

BETWEEN

STAPLEFORD FINANCE DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

PATRICK KEARNEY

DEFENDANT

**JUDGMENT of Mr. Justice Brian McGovern delivered on the 16th day of February, 2018**

1. In this application, the plaintiff seeks summary judgment against the defendant in the sum of €16,896,207.26, arising under a deed of settlement dated 14th November, 2014, (*"the deed of settlement"*).

2. By agreement dated 23rd May, 2014, the liabilities of the defendant in respect of a facility granted by Anglo Irish Bank Corporation Limited on 13th February, 2009, were purchased by the plaintiff. On 28th October, 2014, the balance due on the said account was €19,256,207.26.

3. The plaintiff agreed to enter into a settlement agreement with the defendant whereby the said debt of €19,256,207.26, was compromised by the defendant paying to the plaintiff the sum of €2,360,000 and subject to the terms and conditions in the deed of settlement.

4. Paragraph 4.1.1 of the deed of settlement states:-

*"Stapleford is entering into this agreement based on certain financial information provided and representations made to it by the Borrower. In this regard, the Borrower expressly represents and warrants to Stapleford that:*

*(a) he has provided full and complete details to Stapleford;*

*(b) he has at all times kept Stapleford aware of all material facts or circumstances relative to his business or affairs which, on the basis of utmost good faith, should be disclosed to Stapleford; and*

*(c) any information provided to Stapleford in connection with the matters referred to in this agreement and the obligations in respect of same was, at the time provided, true and accurate in all respects."*

5. Clause 4.2 of the deed of settlement provides as follows:-

*"The Borrower acknowledges and agrees that in the event of a breach of his obligation pursuant to this agreement or in the event of a breach of the representations and warranties set out in this agreement within a period of 24 months from the date hereof that Stapleford has the right to terminate this agreement and commence proceedings against them in respect of the outstanding Liabilities."*

6. The deed of settlement also provided that the security held by the plaintiff over certain subordinated bonds of Anglo Irish Bank Corporation Limited (*"the bonds"*) was to be released to the defendant following payment to the plaintiff of the settlement amount of €2,360,000.

7. On 14th November, 2014, the defendant paid the settlement sum of €2,360,000. Subsequently, the plaintiff claimed that it learned that the defendant entered into a transaction whereby the bonds were sold for the amount of €6m and that at no stage did he disclose that he was contemplating any such transaction, whether in the lead up to and/or at the time of the execution of the deed of settlement on 14th November, 2014, or at any stage thereafter.

8. Accordingly, the plaintiff claims that the defendant has been in breach of the representations and warranties contained in Clause 4.1.1 of the deed of settlement and that, in accordance with Clause 4.2 thereof, the plaintiff is entitled to judgment against the defendant in the sum of €16,896,207.26, being the outstanding liability.

**Legal Test for Summary Judgment**

9. The test for summary judgment is very well established in this jurisdiction and can be found in a number of decisions including the following: *Ryanair v. Aer Rianta* [2001] 4 I.R. 607, *Danske Bank A/S Trading As National Irish Bank v. Durkan New Homes* [2010] IESC 22, and *Harrisrange v. Duncan* [2003] 4 I.R. 1. In general, leave to defend should be granted unless it is very clear that there is no defence. A mere assertion of a defence is not sufficient and requires some evidence to support the nature of the defence being raised. Their test is not whether the defence will succeed or even will probably succeed. (See *Rory O'Brien v. Ulster Bank* [2015] 2 I.R. 656 per MacMenamin J. at paragraph 7.)

10. In deciding the issue as to whether or not the plaintiff is entitled to summary judgment, I have applied these principles to the facts of this case.

**Discussion**

11. On 14th September, 2014, the defendant sent to Mr. James Ferris of Arrow Asset Management (representing the plaintiff) an email in which he stated, inter alia, *"the face value of the bonds is substantially more than any liability owed by me to the bank or its successors"*. The settlement was concluded two months later.

12. In answer to the plaintiff's claim that the defendant did not act with *"utmost good faith"*, the defendant claims that the plaintiff was well aware that he intended to sell the bonds. In an affidavit sworn on 20th December, 2017, the defendant states that James Ferris made contact with him by telephone in or around late August or early September 2014, to commence negotiations to reach a settlement. In various conversations with James Ferris, the defendant states that he made it very clear that he intended to sell the bonds at the first opportunity. Furthermore, the defendant states that James Ferris was at a meeting on 14th October, 2014, which

had been arranged to conclude the settlement agreement. He says that at this meeting, he was involved in numerous telephone calls regarding the sale of the bonds and the prices for the bonds and that Mr. Ferris was present in the room when these conversations occurred and at no time raised any issue regarding the prices for the bonds. The defendant also exhibited a number of emails exchanged between him and representatives of the plaintiff which show that the plaintiff was aware that the bonds were being transferred to a secure account with Davy Stockbrokers and that the purpose of this account being opened was to allow the bonds be traded.

13. James Ferris in an affidavit sworn on 2nd January, 2018, recalls being at the meeting on 14th October, 2014, which he says was for the purpose of getting the defendant to sign the deed of settlement and to pay the settlement amount already agreed, namely, €2,360,000. He avers that neither himself nor his colleague, Mr. Eoin Kirby, were present in the meeting room during any telephone calls relating to the sale of the bonds or the prices of such bonds. There is a clear conflict of fact on that issue.

14. The plaintiff maintains its entitlement to summary judgment on the basis that even if it did know that the defendant intended selling the bonds, the defendant did not disclose that he had agreed to sell the bonds for €6m. The plaintiff asserts that the duty of utmost good faith required him to give that information and that he failed to do so.

15. Another issue between the parties is whether or not the plaintiff is out of time for exercising its right to terminate the agreement by virtue of the provisions of Clause 4.2. The parties interpret that provision differently. The defendant contends that the reference to the 24 months, as it applies to the representation and warranties, can only be a time limit on the right to sue in respect of them and that this is clear from the wording of Clause 4.2. The plaintiff, for its part, described this construction as "*absurd*" and contends that such a proposition is entirely inconsistent with the natural and ordinary meaning of the language employed in the clause. The plaintiff says that the entitlement to terminate the deed of settlement is not subject to any temporal restriction but that time limit is clearly referable to the breach by the defendant of his obligations on foot of the deed. While not conceding that the defendant's point was arguable, counsel for the plaintiff did accept that if any matter went to plenary hearing, it could only be this issue.

16. As this is a claim for summary judgment, different considerations apply to those that would arise on a full hearing. In this type of application, the court is not concerned with fine points of distinction, but must rather look at the overall picture and see whether the defendant has an arguable defence. It seems to me that the plaintiff's argument for summary judgment is too simplistic. It argues that it does not matter that the plaintiff may have been aware that the defendant intended to sell the bonds and that he may have told Mr. Ferris that the value of the bonds was substantially more than his liability. What matters is that he did not tell the plaintiff that at the time of the settlement agreement he had agreed to sell the bonds for a particular price. But, in fact, there is a dispute about that issue because the defendant claims that Mr. Ferris was privy to a telephone conversation in which the sale of the bonds and the price was discussed by the defendant with a third party. While this is denied by Mr. Ferris, it still remains an issue which can only be decided by plenary hearing.

17. It seems to me that the principal issue arising in this case is whether or not the defendant was in compliance with his duty of utmost good faith and that would include a determination based on either of two scenarios:-

(i) that the plaintiff was aware that the defendant was going to sell the bonds and had been told they were worth more than the debt, and

(ii) that the plaintiff was, in fact, aware of the amount as contended for by the defendant.

18. So far as the time limit issue is concerned, this is a question of interpretation of the agreement and is best left to the court to decide at a plenary hearing, unless the matter is so obvious as to give rise to no real issue. But I do not think that the case being made by the defendant on this issue comes into such a category.

## **Conclusions**

19. Having regard to the low threshold to be established by the defendant in meeting the test for remittal of the dispute for plenary hearing, I am satisfied that on the facts of this case and having regard to the issues which have been canvassed before the court that this is not an appropriate case in which to give summary judgment. I am fortified in that view because the defendant has argued that the facility underpinning the settlement agreement was one connected with a share support scheme which he claims raises questions of potential illegality. This has been referred to at the end of his affidavit of 20th December, 2017, and he has indicated that this is another area which he seeks to pursue in his defence of these proceedings. Such an issue is not one which lends itself to summary disposal.

20. I direct that the matter proceeds to plenary hearing on all the issues.