APPROVED **[2023] IEHC 174**

THE HIGH COURT
CIRCUIT APPEAL

2022 No. 112 CA

BETWEEN

JOHN BERRILL
DENIS McCARTHY
JEREMIAH McCARTHY

PLAINTIFFS

AND

KENMARE PROPERTY FINANCE DAC

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 April 2023

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The defendant has brought a motion seeking to have the proceedings against it dismissed on the basis that the proceedings are bound to fail and/or represent an abuse of process. More specifically, it is asserted that the plaintiffs' claim is bound to fail by reason of it having been the subject of a prior accord and satisfaction between the parties.

2. The defendant succeeded in its application before the Circuit Court and an order was made dismissing the proceedings on 1 June 2022. The plaintiffs have brought an appeal against this order to the High Court.

3. The appeal was heard before me on 30 March 2023. On that date, I delivered a short *ex tempore* ruling explaining why the appeal would be allowed and the defendant's motion dismissed. I also indicated to the parties that I would deliver a written judgment on the matter after Easter. This judgment sets out the detailed reasons for my decision to allow the appeal.

LEGAL TEST FOR APPLICATION TO DISMISS

4. The application to dismiss is advanced on the basis that this is a *"documents case"*, i.e. the resolution of the proceedings turns on the interpretation of emails exchanged between the parties' respective solicitors. Accordingly, it is said that this is not a case where oral evidence would be decisive.

5. The approach to be taken to an application to dismiss in respect of a "*documents case*" has been considered by the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21, [2014] 2 I.R. 301 and in *Keohane v. Hynes* [2014] IESC 66. The approach to be taken to an application to strike out or to dismiss proceedings will differ slightly in circumstances where the underlying proceedings turn on the interpretation of (agreed) contractual documents. More specifically, the court may be able to resolve straightforward issues of contractual interpretation on a summary application without the risk of injustice to the parties. This is subject to a number of provisos as follows. First, there must be no factual dispute as to the validity of the contractual documents. Secondly, it must be accepted that the contractual documents represent the entire

agreement between the parties. If, for example, one of the parties alleges that the interpretation of the contract must be informed by oral representations or that a collateral contract exists between the parties, then these are issues which can normally only be properly resolved by a plenary hearing on oral evidence. Thirdly, the contractual documentation must be capable of interpretation on its own terms, i.e. without resort to extrinsic evidence. Finally, the legal issues must be straightforward.

6. In cases where these provisos are fulfilled, it may be legitimate for the court to consider the terms of the contractual documentation on a summary application. If the court concludes that no reasonable interpretation of the contractual documentation could give rise to a claim on the part of a plaintiff—even assuming that all of the facts alleged by the plaintiff would be established at trial—then the proceedings can be dismissed as an abuse of process.

TRIAL OF A PRELIMINARY ISSUE

7. For completeness, it should be recorded that the notice of motion seeks, in the alternative, an order pursuant to Order 34 of the Circuit Court Rules determining, as a preliminary issue tried on affidavit, that the plaintiffs' claim was the subject of a prior accord and satisfaction between the parties and should be dismissed.

8. The Supreme Court in *Cafolla v. O'Reilly* [2017] IESC 17, [2017] 3 I.R. 209 held that while the question of prior accord and satisfaction was, in principle, capable of being dealt with by way of a preliminary issue, a complex case where the issues of accord and satisfaction were not clear-cut required evidence and further argument before a court could conclude that the claims were precluded.

9. The dispute between the parties in the present proceedings is wholly unsuitable for the trial of a preliminary issue. This is because there is a significant factual dispute between the parties as to the nature of the agreement between them. In particular, as discussed presently, the accord and satisfaction asserted by the defendant is said to be found in a handful of emails from December 2019 and February 2020. Crucially, however, there is no consensus that these emails represent or reflect the entire agreement between the parties.

FACTUAL BACKGROUND

10. These proceedings have their genesis in an earlier settlement agreement entered into as between the plaintiffs and the defendant on 29 May 2018. To avoid any possible confusion between (i) this earlier settlement agreement, and (ii) the accord and satisfaction which Kenmare Property Finance alleges was reached in February 2020, all references in this judgment to *"**the settlement agreement**"* should be understood as referring to the settlement agreement executed on 29 May 2018.

11. The settlement agreement was executed in the context of two sets of High Court proceedings. These bore the following record numbers: 2016 No. 2208 S and 2017 No. 6839 P (collectively, "***the debt collection proceedings***"). It should be explained that the debt collection proceedings related to loan facilities entered into by Mr. John Berrill with Anglo Irish Bank Corporation. This indebtedness had, seemingly, been guaranteed by Mr. Denis McCarthy and Mr. Jeremiah McCarthy. The security for the loan facilities included a mortgage over certain lands in County Louth ("***the mortgaged property***"). The loan facilities and

security were subsequently transferred to Kenmare Property Finance in May 2014.

12. The parties will be described in this judgment by reference to their respective positions under the settlement agreement rather than as plaintiffs or defendants. Thus, the three individuals will be referred to collectively as "***the debtors***", and Kenmare Property Finance will be referred to as "***the creditor***". This nomenclature is intended to avoid the risk of confusion which arises from the fact that the role of Kenmare Property Finance in the litigation has been reversed: having been the plaintiff in the summary proceedings issued in 2016, it is now the defendant in the present proceedings.

13. The debt collection proceedings were compromised by the settlement agreement. The settlement agreement envisaged that a total sum of 1.4 million euro would be paid to the creditor by the debtors. This was to be done in accordance with a schedule of payments set out in the settlement agreement. The settlement agreement envisaged that if the debtors had complied with the terms of the settlement agreement by its first anniversary, then the mortgage would be released and the receiver, who had been appointed by the creditor, would be discharged.

14. In the event, the parties decided on a different approach as allowed for under clause 5.5 of the settlement agreement. More specifically, it was decided that the mortgaged property should be sold by the receiver with the co-operation of the debtors. The special conditions under the contract for sale allowed for the deed of assurance to be executed by the mortgagee. It has been explained by counsel on behalf of the creditor that this method of sale was perceived to have

certain advantages to the parties in that it would allow subsequent incumbrances on the mortgaged property to be overreached.

15. The purchase price was fixed at €1,300,000 and a deposit of €130,000 was duly paid. It seems that it had been originally envisaged that the sale of the mortgaged property would close in November 2019. For reasons which are not directly relevant to the current appeal, the closing did not go ahead on that date. There was a closing date arranged for 20 December 2019; however, the sale did not proceed on that date but ultimately closed on 6 February 2020.

16. Prior to the abortive closing date of 20 December 2019, the debtors raised an issue in relation to an alleged overpayment. In brief, the debtors' argument is that it had always been envisaged under the terms of the settlement agreement that they would only ever pay a sum of 1.4 million euro (€1,400,000); that payments in an aggregate amount of €139,000 had been made pursuant to the settlement agreement by December 2019; and that a deposit of €130,000 had been paid in respect of the sale of the mortgaged property. This meant that, as of December 2019, the creditor had received payments in an aggregate amount of €269,000. On the debtors' argument, the outstanding amount payable under the settlement agreement was €1,131,000 and that the closing balance payable on the sale of the mortgaged property should not exceed this sum.

17. It appears from the limited correspondence which has been exhibited that this dispute in respect of the balance payable on the closing of the sale of the mortgaged property was canvassed in an exchange of emails on the morning of the abortive closing date (20 December 2019). The solicitors acting on behalf of the creditor had dismissed the suggestion that the closing balance was to be reduced by €39,000 as "*complete nonsense*" and had stated that the "*record was*

firmly set straight" in emails that morning from "*Pepper*". It appears, although this has not been fully explained on affidavit, that the creditor, i.e. Kenmare Finance Property, is connected to Pepper Finance. The last in time of the emails from 20 December 2019 is an email from the debtors' solicitor stating that his clients had agreed to close at €1,170,000.

18. In the event, the sale of the mortgaged property did not close on 20 December 2019. The sale ultimately closed on 6 February 2020. A sum of €1,170,000 was paid over on behalf of the debtors. On the debtors' analysis, this represents an overpayment of €39,000.

19. Counsel on behalf of the creditor has brought my attention to a number of emails in or about the time of the closing of the sale. It appears from these emails that the solicitors acting on behalf of the debtors had indicated that they wished to receive confirmation that the sale was in full and final settlement of all matters between the parties. Counsel makes the point that the initiative seeking this confirmation had come from the debtors' own solicitors. It is submitted that this amounts to an accord and satisfaction which precludes the debtors from advancing a claim in respect of the supposed overpayment of €39,000.

20. There was some discussion at the hearing before me as to the proper interpretation of an email dated 5 February 2020 which was sent by the solicitors then acting for the debtors to the solicitors acting for the creditor. The email reads as follows:

> "I confirm that funds in the sum €1,170,000 have been transferred to your client account. It is unlikely that funds will reach your account until tomorrow. Please note that funds are <u>to be held strictly in trust to our order</u> pending receipt of updated searches and the handover and satisfactory inspection of the agreed completion documents. We will also require an acknowledgement from your client that when funds are released to your client that the settlement

> agreement has been performed and that it is in full and final settlement of all matters between the parties.
>
> Please note that an additional amount was transferred in error and the additional funds do not relate to this transaction. Our respective accounts teams are liaising with each other for the immediate return of this balance."
>
> *Emphasis (underlining) in original

21. It was submitted on behalf of the debtors that the latter paragraph of this email refers to the supposed overpayment of €39,000.

22. The debtors instituted these proceedings before the Circuit Court on 5 November 2020. The principal relief sought in the proceedings is damages in the sum of €39,000 together with interest. The creditor has delivered a full defence to the proceedings.

23. The creditor successfully applied to the Circuit Court to have the proceedings dismissed summarily on the basis that same are bound to fail and/or represent an abuse of process. This judgment is delivered in respect of the debtors' appeal against the order of the Circuit Court dismissing the proceedings.

APPLICATION TO ADDUCE ADDITIONAL EVIDENCE

24. Before turning to discuss the merits of the application to dismiss, it is necessary first to refer to the outcome of an application to adduce additional evidence. Counsel on behalf of the creditor had submitted at the hearing on 30 March 2023 that if the court, having regard to the submissions made by the debtors, considered that the email correspondence from February 2020 was incomplete or ambiguous, then a short adjournment should be allowed in order to permit the creditor to file a further affidavit exhibiting the full of the email exchange. For the following reasons, this adjournment application was refused.

25. This matter comes before the High Court by way of an appeal from the Circuit Court. The hearing before the Circuit Court had taken place on the basis of affidavit evidence only, i.e. no oral evidence was given. The Courts of Justice Act 1936 provides (at section 37) that no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such an appeal without the special leave of the judge hearing such appeal.

26. Order 61, rule 8 of the Rules of the Superior Courts provides as follows:

> "Where any party desires to submit fresh evidence upon the hearing of an appeal in any action or matter at the hearing or for the determination of which no oral evidence was given, he shall serve and lodge an affidavit setting out the nature of the evidence and the reasons why it was not submitted to the Circuit Court. Any party on whom such affidavit has been served shall be entitled to serve and lodge an answering affidavit or to apply to the Court on the hearing of the appeal for leave to submit such evidence, oral or otherwise, as may be necessary for the purpose of answering such fresh evidence, provided, however, that the Court may at any time admit fresh evidence, oral or otherwise on such terms as the Court shall think fit, and may order the attendance for cross-examination of the deponent in any affidavit used in the Circuit Court or the High Court."

27. The principles governing the exercise of the discretion to admit new evidence on an appeal are well established and are summarised as follows in the judgment of the Supreme Court in *Murphy v. Minister for Defence* [1991] 2 I.R. 161 (at 164):

> "1. The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;
>
> 2. The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;
>
> 3. The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible."

28. As appears, one of the factors to be considered is whether or not the evidence could have been obtained with "*reasonable diligence*" for use at the trial.

29. The creditor is seeking to have these proceedings disposed of on a summary basis and to deny the debtors the opportunity to pursue their claim at a plenary hearing. The onus lies with the creditor, as moving party, to persuade the court that the debtors' claim is bound to fail and that the proceedings should be dismissed as an abuse of process. The creditor advances this application on the basis of a limited set of documentation which it has chosen to put before the court.

30. It should have been obvious to the creditor that the reference, in the email of 5 February 2020, to an additional amount having been transferred in error called for some explanation in circumstances where the gravamen of the debtors' claim in the proceedings is that there had been an overpayment. The basis of the application for an adjournment to adduce additional documentary evidence had been that evidence might exist which would demonstrate that the reference in the email of 5 February 2020 had been to something other than the alleged overpayment of €39,000 which forms the lynchpin of the debtors' claim in these proceedings. This evidence would, presumably, consist of other contemporaneous documentation such as, for example, further email exchanges between the two firms of solicitors. Such documentation, by definition, is evidence which would have been readily available to the creditor at the time it was preparing the paperwork for its application to dismiss.

31. A party who chooses to put forward a partial and self-selected set of documents runs the risk that the meaning of a particular document may appear ambiguous in the absence of the court having sight of all of the surrounding documentation.

32. The creditor has failed to discharge the onus that lies with it as the moving party in the application to dismiss. This is not to say that the creditor may not ultimately be successful in defending the proceedings following a plenary hearing. However, it would be inappropriate to allow the creditor an opportunity to mend its hand in the application to dismiss, by allowing it to adduce additional evidence. It will generally be contrary to the proper and efficient administration of justice to adjourn the hearing of an application to dismiss in order to allow a party, who has chosen to bring what is an exceptional type of application, a second bite of the cherry. If the moving party fails to satisfy the proofs of an application to dismiss, then the proper course will normally be to adjourn the proceedings to plenary hearing. This does not cause any material prejudice to the moving party: they will still be entitled to mount a full defence to the proceedings.

33. It is in the interests of justice that these proceedings go to trial, rather than for there to be yet further delay on an interlocutory application. A period of almost two years has already been expended on the application to dismiss. Were this court to have acceded to the application to adduce additional evidence, it would have been necessary to adjourn a hearing which had been fixed as long ago as June 2022. A further lengthy delay is likely to have ensued before a resumed hearing date would be available.

34. In summary, the application to adjourn the hearing to allow additional evidence to be adduced was refused in circumstances where the creditor cannot be said to have been unfairly taken by surprise and where no material prejudice is caused to it in its defence of the proceedings. An adjournment of the application to dismiss would serve only to cause further unnecessary delay.

DISCUSSION AND DECISION

35. There is a dispute between the parties as to whether the debtors' liability to the creditor is capped at 1.4 million euro (€1,400,000). This is the sum identified in the settlement agreement. The creditor seeks to have this dispute determined on a summary basis by inviting the court to find that the debtors' case is bound to fail and/or represents an abuse of process. The invitation to dismiss the proceedings summarily is advanced on the basis of a small number of emails in the lead up to the abortive closing date in December 2019, and the ultimate closing date in February 2020.

36. On the creditor's argument, the debtors were to pay an *additional* sum of €39,000. It is said that, from the outset, it was envisaged by all parties that (a) the sale of the mortgaged property was not a like-for-like alternative to the debtors' payment obligations under the settlement agreement but rather would result in the recovery by the creditor of in excess of €1,400,000; and (b) the creditor expected the debtors to continue to make the quarterly payments of €12,500 until the sale completed.

37. With respect, the circumstances in which the parties allegedly came to agree that the debtors' obligations were to exceed the figure of 1.4 million euro specified in the settlement agreement are not readily apparent from the limited papers which the creditor has chosen to put before the court. The correspondence relating to the proposal to sell the mortgaged property has not been exhibited by the creditor as part of the application to dismiss. The explanation for this is that the creditor regards the correspondence as being privileged, having been exchanged on a "*without prejudice*" basis. Whereas it is correct to say that

settlement negotiations will normally be privileged from disclosure, an exception may arise where there is a dispute subsequently as to what precisely had been agreed between the parties. It will be a matter for the Circuit Court, in the first instance, to rule on any claim for privilege made in these proceedings.

38. It is simply not possible for this court, on the basis of the limited documentation which has been put before it, to determine conclusively that the parties had reached a new agreement, whereby the debtors were required to pay an additional sum of €39,000, over and above that previously agreed. To determine this issue properly, the court would have to consider all of the relevant documentation exchanged between the parties and to hear oral evidence.

39. It is an inherent risk of an application to dismiss that the court hearing the motion may consider that there is a credible basis for suggesting that, *following the discovery of documents*, it may be possible for the plaintiff to establish the facts which are asserted, and which are necessary for it to succeed in the proceedings. Put otherwise, the court hearing the motion may not be satisfied that it is safe to dispose of the proceedings on a partial set of documents, without the plaintiff having had the opportunity to avail of pre-trial procedures such as discovery.

40. Even the limited documents which have been put before the court are ambiguous. In particular, the reference in the email of 5 February 2020 (quoted at paragraph 20 above) to an additional amount having been transferred in error is open to the interpretation that it is describing the disputed €39,000. As previously noted, a party who chooses to put forward a partial and self-selected set of documents runs the risk that the meaning of a particular document may appear ambiguous in the absence of the court having sight of all of the surrounding documentation.

41. For completeness, the present proceedings cannot be characterised as a "*documents case*" in the sense that the phrase is used in the case law on applications to dismiss. The supposed agreement is said to be found in a handful of emails from December 2019 and February 2020. Crucially, however, there is no consensus between the parties that these emails represent or reflect the entire agreement between the parties. The debtors contend that it had always been agreed that their indebtedness under the settlement agreement was not to exceed the figure of 1.4 million euro, and, further, that the sale of the mortgaged property to a third party had been central to the debtors' willingness to enter into the settlement agreement in the first place. Moreover, it is averred on affidavit that the debtors were put under "*significant duress*", and it is pleaded that the plaintiffs yielded to "*wrongful pressure*" to make an overpayment of €39,000 on 6 February 2020.

42. In summary, these proceedings cannot be safely determined without the benefit of discovery and oral evidence. It is not possible for the court to determine, on the basis of an incomplete set of correspondence, that the parties were *ad idem* on the question of whether the debtors were to pay an additional sum of €39,000 over and above the figure of €1,400,000 under the settlement agreement. Accordingly, the application to dismiss the proceedings on a summary basis is refused. The proceedings will now go to full hearing before the Circuit Court.

CONCLUSION AND FORM OF ORDER

43. For the reasons explained herein, the appeal will be allowed. The order of the Circuit Court of 1 June 2022 will be set aside, and an order made in lieu refusing

the defendant's application to dismiss the proceedings on a summary basis (as per the notice of motion of 24 June 2021).

44. As to costs, my *provisional* view is that the plaintiffs, having been entirely successful in their opposition to the defendant's motion, are entitled to recover the allowable costs of the motion before the Circuit Court and the High Court. The allowable costs before the Circuit Court include the legal costs. As the plaintiffs appeared as litigants in person before the High Court, i.e. without legal representation, the allowable costs before the High Court are confined to their expenses and outlay. If either side wishes to contend for a different form of costs order than that proposed, they should file written submissions within two weeks.

Appearances

The plaintiffs appeared as litigants in person
Eoin Martin for the defendant instructed by Maples and Calder (Ireland) LLP

Approved Garrett Simons