

THE HIGH COURT

COMMERCIAL

[2019 No. 4 S.]

BETWEEN

PROMONTORIA (GEM) DAC

PLAINTIFF

AND

STEPHEN MURPHY AND MARGARET MURPHY

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 30th day of May, 2019**Summary – application for summary judgment for €65 million**

1. This is a summary judgment application by the plaintiff ("Promontoria") against the defendants ("the Murphys") of Bagenalstown, County Carlow.
2. The defendants are a married couple and while the second named defendant ("Mrs. Murphy") did not appear at the hearing, submissions made by the first named defendant, ("Mr. Murphy"), were treated by Mr. Murphy and by Promontoria as being made also on behalf of Mrs. Murphy.
3. The claim is against Mr. Murphy for the sum of €48,319,840.92 and against Mrs. Murphy for the sum of €17,207,314.73. The borrowings were extended by Bank of Ireland to the Murphys in respect of property acquisition and property development in Ireland.
4. The initial loans were extended to the Murphys pursuant to 18 Facility Letters between October 2002 and May 2010 (the "Loan Facilities"). These Loan Facilities were subsequently acquired by National Asset Loan Management DAC ("NALM") under sections 87 and 90 of the National Asset Management Agency Act, 2009.
5. By a Deed of Settlement dated 24th of October 2016 (the "Settlement Agreement") between NALM and the Murphys, the Murphys agreed to pay certain monies to NALM and NALM agreed, subject to compliance with those obligations, to release its charge over the Murphys' family home and to limit its recourse against the Murphys. In particular, this Settlement Agreement provided that in the event of any breach by the Murphys of the terms of the Settlement Agreement, all sums due and owing under the Loan Facilities would become immediately due and payable.
6. By a Deed of Transfer dated 27th of January, 2017 ("Deed of Transfer") NALM transferred to Promontoria its right, title and interest in the Loan Facilities along with all the security and rights connected therewith, including the Settlement Agreement.
7. As a result of the breach by the Murphys of the Settlement Agreement, which is not disputed in these proceedings, letters of demand dated 29th of November, 2018 were issued by Promontoria and arising from the failure of the Murphys to meet those demands these proceedings issued.
8. Mr. Murphy, who was not legally represented at the hearing, raised a number of defences to the summary judgment. He also brought a motion to strike out the summary proceedings on the basis that they failed to disclose any cause of action and for want of prosecution. The defences raised by the Murphys will be considered first.

Defence that evidence of Mr. Gracey is inadmissible

9. Mr. Murphy's first defence is that the affidavit sworn by Mr. Alastair Gracey, on behalf of Promontoria, outlining the details of the Loan Facilities, the alleged breach of the terms of the Settlement Agreement and the amounts due and owing, is inadmissible as Mr. Gracey is not an employee of Promontoria.
10. Mr. Gracey is an employee of Link ASI Limited, a loan service company. He has averred that he is a senior asset manager of that company which acts as a service provider for Promontoria, and that Link ASI Limited maintains the loan accounts for the Murphys' Loan Facilities. The services provided include the updating of data, the application of payments to those accounts, the processing of loan redemptions and the general day-to-day administration and management of those Loan Facilities.
11. In addition, Mr. Donal O'Sullivan, a director of Promontoria swore an affidavit to the effect that Link ASI Limited was appointed by Promontoria as a service provider in respect of the Murphys' Loan Facilities and that Link ASI Limited has responsibility for the day-to-day administration and management of the Murphys' Loan Facilities.
12. It is also relevant to note that Mr. Murphy in his affidavit in which he refers to the Settlement Agreement admitted many of the issues covered by the affidavit of Mr. Gracey. For example, Mr. Murphy avers in his affidavit of 29th March, 2019 that Promontoria acquired the Loan Facilities and that the Murphys entered the Settlement Agreement with NALM. Under the terms of the Settlement Agreement, the Murphys agreed that they had been granted the Loan Facilities, that €69,433,943 was outstanding from them and that events of default had occurred under those Loan Facilities.
13. Order 37, rule 1 of the RSC envisages that in summary proceedings not just the plaintiff, but also "*any other person who can swear positively to the facts*" supporting the summary judgment application, may swear an affidavit in support of such a claim. In addition, in light of caselaw such as *Ulster Bank Ireland Ltd v. O'Brien* [2015] 2 I.R. 656 and, in particular, *Promontoria (Arrow) Limited v. Burke* [2018] IEHC 773 (where the evidence of an employee of a loan service company was held to be admissible where that employee had access to the books and records of Promontoria), it seems clear to this Court that, in the circumstances of this case, the evidence of Mr. Alastair Gracey is admissible in these proceedings. The fact that he is not an employee of Promontoria does not mean that his evidence is inadmissible, since he is a person who can swear positively as to the relevant facts necessary for a summary judgment application, particularly in light of the averments by him and on behalf of Promontoria regarding his role in the day-to-day management of the Loan Facilities on behalf of Promontoria and the admissions of Mr. Murphy on affidavit regarding the evidence to which Mr. Gracey is deposing. Accordingly, this defence is not sufficient for this matter to be sent to plenary hearing.

Affidavit does not state if deponent is a man or a woman

14. In what was not his strongest argument, Mr. Murphy also claimed that since Alastair Gracey does not clarify in his description of himself, (as a 'Senior Asset Manager'), either that he is a man or woman, that this is a defective affidavit and so is inadmissible for this reason. This Court does not accept that the requirement under Order 40, rule 9, to 'state the description and true place of abode of the deponent' requires a deponent to state whether they are a man or woman. Indeed, even if it were defective for this reason, this alleged defect is so irrelevant to the issues at hand that this Court would rely on Order 40, rule 15, which entitles the Court to ignore defects in the descriptions of deponents, to allow the affidavit to be admitted in evidence.

Jurat of affidavit does not indicate if Commissioner for Oaths or Solicitor

15. Mr. Murphy also claims that the second affidavit of Mr. Gracey which was sworn before a Rebecca Flaherty of A & L Goodbody is flawed and so it should not be admissible and the matter should not be sent to a plenary hearing for this reason. His argument in this regard is that Ms. Flaherty did not indicate whether she was a Commissioner for Oaths or a solicitor in the jurat. Again, this was not one of Mr. Murphy's best arguments since if this type of oversight, which is irrelevant to the dispute, was to lead to proceedings being sent for plenary hearing, it would result in the unnecessary congestion of our courts. Accordingly, this Court has little hesitation in again relying on Order 40, rule 15 to allow this affidavit to be admitted in evidence.

Defence that no breach of Settlement Agreement

16. Mr. Murphy's next defence to these summary proceedings is his claim that he is not in breach of the Settlement Agreement. Clause 3.1 of the Settlement Agreement obliged the Murphys to pay three separate sums of money to Promontoria within three months of the execution of the Settlement Agreement on the 24th of October, 2016, i.e. by 24th January, 2017. The sums were €96,000, €306,497 and €1,676,408, respectively, an aggregate of €2.1 million approx. Mr. Murphy does not deny that he has failed to comply with this term of the Settlement Agreement. Indeed, he acknowledges that these sums are held by his solicitor. The most that he asserts in his defence is that he did not know to whom in Promontoria he was to pay this money and so on this basis he claims that he is not in breach of the Settlement Agreement.

17. On 25th of July, 2018, Promontoria wrote to the Murphys notifying them of their failure to comply with Clause 3.1 of the Settlement Agreement and another provision of that Agreement, i.e. Schedule 1, Part B, paragraph 8. In the reply from the Murphys' solicitor dated 30th of July 2018, they dispute their alleged non-compliance with Schedule 1. However, it is telling that the reply is completely silent regarding the Murphys' breach of Clause 3.1. In particular, there is no cheque for the some €2.1 million, then due to Promontoria, attached to that letter of reply (which amount Mr. Murphy says his solicitor holds). Nor was there any cheque paid since that time by the Murphys to Promontoria. Accordingly, it is completely unsustainable for Mr. Murphy, in his defence to the summary judgment proceedings, to claim before this Court that, almost a year after being notified of the sums outstanding under Clause 3.1 while the money was sitting in his solicitor's account, he did not know to whom he should pay the money and that therefore he is not in breach of Clause 3.1. The obvious thing to have done, if the Murphys wished no longer to be in breach of Clause 3.1, was simply to reply to the letter of 25th July, 2018 with a cheque for the sum due to Promontoria.

18. The Murphys are in clear breach of the Settlement Agreement since they undertook to pay the sum of €2.1 million to Promontoria within three months of 24th of October, 2016 but failed to do so and it is no defence for them to say that the money is with their solicitor but they did not know to whom they should pay it. Accordingly, this second defence is not such as to prevent summary judgment being granted in these proceedings.

Defence that not correct amount claimed by Promontoria

19. The next defence put forward by Mr. Murphy in his affidavit is that the sum claimed by Promontoria in these proceedings is 'spurious' or in other words that it is not an accurate amount due and owing by the Murphys. However, this is a bald assertion and Mr. Murphy has provided no evidence of any error or discrepancy in the figures claimed. As a general point, it is to be noted that this bald assertion is made against a background where Mr. Murphy has averred that he signed a Settlement Agreement acknowledging a debt due to NALM of some €69 million (the sum sought in these proceedings amounts to a sum of slightly less than that, a sum of €65 million approx.). However, more specifically, as noted by McMenamin J. in the *Ulster Bank v. O'Brien* case, at paragraph 3 of his judgment:

"[A] simple, bald denial of indebtedness, whether in correspondence or on affidavit, will not be sufficient to discharge the burden, so far as a defendant is concerned. The defendant's evidence must set out in a clear way why the sum claimed is said not to be due and owing to a plaintiff."

20. The Murphys have failed to provide any basis for claiming that there are any errors or discrepancies in the calculation of the sums due from them to Promontoria and have not therefore set out in a clear way why the sum claimed is not due from them. Therefore, this bald assertion by the Murphys that the sums claimed are not due and owing does not provide a defence to these summary proceedings.

Defence that entitled to see un-redacted version of Deed of Transfer

21. The next defence put forward by the Murphys is that they are entitled to see the unredacted Deed of Transfer. However, as noted by Hedigan J. in *IBRC v. Halpin* (Unreported, High Court, 3rd November 2015) at paragraph 7:

"[I]t is simply not enough for a party to say that he wishes to see the document redacted since that would negative the right to redact. He must present some concrete arguments that can lead the court to order the un-redaction."

22. In this case, the Murphys have simply asserted a right to the unredacted Deed of Transfer. They have provided no reason as to why or for what purpose they require the unredacted Deed of Transfer. Furthermore, the very purpose of the Deed of Transfer, namely the *transfer* of the loan facilities by NALM to Promontoria, has been accepted by the Murphys, as Mr. Murphy in his affidavit of 29th March, 2019 expressly acknowledges that Promontoria *acquired* the Loan Facilities. For example, at paragraph 15 *et seq* he avers:

"[Promontoria] when acquiring such loans and agreements *inter alia* is liable to ensure that all aspects of same are in order and complied with [...] I say that [Promontoria] upon acquiring loans/agreements in the fashion as it has acquired the herein enjoys no absolution whatsoever pertaining to the wrongs committed and or perpetrated against me and my wife "

23. In these circumstances, there is no entitlement on the part of the Murphys to the unredacted Deed of Transfer and the alleged entitlement to it cannot therefore provide a defence to these summary proceedings.

Defence of right to cross examine Mr. Gracey

24. The Murphys also assert that they have a right to cross examine Mr. Alastair Gracey. It is clear from the Court of Appeal case of *Northern Bank Limited v. Quinn* [2016] IECA 96, that the right to cross examine in summary proceedings arises only where there is some factual dispute on the affidavits which would justify such cross-examination. At paragraph 41 of his judgment Peart J. states:

“There was no factual dispute on the affidavits which would have justified such a cross-examination, indeed, the defendants do not state what issues would be resolved in their favour by permitting them to cross examine Mr Hall and/or Mrs Brown.”

25. Accordingly, the Court of Appeal held that the defendant in the *Northern Bank* case was not entitled to cross examine. Similarly, in this case there is no factual dispute that would be resolved by cross examination. All the defences above referenced and relied upon by the Murphys amount to bald assertions. Indeed, as previously noted, many of the factual issues have been admitted by the Murphys, either on affidavit or pursuant to the terms of the Settlement Agreement. Accordingly, this alleged right to cross examine does not provide a defence to these summary proceedings.

Conclusion regarding the summary judgment

26. In all the circumstances, this Court concludes that the Murphys have no defence to these summary proceedings. In accordance with the principle for deciding summary judgment cases, as outlined by in Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 at p. 622, namely whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence, it is clear that the Murphys do not satisfy this test and so this matter should not be sent to a plenary hearing.

Defendant’s motion for strike out

27. Mr. Murphy has also brought a motion to strike out or dismiss the summary proceedings on the grounds that they fail to disclose a cause of action and are bound to fail. *McCourt v. Tiernan* [2005] IEHC 268 at para. 6.4 makes clear that:

“The jurisdiction of the court, in the exercise of its inherent jurisdiction, to order that all, or some appropriate aspect of, a claim be struck out is clear from *Barry v Buckley* [1981] IR 306. It is clear, however, that in considering whether to make such an order the court must treat the plaintiff’s claim at its high water mark.”

28. Since this Court has found that the Murphys do not have a fair or reasonable probability of having a *bona fide* defence to these summary proceedings, if at the same time this Court takes, (as it must), Promontoria’s claim at its height, this Court can see no basis for the proceedings being struck out.

29. Mr. Murphy also brought an application to strike out the summary summons for want of prosecution. While the Court has jurisdiction to strike out summary proceedings where there has been inordinate and inexcusable delay, this is not the case with these proceedings. Promontoria was only entitled to bring these proceedings arising from a breach of the Settlement Agreement, which agreement only came into existence on the 24th of October, 2016. Promontoria’s solicitors sent a letter dated 25th July, 2018 to the Murphys giving notice of a breach of that Agreement. This then led to letters of demand dated 29th November, 2018, which were not complied with by the Murphys. As a result, proceedings issued on 3rd January 2019 by way of summary summons and these were then admitted to the Commercial Court on the 25th February, 2019. It is patently clear therefore that there has been no delay on the part of Promontoria and accordingly these proceedings could not be struck out for want of prosecution.

30. In all the circumstances, this Court will grant summary judgment in the sum claimed.