

**THE HIGH COURT**

[2021] IEHC 724

**Record No. 2020/117S**

**BETWEEN:**

**LEONARD & WOODS DEVELOPMENTS LIMITED**

**PLAINTIFF**

**-AND-**

**BRIAN PAGNI**

**DEFENDANT**

**Judgment of Mr. Justice Cian Ferriter delivered this 22nd day of November 2021**

**Introduction**

1. This is an application by the Plaintiff for summary judgment against the Defendant in the sum of €388,906.74. The Defendant seeks to have the matter remitted to plenary hearing on the basis that he has arguable defences to the claim.
2. The Plaintiff is predecessor in title to the landlord of a number of units in the Boyne Shopping Centre, Drogheda, County Louth. The Defendant is a former director of a company called Matthews Chemists (Drogheda) Limited ("the Company") which leased a number of units in the shopping centre from the Plaintiff's predecessor in title. The Defendant guaranteed the discharge by the Company of *inter alia* its rent and service charge debts under the relevant leases. The Plaintiff's application for summary judgment arises from sums said to be owing pursuant to those guarantees.
3. The material factual background is as follows. The Plaintiff served a demand for outstanding rent and service charges on the Company in March 2018 and, after a failure to satisfy that demand, presented a Winding-Up Petition to the High Court on 26th June, 2018. The Company presented an Examinership Petition to the High Court on 3rd August, 2018 and an Examiner was appointed by the High Court on 20th August, 2018. The Examiner prepared a Scheme of Arrangement ("the Scheme") dated 31st October 2018 and convened meetings of various classes of creditors to allow the creditors vote on the Scheme. The High Court ultimately approved the Scheme as prepared by the Examiner. Under the terms of the Scheme, the Plaintiff received 5% of its debt in full and final settlement of its claim against the Company.
4. The Defendant is a former director of the Company and in that capacity had guaranteed the debts of the Company (including its rent and service charge debts) to the Plaintiff's predecessor in title. There is no dispute as to the sums left owing to the Plaintiff in respect of the rent and service charge arrears, net of the sums recouped by the Plaintiff in the Examinership. Rather, the Defendant contends that he has two arguable grounds of defence stemming from the operation of the provisions of s.549 of the Companies Act, 2014 ("s.549").
5. s.549 contains provisions dealing with a situation where a creditor proposes to enforce, by legal proceedings or otherwise, the obligation of a third party (such as a guarantor) in respect of a liability of a company in examinership to the creditor. Given its centrality to the case made by the Defendant on this application, I set out s.549 in full below: -

*"549. (1) If the creditor proposes to enforce, by legal proceedings or otherwise, the obligation of the third person in respect of the liability, then he or she shall—*

- (a) if 14 days or more notice is given of such meeting, at least 14 days before the day on which the meeting concerned under section 540 to consider the proposals is held, or*
- (b) if less than 14 days' notice is given of such meeting, not more than 48 hours after he or she has received notice of such meeting,*

*serve a notice on the third person containing the following offer.*

- (2) That offer is an offer in writing by the creditor to transfer to the third person (which the creditor is, by virtue of this section, empowered to do) any rights, so far as they relate to the debt, he or she may have under section 540 to vote in respect of proposals for a compromise or scheme of arrangement in relation to the company.*
- (3) If that offer is accepted by the third person, that offer shall, if the third person furnishes to the examiner at the meeting concerned, a copy of the offer and informs the examiner of his or her having accepted it, operate, without the necessity for any assignment or the execution of any other instrument, to entitle the third person to exercise the rights referred to in subsection (2).*
- (4) However neither that transfer nor any vote cast by the third person on foot of the transfer shall operate to prejudice the right of the creditor to object to the proposals under section 543.*
- (5) If the creditor fails to make the offer referred to in subsection (1) in accordance with that subsection, then, subject to subsection (6), the creditor may not enforce by legal proceedings or otherwise the obligation of the third person in respect of the liability.*
- (6) Subsection (5) shall not apply if—*
  - (a) a compromise or scheme of arrangement in relation to the company is not entered into or does not take effect under section 542 (3); and*
  - (b) in either of those cases, the creditor has obtained the leave of the court to enforce the obligation of the third person in respect of the liability.*

### **Defendant's Position**

- 6. In short, the Defendant contends that he has two arguable defences to the Plaintiff's claim.
- 7. Firstly, he contends that the Plaintiff failed to comply with the provisions of s.549(1) to the effect that the Plaintiff was obliged, if it wished to enforce the guarantee obligations against the Defendant by legal proceedings, to serve a notice on the Defendant containing the offer set out in s.549(2) ("the Offer Notice") not more than 48 hours after the Plaintiff

had received notice of the meeting convened by the Examiner to consider the proposals contained in the Scheme.

8. Secondly, the Defendant contends that he has an arguable defence to the Plaintiff's claim for summary judgment in circumstances where, notwithstanding the election by the Plaintiff to serve the Offer Notice on the Defendant pursuant to s.549(1), the Plaintiff thereafter acted inconsistently with the Offer Notice and arguably conducted itself in such a manner as to revoke the offer, by executing and sending a proxy form to the Examiner to allow the Plaintiff (*via* its proxy) participate in the creditors' meeting which was to consider and vote on the Scheme and by the proxy turning up and voting in favour of the Scheme on the Plaintiff's behalf at the creditors' meeting.

### **Applicable Legal Principles**

9. I will consider the factual and legal context in which these arguable defences are said to arise shortly. Before I do so, it is necessary to briefly summarise the legal principles relevant to an application for summary judgment. These principles are well established and are not in dispute between the parties. Those principles may be summarised as follows:-
- (a) has the Defendant raised a fair or reasonable probability of a real or *bona fide* defence to the Plaintiff's claims (*Aer Rianta v. Ryanair* [2001] 4 IR 607);
  - (b) the fundamental question remains: "*Is it very clear that the Defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the Defendant's affidavits fail to disclose even an arguable defence?*" (*Aer Rianta v. Ryanair* [2001] 4 IR 607 at 623 (Hardiman J.));
  - (c) if issues of law or construction are put forward as providing an arguable defence, then the Court can assess those issues to determine whether the propositions advanced are stateable as a matter of law, and it is arguable that, if determined in favour of the Defendant, they would provide for a defence (Clarke J. (as he then was) in *McGrath v. O'Driscoll* [2007] 1 ILRM 203 as approved by Laffoy J. in the Supreme Court in *Promontoria (Aran) Limited v. Tiernan* [2016] IESC 67);
  - (d) where the factual basis for an arguable defence is not within the defendant's own knowledge, an arguable defence may nonetheless be made out if the defendant establishes a credible basis for suggesting that witnesses will be available who will depose to facts which might arguably give rise to a defence or where the true nature of a defendant's defence will rest in evidence (whether documentary or otherwise) which will only become available through procedural devices such as discovery, interrogatories or the like. In this regard, mere assertion is insufficient. A credible basis for the assertion needs to be put forward even if it is not, at the stage of the motion for summary judgment, possible to put before the court direct evidence of the assertion concerned (Clarke J. (as he then was) in *GE Woodchester v Aktiv Kapital* [2009] IEHC 512);

- (e) the fact that the defence sought to be raised may be novel does not of itself alter the test to be applied on a summary judgment application: see, e.g., *NALM v. Barden* [2013] 2 IR 28 at 43).

### **Has the Defendant raised an arguable defence here?**

#### **Offer Notice sent out of time?**

10. I will consider first whether, in light of the foregoing principles, the Defendant has raised an arguable defence as to whether the Plaintiff failed to comply with the requirements of s.549(1) and (2) in relation to the service of the Offer Notice on the Defendant.
11. As there were less than 14 days' notice of the creditors' meeting under s.540 to consider the Examiner's proposals for a Scheme, it is common case that s.549(1)(b) applied, i.e. that the obligation was on the Plaintiff to serve the Offer Notice on the Defendant "*not more than 48 hours after*" it had "*received notice of such meeting*" i.e. notice from the Examiner of the creditors' meeting scheduled for (Wednesday) 7th November, 2018 ("the Meeting Notice").
12. It is common case that the Plaintiff served an Offer Notice for the purposes of s.549 on the Defendant on Tuesday, 6th November, 2018. It is also common case, on the basis of the decision of Finlay Geoghegan J. (when in the High Court) in *Padraic Tuffey Limited v. O'Neill* [2013] IEHC 231, that the 48 hours in s.549(1)(b) runs from the time of actual receipt of the Meeting Notice. The issue then is whether there is an arguable basis to suggest that the Plaintiff received the Meeting Notice some time before Monday 5th November, 2018; in particular whether the Meeting Notice was likely received the previous Friday, 2nd November, 2018.
13. The Defendant avers in his affidavit that he understands that the Meeting Notice dated Wednesday, 31st October, 2018 was sent to the Plaintiff by post and that "*if it was sent by post, then presumably the post ought to have been received by Friday, 2nd November, 2018*". He avers that the Examiner also sent a notice convening the meeting of creditors to him and that he received it on Friday, 2nd November, 2018 and he also received a s.549 (offer) notice from another creditor on 2nd November, 2018.
14. It is common case that the Plaintiff served its s.549 Offer Notice on the Defendant on the afternoon of Tuesday, 6th November, 2018. The Defendant then averred that:-

*"The Plaintiff served his Notice [i.e. the Offer Notice] on the afternoon of Tuesday, 6th November, 2018 – 6 days after the Examiner sent the Notice [i.e. the Meeting Notice]. I do not know that this was within the 48 hours of when the Plaintiff received the Notice sent on 31st October, 2018. If it was not, then the Plaintiff cannot seek to enforce the guarantee against me either by these proceedings or otherwise. I do not know when the [Meeting] Notice was received by the Plaintiff. This issue was highlighted in correspondence and Mr. Smyth has not addressed it in what can only be described as a very lengthy grounding affidavit. I intend seeking discovery to resolve this issue".*

15. William Smyth, a director of the Plaintiff company, has sworn an affidavit in which he avers that while the cover letter from PwC (the Examiner's firm) containing the Meeting Notice was dated Wednesday, 31st October, 2018, it was not, in fact, received by the Plaintiff until Monday, 5th November, 2018. He avers that it arrived by regular post. He has exhibited a copy of the letter which is date-stamped as received on 5th November, 2018 (the relevant stamp reads "*Fitzwilliam Properties – 5 Nov 2018 RECEIVED*" and is initialled "DK"). It is accepted for the purposes of this application that Fitzwilliam Properties was the registered business name of the Plaintiff and that DK was Dawn Kane who worked for the Plaintiff.
16. Mr. Smyth avers that "*to put the position beyond doubt*" there were a series of three e-mails exchanged between a member of the Plaintiff's staff and the Plaintiff's solicitor on Monday, 5th November, 2018 which corroborate the actual date of receipt. The first of those e-mails from Ms. Kane to the Plaintiff's solicitor, Mr. Peter Kearney, is dated 5th November, 2018 and timed at 10:39 (and is cc'd to a number of people, including Mr. Smyth). The subject of the e-mail is described as "*Pagni/Boyne Centre*". The e-mail in material part states that "*Attached is a letter received today from PwC (with Scheme of Arrangement) re: Pagni/Boyne Centre*" and states that the relevant staff of the Plaintiff will be in touch soon.
17. The Plaintiff's solicitor, Mr. Kearney, replied to that e-mail on the same day at 14:36 stating as follows:-

*"Could you just confirm that the hard copy received this morning was the only version received? That is, I take it nothing was received by e-mail or fax before the weekend? It is just relevant from a timing perspective as we need to know [sic - likely meant "now"] issue certain correspondence within a fixed timeframe".*
18. Ms. Kane then replied a short time later (at 15:05) to confirm "*Yes first version received this morning via post*".
19. Mr. Smyth swore a further affidavit in which he drew attention to the date-stamp for the receipt by the Plaintiff on 5th November, 2018 of the letter and exhibited the series of e-mails between Ms. Kane and the Plaintiff's solicitor, Mr. Kearney, of that date, referred to above.
20. The Plaintiff submits that the Defendant has adduced no credible evidence to cast any doubt on the fact that the Plaintiff did not receive the Meeting Notice until the morning of 5th November, 2018, within 48 hours of service of the Offer Notice as required by s.549(1)(b).
21. In my view, there is no arguable basis for a contention that the Plaintiff's Offer Notice under s.549 was served out of time on the Defendant. The Defendant frankly stated on affidavit that he did not know when the Plaintiff received the Offer Notice and that in the absence of evidence of same, he would need to seek discovery to advance resolution of that issue. The matter has been put beyond doubt by Mr. Smyth's affidavit evidence. I

do not believe that it can be reasonably said that there is any credible basis advanced by the Defendant to seek to contend that the unequivocal and contemporaneously corroborated evidence of the Plaintiff on the question of the date and time of receipt of the Meeting Notice from the Examiner can be challenged such as to raise an arguable defence as to non-compliance of the Plaintiff with s.549(1) (and therefore a legal impediment to the Plaintiff pursuing its claim for judgment).

22. I do not see how any of the procedural mechanisms available to a defendant in a plenary hearing could advance the matter further. The fact that the Defendant himself got notice of the meeting at an earlier point does not provide a credible basis for a contention that the Plaintiff's sworn evidence as to the date of receipt, and the clear contemporaneous corroborating material supporting the Plaintiff's position on the date of receipt, can be questioned.

**Offer Revoked?**

23. I will turn then to the second arguable defence contended for by the Defendant. The factual position on the affidavit material before the Court on the second arguable defence is as follows. As we have seen, the Plaintiff served the Offer Notice for the purposes of s.549 on the Defendant on Tuesday 6th November, 2018. The creditors' meeting was scheduled for, and in fact took place, on Wednesday 7th November, 2018.
24. The Offer Notice stated, in compliance with the terms of s.549(2), that the Defendant was prepared to make an offer for the purposes of s.549 to transfer to the Defendant any rights insofar as they relate to the debts of the Company which the Plaintiff may have under s.540 of the 2014 Act to vote in respect of proposals for a compromise of a Scheme of Arrangement in relation to Pagni Pharmacies Limited, the Company or any other company within the group. The Offer Notice went on to state that:-

*"If you accept this offer, then a copy of this Notice should be furnished to the Examiner at the meeting due to take place on 7th November, 2018 and the Examiner should be informed of your position and your intention to exercise those voting rights. We strongly recommend that you take legal advice in relation to this Notice in advance of the meeting".*

25. The Defendant avers that he did not attend the meeting, nor did he communicate to the Plaintiff that he would or would not accept the written offer or attend or not attend at the meeting.
26. On 6th November, 2018, the Plaintiff's solicitors sent to the Examiner an executed General Proxy in advance of the creditors' meeting scheduled for the following day. The Plaintiff states that the Examiner had stipulated that the General Proxy forms were to be returned to him by 4 p.m., 6th November, 2018.
27. Pursuant to the terms of this executed General Proxy, the Plaintiff, as a creditor of the Company, appointed Mr. Peter Kearney of Reddy Charlton, Solicitors, as its "General

*Proxy to vote at the Meeting of Creditors to be held in the above matter on 7 November, 2018 and any adjournment thereof". The General Proxy went on to state:*

*"Unless otherwise directed, and in respect of any other resolution properly moved at the Meeting, the Proxy will vote, or may abstain from voting, as he or she thinks fit".*

28. Mr Kearney then attended the creditors' meeting on Wednesday 7th November, 2018 on the Plaintiff's behalf. Mr Kearney avers that the Defendant was not in attendance at the meeting of 7th November, 2018. Mr Kearney further avers that at the outset of the meeting, he *"asked the Examiner, Mr Ken Tyrell of PwC and his solicitor, Mr Michael Murphy,... whether any communications had been received from the defendant in relation to the notice served on him by my firm pursuant to section 549 of the Companies Act 2014. Mr Tyrell and Mr Murphy briefly conferred before confirming that nothing had been received from the defendant by either of them."*
29. Mr Kearney then avers that *"the defendant is alleging that my participation at the meeting in the role of proxy for the plaintiff somehow invalidated the offer conveyed to him pursuant to the notice. That is clearly not the case, as I ensured to enquire as to whether the defendant had done anything in response to the offer before participating in the meeting further."*
30. Mr Kearney further averred that *"I am prepared to contact both Mr Tyrrell and Mr Murphy to obtain their confirmation of this issue if required. However, I trust this affidavit will suffice to confirm the point."*
31. Having established that the Defendant was not present at the creditors' meeting, and having established from the Examiner and the Examiner's solicitor that nothing had been received from the defendant by either of them in relation to the offer notice, Mr Kearney proceeded to exercise the proxy on the Plaintiff's behalf by voting in favour of the proposed scheme at the creditors' meeting.
32. The Defendant contends that this course of action i.e. executing a proxy form, sending the proxy to the meeting and the proxy voting on its behalf at the meeting amounts to the Plaintiff acting inconsistently with the s.549 (2) offer such that it is arguable that the offer was revoked.
33. The Defendant submits that there is no reported authority on the interplay between appointing a proxy to represent a party's interest at a creditors' meeting and serving an offer notice under s.549 to a guarantor in relation to the same meeting. The Defendant contends that the Plaintiff revoked its s.549 offer to the Defendant by appointing someone to represent it at the meeting who in fact then voted in favour of the Scheme at the meeting. It is contended that this is a novel question, is stateable as a matter of law, and that the matter should be remitted to plenary hearing as a result.

34. Counsel for the Plaintiff accepted that it may be possible on a given set of facts to generate an arguable contention as to an unlawfully inconsistent set of actions by a creditor who has sent an offer notice to a guarantor pursuant to s.549, but who then seeks to act in a manner that negates the effect of the offer e.g. by contesting the validity of a purported acceptance of the offer by the guarantor where the guarantor has turned up at the meeting or the guarantor having confirmed acceptance of the offer prior to the meeting but not then showing up to the meeting (perhaps for some good excusable reason) and the creditor thereafter seeking to vote at the meeting as if the offer had not been accepted. However, the Plaintiff submits that there is no inconsistency at all in a creditor attending a creditors' meeting through a proxy in circumstances where at the time the proxy is executed and the proxy attends the meeting, there is no indication from the third party the subject of the offer that it intends to accept the offer.
35. This is borne out on the facts here, it is submitted, by the actions of Mr. Kearney, the Plaintiff's appointed proxy for the meeting, in making careful enquiry of the Examiner at the outset of the meeting as to the whether the defendant guarantor had been in contact with the Examiner in relation to the offer and checking whether the Defendant was, in fact, present at the meeting and then only acting thereafter on foot of the proxy once it was clear that the Defendant was neither present nor had communicated acceptance of the offer.
36. In my view, the matter is very clear. The s.549 offer was made by the Plaintiff to the Defendant. The Defendant made no contact with the Plaintiff in advance of the meeting. The Defendant did not show up at the creditors' meeting. The Defendant never communicated or sought to communicate acceptance of the offer. There is therefore no question of the Plaintiff having then acted inconsistently with s.549(3) at the meeting. s.549(3) clearly requires that if the offer has been accepted by the guarantor, the guarantor must furnish to the Examiner at the meeting a copy of the offer and inform the Examiner of his or her having accepted it. If those steps are fulfilled, the guarantor is then entitled to exercise the voting rights under s.540 in respect of the proposal of a Scheme. It is very clear that the statutory provisions place an onus on the guarantor to positively indicate an acceptance of the offer, before the guarantor is in a position to displace the creditors right to vote at the meeting. None of that happened here.
37. No authority has been cited in support of the proposition that the Plaintiff's conduct on the facts here could even arguably amount to a revocation of the offer. The offer stood to the point of the commencement of the meeting. It was not accepted by the Defendant. The Defendant did not turn up at the meeting, still less furnish to the Examiner a copy of the offer or inform the Examiner of his having accepted it. The Plaintiff was perfectly free in those circumstances to have its proxy vote on its behalf at the meeting.
38. I do not see how it can be credibly asserted that the pre-trial procedures available in plenary proceedings could lead to any potentially different factual, evidential or legal scenario that might yield an arguable defence. Quite simply, the onus was on the defendant to turn up at the creditors meeting and communicate acceptance of the offer.



He did neither. That state of affairs will not be altered, even arguably, by any procedural mechanism available in the event that the matter is remitted to plenary hearing.

**Conclusion**

39. The Defendant having raised no arguable defence to the Plaintiff's claim and the Plaintiff's proofs being otherwise in order, the Court grants liberty to the Plaintiff to enter final judgment against the Defendant in the sum of €388,906.74.
  
40. I propose to award the Plaintiff's its costs of the application to be adjudicated in default of agreement on the basis that costs follow the event. I will give liberty to the Defendant to apply within 7 days if the Defendant wishes to make any argument as to why costs should not follow the event; otherwise costs will be ordered as indicated.