Neutral Citation No. [2013] NIQB 54

Ref: **MCCL8851**

Judgment: approved by the Court for handing down

Delivered: **25/04/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

THE ULSTER BANK/TAGGARTS LITIGATION

McCLOSKEY J

INTRODUCTION

[1] The immediate impetus for this ruling is a series of interlocutory applications pending before the Court. These include an application seeking an Order pursuant to Order 4, Rule 5 of the Rules of the Court of Judicature that the various actions in which the parties are currently engaged should be tried together. Full consolidation is not suggested.

THE PARTIES

[2] The parties are Ulster Bank (Ireland Limited) and Ulster Bank Limited, (as security trustee for the finance parties), on the one hand and Michael Adrian Taggart and John Desmond Taggart, on the other. I shall describe them as "*the Banks*" and "*the Taggarts*" respectively.

THE GUARANTEE ACTIONS

[3] These are two separate actions in which the Banks sue the Taggarts on foot of two personal guarantees executed by them in August and November 2007 respectively. The Banks claim £5 million and €4.3 million. The salient entries in the chronology of these two actions are the following:

(a) September 2008 – May 2009: Letters of demand and solicitors' letters.

(b) June 2009: Writs of Summons.

(c) 3rd December 2009: service of the Statements of Claim.

(d) December 2009 – March 2011: the protracted lifetime of the Banks' summary judgment applications in both cases, culminating in orders in their favour.

(e) March 2011 – June 2012: the equally protracted lifetime of the summary judgment appeal proceedings.

(f) 26th June 2012: judgment of this court, allowing the Taggarts' appeals.

[4] In its aforementioned interlocutory judgment, the Court analysed the defences of the Taggarts to the two guarantee claims in these terms:

> "In very brief compass, the Defendants raise issues of misrepresentation, non-disclosure and unilateral mistake …..
>
> As regards the August 2007 guarantee, the Defendants further make the case that they complied fully with the true terms of this agreement, with the result that the Plaintiffs' demand and ensuing proceedings are in breach thereof and, given the Defendants' full discharge of their contractual obligations, there can be no liability on their part. As regards the [second] guarantee, the Defendants make the case, in essence, that this is vitiated by misrepresentation: their main (though not sole) contention is that the Plaintiffs misrepresented this as a mere replacement guarantee entailing the imposition of no altered or extended liabilities on the Defendants."

I am not conscious of any significant disagreement by any party with this concise analysis.

[5] In allowing the Taggarts' appeals against summary judgment in both cases, I highlighted, *inter alia*:

> "[35] …… A vast proliferation of affidavits in this kind of case is no substitute for viva voce evidence ….. which will enable the Court to assess the veracity of witnesses and to make confident findings of fact ……
>
> There are distinct indications that the evidential matrix before the Court may not be complete ……
>
> There exists, in my view, a veritable **Saunders** 'goldmine for cross examination'. ……
>
> In circumstances where there are obvious doubts, questions, uncertainties and obscurities, I am clearly of the view that the evidential matrix in the present case will remain incomplete, uncertain and obscure until all of the conventional adversarial trial processes have been exhausted."

The two guarantee actions have progressed in tandem since their inception and continue to do so. All parties are agreed that these two actions are ready for trial.

<u>THE TAGGARTS – v – THE BANKS</u>

[6] This is a separate action in which the Taggarts <u>personally</u> sue the Banks for alleged negligent misstatement and/or misrepresentation and breach of contract. The remedies claimed (alternatively) are damages, rescission of an oral contract and the return of monies paid by them to the Banks. In my ruling and further directions promulgated on 11th July 2012, I undertook the following assessment of this action:

> "The Statement of Claim asserts, inter alia, an unlawful failure by the Banks to make certain financial advances to two companies in the Taggart Group, based on a false allegation of breaches of the so-called "LTV covenant"; a representation by the Banks' agent in June 2007 that the refusal to make advances was based solely on the alleged breach of the LTV covenant, being an alleged misrepresentation; a failure by the Bank to disclose that it was unprepared to continue dealing with the

> Taggarts on the same basis as before June 2007; a related failure to disclose to the Taggarts the substance of certain General Purposes Reports; detrimental reliance by the Taggarts on the Banks' alleged misrepresentations, including declining to sell 'Yuill' and/or other Taggart Group assets, with resulting insolvency of the Taggart Group; the extraction of personal guarantees from the Taggarts of £5 million on 8th August 2007, followed almost immediately by the Banks' demand that the Taggarts introduce personal funds into the Taggart Group; a resulting agreement between the parties whereby the Banks would permit the Taggart Group to make full use of the existing financial facilities in consideration of no LTV covenant breaches and the investment of £1.4 million personally by the Taggarts to reduce the Group's indebtedness to the Banks; the ensuing payment of such amount by the Taggarts to the Banks; and ensuing breaches of this agreement by the Banks, giving rise progressively to the collapse of the Taggart Group and resulting losses to the Taggarts personally (the action being brought in their names alone)."

I am unaware of any dissent from this concise analysis, which was based exclusively on the amended Statement of Claim.

[7] The Taggarts' action against the Banks is of moderately more recent vintage than the Banks' guarantee actions against the Taggarts. Chronologically, in brief compass:

(a) The conventional pre-action letter was despatched on 4th January 2011.

(b) The Writ was issued on 7th January 2011.

(c) An initial Statement of Claim (plainly deficient) was served on 29th March 2011.

(d) An amended Statement of Claim, accompanied by a Schedule of Loss, was served on 19th September 2011.

(e) The Defence was served on 22nd December 2011.

Accordingly, during the summary judgment appeal phase of Ulster Bank – v – Taggarts, the related action of Taggarts – v – Ulster Bank progressed to the point where pleadings were closed. I record further that there was no challenge to the amended Statement of Claim and no request for further particulars. In truth, this separate action received scant attention from any quarter while the summary judgment appeals were progressing. The court did, however, raise certain questions about it periodically as I was concerned to establish the litigation inter-relationship, if any and to ascertain the broader picture.

POST-JUNE 2012

[8] Swift upon the heels of the Court's judgment given on 26th June 2012, Taggarts' solicitors made written representations that all three actions be tried together. Ultimately, this contention culminated in the summons of which the Court is currently seized. In my ruling of 11th June 2012, I declined to determine this issue, pointing out that further information and argument were required and emphasising that the central issue was that of **readiness for trial**.

[9] A fluid and fluctuating matrix developed thereafter, during which there was much skirmishing among the parties and frequent appearances before the Court. During this phase, the scheduled trial date was 12th November 2012. The main issue played out before the Court was that of discovery of further documents by the Banks to the Taggarts. Other issues included pleadings, preparation of witness statements and the formulation of the issues in dispute among the parties. The Court also received a more detailed submission on behalf of the Banks, opposing consolidation or anything comparable. On 21st September 2012, the Banks' solicitors wrote a composite letter embracing all actions to which they attached their clients' List of Documents "*and copies of same by way of service upon you*", accompanied by the statement:

> "Please note that we have compiled the List of Documents in respect of the above three actions."

[10] The scheduled trial date of 12th November 2012 approached. On 7th November 2012, the Court made a series of directions addressing the issue of witness statements. At this stage, the two main outstanding issues were further discovery from the Banks and the compilation of comprehensive witness statements on behalf of the Taggarts. These two issues were inter-connected. Discovery and other orders were made on 25th October and 6th, 12th and 14th November 2012. The trial date was vacated. The Court rescheduled

the trial to commence on 22nd November 2012. On 21st November, the Court was informed that further discovery comprising 18 lever arch files had been received from the Banks. These contained in particular certain "security" documents, previously but no longer redacted. The Taggarts challenged the adequacy of the Banks' affidavit in purported compliance with Order 24, Rule 7 and sought further discovery. They complained about the adequacy of particulars served. They contended that their witness statements could not be finalised, given these considerations. The rescheduled trial date of 22nd November 2012 was vacated in these circumstances.

[11] Discovery appeared to be completed thereafter and the exercise of finalising witness statements was concluded, approximately one month later. The main development in this respect was the service of the Supplementary Witness Statement of Michael Taggart in late December 2012. A new trial date of 4th February 2013 was duly allocated. This was vacated on account of the unavailability of the Taggarts' counsel and was rearranged to 7th May 2013. The adjournment application was made timeously and, at this stage, the question of mediation was raised for the first time. This resulted in all proceedings being stayed for a period of approximately two months, straddling January, February and March 2013. The mediation did not generate a consensual resolution. Meantime, two particular issues remained unresolved. The first was the Taggarts' quest for joinder of all three actions. The second was the Banks' objection to the composition of Michael Taggart's Supplemental Witness Statement. Both issues were ventilated again by the parties just before the Easter recess. The Taggarts' formal application for joinder of the three actions (combined with certain other forms of interlocutory relief) then materialised, on 26th March 2013.

COMBINING THE ACTIONS

[12] As the above resume demonstrates, the issue of co-ordinating and programming the three actions and, in particular, the question of whether they should be tried together has been a live one since June 2012 but has remained unresolved whilst energies and emphases have been concentrated in other directions. It has gained renewed focus and vigour since the unsuccessful mediation process. The Taggarts represent that they are ready for a combined trial of all three actions and urge this course. The Banks are trenchantly opposed to joinder.

[13] I have considered, and decline to rehearse, the various written and oral submissions, affidavits and other materials which this discrete issue has generated. Notably, the Taggarts' submissions, harmonious with their pleading in the third action, place the spotlight on the period February to October 2007 – during which, of course, the material events pertaining to, and the execution of, the two guarantees occurred. This submission is based on,

inter alia, further discovery obtained from the Banks, including internal reports. Allegations which are, in principle, capable of constituting misrepresentation, material non-disclosure and breach of contract are canvassed. The Taggarts' arguments resolve to the following core contentions:

(a) Common questions of fact and of law arise in all three actions, against the background of a continuous banker/customer relationship.

(b) Significant costs and time are likely to be saved.

(c) A level playing field, with neither party enjoying any litigation advantage over the other, will be established.

[14] On behalf of the Banks, while it is acknowledged that there are some issues of fact and law and certain witnesses common to all three actions, it is contended that this degree of commonality is insufficient to warrant combination. During the most recent phase of this litigation the question of readiness for trial has emerged as the centrepiece of the Banks' arguments. Referring particularly to the supplementary witness statement of Michael Taggart (finalised in December 2012), the fundamental contention advanced is that the Banks are not ready for a conjoined trial of all three actions on account of outstanding discovery of documents. Specifically, it is contended that discovery is required from the administrators of certain companies in administration belonging to the Taggart Group; accountants (KMPG) engaged to advise the Group in mid-2007; certain other banks with whom the Taggarts were actually or potentially involved; the solicitors advising the Taggarts at the material time (Tughans); and a particular private investor. The solicitor's affidavit also points to recent *inter-partes* correspondence suggestive of a concession by the Taggarts' solicitors that their clients' discovery may not be complete. Finally, the possibility of engaging an expert forensic accountant is canvassed.

<u>CONSIDERATION AND CONCLUSIONS</u>

[15] The question of combining all three actions having crystallised finally and fully, the narrow issue for the Court to consider is that of common questions of fact and/or law. The broader issue encompasses the various principles and criteria enshrined in the overriding objective in Order 1, Rule 1A. The overriding objective, in a sentence, enjoins the Court to conduct and manage cases in a manner which best confronts and minimises undue delay, cost and complexity - the so-called "unholy trinity". The ruling which the Court must make in the present case – as in comparable other cases – involves

the formation of a predictive and evaluative judgment which is as fully informed as possible and withstands the test of rationality. This is a reflection of the considerations that the Court is exercising discretionary powers and that, within the ambit of public law, powers of this kind must be exercised in accordance with well recognised criteria. The requirement to form a rational evaluative judgment is one such criterion. Another is the obligation to take into account all material considerations and to disregard immaterial factors (a prime example of the latter being the suggestion made on behalf of the Banks that the eyes of the commercial banking world are fixed closely on how the Court conducts these proceedings). The Court must also manage litigation in a manner which ensures that every party's right to a fair hearing is respected.

[16] I conclude that, unmistakably, there are issues of fact and law common to all three actions. This assessment can, at this stage of the litigation, be made on a reasonably informed basis and is founded on a combination of the parties' pleadings, the witness statements, the discovered documents and the arguments advanced. The relationship between the Banks and the Taggarts was at all material times that of commercial banker and customer. This was, in law, a contractual relationship. In all three actions, the Taggarts make allegations of misrepresentation, non-disclosure and breach of contract against the Banks. These allegations focus mainly, though not exclusively, on particular dates, periods, events and personnel and they clearly overlap the frameworks of the guarantee actions and the third action. It is not possible to separate the guarantee actions from the third action either by a bright luminous line or a hermetically sealed compartment. The reality of the overall "story", as disclosed to the Court *at this stage*, does not permit this kind of clinical dissection. A strong degree of inter-action association is evident.

[17] I have formed the clear view that joinder of the three actions is likely to save time and costs; will avoid duplication of effort and energies; will secure from the Court a single adjudication of all of the issues belonging to the dispute among the parties; will ensure that no party gains a litigation advantage to the possible detriment of another; will preserve as level a playing field as possible; and will provide an equal measure of fairness to all parties. This is the assessment of the Court in the circumstances now prevailing. While the Banks seek to place some emphasis on how this set of circumstances has materialised, the Court is obliged to squarely confront and deal with the here and now. Moreover, there is no sustainable suggestion that the present litigation matrix has been in some way manufactured by any impropriety or improper manipulation of the Court's process by any party – and assiduous judicial case management would have exposed this in any event .

[18] I conclude, accordingly, that all three actions should be tried together and I thus order. I accede to the Banks' argument that the determination of

the quantum of the claim in Taggarts – v – Ulster Bank should be deferred. The conjoined trial which I have ordered will, therefore, be a split trial in this sense.

OUTWORKINGS OF THIS ORDER

[19] In the interests of fairness, all parties will have an opportunity to address the Court on the implications of this ruling and order, following consideration. I invite the parties to consider the following two options:

(a) **Option 1**: The trial date of 7th May 2013 is preserved and the combined trial proceeds, if necessary on a staggered basis to accommodate any reasonable requests on behalf of the Banks.

(b) **Option 2:** The trial is rescheduled, to commence on 3rd June 2013, when three weeks of court time, if required, will be made available.

[20] The Court will reconvene on 29th April 2013 for the purpose of giving further consideration to timetabling and programming issues. The parties are invited to agree a timetable. A concise statement of the Taggarts' case against the Banks in the third action and the Taggarts' defence to the guarantee actions should be prepared: per Order 18, Rule 12(3). Ditto, sequentially, a concise statement of the Banks' defence in the third action. None of these to exceed two A4 pages.

[21] For completeness, I hereby affirm the Court's *ex tempore* rulings:

(a) The Taggarts' application for an order that the Banks provide security for costs is dismissed. It is an essential precondition to the making of such an order that the Court have reason to believe that the Plaintiff (in this instance the Banks, in the two guarantee actions) will be unable to pay the Defendants' costs: see **Outlet Recording Company – v – Thompson and Others** [2011] NIQB 24, paragraph [26], per Weatherup J. Having regard to all the evidence accumulated, the test for making such an order is not satisfied.

(b) The Taggarts' application for further particulars and a further order under Order 24, Rule 7 is dismissed. At this very late stage, the court must draw a line and matters of this kind must be pursued sensibly and consensually, with adjudication by the court a measure of veritable last resort.

[22] There will be liberty to apply.