THE HIGH COURT

COMMERCIAL

[2014/10816 P]

BETWEEN

JOSEPH SHEEHAN

PLAINTIFF

V.

BRECCIA, IRISH AGRICULTURAL DEVELOPMENT COMPANY, BLACKROCK HOSPITAL LIMITED, GEORGE DUFFY, ROSALEEN DUFFY AND TULLY CORBETT LIMITED

DEFENDANTS

THE HIGH COURT

COMMERCIAL

[2015/5122 P]

BETWEEN

JOHN FLYNN AND BENRAY LIMITED

PLAINTIFF

V.

BRECCIA

DEFENDANT

COMBINED JUDGMENT of Mr. Justice Haughton delivered on the 4th day of March, 2016

Introduction

1. This judgment is supplemental to the judgments which I delivered herein on 5th February in 2016 in the above matters. In both cases I made orders establishing the redemption figures that would have to be paid to Breccia in order for Dr. Joseph Sheehan and Benray Ltd respectively to redeem their loans held by Breccia. In both cases I held against Breccia in determining firstly that Breccia was not entitled to add default surcharge interest of 4% on the basis either that such charges were an unlawful penalty or alternatively that Breccia was estopped from adding such charges for any period prior to June 2015, and secondly that Breccia was not entitled to add "enforcement costs" being the costs of proceedings which were not awarded to Breccia, or the contingent costs of any appeal.

2. At a follow up hearing before me on 18th February 2016 I determined that the plaintiffs were entitled to their costs of the modular hearings related to the redemption issues as against Breccia.

3. On that date counsel for Breccia, Mr. Rossa Fanning BL indicated that Breccia would be appealing both judgments and he applied for orders that would protect his clients pending the final determination of those appeals in the event that the plaintiffs redeemed their loans in the meantime based on the redemption figures determined by this court. Having heard submissions from both parties I reserved my ruling on these applications.

The Arguments

4. Counsel for Breccia aruged that the court should make an additional order in each case requiring that, pending the final determination of any appeals, and in the event that Dr.Sheehan and Benray seek to redeem their loans on the basis of the figures set out in my judgments, they be required to pay the disputed amounts i.e. the difference between the redemption figures as found by me and the redemption figures claimed by Breccia, into an escrow account pending the outcome of the appeals. A variation on this was that the plaintiffs be required to post security for the additional disputed amounts in the event of the plaintiffs redeeming their loans.

5. Counsel argued in the alternative that there should be a stay granted in respect of the orders pending the final determination of the appeals. It was contended that the issues were complicated and the appeals *bona fide*. In particular it was arguable that the 4% surcharge interest was not a penalty clause based on principles enunciated in the recent decision of the UK Supreme Court in *Cavendish Square Holding BV v. Talal El Makdessi: ParkingEye Ltd v. Beavis* [2015] UKSC 67 (see my judgment in the Sheehan case, para. 84 et seq). Counsel stated that there had been no proposal in relation to security pending the outcome of the intended appeals in relation to the disputed amounts, and expressed the concern that, in the absence of a stay, the plaintiffs could redeem their loans based on the redemption figures ordered by this court, and if Breccia won its appeals it would be unable to recover the balance as it would no longer be able to have recourse to the security which it now holds i.e. the borrower's shareholdings in Blackrock Hospital Ltd. Counsel's fallback position was to request a short stay, presumably to enable it to consider and possibly appeal any adverse ruling to the Court of Appeal.

6. With regard to the stay sought on the costs awarded in respect of both trials, counsel differentiated between the two cases. In the *Sheehan* case counsel accepted that the court had conducted a modular hearing, and suggested that there should be a stay on the costs because when the balance of the case is heard the trial judge might order costs against the plaintiffs, and a set off would apply. It was suggested that this was a further reason why there should be a stay in respect of costs in that case. In the *Flynn* case counsel did not accept that the hearing had been a modular one. He asserted that the case had effectively been decided in its entirety, and that because Breccia intends to appeal the stay should extend to the costs pending the determination of the appeal.

7. In contesting the application Mr. John O'Donnell SC on behalf of Dr. Sheehan protested that if the court granted the stay sought it would be a further clog on the plaintiff's right to redemption. In addressing the balancing of interests he pointed out that the court has established a redemption figure of approximately €16.585 million, whereas the addition of surcharge interest and enforcement costs claimed by Breccia would bring this up to approximately €21.370 million viz. a difference of about €4.8 million. If Dr. Sheehan had to pay this it would be an obstacle standing in the way of redemption. He argued that, soon after the defendant acquired Dr. Sheehan's loans, by letter dated 18th of December 2014, Breccia sought immediate payment and discharge of the sum of the €16,144,572 in respect of Dr. Sheehan's Loan Agreements, and that by its stay application Breccia is essentially seeking *additional* security. Counsel argued that Dr. Sheehan had already been damaged by the delay caused by Breccia in the redemption of his loans, and that an appeal that might not come on for in excess of one year would cause him further damage. He indicated that there is a history of difficulty in securing borrowing, and that the funder(s) and Dr. Sheehan currently has in place may disappear if there is a stay in place or Dr. Sheehan is required to lodge the disputed amounts into escrow pending determination of an appeal. It was asserted that this is exactly what Breccia wants to achieve, and that interest on a further borrowing for the additional amount (even if Dr. Sheehan could obtain it) would be a further source of damage to the plaintiff. It was argued that the application for a stay is a "cynical device" calculated to aid Breccia in its pursuit of the shares held as security for Dr. Sheehan's loans. It was suggested that the intended appeals might not be *bona fide* – but might in fact be a "bargaining weapon".

8. Mr. Michael Howard SC on behalf of the plaintiffs in the *Flynn* case adopted similar arguments, and suggested that his clients could suffer irreparable harm because of the risk of losing a funder currently in a position to fund the redemption of the relevant loan at the redemption figures directed by this court - approximately €9.34 million - because his clients would not be in a position to raise the disputed amounts in respect of surcharge and enforcement costs - which would add in excess of €4 million to the redemption figure, of which some €2 million relates to costs of earlier proceedings (see para. 12 of my judgment in *Flynn*). Counsel pointed out that after Breccia acquired Benray's loan facilities on 23rd May 2014, by letter dated 8th August 2014 it demanded the sum of €8.74 million, and on non- payment promptly appointed a receiver over Benray's shares in Blackrock Hospital Ltd, and that receiver was considering a sale of those shares to Yalart Holdings Ltd, a sister company of Breccia also controlled by Mr. Laurance Goodman, for €6.75 million. That putative sale was the subject of an injunction, and the receivership was later found by this court to be invalid (see my judgment in *John Flynn and Benray Limited Plaintiffs v Breccia and McAteer* [2015] IEHC at 547), but had that sale proceeded Breccia would then have held no security in respect of the balance between €6.75 million and the sum claimed by Breccia at that time of €8.74 million, other than guarantees. It was argued that it would be unjust and inequitable for Breccia at this point to obtain security by way of further payment into escrow, or a stay, when it would have enjoyed no similar security for the balance in the event that the sale to Yalart Holdings Ltd had proceeded.

9. In response to these arguments counsel for Breccia responded that if Breccia wins its appeals there will be significant additional sums owing and it will have no means of a recovery, particularly as it appeared that Dr. Sheehan was not in a position to pay the additional amounts, and Benray had indicated through counsel that it couldn't raise the extra money. With regard to Benray it was also argued that there was no evidence before the court that its current funder – HIG – would not be in a position to provide funding next year i.e. after an appeal was determined, and no Facility Letter had been produced, and no end date in respect of any offer of funding had been put before the court. Counsel also noted that neither plaintiff had come up with any compromise suggestion as to the terms that the court might impose on the plaintiff's in the event of refusing a stay eg. that a percentage of the disputed sums be paid into escrow.

Legal Principles

10. The parties accepted that the legal principles that the court should apply are those established in *Redmond v Ireland and Another* [1992] 2 IR 362 and *Irish Press Plc v Ingersoll Irish Publications Limited* [1995] 1 I.L.R.M. 117, and particularly as elaborated by Clarke J. in *Danske Bank A/S trading as National Irish Bank Plaintiffs v Niall McFadden Defendant* [2010] IEHC 119. Firstly the court should consider whether the appeal is *bona fide*, rather than tactical, or a "a bargaining weapon" (one of the criteria set out by McCarthy J in *Redmond* – see p.366). Then the court should conduct a balancing exercise. As Clarke J. stated in *Danske Bank*:-

> "2.4 Where the appeal is genuine, it seems clear from *Ingersoll* that the court should conduct a process analogous to the balance of convenience test which the court is required to apply in determining whether to grant an interlocutory injunction. It is obvious that a successful party in this Court may lose out to a greater or lesser extent and with a greater or lesser degree of permanency as a result of having a stay placed on any order obtained. Likewise, it is equally clear that an unsuccessful party who fails to obtain a stay, but who ultimately succeeds on appeal, may suffer, again to a greater or lesser extent and again with greater or lesser degree of permanency, as a result of the fact that a court order has been effective against them in the intervening period. In the words of McCarthy J. in *Redmond* the court is, in those circumstances, required to "maintain a balance so that justice will not be denied to either party".
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> 2.5 To those considerations I would add one further matter. In the context of the interlocutory injunction jurisprudence, I expressed the view in *Evans v. I.R.F.B. Services (Ireland) Limited* [2005] IEHC 107, that, in a case where there was significant potential detriment on both sides, it seemed to me "that it is necessary to consider whether there is any form of injunction which might meet, to the greatest possible extent, the legitimate concerns as to detriment of both parties". It seems to me that an analogous principle applies in the context of a stay. It may be that a stay on terms or the imposition of terms without a stay can ameliorate the potential detriment to both sides in the event that either a stay is granted and the appeal fails or a stay is not granted and the appeal succeeds…."

Application to these cases

11. Notwithstanding submissions to the contrary I am satisfied that appeals of these cases would be *bona fide*, at least in the sense that it could not be said that they had no possible prospect of success. The recent UKSC decision in *Cavendish* heralds a new approach in the United Kingdom to contractual provisions which impose penalties, based around principles of commercial justification, proportionality and unconscionability. It may be that if followed and applied by our Court of Appeal it could lead to a different result in the present cases where I have followed and applied the principles enunciated by Finlay Geoghegan J. in *ACC Bank Plc v Friends First Management Pension Funds Limited and Others* [2012] IEHC 435. It must also be accepted that there may be arguments on appeal in relation to the estoppel and "enforcement costs" issues which could not be characterised as flimsy or unstatable.

12. Turning to the "balance of convenience" test, and balancing the different consequences for the parties of granting or withholding a stay, I proceed on the assumption that the borrowing plaintiffs will, if no stay is granted, proceed to redeem their loans on the basis of the figures established by my orders, and that the priority charges over shares in Blackrock Hospital Limited currently held by Breccia as security for the loans will be released, as will Mr.Flynn's guarantee of Benray's loan. If appeals succeed then in 1 year to 18 months from now Breccia could become entitled to recover additional sums in the order of €4 to €5 million in each case. Were the appeals to succeed only in respect of the surcharge interest Breccia's entitlement would be significantly less, but it would still be substantial and would probably carry with it some entitlement to costs. If Breccia succeeded only on the "enforcement costs" issue it would recover less, but this would still be a significant amount in Benray's case. As matters stand Breccia would not hold any security in respect of such additional entitlements, and I accept that recovery might be problematic.

13. It must be commented that if redemption by the borrowers took place in accordance with my orders in these proceedings then Breccia would receive considerably more than it first demanded after it acquired the loans. Breccia's possible loss if it won the appeals should therefore be viewed in context. In both cases I find that the redemption figures that Breccia now seeks would put it in a significantly better position than it would have been in if it had recovered on foot of its original demands for payment. Moreover, in Benray's case Breccia would receive at least €2.5 million more than it would have recovered if the sale of the shares to Yalart Holdings Limited had proceeded in September, 2014. Thus in seeking payment into escrow, or a stay, in Benray's case Breccia is effectively seeking security for additional sums that it might recover after an appeal but which it would not have enjoyed had the sale to Yalart Holdings Limited proceeded. This would put Breccia into a significantly better position than it was when that sale for €6.75 million was being considered by the receiver.

14. Turning to the plaintiffs, I am satisfied from the evidence given during the hearing of these cases in relation to third party funding that the plaintiffs have attempted to put funding in place in order to redeem their loans, and that putting alternative funding in place has been difficult, problematic, expensive, and time consuming. Breccia has doubted whether any funding is available to the plaintiffs. I do accept that insofar as the plaintiffs currently "have funding in place" this may only be conditional Heads of Agreement and/or facility offers that are left open for a limited period, or that may now require renewal. However this is only to be expected in refinancing of this nature, and in light of the delays necessitated by the modular hearings in these cases – delay for which the plaintiffs should not be blamed – it would be unreasonable for the court to insist that concrete offers be put in evidence in considering the application for a stay. Moreover I am satisfied that such promises as the plaintiffs hold would contain terms that are now commercially sensitive as between the plaintiffs and the Breccia, and I accept as reasonable the plaintiffs' concerns over unnecessary disclosure. In any case, and to state the obvious, if the plaintiffs are unable to raise the finance necessary to redeem their loans pending appeal then Breccia suffers no prejudice whatsoever if no stays are granted.

15. I also accept that it is likely that third party funders whom the plaintiffs assert are now willing to lend monies at the level that would enable the plaintiffs to redeem the loans in accordance with my orders would not wait around if redemption was delayed by stays pending the outcome of appeals. I also accept that it is, at best, very unlikely that the plaintiff's would be in a position to borrow the additional €4 million or €5 million, or any significant further funds, required in each case to fund the additional disputed amounts if that had to be paid into escrow pending the outcome of the appeals.

16. I am of the view that the likely outcome, if the plaintiffs were obliged to pay additional sums into escrow pending the outcome of appeals, is that the plaintiffs would be unable to fund this and redeem their loans. I am equally satisfied that if the court were to grant stays the plaintiffs would lose 'funders currently willing to lend', in the loose sense of that term. In either of these circumstances the plaintiffs are likely to suffer serious harm from the delay that appeals would necessarily entail, and the effect would be a further "clog or fetter" on the borrowers' rights of redemption. At the very least interest would accumulate on their loans with Breccia, and their shares would continue to be tied to Breccia as security, and at worst they might not be able to arrange refinancing at a future date. The party who would suffer most detriment is Mr.Flynn. As guarantor of Benray's loan he would be released from his personal obligations in the event that Benray's loan is redeemed, but stays would deprive him of this current opportunity.

17. On this analysis I am satisfied that the greater loss if stays are granted or monies required to be paid into escrow will be incurred by the plaintiffs, and that they would probably suffer permanent and irreparable loss. On this basis I decline Breccia's applications for stays/payment of the additional monies into escrow pending determination of any appeals.

18. Also while I am satisfied that Breccia's intention to appeal is *bona fide* in the sense that it may have arguable appeals, I consider that its motive for seeking stays (or payment into escrow) is a relevant matter if its intention is to cause the plaintiffs harm. There has been a pattern of conduct on the part of Breccia that shows it has consistently sought to put obstacles in the way of the plaintiffs redeeming their loans, and that suggest Breccia's real intention is to secure ownership of the borrowers' secured shareholdings in Blackrock Hospital Ltd. In this regard I refer to certain evidence and findings that were made in my principle judgments in these cases.

19. In paragraph 95 of my judgment in the *Flynn* case, when referring to evidence given by Mr. Declan Sheeran on behalf of Breccia, I stated:-

> "95…it was only when pressed under cross examination that he admitted that the defendant had no intention of applying surcharge interest in August, 2014, and that the decision to charge it was only made after a redemption figure was sought in May/June, 2015. Accordingly, in reserving the defendant's rights in the demand letters Mr. Sheeran/the defendant did not have in mind a surcharge interest... I am also satisfied that the decision made in June, 2015 to add surcharge interest to the redemption figure was inspired by Mr. Sheeran, and was intended, along with claim to enforce some costs, to put obstacles in the way of redemption of the Loan Facilities."

20. In the *Sheehan* case Breccia's initial demand for repayment on 18th December, 2014 was for a sum of €16,144,572, again with a reservation of rights. At paragraph 158 of my judgment I referred to the following:-

> "The clear and admitted intention of Breccia at that time was to appoint a receiver to the secured assets the principal of which was the plaintiff's shareholding in BHL. I am of the view that this was their primary objective in the issuance of the letter of demand…"

21. At paragraph 159 of my judgment I stated:-

> "I am satisfied that if the plaintiff had promptly discharged the sum of €16,144,572 on receipt of the letter dated 18th December, 2014 the loans under the Facility Letters would have been redeemed…and indeed Mr. Sheeran accepted as much in his evidence when stating that he didn't believe that Breccia would have had any scope to rework the redemption figure if the plaintiff had of paid up on foot of the figures in the letter."

22. Mr. Sheeran stated in evidence that before that letter was issued he was aware of the surcharge provision and that Breccia had an entitlement, on paper, to 4% surcharge from the date of default, but he didn't "believe that we were under any obligation to report our intention to apply it". My findings in relation to this commenced at paragraph 164:-

> "164. Accordingly, Breccia, given that it considered that surcharge interest applied, should have disclosed this in the letter of demand. Breccia could have calculated and added a specific sum by way of surcharge, or indicated a generic charge by reference to 4% and Clause 5.1. The failure to do was, and was bound to be, misleading. This is emphasised by the fact that surcharge interest would have added in excess of €2.8 million to the debt at that time.
>
> 165. The silence on this issue was a false representation as to fact, namely Breccia's understanding that surcharge interest applied to loans, and a false representation as to Breccia's intention to claim such interest. In these circumstances their silence on the issue of surcharge interests raises an estoppel, and it would be unconscionable for them to be permitted to rely on the saver of rights statement to overcome their misleading silence on the subject.
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> 166. The finding of estoppel by silence is exacerbated by the fact that Breccia still did not seek surcharge interest in their Defence and Counterclaim delivered herein on 26th February, 2015. Although later amended, the initial counterclaim as pleaded was silent as to surcharge, and with reference to the plaintiff's loans in paragraph 65 sought to recover €16,144,572 and, in the prayer, unspecified "interest". In the absence of full pleading of a claim to surcharge interest, that prayer could only be read as a claim to ordinary interest – or perhaps Courts Act interest post judgment – on sums pleaded in para. 65.
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> 167. It wasn't until the plaintiff demonstrated serious intent and desire to redeem his loans, as expressed in the letter of 18th May, 2015 from Arthur McClean to Matheson Solicitor that the defendant, after a lapse of some weeks, reverted on 9th June, 2015 with a figure that added surcharge interest. Even at that stage Breccia through its solicitors did not explain the higher figure now suggested as a redemption figure, or set out any calculations of the surcharge interest. That was only provided on 19th June, 2015. This reaction to the request for redemption figure and the attempted imposition of surcharge at that point in time was unconscionable."

23. In both judgments I also emphasised the importance of the right that a mortgagor has to redeem the mortgage, which I found was coterminous with the right to redeem the loans (see paragraphs 206 and 207 in the *Sheehan* judgment). I accept the submissions made by counsel for the plaintiffs that in pursuing its present application Breccia is acting, as it has done in the past, in a tactical manner designed to put further obstacles in the paths of the plaintiffs with a view to furthering to its own desire of obtaining ownership of the shares in Blackrock Hospital Limited held by Dr. Sheehan and Benray. I regard this probable design and tactic as a further reason for refusing the stays sought, or the imposition of a requirement of payment of monies into escrow.

24. It is incumbent on the court none the less to explore whether the imposition on the plaintiffs of other and less potentially damaging terms could ameliorate the potential detriment to Breccia in the absence of stays and in the event that it pursued appeals which were successful. For reasons already given I am not prepared to impose terms that would require the plaintiffs to place monies in escrow, even a percentage of the additional sums that Breccia assert are properly part of the redemption figures. However, any residual values in the Blackrock Hospital Ltd shareholdings post redemption are a possible source of amelioration. If the plaintiffs redeem their loans from Breccia, then clearly the incoming funders will require a priority first charge over the shares held by Dr. Sheehan and Benray respectively. The court does not have the benefit of any valuations, but it is conceivable that the value of these shares will exceed the liabilities of the borrowers to the new funders. In so far as that may leave some equity in the shares, in my view, that should be provided by the borrowers as temporary security by way of a second charge in favour of Breccia pending the final determination of its intended appeals.

25. Accordingly, if Dr. Sheehan is prepared to give an undertaking that immediately upon redeeming his loans with Breccia, and redeeming his mortgage of shares, he will execute and furnish to Breccia a second mortgage of those shares, to take priority immediately behind the mortgage to the new funder, such second mortgage to be maintained pending the final determination of any appeal in his proceedings, and thereafter to be maintained as security for any sums that may become due by Dr. Sheehan to Breccia depending on the outcome of the appeal, or to be maintained in such other terms as the Court of Appeal may determine, I will refuse the stay first sought by Breccia in respect of my order. If Benray is prepared to give a similar undertaking in respect of its shareholding I will also refuse the stay sought in its case.

26. If such undertakings are forthcoming I will grant a short stay on my orders sufficient only to enable Breccia to apply to the Court of Appeal for a longer stay.

27. If such undertakings are not forthcoming (I will if necessary grant a short adjournment for instructions to be taken) I will consider further whether to make an order imposing terms on the relevant parties in the event of appeal(s).

Stay on costs orders

28. With regard to the costs awarded to the plaintiffs, in both cases there will be a stay on entry and execution until the time fixed by O.86 A of the Rules of the Superior Courts for the issuing of a notice of appeal against my orders, and in the event of such a notice of appeal being issued, until the disposal of the such appeal, provided always that this stay shall not prevent the ascertainment of those costs proceeding to taxation.

29. In the *Sheehan* case I will grant a further stay on the entry and execution of the costs awarded to the plaintiff pending the final determination of the balance of the action. I refrain from making a similar order in the *Flynn* case because the modular hearing is likely to be a final disposal of the action.