THE HIGH COURT

[2024] IEHC 256

[Record No. 2022/316 S]

BETWEEN

SANCUS (IOM) LIMITED

PLAINTIFF

AND

DENIS CORBETT

DEFENDANT

JUDGMENT of Ms Justice Marguerite Bolger delivered on the 1st day of May 2024

1. This is a claim for summary judgment on a summary summons dated 25 October 2022. For the reasons set out below I am refusing this application.

2. The defendant was one of three guarantors for a loan advanced by the plaintiff to a third party in July 2017 which was not repaid. The plaintiff entered into a settlement agreement with the defendant and the other two guarantors dated 17 September 2021 which provided for, *inter alia,* the net proceeds of the sale of a site to be paid to the plaintiff pursuant to a solicitor's letter of undertaking that was attached to the terms of the settlement and which undertook to pay the proceeds of sale within 48 hours of the completion of the sale of the site. The terms of settlement also provided that if there was any default in respect of that payment, that the parties consented to a High Court judgment in respect of the loan against them by the plaintiff for such amount as may be outstanding at the date of such breach.

3. The terms of that settlement agreement are also reflected in correspondence preceding the agreement. Neither that correspondence nor the terms of the settlement agreement provided for a date by which the site was to be sold or any default provision in the event of the site not being sold. The first time a deadline for the sale of the site was asserted was in correspondence from the plaintiff's solicitor of 26 October 2021, shortly after the execution of the agreement. Further deadlines were asserted and then extended by the plaintiff's solicitor in subsequent correspondence. During this time the defendant's solicitor's

correspondence records the attempts that were being made to sell the site and to keep the plaintiff informed of progress and the reasons for various delays in the sale. There is no suggestion that those attempts to sell the site were not *bona fide*. Most of that correspondence refers to the defendant's co-guarantor, Denton Agri Limited, and some of it also refers to the defendant. Eventually by letter dated 21 September 2022 the plaintiff's solicitor wrote to the defendant's solicitor (who was also the solicitor for Denton Agri Limited) making the following points for the first time:-

(i) That clause 1 of the settlement agreement was to be complied with by *"your client"* on or before 5p.m. on 7 October 2022 and that time shall be of the essence in relation to this date.

(ii) If *"your client"* did not comply with clause 1 by that date, a summary summons would proceed pursuant to the terms of the settlement agreement seeking judgment jointly and severally against the defendant, Denton Agri Limited and the third guarantor.

That letter was sent to the defendant's solicitor expressly as solicitor for Denton Agri Limited and only mentioned the defendant as one of the three parties against whom the summary proceedings would be issued.

4. The plaintiff says the defendant has no defence and that the terms of the settlement agreement have been breached as they had made time of the essence for the sale of the site where the parties had always operated on the basis that the sale was to proceed with expedition. They also claim an anticipatory breach of the agreement as they say the defendant has shown his inability to perform his obligation.

5. The defendant highlights the absence in the settlement agreement of a date by which the sale of the site was to take place. Insofar as the plaintiff sought in correspondence to make time of the essence, the defendant's counsel said in oral argument that no such letter was sent to the defendant and that the plaintiff therefore failed to give reasonable notice. I do not think this point about not having been giv en reasonable notice is *"a mere assertion of a given situation which is to form the basis of a defence"*, as per (xi) of the principles set out by McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1. Rather, I consider it to be a point well-made and one that grounds what the defendant has submitted is evidence the court will have to hear, about whether the sale could have been completed within 16 days (being the period of time from the date of the letter to the defendant's solicitors to

when the summary summons was issued), evidence about why the purchase of the site was not completed and what would have been a reasonable time for the vendor to remarket the site and find an alternative purchaser once it became clear that the proposed purchaser could not complete the sale. The plaintiff has not satisfied me that the defendant is unable to perform his obligation. The defendant has satisfied me that he has an arguable defence.

6. I have also had regard to (xii) of McKechnie J.'s principles, i.e.:-

> *"The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter Judgment or leave to defend, as the case may be."*

In addition to my view that the defendant has established an arguable defence that will require evidence to be heard, I am satisfied that allowing the defendant leave to defend these proceedings is a better way to achieve a just result and draw the appropriate balance between the plaintiff's right of access to justice (including to such costs orders as may be made by the trial judge in the event that they find the defendant has no defence and in circumstances where it has not been suggested that the defendant is not a mark for such costs) and the defendant's right to respond to the plaintiff's claim and adduce such evidence as he says is necessary.

7. I therefore refuse the plaintiff's application for summary judgment and direct that the matter shall proceed to plenary hearing.

Indicative view on costs

8. Clarke J. in *ACC Bank Plc v. Hanrahan* [2014] 1 I.R. 1 observed that where the court permitted the matter to plenary hearing and was satisfied that the plaintiff had acted in a particular manner in not agreeing to that course of action, the court should consider whether the justice of the case requires of some or all of the costs of the summary judgment motion to be borne by the plaintiff. He also said in the majority of these cases that:-

> *"the costs of a summary judgment motion as a result of which the proceedings are remitted to plenary hearing should either be reserved or become costs in the cause."*

9. In the circumstances of this case, I do not consider there is evidence of unreasonable behaviour by the plaintiff such as was referred to by Clarke J. The plaintiff believes the defendant has no defence to his claim and ultimately this will be a matter for the trial judge.

In those circumstances my indictive view on costs is that the costs of the motion should be treated as costs in the cause.

10. I will list the mater for mention before me at 10:30a.m. on 10 May 2024 to allow the parties to make such further submissions and costs that they wish to make and to hear whatever submissions the parties wish to make and the final orders to be made.

Counsel for the plaintiff: John E. Donnelly S.C., Paul J. Brady B.L.

Counsel for the defendant: Ross Gorman B.L.