APPROVED **[2023] IEHC 111**

THE HIGH COURT

2021 No. 398 S

BETWEEN

DENIS BROSNAN

PLAINTIFF

AND

G. GEOFFREY CRAMER

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 14 March 2023

INTRODUCTION

1. This judgment is delivered in respect of an application to enter summary judgment against the defendant pursuant to Order 37 of the Rules of the Superior Courts. It is alleged that the defendant is obliged to indemnify the plaintiff in respect of loan repayments made by the latter to Allied Irish Banks ("*AIB*"). AIB had granted a series of loans to the defendant as debtor, with the plaintiff acting as guarantor. The plaintiff contends that he has repaid a principal sum of €425,000 (together with interest) to AIB and is now entitled to an indemnity

from the defendant. The sum claimed by the plaintiff in these proceedings is €484,166.67 plus continuing interest. The interest claimed as of 11 June 2021 is €238,201.47.

2. The defendant seeks to resist the application for summary judgment on three grounds as follows. First, it is said that it had been agreed between the plaintiff and the defendant that any monies paid by the former on foot of the various guarantees were to be debts of a US company in respect of which both the plaintiff and defendant were shareholders. The company is known as Futures Group Inc. It is said by the defendant that all parties were agreed that the monies owing to AIB were a corporate debt and that they were not monies personally owed by the defendant. It is further said that the loan monies were recorded in the company's books as a corporate debt.

3. Secondly, the defendant makes the related point that the conduct and representations of the plaintiff gave rise to an estoppel. I understood this argument to be made in the alternative only, and as intended to address the contingency that a court might determine that the alleged agreement (described above) was not supported by valuable consideration and hence not enforceable as a matter of contract law. In such a contingency, the defendant seeks to rely on an estoppel instead. The factual matters relied upon are broadly similar to those relied upon in respect of the first ground.

4. Thirdly, it is said that almost all of the alleged debt is statute-barred. This third ground of defence is controversial in that the defendant had previously averred on affidavit that he would not be pursuing a defence under the Statute of Limitations.

5. It may be of assistance to the reader to flag at this early stage that there are significant factual disputes between the plaintiff and defendant in their respective affidavits. Moreover, the defendant has expressly averred as to the existence of the alleged agreement. Notwithstanding these factual disputes, the plaintiff invites the court to determine the proceedings conclusively on the basis of a summary hearing without oral evidence or cross-examination. The plaintiff submits that the proposed defence comprises no more than a "*bare assertion*" that an agreement had been entered into. The plaintiff is critical of what he says is the lack of detail or specificity in relation to the alleged agreement. It is said, for example, that the precise nature of the agreement changes throughout the documentation and that it is unclear as to whether or not the defendant asserts that the plaintiff is entitled to recover the monies, which he paid to AIB pursuant to the various guarantees, as against the company directly.

6. For the reasons which follow, I have concluded that the defendant should be granted leave to defend and that the case should be remitted to plenary hearing.

PRINCIPLES GOVERNING APPLICATION FOR SUMMARY JUDGMENT

7. The principles governing an application for summary judgment are well established. In brief, the court must assess whether the defence set out in the affidavits, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence to the claim. In deciding whether the defendant has a credible defence, the court should concentrate its attention on the matters put forward by the defendant. (*Aer Rianta cpt v. Ryanair Ltd (No 1)* [2001] 4 I.R. 607, [2002] 1 I.L.R.M. 381).

8. The term "*credible*" in relation to a defence has a very narrow meaning. A defence is not incredible simply because the judge is not inclined to believe the defendant. Rather, it must be clear that the defendant has no defence. (*Irish Bank Resolution Corporation v. McCaughey* [2014] IESC 44, [2014] 1 I.R. 749).

9. The proper approach to be taken to the assessment of disputed facts has been explained as follows by the Supreme Court in *Irish Bank Resolution Corporation v. McCaughey* (at paragraph 23 of the reported judgment):

> "Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

10. This theme has been addressed more recently by the Court of Appeal in *Allied Irish Bank plc v. Cuddy* [2020] IECA 211. Collins J. emphasised the following points (at paragraphs 65 to 68 of his judgment). It is important to avoid conflating the threshold that a defendant seeking to resist summary judgment is required to surmount (a threshold that all the relevant authorities emphasise is a low one), on the one hand, and the burden that will rest on such a defendant in the event that summary judgment is refused and leave to defend is granted, on the other. The relevant test is not, at this stage, one of "*cogent evidence*" and/or

"*written evidence*". It is, rather, whether "*credible*" evidence is before the court in the particular sense indicated in the authorities. That is not to suggest that the absence of such documentary evidence is irrelevant; it may be a factor, and an important factor, in assessing the credibility of a defence but the absence of documentary evidence does not necessarily require that the court refuse leave to defend.

11. There is one peculiar aspect of the present case which must be borne in mind in assessing whether the legal test for the grant of summary judgment is met. The plaintiff's case is predicated on his having an *equitable right* to recover from the defendant the monies paid out under the guarantees. The plaintiff cites in this regard the judgment of the Court of Appeal of England and Wales in *Morris v. Ford Motor Co. Ltd* [1973] Q.B. 792 (at 800) as follows:

> "When a surety pays off the debt, he is entitled in his own name to sue the principal debtor for the amount, or to sue his co-sureties for contribution. He is entitled to any securities which may have been given for the debt by the principal debtor to the creditor. These rights do not depend upon contract, but upon the established principles of the courts of equity."

12. The plaintiff also cites the judgment of the High Court (Finlay Geoghegan J.) in *In re Eylewood* [2010] IEHC 57, [2011] 1 I.L.R.M. 5.

13. The present case is not, therefore, a case where the debt is said to have arisen under a written contract between the parties. This feature distinguishes the present case from much of the case law relied upon by the plaintiff. The case law is typically concerned with circumstances where the debtor is seeking to rely on an oral agreement which contradicts the terms of a written contract between the parties (the existence of which written contract is not itself disputed). In such a scenario, a court may be prepared to dispose of the case in a summary manner,

on the basis that the defence relied upon by the debtor is not credible. The finding of a lack of credibility will be premised on an irreconcilable conflict between the terms of the written contract and the asserted oral agreement. The parol evidence rule often plays a role in such cases.

14. No such conflict between a written contract and an oral agreement arises in the present case. Rather, the plaintiff's claim is predicated on an equitable right. It is accepted by both sides that any such equitable right is capable of being overridden by an agreement, express or implied, between the parties or by an estoppel arising from the conduct of the parties. See, Andrews and Millet, *Law of Guarantees* (Sweet & Maxwell, 5th ed., 2015) at pages 437 to 438. There is no requirement that such an agreement have been reduced to writing. It follows that it is open, in principle, to a principal debtor to resist a claim for an indemnity by a guarantor on the basis of an *oral* agreement to the effect that no such indemnity is required. Put otherwise, the absence of a written agreement would not be fatal to the asserted defence at the full trial, and *a fortiori* cannot be determinative of the application to enter summary judgment: see, by analogy, *Allied Irish Bank plc v. Cuddy* (cited above).

15. Here, it is common case that the parties did not put in place any written agreement regulating the liability of the defendant, as principal debtor, to indemnify the plaintiff as guarantor. The defendant instead relies on an alleged oral agreement between them. The plaintiff, in an attempt to demonstrate that the defence is not credible, has sought to identify supposed inconsistencies between (i) the existence of such an oral agreement, and (ii) contemporaneous documentation which has been exhibited. Before turning to examine these

supposed inconsistences, it is appropriate first to say something about the factual background against which the oral agreement is alleged to have arisen.

OVERVIEW OF THE CIRCUMSTANCES OF THE CASE

16. The within proceedings take place against the backdrop of a wider dispute in respect of the ownership of a company known as Futures Group Inc (formerly Talent Group Inc). This wider dispute is the subject of ongoing litigation in North Carolina ("***the US proceedings***").

17. The company was incorporated in Delaware in the United States of America in the year 2005 and has its headquarters in North Carolina. All references in this judgment to "***the company***" or "***the corporation***" are intended to refer to Futures Group Inc.

18. The defendant is a US citizen and resides in North Carolina. The defendant had been one of the founders of the company. The defendant continues to be a director and shareholder of the company.

19. The plaintiff is an Irish citizen. The plaintiff had been the chairman of the board of Futures Group Inc from 2011 until his removal in March 2021. The plaintiff's daughter, Aimee Brosnan, was at all material times the company secretary.

20. The plaintiff and the defendant are related by marriage: the defendant married the plaintiff's daughter in 2008. The defendant and the plaintiff's daughter subsequently separated in 2020. Divorce proceedings between the two are currently pending in the United States of America, but it appears that those proceedings have been stayed to await the outcome of other litigation taken as between the plaintiff and the defendant.

21. The plaintiff has invested significant amounts of money in the company since 2006. At least some of these monies are said to have been paid pursuant to an instrument described as a "*convertible revolving promissory note*". This promissory note is dated 17 November 2006 and had initially been for a principal amount of $800,000. The plaintiff asserts that this had been increased to $1,500,000 on 6 August 2009. It appears that at least part of this debt may have been converted into stock and this is said to have resulted in the plaintiff now holding significant equity in the company. Indeed, the plaintiff asserts, in the US proceedings, that he is entitled to a majority shareholding in the company on the basis of the promissory note.

22. It appears that the company had been seeking loan facilities in 2007. The plaintiff asserts that, as a longstanding and trusted client of AIB, he had offered to make enquiries of AIB as to whether it would be willing to provide a loan to the company. The plaintiff further asserts that AIB responded by indicating that it would be unwilling to lend directly to a corporation based in the United States but would be willing to lend to the defendant personally on the basis that the plaintiff would act as guarantor for the loans. Thereafter, AIB provided a series of rolling loan facilities to the defendant over the period 2007 to 2018, with the plaintiff acting as guarantor pursuant to a series of guarantees. The loans were generally of two years duration.

23. It is common case that the proceeds of the AIB loans were paid over to the company. It is also common case that the plaintiff has since repaid a sum of €425,000 (together with interest thereon) to AIB. It is apparent from exhibited correspondence, first, that the plaintiff's daughter expressly references the repayments of the AIB loans being "*rolled*" into the debt owed by the company

to the plaintiff; and, secondly, that the plaintiff had been in direct negotiations with AIB in respect of the loans. (See, in particular, letter dated 5 February 2014 from the plaintiff to the business banking manager in AIB Limerick).

24. In an email of 17 November 2020, the plaintiff refers to his having "*paid off*" the AIB debt and interest. Tellingly, the plaintiff then includes the value of these loan repayments as part of the "*total debt*" which he claims is due to him by the company. This indicates that the plaintiff thought, at that time at least, that his conduct in repaying the AIB loans had resulted in the company becoming indebted to him and that he would be able to recoup the monies paid to AIB from the company.

25. Some months later, the US attorneys acting on behalf of the plaintiff alleged, in a letter dated 23 April 2021, that the plaintiff had loaned the company the principal amount of $3,230,808.67. It is alleged that these loans were made on an *ad hoc* basis as requested of the plaintiff by the company under an "*oral agreement*" that the loan would be repaid in a reasonable period of time when the company was able to stabilise its operations and produce positive cash flow. In contrast to the position adopted by the plaintiff in his email of 17 November 2020, the letter from the US attorneys of 23 April 2021 appears to have *excluded* the repayments made in respect of the AIB loans from the aggregate amount claimed against the company. This change in position occurred a matter of weeks prior to the plaintiff issuing a demand for payment against the defendant on 7 May 2021.

26. The plaintiff took no steps to recover from the defendant the monies paid to AIB until 2021, that is many years after the event. The position is summarised as follows by the defendant in his written legal submissions:

> "Mr Brosnan paid the overwhelming majority of the monies he paid to AIB in December 2010 and January 2012. It is common case that he did not demand the monies from Mr Cramer until the letter of demand from HOMS solicitors dated 7 May 2021. It begs the question – why did he not demand these significant monies from Mr Cramer for a decade at least? This is entirely consistent with an agreement between Mr Cramer and Mr Brosnan that he would not pursue Mr Cramer for the monies. Indeed, it is not in dispute that Mr Brosnan did not demand the monies until after (i) Aimee Brosnan and Mr Cramer's marriage was in difficulty and they had separated and (ii) the board of Directors of Futures had fallen out. All of this is consistent with Mr Cramer's defence."

THE ALLEGED INCONSISTENCIES

27. The plaintiff has pointed out what he insists are a series of inconsistencies in the defendant's case. In particular, it is said that the defendant's claim for the existence of an oral agreement is inconsistent with, or contradicted by, the following.

Promissory note of 30 May 2007

28. The plaintiff attaches significance to the fact that a promissory note, in favour of the defendant, was issued by the company on 30 May 2007. The promissory note is for a principal sum of €400,000 which coincides with the value of the loan facilities which had initially been granted by AIB to the defendant. The plaintiff submits that the very fact that such a promissory note had been entered into is inconsistent with the asserted defence. Attention is drawn to the fact that the promissory note does not make any reference to the contention that the liability in respect of any repayments under any associated guarantees are liabilities of the company. Attention is also drawn to the fact that the plaintiff is not a party to the promissory note.

29. In addition, the plaintiff invites the court to draw the inference that had a *parallel* agreement been entered into between the plaintiff and the defendant, whereby the plaintiff undertook not to seek any indemnity from the defendant in the event that payments were made pursuant to the guarantees, this too would have been reduced to writing. The plaintiff goes so far as to say that it is "*inconceivable*" that the alleged agreement would not have been recorded in writing. With respect, this averment is difficult to reconcile with the plaintiff's own reliance on an alleged *oral agreement* between him and the company (as set out in the correspondence from his US attorneys). Even on the plaintiff's own case, the company was prepared to enter into oral agreements in respect of very substantial sums of money.

30. None of these submissions by the plaintiff dents the credibility of the asserted defence. The very fact that the company executed a promissory note in favour of the defendant tends to confirm the allegation that the AIB loans were at all times being treated as a debt of the company rather than of the defendant. The defendant appears to have been careful to ensure that he had recourse as against the company. It would not have been inconsistent with this for the defendant to have sought to put in place a second safeguard, by obtaining an assurance from the plaintiff that he would not seek an indemnity from him. It is ultimately a matter for the trial judge to determine whether such an assurance was provided. For present purposes, it is sufficient to find that the asserted defence is not lacking in credibility. It is perfectly plausible that the defendant would have sought and obtained such an assurance from the plaintiff, who was, after all, his father-in-law and a substantial shareholder in the company.

31. It will also be recalled that the plaintiff himself has sought to rely on the existence of an earlier promissory note between himself and the company. The plaintiff also seeks to assert that the company had entered an *oral agreement* with him to repay the *ad hoc* loans which he had made to the company.

32. For completeness, it should be noted that counsel on behalf of the plaintiff sought to suggest that the defendant, in a later affidavit, had attempted to "*disavow*" the promissory note of 30 May 2007. With respect, this is not how I understand the affidavit evidence. The point made on affidavit is that the promissory note was drafted by and/or put forward by agents of the plaintiff. This statement is not, however, made in the context of a suggestion that the promissory note was entered into under duress or that it was in some way contrived. Rather, the natural and ordinary meaning of the affidavit is that the defendant is citing this alleged conduct on the part of the plaintiff as evidencing that the plaintiff had been intimately involved in the affairs of the company even before he formally became a director in 2011.

Pleadings in US proceedings

33. The plaintiff seeks to attach great significance to the content of the pleadings in the litigation taken by the defendant in North Carolina ("***the US proceedings***"). More specifically, the plaintiff submits that the defendant's case, as pleaded in the US proceedings, is inconsistent with the position adopted in the present proceedings. It is submitted that the position adopted for the purpose of the US proceedings is that the plaintiff has no right to recover as against the company and that this, by implication, confirms that the intended remedy or recourse for the plaintiff, in the event of his repaying the AIB loans, was to be an indemnity as against the defendant personally.

34. With respect, this submission is not borne out by a consideration of the pleadings in the US proceedings. The precise point being made in the US proceedings is that all parties were treating the AIB loans as a debt of the company rather than a debt of the two individuals. This is set out, in terms, at paragraphs 12 to 15 of the "*complaint*" filed in the US proceedings.

35. Counsel for the plaintiff has sought to argue that there is a contradiction between these pleas and the prayer for relief. This argument overlooks the fact that the US proceedings take the form of an action for what is described as a "*negative declaration*". More specifically, the proceedings seek to address a much wider dispute between the parties as to the shareholding in the company. The prayer for relief reads as follows:

> "Accordingly, Plaintiffs seek a judicial declaration from this Court that Defendant is not entitled to recover the First Alleged Debt, the Demanded Shares, or the Alternative Alleged Debt from Futures or Cramer or, alternatively, the sum and/or shares due and justly owed".

36. As appears, the relief is framed as two alternatives, with a view to allowing the US Court reach whatever determination it considers appropriate on the dispute.

37. For similar reasons, the weight which the plaintiff seeks to attach to the US Court's ruling on jurisdiction is also misplaced. The ruling makes it clear that the case being made is that the AIB loans are a debt of the company. See, in particular, paragraph 15 of the ruling where it is recorded that the parties disagree regarding who is responsible for reimbursing Mr. Brosnan for repaying the AIB loans, with the contention being advanced on behalf of the company and Mr. Cramer that there had been a further agreement among the parties that shifted the repayment obligation onto the company. This summary is entirely consistent with the case being made by the defendant in the present proceedings.

Minutes of board meetings of the company

38. The plaintiff seeks to characterise the alleged oral agreement as one of "*momentous effect*" and submits that had such an agreement been made between the plaintiff and the defendant, then it would have been clearly set out in the minutes of the board meetings of the company. It is further submitted that it is clear from the minutes which have been exhibited that the minutes were "*extremely detailed*" and had been prepared by an "*extremely experienced company practitioner*" in North Carolina.

39. With respect, the absence of a minute which is supportive of the defendant's case does not represent the type of inconsistency or contradiction which would justify this court dismissing the defendant's sworn evidence as lacking credibility. There are a number of plausible reasons as to why such minutes might not exist. In particular, the contemporaneous correspondence suggests that the financial affairs of the company were conducted informally, with the distinction between personal debt and corporate debt being blurred. See, in particular, the correspondence between the plaintiff, the plaintiff's daughter and AIB.

40. Moreover, it is difficult to square the plaintiff's submission with the stance adopted on his behalf by his US attorneys whereby he himself relies on a supposed *oral agreement* between him and the company whereby loans said to have been made by him on an *ad hoc* basis were to be repaid.

Contractual documentation with AIB

41. The plaintiff has sought to suggest that there is a contradiction between the asserted defence and the contractual documentation executed with AIB. In particular, attention is drawn to the fact that AIB's general terms and conditions

preclude the defendant from assigning his indebtedness. It is sought to characterise the oral agreement as a collateral agreement, with the implications which that carries.

42. With respect, this submission tends to miss the point that the dispute in the present case is one between the plaintiff and the defendant *inter se*; and does not involve AIB. It forms no part of the defendant's case to suggest that AIB had agreed to waive its rights as against either the defendant, as principal debtor, or the plaintiff as guarantor. Indeed, it is common case that the loans to AIB have been repaid in full. The dispute centres, instead, on the separate and distinct issue of whether the plaintiff is entitled to an indemnity as against the defendant, or, alternatively, whether the plaintiff had agreed or represented that he would not seek such an indemnity. The existence of such an agreement or representation is a matter between the plaintiff and defendant *inter se* and does not cut against or contradict the contractual documentation with AIB.

ASSERTED DEFENCE MEETS THE CREDIBILITY THRESHOLD

43. For the reasons which follow, I have concluded that the asserted defence is credible.

44. The plaintiff appears to have been an active participant in the affairs of the company; to have had a much more hands on involvement in the AIB loans than would normally be expected of a mere guarantor; and to have blurred the distinction between the personal loans and guarantees, on the one hand, and debts of the company, on the other. The plaintiff appears to have been treating the monies expended by him in repaying the AIB loans as forming part of a much larger debt which the company is required to reimburse to him pursuant to an

oral agreement. More generally, there was a very close family relationship between the plaintiff and the defendant. Against this backdrop, it is entirely plausible that the plaintiff had either agreed or represented that he would not seek to recover the monies from the defendant personally.

45. The decision to pursue a claim against the defendant appears to have been reached only recently. The absence, to date, of any convincing explanation by the plaintiff for his failure to pursue a claim against the defendant until almost a decade had lapsed since the payments were made to AIB adds further credibility to the asserted defence.

46. For the reasons outlined under the previous heading, the plaintiff has failed to establish that the credibility of the asserted defence is undermined by supposed inconsistencies between the existence of the alleged agreement and/or representation, on the one hand, and the content of contemporaneous documentation, on the other.

47. Finally, some weight has to be attached to the fact that three witnesses, namely, Mr Culver, Mr Kleiner and Ms Romeo; have filed affidavits which might be characterised as corroborating some aspects of the defendant's version of events. The first two of these witnesses are former board members and have filed short affidavits in very similar terms to the effect that the AIB loans were always referred to as business debts incurred by the company. The third witness has filed a short affidavit describing how the AIB loans have been treated in the more recent accounts of the company. This affidavit, which has not as yet been controverted, suggests that the company secretary at all times instructed Ms Romeo that the AIB loans were a debt of the company, and that the plaintiff

may have approved financial statements and federal income tax returns which recorded them as such when he was on the board of directors.

48. Counsel on behalf of the plaintiff has been critical of the lack of detail in these various affidavits, and has described the first two affidavits as being "*template affidavits*". Nevertheless it is of some relevance to the assessment of the credibility of the asserted defence that it is supported by other witnesses. It will ultimately be a matter for the trial judge to assess the credibility of these witnesses following cross-examination.

49. It was also suggested that the final paragraph in these two affidavits, which refers to the plaintiff having "*written off*" certain debts, should in some way be regarded as inconsistent with the overall case being made. These criticisms are unfounded. On their ordinary and natural meaning, these affidavits record the plaintiff as having regarded the company as worthless and to that extent written off the debt in his own mind as it were. There is no suggestion that any formal steps to write down the debt or expunge the debt were taken. Rather the phrase "*written off*" appears to have been used in its more colloquial sense.

THE STATUTE OF LIMITATIONS

50. On the plaintiff's own case, most of the monies paid out by him pursuant to the guarantees had been paid out by January 2012. More specifically, two payments of €200,000 (together with interest) were made in December 2010 and January 2012, respectively. No demand was made of the defendant, however, until 7 May 2021, and these proceedings did not issue until 24 June 2021.

51. The defendant now submits that much of the claim is statute-barred. Counsel cites in this regard passages from Andrews and Millet (*op. cit.*) at pages 448

and 449, and Canny, *Limitation of Actions* (Round Hall, 3rd ed., 2022) at §10-22, as authority for the proposition that any cause of action would have accrued on the respective dates upon which the monies were paid by the plaintiff as guarantor. The defendant has conceded (at paragraph 40 of his first affidavit) that the monies had been *acknowledged* as debt owing to the defendant on dates within six years of the institution of the proceedings. It is now submitted, however, that insofar as there have been acknowledgements, same were made *on behalf of the company* and do not preclude the defendant personally from relying on the Statute of Limitations.

52. In response, counsel on behalf of the plaintiff points out, correctly, that the defendant had stated in his first affidavit that he does not seek to rely on a defence under the Statute of Limitations.

53. It would appear, on the basis of the leading textbooks cited, that there is a credible defence available to the defendant under the Statute of Limitations. The point is certainly arguable, and it is unnecessary and inappropriate for this court to go any further in the consideration of such a defence as part of an application to enter summary judgment. The position is complicated, however, by the fact that the defendant, in his first affidavit, expressly stated that he would not be relying upon the Statute of Limitations.

54. The High Court has a discretion, under Order 37, rule 10, to impose conditions on the grant of leave to defend. Relevantly, the court may impose, as a condition of the grant of leave to defend, a stipulation that the defendant might only plead those defences which have been found to meet the "*credible defence*" threshold. The defendant has raised a credible defence under the Statute of Limitations. The question which now arises is whether the court should nevertheless deny the

defendant the right to plead such a defence because of his earlier averment that he did not intend to assert such a defence. Put otherwise, should the court insist that the defendant be held to his earlier stance, by making it a condition of the grant of leave to defend that the defendant not plead the Statute of Limitations.

55. For the following reasons, I have concluded that it would not be in the interests of justice to restrict the leave to defend in this way.

56. The Court of Appeal has explained in *National Asset Loan Management Ltd v. Kelleher* [2016] IECA 118, [2016] 3 I.R. 568 that the objective of the filter mechanism provided under Order 37 is to enable the court to strike an appropriate balance between (i) a plaintiff's right to obtain an expeditious judgment for a debt claimed to be due, and (ii) a defendant's right to have a reasonable opportunity to advance his defence to that claim by being given leave to defend. It is consistent with this objective and with the fair, efficient and cost-effective administration of justice that the court may impose terms restricting the defence to that which meets the "*credible defence*" threshold. A defendant should not be permitted to pursue, to full hearing, a defence which has been held not to meet the threshold. To permit this to happen would cause unnecessary delay and cost to a plaintiff.

57. Returning to the particular circumstances of the present case, it would not advance the objectives underlying Order 37 to preclude the defendant from including a plea in respect of the Statute of Limitations in his defence to the proceedings. It is not the purpose of procedural rules to "*punish*" litigants for their mistakes. The guiding principle in the application of procedural rules is that, where this can be done fairly, the court should seek to ensure that the real issues in controversy between the parties are brought before the court for

determination. Unless irremediable prejudice would be caused to the other side, the defendant should be entitled to raise all credible defences to the proceedings. In circumstances where the case is to be remitted to plenary hearing in any event, it will not add greatly to the cost and duration of that hearing to allow the asserted defence under the Statute of Limitations to be pursued in addition to the issues identified in respect of the existence of an agreement and/or representation not to seek an indemnity.

58. In this regard, a useful analogy might be drawn with the position in relation to the amendment of pleadings. Suppose that a party sought to amend their pleadings so as to introduce, for the first time, a plea that the claim against them was statute-barred. The case law indicates that an amendment, which allows the real questions in controversy between the parties to be determined, should generally be allowed unless to do so would cause prejudice to the other side which prejudice cannot be remedied by an appropriate costs order or an adjournment.

59. Provided always that the "*credible defence*" threshold has been met, it is not obvious to me why a more exacting standard should apply under Order 37 than would apply to an application to amend pleadings. It would be unduly harsh to hold the defendant in the present case to the position initially adopted by him in respect to the Statute of Limitations in circumstances where it would not cause any prejudice to the other side to allow a change in position. These proceedings will have to be adjourned to plenary hearing irrespective of whether the defendant is permitted to pursue a defence under the Statute of Limitations. This is because the substantive defence raised by the defendant, namely that the plaintiff is not entitled to an indemnity because of an earlier agreement and/or

representation, meets the "*credible defence*" threshold and this defence can only be fairly adjudicated upon by reference to oral evidence and cross-examination. The practical reality, therefore, is that there will be a significant lead time before these proceedings are heard and determined. The parties will require time to exchange pleadings and to make discovery of documents. It will not make any material difference to the length of this lead time were the defendant to be permitted to pursue a defence under the Statute of Limitations, *in addition* to what might be described as his substantive defence. To continue the analogy with an application to amend pleadings, this is not a case where one or other party seeks to change position at the eleventh hour, shortly before the scheduled trial date. Rather, the formal pleadings in the present case have yet to be exchanged and no trial date has yet been fixed. In a sense, now that the matter is to be remitted to plenary hearing, following the exchange of pleadings, the proceedings have returned to square one.

60. At the risk of belabouring the point, the foregoing analysis is all premised on the fact that this court has found that the defence under the Statute of Limitations meets the "*credible defence*" threshold. If this threshold had not been met, the leave to defend would have excluded any defence under the Statute of Limitations.

CONCLUSION AND PROPOSED FORM OF ORDER

61. For the reasons explained herein, I have concluded that the asserted defence is credible. This is not a straightforward case whereby a guarantor seeks an indemnity against the principal debtor. Rather, the circumstances of the case are such that it is credible that the plaintiff either expressly agreed or implicitly

represented that he would not seek an indemnity against the defendant. The relevant circumstances include the close family relationship between the plaintiff and the defendant, and the blurring of the distinction between personal debt and the debt of the company. Further, the plaintiff himself appears, until very recently, to have characterised his repayment of the AIB loans as adding to the "*total debt*" which he claims is due to him by the company. This gives credibility to the assertion that the parties had agreed that recourse was to be had against the company not the defendant.

62. Accordingly, it is not appropriate to enter summary judgment but rather the defendant should be granted leave to defend the proceedings and the proceedings will be remitted to plenary hearing. For the reasons explained at paragraphs 50 to 60 above, I have decided that the defendant is not to be precluded from asserting a defence under the Statute of Limitations.

63. This matter will be listed before me on Monday 27 March 2023 at 10.30 am for directions and to address the allocation of legal costs. The parties are requested to attempt to agree, in the interim, a timetable for the exchange of pleadings and the discovery of documents.

Appearances

Andrew Walker SC and Martin Scanlon for the plaintiff instructed by Holmes O'Malley Sexton LLP
John O'Regan for the defendant instructed by Crowley Millar Solicitors LLP

Approved Garrett Simons