Neutral Citation: [2013] IEHC 624

THE HIGH COURT

[2013 No. 6902 P]

[2013 No. 165 COM]

BETWEEN

PARSLEY PROPERTIES LIMITED, ANGEL PROPERTIES LLC, CLIVE HOLMES AND SUZANNE HOLMES

PLAINTIFFS

AND

BANK OF SCOTLAND PLC AND MICHAEL McATEER

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 20th day of December 2013

1. This matter comes before the court by way of the defendants' motion seeking to dismiss the plaintiffs' claim pursuant to O.19, r. 28 of the Rules of the Superior Courts 1986.

2. The first named plaintiff ("Parsley") is a private company, limited by shares, incorporated in the Isle of Man and owned by a trust, whose trustees are Montpelier (Trust and Corporate) Services Limited ("Montpelier"). The second named plaintiff ("Angel") is a limited liability corporation incorporated in Delaware, United States of America. The third and fourth named plaintiffs are husband and wife, and are the current occupants of a property known as Comeragh House at Kilmacthomas, County Waterford, pursuant to a caretaker agreement entered into with Angel, as well as being beneficiaries under the trust.

3. The first named defendant is a banking institution (the "Bank"). The second named defendant is a receiver appointed over various assets held by Angel, including Comeragh House.

4. By way of background, the substantive dispute in this matter concerns the provision by the Bank of loan facilities in relation to an investment by Parsley in a retail site in the United Kingdom in 2005. The plaintiffs allege that the Parsley entered into the arrangements on the basis that they would involve fixed interest rates, whereas the true position is that the contract entailed its entering into interest rate swap arrangements, described by the plaintiffs in their pleadings as a "*sophisticated high risk derivative product*." However, Parsley, nevertheless, went on in 2006 to enter into interest rate protection agreements. Around that same time, Angel mortgaged Comeragh House in favour of the Bank as surety for Parsley. It is alleged that these arrangements were unsuitable, given the nature of the transaction and Parsley's standing, that the Bank mis-sold the interest rate swaps, misstated the position and acted negligently and in breach of fiduciary duty.

5. A useful chronology of relevant events is set out in the affidavit of Paul Street, an officer of the Bank, and is not disputed by the plaintiffs:-

> *"(a) On 22 April 1998, the fourth Plaintiff (Mrs. Holmes) conveyed Comeragh House to a Delaware entity, the second plaintiff (Angel);*
>
> *(b) The third and fourth plaintiffs (Mr and Mrs Holmes) live in Comeragh House on foot of a Management Agreement dated 15 May 1998 between them and Angel;*
>
> *(c) By an agreement in writing made on 28 November 2005 (the Facility Letter) the bank agreed to advance the sum of STG£4,210,484 to an Isle of Man entity, the first plaintiff (Parsley);*
>
> *(d) On 9 January 2006 Angel guaranteed Parsley's obligations to the Bank on foot of the Facility Letter;*
>
> *(e) On foot of the said guarantee Angel mortgaged the property to the Bank on 9 January 2006 (the Angel Mortgage);*
>
> *(f) By a deed of waiver made on 26 November 2005 Mr and Mrs Holmes gave their consent to the Angel Mortgage and declared that the Bank's interest in the property took precedence over any interest that they might have in Comeragh House;*
>
> *(g) On 10 January 2006 Parsley entered into two interest rate swap transactions with a company in the same group as the Bank, HBOS Treasury Services plc (the Swaps) to hedge its liability for interest on foot of the Facility Letter;*
>
> *(h) Parsley defaulted on its obligations under the Facility Letter;*
>
> *(i) The bank made a demand to Angel by letter dated 12 January 2012;*
>
> *(j) By deed of appointment made on 2 February 2012 the bank appointed the [second named defendant] as the receiver and manager over the assets referred to in the Angel Mortgage;*
>
> *(k) By letter dated 30 May 2013 the Receiver gave Mr and Mrs Holmes the required notice under the Management Agreement to deliver up vacant possession of Comeragh House."*

6. Notwithstanding the somewhat complex nature of the substantive dispute, this application turns on two relatively discreet questions. Firstly, it is common case that both Parsley and Angel had been dissolved at the time that these proceedings were instituted, but were subsequently restored to the respective registers. The Bank submitted that, while Delaware law provides for the

retrospective validation of acts purportedly made by the company while dissolved, the law of the Isle of Man has no such provision, and that Parsley's claim must fail on that basis. The Bank further submits that if Parsley's claim fails, this will have the effect of extinguishing the claims of the other plaintiffs, who have no privity to the contract creating the swap. Secondly, and in the alternative, the Bank submitted that the plaintiffs' claim should be struck out as being bound to fail.

7. A liquidator was appointed to Parsley on 12th January, 2012, and that company was dissolved on 3rd July, 2012, pursuant to Manx Law. These proceedings were issued on 5th July, 2013. The dissolution of Parsley was declared void on 22nd September, 2013, by the High Court of Justice of the Isle of Man, Chancery Division, pursuant to s. 272 of that jurisdiction's Companies Act, 1931 ("Section 272"). The stated grounds for the application, contained in a witness statement of Mr. William Garrett, an officer of Montpelier, were to enable the prosecution of litigation in relation to the interest rate swaps, as well as to facilitate Angel to "*deal with*" the appointment of a receiver over its assets in this jurisdiction. It does not appear that the existence of these proceedings was canvassed before the Manx Court.

8. Section 272 provides, inter alia, as follows:-

> "*Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.*"

9. Section 310(1) of the Companies Act, 1962 in this jurisdiction follows precisely the same formula. Furthermore, the section is drafted in similar terms to provisions that operated in England and Wales prior to 2006; namely, s. 223 of the Companies (Consolidation) Act, 1908; s. 294 of the Companies Act, 1929; s. 352 of the Companies Act, 1948; and s. 651 of the Companies Act, 1985.

10. As Parsley is a creature of Manx law, thus the court must have regard to the Affidavit of Law of Peter Bruce Clucas, furnished by the moving party. The deponent stated that, while no Manx authority deals directly with the point at issue, the jurisprudence of the Courts of England and Wales will be strongly persuasive in the Manx Courts on the question of the interpretation of section 272. The case of *Quayle v. Adjar Shipping Company* CPL 2004/7 was opened in support of this proposition, and I am quite satisfied to accept Mr. Clucas' expert opinion that the Manx Courts "*would find as persuasive and follow*" the relevant authorities. Indeed, in the absence of contradictory expert evidence of Manx law proffered on behalf of the plaintiffs, I am bound to accept this opinion.

11. In *Morris v. Harris* [1927] AC 252, Lord Banesburgh held at p. 269 that an order under s. 223 of the Companies (Consolidation) Act 1908, did not have the effect of vitiating steps taken in the period of dissolution:-

> *"I think, my Lords, that the terms in which these consequences are described are exhaustive and emphatic. They are intended to show that an order under the section made, it may be, as long as two years after a dissolution which up to that moment was completely effective, is not at once and as of course to ratify acts done during the interval, which, if done at all, must necessarily have been acts of mere usurpation, by a liquidator or other pretended agent with no office knowingly done on behalf of a company which had no existence. On consideration, it appears, I think, clear that automatically to validate such acts as being the acts of a duly constituted officer on behalf of a duly incorporated company might involve consequences too disastrous to be even envisaged.*
>
> *They are avoided by the terms of the section. The company is restored to life as from the moment of dissolution, but, continuing a convenient metaphor, it remains buried, unconscious, asleep and powerless until the order is made which declares the dissolution to have been void. Then, and only then, is the company restored to activity."*

12. Similarly, in *Joddrell v. Peaktone Limited* [2013] 1 WLR 784, Munby L.J., sitting in the Court of Appeal, having considered the relevant jurisprudence, held that *Morris v. Harris* remains authoritative, stating at para. 29:-

> *"In my judgment, all these cases, correctly analysed, are consistent with Morris v Harris [1927] AC 252. What emerges is the clear distinction between the consequences of the order depending upon whether the order was made pursuant to section 651 of the 1985 Act or its statutory predecessors or pursuant to section 653 of the 1985 Act or its statutory predecessors In the first case, the order had no retrospective effect except to restore the company's corporate existence. It did not validate any actions or activities that had taken place during the period of dissolution. In particular it did not restore to life an action which, having been commenced before the company was dissolved, had abated on the company's dissolution, nor did it bring to life an action which, purportedly commenced while the company was dissolved, was a nullity."*

13. *Morris v. Harris* was followed in this jurisdiction by Laffoy J in *Re Walsh Maguire & O'Shea* Limited [2011] IEHC 457. In this case, the court, while granting a declaration pursuant to s. 310(1) of the Companies Act, 1962 (being drafted in identical terms to Section 272), held that the court had no power to retrospectively validate extant proceedings against the company. She held at para 10.6:-

> *"When one compares s. 310(1) with s. 311(8), in my view, the intention of the Oireachtas as to the scope of the exercise of the Court's discretion under s. 310 in the context of the effect of an order under that section becomes quite clear. In particular, I do not think that the words "upon such terms as the court thinks fit" in s.310 give the Court discretion to give ancillary directions or make ancillary provisions of the type envisaged in s. 311(8). What the Oireachtas intended I believe was that, in an order under s. 310(1), terms might be imposed, for example, as to bringing the winding up to a conclusion in a situation where the purpose of voiding the dissolution was to enable the liquidator to deal with some unfinished business, or to deal fairly with the liability for costs of the application.*
>
> *In my view, if the declaration sought by the petitioner is made, it will have the effect stated in s. 310(1), which I believe is the effect which was outlined in Morris v. Harris and the English authorities in which it was followed, and also by O'Neill J. in Re Amantiss Enterprises Ltd., albeit obiter. Accordingly, the Court's decision cannot be based on a proposition that the petitioner will be entitled to continue the plenary proceedings against the company if the dissolution of the company is voided."*

14. Laffoy J. noted the annotation on s. 310 contained in MacCann and Courtney, 'Companies Acts 1963 – 2009', 2010 Ed. (at p. 581):-

> *"Upon the dissolution being declared void, the company's corporate existence is restored . . . Proceedings may be taken*

by or against the company as if it had not been dissolved. However, the order of the court does not have the effect of retrospectively validating transactions purportedly entered into by or with the company during the period of dissolution. Accordingly, proceedings which had been commenced by or against the company either prior to or during the period of dissolution, will not be retrospectively validated. While the avoidance of the dissolution of the company is not retrospective, the period of actual dissolution will nonetheless be taken into account in determining whether a claim by or against the company is statute-barred."

15. Parsley is a creature of Manx Law. I accept the statement contained in the Bank's affidavit of law that "*the Isle of Man Courts would dismiss in limine any proceedings commenced when Parsley was dissolved*". While no issue was raised as to the appropriate choice of law, and there is no suggestion that Irish law might apply, I am satisfied that position in relation to the effects of the Manx dissolution and subsequent restoration is entirely similar to that operating in this jurisdiction, as outlined by Laffoy J in *Re Walsh Maguire & O'Shea Limited*, being based on an identical legislative provision and the line of authority on this point emanating from *Morris v. Harris.* Therefore, Parsley's claim must fail.

16. Regarding the balance of the claim, the bank submitted that the third and fourth named plaintiffs have no *locus standi* in this matter, regardless of Parsley's position. They executed a Deed of Waiver on 26th November, 2005, in relation to Comeragh House, and have not attempted to repudiate same. While Mr. Holmes is a beneficiary to the Montpelier trust structure, under which Parsley was held, this does not bestow any rights upon him to maintain an action based on an alleged wrong against Parsley.

17. The plaintiffs claim that the interest rate swaps fundamentally altered the relationship between the Bank and Parsley, and by extension the relationship between the bank and Angel. Para 34 of the Statement of Claim states:-

"The sale of the Swaps substantially altered the underlying contract between the Bank and Parsley. Angel provided a guarantee to the Bank for Parsley's obligations under the Facility Letter. The Swaps created new obligations on the part of Parsley which did not exist under the Facility Letter. The Bank was obliged to put Angel on notice of the fact that it was considering altering its financial relationship with Parsley. The Bank was obliged to consult with Angel to determine whether as surety, it would consent to remain liable. The Bank did not put Angel on notice of any alteration to the underlying contract with Parsley. The Bank did not consult with Angel. Angel did not consent to remaining liable as surety for Parsley on foot of the substantial alterations to the underlying contract brought about by the sale of the Swaps."

18. However, the Facility Letter, dated 28th November, 2005, states that:-

"The Borrower, after consultation with BoS, shall enter into such interest rate protection agreements (with Treasury in the form of the Treasury ISDA Documents) regarding its exposure to interest rates or foreign exchanges rates as the Borrower and BoS may agree from time to time."

19. It appears, therefore, that the case advanced on behalf of Angel is unstateable, even were Parsley's claim to proceed. It is clear on the face of the facility letter that interest rate swaps were countenanced under its terms. It was pursuant to this same facility letter that Angel mortgaged Comeragh House as surety. Accordingly, there is no relevant alteration to the underlying agreement, as complained of. Angel's claim must fail, also, on this basis and in light of my findings in relation to Parsley, because, even taken at its height, its claim is dependent on Parsley's claim succeeding.

20. The parties ventilated various matters around the question of whether Parsley's claim would in any event be bound to fail, notwithstanding the question of its ability to bring these proceedings while dissolved. The Bank submitted that Parsley was an "*intermediate borrower*", and pointed to its letter dated 5th May, 2006 stating that:-

". . . on the basis of information which you have given us, we do not believe that you are seeking the requisite regulatory protection that would otherwise be available to you as you are not using swaps for investment purposes in relation to the transaction we have been discussing, but certainty of cash flow in the future.

You should be aware that, as a consequence of your categorisation as an intermediate customer, certain protections afforded to private customers under the rules of the FSA will no longer apply. In particular, the following provisions of the FSA Rules will no longer apply to you:

Provisions designed to ensure that private customers understand the nature of the risks inherent in certain transactions;

Furthermore we may have regard to your expertise when complying with requirements that under the regulatory system that communications must be fair and not misleading;

Provisions designed to ensure that private customers are made aware of the costs to them, directly or indirectly, of financial services to them."

21. The client response section, in the following terms, was signed by Mr. Garrett on 6th May, 2006:-

"(I/We) can confirm, having taken the time to carefully consider the implications of being classified as an intermediate customer, that we have read and understood the above warning and consent to be treated as an intermediate customer."

22. The confirmation letters issued by the Bank in relation to the interest rate swaps contained the following clauses:-

"Each party represents to the other party on the trade date of this Transaction that:

(a) Non-reliance. It is acting for its own account, and it has made its own independent decisions to enter into this Transaction and as to whether this Transaction is appropriate or proper for it based upon its own judgement and upon advice from such advisers as it deemed necessary. It is not relying, and has not relied, on any communication (written or oral) of the other party as investment advice or as a recommendation to enter this Transaction; it being understood that information and explanations related to the terms and conditions of this Transaction shall not be considered investment advice or a recommendation to enter into this Transaction. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of this Transaction.

(b) Assessment and Understanding. It is capable of assessing the merits of and understanding (on its own behalf or

through independent professional advice), and understands and accepts, the terms, conditions and risks of this Transaction. It is also capable of assuming, and assumes, the risks of this Transaction.

(c) Status of Parties. Each party represents to the other party that it is entering into this Transaction as principal (and not as agent or in any other capacity) with the full understanding of the terms, conditions and risks thereof and that it is capable of and willing to assume those risks. Neither party is acting as a fiduciary for or an advisor to the other party in respect of this Transaction."

23. The Bank referred, *inter alia*, to the judgment of Birmingham J. in *McCaughey v. Anglo Irish Bank Corporation Ltd.* [2011] IEHC 546 (Unreported, High Court, 27th July, 2011), wherein the learned judge took the view that very broad exclusionary clauses in a commercial contract involving interest rate swaps were enforceable, stating at p. 35:-

"On their face, these representations and warranties by the plaintiff are couched in very broad terms. They involve him stating that he has all the material that he wants, that he is not relying on any representations, that he has made his decision on the basis of his own appraisal, and that he recognises that he may not have been given complete information but wishes to make the investment. Taken at their face, these representations and warranties present a substantial obstacle to any plaintiff seeking to present a claim on the basis that he has been misled or misinformed...

The plaintiff says that the attempt to confine the case to one of fraud and to prevent the plaintiff advancing various elements of the claim that he wishes to, ignores the nature of the relationship that existed between the plaintiff and the first named defendant and says that the effectiveness or otherwise of the exemption clauses in particular those in the Commitment Agreement cannot be divorced from the nature of that relationship."

Birmingham J. went on at p. 38 to distinguish the well-known authority of *Inter-photo Picture Library Limited v. Stiletto Visual Programme Limited* [1989]

1 Q.B. 433 in the following terms:-

"For my part I find the facts at issue in the Inter-photo case so far removed from the facts of the present case that it is of little assistance. There, a delivery note contained a highly unusual provision stipulating a time for return of transparencies and providing for the consequences if that was not achieved, consequences described as 'unreasonable and extortionate'. Here, in contrast, the plaintiff called to the defendant's premises specifically for the purpose of executing documentation. The documentation was obviously of a legal character and the plaintiff accepts that he was aware that the document contained legal terms. That a contract would seek to regulate the relationship between plaintiff and defendant is not at all unusual, on the contrary, it is entirely to be expected. Neither is there anything unusual in a preprinted contract containing provisions designed to safeguard and strengthen the position of the party that prepared it, indeed quite the contrary. How broad the terms of any exclusions or how specific any representations will be can be expected to vary considerably but that very fact means that it is incumbent on a party who is signing a document that he knows contains contractual terms to satisfy himself that these are appropriate to his situation."

24. The Supreme Court upheld Birmingham J.'s reasoning in *McCaughey v. Anglo Irish Bank Corporation Ltd.* [2013] IESC 17 (Unreported, Supreme Court, 13th March, 2013). Hardiman J stated at para 57:-

"These 'representations and warranties' are said to have been made by the plaintiff but were in reality drafted by the Bank, presented to Mr. McCaughey and signed by him. In my view they are in terms which are breathtakingly broad. They involve him stating that he has all the material that he wants, that he is not relying on any representations and that he has made his decision on the basis of his own appraisal, and that he recognises that he may not have been given complete information but wishes to proceed all the same. This assessment is substantially that of the learned trial judge. I agree with it and would further say that the object of the clauses just quoted is to exempt the Bank from liability for anything except direct lies and actual fraud or fraudulent concealment."

25. An affidavit of English law was proffered on behalf of the Bank which cites the case of *JP Morgan Chase Bank v Springwell Navigation Corporation* [2010] 2 CLC 705, as authority for the proposition that the parties will be bound by their contractual acknowledgment of a particular state of affairs. Aitken LJ stated at para 144:-

"So, in principle, and always depending on the precise construction of the wording, I would say that A and B can agree that A has made no pre-contract representations to B about the quality or nature of a financial instrument that A is selling to B. Should it make any difference that both A and B know at and before making the contract that A did, in fact, make representations, so that the statement that A had not is contrary to what each side knows is the case? Apart from the remarks of Diplock J in Lowe v Lombard, [counsel for Springwell] did not show us any case that might support the proposition that parties cannot agree that X is the case even if both know that it is not so. I am unaware of any legal principle to that effect. The only possible exception might be if the particular agreements between A and B on the certain state of affairs concerned contradicts some other specific or more general rule of English public policy."

26. The court may have regard to the relevant factual matrix in interpreting the terms of the agreement, but, in the words of Kelly J. in his *ex tempore* judgment in *Anglo Irish Bank Corporation PLC v McGrath* [2006] IEHC 78 (Unreported, High Court, 21st December, 2005):-

". . . this is not a licence to disregard the parties' agreement – still less is it a reason to set at nought what is agreed between the parties at paragraph 20 of the guarantee which provides that: 'there are no oral understandings between the bank and the defendant in any way varying, contradicting or amplifying the terms of the guarantee and also that the guarantee supersedes all prior representations, arrangements, understandings and agreements and sets forth the entire, complete and exclusive agreement and understanding between the parties as to the matters provided for in the guarantee.' That being so, I am not entitled – in the absence of evidence of fraud or material representations, to draw a blue pencil through the terms of the guarantee. I am unable to identify any legal basis for the argument advanced. I can understand on a human level why the defendant would feel hard done by but that is not enough insofar as the legalities are concerned."

27. I cannot, on the basis of the evidence before me, envisage any circumstances under which Parsley might avoid the terms of the various instruments entered into by it. Even if it is the case that interest rate swap arrangements were unsuitable for its purposes, it is a corporate entity forming part of a sophisticated structure, being held by a trust and interacting with other corporate vehicles

registered in other jurisdictions. Parsley was managed by a professional trustees and had available to it the possibility of obtaining any necessary legal or financial advice in relation to the transactions in question. The exclusionary terms were clear and are enforceable, in circumstances where the plaintiffs have not specifically pleaded fraud or fraudulent concealment.

28. It is not without significance that these proceedings were commenced after the second defendant as receiver had sought possession of Comeragh House from the third and fourth defendants, who threatened to seek an injunction if any steps were taken to remove them during the currency of these proceedings.

29. In summary and for the foregoing reasons, in my judgment the plaintiffs' claim must fail, primarily on the basis that Parsley had been dissolved at the time that these proceedings were issued, and that the order under s. 272 did not have the effect of retrospectively validating steps taken while it was dissolved. I am satisfied that the remaining plaintiffs' claims, taken at their absolute height, are dependent upon Parsley's succeeding in its claim against the Bank, and they too must fall away.

30. If I am in error on the application of s. 272, I am also of the view that there is no reasonable prospect of Parsley's claim against the Bank succeeding, were it to go to trial. Again, the balance of the claim must also fall on this basis.

31. Accordingly, I grant the relief sought by the defendants and will make an order dismissing the plaintiffs' claim.