APPROVED **[2022] IEHC 499**

THE HIGH COURT

2020 No. 46 S

BETWEEN

BRENDAN MULLIN

PLAINTIFF

AND

JOHN G. BURNS LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 31 August 2022

INTRODUCTION

1. This matter comes before the court by way of an application to enter judgment in summary proceedings. The debt arises under a settlement agreement entered into between the parties in respect of earlier proceedings. The defendant has, on its own admission, failed to comply with the schedule of payments prescribed under the settlement agreement.

2. The defendant seeks to resist judgment on the basis that its obligation to comply with the schedule of payments is, supposedly, contingent on its being retained to provide building services to the plaintiff and/or a company said to be controlled by the plaintiff. In effect, it is said that the scheduled payments under the

settlement agreement were to be funded out of fees which the defendant would receive for these building services.

3. For the reasons explained below, I have concluded that the terms of the settlement agreement are unequivocal, and that the defendant has failed to demonstrate a credible defence to the proceedings.

PRINCIPLES GOVERNING APPLICATION FOR SUMMARY JUDGMENT

4. The principles governing an application for summary judgment are well established. In brief, the court must assess whether the defence set out in the affidavits, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. In deciding whether the defendant has a credible defence, the court should concentrate its attention on the matters put forward by the defendant. (*Aer Rianta cpt v. Ryanair Ltd (No 1)* [2001] 4 I.R. 607, [2002] 1 I.L.R.M. 381).

5. If issues of law or interpretation are put forward as providing a credible defence, then the court can determine whether the propositions advanced are stateable as a matter of law. The court should, however, only carry out such an assessment where the issues are relatively straightforward and where there is no real risk of an injustice being done. (*Irish Bank Resolution Corporation v. McCaughey* [2014] IESC 44, [2014] 1 I.R. 749).

SETTLEMENT AGREEMENT

6. These proceedings seek to recover a debt said to be payable under a settlement agreement. The settlement agreement is in respect of an earlier set of summary proceedings between the same parties: High Court 2019 No. 1307 S.

7. The settlement agreement is comprehensive, running to some 7 pages (excluding schedules and execution pages). The settlement agreement, at clause 14, expressly recites that the parties had obtained independent legal advice prior to their entering into the agreement:

> "14. Legal Advice
>
> 14.1 The Parties hereby confirm that they have each obtained independent legal and tax advice prior to entering into this Agreement and are fully aware of the consequences of so doing."

8. The settlement agreement includes, at clause 10.1, a so-called "*entire agreement*" clause as follows:

> "10.1 This Agreement together with all documents to be executed pursuant to this Agreement constitutes the entire agreement between the parties relating to the subject matter of this Agreement."

9. The principal obligations of the defendant under the settlement agreement are prescribed under clause 5 as follows. (The defendant is described by the initials "*JGBL*" and the plaintiff by the initials "*BM*").

> "5. Obligations on JGBL
>
> 5.1 JGBL agrees to pay the sum of €276,250 without deduction in full and final settlement of the Dispute to BM by electronic fund transfer to the Account in the following amounts and on the following dates:
>
> – €69,062.50 on 20 December 2019;
> – €69,062.50 on 20 January 2020;
> – €69,062.50 on 20 February 2020; and,
> – €69,062.50 on 20 March 2020.

5.2 JGBL agrees to pay the sum of €3,000 in contribution to BM's legal and associated costs incurred in relation to the Summary Proceedings and the Company Law Proceedings without deduction to BM by electronic funds transfer to the Account on 20 January 2020. For the avoidance of doubt, the obligation in clause 6.2 is without prejudice to clause 10 herein.

5.3 Subject to suitable planning permission being granted and subject to contract, BM agrees to favourably consider retaining JGBL on a cost plus building contract for building works on the Sandymount Avenue, Ballsbridge site owned and/or controlled by BM or in respect of which BM has an interest."

PROCEDURAL HISTORY

10. These proceedings were instituted by way of summary summons on 11 February 2020. The defendant entered an appearance to the proceedings on 18 February 2020. The plaintiff issued a notice of motion on 25 May 2020 seeking to enter judgment in the sum of €279,250.

11. The difference between the sum in the summary summons and the notice of motion can be explained by the fact that, as of the date the proceedings were instituted, the last of the scheduled payments had not yet fallen due. By the time the motion came to be issued, however, the full amount was outstanding.

12. Following an exchange of affidavits, the defendant conceded that it had no defence to a claim for €125,000. Thereafter, the High Court (Hanna J.) by order dated 6 December 2021 entered judgment against the defendant in the sum of €125,000. The balance of the claim for summary judgment was adjourned for further argument. The matter ultimately came on for hearing before me on 11 July 2022. The matter overran the hour allotted and the hearing had to be

adjourned and was completed on 18 July 2022. Judgment was reserved until today's date.

DISCUSSION AND DECISION

13. The defendant admits that it has not complied with the schedule of payments under the settlement agreement. However, the defendant seeks to resist judgment on the basis that its obligation to comply with the schedule of payments is contingent. More specifically, it is alleged that it had been a term of the settlement agreement that the defendant was to be retained to provide building services in respect of a property at Sandymount Avenue, Dublin 4, and that the fees payable for these building services were to be set-off against the defendant's indebtedness under the settlement agreement. It is further alleged that the plaintiff is in breach of the settlement agreement in failing to retain the defendant to provide these building services.

14. In support of this asserted defence, the defendant seeks to rely on the wording of clause 5.3 of the settlement agreement as imposing some sort of an obligation upon the plaintiff to procure a third-party, namely a company called Bisvale DAC, to retain the defendant to provide building services. The defendant has purported to issue an invoice, dated 25 November 2021, to Bisvale DAC in the sum of €125,000. The defendant also seeks to call in aid the provisions of two earlier agreements said to have been entered into between the parties in 2017.

15. With respect, the asserted defence is neither stateable nor arguable. The terms of the settlement agreement are unequivocal. There is nothing in the settlement agreement which supports the contention that the scheduled payments were

contingent or conditional on the defendant being retained to provide building services. Clause 5.1 could not be clearer in its terms.

16. The wording of clause 5.3 is aspirational only and cannot credibly be relied upon as giving rise to an enforceable contractual obligation to retain the defendant. Still less does it allow deferral of the scheduled payments. The most that the clause says is that the plaintiff agrees to favourably consider retaining the defendant to carry out building works at the site on Sandymount Avenue. Any retainer is expressly stated to be "*subject to contract*". The words "*favourably consider*", on their own, do not amount to the creation of any contractual obligation. "*Consider*" suggests no more than what it means, to give thought to retaining the defendant. "*Favourably*" is a qualifying phrase and adds colour, but even taken at its height, still cannot change the very meaning of the word it operates on.

17. The defendant's reliance on the judgment of the High Court (Baker J.) in *AIB Mortgage Bank v. Hayes* [2016] IEHC 280 is misplaced. That judgment does not stand as authority for the proposition that the phrase "*favourably reviewed*" in a contract can create a collateral warranty. Rather, the judgment was reached on the basis that the formal loan document between the parties in that case was not intended to comprise all of the elements of the agreement for loan, and that two elements, which had been omitted from the written document, found clear expression in other written documents adduced in evidence. The words "*favourably reviewed*" did not form any part of the representation relied upon, but rather appear in the judgment as the court's summary of the practical effect of the representations actually made.

18. The defendant has also sought to rely upon the content of an email of 19 March 2019 as supposedly giving rise to a representation. This is impermissible having regard to the "*entire agreement*" clause contained in the settlement agreement.

19. At all events, even if it were permissible to have regard to this email, it does not advance the defendant's case. First, as appears from the subject-line, the content of the email is expressly stated to be "*subject to contract*". Second, the body of the email does not contain any actionable representation by the plaintiff to the defendant: the email goes no further than to say that it is *currently envisaged* that Bisvale DAC would engage the defendant. This falls well short of a commitment. Third, the email had been sent some eight to nine months prior to the institution of the first set of summary proceedings. It cannot, therefore, be said to be part of the negotiations leading up to the settlement agreement (even if such negotiations were admissible as an aid to interpretation, which they are not). Finally, the defendant, as part of the settlement agreement, waived all claims and/or causes of action against the plaintiff: see clause 3.1 thereof.

20. In summary, clause 5.3 objectively interpreted does not create an enforceable contractual obligation to retain the defendant, still less does it make the payment obligation under clause 5.1 contingent on such a retainer.

21. The defendant has sought to rely on two earlier agreements, said to have been entered into between the parties in 2017, to reinterpret clause 5.3 of the settlement agreement. It is submitted that these earlier agreements form part of the background to the settlement agreement.

22. It is correct to say that, in interpreting a contract, it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider

they had agreed. This will require consideration of not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of the contract in issue, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the contract. (*Law Society of Ireland v. Motor Insurers' Bureau of Ireland* [2017] IESC 31 *per* O'Donnell J. at paragraph 12).

23. Here, the context of the settlement agreement had been the earlier set of summary proceedings. The settlement agreement had been reached in the context of live litigation between the parties. As appears from the recitals thereto, the parties agreed to resolve the dispute subject to the terms of the settlement agreement. Importantly, the settlement agreement contains an "*entire agreement*" clause, and the parties each disavowed the existence of and waived any claim or cause of action—past, present or future—against the other. The settlement agreement also contains confirmation that each party had obtained independent legal and tax advice prior to entering into the agreement and that they were aware of the consequences of so doing.

24. A settlement agreement, perhaps more than any other type of contract, falls to be interpreted objectively. There is a strong public interest in favour of the amicable resolution of legal proceedings, without the necessity for a full court hearing with the attendant delay and cost. Litigation imposes a direct cost on the parties to the particular proceedings, and, more generally, entails a societal cost in terms of the provision of judicial and administrative resources.

25. It would defeat the public interest in the amicable resolution of legal proceedings were there to be regular satellite litigation as to the meaning and effect of an

earlier settlement agreement. It is in the public interest, therefore, that there be certainty as to the terms upon which legal proceedings have been settled and this is achieved by giving an objective interpretation to the language actually employed by the parties to embody their agreement in written form and which both parties have signed up to. The precise purpose of reducing the terms of settlement to writing is to avoid any possible dispute as to what has been agreed.

26. It is important that a party who enters into a settlement agreement can do so secure in the knowledge that the agreement can be enforced in accordance with its written terms. This is especially so where, as in the present case, the settlement agreement is a comprehensive document and has been entered into with the benefit of independent legal advice. The words used by the parties in the settlement agreement represent the clearest expression of their intention and should not be departed from without good reason.

27. Here, the language of the settlement agreement is clear and precise. The settlement agreement is intended to be a self-contained agreement. The very purpose of an "*entire agreement*" clause, such as the one used in the present case, is to ensure certainty by indicating that the settlement agreement is to be interpreted by reference to its own terms, and not to other extraneous documents.

28. It would undermine the intention of the parties were the express terms of the settlement agreement to be overridden by reference to the content of the earlier loan agreement (and related co-operation agreement) entered into between the parties in 2017. The settlement agreement was intended to compromise all claims and causes of action between the parties. It would defeat this purpose to resurrect the earlier loan agreement which had been the subject of the proceedings under settlement. By choosing to compromise those legal

proceedings, the parties relinquished the opportunity to agitate the rights or wrongs of their earlier contractual dispute and cannot now seek to reagitate those issues through the settlement agreement.

CONCLUSION AND PROPOSED FORM OF ORDER

29. For the reasons explained above, the defendant has failed to put forward an arguable or credible defence to the proceedings. Accordingly, the plaintiff is entitled to enter judgment against the defendant in the sum of €154,250 (together with interest pursuant to the Courts Act 1981 from 20 December 2019). Interest will also accrue from the date of judgment. All of this is in addition to the judgment previously entered against the defendant in these proceedings on 6 December 2021.

30. As to costs, my *provisional* view is that the plaintiff, having been entirely successful in the proceedings, is entitled to his costs in accordance with the default position under Part 11 of the Legal Services Regulation Act 2015.

31. The proceedings will be listed for final orders and to address the allocation of costs on Monday 10 October 2022 at 11.30 o'clock.

Appearances

Jonathan S. FitzGerald SC for the plaintiff instructed by P.D. Gardiner & Company Solicitors
David Byrnes for the defendant company instructed by Noble Law Solicitors

Approved Garrett Simons