Neutral Citation: [2014] IEHC 476

THE HIGH COURT

[2014 No. 8343P]

BETWEEN

BRIAN McDONAGH

PLAINTIFF

AND

ULSTER BANK IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Keane delivered on the 22nd of October 2014

Introduction

1. There are two applications before the Court. The first is the plaintiff's application for an interlocutory injunction pending trial. The second is the defendant's application for an order setting aside the interim injunction that was granted to the plaintiff on an *ex parte* basis by Moriarty J. on the 1st October 2014.

Background

2. In August 2007, the plaintiff and his two brothers acting in partnership purchased lands in Kilpeddar, County Wicklow ("the Kilpeddar lands") for €22 million. In January 2009, the plaintiff and his brothers entered into a loan agreement with the defendant Ulster Bank Ireland Limited ("the bank") to borrow the sum of €21,855,000 in order to fund that purchase. The plaintiff and his brothers subsequently drew down those funds.

3. The plaintiff avers to certain legal disputes that arose in connection with the development of the Kilpeddar lands. Evidently, this had implications for the plaintiff's repayment of the loan in accordance with the terms of the loan agreement, although the plaintiff is reticent in addressing the nature and extent of his default in that regard.

4. The plaintiff does aver that he entered into a compromise agreement with the bank on the 13th March 2013 and that the purpose of that agreement was to assist the bank in seeking to recover as much as possible of the debt to it that the plaintiff had incurred in respect of a number of loan accounts associated with the purchase of various properties, including the Kilpeddar lands.

5. While the compromise agreement commences with the statement that it is made on the 13th March 2013, it also contains a definition of the term "effective date", the text of which has been inserted by hand and initialled by the plaintiff. It provides that the effective date of the agreement is to be three weeks from the 27th May 2013.

6. Under the compromise agreement, the borrowers, including the plaintiff, assume the following principal obligations. They are to facilitate willingly, through their active cooperation, the recovery by the bank of the debt which each of them owes to it. They each acknowledge their indebtedness to the bank, amounting in the plaintiffs case to a cumulative personal indebtedness on various loan accounts at the present time amounting to €26,130,436.90 (according to the bank), and each acknowledges the security that he or she has provided to the bank in respect of the various loan agreements to which he or she is a party. Each borrower warrants to the bank in utmost good faith the contents of an updated statement of affairs prepared by him or her, upon the accuracy of which the validity of the compromise agreement depends, and each confirms in writing that he or she has no other undisclosed assets. Rents accruing to the various borrowers on certain identified properties are to be remitted into specified rent accounts. The borrowers, including the plaintiff, are to lodge the sum of €400,000 in cash with the bank in reduction of their overall borrowing. The borrowers, including the plaintiff, agree not to enter into any bankruptcy or insolvency arrangement during the currency of the agreement. The borrowers, including the plaintiff, agree to dispose of a number of specified properties for the best price reasonably obtainable within a specified time frame, and to remit the proceeds of sale to the bank, net only of taxes arising and agreed disposal costs. In particular, the borrowers, including the plaintiff, are to "instruct the agents to liaise fully with and disclose fully and frankly to the bank all details of the sales process and any negotiations relating thereto." The borrowers, including the plaintiff, are to notify the bank of all tenancies and licences affecting any of the properties and are to properly manage and insure those properties prior to sale.

7. The bank's obligations under the compromise agreement are essentially twofold. First, the bank is to postpone enforcement of the borrower's debts to enable the borrowers to take the steps required of them under the agreement. In particular, the bank agrees not to institute proceedings against the borrowers in respect of the debt during that period. Second, the bank is to acknowledge full implementation of the agreement as amounting to full and final settlement of the borrowers' debts to it.

The proceedings

8. A plenary summons issued on the 1st October 2014 on foot of which the plaintiff seeks various reliefs against the bank. Perhaps the most significant of those is an order directing specific performance of the compromise agreement or, in the alternative, an order awarding damages for breach of that agreement. The plaintiff also seeks orders restraining the bank from appointing receivers to any of his properties covered by the compromise agreement or, indeed, from taking any steps to enforce or recover the plaintiffs liabilities or loans. From the affidavits sworn by the plaintiff, it emerges that each of these remedies is sought by reference to the plaintiffs assertion that he has complied with the terms of the compromise agreement but that the bank has not.

9. Broadly summarised, the plaintiff alleges that the bank has breached the compromise agreement in three ways. First, the plaintiff claims that the sum of €325,000 was wrongly debited from his account by the bank on the 27th March 2013, in breach of the bank's obligation under the compromise agreement to postpone its rights and remedies under the relevant loan agreements between the bank and the plaintiff.

10. Second, the plaintiff contends that, on the 18th March 2014, the bank wrongly appointed a receiver over two of his properties covered by the compromise agreement and that, while the bank acknowledged shortly afterwards that this had been done in error and declared it would discharge the receiver immediately, it failed to do so, and the plaintiff understood that, as late as the 30th

September 2014, when he swore the affidavit grounding his application for an interim *ex parte* injunction, the said receiver was continuing to manage those properties in breach of the compromise agreement.

11. The third way in which the plaintiff contends that the bank has breached the compromise agreement is in refusing to consent to the sale of the Kilpeddar lands to a company named Granja Limited whose offer of €1,501,000 was accepted by the plaintiff and the other owners of those lands on the 13th June 2014. In this context, the plaintiff also contends that the bank has refused to consent to the sale of two other properties covered by the compromise agreement and that it has failed to discharge accrued fees and expenses associated with the marketing of the properties.

The interim injunction application
12. By reference to the assertions just described, on the 1st October 2014, the plaintiff in person applied for, and was granted *ex parte*, an interim injunction restraining the bank from taking any steps either to enforce (*sic*) the compromise agreement or to enforce or recover the loans or liabilities of the plaintiff pursuant to the said agreement or otherwise, pending the plaintiff's application for an interlocutory injunction in similar terms. That application for an interlocutory injunction is one of the two applications now before the Court. It is a peculiar feature of this case that the plaintiff has been legally represented in respect of his dealings with the bank at all material times both before and after he applied for an interim injunction, although not when he did so as a litigant in person.

Subsequent events
13. On the same day that the plaintiff obtained an interim injunction, the bank appointed receivers to the Kilpeddar lands and various other properties covered by the compromise agreement. It is common case that, while the former event appears to have preceded the latter, the bank was not on notice of the interim injunction when that appointment was made.

14. By notice of motion dated the 7th October 2014, the bank has brought an application to have the interim injunction set aside on grounds of material non-disclosure. That application is grounded on an affidavit sworn on the 7th October 2014 by a bank official named J.P. Moore ("the Moore affidavit"). It is the other application now before the Court.

The application to set aside the interim injunction
15. The bank asserts that the plaintiff has failed to make full and frank disclosure of the following matters. First, in respect of the plaintiff's claim that the sum of€325,000 was wrongly debited from his account by the bank on the 27th March 2013, in breach of the compromise agreement dated the 13th March 2013, the bank submits that the plaintiff wrongly failed to disclose that he did not initial his acceptance of the agreement until the 29th May 2013, such that it plainly was not operative, as the plaintiff would have been well aware, until the effective date recited on its face *i.e.* "3 weeks from 27th May 2013."

16. In support of that submission, the Moore affidavit exhibits an exchange of email correspondence between the parties' solicitors whereby, on the 28th May 2013, the plaintiffs solicitors queried the appropriation of the relevant funds by the bank, and, on the 29th May 2013, the bank's solicitors replied that, as the plaintiff was aware, the funds concerned were held by the bank as security pursuant to a letter of set off executed by the plaintiff on the 23rd July 2007. The bank's solicitors also stated in that e-mail that, if they were not furnished with an initialled compromise agreement by close of business on that day, the bank would withdraw its offer of compromise. The plaintiff did not exhibit that correspondence in seeking an interim injunction, nor, it would appear, did he disclose its contents to the court in asserting that the bank wrongly appropriated those funds in breach of the compromise agreement that is dated, and by implication had become operative, on the 13th March 2013.

17. The plaintiff swore a second affidavit on the 9th October 2014, in response to the bank's application. In that affidavit, the plaintiff baldly avers that the compromise agreement "was entered into on the 13th March 2013." However, he does not address the initialled handwritten term of the agreement that states that its effective date is to be "3 weeks from the 27th May 2013." Nor does he address the issue of when he initialled his acceptance of the agreement or the issue of when it became operative.

18. Second, in relation to the plaintiffs contention that the bank has failed to remove a receiver appointed over certain of the plaintiffs properties on the 18th March 2014 and that the receiver concerned "continues to manage the respective properties" notwithstanding an assurance to the plaintiff by the bank that the receiver had been appointed due to an internal oversight and would be discharged immediately, the bank submits that this averment on the part of the plaintiff is entirely false.

19. In support of that submission, the Moore affidavit exhibits the relevant deeds of discharge in respect of each of the two receivers concerned, both of which are dated the 22nd April2014.

20. In his second affidavit, the plaintiff now avers that, despite several requests, neither he nor his legal advisers received confirmation that the receivers were discharged until they were served with the Moore affidavit and exhibits, and certainly not before the plaintiff sought and was granted interim relief. Nevertheless, a negative averment that no confirmation has been received of the discharge of certain receivers is a quite different thing than a positive averment that those receivers are continuing to act.

21. Third, in relation to the plaintiffs claim that the bank has breached the compromise agreement by refusing to consent to the sale of the Kilpeddar lands to Granja Limited ("Granja"), the bank asserts that the plaintiff failed to make full and frank disclosure of a number of material facts.

22. The bank points out that, while the heads of agreement document (on the letterhead of the plaintiff's auctioneers) that the plaintiff has exhibited is signed on behalf of the vendors, the purchaser and the auctioneers, and is dated the 13th June 2014, it was not furnished to the bank prior to service upon them of the present proceedings, nor was the bank informed of the alleged offer or agreement. Further, the Moore affidavit exhibits a page from the auctioneers' website purporting to record that the property has been sold for €975,000.

23. In addition, the Moore affidavit exhibits *inter partes* correspondence that was not disclosed by the plaintiff and, in particular, points to a letter from the plaintiff's then solicitors, dated the 28th July 2014, in which they state on the plaintiff's behalf:

> "Our client wishes to inform you at this stage that he has found a party who has expressed an interest in purchasing the assets set out in the schedule to the [c]ompromise [a]greement...."

On behalf of the bank it is submitted that, since one of the assets set out in the schedule to the compromise agreement is the Kilpeddar lands, this statement made on the 28th July 2014 is difficult, if not impossible, to reconcile with the suggestion that a party had made an offer to purchase those lands that the plaintiff and the other owners had accepted on or before the 13th June 2014.

24. On the same basis, the Moore affidavit exhibits an e-mail that the bank's solicitors received on the 20th June 2014 from the

solicitors for the owners of the Kilpeddar lands containing the following statement:

> "[the plaintiff's brothers] ...wish to dispose of the lands in Kilpeddar to the highest bidder within the time frames agreed and discussed with the bank. With this in mind their instructions to [the auctioneers] are a full but timely advertising campaign."

On behalf of the bank it is submitted that this statement also is difficult, if not impossible, to reconcile with the heads of agreement document dated the 13th June 2014, purportedly signed by the plaintiff's brothers.

25. In his second affidavit, the plaintiff does not deal with these matters directly but avers instead that any failure to exhibit all of the prior *inter partes* correspondence to the affidavit grounding his *ex parte* application for interim relief was the result of clerical error. Neither the nature of that error nor the circumstances in which it occurred is described or explained. The plaintiff further avers that "the salient matters at issue are dealt with in the affidavit", although he does not explain why the correspondence described above should not be considered salient to his *ex parte* application. The plaintiff also deposes that he is a stranger to the relevant correspondence between the solicitors acting for his brothers (formerly, his own solicitors also) and the bank's solicitors.

26. A partner named John O'Sullivan in the firm of solicitors representing the bank swore a further affidavit on the bank's behalf on the 10th October 2014 ("the O'Sullivan affidavit"). That affidavit exhibits the statement of affairs that the plaintiff provided to the bank as part of his obligations under the compromise agreement. That statement of affairs recites that a holiday home in Portugal, disclosed as an asset of the plaintiff, is owned by "McDonagh & Ooi". In the course of argument, Counsel for the bank pointed out that the company report in respect of Granja, exhibited to the Moore affidavit, records that the name of one of that company's three directors is Tian Su Ooi. In response to that observation, Counsel for the plaintiff informed the Court that, on his instructions, the person named Ooi who shares an ownership interest in the plaintiffs holiday home in Portugal is the plaintiffs girlfriend and that the Tian Su Ooi who is a director of Granja is Ms. Ooi's brother. In response to the submission that the failure to disclose these facts amounted to a further instance of material non-disclosure on the part of the plaintiff, it was argued on the plaintiffs behalf that the relevant information was, as the bank had very nearly demonstrated, capable of being discovered by diligent enquiry and, as such, did not have to be disclosed pursuant to the plaintiffs duty to make full and frank disclosure.

The golden rule

27. As Clarke J. had occasion to note in *Bambrick v Cobley* [2005] IEHC 43, the obligation to make full and frank disclosure in applying for relief *ex parte* was described in the following terms by Browne-Wilkinson V.C. in *Tate Access Floors Inc. v. Boswell* [1991] Ch. 512 (at 532):

> "No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for *ex parte* relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the *ex parte* order and may, to mark its displeasure, refuse the plaintiff further *inter partes* relief even though the circumstances would otherwise justify the grant of such relief."

28. In this case, I am satisfied that the plaintiff failed to disclose the following facts in applying for, and obtaining, an interim injunction *ex parte*:

> (a) The date upon which the compromise agreement, dated the 13th March 2014, was to become effective.
>
> (b) The date upon which the plaintiff initialled, thereby accepting, the terms of the compromise agreement upon which he seeks to rely.
>
> (c) The bank's contention in prior correspondence that the compromise agreement had not been initialled by the plaintiff before the 29th May 2014 and could not have taken effect any earlier than that date.
>
> (d) The existence of the relevant *inter partes* correspondence demonstrating the bank's contention in that regard.
>
> (e) The absence of any basis for the plaintiffs assertion that the receivers appointed by the bank on the 18th March 2014 were continuing to act on the 30th September 2014, when, as the plaintiff now concedes, the furthest he could fairly or truthfully put the matter on that date was that he had not received formal confirmation from the bank prior to that date that those receivers had been discharged.
>
> (f) The assertion by the plaintiffs solicitors in a letter written on the 28th July 2014 that the plaintiff had found a party who had expressed an interest in purchasing the properties covered by the compromise agreement.
>
> (g) The absence of any suggestion or acknowledgment in that letter that the plaintiff and the other owners of the Kilpeddar lands had received, and accepted, a firm offer of €1.501 million for that particular property, over one month previously, as evidenced by heads of agreement to sell dated the 13th June 2014.
>
> (h) The existence of that letter as part of the train of *inter partes* correspondence.
>
> (i) The existence of a close personal connection between the plaintiff and a director of the company Granja *i.e.* that one of the directors of the latter is the brother of the plaintiff's girlfriend.

29. The next question I must address is whether the undisclosed facts I have just described were material to the application for interim *ex parte* relief that was made by the plaintiff. In that regard, the plaintiff would have done well to heed the caution expressed by Lord O'Hagan L.C. in *Atkin v Moran* [1871] I.R. 6 E.Q. 79 that:

> "The party applying is not to make himself the judge of whether a particular fact is material or not. If it is such as might in any way affect the mind of the court it is its duty to bring it forward."

30. I am satisfied that each of the relevant facts was at least capable of affecting the mind of the court. Indeed, although it is not strictly necessary to do so, I would go further and say that, considered in concert, it is difficult to conceive that those facts would not have affected the mind of the court.

31. I have reached that conclusion with due regard to the following passage from the judgment of Clarke J. in *Bambrick v Cobley*,

supra:

> "I am also mindful of the fact that the courts have noted (for example in *Brink's-Mat Limited v. Elcombe* [1988] 3 All E.R. 188) that in particular in heavy commercial cases the borderline between material facts and non-material facts can be a somewhat uncertain one and that, without discounting the heavy duty of candour and care which falls upon persons making *ex parte* applications, the application of the principle of disclosure should not be carried to extreme lengths.
>
> Taking those authorities it would seem that the test by reference to which materiality should be judged is one of whether objectively speaking the facts could reasonably be regarded as material with materiality to be construed in a reasonable and not excessive manner."

32. I have concluded that the facts identified at sub-paragraph (a) to (d) inclusive of paragraph 28, *supra*, were directly and, therefore, reasonably material to the plaintiffs assertion that, on the 27th March 2013, the bank had wrongly appropriated funds from the plaintiffs account in breach of a compromise agreement entered into - and, by implication, which took effect from – the 13th March 2013. I have concluded that the fact identified at sub-paragraph (e) of that paragraph was material to the plaintiffs claim that receivers appointed by the bank were continuing to act in respect of certain of the plaintiffs properties in breach of that compromise agreement. And I have concluded that the facts identified at each of the sub-paragraphs (f) to (i) of that paragraph were reasonably material to the plaintiffs claim that the bank was, and is, in breach of the compromise agreement by unreasonably withholding its consent to the sale of the Kilpeddar lands in response to a genuine offer. For these reasons, I am satisfied that there was in this case a significant and material failure to disclose matters which should have been disclosed in the context of the *ex parte* application for interim relief.

Consequences of material non-disclosure
33. I accept, as Clarke J. found in *Bambrick v Cobley*, *supra*, that the effects of non-disclosure are not automatic; see *Lloyds Bowmaker Limited v Brittania Arrow Holdings Limited* [1988] 1 W.L.R. 1337. I accept further that the court has a discretion, in cases where failure to make material disclosure at the interim stage has been established, both to discharge the interim injunction already granted and to refuse to grant any interlocutory injunction then sought.

34. I adopt the following description of the factors relevant to the exercise of the court's discretion in that regard identified by Clarke J. in that case:

> "1. The materiality of the facts not disclosed.
>
> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of court is likely to weigh more heavily in favour of the discretion being exercise against the continuation of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
>
> 3. The overall circumstances of the case which lead to the application in the first place."

34. Considering each of those factors as it applies to the case at hand, I find as follows. First, for the reasons already set out above, the facts that were not disclosed were directly relevant and, therefore, reasonably material, to the specific allegations made by the plaintiff of breach of the compromise agreement by the bank. Second, while I do not go so far as to find that the non-disclosure at issue was deliberate, I am quite satisfied that it involved a culpable failure on the part of the plaintiff. Third, I find that no other aspect of the overall circumstances in the case is directly relevant to the exercise of the discretion now at issue. I therefore conclude that I should exercise my discretion by acceding to the application to discharge the interim injunction and against any consideration of the application for interlocutory relief.

Campus Oil guidelines
35. Lest I am mistaken in that conclusion, for the sake of completeness I propose to consider whether, on the facts now before the Court, it would be otherwise appropriate to grant the interlocutory injunction sought in accordance with the applicable *Campus Oil* guidelines.

36. I am prepared to accept for the purpose of the present application that there is a *bona fide* question to be tried concerning the plaintiffs claim that the bank is in breach of the compromise agreement. In doing so, it is only fair to note that, as the plaintiff did acknowledge in seeking interim relief, the bank makes the countervailing claim that the plaintiff is in breach of several of his obligations under that agreement. Those conflicting claims are not amenable to resolution in the limited context of the motions currently before the court.

37. On the adequacy of damages, the plaintiff contends that any subsequent award of damages at trial would not be an adequate remedy for him if he cannot obtain the injunctive relief that he seeks, as that may result in his bankruptcy. The bank goes on to make the obvious point that the properties over which it has appointed receivers are properties that the plaintiff was in any event bound to sell under the terms of the compromise agreement, so that the real issue between the parties is whether, thereafter, the bank is entitled to pursue the plaintiff for the balance of his indebtedness to it under the various loan agreements between them or is bound instead by the terms of the compromise agreement to accept the proceeds of sale of the relevant properties in full and final settlement of that debt. The bank also makes the point that, if the irremediable harm the plaintiff apprehends should he not obtain injunctive relief is bankruptcy, then the undertaking that he has provided to compensate the bank for any damage suffered by it on foot of a wrongly granted injunction is of little or no value.

38. In those circumstances, it is necessary to consider the balance of convenience. The *status quo* is that the receivers are in place, having been appointed by the bank before it was served with the interim injunction now at issue. I am satisfied that, to borrow a phrase from the judgment of May L.J. in *Cayne v Global Natural Resources* [1984] 1 W.L.R. 893, "the balance of the risk of doing an injustice" favours the maintenance of that *status quo*. I would therefore refuse the plaintiffs application for an interlocutory injunction on that basis also.