[2020] IEHC 166

THE HIGH COURT

[2018 No. 6586 P.]

BETWEEN

JOICE CARTHY, AUGUSTUS CULLEN, JAMIE HART AND DAVID LAVELLE, A PARTNERSHIP TRADING UNDER THE STYLE AND TITLE OF AUGUSTUS CULLEN LAW AND CULLEN SOLICITORS SERVICES LIMITED

PLAINTIFFS

AND

MICHAEL BOYLAN, GILLIAN O'CONNOR, A PARTNERSHIP TRADING UNDER THE STYLE AND TITLE OF MICHAEL BOYLAN LITIGATION LAW FIRM AND CIARA MCPHILLIPS

DEFENDANTS

JUDGMENT of Mr. Justice O'Connor delivered on the 8th day of April, 2020

Introduction

1. This judgment considers the jurisdiction and powers of the Court to enforce a settlement agreement for proceedings which have been struck out by consent with liberty to apply to enforce the settlement. After the departure of the first and second named defendant solicitors from the first named plaintiff firm of solicitors, client files were transferred to the third named defendant ("MBLLF") subject to an agreement between the parties ("the settlement agreement").

Background

2. Following a mediation, Costello J. was informed in these proceedings on Friday, 27th July, 2018, that the parties had entered into the settlement agreement and by consent "the plaintiffs' action be struck out with no order as to costs". It was also ordered that the settlement agreement "be received and filed in court" and "Liberty to apply to all parties for the purposes of enforcing the said settlement". Earlier, in July, 2018 the plaintiffs had sought interlocutory reliefs against the defendants arising from the resignation of the first and second named defendants as partners from the first named plaintiff ("ACL") and the establishment of MBLLF.

3. The reliefs now sought in the notice of motion issued by the plaintiffs on the 11th July, 2019, were confined at the hearing of this application, in which submissions were made and then concluded on the 6th March, 2020 for the plaintiffs on one side and for only the first and third named defendants ("these defendants") on the other side to the following reliefs :-

> "(3) An order declaring that Brendan Cooke, legal costs accountant ("Mr Cooke") has been duly appointed by the parties to the settlement agreement to make a determination(s) as to the sums due to [ACL] in respect of legal costs pursuant to paragraph 6(c) of the settlement agreement in respect of each of the [168] files listed…
>
> (4) An order directing [Mr Cooke]… to make a determination(s) of the sums due to [ACL] by [MBLFF] pursuant to the settlement agreement in respect of each of the [168] files listed…

(7) An order directing Declan Walsh Accountant of RSM Ireland ("Mr Walsh") to make a determination of the value of [MB's] capital account in [ACL] pursuant to paragraph 13 of the settlement agreement."

4. The plaintiffs also seek "Such further or other order as [the Court] may deem necessary in order to give effect to paragraphs [6 and 13] of the settlement agreement" which was clarified during the hearing of this application to be an order directing MB to do what was necessary for Mr Cooke to proceed and to sign a letter of engagement for Mr Walsh so that he could value the capital account.

5. In order to put the delay in enforcing the settlement agreement in context, counsel for the plaintiff explained that that there was about 10% in the differing estimates from the two cost accountants engaged by the relevant parties (albeit conditional) at the end of October 2018 in respect of eight files transferred to MBLLF which came to a total just over €1m. The terms of the settlement agreement concerning set offs and payment dates are not germane to the issues in contention before this Court now.

Receiving and filing settlement agreement in Court

6. One approach where parties desire an agreement to be readily enforceable without the need for a fresh action is to stay the proceedings for the purpose of making the terms of compromise a rule of court and to enforce same while directing that the agreement be filed and made a rule of court (see para. 15-06 and precedent No. 17 in the "Law and Practice of Compromise" by Foskett, 4th Ed. [1996] as mentioned at fn 20 in para. 9-11 in Foskett on Compromise 8th Ed. [2015]. This authoritative text advises:-

> "Specific agreement to this effect is necessary [*Graves v. Graves* [1893] 69 L.T. 420]… [T]he procedure is very similar to that of scheduling the terms of the agreement to a Tomlin order. It is, however, an old procedure and its disadvantage is that there is a division of judicial opinion about the precise manner in which enforcement may be achieved."

Tomlin Order

7. Dashwood v. Dashwood [1927] 71 SJ 911, (judgment of Tomlin J delivered on 1st November 1927), concerned the enforcement of a settlement in a partnership dissolution action. There, the partnership carried on business as undertakers. An order was made by consent that the proceedings be stayed "except so far as may be necessary for the purpose of carrying this order and the terms agreed between the parties and set out in the schedule hereto into effect". There was a restrictive covenant attached to the right of the defendants "to purchase the plaintiff's share in the capital, goodwill and assets of the partnership… A preliminary point was taken that committal or attachment did not lie until an order for specific performance of the agreement in the schedule or an injunction had been obtained."

8. Tomlin J. said:-

> "It is curious that there is no direct authority on the point, and I have to make up my mind independently of authority which is the right view… In the present case,

the court is staying the action on terms which the parties have agreed, and only keeping it alive to the extent necessary to enable any party thereafter to enforce the term. It seems to follow that the terms in the schedule are not an order of the court which ought directly to be enforced by proceedings for contempt. The proper course is to apply for specific performance or an injunction, and then to base proceedings for contempt on any subsequent breach. The application, therefore, fails…"

9. Criticism of Tomlin J in a letter published in SOL. J & R, Volume 71 at p. 907 was rebuffed by the editor who explained that Tomlin J. was concerned with "an agreement sanctioned by the court" and "Encroachment on such liberty (i.e. freedom from imprisonment) even in modern times, are not as likely made by the judicial as by the executive and legislative branches of government".

10. Tomlin J published a chancery division practice note which is reported in The Weekly Notes p. 290 and dated 2nd November 1927 that "in future where an action was proposed to be stayed on agreed terms to be scheduled to the order, the minutes should be drawn so as to read as follows: 'And, the plaintiff and the defendant having agreed to the terms set forth in the schedule hereto, it is ordered that all further proceedings in this action be stayed, except for the purpose of carrying such terms into effect. Liberty to apply as to carrying such terms into effect.'"

Green v. Rozen

11. Counsel for these defendants cites the judgment of Slade J. in Green v. Rozen & ors [1955] 2 QBD 797 at p. 799 where he described five ways in which an action can be disposed of when terms of settlement are agreed. The following is a summary:-

    (1) In a debt type case, "give judgment for the total amount agreed to be paid coupled with a stay of execution so long as the instalments are paid in accordance with the terms agreed";

    (2) Where future acts by the parties are agreed, make an order in the terms agreed, which order is agreed to be an order of the court;

    (3) Where the order is not agreed to be an order of the court but the parties agree that a new action to enforce the terms of settlement will not be required, make a "Tomlin order" to the effect that the action is stayed by consent on terms scheduled to the order;

    (4) There is a variation of the Tomlin order: "staying all further proceedings in the action on the terms agreed on counsels' brief";

    (5) Where the court is merely informed that the case has been settled on the terms endorsed on counsels' briefs.

12. Counsel for the defendants submit that the order made in these proceedings is akin to the fifth way because it was agreed that these proceeding are struck out. Counsel also

referred to the statement of McGuinness J. in McMullen v. Clancy (Unreported, High Court, 3rd September, 1999) at p. 8 about "…the distinction between "liberty to re-enter" and "liberty to apply" which was the term used in the settlement and this was not explained to the plaintiff "in support of the submission that fresh proceedings were now required."

Ascough v. Roe

13. Barron J. in Ascough v. Roe (Unreported, High Court, 21st May, 1982) which was a judicial review application, quashed a decision by a Circuit Court judge to rehear proceedings which had been struck out by consent following the execution of terms of settlement with "liberty to both parties to apply at any court of the Eastern Circuit". Barron J. held at p. 10, "in my view, liberty to apply in the present case cannot be interpreted as meaning that the arrangement made between the parties is to be subject to review".

21st Century Case Law

14. In Tomkin v. Tomkin (Unreported, High Court, 8th July, 2003), Smyth J. granted an application to enforce settlement terms concerning a family trust dispute brought by way of notice of motion in circumstances where the prior order of the court in the proceedings provided:-

> "Strike out the proceedings with liberty to any party hereto to re-enter and apply for the purpose of enforcing the settlement."

15. Admittedly, the shorthand note of the judgment discloses that the principal primary dispute between the parties concerned the allegations of wilful default on the part of the defendant as opposed to the manner of application to enforce the terms of settlement.

16. In Corcoran v. Eassda Ireland Limited and Jackson [2013] IEHC 107 (Unreported, High Court, 6th March, 2013), Murphy J. having cited Ascough v. Roe and a subsequent judgment of the Court of Appeal in England, Hollingsworth v. Humphrey (unreported, 10th December, 1987), granted an order for specific performance of a compromise recorded after the exchange of pleadings. The first named plaintiff had issued a notice of motion in the same proceedings seeking implementation of the compromise terms. The defendants issued another notice of motion seeking to have a lis pendens over an entire development excluding the home of the plaintiff vacated. Points of claim and a response were delivered with many affidavits exchanged. Therefore, the parties had engaged in existing proceedings which had been compromised to seek specific performance of the terms of the compromise. There is no mention of the parties seeking to jeopardise the exchange of affidavits, points of claim and reply by arguing that new proceedings were required before a determination by Murphy J.

D.L. v. M.L.

17. In D.L. v. M.L. [2013] IEHC 441 (Unreported, High Court, 27th September, 2013), McDermott J. in an appeal from the Circuit Court noted at para. 7 that:-

"The respondent, in accordance with a clause permitting liberty to apply, re-entered the matter before the Cork Circuit Court by way of notice of motion dated 6th July, 2011…"

18. There, the respondent wife sought in a second notice of motion a number of possible orders relying upon consent terms attached to a Circuit Court order made a "rule of court" with "liberty to apply". The applicant husband effectively appealed the order of the Circuit Court directing his redundancy sum to be paid to a bank in discharge of a joint liability which he had agreed to take over. Counsel for the applicant husband submitted that neither the Circuit Court nor the appellate court had jurisdiction to make such an order on a number of grounds including those outlined at para. 24:-

"(2) Clause 4 of the consent… was only made a rule of court and therefore, is not enforceable against the appellant unless the respondent applied to the court and obtained an order giving effect to the terms of clause 4…

(3) Clause 4 is so vague that it is not possible to translate it into an order of sufficient precision as to give rise to the specific entitlement now claimed, namely, an entitlement to the freezing of a lump sum and/or that it be paid to the Bank;

(4) It would be inappropriate to make any order on the basis of clause 4 because it seeks to impose obligations on the Bank and the appellant in his dealings with the Bank in a manner calculated to affect the Bank's interests when it is not a party to these proceedings."

19. It was accepted that the redundancy payment could not have been contemplated at the time of the consent order.

20. McDermott J. at para. 27 quoted Warrington L.J. in Re Shaw [1918] P. 47 at pp. 53-54 and the last sentence is particularly apposite:-

"The effect of making the terms a rule of court enables the terms to be summarily enforced without the necessity of bringing an action."

21. McDermott J. concluded that the unexpected events required the urgent application on the part of the respondent wife. He also held at para. 35:-

"I am satisfied that notwithstanding the case law envisaging the two stage process as outlined by counsel, and the objection taken to the very general form of the earlier notice of motion brought to re-enter these proceedings, that this is a case in which the court should not permit technical or pleading points to defeat, what I consider to be the just result. This is a case in which the obligations of both parties were executory with a view to the vesting of various properties in each party."

22. It is noted that in D.L. v. M.L. the term "rule of court" was used in the order. In the application before this Court, "rule of court" was not used. Notwithstanding, a rule of court must be made an order of the court before it can be enforced.

Mediation Act

23. Counsel for the plaintiffs refer to s. 11(3) of the Mediation Act, 2017 ("Mediation Act, 2017") coupled with O. 56 A (5) of the Rules of the Superior Courts ("RSC") which provides for a statutory mechanism to facilitate summary type enforcement of a mediated agreement whether there have been proceedings or not. It is "…bizarre to suggest that an altogether different approach should be taken in this case". In other words, the resistance to this Court having jurisdiction because the plaintiffs did not issue a notice of motion referring to those statutory provisions as opposed to the terms of the mediated agreement is ill-founded according to the plaintiffs.

24. In reply for these defendants, Mr Fitzpatrick, emphasises that the Mediation Act, 2017 and the resulting order 56 A (5) of the RSC does not apply in proceedings which have been struck out and which are "dispositive of the proceedings". Counsel also mentions the rejection by the ACL of the offer to mediate the current dispute between the parties about the reliefs now sought requires a determination by the Court as might occur in other specific performance actions.

Legal Cost Accountants

25. This application proceeded on the basis of no less than twelve affidavits with at least 60 exhibits. Three affidavits were sworn by the legal cost accountant retained for MBLFF ("SF") and two affidavits were sworn by his opposite number for ACL ("TMcM"). In default of agreement, the quantum of costs for files transferred with the authority of clients to MBLLF are to be determined by a Mr Cooke who they appointed in accordance para. 6(c) of the settlement agreement.

26. Counsel for the defendants suggests the following issues of fact which remain in dispute:-

    (1) Whether TMcM resiled from an earlier claim for €20,000 in respect of one file representing a claim for €50,000 later in respect of the same file; and

    (2) Whether TMcM resiled from an agreement on the costs in five of the eight files by maintaining that they were dependent on acceptance of the plaintiffs' claim for costs on three other files.

    These defendants submit that the plaintiffs "bear the burden of proof of establishing the factual accuracy of the allegations which they have made". The plaintiffs reply that "[T]he existence or otherwise of any such disagreement is completely irrelevant to the relief sought". Paragraph 6(c) of the settlement agreement provides for the binding determination of Mr Cooke. The plaintiffs further contend that the email from SF to TMcM and Mr Cooke sent on the 18th June, 2019, which confirmed that he had instructions "…not to embark upon the process in this case for the minute" has allowed MB to take unilateral action to hinder the implementation of the settlement agreement. Finally, the plaintiffs clarify that the application before this Court is not to apportion blame to TMcM or SF.

Capital Account

27. The plaintiffs claim that MB will not, without an order of the court, engage Mr Walsh to resolve the quantum of MB's capital account according to clause 13 of the settlement agreement. Counsel for MB submits that the issues to be determined in respect of the capital account are issues which can only be determined having regard to an on-going Revenue audit about the tax treatment of assets and liabilities in the relevant firm. A previous alleged impediment arising from a taxation review for a significant file transferred was resolved at the end of January, 2020 following an agreement reached with the representatives for the parties on the other side of that litigation.

28. In other words, the plaintiffs claim that Mr Walsh can proceed while MB claims that the effect and result of the Revenue audit needs to be ascertained before Mr Walsh can ascertain the quantum of MB's capital account. MB suggests that there will be no disagreement about the quantum of the capital account once the Revenue audit is completed.

Conclusions

Procedural issue

29. The tightly typed six-page settlement agreement with 33 paragraphs including seven subparagraphs in the relevant clause 6 has given rise to two rather net substantive issues of dispute. The procedural point taken by these defendants shows a desire for each and every particular to be the subject of pleading whether by way of points of claim and reply in existing or new proceedings followed by the adducing of oral evidence.

30. Any suggestion that fresh proceedings are required to enforce the settlement agreement conveniently ignores the order granting liberty to apply for all parties for the purpose of enforcing the settlement agreement. The above review of the more recent case law in this jurisdiction particularly, reveals the willingness of the courts and practitioners to administer justice effectively, without delay and with a view to minimise expense. Furthermore, the Mediation Act, 2017 underscores the intention of the legislature to facilitate the enforcement of mediated agreements in a cost effective and efficient manner. It would be pedantic for this Court in the circumstances of this application to require the plaintiffs to issue or amend a notice of motion referring to the Mediation Act, 2017 or the RSC. The parties are practising solicitors and well understand the practice of focusing on the outstanding issues in dispute at the hearing of a motion, the notice for which may be broad in scope. The approach taken by McDermott J. in D.L. v. M.L. [2013] IEHC 441 (Unreported, High Court, 27th September, 2013) referred to above, commends itself to this Court. There may be a situation in other applications to enforce mediated terms of settlement where it would be desirable or necessary to notify parties in writing of the exact terms of the order to be sought. In the present application there can be no doubt about what is now sought to be enforced.

Cost Accountants

31. There is disagreement between the cost accountants engaged by the parties. The court cannot resolve primary issues of fact which are disputed through the exchange of affidavits. The height of the position for MBLLF is that TMcM agreed the costs for a number of client files with SF. Having read through the affidavits and considered the

submissions, I conclude that there is agreement among those cost accountants about their disagreement. SF was instructed in June, 2019 to hold back and that, in itself, was not an option available to these defendants under the settlement agreement. Clause 6(c) of the settlement agreement requires upon a default of agreement between TMcM and SF, that they appoint a third legal cost accountant to make a determination which "shall be binding on the parties". The law in this jurisdiction concerning the role of experts and the extent to which experts can determine mixed questions of law and fact has been outlined recently in the judgment of the Supreme Court in Dunnes Stores v. Paul McCann, Stephen Tennant and Point Village Development Ltd [2020] IESC 1 (Unreported, Supreme Court, 22nd January, 2020). There, Dunne J., at para. 73, decided that the expert should be allowed to proceed to determine issues including the interpretation of a particular clause.

32. In a similar vein, TMcM and SF should not be hindered from engaging with Mr Cooke or any other cost accountant who they agree to appoint under the settlement agreement. It was for those professionals to appoint and then to interact with Mr Cooke as he may require about the quantum of costs for each file. It is reasonable to expect practitioners to honour their commitments under the settlement agreement which are incorporated in a court order.

Construing Clause 6 (c) "a third legal cost accountant"

33. The Court had an enlightening exchange with counsel for these defendants about the operation of clause 6. The settlement agreement leaves it to TMcM and SF to agree the costs due to ACL, and in the event of a dispute a third legal cost accountant makes a binding determination. The introduction of the right of clients to a bill of costs from ACL to the process does not avail these defendants in delaying the determination by Mr Cooke because the settlement agreement does not provide for same. The parties were well placed, advised and represented at the mediation before the settlement agreement was executed. The defendants cannot rely on the actual or contingent rights of others to hinder the implementation of detailed terms.

34. As for whether there can be a different third legal cost accountant for each and every file or group of files, the Court is reluctant to interfere where there is not a clear dispute between TMcM and SF about the appointment of Mr Cooke. Suffice to say that the submissions made by Mr Lyons for the plaintiffs in replying submissions have appeal. Clause 6(c) uses the singular for "third legal cost accountant" and the parties could run into severe difficulties in engaging multiple legal cost accountants if TMcM and SF must engage several because there is a limited number of cost accountants in the State who could be engaged. MB and SF may have expected a different approach from Mr Cooke but again the parties clearly did not specify how Mr Cooke was to proceed. The settlement agreement shows that the parties relied on the professionalism and integrity of their own cost accountants and then the third cost accountant. It is too late to be implying terms for further review or practices adopted in other processes to ascertain legal costs. The Court approves of the acknowledgement that the independent legal cost accountant "should be the master of his own procedure". It is not necessary for the purpose of this application to

comment on the alleged possible "schadenfreude" on the part of these defendants in regard to the alleged necessity for ACL to produce a bill of costs for former clients.

35. There is no justification to maintain the instruction given to SF to refrain from proceeding with agreeing costs or referring the disagreement to Mr Cooke. The effect of the said email of the 18th June 2019 which followed the first and only decision of Mr Cooke on the 21st May 2019 meant in the words of Mr Fanning counsel for the plaintiffs, that "the whole process has shuddered to a halt".

36. Having regard to the lack of representation for Mr Cooke and Mr Walsh at the hearing of this application (despite the letters sent in July 2019 from Mr Walsh and Mr Cooke that they see no need to be involved and that they will abide by any order), the Court does not favour making any order at this stage directed to those individuals including a declaration which may have the same effect. However, the Court will hear counsel as to the precise terms of the order to be made to allow Mr Cooke to proceed. Furthermore, liberty can be given for a future application in these proceedings by way of notice of motion. Mr Lyons, counsel for the plaintiffs reasonably accepted in reply that such an application might be required to provide a substitute for Mr Cooke or Mr Walsh if the need arose. This liberty to issue a notice of motion seeks to limit the time and expense for giving effect to the settlement agreement.

Decision on capital account

37. The thrust of the Supreme Court judgment in Dunnes Stores v. Paul McCann & ors [2020] IESC 1 is to leave it to nominated experts to decide on issues of fact. Despite all of the averments in the voluminous affidavits and correspondence, Mr Walsh has not averred to the necessity of the outcome of the Revenue audit for his task. MB avers to his belief that Mr Walsh requires that detail without having engaged Mr Walsh in accordance with the settlement agreement. Clause 13 is clear:-

> "Any dispute in relation to the quantum of [MB's] capital account shall be determined by [Mr Walsh]… or any accountant in his practice nominated by him in (the costs of such adjudication to be shared equally)."

38. The Court views the submission that there is no dispute about quantum as artificial if not contrived. Mr Walsh should be engaged and allowed to advise if and when he can determine the issue about MB's capital account. There will be no necessity to engage Mr Walsh if the relevant parties agree a sum for the capital account. However, at the moment there is a disagreement. The plaintiffs do not accept that Mr Walsh cannot be engaged at this stage and therefore a dispute exists. The Court invites a draft of the precise terms of that order bearing in mind that it is the Court's understanding that the suggested order given in oral submissions was not formally put in writing to MB.

Order to be Made

39. The current limited facility for oral hearings due to the Covid-19 pandemic prompts the Court to invite in view of the imminent long Easter weekend, the solicitors for the plaintiffs to furnish a draft of the orders which can be made in view of this judgement to the solicitors for these defendants before 4pm on the 17th April 2020. Then the solicitors

for these defendants should reply by email before 4pm on the 24th April 2020 with any suggested changes or additions. The plaintiffs' solicitors are then requested to furnish to the registrar while copying the solicitors for these defendants a copy of that exchange of correspondence with a view to making an order which can be perfected without further delay. The Court asks the registrar to circulate after the electronic delivery of this judgement a draft of the orders which the parties may wish to consider in their exchanges. The parties are further invited to agree or suggest such time and means which will accommodate counsel and solicitors alike to hear oral submissions if they are necessary. I clarify that the registrar can perfect such orders on consent as can be made on receipt of verified communications from the solicitors on record for the plaintiffs and these defendants.

Counsel for the Plaintiffs: Rossa Fanning and Padraic Lyons

Solicitors for the Plaintiffs: Mason Hayes Curran

Counsel for the first and third named defendants: Andrew Fitzpatrick and Ellen Gleeson

Solicitors for the first and third named defendants: Daniel Spring & Company