THE HIGH COURT

[2021] IEHC 622

RECORD NO 2017/2433S

BETWEEN:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

EDWARD (OTHERWISE LAURENCE) MCGETTIGAN AND EILEEN MCGETTIGAN

DEFENDANTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 15 September 2021

Introduction

1. By the within proceedings the plaintiff seeks judgment in the sum of €380,922 as against the defendants jointly and severally and judgment as against the first defendant in the sum of €444,409. Those amounts are sought on foot of four letters of personal guarantee and indemnity, two having been provided on 7 March 2000 and 10 November 2000 by both defendants, and two given on 7 February 2020 and 5 April 2000 by the first defendant only, in respect of loans of a company entitled EL McGettigan and Sons Ltd (the "Company").

2. On 18 July 2017, the plaintiff demanded repayment, from the liquidator of the Company, of amounts due on the Company's accounts. As of 23 October 2017, the Company remained indebted to the plaintiff in the total sum of €3,869,443.78.

3. On 3 January 2018, the plaintiff issued a summary summons seeking repayment of the amount due and owing from the defendants on foot of the guarantee.

4. I have decided to give liberty to the defendants to defend the proceedings, largely on the basis of contemporaneous documentation that they have produced that supports their case that the plaintiff made representations and/or made an agreement with them in June 2013 that it would not call in the personal guarantees provided the first named defendant acted as receiver for the plaintiff by liquidating the assets of the company and remitting same to the plaintiff. The plaintiff disputes that claim and argues that their subsequent conduct is inconsistent with any such representation and that therefore no promissory estoppel arises. However, given the documentation in question – an email from the relevant bank manager the day before the meeting and a diary entry by Mr. McGettigan of his notes of the meeting – I am satisfied the matter cannot be resolved in a summary manner and should be sent to plenary hearing. In those circumstances, the defendants' motion for cross examination on the affidavits seeking liberty to enter final judgment and discovery has become redundant so there is no necessity to rule on same.

Motion for judgment

5. On 19 November 2018, the plaintiff issued a notice of motion seeking final judgment as against the defendants jointly and severally in the amount of €380,922 and judgment as against the first defendant in the sum of €444,409. The motion was grounded on an affidavit of Kieran O'Donnell of 14 November 2018.

6. A replying affidavit was sworn by Mr. McGettigan on 13 December 2018. Neither defendant has the benefit of legal representation in these proceedings. In that affidavit he avers that a meeting took place between him and the manager of the plaintiff, Gerry Hannan. Because of the importance of this averment I will quote the relevant extract from the affidavit.

> *"I outlined at this meeting the various issues that a precipitate liquidation of the companies assets including title issues, maintenance issues and completion issues which would result in the bank not crystallising sufficient funds from the liquidation of company assets to eliminate the companies indebtedness and various proposals and counter proposals were discussed culimating (sic) in an agreement between myself and Gerry Hannan who at all times held himself out as being in a position to make decisions on the banks behalf as I work diligently with the bank to act as a defacto "self receivership in situ" for no salary in return for the bank undertaking to not call in personal guarantees held by my wife and I. I honoured my undertakings and over a period of 3 years managed to liquidate without recourse to a receiver by the bank both companies entire assets within the afforded all precipitate timeline by the bank returning full proceeds of any sales to the bank and worked through the liquidation of both companies without recompense."*

7. He goes on to say that the plaintiff is legally "stopped" from seeking summary judgment in seeking to now call in the personal guarantees contrary to the position taken at the meeting and asserts this is a breach of promissory estoppel.

8. By affidavit sworn 25 February 2019, Mr. O'Donnell responds to certain points that had been raised by Mr. McGettigan in relation to the service of the summons on him and rebuts the allegations of Mr. McGettigan that he, Mr. O'Donnell, was in breach of the Private Securities Services Act 2004 or that he was guilty of any criminal wrongdoing by handing Mr. McGettigan a copy of the summons.

9. He advised that when he first met Mr. McGettigan on 24 August 2018, Mr. McGettigan informed him that he had an agreement with Gerry Hannan to the effect that if the defendants' cooperated with the sale of the Company's assets, the plaintiff would come to some form of agreement in relation to the residual balance. He avers that this statement contradicts the averments of Mr. McGettigan identified above.

10. On 28 February 2019, Mr. Brian Feeley of the plaintiff, swore an affidavit where he avers at paragraph 6 that there is no record of the meeting having taken place between Gerry Hannan and the defendant as set out in Mr. McGettigan's affidavit. I comment further on that averment below, given the fact that Mr. McGettigan exhibits an email from Mr. Hannan of 10 June 2013 that refers to the meeting taking place the following day.

11. At paragraph 8 he says that the first time that either of the defendants raised an issue about such an alleged undertaking or arrangement was after the within proceedings had issued. In fact, on 9 March 2017, the defendants wrote to Mr. Drislane, Senior Business Manager at the Bank of Ireland, Letterkenny, stating that they had consented to act as *de*

facto receivers *in situ* in return for the Bank's reciprocal undertaking not to pursue the personal guarantees. I make this observation not to criticise the plaintiff for this averment, as mistakes of this type are easily made where there is a long history of correspondence, but rather to emphasise that the defendants had in fact raised this argument nine months prior to the proceedings being issued.

12. Mr. Feeley refers to a meeting of 22 December 2016 where there was a meeting between Mr. O'Donnell and Mr. Drislane, Mr. McGettigan and his accountants and he exhibits a copy of the Bank's internal memo of that meeting. He notes that in the memo there was no mention of the alleged undertaking not to pursue the defendants for the personal guarantees. He also refers to the proposal put forward on behalf of the defendants on 31 January 2017 where it was proposed that the defendants would pay a sum of €48,256 in full and final settlement of all indebtedness that the defendants had with the plaintiff and other entities within the plaintiff's banking group in circumstances where the defendants' entire liability to the plaintiff was approximately €2.91 million, including the sum total of €825,000 in respect of the guarantees the subject matter within proceedings. He says that proposal is at odds with the defendants' suggestion that they had some form of binding agreement with Gerry Hannan. I note that letter does not make any reference to the personal guarantees.

13. In that memo, it is noted that the defendants' financial adviser asked what the plaintiff would do if judgment were obtained and whether the plaintiff would be likely to register it on the family home. Mr. Drislane indicated that if judgment were obtained it was likely that it would be registered against the private dwelling home where the McGettigans live.

The email of 10 June 2013 and diary entry of 11 June 2013

14. On 28 April 2019 Mr. McGettigan swore a replying affidavit where he stated that the court should identify a lack of veracity in Mr. Feeley's affidavit, given that Mr. Feeley did not furnish the defendants or the court with a copy of an email of 10 June 2013 from Gerry Hannan to the defendants' accountant, Pat McDermot which he says sets out the "broad brush strokes" of the agreement between the defendants and the plaintiff. He exhibits same. I quote the email in full:

> *Pat,*
>
> *Thanks for that. Laurence has arranged to call with me tomorrow morning to cover some movements on the SOA.*
>
> *Can I call with you tomorrow evening in order to understand the income as per the tax returns in 2011 and what their income is likely to be going forward.*
>
> *The picture at present looks like*
>
> *E L McGettigan & Sons Limited*
>
> *Voluntary sale of all assets to realise max 950k and lodge proceeds in reduction of liabilities 4 400k Balance not to be called with Letters of Guarantee not called*

Bank of Ireland Mortgages All properties to be sold to realise 240k with proceeds lodged in reduction of Liabilities 301k No plans to deal with residual debt 81k

Laurence and Eileen McGettigan/Paddy and Diane Doherty No proposal to service the existing loan 600k

15. He signs off as Gerry Hannan, SBM, Business Banking, Bank of Ireland Letterkenny Co. Donegal. At the end of the email there is the notation "INFORMATION CLASSIFICATION RED".

16. No explanation is given as to the meaning of same. Nor is any information given by the plaintiff as to why this email was not produced or exhibited by it in the extensive affidavit exchange. Mr. McGettigan criticises the plaintiff for not disclosing the email or the existence of the meeting in response to a data protection request sent by the defendants. Asserting in response, as the plaintiff does, that the case is not about compliance with data protection obligations – a statement that is correct in its own terms – does not constitute an explanation as to why the email was not exhibited. It would have been helpful to understand the lacunae in the plaintiff's exhibits.

17. In the replying affidavit filed by Mr. Hannan (described below), he avers that the reference to the letters of guarantee "not called" was simply a description of the fact that they had not been called to date. However, that interpretation is arguably not the most obvious one, given that the remainder of the email is about future plans rather than the existing state of play. The question of the correct interpretation of this email and its implications for the defence raised by the defendants does not seem to be one appropriate to summary judgment.

18. Next, Mr. McGettigan exhibits the page of his diary entry for the meeting of 11 June 2013. The entry is at times hard to make out but appears to state as follows:

"meeting Gary Hannan BOI

Gary happy with plans – proposal to liquidate assets acting as receivers in situ save bank costs on receivers fees sort right of way termination of leases title issues and sell uncontested assets i.e. Keenaghan and Hill head

In return BOI – no call in of PGS (personal guarantees) no residual on two bank loans I have to sort my own PDH (private dwelling houses) mortgage – will not be part of settlement nor will credit card

Gerry says every bust turns to boom 3 to 5 years all back in the game – stick to plan & BOI will honour its undertakings

[illegible] [Gerry re issue with pumping station at mountaintop".

19. At paragraph 7 Mr. McGettigan says the plaintiff has failed to identify how the property portfolio was liquidated by the defendants acting as receivers *in situ*, generating

€1,466,298 for the plaintiff and incurring 5 years of work by the defendants, preparing properties for sale, repairing and maintaining properties for sale, resolving title issues, terminating a lease and right-of-way disputes. He exhibits an asset disposal schedule identifying properties liquidated voluntarily. There is no contest but that a significant volume of assets was liquidated in an effort to pay the Company's debts, although in a replying affidavit Mr. Feeley avers they were worth circa €1 million rather than circa €1.4 million. He swears that Mr. Hannan held himself out as being authorised to enter into binding agreements with the defendants on behalf of the plaintiff as he had done for over 20 years with the defendant and his extended family.

20. In relation to the proposed settlement of 31 January2017, he notes that the proposal was confined to settlement of net outstanding debts as opposed to liabilities, which the defendants understood were excluded by the agreement with Gerry Hannan.

21. A further replying affidavit is sworn by Mr. McGettigan on the same date in response to the affidavit of Mr. O'Donnell. In it, he says he had to emigrate to the UK to obtain employment to meet the monthly mortgage payments on his sole remaining asset, namely the family home, which has continued to be serviced without either default or arrears.

22. On 21 August 2019 Mr. Feeley swore a second affidavit. He notes that the within proceedings are not the correct forum for the resolution of any alleged non-compliance with the provisions of the GDPR or the Data Protection Act. He agrees the Company reduced its indebtedness to the plaintiff through the sale of various properties over which the plaintiff has a charge but says the suggestion by Mr. McGettigan that he was acting as a receiver on behalf of the plaintiff is incorrect, pointing out that the Company has an obligation under the terms of the facility letters to repay the monies that were advanced to it and that Mr. McGettigan, on behalf of the Company, agreed to sell various properties and to apply the proceeds of sale to the Companies' loan accounts.

23. He argues that having regard to the terms of the guarantees, even if some form of communication had been given by Mr. Hannan that the plaintiff would release the defendants from the terms of the guarantees, the clauses of the guarantees provided such communication would not release the defendants from their obligations and would not therefore amount to a defence of the plaintiff's claim in law or equity.

24. I consider this is a legal argument not susceptible to being determined at summary hearing, given that it requires a consideration of the terms of the guarantee and the law of promissory estoppel to ascertain whether, even if the legal requirements for such estoppel are found to be present, the terms of the guarantee prevent the defendants from relying on an otherwise valid estoppel. This is a complex legal question that cannot, in my view, be answered in a summary manner on a motion for judgment.

25. He exhibits correspondence between various solicitors and advisors acting for the defendants, who made various proposals to the plaintiff in relation to the Company's indebtedness between 2014-2017. Mr. Feeley avers that that correspondence makes it

clear that there was no concluded agreement whereby the plaintiff had agreed to release the defendants from their obligations under the guarantees. Particular reliance is placed on a statement of personal and financial details of 21 August 2014, which includes in the list of the defendants' assets and liabilities, the liabilities under the letters of guarantee the subject of these proceedings.

Affidavit of Mr. Hannan

26. On 28 August 2019 an affidavit was sworn by Mr. Gerry Hannan, retired bank official of Letterkenny. This affidavit merits careful consideration given the reliance placed on the meeting with Mr. Hannan by the defendants. He says that between 2003 and 2013 he was the person within the Letterkenny branch of the plaintiff who had responsibility for managing the Companies' loan accounts and current accounts. (It appears that the defendants were involved in other companies apart from E & L McGettigan & Co.). He avers that the Company had significant borrowings from the plaintiff and it was agreed between the plaintiff and the Company that the Company would sell certain properties over which the plaintiff had a first legal charge with a view to reducing the Company's indebtedness to the plaintiff. He says that he utterly rejects the suggestion that he agreed to release the defendants from their personal guarantees. (It should be noted that the case being made by the defendants is subtly different in that the note of the meeting refers to the plaintiff not calling in the guarantees rather than releasing them from the guarantees).

27. He notes that the email of 10 June 2013 was sent in advance of the meeting he had with Mr. McGettigan. He avers that the quoted text of "*balance not to be called with letters of guarantee not called*" was not a suggestion by him that the plaintiff would release the defendants from their obligation but rather that he was stating the fact that, as of the day of writing the email, the plaintiff had not called in the letters of guarantee. He goes on to say that he did not give an undertaking at the meeting that the plaintiff would release the defendants from their personal guarantees and continues to the effect that, even if he had agreed to do so (which he denies), he did not have the authority to enter into any such arrangement with the defendants as this would have meant writing off a debt in excess of €3.8 million in respect of the Company and personal guarantees in the amount of €825,331. (It is not clear to me why writing off the guarantee is treated by Mr. Hannan as equivalent to writing off the entire debt of the Company).

28. Finally, he refers to a proposal received from a financial adviser of the defendants on 1 November 2013 and his response of 26 November 2013 where he advises the proposal had been declined. He notes the letter advised that the plaintiff would be proceeding to call in the Company's facilities and the guarantees.

29. The letter of 1 November 2013 is important since it does not reflect the agreement or arrangement that the defendants now rely on. Rather, it proposes that the defendants would repay €450 per month in relation to the Company's debts and the remaining loan be secured by way of a charge over the lands at Keenaghan. As discussed below, this is particularly inconsistent with the argument made at hearing that part of the deal between the parties on 11 June 2013 was that the lands at Keenaghan would be sold.

30. Of some importance is the response of 26 November 2013 from Mr. Hannan, where he states that the proposal is not accepted and the Bank will be proceeding to call in the Company's facilities and letters of guarantee. The defendants do not identify any response by them to this letter despite the proximity of the November letter to the June meeting, and no explanation is given as to why the defendants did not invoke the representation/agreement of June 2013 at that stage.

31. A replying affidavit was filed by Mr. McGettigan on 23 September 2019. He says it was Gerry Hannan who introduced and explained the term "*self receiver in situ*". A further affidavit was sworn by Mr. McGettigan on the same day.

Affidavits post the hearing

32. At trial before me the defendants were not able to point to any evidence identifying the date of the sale of the family lands at Keenaghan, Kilmacrenan, Co. Donegal, which lands were referred to in the diary entry, and neither party was at that stage able to indicate the use to which the sale proceeds were put. In those circumstances I gave liberty to file affidavits after the hearing. An affidavit of Eileen McGettigan was filed on 17 August 2021 where she exhibited a copy of the conveyance of the family farm of 23 October 2015 which evidenced a purchase price of €156,750. and a letter from the solicitor who carried out the transaction identifying that the sum of €148,829.45 was forwarded to the Bank of Ireland on 25 July 2016.

33. A replying affidavit was sworn by Brian Feeley on behalf of the plaintiff on 9 September 2021 where he accepted that the farmland at Keenaghan was sold in 2016 but notes that the proceeds were not credited to any of the loan accounts operated by the Company over which the defendants gave personal guarantees. Rather, the proceeds were put towards loan account number 4636 3018 which is in the names of the defendants and Paddy and Diane Doherty.

Defendants' motion for cross examination and discovery

34. On 21 November 2019 a motion was brought on behalf of the second named defendant seeking that (i) the proceedings be referred to plenary trial (ii) requesting the defendants be permitted to cross examine the plaintiff's deponents (iii) requesting discovery of bank records from 1985 to 31 December 2014 and (iv) giving liberty to the defendants to enter a counterclaim for the work done while acting as receivers *in situ*. That motion is grounded on the affidavit of Mrs. McGettigan of 15 October 2019.

35. That was replied to by the third affidavit of Mr. Feeley sworn 20 January 2020 who resists all the reliefs sought. In relation to the application to cross-examine, he notes that the averments made by the defendants have been disputed in his second affidavit and the affidavit of Gerry Hannan and avers that the compromise alleged in June 2013 is contradicted by the proposals of the defendants' financial adviser on 1 November 2013 and later in February 2014 and January 2017.

Analysis

36. Although initially only the motion brought by Mrs. McGettigan was listed for hearing, it was agreed by the parties that I could also deal with the motion for judgment. I have

decided to refuse the plaintiff's motion for judgment for the reasons set out below and to send the matter to plenary hearing. That means the defendants' motion becomes redundant since at plenary hearing the defendants will be entitled to cross-examine the plaintiff's witnesses in the normal way and will also be entitled to discovery in principle, subject to meeting the usual criteria of necessity and relevance.

37. The legal test as to whether I should send a matter to plenary hearing is set out in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607, i.e. I must consider whether there is a fair and reasonable probability that the defendants have a real and *bona fide* defence.

38. The defendants have raised various issues about service and failure to comply with data protection requirements. This is not an appeal against a data protection decision and those arguments cannot constitute an arguable defence. In relation to the point about there being no notice of intention to proceed within the requisite time, the defendants were served with the motion for judgment and the various affidavits. Service is a step in the proceedings which means that there was no gap of time requiring a notice of intention to proceed (see *Danske Bank v. Walsh* [2018] IEHC 799). Finally, I do not believe there is any merit to the arguments alleging a breach of the Private Securities Services Act 2004. Service was effected by Mr. O'Donnell of the Bank of Ireland. He has averred at paragraph 9 that he never claimed to be a summons server or a private security employee but is and was at all material times a bank official employed by the plaintiff and was not a holder of a PSA licence, no such licence being required in the context of his employment with the plaintiff. Those averments are not substantially controverted by Mr. McGettigan.

39. However, as identified above, the defendants raise a more substantive issue i.e. whether the plaintiff is estopped from calling in the personal guarantees given an agreement and/or representation that was made to Mr. McGettigan by Mr. Hannan. The essence of the argument is that the plaintiff is estopped from calling in the personal guarantees because Mr. Hannan agreed with Mr. McGettigan at the meeting of 11 June 2013 that if he acted as a receiver over the properties in respect of which the plaintiff had charges and liquidated assets on behalf of the plaintiff, the plaintiff would not call in the personal guarantees. In this regard, heavy reliance is placed upon an email and a handwritten diary entry, extracts from which have been set out above.

40. The necessary elements of promissory estoppel are well established. Where one party has made to another a clear representation, by words or conduct, that is intended to affect the legal relations between them and to be acted upon, and the other party has acted upon it by altering his or her position to their detriment, the person who gave the assurance cannot be allowed to revert to previous relations as if no such promise had been made (see *Doran v. Thompson & Sons Ltd* [1978] I.R. 223). To avoid summary judgment, it is necessary that all elements of the doctrine are present at the height of the case made by the person asserting the estoppel.

41. The defendants assert a clear representation by Mr. Hannan to the effect that the plaintiff will not call in the personal guarantees if the defendants act as receiver. An affidavit is

sworn as to that conversation by Mr. McGettigan and critically, he exhibits his diary entry for the meeting to support his version of events, as well as an email from Mr. Hannan the day before the meeting which on one interpretation certainly supports Mr. McGettigan's version of events. He also avers that himself and his wife acted to their detriment on reliance upon that representation, by acting as *de facto* receiver and selling properties in order to pay down the Company's debt, without any compensation for what he avers was a five-year project. There is uncontested evidence that many properties of the Company were prepared for sale by the defendants, sold and the proceeds remitted to the plaintiff to pay off part of the Company debt, although there is a dispute as to whether the value was circa €1.4 or closer to €1 million. Nor is there any dispute about the fact that no compensation was provided by the defendants for this work.

42. The plaintiff argues that the conditions for promissory estoppel are not met even at height of the defendants' claim. Having regard to the summary of the defendants' case and the evidence adduced in support of same above, I cannot agree with that submission. The defendants' case is considerably strengthened by their reliance on contemporaneous documentation, namely the email of 10 June 2013 and the diary entry of 11 June 2013. The email generally supports the argument of the defendants that at the meeting of 11 June, discussions were going on as to the financial situation of the defendants and solutions as to same were being sought to be identified. The reference to "voluntary" sale of assets could be taken to be supportive of the defendants' argument that it was of value to the plaintiff to have the defendants assisting in the sale of assets. The reference to "Letters of Guarantee not called" is potentially very significant. One interpretation of the email might be taken to suggest that there is a potential deal that would result in the Letters of Guarantee not being called in. As noted above, Mr. Hannan's response is not enough to dispose of the issue at this stage. The correct interpretation of the email should be decided following a plenary hearing.

43. Moreover, the diary entry is of considerable importance. It is a very detailed contemporaneous note of the meeting. Significantly, there is no effort by the plaintiff to dispute the validity of the document. It is detailed in its description. It uses the term "receivership in situ" that Mr. McGettigan avers was introduced by Mr. Hannan, it identifies the nature of the tasks that the defendants will have to carry out, it refers to the *quid pro quo* i.e. in return no calling in of personal guarantees, it sets out the obligations that remain unaffected by the deal i.e. mortgage and credit cards, and it refers to the Bank honouring its undertakings.

44. For me to grant summary judgment, I would have to either completely ignore the existence of the diary entry or alternatively conclude that it was either intentionally fabricated by Mr. McGettigan or that Mr. McGettigan had, in good faith, recorded a conversation that never took place. That is a very large leap to take on a motion for summary judgment.

45. There is also the issue of the averments. There is a straightforward conflict of events in respect of the meeting as between Mr. McGettigan and Mr. Hannan. Mr. Hannan does not

offer any alternative version of the meeting or explain its purpose and nor does he comment upon what is said in the diary entry. The plaintiff asks me to prefer Mr. Hannan's averments, despite the fact that he offers no note of the meeting or any other documentation, in contrast to Mr. McGettigan. Nor does he explain the policy of the plaintiff at the relevant time in relation to minutes of meetings with clients or indicate whether a search was made for bank records of the meeting and if so the outcome of that search. There is no explanation of the term "Information classification red".

46. The plaintiff's response is one that largely ignores the events of June 2013 but focuses on the defendants' conduct after the alleged agreement. It does not put forward any contemporaneous documentation, unlike the defendants, but argues that I should look at the subsequent conduct of the defendants, being correspondence in 2013, 2014 and 2017, seeking to address the position of the Company/defendants, that fail to refer to the arrangement or estoppel. It points to correspondence by Gibson & Associates Solicitors who acted for the defendants in 2014 and asserts that if there was indeed a representation that the defendants had relied upon, the solicitors would have been sure to identify same in their correspondence.

47. It is true that there is very little reference to the personal guarantees in the correspondence, although it is true that they are identified in a statement of assets in 2014 (though not in a statement of personal assets in 2017).

48. This seems to be inconclusive at summary stage for the following reason. The defendants say the correspondence reflects efforts to deal with other personal loans and joint loans. They say the lack of a reference to personal guarantees in the correspondence was because they believed they had an agreement in respect of those, and therefore did not need to address them in their various proposals. That explanation, although not conclusive, might provide an explanation for the lack of proposals on the personal guarantees. On the other hand, the plaintiff might be correct in saying that the failure to address the representation/agreement is indicative on a lack of belief in, or reliance upon, same by the defendants. That issue seems to be suitable for determination at plenary hearing rather than summary hearing.

49. However, there is one omission on the part of the defendants that gives me cause for concern. This is the fact that when Mr. Hannan wrote in November 2013, only months after the meeting in June, rejecting a proposed settlement, he referred to the Bank calling in the personal guarantees. The defendants do not appear to have replied invoking the representation. This is difficult to understand given how recently the meeting with Mr. Hannan had taken place. But to further complicate matters, it is clear from the statement of affairs of 2014 referred to above that Mr. McGettigan had three other guarantees not the subject of these proceedings so it cannot be concluded that the reference to the letters of guarantee in Mr. Hannan's letter of November was necessarily a reference to, or was understood by the defendants as, the letters in question here.

50. In summary, given the documentary evidence put before me by the defendants, and the conflicting factual averments in respect of the meeting of 11 June 2013, I am satisfied

there is a substantive dispute as to whether the plaintiff is estopped from relying upon the personal guarantees that requires to be resolved at plenary hearing.

51. Finally, I should address that part of the argument, made by Mrs. McGettigan in oral submissions, that part of the deal offered was that the personal guarantees would not be called in if the lands at Keenaghan were sold. It is certainly true that there is a reference to selling uncontested assets including Keenaghan in the diary entry (and not to selling unencumbered assets as Mr. Feeley avers) but it is also true that there are many references to selling the farm at Keenaghan in subsequent correspondence or offering it as security for a proposed loan.

52. Moreover, in the letter pre-dating the proceedings from the defendants to the plaintiff referred to above, there is no reference to the sale of these lands being part of the agreement and equally there is no reference in the affidavits of Mr. McGettigan to this being a part of the agreement. The affidavits filed after the hearing make it clear that the lands were ultimately sold on foot of the plaintiff's charge on same as security for a loan to the defendants and two other persons, and the proceeds of same were used to pay off part of this loan. That makes it more difficult for the defendants to show they have detrimentally altered their position in respect of those lands on foot of the plaintiff's alleged representation. However, given that I have already concluded the defendants have identified a probability that they have a real and bona fide defence in respect of the argument identified in Mr. McGettigan's first affidavit, my observations in relation to the Keenaghan lands do not alter my conclusion that I should give liberty to the defendants to defend the claim.

Conclusion

53. In the circumstances, I am satisfied the defendants have discharged the burden of identifying a probability that they have a real and *bona fide* defence in relation to the Act and I therefore give them liberty to defend the proceedings.