THE COURT OF APPEAL

Neutral Citation No. [2021] IECA 170

Court of Appeal Record No. 2017/566

High Court Record No. 2014/2228S

Woulfe J.
Costello J.
Haughton J.

Between

ALLIED IRISH BANK PLC

PLAINTIFF/RESPONDENT

AND

G.R.O. OIL LIMITED, ANTON HUNT, ANTHONY MCCARTHY, MAURICE O'DONOVAN, DANIEL JOSEPH O'SULLIVAN, EDWARD DRAPER, GERARD CORKERY, JAMES O'DONOVAN, STEPHEN SHORTEN, ROY KINGSTON AND MICHAEL O'RIAIN

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Woulfe delivered on the 11th day of June, 2021

Introduction

1. This appeal was brought by the third, fourth, fifth, eight, ninth and tenth named defendants (hereafter "the participating defendants") against the judgment and order of the High Court (O'Regan J.) made on the 28th November, 2017. By this order the learned trial judge refused the participating defendants' application for a declaration that the plaintiff is estopped from seeking to enter final judgment for any sum in excess of €1,100,000 as against those defendants, and each of them or any of them, and refused an order preventing the plaintiff from taking any further steps in the proceedings to seek judgment for any amount in excess of €1,100,000, and also granted the plaintiff the costs of the motion.

2. The reliefs sought by the participating defendants were not sought in the context of a defence to the summary proceedings brought by the plaintiff, but rather by way of a stand-alone, discrete application. The participating defendants were represented by solicitor and counsel during the course of these proceedings, including at the hearing of this appeal.

Background

3. In the early 2000's a group of farmers came together with a view to growing and producing rapeseed oil to service the growing biodiesel market. Initially the enterprise was on a relatively informal footing but over time became more formalised and the group

of farmers, namely the second to eleventh named defendants herein, decided to purchase a biodiesel processing site in County Tipperary.

4. In or about late 2004, the defendants decided to set up a company to operate the enterprise, and the first named defendant (hereafter "the company") was incorporated. In 2008 the plaintiff loaned the sum of €2,280,000 to the company for the purposes of purchasing the site in County Tipperary for the proposed biodiesel plant. All of the individual defendants signed personal guarantees in respect of the monies loaned to the company.

5. As of 2006, the Government and the European Union were encouraging green energy projects, and the company qualified for a start-up "leader" grant of €60,000 in 2007. However, shortly after the loan was drawn down by the company, the Government changed its policy on biodiesel and a number of grant schemes were cancelled. Coupled with the downturn in the economy and farming overall, the project quickly became unviable.

6. The company's loan account fell into arrears at an early stage, and demand was made of the company in August, 2013, and subsequently of the individual defendants on foot of their personal guarantees in September, 2013.

The High Court Proceedings

7. These proceedings were commenced by summary summons dated the 4th September, 2014, wherein the plaintiff sought judgment as against each of the second to eleventh named defendants, on a joint and several basis, in the sum of €2,180,000. The matter came before the Master of the High Court pursuant to a notice of motion issued on the 24th November, 2014, seeking liberty to enter final judgment. The proceedings travelled through the Master's Court, the High Court common law motion list and the High Court non-jury list and ultimately they were set down for hearing on the 7th December, 2016, in the non-jury list of the High Court sitting in Cork.

8. A series of affidavits were exchanged between the parties during the course of the proceedings, and in the course of same the defendants sought to raise an arguable defence and to have the proceedings sent forward for plenary hearing. At the same time, prior to the matter coming on for hearing, the participating defendants came together with a view to making a settlement offer to the plaintiff. Negotiations were entered into between the plaintiff and the participating defendants, and further details of these negotiations will be considered later in this judgment.

9. On the 7th December, 2016, the parties travelled to the High Court sitting in Cork. Having reached an advanced stage in the negotiating process, the participating parties consented to the motion for judgment being adjourned back to a date in January 2017 for mention only. The plaintiff proceeded with its motion as against the non-participating defendants, and was successful in obtaining judgment on the second day of that hearing. Throughout the course of Wednesday the 7th December, 2016, counsel for the plaintiff and counsel for the participating defendants had detailed discussions regarding the precise terms of a

possible settlement. A draft settlement agreement was drawn up by counsel, printed off and considered by the parties. Ultimately a written settlement agreement was never executed by both sides, and on the 14th June, 2017 the participating defendants issued a notice of motion as against the plaintiff seeking the following reliefs:-

(i) A declaration that the plaintiff is estopped from seeking to enter final judgment for any sum in excess of €1.1m.

(ii) An order preventing the plaintiff from taking any further steps in the proceedings to seek judgment for any amount in excess of €1.1m.

(iii) Such further or other order as to this honourable Court shall seem fit and just in the circumstances of the case.

10. A further series of affidavits were exchanged between the participating parties during the course of the proceedings in relation to this motion. It is necessary to set out the affidavit evidence in some detail in order to understand the precise issues arising and the conclusions reached by the trial judge. In her first affidavit sworn on the 13th June, 2017, Ms. O'Driscoll, the solicitor for the fifth and tenth named defendants, set out details of the negotiations which had taken place between the plaintiff and the participating defendants in an effort to compromise the proceedings. She explained how, after much discussion, each of the individual six participating defendants had agreed to put the sum of €150,000 into a central fund which would then form a collective offer to the plaintiff of €900,000, and this offer was put to counsel for the plaintiff in late July, 2016. In late October, 2016 the plaintiff reverted and looked for the sum of €1.3m from the participating defendants, and in addition to that a sworn statement of means from each of them. Counsel for the participating defendants put a figure of €1m to counsel for the plaintiff which was rejected, but ultimately an indication was given that €1.1m would be acceptable. It is stated that this figure of €1.1m "was settled on and played no further part in negotiations".

11. Ms. O'Driscoll goes on to describe how the participating defendants set about preparing sworn statements of means "once the amount to be paid was agreed". Within the statement of means they listed all of their assets, including those which had nothing to do with the security provided in respect of the personal guarantee, the subject matter of these proceedings. The participating defendants acted with utmost good faith and honesty "on the basis that agreement had been reached". The figures involved in the settlement by each of the fifth and tenth named defendants would require lands that their families had farmed for generations to be sold, or utilised as security for borrowings the basis of a first legal charge, which was a cause of hardship and emotion for these defendants and their families.

12. Ms. O'Driscoll then turns to what happened in Cork on the 7th December, 2016, the date the plaintiff's motion for summary judgment was listed for hearing. She states that throughout the course of that day counsel for the plaintiff and counsel for the participating defendants had numerous and detailed discussions regarding the precise

terms of settlement. A draft settlement agreement was drawn up by all of the counsel involved, printed off and considered by all the parties. The details negotiated included the timescale for payment, which was agreed as being nine months. Furthermore, a number of ancillary details were agreed upon.

13. Ms. O'Driscoll avers that it was the intention of the participating defendants to sign the settlement agreement when negotiations concluded on the 7th December, 2016, as time was of the essence for them, given their requirement to sell some land in order to meet their obligations "under that deal". However, counsel for the plaintiff indicated that "certain matters would need further approval and the plaintiff would not be in a position to sign and enter into the agreement on that date". Accordingly, the matter was adjourned back to a date in January, 2017 for mention only.

14. Notwithstanding the fact that the settlement agreement was not executed on that date, Ms. O'Driscoll says that it was the firm belief of the participating defendants that "a deal was all but reached". She states that this belief was evidenced by the fact that the participating defendants entered into a written agreement on that date amongst themselves to ensure that the €1.1m would be in place within nine months. Furthermore, the fifth named defendant set about selling some lands, and the tenth named defendant engaged in refinancing, in order to be in a position to pay the settlement sum.

15. Ms. O'Driscoll states that certain amendments to the draft settlement agreement, as sought by the plaintiff, were accepted by the participating defendants on the 20th December, 2016, and as of that date the participating defendants understood that a final version had been agreed upon and "the only thing outstanding was formal approval from the bank's Credit Committee". This was not immediately forthcoming, however, and the matter was adjourned when listed for mention on three occasions in early 2017. During this period no further negotiations regarding any term of the draft settlement agreement took place. It appears that the plaintiff did, however, raise queries in respect of the statement of means of the eight named defendant, although Ms. O'Driscoll was not privy to the nature of those queries.

16. Ms. O'Driscoll then deals with the collapse of the deal or proposed deal in March, 2017. By letter dated the 22nd March, 2017, the plaintiff's solicitors wrote to each of the solicitors for the participating defendants and stated:-

> "We confirm that our client has considered the settlement proposal put forward on behalf of your clients and the other participating defendants. However, our client is not in a position to accept same".

In her reply dated the 29th March, 2017, Ms. O'Driscoll complained that this letter raised the issue that her clients had acted to their detriment in the course of the proceedings by providing statements of means which the plaintiff would not ordinarily have been entitled to see without an order for discovery in aid of execution, and did so on the basis of the plaintiff's representation that it would accept the sum of €1.1m along with sworn statements of means to resolve the matter.

17. In their further letter dated the 13th April, 2017, the solicitors for the plaintiff stated that at all times any offer forwarded by the participating defendants was subject to receipt of sworn net worth statements and subject to Credit Committee approval, and that these requirements are well known standard requirements for financial institutions which must be complied with before a financial institution can enter into a settlement agreement. No explanation was provided as to why the approval of the Credit Committee was not forthcoming.

18. Ms. O'Driscoll concludes her first affidavit by alleging bad faith on the part of the plaintiff. She suggests that its behaviour shows that it entered into a negotiation for ulterior motives, so as to allow it to fully ascertain the financial position of the participating defendants by inducing them to provide detailed statements of means. The participating defendants had acted to their detriment in providing the information sought by the bank, in that any negotiation position that they might have taken prior to the information being made available to the plaintiff had now been entirely exterminated. By providing the information to the plaintiff, and by placing their land on the open market and by entering into refinancing arrangements with other financial institutions, the participating defendant had acted to their detriment on foot of the plaintiff acting in bad faith. Finally, under the heading "estoppel", she says that prior to the commencement of the negotiations there was in existence a legal relationship in which both the plaintiff and the participating defendants owed each other a duty not to act unconscionably towards each other, and that as a result of the plaintiff's bad faith, the participating defendants had acted to their detriment.

19. A very similar affidavit was sworn by Mr. James Long, solicitor for the third, fourth and ninth named defendants, dated the 31st August, 2017. In his affidavit he makes identical averments regarding the negotiations which took place between the parties, and the firm belief of the participating defendants as of the 7th December, 2016, that "a deal was all but reached". As regards steps taken by his clients on foot of that belief, the third named defendant set about procuring the required funds by endeavouring to put three Dublin properties up for sale. The fourth named defendant put lands at Kinsale up for sale. The ninth named defendant applied for a loan facility and had to draw down that facility in early March, 2017. Mr. Long again alleges that the participating defendants acted to their detriment as a result of the plaintiff acting in bad faith.

20. These participating defendants' claims about bad faith on the part of the plaintiff were completely rejected in a replying affidavit sworn by Ms. Breda Sheahan, the solicitor for the plaintiff. In her first affidavit sworn on the 19th September, 2017, Ms. Sheahan avers that at no time did the parties enter into any form of concluded or binding settlement agreement. She states that the participating defendants were at all times aware that any settlement proposal was (a) subject to and conditional upon the provision of financial information by the participating defendants to the plaintiff (by way of standard financial statements/statements of means) and following that (b) subject to and conditional upon approval by the plaintiff's Credit Committee. This fundamental conditionality to the

reaching of any concluded agreement was made clear throughout all settlement discussions to the participating defendants.

21. Ms. Sheahan states that the participating defendants, all of whom were represented by solicitors and counsel, at no time during the discussions held in December, 2016 raised any issue whatsoever regarding these conditions. Following consideration of the proposal by the plaintiff's Credit Committee, the proposal was rejected. The plaintiff, it is submitted, was perfectly entitled to reject the proposal. Any argument to the effect that the plaintiff has somehow acted in bad faith by rejecting the proposal is not understood, particularly in circumstances where at all material times the proposal, being subject to Credit Committee approval, was either to be approved or rejected.

22. As regards any steps taken by the participating defendants to sell lands or to raise finance, based on an alleged understanding that an agreement had been reached, Ms. Sheahan states that at the time that any such steps were taken, no concluded agreement had been reached between the parties with regard to a compromise.

23. Ms. Sheahan then deals with the allegation that the plaintiff entered negotiations for ulterior motives. Firstly, insofar as Ms. O'Driscoll was suggesting that the plaintiff had now obtained some form of collateral advantage by reason of being made aware of the participating defendants' financial information, or indeed that the defendants had been put at some disadvantage, it was submitted that in the context of the within summary judgment proceedings, neither side's positions had been altered or prejudiced in any way. It remained the case that the plaintiff is required to demonstrate, to the satisfaction of the High Court, an entitlement to obtain summary judgment against the participating defendants. Secondly, with regard to Ms. O'Driscoll's argument that the negotiation position that the participating defendants may have taken, prior to the financial information being made available to the plaintiff, had now been entirely exterminated, Ms. Sheahan suggests that it is noteworthy that Ms. O'Driscoll does not draw the Court's attention to her firm's letter of the 18th April, 2017, wherein the plaintiff agreed, inter alia, to return all documentation furnished to it during the negotiation process to the participating defendants, and to furnish an affidavit confirming (a) that all such documentation had been returned, and (b) that any copies had been permanently destroyed.

24. The next affidavit was sworn by Ms. Denise Kelleher, solicitor for the eighth named defendant, on the 23rd October, 2017, and contains many similar averments to those in the affidavits of Ms. O'Driscoll and Mr. Long. Ms. Kelleher states that due to the manner in which the negotiations continued, the level of detail and efforts that the parties went to in relation to the written terms of the agreement, the tacit acceptance by the plaintiff of the figure offered, the steps taken by the defendants to give furtherance to the agreement, and the fact that the plaintiff patently negotiated in bad faith, the plaintiff is estopped from seeking to enforce any figure higher than the sum of €1.1m. Her client had spent extensive time preparing his statement of means and provided extensive vouching in respect of the matters therein, and had acted on the basis that agreement had been

reached, subject to the provision of the sworn statement of means. Ms. Kelleher says that the fact that the plaintiff sought the said statement of means is "tacit acceptance of the fact that an agreement had been reached".

25. As regards the events in Cork on the 7th December, 2016, Ms. Kelleher states that while it was initially envisaged, and indeed understood by her client, that the agreement was to be executed by the parties on that date in Cork, counsel for the plaintiff informed the participating defendants' representatives that his client's Credit Committee would have to "okay" the agreement before it could be executed. She says that this came "as somewhat of a surprise", as the level of detail of the discussions and in the written agreement was clearly such that same could only have been done on foot of detailed instructions on all sides.

26. Ms. Kelleher then turned to the interaction between her client and the plaintiff regarding his statement of means in early 2017. She exhibits correspondence wherein the plaintiff raised queries regarding the net worth statement furnished by her client, including queries as to why certain property had not been included in his net worth statement or in previous net worth statements. Ms. Kelleher states that at all material times she sought clarification from her client as to the nature of the requests from the plaintiff, and furthermore acted speedily and without delay in obtaining all of the information sought by the plaintiff, and that the queries raised by the plaintiff were fully dealt with in the correspondence.

27. Ms. Kelleher then makes reference to what she describes as "a very strange letter" from the plaintiff received by her on the 9th February, 2017, which letter was sent to each of the solicitors for the participating defendants. She states that the letter threatened that the plaintiff would abandon settlement in default of consent to a six week adjournment, and of particular concern was the fact that the basis for the threat was the purported failure on the part of her client to provide full information. The relevant portion of the letter referred to queries with regard to a sworn net worth statement received from one of the participating defendants, and stated that "until all queries are answered in a satisfactory manner, particularly as to why certain assets were not declared on the net worth statement, then our client will not be in position to provide the participating defendants with a decision". Ms. Kelleher states that this reference was to her client, the eighth named defendant, and was disingenuous when one considers the correspondence that passed between her office and the plaintiff's solicitors, as one sees that all information was provided promptly.

28. Ms. Kelleher also refers to a similar assertion which was made around this time on one of the occasions that the matter was listed for mention, when the Deputy Master presiding questioned why the matter was being continually adjourned. On this occasion, counsel for the plaintiff stated to the Court that one of the defendants (her client) had not been fully forthcoming with information pertaining to his statement of means. Ms. Kelleher avers that the assertion that her client was in some way "recalcitrant" caused disquiet among

the other participating defendants, and suggests that the fact that the assertion was baseless is disappointing.

29. Ms. Kelleher then turns to the correspondence around the collapse of the compromise or proposed compromise in March, 2017, as previously dealt with in the first affidavit of Ms. O'Driscoll and summarised above. As regards the plaintiff's letter dated the 22nd March, 2017, stating that the plaintiff "is not in a position to accept" the settlement proposal, Ms. Kelleher says that no explanation was proffered for this decision and that the letter came as a huge surprise to her, and she again raises the spectre of bad faith on the part of the plaintiff. She states that there was some concern amongst the participating defendants that the collapse was in some way caused by her client, but she suggests that it is again evident that this was not the case.

30. Ms. Kelleher concludes her affidavit by stating, in a manner similar to the other deponents on behalf of the participating defendants, that the eighth named defendant acted to his detriment in providing a considerable level of personal information to the plaintiff. She suggests that even if the plaintiff obtained judgment as against her client, it is unlikely that it would ever obtain an order for disclosure in aid of execution of the level of information provided. She says that the only reason that her client provided this information to the plaintiff was on the basis that the plaintiff was seeking it on a *bona fide* basis, and for the purposes of giving effect to the compromise that had been reached. It was apparent to her that the sole purpose of the "negotiations" leading to detailed written terms of agreement was to ascertain the financial position of the participating defendants, and she says that the plaintiff was negotiating in bad faith in so doing and that such behaviour is unconscionable.

31. Many of the claims made by Ms. Kelleher were rejected in a second replying affidavit sworn by Ms. Sheahan, the solicitor for the plaintiff, on the 16th November, 2017. She notes Ms. Kelleher's averment that the plaintiff is estopped from seeking to enforce any figure higher than €1.1m by reason of a number of matters, including the "tacit acceptance" by the plaintiff of the figure offered and "the fact that the plaintiff bank patently negotiated in bad faith". She confirms that it is not accepted on behalf of the plaintiff that there was at any stage any apparent acceptance such as would bring about a situation of estoppel, and she refutes that the plaintiff negotiated in bad faith.

32. As regards Ms. Kelleher's claim that the fact that the plaintiff sought statements of means from the participating defendants is "tacit agreement of the fact that an agreement had been reached", Ms. Sheahan states that this argument belies the true nature of the interaction between the parties in late 2016 and into 2017. She refers back to what she said in her first affidavit, as to the participating defendants' representatives being at all times well aware as to the conditional nature of any settlement, and says that this does not appear to be contradicted by Ms. Kelleher, who had described in her own words how the plaintiff's counsel had stated on the 7th December, 2016, that the plaintiff's Credit Committee "would have to okay the agreement before it could be executed".

33. Ms. Sheahan then deals with the interaction between the plaintiff and the eighth named defendant in early 2017, regarding the provision of financial information. She suggests that far from the correspondence demonstrating an absence of good faith on the part of the plaintiff, the correspondence demonstrates that the plaintiff fully engaged in the negotiation process. As regards the letter of the 9th February, 2017, sent by the plaintiff (which Ms. Kelleher had described as "a very strange" letter), while it is not accepted by Ms. Sheahan that the plaintiff or its representatives made any form of disingenuous representations, she suggests that it is of some importance to note that in that letter clear reference is made to two possible outcomes (emphasis added by Ms. Sheahan), namely the acceptance or refusal of the settlement proposal put forward.

The High Court Judgment

34. The motion brought by the participating defendants came on for hearing before O'Regan J. on the 27th November, 2017, and she delivered her ex tempore judgment on the 28th November, 2017.

35. In her judgment O'Regan J. described the argument on behalf of the participating defendants as being to the effect that by in or about the 22nd November, 2016, a deal was done between the participating defendants and the bank to the effect that a figure of €1.1m would purchase, effectively, the summary judgment proceedings, subject only to those defendants furnishing a statement of affairs. Critical to the defendants' argument in this regard, she felt, was the implication that the parties were not involved in the negotiation of a singular settlement but, rather, the settlement was to be divided in two – namely, regardless of whether or not the parties in fact resolved outstanding issues, and irrespective of the terms of those outstanding issues, the figure of €1.1m would suffice, provided only that the statements of affairs were forthcoming. By the 1st December, 2016, the statements of affairs were forthcoming. She observed that even assuming that such a deal was done at that stage, it is of course the reality that any such deal was not an enforceable deal because there was no consideration. She noted that the defendants say that thereafter they did undertake certain matters which was to their detriment, and certainly it was common case that they went about raising funds in respect of either a deal done, as they say, or in anticipation of a deal to be done.

36. O'Regan J. was satisfied that the resolution of this matter turned on the affidavits furnished by the relevant solicitors who appeared for the parties, and the draft agreement that was drawn up. Her understanding was that counsel for the third, fourth and ninth named defendants made an additional argument, to the effect that if you have a draft agreement and both parties are to take certain steps on foot of that draft agreement, and if one party does in fact take the steps anticipated by same, notwithstanding that it has not been executed by the other party, it then becomes binding and enforceable as against the party who has not signed the document. She was completely satisfied that this was an untenable argument in law and that there was no jurisprudence to support same.

37. As far as O'Regan J. was concerned, the central issue was whether or not an estoppel arises, and this type of estoppel had been considered by Laffoy J. in *The Barge Inn v. Quinn Hospitality Ireland Operations 3 Limited* [2013] IEHC 387. The defendants had also

referred to Doran v. Thompson [1978] I.R. 223, which case dealt with another element of promissory estoppel, and, in fact, although not referred to, that case was consistent with the Supreme Court decision in *Mackie v. Wilde* [1998] 2 I.R. 578, which also dealt with the issue of estoppel and involved the conscionability of resiling from an agreement which had not been executed in writing but which had been partly performed.

38. O'Regan J. was of the view that all of the jurisprudence was to the same effect. In the *Barge Inn* case the elements necessary to found an estoppel were that that there was a pre-existing legal relationship, an unambiguous representation had been made, and the promisee relied upon the representation. The doctrine of estoppel involves a representation/promise and a possible detriment, but there must also be some element of unfairness and unconscionability, and the estoppel must be used as a defence as opposed to a cause of action. She considered that this matter turned on whether an unambiguous representation/promise had been made by the plaintiff to the participating defendants.

39. O'Regan J. then referred to the affidavits furnished by the solicitors for the participating defendants, and highlighted certain averments made in those affidavits. Firstly, the averment at para. 5 of Ms. O'Driscoll's first affidavit where she said that ultimately an indication was given that €1.1m would be acceptable to the plaintiff, and this figure was settled on and played no further part in the negotiations. Secondly, the averment at para. 12 of Mr. Long's affidavit where he said that such was the level of negotiation up to and including on the 7th December, 2016, between counsel for the plaintiff and counsel for the participating defendants and given that all demands of the plaintiff were acceded to by the participating defendants, that it was their firm belief that a deal was all but reached. Thirdly, the averment at para. 7 of Ms. Kelleher's affidavit where she said that a counter offer was made by the participating defendants in the sum of €1m, which said offer was rejected, but however an indication was given that the sum of €1.1m was acceptable to the plaintiff , and that negotiations as regards a settlement sum ended at this figure and, despite the fact that the plaintiff ultimately collapsed the deal, this figure did not change and it was on this figure that the participating defendants commenced preparation for their statements of means.

40. O'Regan J. noted that, in the draft settlement agreement, it was recorded that it was thereby agreed that the participating defendants would, between them, pay the sum of €1.1m and other issues that arose were also included in that draft agreement. She was satisfied that nowhere in the grounding affidavits of any of the defendants was it suggested that there were successive agreements undertaken by the parties so that, once the figure of €1.1m was arrived at, then an agreed figure had been achieved. However, that figure, in her view, was in the context of the overall agreement and there was nothing in the affidavits to suggest that there was a succession of agreements, the first being a promise or a commitment by the plaintiff that a deal was done in the sum of €1.1m, subject only to the furnishing of the statements of affairs and irrespective of whether any other issue which arose concerning the payment and the raising of the funds was ironed out.

41. O'Regan J. held that it was not suggested and, in addition, because of the various averments contained in the three separate affidavits, she was not satisfied that it could, under any stretch of the imagination, be stated that a clear and unequivocal promise was made. Because of this, she was satisfied that the defendants, although in a difficult situation and having had to negotiate also between themselves for the raising of the money, could not establish on the basis of the jurisprudence that an estoppel arose in their favour, limiting the amount of summary judgment which the plaintiff might seek to achieve against them in these proceedings. She therefore went on to make an order refusing the reliefs sought by the participating defendants, and awarded the plaintiff the costs of the motion.

Notice of Appeal

42. The participating defendants filed a notice of appeal to this Court on the 8th December, 2017, and set out seven grounds of appeal. The central ground appears to be that the learned trial judge erred in finding that the plaintiff is not estopped from seeking to enter judgment for any sum in excess of €1.1m as against the participating defendants, and in particular that she erred in finding that the plaintiff had not made an unambiguous representation that the compromise sum required by the plaintiff was €1.1m. In the respondent's notice filed on the 19th December, 2017, the plaintiff pleaded that the trial judge was entitled to conclude that the affidavit evidence did not support the contention that a clear and unequivocal promise or representation was made by the plaintiff, having regard to the evidence before the Court and to the legal submissions made.

Submissions of the Parties

43. The written submissions filed by the participating defendants focused on the issue of promissory estoppel. A second, and possibly inconsistent, argument was advanced that on the 20th December, 2016, the proceedings as against the participating defendants "were successfully compromised", on the basis that at that point in time the final draft agreement was put forward by the plaintiff and accepted by the participating defendants.

44. As regards promissory estoppel, the submissions cited the following key elements of the doctrine, as set out in McDermott on Contract Law (2nd Ed., 2017), and cited with approval by Laffoy J. in the *Barge Inn* case at para. 68:-

"(i) A pre-existing legal relationship between the parties.

(ii) An unambiguous representation.

(iii) Reliance by the representee (and possible detriment).

(iv) Some element of unfairness or unconscionability.

(v) The estoppel is being used not as a cause of action, but as a defence or as a rule of evidence to stop the other party raising a defence.

(vi) The remedy is a matter for the Court."

45. It was submitted that in the within proceedings, each and every element as set out above is met and all of the ingredients for estoppel are present. In the first instance, there is undoubtedly, a pre-existing legal relationship between the plaintiff and the defendants in that they entered into a loan agreement in 2008. Further, there was an unambiguous representation by the plaintiff that it would accept the sum of €1.1m from the participating defendants in settlement of its claim as against those participating defendants.

46. The plaintiff submitted that the affidavit evidence does not support the contention that a concluded and binding agreement was reached. On the participating defendants' own evidence, evidence that is common to each of the relevant deponents, the acceptance by the plaintiff of the terms negotiated by the parties was – as of the 20th December, 2016 – conditional upon the approval of the Credit Committee. The participating defendants sought to describe this condition as being of little, if any, significance, but it was submitted that this was an attempt to disregard the fundamental conditionality of the negotiation process.

47. As regards estoppel, it was submitted that the requirement to demonstrate a clear and unambiguous promise or representation had not been met. The contention that the plaintiff made an unambiguous representation that it would accept the sum of €1.1m in settlement of the claim simply ignores, without justification or explanation, the fact that the acceptance of the proposal was at all material times subject to Credit Committee approval.

The Procedural Issue

48. At the outset, I would query the procedure adopted in this case, whereby a declaration is sought on foot of a notice of motion. Given that a declaration is a final order and not an interlocutory order, it seems highly questionable whether the proper procedure was adopted, or whether the matters put forward by the participating defendants should have been advanced by way of a defence to the substantive claim rather than by way of a stand-alone, discrete application brought during the course of the summary proceedings. However, no such point was taken by the plaintiff in response to the application, nor by the trial judge and therefore it is proposed merely to note the procedural issue and deal with the appeal on the merits.

The Estoppel Issue

49. I am satisfied that the trial judge had ample evidence before her to justify her conclusion that the participating defendants cannot establish an estoppel in their favour, limiting the amount of any judgment to the sum of €1.1m, based on a promise or representation by the plaintiff that an agreement to accept €1.1m had been reached. It seems clear from the affidavit evidence, as summarised in some detail earlier in this judgment, that agreement on a settlement figure of €1.1m was reached in late October, 2016. It seems equally clear, however, that an overall concluded agreement was not reached at this point, which overall agreement would presumably deal with ancillary matters such as timing etc, but that the plaintiff sought a sworn statement of means from each of the participating defendants.

50. It is also clear from the affidavit evidence that no overall agreement had been concluded by the time the parties travelled to Cork on the 7th December, 2016. There is reference in the affidavits of Ms. O'Driscoll and Mr. Long to counsel having had "numerous and detailed discussions regarding the precise terms of the settlement agreement", and in the affidavit of Ms. Kelleher to counsel having spent "extensive time drawing up precise terms of the compromise agreement, all of which concerned the timing of the payment and the release of charges to facilitate a sale of lands charged in favour of the plaintiff bank".

51. While negotiations appear to have made significant progress on the 7th December, 2016, including reaching an agreement on the timescale for payment, and while the participating defendants may have envisaged that a concluded agreement would be executed on that date, all of the grounding affidavits sworn by their solicitors accept that counsel for the plaintiff indicated on that date that his client's Credit Committee would have to approve the proposed deal before it could be executed by the plaintiff.

52. Against that backdrop, Ms. Sheahan avers as follows at para. 10 of her first affidavit:

> "Further, I say and believe that the participating defendants' representatives were at all times aware that any proposal was (a) subject and conditional upon the provision of financial information by the participating defendants to the plaintiff (by way of standard financial statements/statements of means) and following that (b) subject to and conditional upon approval by the plaintiff's Credit Committee. This fundamental conditionality to the reaching of any concluded agreement was throughout all settlement discussions made clear to the within applicants."

53. This averment was clearly of critical significance in the context of the present application, and it is of equal significance that this averment was not contradicted by any deponent on behalf of the participating defendants. While it is said on their behalf that further amendments to the draft agreement were agreed on the 20th December, 2016, their own affidavit evidence accepts that any overall agreement still required the "formal" approval from the plaintiff's Credit Committee, and this is entirely consistent with how matters proceeded in early 2017.

54. Having regard to the state of the affidavit evidence, I am satisfied that the trial judge was entirely correct in finding that no clear and unequivocal promise or representation was made by the plaintiff that an agreement to accept €1.1 million had been reached, and in holding that no estoppel arises to prevent the plaintiff seeking judgment for any greater sum. Any agreement between the parties was at most a conditional agreement, conditional upon approval by the plaintiff's Credit Committee, and this condition was never satisfied so as to give rise to a concluded agreement. In the same way there was no unambiguous representation by the plaintiff that a deal was done in the sum of €1.1m, but only a conditional indication that the claim might be compromised if the approval of the Credit Committee was ultimately forthcoming.

Duty to give Reasons?

55. During the course of exchanges with the Court, counsel for the plaintiff was asked whether it could be said that in the circumstances which prevailed there was some duty, perhaps a fiduciary duty, owed by the plaintiff to give reasons for rejecting the settlement proposal. Counsel replied that cases such as *Irish Bank Resolution Corporation Limited (In Special Liquidation) v. Morrissey [2013]* IEHC 208 had established that in Irish law the lender/borrower relationship does not generally impose fiduciary duties on the lender.

56. Counsel for the defendants touched on this issue during the course of their replying submissions. Counsel for the fifth and tenth named defendants referred to the decision of Baker J. in *Ryan v. Danske Bank* [2014] IEHC 236. In that case, Baker J. rejected an argument that there existed in the relationship between the borrower and the bank an obligation on the part of the bank to act towards him with a degree of reasonableness or fairness, which is more commonly found in public law, applying the judgment of Ms. Justice Finlay Geoghegan in *Irish Bank Resolution Corporation (In Special Liquidation) v. Morrissey*. She was, however, satisfied that the law will import into the relationship of mortgagee and borrower a duty to act in good faith, and the terms that are implied are terms that the mortgagee not act capriciously or in a way that unfairly prejudices the borrower. The terms that are implied do not go so far as to import duties of utmost good faith as might arise in a fiduciary relationship, and Baker J. was not satisfied that the terms sought to be implied by the plaintiff in that case could be implied at common law. Notwithstanding that he cited that last finding of Baker J., counsel stated that "there is in any negotiation utmost good faith" and the participating defendants were negotiating with utmost good faith, and it was not fair and conscionable in the circumstances that the plaintiff could walk away from the proposed compromise.

57. Counsel for the eighth named defendant submitted that, in circumstances where the bank chose to engage in such a level of negotiation, they had a moral duty and an equitable duty to act fairly. He later clarified that he was not trying to raise any wider point in terms of any possible duty of good faith.

58. Counsel for the third, fourth and ninth named defendants also referred to the decision of Baker J. in the Ryan case. While there was no fiduciary relationship, there was a duty of good faith identified by Baker J. "at a general level", and it was submitted there was certainly a duty of care at common law in negligence. He cited the old English case of *Tournier v. National Provincial and Union Bank of England* [1924] 1 K.B. 461, where the Court of Appeal held that disclosure of a customer's bank account details was a breach of a banker's duty of non-disclosure. In exchanges with the Court he appeared to go further than merely saying that the failure to give reasons was a breach of the bank's duty of good faith, by agreeing that he was now saying that going back on the €1.1m proposal was in itself a breach of good faith, and that this was a stand-alone argument why they should not be entitled to do so, leaving aside estoppel.

59. In reply to these new arguments on an issue which had not been raised in the written submissions, counsel for the plaintiff said that he would need time to consider the Ryan case, but he had looked at it briefly since it was raised and he did not think it supported

the submissions made by the participating defendants. The finding of a duty of good faith was considered only in the circumstances of a mortgagee and mortgagor relationship, and involved a principal private residence, and this was a case where the borrower was held to be a consumer entitled to the protection of the Consumer Protection Code 2012. He was concerned about any possible expansion by this Court of the duty of good faith from that judgment to the present situation without further consideration, and he sought an opportunity if necessary to address the Court further on the issue.

60. I am of the view that this Court should not reach a conclusion in this case on the issue of whether the bank's failure to give reasons was a breach of any duty to act in good faith owed by the bank, in the type of circumstances which prevailed here. Such an argument was never directly raised in the Court below, nor was it pleaded in the notice of appeal to this Court, nor was any such submission made in the written submissions filed by the participating defendants. The issue arose during exchanges between the Court and counsel at a late stage of the oral hearing, and in circumstances where the members of the Court did not even have a copy of the Ryan judgment before them. On a very preliminary consideration the argument appears to me to involve very fundamental matters, and potentially to require an expansion of the law as previously set out in the Ryan case, and I believe that any conclusion on this issue should await a future case where the issue is fully pleaded and argued.

Conclusion

61. In my view, the participating defendants have not established that the learned trial judge erred in any way in the conclusions she arrived at. Accordingly, I would dismiss the appeal and affirm the decision of the learned trial judge.

62. As regards costs, the Court is of the view that it is appropriate to have a brief supplemental hearing on the issue of costs. The office of the Court of Appeal will notify the parties of the date and time of the costs hearing.

63. As this judgment is being delivered electronically, I note that each of Costello J. and Haughton J. have indicated their agreement with it and with the orders I propose.