Neutral Citation: [2015] IEHC 133

THE HIGH COURT

COMMERCIAL

[2014 No. 10198 P.]

[2014 No. 179 COM]

BETWEEN

PAUL DORMER AND GERARD DORMER

PLAINTIFFS

AND

ALLIED IRISH BANKS PLC, LUKE CHARLETON AND MARCUS PURCELL

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 26th day of February, 2015

1. The plaintiffs in this action are judgment debtors of the first named defendant. In High Court commercial proceedings bearing record number [2013 No. 4139 S.] [2013 No. 184 COM] ("*the earlier proceedings*"), Allied Irish Bank Plc obtained judgment against Paul Dormer and Gerard Dormer (the plaintiffs in these proceedings) in the sum of €17,663,876.

2. In the present proceedings, the plaintiffs seek to have the said judgment vacated on the basis that it was obtained on foot of a settlement agreement which was not properly completed. By notice of motion dated 3rd December, 2014, the plaintiffs sought an interlocutory injunction restraining the receivers (the second and third named defendants) from taking any further steps to sell, market or otherwise deal in the assets of the plaintiffs or take any of the steps in the exercise pursuant to their appointment, which is disputed, pending the trial of the action. On 3rd December, 2014, the plaintiffs had obtained an interim injunction following an *ex parte* application made before Gilligan J.

3. In the earlier proceedings, an application for summary judgment was listed before Kelly J. on 30th January, 2014. On that date, the parties entered into a written settlement agreement and the summary judgment application was adjourned to 4th March, 2014, to allow the implementation of the agreement. The agreement provided, *inter alia*, at para. 5(3):-

> *"Eamon Conneely, Sarah Bowen and Michael Morris will, subject to the satisfaction of the matters referred to in 1 and 2 above, recommend to the Area Credit Committee of the Plaintiff, a proposal for credit facilities on the terms of the Heads of Terms as issued on 8th October, 2013, as may require to be varied or amended on such terms as Mr. Conneely, Ms. Bowen and Mr. Morris believe to be necessary insofar as is required to take account of the valuations received by the Plaintiff pursuant to Special Condition 1 of the Heads of Terms and to take account of the terms of settlement with Mrs. Dormer, referred to at 1 above."*

Under the terms of the agreement, the plaintiffs unconditionally agreed that judgment would be entered against them in the event that the Credit Committee rejected the proposal.

4. The gist of the plaintiffs' claim in these proceedings is that the first named defendant wrongfully obtained judgment against them by misrepresenting its adherence to the settlement agreement which required members of the first named defendant to recommend to the Area Credit Committee of the first defendant, a proposal for credit facilities. The plaintiffs claim that after judgment was obtained against them, they made a data protection request and discovered that the recommendation made to the Area Credit Committee was nothing of the kind because it was couched in terms which included negative information about the plaintiffs. This meant that the rejection of the recommended proposal was inevitable.

Issues

5. In this motion, a number of issues arise. They are:-

> (i) what is the meaning and effect of the settlement agreement?;
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> (ii) can the judgment of 4th March, 2014, be set aside or vacated?;
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> (iii) is there a fair issue to be tried?;
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> (iv) whether damages are an adequate remedy?; and
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> (v) what is the value of the plaintiffs' undertaking as to damages?

6. The settlement agreement of 30th January, 2014, in the earlier proceedings was signed by the plaintiffs and a representative of the first defendant. The agreement provides at clause 5 that certain steps shall be taken by the bank including the recommendation to be made by Eamon Conneely, Sarah Bowen and Michael Morris to the Area Credit Committee (Clause 5(3)). Clause 4 of the agreement states:-

> *"The defendants further irrevocably agree to consent to judgment as aforesaid in the event that the plaintiff has not agreed, on or before 28th February, 2014, to provide facilities on foot of the recommendation referred to at para. 5(3) of the Steps below."*

7. It seems to me that the terms of the agreement are quite clear. The parties named in clause 5(3) were to make a recommendation to the Area Credit Committee of the bank for credit facilities on the terms set out therein. There was no guarantee that the Credit Committee would accept the recommendation and, as things turned out, that is what happened. A recommendation was made and the Area Credit Committee declined to offer further credit facilities.

8. The order of Kelly J. made on 4th March, 2014, in the earlier proceedings, records that having regard to the terms of the settlement agreement entered into by the parties on 30th January, 2014, and in accordance with its terms, the court determined that the bank was entitled to judgment against Paul Dormer and Gerard Dormer, together with accrued interests and costs and the judgment sum was fixed at €17,663,876.

9. In this action, the plaintiffs seek to set aside or vacate the order made by Kelly J. on 4th March, 2014. In written submissions, the plaintiffs state: *In summary, it has since come to light, by way of documentation obtained by the plaintiffs pursuant to a Data Protection request, that the Defendants did not adhere to the terms of the settlement agreement…"* and specifically that the purported "*recommendation*" was not, in fact, a recommendation to the Credit Committee. The plaintiffs claim that the servants or agents of the first defendant presented the "recommendation" in such a way to the Credit Committee that rejection of any further lending proposal was inevitable and that this constituted a manifest breach of the settlement agreement. In para. 14 of their written submissions, the plaintiffs state:-

> *"As the plaintiff in this case is not pleading fraud, but rather misrepresentation, upon which they were induced to enter into an agreement (sic). As a result of the Court requiring an element of fraud to set aside a consent judgment, the plaintiff must issue separate proceedings (the within proceedings) to set aside the judgment granted in the summary proceedings bearing the record number 2013/4139 S."*

That position was maintained in oral argument before the court.

10. The jurisprudence on the issue of setting aside a judgment is uncontroversial. In *Keating v. Judge Crowley & Ors* [2010] IESC 29, Murray C.J. in delivering the judgment of the court said:-

> *"Absent fraud, or some fundamental issue of justice arising from the conduct of the proceedings, it is difficult to contemplate circumstances in which a party would be permitted, in an appeal or otherwise, to impugn a determination by the High Court of an issue, such as liability, which had been expressly conceded by the party concerned."*

11. This was in the context of a party seeking a review of an order made by consent. He pointed out that it was not contended in that case that there was anything in the nature of fraud or fundamental injustice and stated:-

> *"In that light the issue of liability between these parties can probably be regarded as being governed by the principle of res judicata."*

12. The order of 4th March, 2014, is a final order. It was perfected on 14th March, 2014, and no appeal was taken against it. There can be no doubt that these proceedings are designed to achieve the setting aside of that judgment. But the law is clear that nothing short of fraud, pleaded with sufficient particularity and established on the balance of probabilities would constitute sufficient grounds for upsetting a previous decision given by the court and which has not been appealed. See *Tassan Din v. Banco Ambrossiano S.P.A* [1991] 1 I.R. 569. At p. 578, Murphy J. said:-

> *"It seems to me, therefore, that all that can be said is that at one time a court might have set aside a judgment of a court of co-ordinate jurisdiction not merely for the grounds of fraud but also on the basis of the discovery of new evidence. The law, as I understand it, in this country is that (in the absence of fraud) 'new evidence' can be availed of as part of the appeal process or not at all…."*

This view of the law was endorsed by the Supreme Court in *Kenny v. Trinity College* [2008] IESC 18.

13. In the present case, the plaintiffs have stated quite clearly that they do not rely on fraud. In those circumstances, it is difficult to see how the plaintiffs can hope to set aside the judgment of 4th March, 2014 or to have that judgment vacated. The judgment of the Supreme Court in *Keating v. Judge Crowley*, does not appear to me to apply in this case because the judgment on 4th March, 2014, was not a consent judgment. It is clear from the order of Kelly J. that counsel for the defendants sought an adjournment to enable them to respond to what was canvassed in an affidavit of Ms. Katherine Forde and that counsel for the bank opposed any adjournment. In spite of that application, the learned judge felt that the terms of the agreement were clear and that on the basis of it the bank was entitled to judgment. There was no question of the judgment being obtained on consent.

14. The next matter I have to consider is whether there is a fair issue to be tried? This issue is also bound up with the question of whether or not the plaintiffs are estopped *per rem judicatam* from maintaining these proceedings. I have been referred to transcripts of the exchanges between counsel and Kelly J. at the hearing on 4th March, 2014. The following exchange took place between Kelly J. and counsel for Paul Dormer and Gerard Dormer who are the plaintiffs in these proceedings:-

> *"Judge: So does it boil down to this? That you contend that the agreement is a conditional agreement and that all of the conditions that you were obliged to perform have not be performed but the reason that you say that its so is because of some lack of enthusiasm on the part of the three officials who were to make the recommendation to the Area Credit Committee, and you are going so far as to say that that constitutes a breach of the settlement agreement –*
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> *Mr. Crean: Yes.*
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> *Judge: - so as to vitiate the provisions of it, which were set out in fairly stark terms, namely that you would be consenting to judgment irrevocably today if you weren't able to meet the conditions?*
>
> *Mr. Crean: Yes, precisely…"*

15. Now that is exactly the same case that the plaintiffs make in these proceedings. So where does that leave the plaintiffs? They say they are not making out any case in fraud. They claim that they were induced to enter into a settlement with the bank on the basis of a misrepresentation, namely, that the three named representatives of the bank would make a recommendation to the Area Credit Committee whereas, in fact, the "*recommendation*" actually made was nothing of the sort. But that issue has already been canvassed before Kelly J. on 4th March, 2014 and he decided against the Dormers and gave judgment to the bank. The order of Kelly

J. has been perfected and not appealed. The issues raised in the present case were canvassed before Kelly J. and he has decided upon those issues. It follows that the plaintiffs are precluded from seeking an order in this Court setting aside or vacating the order of the court made in the earlier proceedings, as no fraud is alleged. Furthermore, the plaintiffs in this action are estopped *per rem judicatam* from making the case that they now seek to make as a means of challenging the judgment against them.

16. In those circumstances, the plaintiffs have failed to establish a fair issue to be tried which is an essential ingredient of an application for interlocutory injunction pending trial.

17. There are a number of subsidiary points which are not necessary for me to decide having regard to my finding above. However, in case the matter proceeds further, I will deal with them briefly. Although the plaintiffs claim that damages would not be an adequate remedy, I do not accept that argument. Judgment mortgages were registered against a number of the plaintiffs' properties in excess of seven months prior to any injunction application. The properties had been charged in favour of the bank by the plaintiffs who were entitled to put in receivers over the properties when an event of default occurred. All the properties are charged or mortgaged in favour of the bank and they are part of a commercial investment. In the circumstances, damages would be an adequate remedy in the event that an injunction was refused and the plaintiffs were to be ultimately successful.

18. As a condition for obtaining an interim injunction the plaintiffs gave an undertaking as to damages. The value of such an undertaking must be questionable in the light of the fact that a judgment against them in a sum of €17,666,876. It is not credible to suggest that the plaintiffs would be able to honour that undertaking if called on to do so.

19. I refuse the application for an interlocutory injunction and I make an order directing that the interim injunction granted on 3rd December, 2014, be vacated.