Unjust Enrichment in Ireland

Capper, D. (2021). Unjust Enrichment in Ireland. *Lloyds Maritime and Commercial Law Quarterly*, *2021*, 647-653. https://www.i-law.com/ilaw/doc/view.htm?id=423817

Published in:
Lloyds Maritime and Commercial Law Quarterly

Document Version:
Publisher's PDF, also known as Version of record

Queen's University Belfast - Research Portal:
Link to publication record in Queen's University Belfast Research Portal

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Download date:24. May. 2024

Unjust enrichment in Ireland

*David Capper**

CASES

Northern Ireland

1. ***Donaghy v JJ Haughey Solicitors Ltd*** [2019] NICh 1 (NI HC, ChD: McBride J)

Return of papers relating to administration of estate and previous litigation—solicitor's lien

The plaintiff was the executrix and sole beneficiary of the will of a deceased woman for whom she had been carer for a number of years. The estate consisted almost entirely of a dwelling house in Armagh, into which the plaintiff moved a short time before the testatrix's death, having sold her own house first. The will was challenged by a hospice on the ground of testamentary capacity; if this challenge had succeeded, an earlier will in favour of the hospice would have been revived. These proceedings were settled in terms of a 50:50 split of the estate between the plaintiff and the hospice.

The plaintiff lodged a complaint with the Law Society of Northern Ireland concerning her solicitors' (defendants in the current proceedings) handling of the administration of the testatrix's estate and the legal proceedings brought against her by the hospice. The defendants wrote to the plaintiff asserting that she had been uncooperative in respect of the property sale needed to give effect to the settlement with the hospice, and stating that in light of her complaint she should instruct other solicitors to continue the administration of the estate. Meantime the hospice brought proceedings against the plaintiff for specific performance of the settlement agreement.

In the current proceedings, the plaintiff sought delivery to her new solicitors of all papers in the defendants' possession relating to the administration of the estate and the previous legal proceedings. The defendants refused to comply with this request until their costs had been paid or a satisfactory undertaking to do so was given. The plaintiff claimed that she needed the papers to help her decide whether to issue a third-party notice against the defendants in the specific performance proceedings.

Held: Subject to any contrary agreement, solicitors were entitled to exercise a general lien in respect of costs over any property of a client properly in their possession as a solicitor. As solicitors were officers of the court, the court could supervise the enforcement of the lien on equitable principles. A practice had developed that, if solicitors discharged themselves in the course of ongoing proceedings, the court would usually order them to hand over all relevant papers to their client's new solicitors, on the latter's undertaking to preserve the lien for costs and redeliver the papers at the end of the litigation. However, this weighty factor could be overridden if a different course best served the interests of justice.

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If the client terminated the retainer, that was usually a weighty factor against interfering with the lien, but again this could be overridden in the interests of justice. The following non-exhaustive list of factors would guide the court in the exercise of its discretion: (a) who ended the solicitor/client relationship, when and why it had ended; (b) the nature of the case; (c) the stage litigation had reached; (d) the parties' respective conduct; (e) the balance of hardship that might result from the order the court made; (f) the fact that the value of the solicitor's lien was likely to be considerably diminished if papers required for pending litigation were handed over.

Applying these principles, the starting point was that the solicitors had terminated the retainer but in circumstances in which the client had not been cooperating in the enforcement of the settlement and had made a complaint against the solicitors. The plaintiff did not need the papers to defend the specific performance claim or decide whether to issue a third-party notice. If the plaintiff had serious concerns about the way the defendants had handled the administration of the estate, she could bring a professional negligence/breach of contract claim against them. The order sought by the plaintiff in the current proceedings was tantamount to pre-action discovery in contemplated proceedings of that nature. The value of the defendants' lien would be substantially diminished if they had to hand over the papers now. There would be no corresponding hardship for the plaintiff, as she would receive a substantial payment under the settlement agreement. The appropriate order to meet the balance of justice between the parties was that, if the plaintiff executed a charge over her interest in the deceased's home in the defendants' favour as security for their costs within 14 days of the court's order, the defendants would deliver up to the plaintiff's solicitors the papers relating to the administration of the deceased's estate and the previous litigation.

2. *Stewart v Martin* [2019] NIQB 7 (NI HC, QB (Comm): Keegan J); varied [2019] NICA 54 (NI CA: McCloskey LJ, Maguire J and Sir Richard McLaughlin)

Rescission—breach of fiduciary duty—Quistclose trust—deceit—negligent misstatement—contributory negligence—joint and several liability

The plaintiffs invested £490,000 in redeemable preference shares in a property development company. The first and second defendants were directors of the company and the third defendants were the company's solicitors. The first and second defendants falsely represented that the plaintiffs' investment would be applied towards the acquisition of a property development site in Ballygowan, County Down, but was actually used to acquire properties in East Belfast in which the plaintiffs had no interest. Crucial to the third defendants' role in this case was a meeting at the third defendants' office to which the plaintiffs were brought by the first and second defendants. At this meeting, the solicitor responsible for the development project advised the plaintiffs to obtain their own legal representation, but also informed the plaintiffs that effect would be given to the share purchase transaction once everything pertaining to it had been agreed. The plaintiffs never received any shares in the company, which went into administration in the property crash at the turn of the 2000–2010s. The plaintiffs brought this action claiming rescission of the

share purchase transaction and/or monetary relief, which was pleaded in a variety of ways, including misrepresentation and breach of fiduciary duty.

Held (Keegan J): As the contract for the investment of the plaintiffs' £490,000 had been made with the company and the latter was not a party to the proceedings, rescission of this contract could not be ordered. Nor could restitution pursuant to a *Quistclose* trust be ordered, as there was insufficient evidence of specific earmarking of the plaintiffs' money to meet the requirements for relief on this ground. The first and second defendants had fraudulently misrepresented that the plaintiffs' investment would be applied towards the Ballygowan project in which they had expressed interest but had been used to acquire properties in East Belfast with respect to which the plaintiffs had made clear they did not want to be involved. Damages would be awarded against the first and second defendants for deceit and no reduction for the plaintiffs' contributory negligence (see below) would be made as this defence did not apply in the face of fraud.

With respect to the position of the third defendants, they could not be liable for dishonest assistance in a breach of trust because there was insufficient evidence of the existence of a trust and no proof of dishonesty. However, relying on *Steel & Ors v NRAM* [2018] UKSC 13; [2018] 1 WLR 1190, the judge concluded that the solicitor with responsibility for the investment transaction had assumed responsibility to the plaintiffs when he told them that effect would be given to the share purchase transaction once everything pertaining to it had been agreed. The judge found that, at the time the solicitor received the plaintiffs' money and allowed it to be applied to the development project, he should have realised that the plaintiffs could have been mistaken about the nature of that project. The first and second defendants had agreed to contribute two-thirds of the share capital of the property development company but never did so. The liquidity problems this caused at least partly explain how the plaintiffs' investment was used for the East Belfast properties instead of the Ballygowan project. So the third defendants were held to be liable in negligent misstatement. However, damages were reduced by 80% due to the plaintiffs' contributory negligence. This was because they had failed to heed the advice of solicitors acting for them who told them they would not be acting prudently if they continued involvement in a project where all agreements between relevant parties were oral and nothing had been reduced to writing. In addition, there was the advice of the solicitor managing this project that he acted for the first and second defendants only and that the plaintiffs should obtain their own legal representation.

Order: The order made by the judge was as follows:

1. The first and second defendants were jointly and severally liable as between themselves for the plaintiffs' loss.
2. The third defendants were severally liable for the plaintiffs' loss, but this was reduced by 80% for contributory negligence.

When the above was reduced to figures, this came to judgment for £245,000 against the first and second defendants and £49,000 against the third defendants (£245,000 reduced to £49,000 for contributory negligence).

Comment: It should be instantly apparent that the above computation does not follow from the judge's findings that the first and second defendants were jointly and severally liable and the third defendants severally liable. The error was corrected by the Court of Appeal but, before Keegan J is pilloried for this mistake, tribute must be paid to the way she managed to distil the facts out of a case characterised by a lack of particularity in pleading and oral evidence from lay witnesses that was barely intelligible.

Appeal: The plaintiffs appealed against the reduction of their damages against all defendants by 50% and the reduction of damages against the third defendants for contributory negligence. There was no cross appeal by any of the defendants and the first and second defendants did not participate in the appeal. Prior to the appeal, a settlement was reached between the plaintiffs and the third defendants in the sum of £200,000. The first and second defendants were not reckoned to be a good mark for damages. This narrowed the issues in the appeal considerably.

Held (Court of Appeal): As the judge had found the first and second defendants to be jointly and severally liable for the whole of the plaintiffs' loss, judgment should be entered against them (disregarding for now the settlement with the third defendant) for £490,000. As the judge had found the third defendants severally liable for the whole of the plaintiffs' loss, subject to contributory negligence at 80%, this should have been judgment against them for £98,000. There had been no finding that any defendant was liable for separate losses, so it was incorrect to reduce any party's liability below £490,000.

Order: This produced a court order in the following terms:

1. The plaintiffs were to get judgment against the third defendants for £200,000.
2. The plaintiffs were to get judgment against the first and second defendants for £490,000. This judgment was to be enforced giving appropriate credit for the judgment against the third defendant.

Republic of Ireland

3. *AIB Mortgage Bank v O'Toole & Anor* [2018] IECA 6 (CA: Ryan P, Irvine and Whelan JJ)

Equitable consolidation

The respondent bank made two separate loans to the appellants, each secured by mortgages over two sets of properties in Carlow. The appellants sold one of the properties subject to the first mortgage and sought to redeem the mortgage over it, retaining the surplus over and above the amount secured on it. The bank refused to agree to the redemption of the mortgage over the sold property, contending that it was entitled to retain it as security for the second loan. The appellants contended that the only way that this could be done was through the equitable doctrine of consolidation, whereby a mortgagee could retain a mortgage over one property as security for the amount owed on another property mortgaged to it by the same mortgagor. The appellants further contended that the conditions applicable to equitable consolidation were not satisfied in this case and therefore the bank was obliged to allow the sold property to be released from the first mortgage.

Decision: Appeal dismissed.

Held: Equitable consolidation was the mortgagee's right, permitted to prevent a mortgagor being unjustly enriched at the expense of the mortgagee by selling a mortgaged property, redeeming the security and retaining the surplus money. Under the Conveyancing Act 1881, s.17, there was no right of consolidation unless the mortgage documents evidenced a contrary intention. In this case it was unnecessary to decide whether the bank had any right of consolidation. If it had, it was not obliged to rely upon it and the right of consolidation was not the only way in which the bank could preserve its mortgage over the first set of properties as security for the second loan. An examination of the security documents in this case made it clear that this was a case of cross securitisation, where all the loans and securities applicable to them were "all monies" and secured repayment of any sums owing by the appellants to the bank.

4. *Allied Irish Banks Plc v Doran* [2018] IEHC 2 (HC: Barrett J)

Guarantee—elderly parent—independent legal advice—Etridge defence—undue influence and misrepresentation

This was an application for summary judgment by a bank against an elderly man who had guaranteed a loan of €126,195 extended to his son and daughter-in-law. The guarantor deposed that he was then 80 years old, had received only primary school education, and was ignorant of banking and business matters. In 2006, when he was in his late 60s, he had executed a guarantee in favour of his son and daughter-in-law and had received independent legal advice in respect of that. In 2010, he was brought to the bank's offices in Carrick-on-Shannon, where he was asked to sign another document on behalf of his son and daughter-in-law. The nature of this document was not explained to him and he received no independent legal advice about it. He was not told that his son and daughter-in-law were in default under the 2006 loan and that this was the reason for the execution of a fresh guarantee.

Decision: Summary judgment for the bank.

Comment: The guarantor relied on three defences in an attempt to have the bank's application referred to a full plenary hearing, two of which require no detailed exposition in this digest. The defences requiring no detailed exposition were: that the bank's special indorsement of claim did not contain sufficient particulars of the bank's claim to enable the guarantor to know whether he should pay or defend the claim; and that the terms of the guarantee were unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1995. The first question here has been the subject of a judgment of the Supreme Court in *Bank of Ireland Mortgage Bank v O'Malley* [2019] IESC 84. The judge held that the particulars were sufficient in the current case but whether they would be regarded as sufficient after the *O'Malley* judgment is not entirely clear. The second was that the guarantor had insufficient opportunity to become acquainted with the terms of the guarantee. This defence was rejected because the guarantor had just signed the guarantee without reading it.

The defence that is more worthy of note in the present context draws from *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44; [2002] 1 Lloyd's Rep 343;

[2002] AC 773. Several decisions of the courts in Ireland have considered the duty of a bank when dealing with a vulnerable guarantor standing surety for a family member or other person with whom they are in a close emotional relationship. In *ACC Loan Management Ltd v Connolly* [2017] IECA 119; [2018] RLR § 261, the Court of Appeal had been divided on the question whether the vulnerability of the guarantor was sufficient in itself to place the bank under an obligation to have the guarantor independently advised or to take other steps to ensure (s)he understood the nature and effect of the transaction being entered into. In that case, Hogan J would have required that; but the majority judgment of Finlay-Geoghegan J requires proof of undue influence, misrepresentation or other wrongdoing on the part of the borrower. In *AIB v Doran*, the guarantor sought to argue that there was a misrepresentation by silence on the part of bank and borrower in not explaining that the reason for taking out a new guarantee was that the son and daughter-in-law were in default under the 2006 loan. However, the judge considered that this went without saying as the reason for a new guarantee, so this defence was rejected as well.

Barrett J appears to have been unhappy about the decision he reached. He observed that the bank's affidavit contained no detail about the circumstances in which this guarantee was entered into, and stated that the court was bound by the *ratio* of the decision in *Connolly*. He said that, if Hogan J's judgment in that case were to be followed, this might not unreasonably be regarded as a fairer outcome, and he expressed the hope that the guarantor's age would be taken into account when the bank moved towards enforcement of the judgment.

5. *Allied Irish Banks Plc v DX and TX* [2019] IEHC 549 (HC: Barrett J)

Unconscionable bargain—capacity

This was an application for summary judgment on the bank's claim to enforce a guarantee entered into by the defendants in relation to a loan advanced to their son, JX, in 2009. There was clear evidence that the son had been experiencing mental health issues since at least 2015 and some evidence that these problems had been prevalent at the time the loan was extended. The defendants disputed their liability under the guarantee on the grounds that the loan to the son was an unconscionable bargain and because he lacked sufficient mental capacity at the time it was executed.

Decision: Summary judgment was denied and a full plenary hearing was ordered.

Held: The loan was not an unconscionable bargain because it was neither unconscionably improvident nor at an undervalue. However, there was some evidence of mental incapacity and, having regard to the low threshold that has to be established in order to send a case to full plenary hearing, that was the appropriate course to take in this case.

Comment: The judge's analysis of the unconscionable bargain jurisprudence was far from in-depth, so this decision should not be taken as meaning that the absence of substantive unconscionability always means a transaction cannot be an unconscionable bargain. This was a summary judgment application and the judge was able to find enough in the borrower's mental health issues to send the case to plenary hearing.

6. *Allied Irish Banks Plc v GRO Oil Ltd & Ors* [2019] IEHC 189 (HC: Twomey J)

Undue influence—breach of fiduciary duty

In 2008, the bank loaned GRO Oil Ltd €2.18m to enable it to convert rapeseed oil into diesel and to acquire a site in Thurles to build a manufacturing plant there. This loan was guaranteed by the directors and shareholders of the company on a joint and several liability basis. The loan fell into arrears and the bank proceeded against the guarantors. The bank sought summary judgment against the widow and personal representative of Mr Corkery, one of the shareholder directors who signed the guarantees in 2008, in the sum of €2.18m. The widow maintained that her late husband had not understood that the guarantee he signed was joint and several. She averred that her husband suffered from Asperger's Syndrome, Dyslexia and Attention Deficit Disorder but produced no medical evidence to substantiate these claims. Her defence was that her husband signed the guarantee under the undue influence of the bank, which was also in breach of fiduciary duty towards him because of his vulnerability.

Decision: Summary judgment for the bank.

Held: No evidence of undue influence had been produced. Nor was there anything to suggest that the relationship between the bank and Mr Corkery was one where the bank owed him the super-added duties of utmost good faith and disclosure that characterised a fiduciary relationship. Mr Corkery was a successful farmer and businessman and a director of a company that borrowed money for a commercial venture to which the directors of the company all agreed. It was not up to the bank to explain the nature of joint and several liability to him. It was up to Mr Corkery to satisfy himself as to the extent of his potential liability before he signed the guarantee. The defence was all mere assertion and summary judgment would be granted.

7. *Allied Irish Banks Plc v Grove Oil (Roscrea) Ltd* [2018] IEHC 793 (HC: MacGrath J)

Guarantee—close emotional relationship—undue influence—constructive notice of lender—Etridge defence

The bank provided lending facilities to the second defendant's garage business in Roscrea. The second defendant's partner (the third defendant) signed a guarantee of this loan. When the bank sought summary judgment for the amount outstanding on the loan as guaranteed by the third defendant, she deposed to the fact that she was living with the second defendant at the time. They had a child together and she was a homemaker completely dependent on her partner for financial support. When the second and third defendants went to the bank to sign the loan and guarantee documents, the third defendant deposed that the second defendant told her "don't ask questions, just sign the papers". When the second and third defendants attended at the bank to sign the relevant papers, the third defendant queried with the bank official why the amount specified in the guarantee was larger than the amount indicated to her by the second defendant. At this point the bank official left the room and told the parties to sort it out among themselves. A deed of mortgage over the second and third defendants' home was also signed as security for the guarantee. The relationship between the second and third

defendants had broken up by the time of the court proceedings. In these proceedings, the bank applied for summary judgment. The third defendant resisted this on the ground of the second defendant's undue influence and the bank's constructive notice of this.

Decision: Summary judgment was denied and a full plenary hearing was ordered.

Held: The third defendant's affidavit evidence of her financial dependency on the second defendant and his insistence that she ask no questions but just sign the papers, was sufficient to raise an arguable defence of undue influence by the second defendant. The bank knew sufficient about the relationship between the second and third defendants, particularly the third defendant's non-involvement in the second defendant's business and her position as a homemaker, to raise a triable issue about its constructive notice of undue influence. Summary judgment was denied and a full plenary hearing was ordered.

8. ***Allied Irish Banks Plc v Murray*** [2019] IEHC 294 (HC: Barrett J)

Bank guarantee—Etridge defence

The respondent was a nominal director in a company called Soljet in which her son was also a director. The respondent signed an unconditional and irrevocable joint and several guarantee of the company's liabilities. The guarantee contained a prominent warning about the consequences of entering into it and an advisory note that the respondent should obtain legal advice before signing. She signed it in the presence of her solicitor. The bank moved to enforce the guarantee against her and applied for summary judgment.

The respondent made the following points. (1) Although a director of the company, she took no part in its daily operations and had difficulty getting information either from the company or her son. (2) She signed the guarantee under duress exerted by the bank. (3) The facility letter issued to the company required written confirmation that all guarantors had been independently advised and this confirmation had not been provided.

Decision: Summary judgment ordered.

Held: (1) The arguments that, although a director of the company, she took no part in its daily operations, and that she had difficulty getting information either from the company or her son, could not avail the respondent. (2) Any pressure from the bank was only the statement that without the guarantee it would not support restructuring of the company's finances. There was nothing wrong with that. Other pressure came from her son but there was no evidence that the bank had any notice of this. In any event the respondent's solicitor was with her when she signed the guarantee. (3) Though the facility letter issued to the company required written confirmation that all guarantors had been independently advised and this confirmation had not been provided, this could not assist the respondent, because it was a matter between lending bank and borrowing company. In any event, the drawing down of the loan by the company clearly indicated that this requirement had been waived.

Per Barrett J: People who are asked by family members or loved ones to become directors in companies and to sign guarantees of company liabilities should consider most carefully if they want to accept such liabilities in the event that a seemingly attractive commercial venture fails.

9. *Barry v Ennis Property Finance DAC* [2018] IEHC 766 (HC: Stewart J)

*Undue influence—*Etridge *defence—receivership—interlocutory injunction—serious question to be tried*

This is a condensed and simplified statement of the facts and issues in this case so as to highlight the undue influence issues arising in it.

The plaintiff executed a number of guarantees in support of loans granted to a company owned and managed by one of her sons (N). The guarantees were secured by a mortgage over the family's home. The loans, guarantees and mortgage were all with Bank of Scotland Ireland (BOSI), whose interests were transferred to the defendants (EPF), a property fund which purchased a large number of distressed debts belonging to BOSI. Following the default of N's company, EPF moved to appoint a receiver over the property mortgaged to secure the guarantee executed by the plaintiff. The proceedings summarised here were an application by the plaintiff for an interlocutory injunction to restrain the receiver from selling, possessing, trespassing upon or otherwise dealing with the mortgaged property.

The plaintiff's case was that she had been a homemaker wife and mother up to her husband's unexpected death from an undiagnosed cancer. N had been working in his father's business for two years prior to his death. The plaintiff deposed that N felt slighted at the failure of his father to provide further for him in his will and threatened not to help with the management of his father's business unless the plaintiff guaranteed loans to be made to his own business. Despite her doubts about N's ability to make a success of his business the plaintiff felt coerced into providing the guarantees, as otherwise there would be nobody to run her late husband's struggling business. The plaintiff further deposed that BOSI knew she was a homemaker with little business experience and that she was deriving no significant benefit from either her husband's or N's businesses. She had been a director of her husband's business for several years but that was during a time when there was a legal requirement to have at least two directors in an Irish registered company. Despite being on constructive notice of the undue influence under which the plaintiff was labouring, BOSI took no steps to ensure that the plaintiff was given any independent legal advice or otherwise liberated from N's influence.

Decision: The interlocutory injunction was granted and the parties were urged to proceed to a plenary hearing as quickly as possible.

Held: In order to obtain an interlocutory injunction restraining the receiver from taking possession of and selling the mortgaged property on the ground of N's undue influence, the plaintiff had to show a serious question to be tried in relation to the undue influence issue and that the balance of convenience was in her favour. She succeeds on both issues. [However, only the undue influence question is further discussed in this note.]

Showing the existence of a serious question to be tried is an essentially similar exercise to the demonstration of an arguable defence where the lender seeks summary judgment against the borrower or guarantor.

First, the plaintiff had to adduce evidence that she had acted under the undue influence of N. It is necessary to note the insidiousness of undue influence, especially at an interlocutory stage of proceedings and where the case is one of third-party undue influence. Undue influence thrives on intimacy and is employed in the casual conversation, as opposed to the minuted board meeting. Important evidence may come

from the influencer but they may avoid participation in the proceedings for obvious reasons. It may also be observed here that the influencer often has a self-serving interest in damning him or herself in order to keep a property shared with a guarantor out of the hands of the lender. Another source of evidence relating to the guarantor's business experience may lie in the lender's loan account file but that will be in the possession of the lender.

There are several questions the guarantor should address in the affidavit in support of the serious question to be tried or arguable defence:

(i) What commercial experience does the guarantor have?
(ii) What is the relationship that the guarantor claims to give rise to undue influence?
(iii) What events led to this relationship exposing the guarantor to undue influence?
(iv) What was the influencer's motive for unduly pressurising the guarantor?
(v) What did this person say or do that placed the guarantor under undue influence?
(vi) What decisions was the guarantor motivated to make by the undue influence?
(vii) What would the guarantor's attitude to those decisions have been without undue influence?
(viii) How did those impelled decisions contribute to the set of facts being considered by the court?

Moving to the lender's position: it can be very difficult for the lender to show that there was no undue influence. The lender can much better protect itself by taking steps to ensure that concerns about the effect of undue influence upon the guarantor are put to rest. The loan account file can be a valuable source of contemporaneous information about the relationship between the lender and the guarantor. What evidence does this file record about the guarantor's business experience? How did the lender engage with him or her? Did it ensure the guarantor received independent legal advice?

On the facts of this case, the plaintiff had shown a serious question to be tried that she was unduly influenced by N. She was a homemaker with limited business experience. N had threatened to abandon her and the family business if she did not guarantee loans to his business. BOSI knew that the guarantor was the mother of N and that the loan to his business was not for her benefit. No evidence from the loan account file had been put before the court to offer much of a rebuttal to the evidence deposed to by the plaintiff or to show what steps had been taken to alleviate concerns about the guarantor's appreciation of the burden she was taking on. Admittedly, EPF could not have any better file than the one transferred to it by BOSI but no account could be taken of that in deciding the interlocutory injunction application.

10. ***Comans Wholesale v J Donohue Beverages Ltd (in receivership)*** [2019] IEHC 657 (HC: Murphy J)

Retention of title

This judgment decided a preliminary issue about the meaning and effect of a retention of title clause in a contract for the sale and supply of drinks and beverages between the plaintiff unlimited company and the first defendant limited company.

Goods were sold subject to a retention of title clause, the details of which are set out below. Receivers had been appointed to the first defendant by the Bank of Ireland under a general floating charge and the bank had also been granted several other securities over the first defendant's assets. The receivers had returned to the plaintiff €51,910.85 in goods not paid for by the first defendant and not resold to any third party. In dispute was the sum of €334,362.58 representing goods the first defendant had not paid the plaintiff for and had resold to third parties. The plaintiff claimed that this sum was impressed with a trust in its favour, so that it was entitled to the sum in priority to the first defendant's creditors. The receivers argued that this sum was subject to a charge registrable under the Companies Act 2014, ss 408–409 and was void against the creditors of the company because it had not been registered. In the alternative, the plaintiff contended that, if this were a charge and not a trust, it was a charge falling within one or other of two exempt charges in s.408 and did not require registration. The material terms of the retention of title clause in cl.9 of the plaintiff's terms and conditions of sale provided as follows:

9.1 – title to no goods passed to the first defendant until all sums it owed to the plaintiff now or at any time were paid.

9.2 – until title passed, the first defendant held all goods as the fiduciary agent of the plaintiff. The goods had to be marked and stored separately so as to be identifiable as the plaintiff's. The plaintiff was allowed to enter the first defendant's premises to inspect the goods from time to time. The first defendant was obliged to deliver the goods up to the plaintiff on demand and if it failed to do so the plaintiff was entitled to retake possession.

9.3 – until title passed the first defendant was not entitled to pledge, create a lien over or charge the goods to any third party. If it did so then all monies owing to the plaintiff became immediately due and payable.

9.4 – the first defendant was permitted to resell the goods but only in the ordinary course of business and at no less than full market price. From those proceeds of sale an amount representing the cost price of the goods as sold by the plaintiff was to be held in a fiduciary capacity on trust for the plaintiff. This sum was to be held in a separate bank account clearly denoted as containing the plaintiff's money.

No designated account under cl.9.4 was ever set up.

Decision: The retention of title clause created a charge, not a trust. The charge is not one which comes within the exceptions specified in the Companies Act 2014, s.408 (1) and therefore required to be registered in order to be effective against the receivers and creditors of the first defendant company.

Held: (1) The terms and conditions of sale had created a charge over the proceeds of sale of any goods sold to third parties. The plaintiff argued that the case was distinguishable from *Unitherm Heating Systems Ltd v Wallace* [2015] IECA 191; [2016] RLR § 183 in two particular respects. First, the plaintiff had an interest in only sufficient of the proceeds of sale of goods to repay their cost price as between the plaintiff and the first defendant. Secondly, the buyer had not assigned to the seller any claims for payment against sub-buyers and the plaintiff had no right to pursue sub-buyers. However, these distinctions did not alter the essential character of cl.9, which remained the provision of security for

monies due in the context of an ongoing commercial relationship. (2) The plaintiff's argument that, if cl.9 created a charge it was not one that was registrable under ss 408 and 409 was also rejected. The proceeds of resale of goods were not "cash" but a chose in action owed by the first defendant to the plaintiff. Nor could they be regarded as money credited to the account of a financial institution or a deposit.

Per Murphy J: If the separate bank account that was required to be set up under cl.9.4 had actually been set up, then this "might well" have been regarded as money credited to the account of a financial institution.

11. *Emberton Finance Ltd v Cronin* [2018] IEHC 572 (HC: McDermott J)

Non est factum

The plaintiff was the assignee of previous lenders who had loaned money to the defendant for the purpose of investment in a construction project in New York City. The plaintiff sought summary judgment for the amount outstanding on foot of the loan, essentially all of it plus interest because the construction project collapsed in the property crash of the previous decade. The defendant's defence was *non est factum*, specifically that he believed he was signing documents relating to a non-recourse loan that could not be recovered against him. He deposed to advice given to himself by his accountant that this was the nature of the loan and contended that he was hampered in the presentation of this defence by the latter's intervening death. The loan documents were expressly to the contrary of the non-recourse nature the defendant stated that he understood them to be.

Decision: Summary judgment was refused and a full plenary hearing was ordered.

Held: Any plea of *non est factum* would fail where the party relying on it was negligent in signing the document from which (s)he sought to withdraw. The defendant had chosen not to read the document or to obtain legal advice in respect of it. He chose not to respond to the invitation to withdraw from it when a copy was furnished to him some days after he signed it. The creditor had not contributed in any way to the defendant's misunderstanding and the defendant was an experienced businessman able to read and understand the contractual documentation used in this transaction. However, the plaintiff had not furnished the court with any evidence challenging the defendant's account of how the loan was negotiated or how he came to sign it. The defendant had done just enough to raise an arguable defence and the case was sent to plenary hearing.

12. *Harlequin Property (SVG) Ltd v O'Halleron & Anor* [2019] IESC 76 (SC: O'Donnell, MacMenamin and Charleton JJ)

This was an appeal from the decision of McGovern J at [2013] IEHC 362; [2014] RLR § 172. The appellant, Mr O'Halleron, self-represented, and the issues before the Supreme Court were purely factual. Other than the Supreme Court's dismissal of the appeal, there is nothing further of note.

13. *HKR Middle East Architects Engineering LC & Ors v English* [2019] IEHC 306 (HC: McDonald J)

Total failure of consideration

The facts of this case consisted of a litany of sham transactions and false evidence presented by the two individual parties to the litigation. The second named plaintiff and the defendant entered into an arrangement under which the second named plaintiff transferred his shares in the first named plaintiff to the defendant for the latter to retain them as "caretaker" until the second named plaintiff emerged from an English bankruptcy. While the defendant was looking after the second named plaintiff's shares, he caused some $8m of the first named plaintiff's money to be transferred to an entity called Sunkit. The reason for transferring this money to Sunkit was to "salt it away" from reach by the second named plaintiff's trustee in bankruptcy. It appeared that, after this sum had been paid to Sunkit, Sunkit had made very substantial payments to the defendant for fictitious introduction services purportedly provided by the defendant. It also appeared that the second named plaintiff was possibly entitled to payment from this $8m as a major shareholder in the first named plaintiff.

Decision: The first named plaintiff was entitled to restitution from the defendant of money paid for the fictitious introduction services.

Held: The first named plaintiff was entitled to restitution from the defendant of money paid for the fictitious introduction services, as this money had been paid for a consideration that totally failed. As the full amounts and surrounding circumstances had not been proved, an account must be taken, in which the second named plaintiff would be entitled to establish what may be due to him.

Per McDonald J: Having regard to the sham transactions and false evidence that were features of this case, the illegality defence may be an issue in the taking of the account.

14. *Kenny v Kenny* [2019] IEHC 76 (HC: O'Connor J)

Resulting and constructive trusts

In 2000, the plaintiff and his son jointly purchased an apartment in the Smithfield area of Dublin for £160,000 (then €203,000). Both purchasers were jointly and severally liable for a mortgage from First Active Plc of £130,000, the plaintiff paying the balance of £30,000. All mortgage repayments came from the joint account of the plaintiff and his wife. The plaintiff gave evidence that the lender wanted someone younger to be part responsible for the mortgage, in anticipation that the plaintiff would predecease his son. A mortgage protection policy on both the lives of the plaintiff and his son was taken out at the same time as the mortgage loan was advanced because, as the plaintiff testified, the lender wanted to ensure that the mortgage could be met if the plaintiff or his son were to die. The plaintiff paid all the €36 per month premia on this policy. The plaintiff admitted in his evidence that there had been no discussion or agreement between himself and his son about what should happen to the apartment or the mortgage protection policy in the event of the death of either of them.

In 2007, at the height of the property market, the plaintiff remortgaged the apartment with Permanent TSB. The mortgage in favour of First Active was discharged and money was taken from the equity that had accumulated in the apartment and invested in a mezzanine floor in factory premises belonging to a company established by the plaintiff in 1981. The evidence as to the amount invested was vague, the plaintiff tentatively estimating that it was about €100,000. The son worked for this company, which entered into liquidation in 2012. The mortgage protection policies that had been assigned to First Active in 2000 remained assigned to it and no new mortgage protection assurance was taken out. The plaintiff continued to pay the mortgage on the apartment from the joint account with his wife.

The plaintiff's son died in January 2013. He was divorced from his wife but left three daughters, one of whom, the defendant in this case, took out letters of administration to her late father's estate. Permanent TSB took possession of the apartment in 2018 because of the plaintiff's default in paying mortgage repayments. The plaintiff estimated the apartment's market value when Permanent TSB took possession to be about €220,000–230,000. €269,000 was still owing on the mortgage and it was not disputed that the apartment was in negative equity.

In these proceedings, the plaintiff claimed to be beneficially entitled to the proceeds of the mortgage protection policy valued at €95,000 on the basis of having paid all the premia due to date. The total amount of premia paid from the plaintiff's joint account with his wife was €5,594.54.

Decision: The claim fails.

Held: (1) The plaintiff was not entitled to the mortgage protection policy proceeds on the basis of a resulting trust because he could not rebut the presumption of advancement in favour of his son. There was no evidence of any discussion between father and son as to the sharing of the equitable interests in the apartment or the mortgage protection policy at the time these transactions were entered into. It could not just be assumed that, because the son was 37 years old at the time, his father could not intend such generosity. It had to be borne in mind that, by becoming a party to the mortgage on a joint and severable liability basis, the son was taking on a substantial financial risk. (2) Nor was the plaintiff entitled to the mortgage protection policy proceeds on the basis of a constructive trust. There was nothing unconscionable about the interests in the apartment and policy that the son acquired and no unjust enrichment. Once again, it had to be taken into account that the son assumed a large financial risk to pay a mortgage on a property which was now in negative equity.

Comment: The judge indicated his willingness to hear counsel on an application for the estate to repay to the plaintiff and his wife the €5,594.54 premia paid, although no potential basis for the plaintiff recovering this sum was stated.

15. ***Naylor v Maher*** [2018] IECA 32 (CA: Ryan P, Peart and Hogan JJ); varying [2012] IEHC 408 (O'Keefe J); [2013] RLR § 158

Proprietary estoppel—allowance for defendant—undue influence—costs

The plaintiff and defendant were respectively the son and daughter of the deceased. The plaintiff had been living in Dublin but, in the early 1970s, at the request of his father, he

returned to run the family farm. He earned significantly less at home than he was likely to have earned pursuing a career in Dublin; the trial judge considered that he had real potential to make a very good life for himself in the capital. The deceased made repeated assurances to the plaintiff that he would leave the farm to him in his will and did so by the will he made in 2005. However, the deceased made a new will in 2006, leaving the farm to his daughter, who had become his full-time carer by that stage of his life. The 2006 will gave the plaintiff a legacy of €150,000 in place of the farm.

The plaintiff brought proceedings seeking to have the 2006 will cancelled, on the ground of the defendant's undue influence, and the 2005 will revived. Alternatively, the plaintiff sought to prove that the farm should be removed from the deceased's estate and given to him under the doctrine of proprietary estoppel. The plaintiff failed on the issue of undue influence but succeeded in becoming the owner of the farm under proprietary estoppel. The plaintiff also recovered all his costs, which the judge ordered to be paid out of the estate.

The defendant appealed the award of the farm to the plaintiff under proprietary estoppel and the award of the entirety of the plaintiff's costs out of the estate.

In relation to proprietary estoppel, the defendant did not challenge the judge's findings that the deceased had made assurances to the plaintiff that the farm would be left to him by will. The defendant argued that the proper approach to measuring an award under proprietary estoppel was in accordance with the detriment suffered by the plaintiff in reliance on the deceased's promises, and should not be an attempt to measure the plaintiff's expectation from the deceased's promises. Measured that way (the reliance way), the plaintiff's detriment was in moving back from Dublin to help his father and that could be measured in monetary terms. The defendant's expert evidence measured it at about €163,000, which could be satisfied mostly from the legacy of €150,000.

Decision: Appeal dismissed, though, as a condition of receiving a transfer of the entire lands, the plaintiff is required to execute a disclaimer in respect of so much of the bequest of €150,000 as he would otherwise receive.

Held: (1) Even if reliance were the appropriate way to measure the estoppel, the plaintiff should get the family farm. His reliance could not be measured in purely monetary terms. He had altered the course of his life at the deceased's request and the trial judge had expressly found that he had real potential to succeed in Dublin. The plaintiff was entitled to receive the family farm in order to satisfy his equity. (2) While taking no position on whether proprietary estoppel relief should be measured by expectation as opposed to reliance, it seems that there was a concluded contract between the deceased and the plaintiff with regard to the family farm. The consideration moving from the plaintiff was giving up his chances of a life in Dublin in exchange for the deceased's promise of the farm. [*Editor's comment*: As this appears to be an oral contract for the sale of land, it would presumably only be enforceable via part performance.]

(3) However, in order to receive the farm, the plaintiff must issue a disclaimer of the €150,000 legacy which the trial judge had allowed him to retain along with the farm. This had clearly been given to the plaintiff in the deceased's 2006 will in place of the farm. He who seeks equity must do equity. And see the English decisions of *Spence v Crawford* [1939] 3 All ER 271, *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428

and *Cheese v Thomas* [1994] 1 WLR 129 as support for the proposition that monetary adjustments could be made to orders divesting parties of property in order to ensure a more equitable disposition of the case.

(4) In relation to the costs issue, the defendant argued that much time in the 21-day trial had been taken up with the issue of undue influence on which the plaintiff had lost. It was therefore said to be inappropriate that the plaintiff should recover his costs at the expense of the estate when much of those costs were incurred at the plaintiff's insistence. It should be pointed out that the disclaimer of the €150,000 legacy would place that sum in residue and thus available to meet costs. On this issue, the traditional Irish practice is to allow the parties to get their costs out of the estate where they raised issues of public importance concerned with the circumstances in which a will was made. Parties should not be deterred from raising these issues by fear of an adverse costs order. The plaintiff had been justified in originally raising the undue influence issue but ought to have realised by the beginning of the hearing in the High Court that the case on that issue was not particularly strong. In light of that, the plaintiff is allowed 75% of his costs in the High Court out of the estate.

Comment: Peart J (who delivered the Court's judgment) continually referred to the estoppel as promissory, though it surely should be called proprietary.

16. *O'Malley v Breen & Anor* [2019] IEHC 645 (HC: O'Connor J)

Resulting trust—advancement

The plaintiff in this case was the brother and executor of the deceased, a practising solicitor, who died on 22nd February 2017. The first defendant (Kay) was the first wife of the deceased, whom he married in 1986, separated from in 1996 and eventually divorced in January 2017. There were two children of that marriage, both adults at the time of these proceedings. The family lived in Dundalk. The second defendant (Mary) was the woman with whom the deceased commenced a committed cohabiting relationship some time after his separation from Kay. The deceased and Mary had four children together but only one was of full age at the time of the proceedings. The family lived in County Down in Northern Ireland. When the deceased became terminally ill, he obtained a divorce from Kay and married Mary in late January 2017.

These proceedings related to an investment property purchased by the deceased and Kay in Dundalk in 2000. The property was purchased for £190,000 with the assistance of a £160,000 mortgage obtained from Allied Irish Bank. The deceased paid the outstanding £30,000 from his own funds; and, by agreement of the deceased and Kay, the rent earned by the property was used to pay the mortgage. Both the deceased and Kay were responsible for the mortgage and, at the insistence of the lending bank, a 20-year insurance policy to secure the mortgage was taken out at the time of the purchase. The deceased paid the £42.83 (€54.38) per month premium until his death in 2017, despite redeeming the mortgage as explained below, in 2008. Kay obtained the proceeds of this policy for herself in July 2017.

In 2008, the deceased and Mary purchased a holiday home in Donegal for €480,000. They borrowed €750,000 from Bank of Ireland Mortgage Bank. In addition to funding the purchase of the Donegal property, this loan was used to pay off another loan and

€143,741.32 was used to redeem the mortgage on the Dundalk investment property. Kay did not find out that this had been done until early 2017. Both the Dundalk and Donegal properties were mortgaged to the Bank of Ireland as security for the €750,000 loan. Mary signed papers in relation to the 2008 transactions but was unaware that Kay was registered as joint owner of the Dundalk property.

By his will, made on the same day as the deceased married Mary, the deceased left to Kay their former family home in Dundalk together with the Dundalk investment property.

By the time of these proceedings, the balance due to the Bank of Ireland was €567,834. The Dundalk property was valued at about €220,000–230,000 and the plaintiff averred that the Donegal property was worth about €300,000. Taking account of other debts, the estate appeared to be insolvent. These proceedings were taken in order to determine the respective interests of Kay and the deceased's estate in the Dundalk property.

Decision: Interests determined as ordered.

Held: (1) The Dundalk property was purchased by the deceased and Kay in 2000 as joint tenants in respect of the legal title. (2) As to the beneficial interests in the property, this depends on the application of the presumptions of resulting trust and advancement. (3) It is inappropriate to apply the presumption of advancement from husband to wife in this case because the parties were living apart at the time of the purchase and the purchase was an investment property. (4) The presumption of resulting trust in proportion to the contributions made by the deceased and Kay is therefore the operative one. (5) The 2008 transactions severed the joint tenancy in relation to the Dundalk property. This means that Kay obtained a legal and beneficial interest to a share in that property and also held a beneficial interest in the property on trust for the deceased's estate. (6) The bequest of the deceased's share in the Dundalk property to Kay was held subject to the Bank of Ireland mortgage over that property. (7) The precise terms of this order would have to be worked out in a further hearing, particularly in relation to the shares of the deceased and Kay in the Dundalk property. It would not appear likely that the court's decision on this matter was likely to be that, as the deceased essentially paid everything, the estate would get everything. Kay had been subject to a joint liability to pay the mortgage for a significant period of time and the deceased would not have been coming to equity with clean hands in view of the way he discharged the Dundalk mortgage entirely for his own benefit without telling Kay he had done so.

17. *O'Rourke v O'Rourke* [2018] IEHC 791 (HC: O'Hanlon J)

Proprietary estoppel

The plaintiff and his ex-wife Diane, daughter of the second and third defendants, moved into Furness Hall in County Kildare in 2004, shortly after their marriage. The property was purchased by the second and third defendants on trust for Diane with the support of a mortgage provided by First Active Plc. The reasons for the second and third defendants putting the property in trust were partly to do with tax efficiency but to a great extent also because they had doubts whether the marriage between the plaintiff and their daughter would last. Diane was given a licence to occupy the property as her home together with

the plaintiff. It was her parents' hope that the property would eventually be gifted to the couple but that was dependent on the stability of their marriage. The marriage did not last and Diane left the property in 2012, delivering the keys to Ulster Bank Ireland DAC, the fourth defendant, which had taken over the mortgage from First Active Plc.

During the course of the marriage, the plaintiff spent a lot of money on renovations, improvements, and other work to the house. Along with Diane, he lived in the house rent free and continued to do so after she left. The plaintiff ran his business from the property and earned rent from tenants occupying several parts of it. At the trial, the plaintiff gave evidence of his belief that the property had been gifted to Diane and himself and that he did not know it was in trust or that he and Diane were living there pursuant to the licence granted by her parents. The judge found that some of this evidence had been fabricated and that it was flatly contradicted by practically every shred of documentary evidence adduced at the trial. The house was in significant negative equity by the time of the trial. In these proceedings, the plaintiff sought to prove that he was entitled to an equitable interest in the property by virtue of the doctrine of proprietary estoppel.

Held: (1) The plaintiff was not entitled to an interest in the property under a resulting trust. Contributions simpliciter were insufficient to acquire an interest in property owned by another. There had to be a specific agreement that the contributor would be compensated and there was no evidence of that in this case. (2) Nor could the plaintiff's case on proprietary estoppel be accepted. No representations were ever made to him by the second and third defendants that, if he were to expend money on the house, he would acquire an equitable interest in it or move any way closer to the hoped for day when the house would be gifted to Diane and himself. The plaintiff had lived in the property rent free for 14 years and anything he spent on it was for his own and Diane's benefit and not something that could be understood as reliance upon any representation made by anyone. There was in any case nothing inequitable about denying the existence of an interest in favour of someone who had lived in the property rent free for so long, had operated a business there and earned rent from it, as well as tendering false evidence in support of his claim.

ARTICLES

18. Hicks, Andrew D, "Do Constructive Trusts Deter Disloyalty?" (2018) 69 NILQ 147.

19. Courtney, Thomas B, "The Company Director's Duty to Avoid Conflicts: From Inner Core to Outer Limits" (2019) 62 *Irish Jurist* 21.

20. Devonshire, Peter, "Forfeiture of Payment to a Delinquent Agent" (2019) 70 NILQ 263.