Neutral Citation No. [2012] NIMaster 10

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

ANSON LOGUE
WILLIAM MOFFETT

Applicants.

and

BANK OF IRELAND (UK) PLC

Respondent.

MASTER KELLY

INTRODUCTION

[1] Mr Logue and Mr Moffett ("the Applicants") respectively seek to contest a bankruptcy petition and set aside a statutory demand issued against them by the Respondent. The unsecured amounts involved are €69,297,578.58 and €67,521,869.83 respectively. The liabilities, which are disputed, relate to two separate facilities for two partnerships in which the Applicants are involved. These are known as Newbay Properties and Newbay Doherty. The Respondent demanded repayment of the facilities citing breaches of ancillary terms and conditions of the facilities as the basis for entitlement. These ancillary terms and conditions include a Loan to Value ("LTV") ratio covenant and a tax compliance covenant. The Applicants allege that the

Respondent engineered the breaches to cause the default. The Respondent denies the allegations asserting that the terms and conditions of the facilities clearly state that the Respondent is entitled to demand repayment of the facilities in the event of breaches of any terms and conditions.

[2] At the hearing of the contested matters, Mr Logue was represented by Mr Shields, Mr Moffett by Mr Gowdy and the Respondent by Mr Dunlop. I am very grateful to counsel for their careful preparation and conduct of the case together with their helpful skeleton arguments and authorities, which I have taken into consideration, even if I do not expressly refer to each one in this judgment.

[3]The hearing of the application was conducted on the papers. Affidavits were filed by the Applicants and the Respondent's affidavits were those of Craig Logan (Director in the Respondent's Property Finance Group), Ewan Adair (Relationship Manager with the Respondent) and Ian Sheppard (the Respondent's Head of Corporate Banking NI). However it must be stated that the Respondent's main deponent is Mr Logan with Mr Adair and Mr Sheppard adopting Mr Logan's evidence save for short affidavits exhibiting diary entries. As the hearing was within the context of the relevant insolvency provisions regarding disputed debts, it was not a trial of the dispute itself. This judgment should be interpreted accordingly.

THE SUBSTANTIVE LAW

[4]Article 242 of the Insolvency Northern Ireland) Order 1989 ("the 1989 Order") allows a creditor to issue a statutory demand where the debt is for a liquidated sum payable immediately and the debtor appears unable to pay it. There are 4 grounds that would allow the Court to set aside a statutory demand and these are set out in Rule 6.005(4) of the Insolvency Rules (Northern Ireland) 1991 which states:-

> "The Court may grant the application if –
>
> (a) the debtor appears to have a counterclaim, set off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or
>
> (b) the debt is disputed on grounds which appear to the Court to be substantial; or
>
> (c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.001(6) is not complied with in respect of it, or

the Court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

(d) the Court is satisfied, on other grounds that the demand ought to be set aside".

[5] The most common of the four grounds relied upon in applications to set aside statutory demands is Rule 6.005(4)(b), namely that the debt is disputed on grounds which appear to the Court to be substantial. There are three main authorities which essentially address the question of what constitutes "substantial" within the context of Rule 6.005(4). The first of these is the case of **Moore v Commissioners of Inland Revenue [2002] NI 26** wherein Girvan J sets out the applicable test against the background of an individual's Article 6 rights. At page 8-9 of his judgment the learned judge states:

> " To deprive an alleged debtor of an opportunity to litigate his dispute a fair statutory demand procedure requires that that the creditor spells out clearly and accurately what his debt is, establishes that the debt is due and gives the debtor a full opportunity to show cause why in the interests of fairness and practice he should have the opportunity to defend the claim by litigation.
>
> In summary judgment applications the plaintiff must show that the defendant has no arguable case. In an application to set aside regularly obtained judgments the test appears to be whether the defendant in the interests of justice should be permitted to defend the action. In either set of proceedings it is clear that if a defendant has in reality no defence to the plaintiff's claim allowing the defendant to defend would be unjust to the plaintiff. Refusing leave to defend would not be unjust to the defendant since it would merely delay the enforcement of the plaintiff's indisputable right and send to trial an indefensible case.

> Although at first sight the wording of Rule 6.005 and some decided cases may suggest that a debtor served with a statutory demand bears a heavier burden than is borne by a defendant in summary judgment applications or applications to set aside judgment and that an onus of proof is thrown on him, in reality the test applicable should be no different. This is particularly so in the light of Article 6 and in the light of the severe consequences flowing from a decision not to set aside a statutory demand".

In the more recent case of **Allen –v-Burke Construction Ltd [2010] NICh9, [2011] NIJB 62** Deeny J stated:

> "The grounds of dispute must be genuine. The grounds of dispute must not consist of some ingenious pretext invented to deprive a creditor of his just entitlement. It must not be a mere quibble."

The case of **Sheridan Millennium Ltd-v-Odyssey Property Company [2003]NICh7,** although involving a debtor company, has equal application in the case of an individual debtor. At paragraph [8] of the judgment Girvan J states:

> "If the company can show that there is a genuine dispute on grounds showing a potentially viable defence requiring investigation then the matter should be tried out by action and the issuing of a winding-up petition would be inappropriate and an abuse of process."

[6] Rule 6.005(4)(d) is the second most common ground relied on in these cases. This ground provides that the Court may, if satisfied, set the statutory demand aside on "other grounds". While "other grounds" may sound somewhat general, it was held by the Court of Appeal in **Re: A Debtor (**

Lancaster No 1 of 1987) [1989] 1WLR 271 that the "other grounds" must also be substantial.

[7]Applying those principles, in order for the Applicants to succeed in this case, they must demonstrate that they have an arguable case or a potentially viable defence requiring investigation. Conversely, the Respondent must demonstrate that the Applicants have no arguable case or potentially viable defence requiring investigation; or, alternatively, that the Applicants grounds for dispute amount to nothing more than an ingenious pretext or mere quibble.

[8] In the present case, the Applicants rely on the two most common provisions of Rule 6.005(4) namely (b) and (d). The Applicants also dispute the debt on two bases. These are:-

> (i)That the Respondent is estopped from demanding repayment of the principal while the Applicants are servicing the interest on the debt;
> (ii) That the Respondent's conduct in relation to the Applicants' facilities has created an unfair credit relationship giving rise to an entitlement to relief under Article 140B of the Consumer Credit Act 1974.

[9] Unlike Mr Moffett, Mr Logue did not file an Application to Set Aside the statutory demand issued by the Respondent. This resulted in the Respondent presenting a bankruptcy petition against him and he brings his case on foot of a Notice of Intention to Oppose a Bankruptcy Petition. However, as the Applicants' grounds for dispute is more or less the same, and to avoid confusion, I see no reason why the Applicants' cases cannot be dealt with under the rubric of an Application to Set Aside a statutory demand as the court will apply the same principles in considering the merits of the dispute in both a Set Aside and contested petition scenario.

Background and Chronology

[10] The Applicants in this case are property developers. Mr Logue, Mr Moffett and a Mr Patrick Doherty (not a party to this matter) trade in a partnership known as Newbay Doherty. This partnership owns six shopping centres and commercial retail parks at Letterkenny, Sligo and Tullamore. The tenants for these outlets would include many of the leading high-street brands such as Marks & Spencer, NEXT, Argos, River Island and McDonalds to name but a few. Mr Logue and Mr Moffett also trade in another partnership known as Newbay Properties which owns Monaghan Shopping Centre and residential sites at Archerfield, North Berwick, East Lothian.

[11] It appears that the commercial relationship between the parties commenced at some time in or around 2000. The Applicants say that from 2000 to 2009 they had a "fabulous" banking relationship with the Respondent. The Respondent does not deny this. In turn, the Respondent acknowledges the Applicants as sophisticated and successful property developers. These mutual descriptions are significant, as they set the relationship between the parties into context, and form an important aspect to the commercial background of this case.

[12] Pausing there, I should emphasise that it is difficult to set out the chronology of the events giving rise to the statutory demands with any degree of accuracy. This is due in part to the parties' own inability to recall exact dates of discussions coupled with a general lack of documentation from the Respondent. However, the chronology does appear to begin as previously stated in 2000. From 2000-2009, the Applicants contend that the Respondent renewed and extended the two facilities from time to time and that there has never been any history of payment default. By letter of 25th January 2010 the Respondent issued facility letters to Newbay Doherty and Newbay Properties to replace the previous facilities. The facility to Newbay Doherty had an expiry date of the last business day of December 2011 and a covenant at clause 10(a) which stated that:

"(the) Loan to Value is to be maintained at a maximum level of 100% at all time."

[13] As appears from the papers, this facility was accepted by the Applicants on 31st March 2010. The Newbay Properties facility letter had a similar LTV ratio clause 10(a), but in this case the LTV ratio was to be maintained at a maximum level of 85%. This facility had an expiry date of the last business day of December 2010. That facility was accepted by the Applicants on 29th March 2010. In both cases the authorised signatory of those facilities on behalf of the Respondent is named as Ian Sheppard, acting Head of Corporate Banking.

[14] What transpired between the parties prior to the facility letters of 25th January 2010 and the acceptance of those facilities on 29th and 31st March 2010, (not to mention much of 2010) is a matter of considerable dispute. What is clear however is that various discussions took place between the Applicants and representatives of the Respondent about the renewal of facilities. The Applicants contend that in the course of discussions with Craig Logan and Ian Sheppard that they were assured that their facilities would be automatically renewed, that they were "not a NAMA case and never would be" and that "we would work through the downturn in the property market and come out ok". The Applicants further contend that based on these assurances, they proceeded to accept the offer of facilities from the Respondent rather than explore re-financing elsewhere. The Respondent rejects this version of events. It contends that the purpose of these meetings

was to negotiate terms for the renewal of facilities not the renewal of existing facilities. The Respondent points to the fact that facility letters clearly state that they supersede previous facilities and that the terms of the two new facilities clearly differ from the terms of the facilities being replaced. The Respondent further argues that the Applicants had ample opportunity to consider those terms before accepting the facilities in writing in or about March 2010.

[15] The chronology then moves forward to 24th November 2010. By now, the Applicants have agreed to the facilities, accepted the facilities and are servicing the facilities. On 24th November 2010, the Respondent wrote to the Applicants stating:

> "Under paragraph 13(d) of the Bank's facility letter to Newbay Doherty dated 25th January 2010, the Bank has the right to request updated valuation reports on the Property Portfolio (as defined in the letter) at any time.
>
> The Bank wishes to exercise this right and requests that Newbay Doherty appoints a valuer (the valuer to be subject to prior approval by the Bank) to value the Property Portfolio as soon as possible."
>
> This letter goes on to refer to Mr Moffett's personal overdraft and request that he provide a detailed statement of net worth to facilitate the review.

As appears, the letter of 24th November 2010 requests the Applicants to appoint a valuer, but the valuations exhibited in evidence in this case are clearly that of the Respondent. Again there is a gap in the evidence as to how that came about. In any event on 15th December 2010, 9 months after the Newbay Doherty facility had been accepted and a year before it was due to expire, it would appear that the Respondent commissioned two valuations from valuer CB Richard Ellis (CBRE), on the Newbay Doherty Properties. In the letter of instruction to CBRE of 15th December 2010, the Respondent states at "2":

"The date of valuation is to be the date of your report."

[16]The reports which are produced on foot of that letter of instruction are substantial, complex documents containing the usual professional caveats. But it is difficult to ascertain with clarity exactly when the valuations were carried out. For example, the report relating to Tullamore Retail Park refers on the front page to "valuation date 15th April 2011" and inside to a "report date of 28th February 2011" with a "valuation date of 1st February 2011" and this is repeated with the various other properties in the portfolio. In any event, Mr Sheppard and Mr Logan wrote to the Applicants on 19th April 2011 advising

of the findings of the valuation and informing the Applicants that they had breached Clause 10(a) of the facility letter of 25th January 2010. The letter states:

> " This (the breach of clause 10(a) amounts to an event of default under paragraph 11 of the facility letter. The Bank reserves the right to terminate its commitment to lend under the facility as a result of this event of default. Consequently the facility is now repayable on demand.
>
> Without prejudice to the reservation of rights outlined above, the bank has requested that Newbay Doherty should seek independent tax guidance before reverting to the Bank with restructuring proposals regarding the facility. This should be received by Craig Logan by no later than 26th April 2011."

The letter goes on to say:

> "Bearing in mind that the facility is now repayable on demand, if this request is ignored by the partnership, this would be regarded as a very serious development by the Bank."

[17]However, the Applicants do not accept the contents of the valuations. They contend that the first valuation did not say what the Respondent wanted it to say resulting in a second valuation which, it is alleged, was manipulated to bring the LTV ratio below that contained in the loan facility thereby engineering a default. Indeed it appears that the Applicants viewed the contents of Mr Logan's letter so seriously that it prompted them to consult their solicitors, Gore & Grimes, in Dublin. Gore & Grimes responded to Mr Logan's letter on 26th April 2011 on the Applicants' behalf. In that letter the Applicants' solicitor states:

> "By way of general comment, the collapse of the property market in this country has undoubtedly caused difficulties for Retail Developments such as those constructed by Newbay Doherty. That said, these difficulties have been caused through no fault whatsoever of Newbay Doherty, who have at all times been prudent Borrowers and Developers. Furthermore, unlike many of your Borrowers, Newbay Doherty are not in default of their banking facilities. The rent roll is adequate to cover the borrowings, there are no arrears and all sums due to your Bank have been paid. In the circumstances our Clients expect your Bank to take cognisance of these matters and to work constructively with our Clients to resolve any difficulties there may be.

> Our Clients do not accept the Bank's right, as claimed in your correspondence, to immediate repayment of the facilities."

The letter goes on to say:

> " Valuation. You say in your letter that your Bank has received an "up-dated" Valuation Report" which shows that the Property Portfolio "is significantly less than the amount of the facilities extended by the Bank", and you then claim in your letter that this has caused a breach of paragraph 10(a) of the facility Letter. We would like to make it as plain as possible that our Clients do not accept your up-dated valuation figure. Furthermore, they are fully aware of the circumstances in which you obtained this disputed valuation, and the manner in which you did so has caused them considerable concern.
>
> You requested a portfolio valuation from a Valuer on the Bank's Panel, and you received this. Evidently not in agreement with the figure, and putting it as politely as we can, the Bank then made representations which resulted in a revised and reduced valuation, which is the one you now seek to rely on. Our Clients are fully aware of the facts and circumstances of this matter and do not accept your revised valuation nor the manner in which you obtained it."

The letter goes on to deal with some practical matters regarding planning issues etc. and concludes by saying that the Applicants were seeking tax advice to see if the tax burden could be reduced to free up capital, and that they were negotiating with tenants to let vacant spaces in the developments.

[18] Mr Logan responded to the Gore & Grimes on 6th May 2011. In this letter Mr Logan states:

> "You have made vague allegations relating to the valuation report. The valuation report has been produced by a reputable and experienced firm of chartered surveyors. It can surely come as no surprise to anyone that Irish commercial property values have dropped significantly over the last few years. A shortfall of some €30 million is not something which the Bank can just ignore."

Mr Logan's letter does not however address the question of there being two differing valuations but concludes by confirming that although the facilities are payable on demand, no demand had been made and that the facilities

remained available. Nonetheless, the request for restructuring proposals was clearly emphasised.

[19] The next letter in the chronology is a letter from Mr Logan dated 17th May 2011 to Mr Moffett. This letter is more conciliatory in tone and refers to correspondence received from the Applicants' tax consultant's advice. This exchange of correspondence with the tax consultants appears to have mollified the Respondent somewhat in terms of the possibility of re-structuring the facilities, but the Respondent is still firmly requesting that the Applicants respond to the Respondent's requests for written refinancing proposals to be submitted within 10 days of the date of the letter.

[20] There follows a further gap in the chronology between May and 19th August 2011 when Mr Logan writes to the Applicants referring to meeting which took place between the parties the previous day and which he describes as "positive and constructive". This letter refers to a possible 6 month extension to the Newbay Doherty facility subject to certain actions to be taken by the Applicants including inter alia cash flow projections and deferred payments to certain creditors together with the actions regarding planning issues etc.

[21] A further chronological gap then occurs from 19th August to 15th November 2011 when some letters are issued by the Bank to the Respondents in relation to the other partnership of Newbay Properties. However, for present purposes there is nothing significant about this correspondence. What happens next, however, is highly significant. On 22nd November 2011 the Applicants say that they attended the Letterkenny Branch of the Respondent bank to arrange for the transfer of €1.5m in order to address tax liabilities – tax compliance being a condition of the facilities. On arriving at the Bank the Applicants were told that the account was blocked and as a consequence, they were unable to access funds. They say they were told by the branch to contact the Respondent. This they did and it apparently resulted in a meeting being convened at the Respondent's office in Belfast the following day. Present at that meeting were Ian Sheppard, Craig Logan, Ewan Adair and the three partners of Newbay Doherty. Exhibited to the Respondent's evidence is an internal memo of that meeting. Whilst that internal memo is not formally proved, or agreed, it does nevertheless demonstrate that despite the impugned LTV issue having occurred seven months earlier, the Respondent still had taken no action on it and appears to be content to continue the business relationship with the Applicants. This is evidenced by the following bullet points:

- IS (Ian Sheppard) confirmed that the Bank believed that the promoters were the best people to manage the existing property assets in question. He also confirmed that the recently commissioned report by Murphy

Mulhall had commented positively on the promoters.

- IS acknowledged that the Bank was aware of the legacy and ongoing tax liabilities of the promoters and indicated that this was being factored into proposals being considered internally. The Bank was considering various potential scenarios.
- IS indicated that the ideal solution would be one that could keep the assets intact and the promoters on board with regard to ongoing management.
- Subsequent discussion returned to Newbay Doherty, with IS indicating that the Bank was working on a further credit submission which was due to be submitted before the end of the month and which would clarify the Banks position with regard to the facilities advanced to the promoters and their tax liabilities.
- The promoters were asked whether they would sign the outstanding Newbay Doherty facility extension letter but indicated that they had been advised not too(sic), although they had no objections to the proposed security structure."

By contrast, according to this memo, the Applicants do not appear to be content with the relationship as the following bullet points demonstrate:

"

- BM(Mr Moffett) and PD(Mr Doherty) both commented on how embarrassing the previous day's experience at the branch had been for them. PD acknowledged that they had created a tax problem. AL (Mr Logue) indicated that the bank had been vague about the nature and quantum of solution in relation to their tax position at a recent meeting on 17/11/2011 and BM indicated that their belief that failing to pay their existing tax liability would result in the Revenue seeking to Bankrupt them. AL commented that they were therefore forced to go to Letterkenny to seek to transfer the funds.
- BM commented that they were encountering problems with various contractors/ creditors as word leaked that they were coming under increased financial pressure.
- AL commented that he believed that he was being treated unfairly by the Bank with existing correspondence proposing to use Newbay

> Doherty distributions to meet his personal liabilities to the Bank. He voiced his frustration at this proposal and previous issues with the Bank and indicated a lack of trust in the BoI staff present."

[22] Events appear to have moved swiftly after that although, again, the exact chronology is unclear. The management of the Applicants' accounts appears to have moved from Belfast to the Respondent's Specialist Property Group in Dublin in January 2012 due to the "perceived risk". There are minutes of what appears to be a short meeting with the Applicants and the Respondent at the Specialist Property Group on 20th January 2012. However, given the somewhat perfunctory nature of these minutes, it would seem the Applicants' relationship with the Respondent was effectively at an end. From February 2012 to April 2012, it seems that the Respondent issued a series of letters to the Applicants calling in all their facilities with the Respondent. This included their personal as well as partnership borrowings. It appears that the Respondent appointed Receivers and a statutory demand issued against each Applicant on 11th June 2012. The demands are in respect of both Newbay Doherty and Newbay Properties and the personal borrowings of both Applicants. The amounts stated on these statutory demands are made up of the aggregate sums of the Applicants' personal and partnership borrowing less the value the Respondent placed on the security. These statutory demands were not preceded by any legal process.

Discussion

[23] The starting point for consideration of the issues in this case is the decision of the Respondent to revalue the Applicants' property portfolio <u>after</u> rather than <u>before</u> the offer and acceptance of new facilities in circumstances where, a), the Respondent had imposed an LTV covenant in the facilities and b), payments were being made and accepted on foot of the agreed facilities. This is essentially the genesis of the Applicants' dispute of the debt by way of the defence of estoppel and an unfair credit relationship. I now turn to those issues.

The Estoppel issue.

[24] At the heart of the Applicants' case is their contention that in the course of discussions concerning the renewal of the two Newbay facilities, clear assurances were made to them by senior officials within the Respondent Bank upon which they relied. They contend that in the course of discussions where the loan portfolio was being discussed, the Respondent assured the Applicants that they were not a NAMA case and never would be, that the facilities would be automatically renewed on expiry, and that they would continue to work together through the property downturn. The Applicants contend that because of these assurances they proceeded to renew facilities

with the Respondent in the belief that the Respondent would not enforce the express terms of the facilities provided the Applicants continued to service the loans. They argue that further to these assurances, they did not seek re-financing elsewhere. They say they would have been able to do this as their property development business was profitable given its high quality tenants.

[25]The principles of the doctrine of promissory estoppel are set out in **Snells Equity (32nd ed.)** at paragraph **12.009** and may be summarised as follows:

(a) One party to a transaction freely makes a clear and unequivocal promise or assurance to the other party to that transaction;
(b) The promise or assurance is intended to affect the legal relations between the parties;
(c) The party to whom the promise or assurance was made acts on the promise or assurance before it is withdrawn;
(d) It would be inequitable in the circumstances to permit the party making the promise or assurance to withdraw from it.

Both Mr Gowdy and Mr Shields argue that the Respondent's affidavit evidence when properly analysed is carefully worded and fails to address the issue of the assurances directly. They argue that when viewed within the history of the relationship between the parties it was reasonable that the Applicants would, in the course of discussions, rely on assurances given. They also point to the lack of affidavit evidence, minutes of meetings or internal memoranda which would controvert the Applicants' evidence. They argue that one would expect a proliferation of discoverable documentation in a commercial relationship of this calibre.

[26]Mr Dunlop however, argues that the Applicants' promissory estoppel claim is a mere smokescreen. He contends that all facilities in the parties' banking history were "on demand" facilities on foot of agreed terms and conditions and that this is, and always has been, clearly set out in all of the Respondent's written documentation. He argues that given the level of borrowing involved, it is stretching credibility to suggest that a bank official would have the authority to agree to specific and precise terms and conditions of borrowings in the region of €160m; or that facilities at this level would be automatically renewed on expiry. Mr Dunlop further argues that the Applicants' claims that Mr Sheppard assured them that their partnerships were not NAMA cases and never would be are "loosely defined phrases" which could not be interpreted as clear and unequivocal representations, and fall very shy of the necessary requirements of establishing an estoppel case. Mr Dunlop cited the dicta of Ward LJ in **Ace Insurance SA-NV v Seechurn [2002] EWCA Civ 67 paragraph 21:**

> "It is, in my judgment, important to emphasise that the unequivocal unambiguous promise or

> representation has to be that the party did not intend to enforce his strict legal rights."

[27] However this, in my view, only leads us to the more vexed issue of whether an estoppel issue such as in the circumstances of this case can be determined summarily on the papers. Mr Gowdy argues that all the authorities advanced by the parties on this issue, including the Respondents authorities, involved full plenary hearings with examination and cross-examination of witnesses. Mr Shields supports this argument citing the case of **Ulster Bank Ltd –v-Taggart [2012] NIQB 46** wherein McCloskey J states at paragraph [53]:

> I stand back from the totality of the evidence and the parties' arguments, adopt a balanced and panoramic view and give effect to the governing principles as follows. I conclude that the present cases are paradigm examples of the inapplicability of the Order 14 procedure. A vast proliferation of affidavits in this kind of case is no substitute for *viva voce* evidence elicited by examination-in-chief, cross-examination and appropriate judicial questioning all of which will enable the court to assess the veracity of witnesses and to make confident findings of fact. I find myself unable to make such findings based on the voluminous evidence assembled and duly considered. I specifically decline to interpret contemporaneous communications – documented in e-mails and letters and forming the subject of assertions and rebuttals by both sides – in a summary fashion. As appears from my résumé of certain key features of the evidence above, there are distinct indications that the evidential matrix before the court may not be complete. Arguably the clearest illustration of this is found in the affidavits of both sides. These are replete with averments crying out for further probing, challenge and clarification. There exists, in my view, a veritable ***Saunders*** '*goldmine for cross-examination*'.

[28] For present purposes, there are certain basic considerations which inform the answer to the estoppel issue. Adopting the same approach as in the **Taggart** case i.e. standing back and objectively assessing the totality of the evidence, I find that those considerations may be summarised by the following:

(i) The history of the relationship of the parties.
(ii) The parties' concurrence that discussions took place between the parties regarding the terms of the facilities.

(iii) The conduct of the Respondent when objectively assessed.

The history of the relationship of the parties.

[29] As stated previously, according to the Applicants this is a relationship which was once "fabulous". The Respondent, through counsel, refers to the Applicants as "successful and sophisticated property developers". There appears to be no doubt that this was a mutually beneficial commercial relationship of over ten years' standing which transacted business during a decade of both economic growth and decline. There is no history of default in borrowing on the part of the Applicants. There appear to have been no problems regarding the renewal of facilities in the past, or any historical issues regarding securing credit approval. Bearing this in mind, it seems to me that given the high finance involved and the degree of business conducted by the parties over such a lengthy period, a relationship of this standing must be founded on mutual confidence and trust. It also follows that within such a commercially important relationship, one would expect a degree of professional rapport to develop between the parties and an element of informality and candour to be present in discussions. Yet this is not reflected in the affidavit evidence of the Respondent. For example, Mr Logan, one of the key figures in the Applicants' banking history states in his affidavit of 17th September 2012 at paragraph 12:

> *" At no stage throughout my dealing with the applicant did I provide any assurance that Facility 1 and/or Facility 2 would be automatically renewed upon expiry. Indeed, the Applicant would be aware that in order to have a renewal offered in respect of an expired facility I would have to prepare a paper for submission to the Respondent's credit committee to make a decision as to whether or not a further facility would be offered. Indeed the letters noted at paragraph 9 herein, and exhibited at Tab 3, specifically address this point to the Applicant's attention. It was not, therefore, in my gift to make an offer of a renewed facility and I could not, therefore have provided any assurance as to whether a facility would be automatically renewed upon expiry"*

Against the established background of the relationship of the parties, I consider it likely that any discussions over the renewal of facilities must have been expansive, extending considerably beyond the formalities of Mr Logan's words. After all, the parties were in reality each attracting the business of the other. I accept that the strict formality of these words is pertinent, but the tone

is one of detachment which seems incongruous when viewed against the history of the relationship itself.

The discussions between the parties regarding the facilities.

[30] It is not a matter of dispute that the Applicants and various senior officials within the Respondent bank held discussions regarding the terms of the facility letters of 25th January 2010 before they were eventually signed at the end of March 2010. However, there is no objective evidence as to the content of those discussions. The Court is therefore left only with the dissenting affidavits of the parties all of whom are experienced professional individuals. However, it is observable that there are no substantive affidavits from Mr Adair and Mr Sheppard, with whom the Applicants contend discussions took place. Mr Logan addresses this in his affidavit of 18th January 2013 at paragraph 14:

> *" Particularly I refer to the averments made in my affidavit of 17th September 2012 at paragraph 12. At no point did I provide any assurance to the Respondent that any of his facilities would be automatically renewed upon expiry. I have discussed this with my colleagues Ewan Adair and Ian Sheppard, who have each read and agree with my affidavit of 17th September 2012. Each of Mr Adair and Mr Sheppard have also confirmed to me that no assurance was ever given by them to the Respondent that any of the facilities would be renewed upon expiry."*

There being no objective evidence regarding the discussions held by the parties, I now turn to consider the conduct of the Respondent following the impugned LTV breach.

The conduct of the Respondent when objectively assessed.

[31] Following its letter to the Applicants of 19th April 2011 wherein it informs the Applicants of the impugned LTV breach, the Respondent took no enforcement action. Rather, the main thrust of the flow of correspondence from the Respondent that follows the letter of 19th April 2011, suggests that the Respondent's intention was to elicit proposals from the Applicants for restructuring the facilities. That "re-structuring" the facilities means anything other than re-negotiating the terms of the facilities seems unlikely. It also infers that the Respondent no longer wished to adhere to the terms of the facilities agreed in March 2010. However, there is no suggestion that the Respondent did not wish to retain its relationship with the Applicants. As the internal memorandum of 23rd November 2011 demonstrates, some seven months later (and almost a year after the portfolio revaluation was

commissioned), not only had the Respondent still not acted on the apparent LTV breach, but the Respondent appears to continue to repose trust and confidence in the Applicants in the management of the property portfolio. Moreover, the Respondent appears willing to extend the facility in which the LTV covenant is apparently breached for 6 months, but it is the Applicants who are reluctant to do so. In **Odyssey Pavilion LLP –v-Marcus Ward Ltd [2011] NICh10** as argued by Mr Gowdy, Girvan LJ states at paragraph [53]:

> " For the equitable doctrine to operate there must be a legal relationship giving rise to rights and duties between the parties. There must be a promise or representation by one party that he will not enforce against the other his strict legal rights arising out of the relationship. The promise may be implied (as in Hughes v Metropolitan Railway). The implication must fairly arise from the course of conduct between the parties. *Chitty in Vol 1 Contract at paragraph 3.090* states that:
>
> "There is some support for the view that the promise must have the same degree of certainty as would be needed to give it contractual effect if it were supported by consideration."
>
> The tentative way in Chitty expresses that proposition suggests that the point is not entirely free from argument. The purpose of the requirement is to prevent a party being able to rely on some indulgence or concession arising from a failure by the representor to insist on strict performance of the contract. There must be an intention on the part of the representor to be distilled from the object evidence that the representee would rely on the representation. There must of course be reliance in fact. Even if the requirements are satisfied the representor may be able to go back on his representation if it would not be inequitable for him to do so. "

[32] Having given careful consideration to all those matters and standing back from the totality of the evidence, I am led to conclude that the basis for Applicants' estoppel argument does not lack credibility. Nor is it unarguably weak. However, there being no persuasive affidavit evidence or compelling objective evidence to defeat the Applicants estoppel claim summarily, I conclude that the estoppel issue can only be determined by an adversarial hearing to include oral evidence. However, for the purposes of Rule 6.005(4)(b) I am satisfied that there is sufficient evidence that the Applicants have a potentially viable defence to the debt in the form of promissory estoppel. Thus I find that the requirements of Rule 6.005(4)(b) are satisfied. I now turn to the second limb of the Applicants grounds for dispute.

The Unfair Credit Relationship issue.

[33] Section 140C(1) of **The Consumer Credit Act 1974** ("the CCA 1974") allows an individual debtor to apply to the court (Section 140B(2)) to intervene in an unfair credit relationship where the amount paid or payable under a credit agreement is relevant. The Applicants argue that as individuals they are entitled to avail of the CCA 1974. The grounds upon which the Applicants rely to support that contention are that:

(i) They contend that the manner in which the Respondent has exercised and enforced its rights under the credit agreement is unfair.
(ii) They contend that the Respondent reneged on clear assurances that it would work with the Applicants through the economic downturn.
(iii) They contend that they relied on these assurances and did not seek re-financing elsewhere, which, given that they are successful property developers, they are confident they could have secured from another financial institution.
(iv) There is no history of repayment default in or about the servicing of the facilities.
(v) They contend that the Respondent contrived the default of the facilities by manipulating the Valuation Report and preventing them from accessing funds to discharge tax liabilities.
(vi) They contend that to present them with a demand for tens of millions of euro to be paid within 21 days is wholly inequitable.

Mr Gowdy advances the proposition that if a borrower with a residential mortgage, having not defaulted on mortgage payments, faced re-possession due to negative equity, the court would intervene under the CCA 1974 if the lender was seeking re-possession; or if the lender was using the negative equity position to seek increased payments from the borrower. Mr Gowdy's point is that in reality the Applicants' position is simply another version of that and that as individuals they are entitled to avail of the provisions of the CCA 1974.

[34] Mr Dunlop disputes that Applicants are entitled to avail of the 1974 Act. He argues that as the facilities in question are repayable on demand in the event of breach of terms and conditions, and the Applicants agreed to that term, the demand for repayment is fair. Mr Dunlop cited **Goode Consumer Credit Law and Practice Division 1, Part 1C** at **47.152:**

> "This is a new area of intervention and it is uncertain to what extent it will be used. If the agreement itself and any related agreement are fair for the purposes of CCA 1974, s140A(1)(a), in general exercising or enforcing any rights under the agreement must surely be fair also."

For present purposes, the question of whether the Applicants are entitled to avail of the CCA 1974 (while still relevant to the Applicants' case) cannot be determined by this Court. The power to intervene by way of an order under the CCA 1974 only arises in proceedings. However, the Respondent has not issued any proceedings against the Applicants. A statutory demand is not proceedings. This leads me to consider whether in the circumstances of the case the Respondent was entitled to present statutory demands against the Applicants without prior proceedings. The Respondent's case is predicated on its entitlement to demand repayment of the facilities by virtue of alleged breaches of ancillary terms and conditions. However, the term allegedly breached was not a payment default. The loans were being serviced. Indeed there is no history of such default by the Applicants. This is therefore not a typical defaulting borrower scenario. This causes me to reflect on whether the creditor's entitlement to demand repayment of a facility such as in the circumstances of this case, gives rise to an entitlement to issue a statutory demand under Article 242 of the 1989 Order. In order for a creditor to avail of Article 242 of the 1989 Order the debt must be for a liquidated sum. The question arises as to whether a debt can be said to be liquidated for the purposes of Article 242 in circumstances where:-

(a) There has been no default in the servicing of the loan.
(b) The creditor did not have to act on the breach complained of.
(c) If the creditor had not acted on the breach complained of, that creditor may not have suffered a loss.
(d) The creditor may still accepting payments of the loan.
(e) The breach complained of was not due to any act/omission on the part of the debtor.
(f) The breach is founded on a valuation which is not agreed by the debtor.

[35] After careful consideration, I have formed the view that in the particular circumstances of these cases, such as those outlined above, the debt could not have been liquidated for the purpose of Article 242 without prior litigation or express agreement over the sum demanded. Accordingly, I find that the statutory demands in this case were inappropriate and ought to be set aside under Rule 6.005(4)(d),notwithstanding any dispute. Furthermore, I note from the Respondent's Trial Bundle that Mr Doherty, the third partner in Newbay Doherty, was served with a writ by the Respondent and, via his solicitor, expressly consented to judgment being entered against him for a specific sum. That liquidated the debt as against Mr Doherty. However, the issuing of a

writ in that instance allowed Mr Doherty to fully contest any case against him in an adversarial manner if he wished to do so. Had the Respondent treated the Applicants likewise, they would have been afforded the same opportunity of an adversarial hearing in which the Unfair Credit Relationship argument could have been fully ventilated.

[36] Article 6 of the ECHR provides that in the determination of an individual's civil rights, that individual is entitled to a fair and public hearing within a reasonable time, by an independent and impartial legal tribunal. The individual is entitled to a full adversarial hearing whereby he may call witnesses, seek discovery and cross-examine witnesses. This is a case where the debt which is alleged due by the Respondent finds its origin in a decision made by the Respondent, in the exercise of discretion, to carry out a valuation of the Applicants' property portfolio for reasons which are not apparent. This valuation took place nine months into a two-year facility which was agreed between the parties. This decision, and the decisions which followed, raise the following questions to which the Applicants are, in my view, entitled to investigate:

(i) Who made the decision to value the property portfolio on or about 15th December 2010?
(ii) What was the basis for that decision?
(iii) Who made the decision to act on the valuation and seek the re-structuring of the loan?
(iv) What was the basis of that decision?
(v) Who made the decision to block the account from which the tax bill was to be discharged?
(vi) What was the basis for that decision?

Conclusion.

[37]Taking all matters into account and for reasons set out above and elsewhere in this judgment I am satisfied that the Applicants have demonstrated that there is a genuine dispute on grounds showing a potentially viable defence requiring investigation. I am further satisfied that they are entitled by virtue of Article 6 to have that defence tried out by action. Accordingly Rule 6.005(4)(b) is satisfied. I am further satisfied that the statutory demands were the wrong form of process in the circumstances of this case and that the statutory demands ought to be set aside under Rule 6.005(4)(d). In the circumstances, I dismiss the bankruptcy petition in the case of Mr Logue and set aside the statutory demand in the case of Mr Moffett. I will now hear counsel on costs.