THE HIGH COURT

COMMERCIAL

[2017 No. 2260 S]

BETWEEN:

PROMONTORIA (GEM) DAC

PLAINTIFF

-AND-

CIARAN REDMOND, MICHAEL O'NEILL, CLODY NORTON, PETER CREAN, T/A THE NORC PARTNERSHIP

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 2nd May, 2018.

Summary

1. This case involves an application for summary judgment by the plaintiff ("Promontoria") against the defendants in the sum of €4,572,662.91 arising from borrowings made by facility letter dated the 20th December, 2004 ("the Facility Letter"). The borrowings were made for the purpose of building 16 apartments at Mill Race, Bunclody, Co. Wexford.

2. Under the terms of the Facility Letter Anglo Irish Bank Corporation plc ("Anglo") offered a loan facility of €3,896,000 to the defendants ("the Facility Letter"). The defendants accepted the Facility Letter and the Bank's General Conditions on the 5th January, 2005.

3. Only two of the defendants are contesting these proceedings. The primary defence to the summary judgment is provided by Mr. Peter Crean, the fourth named defendant ("Mr. Crean"). Mr Crean who, as well as having being involved in the proposed property development for which these funds were required, is a solicitor. He argues that the matter should go to a plenary hearing because he claims that he reached a binding settlement agreement on the 16th February, 2018 (the "Alleged Settlement Agreement") with Promontoria whereby he settled his joint and several liability of €4.5 million for his undertaking to pay €80,000. The third named defendant, Ms. Clody Norton ("Ms. Norton"), also relies on the Alleged Settlement Agreement as a defence to the summary proceedings against her, on the grounds that the claim against her cannot be sufficiently particularised until the amount, if any, agreed to be paid by Mr. Crean under the Alleged Settlement Agreement is established at a plenary hearing on that issue.

4. Neither Mr. Crean nor Ms. Norton dispute that the monies were borrowed and that they have defaulted in the repayment of those monies.

Background

5. Pursuant to the NAMA Act, 2009, National Asset Management Limited ("NALM") became legally and beneficially entitled to the Facility Letter. By Global Assignment Deed dated 27th January, 2017, between NALM as assignor and Promontoria as assignee ("Global Assignment Deed"), the Facility Letter was transferred to Promontoria, although as noted hereunder, Mr. Crean alleges that this root of title whereby Promontoria became entitled to the Facility Letter is not sufficiently established.

6. By letter of demand dated 15th June, 2017, Promontoria sought the sum of €4,545,502.52 then due and owing under the Facility Letter from the defendants.

7. As well as his primary argument that he has a binding settlement agreement with Promontoria, Mr. Crean has also advanced a number of arguments in support of his contention that Promontoria should not get summary judgment, but that this matter should proceed to a plenary hearing. These arguments will be considered in turn in light of the test set down by McGuinness J. in *Aer Rianta v. Ryanair* [2001] 4 IR 607 at 615 that the key issue for this Court in deciding whether to grant a summary judgment is whether the defendant has a '*credible defence*'.

Statute of Limitations claim

8. At para 4 of his affidavit, Mr. Crean avers that the plaintiff's claim is statute barred by s. 11 of the Statutes of Limitations Act, 1957. He avers that the last payment in respect of the Facility Letter was made '*over six years ago and I believe it was in or about November 2009*' and that the repayment date under Clause 7 of the Facility Letter was 1st December, 2005, which is also more than six years from when these proceedings were issued.

9. However, it seems clear to this Court that based on the judgment of Baker J. in *Allied Irish Banks plc v. Pollock & anor* [2016] IEHC 581, that the ordinary meaning of the terms of the Facility Letter need to be considered in reaching a conclusion on this statute of limitations claim. In this regard, Clause 7 of the Facility Letter states:

> "The Facility is repayable on demand which demand may be served at any time by the Bank at its sole discretion and without stating any reason for such demand. Without prejudice to the demand nature of the Facility, the Facility shall be reviewed on or before 1st December 2005. In the meantime, interest is to be funded on a monthly basis."

On the ordinary meaning of this clause, all that was going to happen on the 15th June, 2017, was a '*review*' of the facility and therefore this was not the repayment date in this Court's view. It is also the case that this clause explicitly states that the facility is '*repayable on demand*'. Accordingly, this Court concludes that the cause of action in these proceedings arose when demand was made on the 15th June, 2017, and therefore there is no question of these proceedings being statute barred.

Condition precedent claim

10. Mr. Crean avers that Anglo failed to adhere to a condition precedent in the Facility Agreement, which related to Anglo obtaining a valuation of the property at Mill Race, Bunclody which property was to secure the loan. Clause 5(1) of the Facility Letter states:

> "The Facility shall not be available for drawdown unless the Conditions Precedent set out in the General Conditions are satisfied and the Bank has received, in form and substance, satisfactory to it:

(i) A report, addressed to the Bank, from its nominated valuer (the "Valuer") regarding the Property. The terms of reference for this report will be set out in the Banks letter of instruction to the Valuer."

However, it seems clear to this Court that this condition precedent was waived by Anglo, since no valuation was obtained, yet Anglo proceeded to lend the money to the four defendants. There is nothing in the wording of the Clause 5 or in the other circumstances of this case which would lead this Court to conclude that the valuation was not for the benefit of Anglo alone, in order for it to be satisfied that it had sufficient security for the loan. It is also clear to this Court that the requirement to have a valuation is severable from the remainder of the Facility Letter and so on the authority of *IBRC v. Cambourne Investments* [2014] 4 IR 54 this Court finds that this is not a good defence to the summary judgment. In any case, as noted by Charleton J. in *Cambourne*, the obligation of the defendants to repay monies borrowed is not extinguished even where there has been failure to comply with a condition precedent.

The SME Code claim

11. Mr. Crean alleges that Link ASI Limited (formerly known as Capita Asset Services (Ireland) Limited) ("Link"), the company providing loan administration services on behalf of Promontoria, has made a number of breaches of the *Code of Conduct for Business Lending to Small and Medium Enterprises* issued by the Central Bank of Ireland ("SME Code"). In light of these alleged breaches it is Mr. Crean's case that Promontoria ought not be granted judgment or that the Court ought exercise its jurisdiction to stay the summary proceedings pending the plaintiff proving it and its agents are compliant with the SME Code or to explain why they are not so compliant.

12. As is clear from the judgment of Ryan J. (as he then was) in *ACC Bank plc v. Deacon* [2013] IEHC 427, compliance with the SME Code is not a prerequisite to establishing liability, nor does non-compliance furnish a defence. It follows that the alleged failure of Link to comply with the SME Code is a regulatory matter between the Central Bank and the regulated financial service providers and it does not provide any defence to the defendants to these summary proceedings.

Promontoria's title to bring these proceedings

13. Mr. Crean takes issue with the redacted Global Assignment Deed between NALM as assignor and Promontoria as assignee. Mr. Crean avers that the document is redacted to such a degree that it does not show what rights or title or interest was transferred from NALM, if any, to Promontoria. It is further averred that Promontoria has not established what rights, interests or benefits NALM had at the time of the transfer that were capable of transfer to Promontoria.

14. This Court does not accept that claim. Clause 4 of the Global Assignment Deed is not redacted and it, combined with the unredacted reference to the Facility Letter in the later part of the Deed, make it clear that the entire interest of NALM in that Facility Letter, including the right to sue on outstanding sums, was assigned to Promontoria.

15. As regards NALM's entitlement to assign the Facility Letter, Clause 2 of the Global Deed of Transfer contains a certificate by NALM that the Scheduled Documents, which includes the Facility Letter, had been transferred to it in accordance with Part 6 of the National Asset Management Agency Act 2009. In this regard, it is relevant that under s. 108 of that Act, NALM is entitled to certify under seal that it holds a specific 'bank asset' (which includes a credit facility, such as the Facility Letter) and this certificate is conclusive as to the matters set out therein. On this basis, this Court concludes that this argument regarding the evidence of Promontoria's title does not offer the defendants a credible defence.

Settlement agreement claim

16. Mr. Crean's primary ground of defence is his averment that his financial advisor Mr. Kent Ashmore ("Mr. Ashmore") reached the Alleged Settlement Agreement with Mr. Johnny McWhinney ("Mr. McWhinney") an employee of Link/Capita, to compromise the claim the subject matter of these proceedings. This is also the primary ground of defence by extension for Ms. Norton, who claims that she should not be subject to summary judgment if Mr. Crean's argument that he has a binding settlement agreement is sent forward to be dealt with at a plenary hearing, since the terms of that settlement could impact upon the amount of money due from her to Promontoria.

17. The issue that this Court has to determine is whether, based on the documentary evidence exhibited in the affidavits and the other sworn evidence, Mr. Crean has a credible defence.

18. The background to the Alleged Settlement Agreement claim is that Mr. Crean avers that after these proceedings were initiated in the High Court in October 2017, he engaged Mr. Ashmore, a financial adviser, to negotiate with Link regarding his liability for the loan. He avers that arising from those discussions, he was informed by Mr. Ashmore that a *'figure had been agreed with Capita'* . It is clear from subsequent averments that this figure was €70,000. He further avers that *'as we had agreed terms'*, he did not contest the application to have the proceedings transferred to the Commercial Court, which was listed for the 5th February, 2018. Notwithstanding this averment that a settlement had been agreed prior to 5th February, 2018 and that he did not contest the transfer to the Commercial Court because of that settlement, he avers that on the 16th February, 2018, Mr. Ashmore contacted Mr. Crean to say that if the:

> "offer that I had previously made was increased by €10,000 that the matter was settled and could be finalised that day".

This averment, referring to the previous *'offer'* of €70,000 being increased runs completely contrary to Mr. Crean's earlier averments that he had an *agreement* for €70,000 which had been reached prior to the 5th February, 2018. It seems to this Court therefore that what Mr. Crean alleges was an 'agreement' for €70,000 was in fact simply an offer of €70,000 which had not been accepted by Promontoria. This mischaracterisation of the first 'agreement' for €70,000 is relevant when this Court considers whether the second 'agreement' for €80,000 was in fact an 'offer' or a binding agreement.

19. Mr. Crean's affidavit then goes on to state that Mr. Ashmore accepted on his behalf what he terms the *'revised offer'* from Promontoria, through its agent, Mr. McWhinney. He avers that later that day, Mr. Ashmore contacted him to say that Mr McWhinney had contacted him to say the settlement agreement was being withdrawn. He further avers that he was *'ready to agree and sign and complete the settlement on the 16th February 2018'*. It is relevant to note that this language is consistent with there being no 'agreement' reached until a document was signed. He also avers that the *'key terms of the agreement were at all times known and understood'*. It is relevant to note that this language is consistent with only the key terms having being agreed and not all the terms of the settlement and as noted hereunder in the negotiations, there was a reference by Mr. Ashmore, to only part of the then €70,000 being paid up front, with the balance being paid some months later, yet no reference is contained in Mr. Crean's affidavit to the date for payment of the €80,000.

20. He then avers that:

"Mr. Ashmore has written records, by way of email, correspondence and contemporaneous notes of the negotiations and the final agreement."

However, it is significant that despite this averment, the affidavit filed subsequently by Mr. Ashmore contains no written records, emails, correspondence or contemporaneous notes whatsoever. Accordingly, there is no documentary evidence supplied on behalf of Mr. Crean to support his contention that an oral agreement was reached on the 16th February, 2018, to settle the litigation, or indeed that an oral agreement was reached prior to 5th February, 2018, to that effect.

21. In contrast, the affidavit of Mr. McWhinney contains a considerable amount of emails and contemporaneous notes that support his sworn evidence that no agreement was reached with Mr. Ashmore on the 16th February, 2018, or at any other time, for example:

• Mr. Crean submitted an email to Mr McWhiney on the 28th May, 2017, offering €40,000 to settle his indebtedness. In his email of 3rd August, 2017, Mr. McWhinney stated in what is clearly a very carefully drafted email as follows:

"Following a review of the information presented, Promontoria Gem DAC ("Promontoria") has now reverted to Capita Asset Services (Ireland) Limited ("Capita") with their decision.

Capita can confirm that Promontoria has Declined the offer as it does not in their view represent a realistic offer either in respect of the value of the property or in relation to the outstanding debt. My client has been unwilling to provide a target number.

The decision has been made solely by Promontoria and is delivered to you by Capita Asset Services (Ireland) Limited in our capacity as service provider to Promontoria."

It is clear that Mr. McWhinney is making plain to Mr. Crean the limited role which Mr. McWhinney had in the process, as he was operating simply as a conduit for offers with Mr. Crean.

• On the 17th November, 2017, Mr Ashmore sent Mr. McWhinney an offer of €70,000. However, this was not a straight forward offer, as it indicated that Mr. Crean had only €40,000 in available funds, and he would be acquiring the remaining €30,000 from two different sources and so would not be able to pay €30,000 until the following March. Significantly, in this email, it is Mr. Crean who indicates, through his agent Mr. Ashmore, that even if the figure is acceptable, Mr. Crean will *'require a settlement agreement in writing prior to any funds being transferred'.*

Thus Mr. Crean is indicating the need for a written agreement with Promontoria.

• On the 30th November, 2017, Mr. McWhinney replied to Mr. Ashmore regarding status of this offer made by Mr. Crean to Promontoria, via Mr. McWhinney. It is relevant that this email is headed 'Without Prejudice / Subject to Contract / Contract Denied'. He states:

"the case is up for approval (subject to contract) on Monday. If approval is secured it will not be binding but we can then move into legals".

Then to emphasis the position ever more regarding Link/Capita's role in the process between the borrower and Promontoria, there is an express statement under Mr. McWhiney's signature which states:

"Link ASI Limited has no authority to bind, commit or conclude contractual arrangements on behalf of Pomontoria"

Thus, from this email the role of Link/Capita is the process is clear , namely as a conduit of offers to Promontoria, but more importantly it is clear from this email that even if agreement in principle was reached on a figure it was *'subject to contract'* and was not therefore legally binding until the 'legals', i.e. legal documentation is signed and it is clear based on this email that nothing that Mr. McWhinney could say or do changed that situation, since by the express terms of this email, he had no authority to bind Promontoria.

• On the 8th December, 2017, Mr. Ashmore sought an update on the offer and in reply Mr. McWhinney replied that the *'case has not yet been presented so no news'* and again this email had the heading W*ithout Prejudice / Subject to Contract / Contract Denied'* and contains the statement under his signature that Link had no authority to bind Promontoria.

• On the 10th January, 2017, Mr. McWhinney sent another email with the same *'subject to contract'* heading and *'no authority'* statement, in which he again emphasises that reaching agreement on the figure is only the first step in a two step process for Mr. Crean in reaching final binding agreement with Promontoria, since he states:

"The position with [Mr. Crean] remains the same as when we last spoke. Our client awaits the opportunity to present [Mr. Crean's] proposal for approval (when it will still be subject to final legals.)"

• On the 16th February, 2018, Mr. McWhinney sent an email to his case management system at 5.20 pm recording his conversations with Mr. Ashmore during the course of that day. He states:

"Kent Ashmore called JMcW, explaining that the bad publicity caused by news of PGD's judgments proceedings against the NORC partnership was causing Peter great distress, personally and in terms of his business reputation. He stated that he sought an "open letter" confirming that PGD would settle with his client so that he could counter the bad press. To this end he asked whether there was anything else that he could do to persuade Promontoria to settle with his client.

JMcW stated that he would take instruction that afternoon but that there was no guarantee that a settlement at any level would be supported. In a final effort to persuade Prom to settle Kent indicated that he would go and talk to Crean to see if further funds could be secured. He indicated that a further €10k may be the extent of Crean's resources and that he would call back.

He did call back at around 12 noon when he confirmed that Crean had secured a further 10k, so was now offering €80k in FFS, payable within 4 weeks. JMcW indicated that he would have an opportunity to take instructions on this

at 2.30pm and that he would come back later that afternoon with news on whether a deal at that level would be supported or not.

At c 3.15pm, Kent called again. JMcW confirmed that he had taken instructions but that the decision had been made to proceed to judgment – and that no offer at any level would be entertained. Kent failed to see the rationale behind the decision and was annoyed by this as he said his client had done everything he could. He stated that the offer would be taken off the table immediately and JMcW confirmed again that there would be no deal at any level. Kent said he would let his client know.

At 3.30pm Peter Crean called JMcW directly on his mobile stating that this decision would put him out of business. JMcW explained that he understood it was not the news Crean wanted to hear but the decision had been made and no further offers would be accepted."

While this Court is not tasked with resolving the conflict of evidence, it is relevant that this contemporaneous note does not support Mr. Crean's position that a binding oral agreement had been reached on the 16th February, 2017, between Mr. McWhinney, on behalf of Promontoria and Mr. Crean.

• On the 15th March, 2018, Mr. McWhinney states in his contemporaneous note of a telephone conversation with Mr. Ashmore as follows:

"There was another call from Kent Ashmore (who had been trying to call JMcW) when he was out of the office the day before.

Kent said that an Affidavit was due to be drafted and that Peter Crean was very unhappy that things were going to start getting "very messy" for JMcW and Kent himself as they would all be dragged into this.

Kent asked whether the previous call (below) had been recorded. JMcW wtated that it had not been but that detailed minutes had been kept of it. Kent said that a deal was agreed at that call, as a figure had been offered by JMcW "without authority" and that when Peter had confirmed that he could raise it there was then "a deal".

JMcW explained that this was not what happened, as Kent had called asking whether there was anything else that could be done to secure a settlement for Crean. Even when a further €10k was offered JMcW had made clear that support would have to be sought. Unfortunately for Peter Crean, this support was not forthcoming.

Kent stated that this was not true and referred to the Diamond / Declan O'Mahony case. He said "this sounds like you were acting outside your authority" and that you "have form".

JMcW stated that he could not comment on another case. Kent said that it was all in the public domain and that the same has happened to Peter Crean as it had to Declan O'Mahony, specifically that an offer had been made which was subsequently withdrawn.

JMcW stated again that he could not discuss another case but that no support had been secured for any deal with Peter Crean and that judgment was being pursued.

Kent said that if that was our position then things would be taking "a different path"."

• It is also relevant to note that Mr. Ashmore in his affidavit avers in relation to the €70,000 'agreement' that:

"I confirmed the sum of €70,000 was offered and Mr. McWhinney replied that this was acceptable and he was awaiting a written confirmation of this".

This is relevant since it supports the view that Mr. Ashmore did not believe at that time that he had 'an agreement' on the €70,000 figure, and that is why he was looking for written confirmation of that fact.

22. Based on the foregoing emails and contemporaneous notes, it seems clear to this Court that any person dealing with Mr. McWhinney would know that one could not have a binding settlement agreement based on discussions with him, since he had no authority to bind Promontoria and was only acting as a conduit for offers to Promontoria, but more significantly that even if an offer was accepted in principle by him on behalf of Promontoria, it would not come into legal effect until documentation was signed by Promontoria to that effect.

23. The evidence provided on affidavit on behalf of Mr. Crean does not provide credible evidence to support his contention that an oral agreement, even in principle, was reached with Mr. McWhinney, in light of the documentary evidence provided by Mr. McWhinney in support of his claim that no agreement was reached even in principle. While this Court does not purport to resolve conflicts in the evidence on affidavit, it is in a position, based on the evidence provided by parties on affidavit, to determine whether Mr. Crean has a credible defence.

24. It concludes, based on all of the forgoing evidence including the inconsistent evidence in Mr. Crean's affidavit regarding the status of the €70,000 offer/agreement, that Mr. Crean does not have a credible argument that he has a binding settlement agreement for €80,000 with Promontoria.

25. Crucially, even if agreement was reached in principle on the €80,000 figure, as alleged by Mr. Crean, despite the foregoing evidence, it is clear to this Court that such an 'agreement' would not be legally binding until legal documentation was signed by Promontoria.

26. For this reason, the claim by Mr. Crean that he had a binding settlement agreement with Promontoria is not, in this Court's view, a credible defence to these proceedings.

Interest calculation claim

27. Mr. Crean raises a number of issues with regard to the calculation of interest in respect of the plaintiff's claim. It is asserted that the debt owed is uncertain and that the figure claimed is incorrect. He questioned the inclusion of a second account which is subject to a higher rate of interest and he asserts that he did not authorise or agree to a second account. Promontoria has waived its claim

in relation to the second account (which represents a reduction in the amount claimed of €13,551.29).

28. In reply, it is averred on behalf of Promontoria by Mr. McWhinney that the rates of interest on the two accounts are based on the rates payable as outlined in the Facility Letter and the General Conditions. The grounding affidavit exhibits a bank account which shows a figure of €4,559,111.62 outstanding on the partnership account. The plaintiff also submits that this ground of opposition is baseless in that neither Mr. Crean nor the other defendants have sought to challenge the plaintiff's entitlement to charge interest under the Facility Letter nor have they advanced contrary figures.

29. The Supreme Court decision in *Ulster Bank v. O'Brien & ors* [2015] IESC 96, makes it clear that a bank statement is *prima facie* evidence of what is contained therein At para 23 of his judgment Charleton J. summarised the position regarding summary proceedings as follows:

> "the swearing of an affidavit and its service in court proceedings which make allegations that a sum is due, can be accepted in the absence of denial, where the form and the content of what is deposed to and the exhibits supporting it carry sufficient indications of reliability. Part of the matrix of facts to be considered is whether the documentary evidence establishes a relationship whereby the obligation to pay for goods or services, or to repay a debt, are properly referenced and exhibited."

30. Similarly, the Court of Appeal decision in *AIB v. Pierce* [2015] IECA 87 makes it clear that the special endorsement of claim is not required to take on the character of a bank statement with a breakdown of interest and capital, since all that is required is a *'pithy and concise statement of the claim'*.

31. However, while Mr. Crean has not raised any *prima facie* issues with the calculation of interest on the main account, it does seem to this Court that Mr. Crean genuinely believed (incorrectly, in this Court's view) that he had settled his proceedings with Promontoria, and he avers that for this reason, he did not contest the proceedings being admitted to the Commercial Court. This meant that in April, just weeks after his Alleged Settlement Agreement had been finalised in February, Mr. Crean had to defend a summary judgment in the Commercial Court. It is conceivable that if he had more time (which would have occurred if the proceedings had been heard in the Chancery List which might have been the case, if he had objected to them being heard in the Commercial Court), he might have been able to consider in more detail whether the correct interest had been charged on his loan. It is also relevant in this context that Promontoria has decided to waive the interest on the second account and that counsel for Promontoria submitted at the hearing that it remains open to the Court to take account of the fact that, whatever about the interest, no credible defence has been mounted to the repayment of the principal.

32. In all these circumstances and bearing in mind that neither Mr. Crean nor Ms. Norton have disputed that the sum of €3.89 million was borrowed and has not been paid back, this Court concludes that no credible defence has been provided to these proceedings, but that in all the circumstances, the appropriate order to make is to grant summary judgment for that principal sum, €3,896,000.