM.

30. Seamus Downes stated in his witness statement and in evidence that in early 2012 he was told by Dermot McEvoy that "they (whom I took to be either NAMA, Eversheds or both) had carried out a full security review, arising from which it was confirmed that I had no liability (for MKI). This confirmed my understanding of the existing position, which had informed the manner in which I had conducted my affairs in the meantime. Notwithstanding that, I took the call as delivering good news." This conversation took place some eight months before NALM demanded payment under the 2003 guarantee.

31. He gave evidence that he already believed he had no liability from what had happened a year earlier when he refused to give a new guarantee. The context of the conversation in early 2012 was that Dermot McEvoy had been approached by his partners as there was potential for a conflict of interest if Eversheds accepted instructions from NALM to act in relation to "the Paul O'Brien connection". He contacted Seamus Downes to see if he objected to Eversheds acting.

32. The evidence does not disclose any factual basis which would support an "understanding" by Seamus Downes between late 2010 and early 2012 that the "existing position" was that he had "no liability" in the sense that he had been in some way released from the 2003 guarantee. This was wishful thinking. On cross examination he agreed that he got an email from an official in NALM in late May 2011 which referred to his liability for €5.84 million under that guarantee. His understanding of his legal position was not based on anything which NALM communicated to him.

33. This evidence relating to the conversation between Seamus Downes and Dermot McEvoy in early 2012 does not state that the status of the 2003 guarantee was discussed. What did Seamus Downes think happened to that guarantee in the "security review"? Lack of pursuit of Seamus Downes on the 2003 guarantee to date and communication to him of a conclusion in a security review carried out by somebody else that he was not liable for MKI on some unspecified basis were not sufficient to raise an estoppel.

34. I agree with the conclusion of the learned High Court judge that there was no "clear and unequivocal promise or assurance" which Seamus Downes could rely on as founding either an estoppel by representation or an estoppel by convention. It was not proved that NALM authorised Dermot McEvoy to give Seamus Downes a binding assurance that NALM would not rely on the 2003 guarantee or that any such assurance was in fact given. Dermot McEvoy had no ostensible authority from NALM to give that sort of assurance to his own client. Any benefit as a result of the conversation with Dermot McEvoy did not assist NALM. The only result was that Eversheds were allowed by Seamus Downes to act on behalf of NALM in further proceedings in "the Paul O'Brien connection." Nothing advanced in evidence was capable of bringing into existence any binding state of affairs which precluded NALM from relying on the 2003 guarantee.

35. The learned High Court judge arrived at the same conclusion in relation to the Castletroy loan. This loan was repayable on demand under the terms of a facility letter dated 22 October 2010 which envisaged that it be refinanced or repaid in full by 1 March 2011. This facility offer was accepted by Seamus Downes. There is no evidential basis for any claim by Seamus Downes that AIB or NALM were estopped by either their conduct or some underlying assumption which gave rise to a convention so as to preclude them from terminating this advance and requiring repayment. The fact that the borrowers were meeting interest commitments on the loan and were also paying down the capital out of the rent roll could not found any estoppel.

36. The next series of points raised in the appeal relate to the transfer to NALM of the MKI and Castletroy loan facilities and related security. It is clear that Seamus Downes was not notified in advance of these transfers. An issue is also raised that the Castletroy loan did not relate to "development land" as defined in the 2009 Act and did not come within the prescribed classes of eligible bank assets set out in the National Asset Management Agency (Designation of Eligible Bank Assets) Regulations 2009 (S.I. No. 568 of 2009).

37. These points are not maintainable. Seamus Downes was aware that these loans had been transferred prior to the commencement of the actions

against him relating to the Castletroy and MKI loans. He was informed of this by Maura O'Sullivan of NALM on 12 January 2012. Other evidence discloses that he was fully aware from NALM that these loans and his guarantee had gone to NALM in May 2011.

38. No judicial review proceedings were taken to challenge the decisions to transfer these assets within the time provided by s.193 of the 2009 Act. In the absence of a successful challenge to the decision to transfer by judicial review the certificates dated 1 June 2012 and 23 July 2012, issued under s.108 of the 2009 Act, were conclusive that NALM held the MKI liabilities, Castletroy Loan and any associated security.

39. I agree with the conclusion of the learned High Court judge that Seamus Downes was out of time to challenge the validity of the decisions to transfer the Castletroy and MKI loans and related security. The matter is governed by the decisions of the High Court and the Court of Appeal in *NALM v. Barden* [2013] 2 I.R. 28*, NALM v. Cullen* [2013] IEHC 121 and *NALM v. Breslin* [2017] IEHC 350 and [2017] IECA 283. These authorities make clear that it is not permissible for a defendant to do an "end run" around judicial review, which is the statutory means of challenging such decisions, or to avoid the statutory time limits for such legal challenges, by contesting their validity in plenary proceedings. This also disposes of the challenge in the counterclaim to the validity of the appointment of the statutory receivers over the property comprised in the mortgage of the Castletroy property.

40. Accordingly, it is unnecessary for us to express a view as to whether evidence established that the Castletroy loan related to "development land" as defined in s.4(1) of the 2009 Act and was an "eligible bank asset" as prescribed by S.I. 568 of 2009, within s.69(4) of the 2009 Act. It is also unnecessary for us to express a view on the legal effect of any failure of AIB or NALM to notify Seamus Downes or to give him an opportunity to make representations relating to his guarantee to AIB for MKI or the Castletroy loan prior to the transfer of these loans and related guarantees and other security to NALM.

41. It is also unnecessary for us to express a view on the extent to which mortgage documents which secured the Castletroy loan extended the

security conferred on AIB/NALM to cover other liabilities to AIB of the individual mortgagees. We were told at the conclusion of the appeal hearing that Castletroy has been sold and that the liability for the amount referred to in the judgment has been discharged. The appeal relating to Castletroy relates to legal costs at this stage. If proceeds of sale of Castletroy in excess of what is required to repay the Castletroy loan and the relevant receivers and legal costs have not been properly accounted for, this issue can be litigated elsewhere.

42. In circumstances where this judgment is being delivered electronically, Donnelly and Pilkington JJ. have authorised me to record their agreement. These appeals will be dismissed.

43. My provisional view is that the respondents are entitled to their costs of appeal. There is a single notice of appeal in the two actions. Many of the issues raised are common to both actions. I have in mind to make a single order for costs of the appeal in the guarantee action and no order for costs of the appeal in the Castletroy loan action. If a party wishes to contend for an alternative costs order, there will be liberty to deliver a written submission not exceeding 1,000 words within 14 days and an opposing party will have the same period to respond. In default of such submissions, an order in the terms proposed here will be made.