

**THE HIGH COURT
COMMERCIAL**

[No. 2014/10816 P.]

BETWEEN

JOSEPH SHEEHAN

PLAINTIFF

AND

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

DEFENDANTS

JUDGMENT of Mr. Justice Quinn delivered on the 30th day of June, 2020

1. On 27 May, 2020 I delivered judgment in Module Three of these proceedings which related to the plaintiff's allegations of conspiracy and other claims against the defendants, and a counterclaim by the first named defendant, (the "Principal Judgment").
2. The judgment was delivered electronically and in accordance with the directions of the President, the parties were requested to make, within fourteen days of the delivery of the judgment, written submissions as to the precise form of order and concerning costs.
3. Submissions were received from the parties. The plaintiff's submission was confined to a request for a stay on any order for costs. The submissions of Breccia were more extensive, and related in part to the calculation of the amount of the judgment on its counterclaim. Having regard to the contents of that submission. I afforded the parties an opportunity to make supplemental submissions. No further submissions were made and this is my ruling on the issues arising from the original submissions.
4. In the Principal Judgment I dismissed the claims of the plaintiff for the following declarations:
 - (1) That the first named defendant, its servants or agents or any person acting in concert with it is not entitled to acquire the plaintiff's loan facilities dated 28 March, 2006, 12 November, 2008 and/or the Guarantee and Indemnity dated 28 March, 2006 ('the Benray Guarantee') by reason of unlawful and/or illegal conduct (para. 4 of the prayer for reliefs), by reason of its involvement in the bidding process (para. 5), by reason of breach of the plaintiff's constitutional rights and/or his rights under the European Convention on Human Rights and/or his rights under the Charter of Fundamental Rights of the European Union (para. 6);
 - (2) A declaration that any sale or transfer of the plaintiff's loan facilities was null, void, invalid or illegal (para. 7); and
 - (3) A declaration that the defendants have conspired to adversely and prejudicially affect the property interests of the plaintiff in divesting, selling and seeking to enforce against the shareholding of the plaintiff (para. 22).
5. I refused the plaintiff's claim for damages and for accounts and enquiries.

6. I also stated that I would grant judgment on the counterclaim in the amounts claimed by Breccia, namely the amount of €17,507,742.28 due pursuant to the plaintiff's loans, and the amount of €1,518,846.57 due by the plaintiff pursuant to the Benray Guarantee together with interest up to the date of judgment calculated in the manner evidenced by Mr. Sheeran, who had given evidence on behalf of Breccia.

Counterclaim declarations.

7. The first and second named defendants submit that the court should make the declarations which it sought in para. 84 (a) and (b) of the counterclaim, namely as follows:
 - (a) A declaration that the purchase by Breccia of the plaintiff's loan facilities was lawful, valid and effective.
 - (b) A declaration that Breccia is entitled, pursuant to the mortgage, to appoint a receiver over and/or exercise the power of sale in relation to the plaintiff's shares in the third named defendant.
8. The defendants submitted that the making of these declarations follows as a corollary of the refusal by me to make the declarations sought by the plaintiff and referred to at para. 4 above.
9. No submission was made by the plaintiff in relation to this point.
10. I am satisfied that having regard to the findings I made in the Principal Judgment it is appropriate to make the declarations claimed by the first and second named defendants and the Order will contain such declarations.

Counterclaim – monetary amounts

11. Breccia has pointed out that its counsel indicated at the hearing of these proceedings that it was not pursuing the part of the counterclaim which related to the amount due pursuant to the Benray Guarantee, recited in the Principal Judgment as an amount of €1,518,846.57. Accordingly, that amount will not be included in the Order.
12. Breccia has submitted that certain deductions should be made in the amount of the counterclaim judgment reflecting payments which have been received by Breccia.
13. On 19 June, 2019, in Module One of these proceedings the court declared that the first named defendant is entitled to receive payment of dividends attributable to the plaintiff's shareholding in the third named defendant.
14. On 31 December, 2019 and 3 February, 2020 payments of such dividends were made to Breccia in sums totalling €3,747,814.46.
15. On 28 May, 2020 Breccia received payment of a sum of €10m from a receiver which it had appointed over the plaintiff's shares in the third named defendant. The receiver had sold those shares to the second named defendant and the amount of €10m represented an interim payment to Breccia pursuant to its security over those shares.

16. Breccia has submitted that in calculating the amount of the final judgment credit should be given for the amount of this payment, less certain enforcement costs incurred by it, which amount to a sum of €4,030,000. Accordingly, it submits that a sum of €5,970,000 should be applied to the credit of the plaintiff in making this calculation.
17. In relation to the enforcement costs Breccia submits that pursuant to Clause 6.2 of the General Terms and Conditions which apply to the plaintiff's loan facilities, the plaintiff is required to pay all costs, charges and expenses (including, but not limited to legal and other professional fees and expenses) incurred in connection with the enforcement of its security. It is submitted that Breccia is entitled to require the following amounts to be paid:
 - (i) €3,300,000: "Sheehan v. Breccia (Module 1 and 3)".
 - (ii) €580,000: "Sheehan v. Breccia – High Court and Court of Appeal (injunction)".
 - (iii) €150,000: "non-litigation legal fees".
18. The quantum of these costs has not yet been the subject of any taxation or adjudication. Nonetheless, Breccia has referred this Court to the judgment of the Court of Appeal (Sheehan v. Breccia, Finlay Geoghegan J., 30 July 2018) which is authority for the proposition that such costs may be taken into account in the calculation of a redemption figure even before they have been taxed or ascertained.
19. Breccia submits that the principle applied by the Court of Appeal in that judgment permits that it would apply the costs which it has incurred out of the amount of the interim payment and apply the balance of €5,970,000 to the plaintiff's loan facilities.
20. Reference is made by the defendants to the judgment of the Court of Appeal in which Finlay Geoghegan J. stated the following:

"89. Where there is a contractual right to costs already incurred but no relevant court order has yet been made then there may be an element of contingency in relation to either the liability for the costs or as to the amount of the costs. It appears to me that Breccia, nevertheless is entitled to provide as part of the redemption figure an estimate of the costs incurred to which it asserts a contractual entitlement to recover out of the mortgaged property. Mr. Sheehan has the option either of redeeming by making payment of the estimated amount or by seeking to reach agreement that the amount estimated to be costs incurred but which appear contingent as to liability or amount be otherwise secured by an appropriate mechanism. A mortgagee cannot be required to release security for costs already incurred to which it has a contractual secured right but which are contingent either as to amount or because they are litigation costs and ultimately a judge in exercise of his O.99 discretion might deprive the mortgagee of the costs unless there is alternative agreed security in place.

90. *Accordingly, it follows that my determination on the enforcement costs issues only differs from that of the trial judge insofar as it appears to me that Breccia is entitled to include in the redemption figure an estimate of litigation costs already incurred to which there is a contractual right but which have not yet been the subject of a court order notwithstanding that the ultimate recovery may be contingent on an order in Breccia's favour pursuant to O.99 or contingent as to amount if the costs have already been awarded but the amount of same is disputed and taxation has not yet taken place.” [emphasis added]*
21. No submission has been made on this subject by the plaintiff.
22. I am satisfied that the principle set out in the judgment of the Court of Appeal, which relates principally to the calculation of the redemption amount, is relevant to the question now under consideration as to the extent of the obligations of Breccia to give credit to the plaintiff for amounts received by it from the receiver and the amount of such credit. I shall apply that principle and therefore reduce the judgment sum by the amount of these estimated costs in the manner proposed by Breccia.
23. Breccia delivered an affidavit sworn by Mr. Declan Sheeran on 11 June, 2020, in which he averred that the amounts of costs totalling €4,030,000, although not yet taxed or ascertained, represent an estimate of the enforcement costs incurred by Breccia and recoverable from the plaintiff pursuant to Clause 6.2 of the General Conditions.
24. In permitting Breccia to deduct that amount from the credit it gave to the plaintiff for the interim payment it received from the receiver, I am accepting that it is based on Breccia's estimate of those costs. This is not to be taken as endorsing the quantum of the costs, which do not fall for adjudication in this ruling.
25. Mr. Sheeran referred also to the necessity to include in the Order the calculation of interest in accordance with the terms of the facility namely at the ordinary contractual rate of 1.75% above the three-month Euribor, as provided for in the Facility Letter.
26. In Mr. Sheeran's affidavit he verifies the amounts received by Breccia in respect of dividends from the third named defendant, and the payment received from the receiver on 28 May, 2020, and the estimates of the costs referred to above. Mr. Sheeran has exhibited an up-to-date calculation of the amount Breccia claims pursuant to the loan, taking into account all of the above adjustments and he avers that the balance due as at 10 June, 2020 is €7,894,534.44. I shall grant judgment for that amount.

Costs

27. The first and second defendants have submitted that they are entitled to an order for their costs.
28. No submission relating to costs (except in respect of a stay considered below) was made by the plaintiff.

29. There being no special circumstances justifying their refusal, the defendants are entitled to their costs of this module and I shall order that the plaintiff pay those costs.
30. The third named defendant has previously secured an order for its costs against the plaintiff and accordingly the costs order now made will be in favour of the first, second, fourth, fifth and sixth named defendants.

Stay on costs

31. The plaintiff has informed the court that he wishes to appeal the judgment in this module and requests a stay on any costs orders *"until this appeal is heard and judgment rendered"*.
32. The plaintiff has also informed this Court that he has made a filing in court in Illinois, USA under Chapter 11 of the US Bankruptcy Code. He has informed the court that he is *"adhering to the worldwide stay as granted"*.
33. The plaintiff submits that his request for a stay on costs is consistent with this Court's judgment in Module One which is currently under appeal where costs were stayed pending the hearing and determination of the appeal.
34. The defendants submit that the plaintiff has failed to identify what arguable grounds of appeal he may have and that on that ground he is not entitled to any stay pending an appeal. The defendants have also submitted that there is no realistic prospect of the court's judgment being overturned on appeal.
35. The defendants also submit as follows:
 - (1) That there are already a significant number of undischarged costs orders against the plaintiff in respect of these proceedings.
 - (2) That if the defendants are delayed in enforcing any costs order there will be no certainty that the plaintiff will have assets to satisfy the orders on the expiry of the stay.
 - (3) The defendants have also drawn to the attention of the court the record of the plaintiff in connection with the progression of his appeal from the judgment of this Court in relation to Module One. It is said that the plaintiff has failed to comply with the directions of the Court of Appeal in relation to the conduct of that appeal and has failed to appear at a number of directions hearings.
 - (4) That the conduct of the plaintiff in connection with these matters evidences that he has *"no wish or intention to progress any appeals and merely wishes to frustrate the ability of [the defendants] to conclude this lengthy and costly litigation."*
36. In relation to the effect or relevance of the Chapter 11 proceedings in the U.S. Bankruptcy Court, Breccia says that in the context of the appeal in Module One certain directions were made by the Court of Appeal on 15 May, 2020, with a view to obtaining

clarity as to whether the plaintiff had capacity to continue this litigation and related matters and that the plaintiff has not complied with those directions.

37. The fact that this Court's judgment in Module One in respect of costs was subject to a stay does not mean that I should grant a stay on costs in this module. Having regard to my findings in the Principal Judgment and to the plaintiff's record of failing to comply with directions made to progress the appeal in Module One of these proceedings, I am not persuaded that it would be just to grant any stay in this Module. Accordingly, I shall refuse to grant a stay on the order for costs.