

THE HIGH COURT

COMMERCIAL

[2004 No. 9112P P]

BETWEEN:

PROMONTORIA (ARROW) LIMITED

PLAINTIFF

-AND-

PAT WHELOCK, MICHAEL O'LEARY

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 18th day of April, 2018.

Summary

1. The plaintiff ("Promontoria") is a debt acquisition company while the first named defendant ("Mr. Wheelock") is an engineer based in Enniscorthy, Co. Wexford and the second named defendant ("Mr. O'Leary") is an accountant in an accountancy firm called Michael O'Leary & Company also based in Enniscorthy, Co. Wexford. The substantive dispute between the parties concerns a claim taken by Promontoria against Mr. Wheelock for the repayment of a loan of €2.6 million. Judgment in default has already been obtained by Promontoria against Mr. O'Leary.

2. The proceedings arise from Promontoria's acquisition of a loan from National Asset Loan Management Limited ("NAMA"), which loan had been made by Irish Bank Resolution Corporation (formerly Anglo Irish Bank Corporation Limited ("Anglo")) to Mr. Wheelock and Mr. O'Leary pursuant to a Facility Letter dated 23rd December, 2011 (the "Facility Letter"). Mr. Wheelock's defence to the substantive proceedings is that Mr. O'Leary forged his signature on the Facility Letter.

3. The original proceedings were issued by NAMA on the 24th October, 2014, and on 14th March, 2016, Promontoria was substituted as the plaintiff in the proceedings arising from its acquisition of the underlying loan.

4. The proceedings before this Court relate to two motions issued by Promontoria, one seeking an order for the trial of a preliminary issue and one seeking to compel Mr. Wheelock to comply with discovery.

Background facts

5. The plenary summons in this case is a relatively straightforward and common claim for judgment on foot of Mr. Wheelock's failure to repay some €2.6 million under the terms of the Facility Letter. However, what is curious about this case is that Mr. Wheelock alleges that Mr. O'Leary forged Mr. Wheelock's signature on the Facility Letter. Mr. Wheelock also alleges that Mr. O'Leary forged his signature on the mortgage documentation providing Anglo with security for the monies advanced. This Court was shown a copy of a letter dated 4th March, 2014, from Mr. O'Leary to solicitors for Mr. Wheelock, in which Mr. O'Leary accepted that he had forged Mr. Wheelock's signature, *albeit* that he sates in that letter that he did so at the request of Mr. Wheelock. Solicitors for Mr. Wheelock wrote to NAMA on the 7th February, 2014, outlining Mr. Wheelock's claim that Mr. O'Leary had forged his signature. On the 20th February, 2014, Mr. Wheelock's solicitor provided NAMA with further details in relation to the alleged forgery, including a copy of Mr. Wheelock's passport signature.

6. In separate proceedings (*Wheelock v. O'Leary* (2014 No 5751 P)), Mr. Wheelock sued Mr. O'Leary for the alleged forgeries. The present proceedings before this Court by Promontoria against Mr. Wheelock were stayed pending the resolution of the *Wheelock v. O'Leary* proceedings in which Mr. Wheelock sought €7.9 million in damages from Mr. O'Leary for, *inter alia*, his alleged forgery of Mr. Wheelock's signature in connection with the borrowing of monies from Anglo and the purchase of lands using those funds (the "Monvoy Lands"). The *Wheelock v. O'Leary* proceedings were settled on terms, including the payment by Mr. O'Leary to Mr. Wheelock of the sum of €1.5 million, which matched Mr. O'Leary's cap on his accountancy firm's professional indemnity insurance. The settlement was evidenced by a Settlement Agreement dated 10th February, 2017, between, Mr. Wheelock as plaintiff and the following defendants: Mr. O'Leary, Dolores O'Leary, Justin McConville t/a Micheal O'Leary & Co, Archdale Construction Limited, Sapol Electrical Limited, Sinead O'Leary, Thomas Bolger and Andrew O' Leary (the "Settlement Agreement").

A. The trial of a preliminary issue

7. Against this background, this Court will consider the application by Promontoria to have a matter tried as a preliminary issue in these proceedings. Promontoria seeks the trial of the following preliminary issue pursuant to Order 25, rule 1 or Order 63A, rule 5 or Order 63A, rule 6(1)(ii) of the Rules of the Superior Courts:

"Whether the security held by the Plaintiff ranks in priority to any claims, rights or interests asserted by the First Named Defendant in respect of the Monvoy Lands by reason of the Plaintiff's acquisition of the said lands from National Asset Loan Management Limited."

8. In essence therefore Promontoria wants this Court to determine as a preliminary issue, whether the mortgage over the Monvoy Lands in favour of Promontoria, which was allegedly forged, takes priority over Mr. Wheelock's interest in the Monvoy Lands.

9. Order 63A, rule 5 deals with the making of orders in the Commercial Court regarding the conduct of the proceedings. It is clear from that this Court has jurisdiction to make a decision to hear a matter as a preliminary matter pursuant to the terms of this Order. That Order provides that any order made by the Court regarding the conduct of proceedings may be made if it is:

'just, expeditious and likely to minimise the cost of the proceedings'.

10. While Order 63A is of general application to all possible orders made by a court regarding the conduct of proceedings, since it does not specifically refer to the trial of a preliminary issue, Order 25, rule 1 specifically refers to an application for a matter to be heard as a preliminary point of law, as in this case. It is relevant to note that this Order specifically bases the application in the pleadings. This is because the Order states:

"Any party shall be entitled to raise *by his pleading* any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial." [emphasis added]

The Pleadings

11. Paragraph 4 of the Special Indorsement of Claim in the Plenary Summons dated 24 October 2014, in which the plaintiff (then NAMA, but now Promontoria) seeks judgment for €2.6 million against Mr. Wheelock, states:

"In accordance with its statutory powers referred to herein, [NAMA] by instrument dated 23rd of March 2012, and supplementary to an acquisition schedule dated 1 November 2010 acquired the loans the subject of the loan facility referred to below, and *related security*, from Irish Bank Resolution Corporation Limited (formerly Anglo Irish bank Corporation Limited)." [emphasis added]

Mr. Wheelock relied on this reference to the related security to seek particulars from NAMA and in his Notice for Particulars dated 27th November, 2014, he states:

"With reference to the 'related security' referred to at paragraph 5 (*sic*) of the General Indorsement of Claim, please state whether [Mr. Wheelock] is alleged to have signed deeds of mortgage dated 18 July 2003 and 22 August 2008".

In its Replies to Particulars dated 11th December, 2014, NAMA states in reply to this request:

"This does not arise on the Indorsement of Claim. In these proceedings, the Plaintiff is not seeking to enforce the related security (namely, the Deeds of Mortgage dated 18 July 2003 and 22 August 2008)."

12. Therefore in the case before this Court, the pleadings seek a judgment for a debt. The proceedings do not deal with the enforcement of security. In fact, NAMA went a step further and expressly stated in their Replies to Particulars that it is not seeking to enforce the security in this case. Yet, in this motion Promontoria is seeking to have the issue of the priority of the security tried as a preliminary issue in these proceedings, even though NAMA stated in its Replies to Particulars that it is not seeking to enforce the security in these proceedings.

13. Promontoria has put up arguments to the effect that if the Court granted the application it would be likely to minimise costs (in line, they say, with Order 63A, rule 5) and be more efficient (since Promontoria has stated that if the application is refused it may then simply seek to amend its pleadings and make the same application again in the future, which would be a waste of money and court time). However, it seems to this Court that while Order 63A is aimed at saving costs and time, it is aimed at saving costs and time in *'those proceedings'* and not the cost and time of a litigant, by saving a litigant from issuing new proceedings or from amending its proceedings to deal with an issue which is not covered in the proceedings before the Court. Thus, the cost and time which Promontoria is seeking to save is not the cost and time in *these proceedings*, which do not have anything to do with enforcing security or the priority of that security, but rather the cost and time in other proceedings which it has not yet issued. Accordingly, this Court refuses the application to hear the issue regarding the priority of the security as a preliminary issue.

B. Discovery of settlement terms regarding the alleged forged signature

14. The second application relates to the alleged failure of Mr. Wheelock to comply with discovery ordered by McGovern J. The background to this is that the proceedings before this Court were stayed because of the relevance of the *Wheelock v. O'Leary* proceedings between Mr. Wheelock and Mr. O'Leary, in which Mr. Wheelock alleged that Mr. O'Leary had forged his signature and in which Mr. Wheelock sought €7.9 million in damages from Mr. O'Leary. After Promontoria learnt of the settlement of the *Wheelock v O'Leary* proceedings, it sought successfully to have the stay lifted and it sought an order for discovery of the Settlement Agreement.

15. McGovern J. granted an order for discovery against Mr. Wheelock on the 17th July, 2017. This required Mr. Wheelock to:

"Provide to the Plaintiff by way of discovery on affidavit the settlement agreement made as between the First Named Defendant and the Second Named Defendant on or about the 10th day of February 2017 within 1 week (i.e. no later than 24 July 2017)"

16. Mr. Wheelock provided the Settlement Agreement to Promontoria but redacted, sections 4, 5, 13, 15 and 16 of the Agreement and Promontoria is now seeking an order compelling Mr. Wheelock to comply with the Order of McGovern J., save that Promontoria does accept that Mr. Wheelock was entitled to redact sections 4 and 5 of the Settlement Agreement, on the grounds that Mr. Wheelock has stated that those sections make reference to the affairs of Mr. O'Leary.

17. In relation to sections 13, 15 and 16, Mr. Wheelock in his Replying Affidavit dated 18th January, 2018, avers that:

"I further say that sections 13, 15 and 16 of the settlement agreement were redacted on the ground that they relate to a private indemnity between the parties to the settlement agreement. This indemnity is of no concern to the Plaintiff."

18. In deciding this issue, it is important to bear in mind that this Court is dealing with a claim in these proceedings that Mr. Wheelock received €2.6 million from Anglo pursuant to a Facility Letter which was forged. The purpose of the Facility Letter is stated in section 2 of that letter to be the provision of further working capital for the Monvoy Lands. Section 3 of the Facility Letter makes clear that the security for the said loan of €2.6 million is the Monvoy Lands. As previously noted, Mr. Wheelock's defence to these substantive proceedings on the Facility Letter is that his signature was forged. It is also clear from the *Wheelock v O'Leary* proceedings that he claims that his signature is also forged on the mortgage deeds in favour of Anglo providing security pursuant to his obligation under section 3 of the Facility Letter.

19. The terms of the Settlement Agreement between Mr. Wheelock and the alleged forger of his signature (Mr. O'Leary) seems to this Court to be of relevance to the current proceedings in which Promontoria seek to rely on the allegedly forged document. This was clearly why McGovern J. ordered the discovery of the Settlement Agreement in the first place.

20. As regards the relevance of the indemnity between Mr. O'Leary and Mr. Wheelock which has been redacted, the precise terms of that indemnity, which have not been disclosed, could be relevant regarding whether Mr. Wheelock's signature was actually forged (as alleged by Mr. Wheelock) or whether it was done under instruction (as alleged by Mr. O'Leary). It is also relevant that Mr. Wheelock's affidavit simply states:

"I further say that sections 13, 15 and 16 of the settlement agreement were redacted on the ground that they relate to a private indemnity between the parties to the settlement agreement. This indemnity is of no concern to the Plaintiff."

Accordingly, it is not clear whether Mr. Wheelock indemnified Mr. O'Leary in return for his payment of €1.5 million (or some other consideration) or whether Mr. O'Leary indemnified Mr. Wheelock in return for his discontinuance of the proceedings (or some other consideration). It seems to this Court that the terms of that indemnity could shed some light on the status of the alleged forged signature on the Facility Letter, which is at issue in these proceedings. This is particularly so when one considers that under the Facility Letter Mr. Wheelock undertook to grant a first legal mortgage to Anglo over the Monvoy Lands and if Mr. Wheelock's signature was forged as he alleges on the Facility Letter and the Deeds of Mortgage, it could lead to Mr. Wheelock being in a position where he might not have to repay the loan and he might have the benefit of the Monvoy Lands in priority to Promontoria, despite the terms of the Facility Letter, which would be a considerable financial benefit to Mr. Wheelock.

21. The possibility of such a financial benefit to Mr. Wheelock, as the backdrop to the settlement of his litigation with Mr. O'Leary, would clearly be of relevance to any settlement terms negotiated between Mr. Wheelock and Mr. O'Leary. This potential financial benefit to Mr. Wheelock could conceivably be a factor in the operation of any indemnity between Mr. Wheelock and Mr. O'Leary. Accordingly, the terms of the indemnity, and in particular the issue of whether there is, or is not, a reference in those terms to this possible financial benefit, could impact on the Court's view of the status of the alleged forgery.

22. Against this background, it is difficult for this Court to avoid the conclusion that the terms of any indemnity between Mr. O'Leary and Mr. Wheelock are of relevance to these proceedings between Promontoria and Mr. Wheelock and so this Court would order the discovery of the redacted sections 13, 15 and 16 of the Settlement Agreement.