Neutral Citation: [2013] IEHC 315

THE HIGH COURT

2007 5218 P

BETWEEN

PADRAIG J. BUTLER PRACTICING UNDER THE STYLE AND TITLE OF BUTLER SOLICITORS

PLAINTIFF

V.

EUGENE McKENNA AND SEAMUS McKENNA

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered the 9th day of July 2013

1. The matter before the Court relates to a dispute between Mr. Padraig Butler, a former solicitor and the defendants and counterclaimants who were at one time clients of Mr. Butler.

2. The background to this matter is that Mr. Seamus McKenna and Mr. Eugene McKenna were involved in construction and development, pursuing their activities through two companies A.P.K Limited and Dunbar Clancy Construction Limited. One of the projects with which the defendants/counterclaimants were involved was the acquisition of a site at Fiddown, Piltown, Kilkenny and the construction of 37 residential units thereon. The defendants and counterclaimants sought and obtained finance from ACC Bank in relation to the Fiddown project. Finance was provided in three tranches, the first in the amount of €996,000 on the 23rd September 2004, designed to assist with the purchase of what was a four acre site, a second in the amount of €1.678M to provide construction finance for the first phase and the third in the amount of €1.911M to provide construction finance for Phase II of the construction project which involved the construction of an additional twenty houses.

3. The plaintiff, Mr. Butler, then practicing under the style and title of Butler solicitors acted as solicitor for the defendants/counterclaimants and in that capacity he was required to provide a solicitor's undertaking to ACC bank and in particular required to undertake that the nett sale proceeds of the residential units be lodged against the debts of ACC. Undertakings as sought were furnished. In addition in the context of the loan offer of the 7th April 2005, relating to the final tranch of funding, the solicitor for the borrowers, Mr. Butler was required to confirm and did confirm that twenty one unconditional contracts for sale were in place (seventeen Phase I units and four Phase 2 units) for a minimum consideration of €3.49M.

4. It is common case that the undertaking furnished and which ought to have been complied with have not in fact been complied with. It is also accepted that undertakings furnished by Mr. Butler to individual home purchasers that necessary releases would be secured, have not been complied with. However, what is at the heart of the case is why the undertakings were not complied with. Mr. Butler says that the reasons why was because he foolishly and naively accepted what he was told by Messrs. McKenna and in particular by Mr. Seamus McKenna which was that an arrangement had been entered into with ACC which meant that the bank did not require Mr. Butler to comply with his undertakings, but rather was agreeable that some of the proceeds of the sale of Fiddown units could be diverted to other projects. Again, it is not in dispute that there was never any such agreement and the area of dispute is as to whether Mr. Butler was ever told falsely that such an agreement was in place. Mr. Seamus McKenna completely denies that there was ever such an agreement and claims that he never told Mr. Butler that there was. Even had he told Mr. Butler that such an agreement had been achieved and he is emphatic that he did not, Mr Butler would not have been entitled to act on what he has been told. Mr. Butler's clear obligation was to honour his undertakings, unless and until released from them by ACC, the party to which they had been furnished.

5. The plaintiff, at a stage when he was legally represented issued what was a very elaborate plenary summons and statement of claim. However, it is accepted by Mr. Butler that at this stage his claim is confined to the reliefs sought at para 4 of the Statement of Claim which is in these terms:-

"A declaration that the defendants and each of them by their conduct, misrepresentation and breach of their contract with the plaintiff have exposed the plaintiff to a personal liability on foot of the undertaking provided by the plaintiff by causing sale proceeds derived from the sale of the residential units on the Fiddown land to be applied otherwise than in permanent reduction of the defendants indebtness to ACC bank on foot of the loan facilities provided by ACC bank to the defendants."

6. The defendants have delivered a defence and counterclaim. So far as the counterclaim is concerned the essential case made is that the plaintiff, by his wrongful failure to comply with his undertaking has caused the defendants/counterclaimants to suffer loss and damage. The counterclaimants have also contended that the plaintiff has permitted a deficit to arise on their client account. Various estimates have been offered a different stages and the latest calculation on behalf of the defendants/counterclaimants presented by accountant Mr. Tom Murray of Friel Stafford is that there is a shortfall of €1,026,390.62. Mr. Butler it must be said, does not all accept there is any shortfall and says that in respect of every issue of concern that is being raised that there is a full and satisfactory explanation.

7. In a situation where Mr. Butler does not have access to an accountant and is not in a position to offer accountancy evidence to the court it has been agreed that the appropriate course of action is to determine in the first instance the issue of liability and to defer the question of quantum and the calculation of loss if any.

8. Turning first to the plaintiff's claim, it seems to me that this is really a nett question of fact, bearing in mind that on this aspect of the case it is the plaintiff, Mr. Butler who having brought the case bears the onus of proving the case.

9. It must be said that there are elements of the situation for which the plaintiff contends which are inherently improbable. That a bank would agree to "some funds being diverted" would seem very surprising. In making that observation, I am conscious that various financial institutions behaved in a fashion that might have seemed unorthodox in the first half of the last decade. But even making full allowance for this, it seems to me inconceivable that a financial institution would agree to "some" funds being diverted, without

defining or delimiting the extend of funds that could be diverted, the purposes for which the diversions were permitted and the period of time for which the diversions were permitted to remain in place. It seems to me that it is literally incredible that an experienced solicitor told by a client that there was an agreement that some funds could be diverted would accept this and act on it without question. Mr. Butler on a number of occasions has described his response as "foolish and naïve" but I don't believe that language adequately addresses the situation. If, remarkably, an experienced solicitor allowed himself to be misled in the way suggested by Mr. Butler, then one would expect that as soon as the first hint of what had occurred began to emerge that the solicitor would immediately move to put on record in a formal fashion what had occurred and would seek to retrieve and regularise the situation. This has not happened.

10. On the other side of the coin, Mr. Butler asks, rhetorically, if the defendants/counterclaimants did not as they claim realise that Fiddown funds were being diverted, then where did they think the funds that were being applied to various other purposes of theirs were coming from. Mr. Seamus McKenna answers the question posed by saying that it must be appreciated that the defendants/counterclaimants operations were not by any means confined to Fiddown, that they had a number of projects underway and were dealing not just with ACC but with a number of different financial institutions. Mr. Seamus McKenna acknowledges that various substantial sums were paid by the plaintiff to the defendants or to third parties on behalf of the defendants, but is adamant that he had not realised and indeed had no reason whatever to believe that funds intended for ACC Bank had been diverted.

11. The question posed by Mr. Butler, initially rhetorically and then raised directly with Mr. McKenna when he gave evidence is a reasonable one and it has given me cause for thought. In a situation where Mr. Butler was not complying with obligations and honouring his undertakings, one would have expected to see this addressed in correspondence in clear, specific and unequivocal terms. Mr. McKenna has said he was raising concerns that he was experiencing orally but for my part I would have expected the matter to be dealt with in correspondence. I have however, considered the significance of such limited correspondence as did occur and I have done so against two possible backgrounds, one being that everything that had occurred had taken place with the authority of Mr. Seamus McKenna and indeed on his instructions and the other possibility being that Mr. Butler's actions were not authorised by the McKennas. It seems to me that the correspondence, such as it is, with its focus on obtaining and reviewing account and culminating in a letter of the 21st January 2007, the final paragraph of which read "despite many promises to deliver this statement you have to date not done so. The purpose of this letter is to put in writing our demand for the statement. This is our right and if it is not forthcoming immediately, we will use this letter as the basis for further action" is more consistent with the view that Mr. Seamus McKenna was trying to find out what was happening and had happened than with the situation that he and his brother were directing what was going on.

12. Then, I have had the opportunity of seeing and hearing Mr. Butler and Mr. Seamus McKenna give evidence and I have regard to the impression they created. The impression that each created serves to re-enforce my view that the probabilities are that matters did not occur as Mr. Butler contends and that the probabilities are that Mr. Butler was not misled by his clients into believing that an agreement had been struck with ACC which meant that obligations previously entered into did not have to be honoured. Accordingly, I must dismiss the claim of the plaintiff.

13. So far as the defence and counterclaim and the defence to the counterclaim is concerned, the position is less than satisfactory in some respects. It is for this reason, in part that the question of calculating any damages that might arise has been deferred.

14. The defendants/counterclaimants have presented evidence, as I have mentioned, from Mr. Tom Murray, a partner in Friel Stafford Accountants. However, his report is based on documents provided to him by the defendants and their solicitors, which for the most part were received by them from the plaintiff. He has not been in a position to carry out an audit or otherwise been in a position to verify independently the information which has been provided to him. An earlier examination of the accounts had been undertaken at the interlocutory hearing stage by Mazaars Accountants. The background to their involvement was that McKenna's had been seeking accounts for some time and in January 2007, Mr. Butler produced a "draft" set of client accounts. On sight of this the McKenna's had numerous queries and engaged Mazaars to undertake a review. Then, after considerable correspondence a revised set of accounts was produced by Mr. Butler. That set of accounts was reviewed by Mazaars but again they had numerous queries. In relation to the involvement by Mr. Murray, in summary, he is highly critical of aspects of the accounts and has concluded that there is a shortfall or deficit in the client account of €1,026,390.62. Mr. Butler has not put, or perhaps not been in a position to put any accountancy evidence before the court. Instead he has selected individual transactions or entries that were said to cause concern and has provided an explanation or context for these. It may well be that if a complete forensic review of all the financial dealings over the relevant period involving the McKennas and the Mr. Butler is undertaken that the shortfall will be significantly less than Mr. Murray is suggesting but that remains to be seen.

15. In that regard I note that estimates of the shortfall have fluctuated very considerably. However, while there may be significant doubt about the extent of the shortfall, the overall impression I am left with is that I can have little doubt but that there is indeed a shortfall. In these circumstances I conclude that the defendants/counterclaimants succeed. I will discuss with counsel for the defendants/counterclaimants and with the plaintiff what arrangements need to be put in place for the assessment of the extent of the loss.