

## THE HIGH COURT

[RECORD NO] 2012 76 SP

BETWEEN

GOODBODY STOCKBROKERS

PLAINTIFF

AND

ALLIED IRISH BANKS PLC AND CARMEL PATTERSON

DEFENDANTS

**JUDGMENT of Mr. Justice Birmingham delivered on the 16th day of April, 2013**

1. These proceedings commenced with the issue of a special summons, an interpleader summons, by Goodbody Stockbrokers ("the interpleader"). The summons was issued in a situation where the interpleader was faced with competing claims to a portfolio account from Allied Irish Banks Plc ("the Bank") and from Carmel Patterson ("the claimant").

2. The background to the present dispute is that Mr. William Patterson ("the customer") who is the husband of the claimant, entered into a discretionary portfolio management agreement with the plaintiff, Goodbody Stockbrokers, opening a portfolio account no. GSPA0070.

3. By Letter of Pledge ("letter of pledge") dated 27th June, 2006, Mr. Patterson charged in favour of the Bank by way of first fixed charge all of his rights, title, benefit and interest whatsoever both present and future in and to the stocks, shares and investments (together called "the securities") to which he was then or might thereafter become beneficially entitled and which were then or from time to time held in the account, together with all monies then or from time to time standing to the credit of the account (the "credit balance") and all rights relating to the securities and the credit balance together with all other monies as might comprise or represent the proceeds of realisation of, or any income received on investments forming all or part of the securities as security for all sums due to the Bank. As further appeared from the Letter of Pledge, Mr. Patterson irrevocably authorised the stockbroker to hold the secured property to the Bank's sole order, to issue to the Bank a written statement showing the securities held in the account and their value upon request, and upon receipt of a request in writing from the Bank, to sell the securities and apply or make over or transfer so much of the proceeds of any sale or any part or any amount of the Credit Balance in or towards the permanent reduction of secured obligations.

4. Following a letter from the Bank dated 10th February, 2011, enclosing an authority from Mr. Patterson addressed to the Bank to encash the account and apply the proceeds in reduction of his loan facility with the Bank, the account was duly encashed to the extent that was possible. There followed a formal request from the Bank dated 31st March, 2011, asking that the funds be remitted to the Bank in reduction of the secured obligations of Mr. Patterson.

5. The background to the Letter of Pledge is that Mr. Patterson availed of a loan facility provided by AIB, a condition of which was the provision of certain items of security including a charge over the account that has been referred to. This loan facility was reviewed and extended in both 2007 and 2009 and in each instance a condition of the facility was the provision of certain items of security, including a charge over the specified account. The loan facility of 19th June, 2006, was in the amount of €2,343,000.00, that of 29th May, 2007, in the amount of €4,855,000.00, and that of February, 2009 in the amount of €5,162,510.00.

6. As the provision of Clause 2 and in particular Clause 2(c) of the Letter of Pledge is of particular significance, it is convenient to set it out here:-

"2. The Customer hereby IRREVOCABLY AUTHORISES, empowers and directs the stockbroker and/or the Nominee for so long as the secured obligations remain due and owing by the Customer to the Bank;

(a) to hold the Secured Property for the time being subject to this security to the Bank's sole order;

(b) to issue to the Bank a written statement showing the Securities held in the Account and their value upon request, at any time, by the Bank and;

(c) upon receipt of a request in writing from the Bank and whether with or without notice to the Customer TO SELL the securities and apply or (by any other usual means) MAKE OVER OR TRANSFER so much of the proceeds of such sale (and any interest accruing thereon) or any part thereof or any amount of the Credit Balance in or towards the permanent reduction of the Secured Obligations and notwithstanding that legal proceedings have been taken or that the Customer or any other person or persons claiming through or under the Customer shall have applied for payment thereof." [Emphasis in original]

7. Within days of the formal request from the Bank by a letter dated 7th April, 2011, from solicitors acting on behalf of the claimant, Mrs. Patterson, the plaintiff was requested not to transfer funds or the account to the Bank in circumstances where the claimant contended that the funds in question were the assets of the marriage and that she was entitled to a beneficial interest in them. again, as the letter is of significance in the context of the case now advanced on behalf of Mrs. Patterson, it is convenient to set it out at this stage:-

"We act from Mrs. Carmel Patterson, the spouse of Mr. William Patterson, in respect of financial affairs which Mr. Patterson has conducted with yourselves and with AIB which are of grave concern to her and we have accordingly been instructed to write to you on her behalf. Mr. Patterson had previously pledged lands as security in respect of a loan taken out with AIB Bank and as further security had pledged the proceeds of an investment portfolio as set out above and

perhaps other portfolios held with yourselves AIB Bank.

Mrs. Patterson contends that these are assets of the marriage and accordingly that she is entitled to a minimum of a 50% beneficial interest in the lands in the portfolio. Furthermore, Mrs. Patterson did not sign any documentation at any stage which purported to pledge her interest in the portfolio to be accrued to AIB Bank or to any other party. We understand that these proceeds of the portfolio and the portfolio itself are in the process of being transferred across to AIB. We now formally call on you to stop this transaction going ahead until such time as our client has been able to fully engage with both yourselves and with AIB Bank in relation to her interest therein. In the alternative, kindly confirm by return that you acknowledge the 50% interest of Mrs. Patterson in the portfolio and that a separate portfolio will now issue in her name forthwith..."

8. The case advanced by Mrs. Patterson is elaborated upon by her in an affidavit sworn on the 24th September, 2012. She explains that she met her husband in 1985, when she travelled from Scotland to Donegal for a weekend. When the stage was reached that they were considering getting married, she investigated the option of working in Belfast with British Telecom, the company that she had been working for in Scotland. However, she says that her husband was very clear that he did not want a wife working outside the home, and that it was expressly agreed between them that if they got married that she would be a stay at home wife, that she would be jointly entitled to whatever her husband had and, in particular, would be entitled to an income from the share portfolio which he held at the time. In October 1987 Carmel and William Patterson married. Mrs. Patterson observes that they would jokingly say "What's mine is yours and what's yours is mine". She explains that she herself had very little, a few shares in British Telecom, while her husband had a large Georgian house on parkland, had some land in Letterkenny and had a share portfolio which was his main source of income. She states that they expressly agreed that she would look after the house and home and that she would have an income from the shares. Mrs. Patterson says that everything that they had during the marriage was hers and her husband's together on a fifty/fifty basis and that if anything happened to the other, that the remaining spouse would be entitled to the entirety. They drew an income of approximately €20,000 from dividends and that was lodged to the accounts operated by the claimant and her husband at the Raphoe branch of AIB. The claimant has also referred to the fact that when the children of the marriage were older, that in or around 2004/2005, she started to do some property development work on a small scale. She secured a loan in respect of the project from AIB in the amount of about €300,000 and she says that she believes that it was on the strength of marital assets including the share portfolio that the funds were advanced to her. However, when she sought further funding for an additional house that she intended to build, believing that she had the tacit approval of the Bank, AIB, through its local branch, declined to provide a further loan and she believes this was because the marital assets were securing her husband's borrowings.

9. In relation to the shares, she says that in September/Autumn 2004, her husband indicated that he was purchasing thirty acres in Letterkenny for €4.5m and that some shares would have to be sold to pay for the deposit. She agreed to that but did not agree to the balance of the portfolio being offered to the Bank by way of security. Her husband did not consult her in advance and had she been asked, she would not have agreed to offer the shares as security.

10. On behalf of the claimant, it is submitted that she had an interest in the shares and stocks and investments held in the portfolio management account which entitles her to a half share in the proceeds and that is so because of the agreement or understanding that had been reached between the claimant and her husband. In that regard, it is said that the Court has direct evidence from the claimant as to the discussions that took place involving the spouses. This is the sort of evidence required to establish a common intention trust as emerges from cases such as *Lloyds Bank Plc v. Rosset* [1991] 1 AC 107 and *Midland Bank v. Cooke* [1995] 4 AER 265.

11. It is also submitted on behalf of the claimant that in the aftermath of the discussions that she says took place, that she acted to her detriment, though one senses a certain reluctance, on her part, to use that word, in putting her career on hold and committing herself on a full-time basis to looking after the home and family.

12. The claimant's interest is said to be a proprietary one, in the nature of a constructive trust and on the basis that it is first in time, is one that is entitled to priority over whatever rights, the defendant, AIB, has over the Portfolio by reason of the security that it held. The letter of pledge, whatever else it might do, does not create a legal interest in the Portfolio and does not give the Bank title. Mr. Patterson, it is contended, had not been in a position to charge or offer the Portfolio as security, as he held the investment in trust.

13. It is submitted that the absence of notice on the part of the party acquiring the later interest, in this case the Bank, of the existence of the first interest is irrelevant, if that be the situation. However, in fact that is said not to be the position as the Bank is said to have had constructive notice arising from the fact that both spouses had banked with AIB, throughout their marriage and, accordingly, the Bank was in a position to and, did in fact have, a detailed knowledge of their financial affairs.

#### **Bank's submissions**

14. On behalf of the Bank, it is submitted that –

- (i) It has a first fixed charge over the Portfolio Account on the basis of a written Letter of Pledge signed by Mr. Patterson; based on that Pledge, it was at all times entitled to encash the Portfolio Account and apply the proceeds thereof to Mr. Patterson's Loan Account with the Bank.
- (ii) Mrs. Patterson has no beneficial interest in the Portfolio Account in that she never contributed to the acquisition of the Shares/Portfolio Account. As acknowledged by Mrs. Patterson, her husband already had the portfolio of shares when they met for the first time in 1985.
- (iii) The Bank took the charge on the basis that Mr. Patterson had the full legal title to the Portfolio Account in good faith and without notice of any claim on Mrs. Patterson's part and, in particular, without notice of the fact that she is now claiming a fifty per cent entitlement.
- (iv) Insofar as it has been contended on behalf of Mrs. Patterson that Mr. Patterson represented to her that she had a legal entitlement to the Portfolio Account and/or to the extent that he did not discuss using the Portfolio Account by way of pledge, that is a matter as between Mr. and Mrs. Patterson.
- (v) Even if the Bank was, as alleged on the part of the claimant, on some form of notice that the Pattersons had an arrangement between themselves as to using the proceeds of the Portfolio Account by way of income, the Bank was nonetheless still entitled to take the view that the full legal title and rights in relation to the Portfolio Account resided with Mr. Patterson.

(vi) As Mrs. Patterson only asserted her claim for the first time five years after Mr. Patterson signed the Letter of Pledge, her claim must in any event be defeated on the basis of delay/laches and/or acquiescence.

15. In my view, whatever discussions took place between the spouses, and we only have the account of Mrs. Patterson, while potentially relevant to the distribution of the assets by a court called on to address this situation in the context of marital disharmony, that did not create an interest on the part of Mrs. Patterson that prevented her husband from pledging the shares. It appears this Portfolio was acquired by Mr. Patterson long before his marriage. That Mrs. Patterson did not contribute to the assembly of the Portfolio, while not determinative of the issue, is nonetheless, I believe, a highly relevant consideration.

16. In determining where the equities lie, the fact is that the shares were pledged and money was advanced by the Bank in good faith. I do not believe that there was any actual or constructive notice on the part of the Bank as to any interest held by Mrs. Patterson. I am not at all convinced by the suggestion that the original decision to advance funds to Mrs. Patterson, when she took her first steps in property development, was influenced by the existence of the share Portfolio which was in part an asset of Mrs. Patterson. On the contrary, I am satisfied that the position is as averred to by Mr. Declan Toner, on behalf of the Bank, that the Bank had no reason to believe that the items pledged were other than Mr. Patterson's and that he had absolute title to them.

17. There is a further aspect to which I should refer and that is the approach of Mrs. Patterson. She failed to protest or assert an entitlement to restrain activity or even an entitlement to be consulted in 2006 when Mr. Patterson sought a loan using the account as security and likewise, did not raise any issue when the facility was renewed and extended in 2007 and 2009. In particular, Mrs. Patterson took no action when in August 2009, Mr. Patterson authorised the payment of €67,000 from the account to service interest payments due on his loan. In fairness to Mrs. Patterson, even on her best case, her husband continued to have some rights in relation to the account, which might provide at least a partial explanation for her inactivity in August 2009. Nonetheless, the fact that no steps were taken to regularise the situation, as seen from her perspective, militates against the case that she is advancing. It seems to me that whether this is discussed in terms of laches, or delay that affects equities, or as a factor which when weighed in the balance means that the equities are not equal, that the effect is the same.

18. Taken together, the factors to which I have referred have persuaded me that the claim advanced by Mrs. Patterson must fail and that the AIB claim succeeds.