

THE HIGH COURT

COMMERCIAL

[2005 No. 1273 P.]

BETWEEN

SLANEY FOODS INTERNATIONAL LIMITED

PLAINTIFF

AND

BRADSHAW FOODS LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 14th day of March, 2017.

1. The application before the court was brought by the defendant by notice of motion issued on 24th November, 2016, for an order re-entering the proceedings for the purposes of speaking to the minutes of and/or clarifying the terms of the order of the court made by Kelly J., as he then was, on 22nd March, 2006. In that order, Kelly J. gave a declaration that a contract for sale arising on foot of an option agreement, made on 6th April, 2004, between the plaintiff and the defendant and Mr. Robert Bradshaw, was duly executed by the plaintiff and that the contract, for a consideration of €1,531,859.00 less a deposit as defined in the agreement, be specifically performed and carried into execution. The plaintiff was awarded the costs of the action as against the defendant when taxed and ascertained.
2. The order of Kelly J. was appealed and on the 12th November, 2007, the Supreme Court dismissed the appeal and affirmed the High Court order and awarded the plaintiff the costs of the appeal as against the defendant in both courts when taxed and ascertained. The costs of the action in the High Court and Supreme Court were subsequently taxed in the sum of €332,372.00. On 24th November, 2016, the sum due in respect of costs together with interest stood at €524,616.00.
3. The order in both the High Court and Supreme Court in respect of costs made no reference to set off.
4. It is accepted by the parties that the defendant is insolvent and will be unable to pay the costs awarded to the plaintiff. The balance of the purchase consideration is €1,434,160.00 the sum of €97,699.00 having been paid some time ago to the defendant by way of deposit. The plaintiff seeks to set off the order for costs in the sum of €524,616.00 against the purchase money to be paid on foot of the contract. Mr. Bradshaw swore an affidavit on behalf of the defendant stating that, as of 18th December, 2015, the defendant's indebtedness to the Bank of Ireland was €1,319,277.45. Despite numerous requests to do so, the defendant has not stated how much money is required to secure the release of a Bank of Ireland charge over the lands which will be necessary in order for the sale to be completed.
5. It is accepted by the parties that the price to be paid for the lands under the contract to be specifically performed is multiples of what would now be required to purchase the same lands. If the plaintiff is permitted to set off its taxed costs against the balance of the purchase money due, it may result in the defendant not obtaining sufficient funds to discharge its indebtedness to the bank and it may therefore not be able to complete the contract. So, on the one hand the plaintiff, if the sale is completed, will be paying what is in today's terms a grossly inflated price for the property and the defendant, on the other hand, may not be able to discharge in full the sums due to the bank if a set off is permitted.
6. Clause 4(b) of the option agreement which was the subject matter of the hearing before Kelly J. provides that the defendant would procure that its solicitor provide to the plaintiff's solicitor evidence of the defendant's title to the premise with a contract for sale incorporating the law society conditions of sale (2001 edition). Bank of Ireland's solicitors have suggested that the need for a contract under the law society 2001 general conditions is redundant as there is an order for specific performance. I do not agree. It seems to me that whether or not the set off is permitted there are a number of issues along the path to a completed sale which will be better dealt with under an established template such as the law society conditions and since the 2001 conditions were provided for in the option agreement I direct that the sale should be closed on the basis of those conditions. The order of Kelly J. was an order enforcing the contract which arose under the option agreement and it provided for those conditions.
7. I am satisfied that in appropriate circumstances relief can be given after judgment. In this case the figure for costs was not crystallised after the decision of Kelly J. because the matter went to the Supreme Court and then to taxation of costs. While it would have been open to counsel for the plaintiff to apply to Kelly J. and the Supreme Court that the costs, when taxed, be set off against the amount due to be paid by the plaintiff on foot of the contract it seems to me that this is the sort of ancillary order that could be made now if the justice of the case requires it.
8. In *Larkin v. Groeger* [1990] 1 I.R. 461 Barrington J. held at the court has an inherent jurisdiction in its discretion to allow such set off as is necessary to do substantial justice between the parties. In *A.D.M. Londis Plc v. Ranzett Limited* (No. 4) [2015] IEHC 69 Hogan J. allowed a set off of a decree in favour of the plaintiff in the sum of €97,284.00 against a substantial award of costs in favour of the defendant on a counterclaim in the same action and like Barrington J. stated that the court was unfortunately forced to choose which of two innocent parties was likely to bear a loss. That is similar to the position in this application.
9. Having regard to the matters I have outlined in para. 5 above, it seems to me that the best way to do justice between the parties is to direct that the taxed costs of the plaintiff be set off against the purchase price to be paid on completion of the contract. If the court were to do otherwise it means that, not only is the plaintiff now paying substantially more for the lands than they are worth, but it also has no prospect of recovering the substantial costs awarded to it against the defendant which is insolvent.
10. I am conscious of the fact that the set off may give rise to a situation where the balance to be paid by the plaintiff on completion of a contract may be less than the sum owing to the bank and this may create problems so far as the defendant's ability to complete the contract and give good title is concerned. On the other hand the bank may take the view that if it acts on its charge it is unlikely to recover as much money as would be available even allowing for that shortfall and, if it agrees to accept what is available, it may give a release of the charge and it may be possible to complete the sale. But these are not matters for the court to rule on in this application and the solution lies largely in the hands of the parties themselves including the bank.

11. I direct that the plaintiff is entitled to set off the taxed costs against the purchase price to be paid on completion of the sale.