

**THE HIGH COURT**

**[2018/1986 P.]**

**BETWEEN**

**BGB PROPERTY HOLDINGS LIMITED, ARNO PROPERTIES LIMITED, TAGUS  
PROPERTIES LIMITED, TIBER PROPERTIES LIMITED AND DOWNBY DEVELOPMENTS  
LIMITED**

**PLAINTIFFS**

**AND**

**TIFCO LIMITED**

**DEFENDANT**

**JUDGMENT of Ms. Justice Reynolds delivered on the 29th day of May 2020**

**Introduction**

1. In this application, the defendant seeks an order pursuant to the inherent jurisdiction of the court striking out the within proceedings on the grounds that they are frivolous and vexatious and/or disclose no reasonable cause of action and/or are bound to fail.
2. In the proceedings, the plaintiffs claim an indemnity from the defendant in the sum of €3,500,500 in respect of losses incurred as a result of the breach by the defendant of its obligations under a Sinking Fund Agreement and Charge dated 9 October 2007 ("the SFAC").

**Relevant facts**

3. There is no factual dispute between the parties and they have kindly assisted the Court by preparing an agreed factual chronology as to the events giving rise to the within proceedings.
4. Under a Development Agreement dated 31 July 2006, the fifth plaintiff ("Downby") agreed to procure the building of the Crowne Plaza Hotel at Green Park Estate, Dundalk, Co. Louth ("the Hotel"). The Hotel was to be delivered to the first to fourth plaintiffs ("the Borrowers") with the intent that it would be operated by the defendant ("Tifco").
5. Under an Investment Facility Agreement dated 21 July 2006 ("the Facility Agreement"), Anglo Irish Bank Corporation plc (subsequently Irish Bank Resolution Corporation Limited) ("the Bank") granted a seven-year loan of €25,500,000 to the Borrowers to part finance the development of the Hotel.
6. The Borrowers and Tifco entered into a lease of the Hotel dated 9 October 2007 for a term of 34 years and nine months ("the Lease"). Tifco's obligations under the Lease were guaranteed by Banesto Limited ("Banesto").
7. In addition, the Borrowers, Tifco and Banesto entered into a Put and Call Option Agreement dated 9 October 2007 ("the Option Agreement") under which the Borrowers could call on Tifco to purchase the freehold in the Hotel from them, and Tifco could call on the Borrowers to sell the freehold in the Hotel to it. The option price specified in the Option Agreement was to be a sum of not less than €25,810,000 or the amount then due by the Borrowers to the Bank under the Facility Agreement ("the Option Price").

8. As security for its obligations under the Option Agreement, Tifco and the Borrowers entered into the Sinking Fund Agreement and Charge dated 9 October 2007 ("the SFAC").
9. Under the SFAC, Tifco agreed to pay €4 million into a sinking fund in a designated security account with the Bank. That sum was to be deposited by Tifco by way of five equal yearly instalments between 9 October 2010 and 9 October 2014 of €800,000 each.
10. As security for the Facility Agreement, the Bank obtained charges over the Lease, the Option Agreement and the SFAC and in addition a guarantee from Banesto in respect of Tifco's contractual obligations.
11. Further, the Bank obtained a charge over a deposit of €3,500,000 placed by the Downby with the Bank. The Bank's charge over that sum of €3,500,000 was provided for in an Account Charge between Downby and the Bank dated 9 October 2007 ("the Account Charge"),
12. Tifco failed to make the scheduled payments into the designated security account. The only payment made by Tifco to the account was €292,000 paid on 31 August 2009.
13. On 9 February 2012, the Bank called on the Borrowers to procure Tifco's compliance with the SFAC within 21 days. On 6 March 2012, the Bank again wrote to the Borrowers, notifying them that an Event of Default had occurred under the Facility Agreement. By further letter dated 23 July 2012, the Bank demanded immediate payment by the Borrowers of the amount then outstanding under the Facility Agreement, being a sum in excess of €26 million.
14. On or about 24 July 2012, the Bank enforced the Account Charge against Downby over the deposit of €3,500,000. The Bank appropriated those monies and applied them in part discharge of the Borrowers' obligations under the Facility Agreement.
15. On 23 May 2014, the Bank transferred the Facility Agreement and all related security to Beltany Property Finance DAC ("Beltany"), a company ultimately owned by the Goldman Sachs Group.
16. On 10 December 2014, Beltany issued a demand calling for the Borrowers to repay the amount then due under the Facility Agreement, which at that time was in excess of €23 million. The Borrowers failed to satisfy that demand, and on 15 December 2014 Beltany appointed Kieran Wallace as receiver over the security ("the Receiver").
17. The Receiver (acting on his own behalf and as agent of the Borrowers) entered into a Settlement Agreement dated 15 December 2014 with Beltany, Tifco and Banesto (the Settlement Agreement").
18. Under the Settlement Agreement, the Receiver acknowledged that neither Tifco nor Banesto had the means by which to pay the Option Price under the Option Agreement, and Tifco agreed to buy the Hotel for €4 million. The purchase of the Hotel by Tifco for €4 million has completed.

19. The Settlement Agreement was expressed (in clause 2.2) to be *"in full and final settlement of all obligations or potential obligations of Tifco under, pursuant to or in connection with the Option Agreement."* It provided (in clause 2.4.3) that on completion of the sale of the Hotel, *"the Option Agreement will be terminated and all parties to the Option Agreement will be released from their obligations or potential obligations thereunder"*.
20. The Goldman Sachs Group took a majority interest in Tifco in December 2014.
21. The Borrowers (acting through the Receiver) and Tifco entered into a Deed of Release ("the Release") dated 22 December 2014.
22. The Release states (at Recital C) that the Borrowers *"have now agreed to release the security constituted by the Security Document..."*. The Security Document is defined in the Release as the SFAC.
23. The operative clause of the Release (Clause 1.1 ) provides that the *Borrowers "hereby grant, convey, assign, surrender and release unto Tifco all of its or their respective property, assets and undertaking secured by the Security Document to the intent that all the said property and assets shall henceforth be held by Tifco freed and discharged from all monies, liabilities and obligations now or at any time secured by the Security Document and from all claims and demands thereunder."*
24. In 2016, Downby (through its solicitors Leman) sought a copy of the Settlement Agreement from Beltany. Downby is not a party to the Settlement Agreement. A redacted version of the Settlement Agreement was furnished by Beltany's solicitors on 22 August 2017.
25. In November 2017, Leman Solicitors wrote to Tifco on behalf of Downby and the Borrowers calling for confirmation that Tifco was liable to Downby and the Borrowers in respect of the €3,500,000 appropriated by the Bank under the Account Charge. Tifco's solicitors replied on 4 December 2017 to indicate that any liability Tifco might have had to the Borrowers had been compromised under the Settlement Agreement. Leman Solicitors sought a copy of the Settlement Agreement and other information relating to the Settlement on 13 December 2017 and again on 24 January 2018. In circumstances where the information was not forthcoming, and when this was not provided Downby and the Borrowers commenced these proceedings by Plenary Summons on 8 March 2018. A copy of the Settlement Agreement was ultimately supplied (together with a copy of the Release) on 16 July 2018, subject to an agreement that those documents would be covered by the implied undertaking applicable to discovery.

#### **The Settlement Agreement**

26. Pursuant to the Settlement Agreement, Tifco purchased the Hotel for €4m: The Borrowers were released from any further obligations to pay Beltany; the security held by Beltany was released; and all parties were released from their obligations under the Option Agreement.

27. Clause 2 of the Settlement Agreement provided, inter alia, as follows: -

*"2.1 Tifco acknowledges that the Companies acting through the Receiver have a right to exercise a put option under and in accordance with the terms of the Option Agreement and to thereby require Tifco to purchase the Property. Tifco acknowledges the Option Price.*

*2.2 The Receiver acknowledges that neither Tifco nor Banesto have the means by which to pay the Option Price and has satisfied himself as to the market value of the property. Accordingly, the Parties agree the following, which agreement is in full and final settlement of all obligations or potential obligations of Tifco under, pursuant to or in connection with the Option Agreement..."*

28. Clause 2.4 of the Settlement Agreement further provided that, on completion of the sale of the Hotel to Tifco:

*"2.4.3 The Option Agreement will be terminated and all parties to the Option Agreement will be released from their obligations or potential obligations thereunder"*

#### **The Release**

29. In addition to the Settlement Agreement, the Borrowers and Tifco entered into the Release on 22 December 2014.

30. The relevant recitals to the Release state as follows: -

*A. By the Security Document specified in Schedule 2 hereto (the 'Security Document') Tifco granted to the Releasing Parties certain security for the due payment and discharge of certain monies, liabilities and obligations as is therein more particularly set forth.*

*B. By Deed of Appointment of Receiver dated on or about the date hereof (the 'Appointment'), Kieran Wallace (the 'Receiver') was duly appointed as Receiver of and over certain assets referred to and comprised in, and mortgaged and charged by the Security (as defined in the Appointment), and declared that the Receiver shall have and be entitled to exercise the powers conferred on him by the Security and by law.*

*C. The Releasing Parties, at the request of Tifco, have now agreed to release the security constituted by the Security Document in the manner hereinafter appearing and for the purpose of effecting such release, the Receiver, as agent of the Releasing Parties has agreed to join these presents in the manner hereinafter appearing."*

31. The "Security Document" referred to in those recitals is defined in Schedule 2 to the Release as the SFAC. The operative clause of the Release is Clause 1.1., which provides as follows:

*"The Releasing Parties, by the direction of the Receiver, hereby grant, convey, assign, surrender and release unto Tifco all of its or their respective property, assets and undertaking secured by the Security Document to the intent that all the said property and assets shall henceforth be held by Tifco freed and discharged from all monies, liabilities and obligations now or at any time secured by the Security Document and from all claims and demands thereunder."*

### **The proceedings**

32. The Borrowers and Downby commenced proceedings by Plenary Summons dated 8th March, 2018. The principal reliefs claimed are the following:

- "(i) A Declaration that the Plaintiffs are entitled to be indemnified and/or compensated by way of damages for breach of contract by the Defendant in respect of the appropriation, on or about 24 July 2012, by Irish Bank Resolution Corporation Ltd ("The Bank") of a sum of €3,500,000, being the subject of an Account Charge dated 9 October 2007 provided by the Fifth Named Plaintiff to the Bank as surety in respect financial facilities made available by the Bank to the First to Fourth Named Plaintiffs pursuant to an Investment Facility Agreement dated 31 July, 2006, which appropriation was caused and occasioned by reason of breach by the Defendant of its obligations to the First to Fourth Named Plaintiffs pursuant to a Sinking Fund Agreement and Charge made the 9 October, 2007;
- (ii) A Declaration that the Fifth Named Plaintiff' is entitled to the benefit of the said Declaration sought at (i) above pursuant to a binding agreement in writing entered into prior to the commencement of these proceedings by the First to Fourth Named Plaintiffs to assign their rights, entitlements and cause(s) of action in respect of the indemnity and damages sought at (i) above to the Fifth Named Plaintiff;
- (iii) An order directing the Defendant to indemnify and/or pay compensation in damages to the Plaintiffs pursuant to the Declaration sought at (i) above in respect of the said sum of €3,500,000, being the amount of the monies appropriated by the Bank on or about 24 July, 2012...."

33. The grounds on which those reliefs are sought by the Plaintiffs are set out in the Amended Statement of Claim delivered on 23 July 2018. It is clear from the claim as pleaded and from the reliefs sought that the Borrowers' claim derives wholly from Tifco's obligations under the SFAC. For example, at paragraphs 44 and 45, the Plaintiffs plead as follows: -

"By reason of the Defendant's continuing failure to comply with its obligations to the first four named Plaintiffs under the Sinking Fund Agreement and Charge, on or about 23 July, 2012, Anglo/IBRC wrote to the first four named Plaintiffs seeking immediate repayment of the facility in the amount of €26,341,631.26, and confirmed its entitlement to have recourse to the security provided by the first four named Plaintiffs in respect thereof."

On or about 24 July 2012, Anglo/IBRC exercised its rights under the Deposit Account Charge and appropriated the deposit account monies in the sum of €3,500,000, the property of the Fifth Named Plaintiff, and applied same in reduction of the amount owed to it by the first four named Plaintiffs”.

At paragraph 48, the plaintiffs plead: -

“Arising from the above, the first four named Plaintiffs became subject to a legal obligation to indemnify the Fifth Named Plaintiff in respect of its loss of the charged amount in the sum of €3,500,000”.

34. The Borrowers have agreed that Downby be included as a party to the proceedings against Tifco in respect of their losses. No cause of action is pleaded by Downby as against Tifco other than the claims made by the Borrowers in respect of the obligations of Tifco under the Option Agreement and the SFAC.
35. In its Defence delivered on 22 November, 2018, Tifco has pleaded a preliminary objection to the effect that the proceedings have been brought in breach of the Settlement Agreement and/or the Release.
36. The plaintiffs have responded to that plea as follows in their Reply delivered on 13 February, 2019:

“...it is denied that the Settlement Agreement or Deed of Release as pleaded have the effect of precluding the plaintiffs from maintaining these proceedings and the particulars and matters alleged in support of this plea are denied as if set out in full herein and traversed seriatim”.

The plaintiffs also plead, at 18 as follows: -

“. . . it is denied that the Release and/or Settlement Agreement had the effect contended for by the Defendant and they did not release the Defendant from its obligations as pleaded by the Plaintiffs. The Plaintiffs deny the particulars and assertions pleaded therein as if same were herein set forth in full and traversed seriatim. The Plaintiffs will refer to the full terms of the Settlement Agreement and the Release and to their proper construction and meaning at the hearing and in their legal submissions to be made to the Court in due course, which they will contend afford the Defendant no defence against the Plaintiffs’ claims herein”.

**Principles governing application to strike out pursuant to inherent jurisdiction**

37. Before embarking on any consideration of the relevant documents, it is first necessary to consider the court’s inherent jurisdiction to strike out or dismiss proceedings. It is well settled law that this jurisdiction should be “exercised sparingly and only in clear cases” as stated by Costello J. in *Barry v. Buckley [1981] I.R.306*. In considering the principles to be applied, the Court noted as follows:

“The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff’s claim must fail..”

38. The jurisdiction is, therefore, to be sparingly exercised and only invoked when it is clear that the proceedings are bound to fail, rather than where the plaintiff’s case is very weak or where it is sought to have an early determination on some point of fact or law (per Clarke J. in *Keohane v. Hynes* [2014] IESC 66. The jurisdiction is intended to protect against an abuse of process and the principal question for the court in determining such an application is whether the institution of the proceedings represents an abuse of process.

39. More recently in *Lopes v. Minister for Justice Equality and Law Reform* [2014] 2 I.R. 301, Clarke J in distinguishing between applications under the RSC and pursuant to the inherent jurisdiction stated as follows:

“In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in *Sun Fat Chan v. Osseous Ltd* [1992] I.R.425, at p 428, that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.”

40. Clarke J. went on to consider how certain types of cases are more amenable to an assessments of the facts at an early stage than others particularly where the proceedings are solely or significantly dependent on documents, and held as follows:

“Where the case is wholly, or significantly, dependent on documents, then it may be much easier for a court to reach an assessment as to whether the proceedings are bound to fail within the confines of a motion to dismiss. In that context, it is important to keep in mind the distinction, which I sought to analyse in *Salthill Properties Ltd. v Royal Bank of Scotland plc* [2009] IEHC 207, (unreported, High Court, Clarke J., 30 April 2009) between cases which are dependent in themselves on documents and cases where documents may form an important part of the evidence but where there is likely to be significant and potentially influential other evidence as well.”

#### **Interpretation of a Settlement Agreement**

41. The parties agree that the legal principles governing the interpretation of Settlement Agreements are no different to those governing the interpretation of contracts generally. This was recognised by the Supreme Court in *Danske Bank A/S v. Hegarty* [2012] IESC 30 where it was held that a Settlement Agreement is to be “...objectively construed in

accordance with the wording chosen by the parties seen in the general context of the circumstances in which the agreement was entered into.”

42. That decision was recently cited by the Court of Appeal in *Point Village Development Ltd v. Dunnes Stores [2019] IECA 233* where Whelan J. observed as follows:

“It is clear therefore that any subjective understanding on the part of one party as to the effect of words used in the Terms of Settlement or compromise is neither relevant nor admissible in the absence of any plea of mistake or a claim for rectification.”

### **Discussion**

43. There is no dispute between the parties but that the central issue in these proceedings turns on the correct interpretation of the Settlement Agreement and the Release. Tifco contends that the Plaintiff’s claim is bound to fail as it has been brought in breach of the Settlement Agreement and Release, and assert that the issue is simply one of contractual interpretation. It contends that it is an issue which is “wholly, or significantly, dependant on documents” as per Clarke J. in *Lopes* and falls within the ambit of cases which are quintessentially amenable to determination on an application to strike out.
44. The Settlement Agreement was entered into in full and final settlement of “all obligations and potential obligations of Tifco under, pursuant to or in connection with the Option Agreement”. The question that arises is whether it also effected a compromise of Tifco’s obligations under the SFAC. In other words, were Tifco’s obligations under the SFAC “obligations...in connection with the Option Agreement”?
45. Tifco contends that the purpose of the SFAC is clear from its terms and was entered into by the Borrowers and Tifco “to secure the performance of [Tifco’s] obligations as set out in the Option Agreement”. Further, it asserts that as the purpose of the SFAC was to secure Tifco’s obligations under the Option Agreement, the SFAC has no real existence independent of the Option Agreement.
46. Clause 2.4.1 of the Settlement Agreement provided that, upon completion of the sale of the Property the Borrowers will be released from any further liability to Beltany in connection with the Facility Letter and “the Security will be released by Beltany”. Tifco contends that the SFAC falls within the definition of “the Security”.
47. It further asserts that the matter is placed beyond all doubt by the Release, by which the Borrowers (acting through the Receiver) released to Tifco “all of its or their respective property, assets and undertaking secured by [the SFAC]”. The Release, at Clause 1, specified the effect of this, namely that Tifco would hold the SFAC “... freed and discharged from all monies, liabilities and obligations now or at any time secured by [the SFAC] and from all claims and demands thereunder”.
48. In response, the Plaintiffs maintain that the application is not an appropriate application for consideration on a motion to strike out the proceedings *in limine* and contend that the meaning of the Settlement Agreement and the Release must be construed against the



relevant factual matrix, which can only be considered after discovery and a full trial of the issues.

49. The Plaintiffs contend that the non-payment of the monies into the SFAC, which was a breach of contract, gave rise to a liability. Thereafter, it asserts that whilst the Settlement Agreement released "obligations" it did not release "liabilities".

50. In considering the appropriate principles to be applied, the Plaintiffs invited the court to consider the approach adopted recently by Simons in *Clarington Developments Limited v. HCC International Insurance Company PLC* [2019] IEHC 630. That case concerned the interpretation of a bond provided in connection with a construction contract where the bond was in an utterly standard form. What was of particular concern was the ambit of the jurisdiction to strike out where the construction of documents was at issue. Having considered the relevant jurisprudence, Simons J. held that the court may be able to resolve straightforward issues of contractual interpretation on a summary application without the risk of injustice to parties, 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, ie without resort to extrinsic evidence. Finally, the legal issues must be straightforward."

51. In the instant case, the Plaintiffs contend that there is a factual dispute between the parties as to the validity of the contractual documents in circumstances where they were strangers to the documents and have no knowledge of how they came into existence. Indeed, there is no evidence on affidavit in this application as to how the documents came about as the solicitor who swore the affidavit grounding the application was not involved in those transactions and therefore not actually privy to any of the facts relating to the generation of the documents.

52. Further, the Plaintiffs do not accept that the contractual documents represent the entire agreement between the parties in circumstances where it is apparent that the Settlement Agreement required a number of transactions to take place and the generation of additional documentation which has not been disclosed. The Plaintiffs' application for discovery in this regard remains live whilst Tifco pursues the within application.

53. In addition, the Plaintiffs maintain that the proper construction of the Settlement Agreement and Release require the factual matrix surrounding the 2014 transactions, and all documents forming part thereof, to be examined for that purpose.

54. In the circumstances, it is submitted that the legal issues are far from straightforward. In considering the proper construction of the contractual documents, it is contended that words of the Release are to be construed in accordance with, and, if necessary, read down to meet, the reasonable expectations of the parties, and should not, unless absolutely necessitated by both the choice of words used, and the context in which the words are used, be extended generally to release claims of which the parties were not aware. In this regard, the Plaintiffs rely on the leading authority on the proper construction of releases, the decision of the UK House of Lords in *BCCI v. Ali* [2001 1 All ER 961 at 965, para. 9 where Bingham LJ stated:-

“But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights in claims of which he was unaware and could not have been aware.”

55. In summary, the Plaintiffs posit that the core issue in this application relating to construction of the documents is not a “straightforward” one which lends itself to resolution “on a summary application without the risk of injustice to the parties” as per Simons J in the *Clarington Developments Ltd* case.

### **Conclusions**

56. In analysing the issues raised, I can only conclude that the full factual matrix surrounding the genesis of the contractual documents in 2014, together with all documents forming part thereof, are required for the purposes of enabling the proper construction of the Settlement Agreement and the Deed of Release. It is not the function of this Court to seek to definitively construe these documents. However, it is sufficient for the Plaintiffs to demonstrate that Tifco’s preferred construction of the documents is not bound to succeed.

57. Whilst Tifco has relied upon a number of authorities in support of its application, it is notable that in each case a full exposition of the relevant facts was provided to the court by the moving party to allow it to safely form a view as to the prospects for success of the action. I have not had the benefit of such evidence in this application for the reasons as already outlined.

58. Further, I am satisfied that the Plaintiffs have presented a “credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings” as per Clarke J in *Lopes*.

59. In addition, it is readily apparent that the factual dispute surrounding the contractual documents and the issue of any supporting documentation together with the legal issues which have been raised by the Plaintiffs take the within application outside of the scope of the “clear cases” that are amendable to resolution on summary application. The application must therefore fail.

### **Proposed Order**

60. I propose to make an order dismissing the application herein and will hear from the parties on the issue of costs.