Neutral Citation No. [2016] NICA 34 | *Ref:* **MOR10038**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | ***Delivered:*** **01/08/2016**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

BETWEEN:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

Plaintiff/Respondent;

-and-

CONAL DEREK McFEELY and GERARD NOEL McFEELY

Defendants/Appellants.

_____

Before: Morgan LCJ and Weir LJ

_____

MORGAN LCJ (giving the judgment of the court)

[1] This is an application to extend time for the service of a notice of appeal in respect of a judgement entered against the applicants on 3 January 2013 in the sum of £5,398,450.51. Mr Gibson appeared for the applicants and Mr Colmar for the respondent. We are grateful to both counsel for their helpful oral and written submissions.

Background

[2] The applicants are property developers who were involved in the development of commercial property on land at 160-188 High Street, Stratford, East London. The development was to be carried out through Inis Developments Ltd ("Inis"), a company in which the appellants had an interest. On 26 June 2007 Inis entered into a facility agreement with the respondent by which it borrowed £27 million to facilitate the development. As part of the facility agreement on the same date the appellants entered into joint and several capital guarantees in the sum of £5

million (plus interest and costs from the date of demand) in favour of the respondent in respect of the repayment by Inis of the borrowed money plus interest.

[3] Inis was unable to complete the development of the property and consequently unable to repay the loan. The respondent accordingly issued proceedings on foot of the guarantee on 2 February 2012. A defence was lodged on 5 April 2012 alleging that the respondent failed or refused to provide facilities to Inis and alleging that the applicants were put under enormous time pressure to enter into the guarantees. A notice for particulars was served by the respondent on 16 July 2012 but the applicants did not reply. An Order was made on 19 October 2012 to compel replies and in the absence of same an Unless Order was made by Weatherup J on 7 December 2012 which was not complied with. On 3 January 2013 judgement in default was entered against the applicants.

[4] On 3 April 2014 an application was made by the applicants to stay the execution of the said judgement. The basis of that application was the contention that the applicants were likely to obtain sufficient funds to discharge the sums due to the respondent as a result of litigation involving Ashwood Enterprises Ltd, a company also associated with the property development enterprise. That litigation was determined by Mrs Justice Asplin on 29 July 2014 as a result of which no additional funds became available to the applicants. Various attempts were made to pursue the matter to the Court of Appeal but these were unsuccessful and on 19 June 2015 Weatherup J struck out the summons applying to stay the execution of the judgement with costs to the respondent.

The alleged transfer to Bank of Ireland (UK) Plc

[5] This application was grounded on the affidavit of the applicants' solicitor, Raymond St John Murphy. He stated that he was informed by Thomas McFeely, a brother of the applicants, that he was approached by a director of an estate agency involved with the development project. The estate agent had a connection with the former Chief Executive of the respondent, Syed Jaffrey. Mr Murphy reported that Mr McFeely said that he was informed by Mr Jaffrey that the loans in this case had been transferred to Bank of Ireland (UK) Plc when that bank was established to obtain a new banking licence issued by the Bank of England on 1 November 2010. If such a transfer had occurred the respondent no longer held the loans and had no standing, therefore, to enforce the guarantees. This claim was first made in correspondence on 10 September 2015 but was not pursued by way of proceedings until 10 February 2016.

[6] The argument on this issue depends on the interpretation of certain transactions which took place between the respondent and the National Asset Management Agency ("NAMA"), established by the National Asset Management Agency Act 2009 ("the NAMA Act") in the Republic of Ireland. On 12 February 2010

the respondent was designated a participating institution under the NAMA Act. By virtue of section 87 of that Act when NAMA identified an eligible bank asset of a participating institution that it proposed to acquire it was required to serve on the institution an acquisition schedule. By virtue of section 87(3) an acquisition schedule had to set out for each eligible bank asset to be acquired, *inter alia*, the date of acquisition.

[7] Section 91 of the Act makes particular provision in relation to the acquisition of foreign bank assets.

> "91.—(1) In this Part—
>
> 'foreign bank asset' means a bank asset in which the transfer or assignment of any right, title or interest that NAMA proposes to acquire is governed in whole or in part by the law of a state (including the law of a territorial unit of a state) other than the State;
>
> 'foreign law', in relation to a foreign bank asset or a transaction in relation to a foreign bank asset means the law of a state other than the State.
>
> …
>
> (3) To the extent that a bank asset proposed to be acquired by NAMA is or includes a foreign bank asset—
>
> (a) if the law governing the transfer or assignment of the foreign bank asset permits the transfer or assignment of that asset, the participating institution shall if NAMA so directs do everything required by law to give effect to the acquisition, or
>
> (b) if the relevant foreign law does not permit the transfer or assignment of the foreign bank asset, the participating institution shall if NAMA so directs do all that the participating institution is permitted to do under that law to assign to NAMA the greatest interest possible in the foreign bank asset.

> (4) A participating institution, to the extent that a foreign bank asset is one to which subsection (3)(b) applies—
>
> (a) is subject to duties, obligations and liabilities as nearly as possible corresponding to those of a trustee in relation to that bank asset, and
>
> (b) shall hold the bank asset for the benefit and to the direction of NAMA,
>
> in each case subject to the nature of, and the terms and conditions of the acquisition of, the foreign bank asset.
>
> …
>
> (7) A trust, duty, obligation or liability created or constituted by this section shall not be taken to constitute a security.
>
> (8) A participating institution shall comply with any direction of NAMA in relation to any duty, obligation or liability under this section."

[8] NAMA served an acquisition schedule on the respondent pursuant to the NAMA Act on 25 October 2010. The acquisition schedule included the loan due from Inis under the facility agreement. By clause 27 of that agreement the governing law was English law. This was, therefore, a foreign bank asset for the purposes of section 91 of the NAMA Act. Clause 20 of the facility agreement provided that the lender may assign any of its rights to a qualified lender. A qualifying lender was defined as meaning a bank or building society which was within the charge to United Kingdom corporation tax with regard to any payment of interest made in respect of a loan made under the agreement. It was common case in this application that NAMA did not fall within that definition and that the loan could not be assigned or transferred to NAMA. Section 91(3)(b) of the NAMA Act applied and the asset remained within the ownership of the respondent but subject to the obligations imposed by the NAMA Act.

[9] The importance of the acquisition schedule for this litigation lay in the fact that those assets which had not been the subject of an acquisition schedule by NAMA were to be transferred to Bank of Ireland (UK) Plc ("the new bank") under a scheme pursuant to which an Order was made in the Chancery Division in London on 29 October 2010 transferring the business banking assets of the respondent to the new bank. The applicants' submission was that the Inis loans were still held by the respondent and had not been transferred under the acquisition schedule at that date.

Consequently it was argued that they were transferred on 29 October 2010 to the new bank.

[10] The principal basis for that submission arose from section 87(7) of the NAMA Act which provided that the date of acquisition of a designated bank asset shall be at least 28 days after the relevant acquisition schedule is served on the participating institution unless NAMA specified a shorter period in the acquisition schedule. The acquisition schedule in this case was dated 25 October 2010. Within the schedule it was stated that the acquisition date was "the date first herein written" which was 25 October 2010. We conclude on the materials available that the Inis loans were acquired on 25 October 2010 under the acquisition schedule and were not, therefore, part of the business banking business which was transferred to Bank of Ireland (UK) Plc with an effective date of 1 November 2010. This was the original basis of the application. That case was dependent upon the reliability of the hearsay statement by Mr Thomas McFeely upon which the applicants relied. In light of our conclusions we do not consider that statement reliable.

The transfer to NAMA

[11] The alternative argument advanced by Mr Gibson was that NAMA became the effective assignee of the benefit of the facility agreement by virtue of the service of the acquisition schedule. Mr Gibson relied in particular on section 91(4)(b) of the NAMA Act which provides that a participating institution in relation to a foreign bank asset shall hold the bank asset for the benefit and to the direction of NAMA. He submitted that such an obligation was inconsistent with the prohibition on assignment contained within the facility agreement.

[12] In Co-operative Group Limited v Birse Developments Ltd (in Liquidation) [2014] EWHC 530 Stuart-Smith J reviewed the authorities as to the circumstances in which a declaration of trust will be implied for the benefit of an assignee in circumstances where the assignor is prohibited by the principal agreement from assigning the benefit. Mr Gibson maintained that in this instance to put NAMA into the position of trustee would run contrary to the intention of the parties as expressed in Clause 20, the substance of which we have set out at paragraph [8] above.

[13] We do not accept that submission. Although there is a restriction on assignment it is clear that an assignment could have been effected by the respondent to any qualified lender. This was not a case where the identity of the particular lender was of materiality to the contract. That might have been the case if there was a provision requiring the consent of the applicants to any such assignment. There was no prohibition on the respondent declaring a trust in relation to the benefit of the contract and such a trust would not have offended the commercial purpose of the contract.

[14] This is not a case of a failed assignment because of a prohibition in the substantive agreement. The respondent and NAMA knew the precise basis of their relationship because of the terms of the statute. There was no restriction on the respondent entering into such a relationship and it did not offend the commercial purpose of the facility agreement to do so.

[15] We also consider that the entitlement of NAMA to give directions pursuant to section 91 of the NAMA Act is subject to the provisions of section 91(3)(b) which limits NAMA's interest to the greatest interest possible. Section 91(4)(b) cannot extend that interest. Whatever limitations there were there was, however, nothing in the facility agreement to prevent NAMA obtaining such fruits of the facility agreement as the respondent acquired.

Conclusion

[16] The leading case on the extension of time is Davis v Northern Ireland Carriers [1979] NI 19. Lowry LCJ stated:

> "Where a time limit is imposed by statue it cannot be extended unless that or another statute contains a dispensing power. Where the time is imposed by rules of court which embody a dispensing power such as is that found in Order 64 rule 7 the court must exercise its discretion in each case and for that purpose the relevant principles are –
>
> (1) whether the time is sped: a court will, where the reason is a good one, look more favourably on an application made before the time is up;
>
> (2) when the time-limit has expired, the extent to which the party applying is in default;
>
> (3) the effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs;
>
> (4) whether a hearing of the merits has taken place or would be denied by refusing an extension;
>
> (5) whether there is a point of substance (which in effect means a legal point of substance when dealing with cases stated) which could not otherwise be put forward; and

> (6) whether the point is of general and not merely particular, significance.
>
> To these I add the important principle;
>
> (7) that the rules of court are there to be observed."

[17] He went on, however, to encourage a wider approach to the issues in the following passage:

> "If we had left the case here my view would undoubtedly have been that the delay had not been satisfactorily explained and, that all the more so because there had been a hearing on the merits (which must, judged by the very exhaustive and obviously careful written decision, have been both full and painstaking), the application should be refused.
>
> We decided, however, that in order to do justice it would be better to find out the strength of the appellant's case, so far as it was founded on points of law and therefore remained capable of being pursued by way of case stated. We therefore discussed the legal merits of the case in some detail …..It is not, however, necessary to expatiate on this branch of the case, if only because it may come before this court in another guise. I am content to say that nothing emerged to make me feel that justice demanded an extension of time in face of the principles to which I have already adverted."

[18] This is a case where the applicants chose not to play any active part in resisting the judgement that was entered against them. They now seek to introduce evidence much of which was publicly available if they had sought to defend their interests at the time. The absence of a hearing on the merits is entirely due to the inaction of the applicants. A period of three years passed before this application was made. The trigger for the application was a conversation with a person who has not made a statement on a date that is unknown who apparently may have been acting in breach of a confidentiality agreement. We are satisfied on the materials before us that the statement upon which the applicants relied was not accurate. We have examined the alternative issue advanced on behalf of the applicants but consider that it does not advance the applicants' case. In the commercial sphere certainty is important in litigation.

[19] We refuse the application to extend time.