[2020] IEHC 191

THE HIGH COURT

[No. 2017/9322 P.]

BETWEEN

MICHAEL BRESLIN

PLAINTIFF

AND

IRISH BANK RESOLUTION CORPORATION LIMITED
(IN SPECIAL LIQUIDATION)

DEFENDANT

JUDGMENT of Ms. Justice O'Regan delivered on the 3rd day of April, 2020

Issues

1. By way of plenary summons of 18th October, 2017, the plaintiff has claimed against the defendant damages for misrepresentation, negligent misstatement, breach of duty and/or breach of contract together with interest and other reliefs. The relevant statement of claim was delivered on 10th March, 2019. The statement of claim expands on the reliefs sought in the plenary summons in that it seeks damages for deceit and fraudulent misrepresentation in addition to the other headings of relief in the summons.

2. The factual matrix grounding the plaintiff's claim relates to the circumstances surrounding the execution of a deed of guarantee of 5th November, 2008, executed by him in favour of the defendant and the implications, import, or effect of certain assertions made by one Mr. Feeney in advance of execution of the guarantee which utterances are said to have been made in a telephone conversation of 23rd October, 2008, and in a face to face meeting of 24th October, 2008.

3. Following the service of the statement of claim as aforesaid, the defendants issued a notice of motion bearing date 22nd May, 2019, seeking an order striking out the plaintiffs' proceedings as being an abuse of process including on the basis the claims therein are *res judicata* and/or that they are precluded by issue estoppel.

4. Although the issue estoppel is the primary focus of the defendant's position, the totality of issues can be categorised as:

   (a) issue estoppel;

   (b) res judicata;

   (c) abuse of process by way of collateral attack on findings of the Court of Appeal by judgment of 26th October, 2017, being between NALM and the within plaintiff [2017] IECA 283; and,

   (d) the rule in *Henderson v. Henderson* [1843] 3 Hare 100.

5. In the proceedings which culminated in a final order of the Court of Appeal dated 26th October, 2017, (the prior proceedings) the within plaintiff swore three separate affidavits in an attempt to defend the summary judgment application brought against him, namely 30th July, 2015, 6th November, 2015, and 1st March, 2017.

6. The latter mentioned affidavit incorporates the plaintiff's assertions as to statements made to him by Mr. Feeney and I am satisfied from a perusal of that affidavit, together with a perusal of the statement of claim herein, delivered on 10th March, 2019, that the factual averments concerning the communications made between the plaintiff and Mr. Feeney are identical. In other words, the defence put forward by the plaintiff in the prior proceedings by virtue of the affidavit of 1st March, 2017, relate to the same factual background grounding the statement of claim save for the fact that the plaintiff now suggests that in Summer/Autumn, 2008 the defendant had made a decision to stop or severely limit fresh commercial lending (see para. 37 of the statement of claim). The import of this decision, according to the plaintiff, is that the representations made by Mr. Feeney as to future lending were effectively fraudulent misrepresentations.

7. The import of Mr. Feeney's utterances, according to the plaintiff set out at paras. 35 and 44 of the statement of claim are to the effect that, the defendant would continue to make and/or be in a position to make fresh commercial loans in the normal way, that they had the financial capacity to finance the balance of the Waterloo Road Project and were willing to finance the said project. The factual background and import of the asserted utterances are one in the same as contained in paras. 20-26 inclusive of the affidavit of the plaintiff of the 1st March, 2017, in the prior proceedings.

8. Under part 6 of the National Asset Management Agency Act 2009 (the 2009 Act), the facilities granted by Anglo to Car Park Solutions Limited (being the company developing the Waterloo Road project for which the plaintiff entered the guarantee aforesaid) were transferred to NALM on 13th December, 2010. As a consequence, under s.99 of the 2009 Act, the NAMA group entities, subject to s.101 thereof, are entitled to exercise all the rights and powers and were bound by all the obligations of the participating institution from which the bank asset was acquired including inter alia any guarantee.

9. Under s.101 if any representation may have been made to a participating bank but not disclosed to NAMA in writing before the service on the participating institution or the records of such institution did not contain a note or memorandum thereof, where the representations would affect the creditor's right in relation to the bank assets then such representation is not enforceable and cannot be relied upon by the debtor as against NAMA or the NAMA group entity. Under s.101(2) a claim based on any such representation gives rise only to a remedy in damages or other relief.

The Court of Appeal Decision

10. The judgment of the Court of Appeal was delivered on 26th October, 2017, and at para. 6(1) thereof the Court identified a relevant ground of appeal of the appellant as saying that he was induced by the bank in October, 2008 to enter the guarantee based on representations made by Mr. Feeney that construction finance would be furnished for the Waterloo Road project, and this operated as a condition precedent to the guarantee coming into effect. Because the construction finance was not furnished it was argued that he was not bound by his guarantee.

11. At para. 14 of the judgment the Court made reference to Clause 22.6 of the guarantee of 5th November, 2008, to the effect that by that deed the guarantor acknowledged that he did not rely on any warranty or representation made by or on behalf of the bank to induce him to enter the deed.

12. At para. 29 the Court identified the clear jurisprudence applying to an application for summary judgment including quoting from *Aer Rianta v. Ryanair* [2001] IESC 94, which requires that it be very clear indeed that the appellant has no case. Reference was also made to the Supreme Court decision in *IBRC v. McCaughey* [2014] IESC 44, to the effect that the court will be required in such an application to accept the facts of which the defendant gives evidence, or facts in which the defendant puts forward a credible basis for believing that evidence may be forthcoming. The Court then identified that the appellant's hurdle to appeal on a motion for summary judgment is a low one.

13. At para. 30 the Court quotes from the appellant's affidavit of 1st March, 2017, aforesaid and during the course thereof comments that the words specifically ascribed to the banker are noteworthy. It was also noted that although the asserted representations were made on 23rd and 24th of October, 2008, nevertheless the appellant was required to execute a fresh guarantee on 5th November, 2008, while in New York because of some apparent defect in the original guarantee signed on 24th October, 2008. The Court comments that this turn of events afforded the appellant an opportunity to reflect on the commercial prudence of entering into the guarantee to consider its precise terms.

14. At para. 31 reference is made to an email of the appellant to Mr. Feeney of 16th April, 2009, wherein he expresses himself as seriously disappointed at *inter alia* the bank's decision not to afford further credit.

15. At para. 35 the Court finds that the precise words and quotations attributed to Mr. Feeney were at most statements of opinion concerning future events on the part of Mr. Feeney and did not give rise to any representation which became a term of the contract with the appellant by way of a collateral warranty or otherwise. No binding legal obligations were created.

16. At para. 37 the Court of Appeal found that the email of 16th April, 2009, is an acknowledgement that the credit committee of Anglo alone was the arbiter of credit extensions as well as all loan approvals and such communication did not assert any binding and enforceable legal obligation.

17. Further dealings between the appellant and Mr. Feeney were also detailed in the judgment and at para. 39 these communications were held to be a clear acknowledgment of limits of Mr. Feeney's authority and there was no suggestion therein of the guarantee being repudiated or ceasing to be enforceable or that any legally enforceable right to secure funding arose.

18. At para. 41 it is stated that the net effect of the appellant's contention is that the bank was irrevocably contractually obliged to advance the sums.

19. In para. 42 the Court finds that the direct quotations attributed to Mr. Feeney are vague, indistinct and incapable of displacing the express language of Clause 22.6 of the guarantee being language that is clear and unambiguous. The execution by the appellant of this guarantee on 5th November, 2018, afforded the appellant ample opportunity to consider same and it was open to him to amend or vary the Clause if it did not reflect the concluded agreement he now asserts. The Court found that there was no evidence to support this claim beyond the bare assertion of the appellant which is not consistent with any contemporaneous documentation and the appellant had put forward no credible basis for such contention which is wholly inconsistent with Clause 22.6.

20. At para. 43 the Court quoted from *Peekay Intermark Ltd. v. ANZ Banking Group Ltd*. [2006] EWCA Civ. 386, para. 57, to the effect that that Court could see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided they make their intentions clear which would give rise then to contractual estoppel. Following from this quote the Court held that Clause 22.6 of the guarantee and indemnity offers a complete answer to the appellant's claim regarding the alleged representation.

21. At para. 44 it was held that *prima facie* evidence of a binding representation had not been made out by the appellant.

22. In para. 45 it is stated that quite separately s.101(1) of the 2009 Act was relevant and quoted. In para. 46 it is held that the respondent enjoys the protection of s.101 of the Act and any such representation is not enforceable against the respondent. The Court states that by virtue of s.101(2) any claim based on a representation gives rise only to a remedy in damages or other relief against the participating institution.

23. At para. 83 where the Court is dealing with the constitutional challenge of the appellant it is stated that the High Court was correct in assessing that in substance such a constitutional challenge is based principally on s.101 of the 2009 Act. The Court found that the representations being relied on are such that the appellant is demonstrably estopped by virtue of para. 22.6 of the guarantee from maintaining such a claim, and furthermore he is outside of the time limit for such a challenge.

Legal Principles

24. The parties agree as to the principles to be applied in respect of issue estoppel which is a principle closely allied to *res judicata* developed for the purposes of dealing with a final disposal of issues that might arise and preventing a party from being vexed by having to deal with an issue on more than one occasion.

25. The Supreme Court in *Belton v. Carlow County Council* [1997] 1 IR 172, in a judgment of 25th February, 1997, stated that the law on issue estoppel had been set out in the Australian decision of *Blair v. Curran* [62 CLR 464 at p. 531/2] where it was stated:

> *"A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties*

or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion….The Distinction between res judicata and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the formal proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order."

26. In *Bula Ltd. v. Crowley* [1997] IEHC 72, a judgment of Mr. Justice Barr of 29th April, 1997, it was found that issue estoppel did not arise because there was no privity, therefore, abuse of process was considered. The Court held that it must be unjust in all of the circumstances and an abuse of process to allow findings to be revisited, and this applied irrespective of privy. The Court in following *Blair v. Curran* aforesaid, indicated that the determination of fact or law disposes once and for all of that issue, however, only in respect of matters that justify the conclusion of the prior judgment. The questions to be addressed would be:

    (1) Is there an attempt to reopen an issue of fact or law decided?
    (2) Was the finding necessary to the determination made previously?
    (3) Is the finding relevant to an issue now raised? and,
    (4) Is it unjust in all of the circumstances to allow the current proceedings to continue?

27. In the prior proceedings, the issue must have been necessary to the decision which was made (see *Carl Zeiss v. Rayner no. 2* [1967] 1 AC 853, and *Kelly v. Ireland* (unreported) judgment of O'Hanlon J. of 28th January, 1986).

28. In *McCauley v. McDermot* [1997] 2 ILRM 486, the Supreme Court held that for a successful plea of issue estoppel it must be established:

    (1) that the same question had been decided in earlier proceedings;
    (2) that the judicial decision which is said to create the estoppel was final; and,
    (3) the parties to the judicial decision or their privies are the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

    The Court also confirmed the effective definition of privy being:

    "A party is the privy of another by blood, title or interest when he stands in his shoes and claims through or under him."

29. In *Dublin County Council v. Taylor*, [1988] 11 JIC 1802, a High Court judgment of Mr. Justice Blayney of 18th November, 1988, it was held that in assessing whether or not the determination in the prior proceedings was necessary one considers whether or not the judgment would stand without the determination. In that matter, Mr. Justice Blayney indicated that it was necessary to inquire with unrelenting severity in this regard as matters raised and decided may not be the essential foundation of the judgment.

30. Reference is made to the textbook of Paul Anthony McDermott, *Law on Res Judicata and Double Jeopardy* [1999] at Chapter 7, where it is stated that it must be the same precise point which is determined. At para. 7.13 it is stated that if the fact is incidental or collateral no estoppel arises.

31. Mutuality is required and both must be bound and entitled to the prior judgment although this must not facilitate an abuse of process. There is a public interest in the finality of litigation. In applying *res judicata* it is a matter of balance – it will not be applied if injustice arises, however, it must be applied if it would permit a party to an earlier judgment to escape from it.

32. In the text book *Spencer Bower and Handley: Res Judicata*, 5th edition [2019], dealing with privies, it is stated that privity is a matter of substance rather than form.

33. In *Gleeson v. Wippell & Co*. [1997] 1 WLR 510, a judgment of Vice Chancellor Megarry, an issue arose as to privity of interest. There was a clear identity of plaintiffs but not identity of defendants (unless a privity could be established). The Court held that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. However, such a defence cannot be raised unless there is a sufficient degree of identity between the successful defendant and the third party, to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party.

34. In *Vico Limited & Ors. v. The Governor and Company of Bank of Ireland & Ors*. [2016] IECA 273, Ms. Justice Finlay Geoghegan on behalf of the Court of Appeal in a judgment delivered on 12th October, 2016, quoted with approval the effective definition in G*leeson v. Wippell* of privity of interest.

Submissions Issue

35. In resisting the arguments of the defendant that issue estoppel arises, the plaintiff submits:

    (1) By virtue of the Supreme Court decision in *Grant v. Roche Products (Ireland) Limited & Ors*. [2008] IESC 35, the onus of proof to strike out for an abuse of process is "a heavy one".

        However, in this regard it is clear from the Court of Appeal judgment aforesaid in *NALM v. Breslin* at para. 29, that the Court of Appeal were alert to a similar onus in securing summary judgment with the defendant's factual evidence being accepted and the hurdle of the defendant in resisting such a motion for summary judgment being classified as a low one.

    (2) The plaintiff argues that the Court of Appeal was dealing with contractual and promissory aspects of the utterance as is demonstrated by the summary of the argument made by the within plaintiff in para. 6(1) of the Court of Appeal judgment and therefore the issue of tortious liability was not dealt with.

In this regard, in fact in the current statement of claim, a breach of contract is also claimed on the same grounds, notwithstanding the plaintiff's argument that contract was dealt with in the prior proceedings.

Furthermore, in this regard, I accept the defendant's argument that the plaintiff is conflating issue estoppel with cause estoppel. The issue was that the within plaintiff had relied on certain alleged representations which is again the foundation for the within statement of claim. However, the Court of Appeal came to certain conclusions as regard to such asserted representations, therefore, although the current proceedings do not limit themselves to cause of action in contract, nevertheless the issue of the impact of the asserted representations on the plaintiff was dealt with in the prior proceedings.

(3) The plaintiff argues that there is a new element incorporated within the statement of claim to found an assertion of fraudulent misrepresentation and in this regard relies on *Pearson & Son Ltd v. Dublin Corporation* [1907] AC 351 (House of Lords) and *HIH Casualty and General Insurance Limited v. Chase Manhattan Bank* [2003] UKHL 6, to the effect that on the grounds of public policy it is not permissible for a contracting party to exclude liability for his own fraud in inducing the making of a contract.

In response, the defendant argues that in fact, deceit and fraud was raised by the within plaintiff prior to the Court of Appeal decision and refers to para. 3 of the submissions where at para. 3.3 the argument was made that a misrepresentation knowingly made would amount to a fraudulent misrepresentation. Furthermore, at para. 3.1 it is recorded that the defence raised by the within plaintiff in those prior proceedings was misrepresentation, breach of contract and estoppel. The Court held that the precise words and quotations attributed to Mr. Feeney at most amounted to statements of opinion and no binding legal obligations were created and didn't become a term of the contract by way of collateral warranty or otherwise (see para. 35). In addition, the asserted words attributable to Mr. Feeney were held to be vague, indistinct and incapable of displacing express language in Clause 22.6 of the guarantee which was held to be a complete answer (see para. 42).

In my view, the defendant's arguments above are sufficient to dispose of the plaintiff's argument that fraud comprises a new element of the plaintiff's position, and that there was any representation that had legal effect, let alone a fraudulent misrepresentation.

(4) The plaintiff argues that the statement of belief or opinion may also amount to a statement of fact (see *McMahon and Binchy, Law of Torts, 4th edition* [2013] para. 35.09).

In this regard, the Court of Appeal found at para. 35 that the words attributable to Mr. Feeney "at most" amounted to a statement of opinion, but also found that no binding legal obligations were created which in my view has fatal consequences for

an argument based upon the suggestion that the statement of opinion amounts to a statement of fact which in turn amounted to a fraudulent misrepresentation of fact. It is noted that at para. 39 of the Court of Appeal decision it was held that there was clear acknowledgment of the limits of Mr. Feeney's authority. Further at para. 42 it is found that because the guarantee was not executed until 5th November, 2008, the appellant had ample opportunity to consider same. At para. 43 it is held that Clause 22.6 of the document executed by the appellant offers a complete answer to the appellant's claim regarding alleged representation.

(5) The within plaintiff argued that the defendant could not sensibly raise the issue of tort or fraud in the summary judgment proceedings.

However, in this regard as aforesaid it is clear from the submissions made in writing before the Court of Appeal that, in fact, the issues of tort and fraud were raised and at para. 34 of the judgment and it is clear that the Court had regard to such submissions and arguments advanced.

I am satisfied on the basis of the foregoing that the same issue arose in the prior proceedings as is now contended for in the existing statement of claim, namely, the effect of the asserted representations by Mr. Feeney on the plaintiff.

Necessity

36. The plaintiff argues that the issue on representation was not necessary to the decision of the Court of Appeal and therefore any finding with regard to the representation does not come within the ambit of issue estoppel. This argument is based on para. 45 of the Court of Appeal judgment when it is stated that quite separately s.101(1) of the 2009 Act is such that any representation is not enforceable against the claimant in the summary judgment proceedings.

37. The defendant counters that the alleged representations made by Mr. Feeney were raised by the within plaintiff in the prior proceedings in order to by-pass or otherwise avoid the implications of s.101 of the 2009 Act and suggests that any comment on s.101 is in fact obiter with the ratio of the judgment dealing with the representations.

38. In my view, it is clear from the submissions presented by both parties which were before the Court of Appeal identified that both parties were alive to the implications of s.101. Therefore, it seems to me that in presenting the submissions to the Court of Appeal the within plaintiff suggested that the representations were a condition precedent to a binding guarantee coming into effect. If the guarantee was not effective at the date of seeking summary judgment, it would be impossible, regardless of s.101, for NALM to secure summary judgment based upon a binding guarantee.

39. The plaintiff's argument in this regard now suggests that even if the Court of Appeal was satisfied that there was a condition precedent to the guarantee, nevertheless, s.101 would have enabled NALM to secure summary judgment. It is not possible to conceive how it could be the case that if the Court of Appeal found that there was a condition

precedent prior to the coming into effect of the guarantee which had not been fulfilled that, nevertheless, the guarantee could be relied upon under s.101 of the 2009 Act to fix the within plaintiff with responsibility on foot thereof.

40. The within case is not at all similar to the *Dublin County Council v. Taylor* matter dealt with by Mr. Justice Blayney where the District Court in that case dealt with an issue of no relevance, therefore, such a decision could not amount to issue estoppel.

41. I am satisfied in the circumstances that the decision of the Court of Appeal in respect of the nature of the alleged representations were necessary to the conclusion of the Court of Appeal.

Privy

42. On the issue of privy, in my view, the plaintiff is correct in his argument that the within defendant is not a privy of NALM insofar as assignment of estate is concerned. In this regard, s.101 of the 2009 Act does appear to limit the nature of the assignment of interest from Anglo to NALM. In addition, the plaintiff raises the argument that NALM may have been an assignee of Anglo, but Anglo is not an assignee of an estate from NALM.

43. The defendant relies on the *Gleeson v. Wippell* jurisprudence as adopted by the Court of Appeal in *Vico Limited v. The Governor and Company of Bank of Ireland*, on the basis that there is clear commonality of interest and therefore identity of interest between NALM and the within defendant with regard to the asserted representations.

44. The plaintiff, in defence of the summary judgment proceedings, sought to fix NALM with the asserted binding obligations entered into by Anglo, it is clear from the judgment of the Court of Appeal that this was a case which NALM had to meet. In the current proceedings, the plaintiff is seeking to fix the defendant with responsibility for the asserted representations.

45. I am satisfied, in the circumstances, that there is a sufficient degree of identity between NALM and the within defendant to establish a privy of interest between them in relation to the representations such that it is just to hold that the decision of the Court of Appeal is binding in the instant proceedings.

Conclusion

46. In order to establish tortious misrepresentation or fraudulent misrepresentation it is necessary for the within plaintiff to establish some representations made by the defendant to the plaintiff on which the plaintiff relied upon to his detriment.

47. The Court of Appeal has held that the asserted representations of Mr. Feeney at most amounted to a statement of opinion and did not give rise to any representation which became a term of the contract with the plaintiff by way of collateral warranty or otherwise. It held that there was no binding legal obligations created.

48. The Court of Appeal held that the asserted representations are vague, indistinct and incapable of displacing the express language in Clause 22.6 of the guarantee and that

clause offers a complete answer to the appellant's claim regarding alleged representation. The Court of Appeal held that *prima facie* evidence of a binding representation had not been made out by the appellant.

49. By reason of all of the foregoing findings by the Court of Appeal the alleged representation is not actionable. The entirety of the plaintiffs within claim is prefaced on actionable misrepresentation.

50. In all of the circumstances I am satisfied that issue estoppel arises as against the plaintiff in respect of the current proceedings so that the defendant is entitled to an order striking out the plaintiff's proceedings as being an abuse of process as same are precluded by issue estoppel.