

THE HIGH COURT

[2023] IEHC 523

[Record No. 2020 160 S]

BETWEEN

GRACE HEALTHCARE (HOLDINGS) IRELAND LIMITED

Defendant/counterclaim plaintiff

-AND-

SEAMUS BRADY and DERRY SHAW

Plaintiffs/counterclaim defendants

JUDGMENT of Ms Justice Bolger delivered on the 15th day of September 2023

1. This is the plaintiffs' application to strike out parts of the defendants' counterclaim. For the reasons set out below, I refuse the application. I refer to the defendant/counterclaim plaintiff as the defendant, and the plaintiffs/counterclaim defendants as the plaintiffs.

Background

2. The plaintiffs sold share capital in a company that owned a nursing home to the defendants. The defendants retained the amount of €500,000 pending finalisation of the completion accounts. Any dispute on those accounts were to be referred to an independent expert whose determination was to be final and binding. Clause 5 of the sale agreement required the defendants to notify the plaintiffs of any warranty claim by 17 October 2020 and to issue and serve any proceedings by 21 May 2021.

3. These proceedings were commenced by Summary Summons issued on 30 June 2020. The plaintiffs sought judgment in the sum of €500,000 on foot a written sale and purchase agreement (the "Agreement"). It is accepted by the defendant that it has no *bona fide* defence to that claim and the defendant agreed to lodge the monies claimed into Court on that basis on 12 July 2021. The defendants then delivered their counterclaim on 26 July 2021 in which they advanced an indemnity claim and a warranty claims. The plaintiff seeks to have that aspect of the counterclaim

struck out at this interlocutory stage pursuant to O.19 r.2 and O.21 r.14 and/or the inherent jurisdiction of the court in reliance on clause 5 of the Agreement and on the basis that the claim is a collateral attack on, and undermining of, the binding determination of the agreed expert.

4. A chronology has been agreed by the parties, and same is attached to this judgment as an appendix.

Decision

5. The court's jurisdiction to exclude a counterclaim is a discretionary one as confirmed by Barr J. in *RE M. v. Anton Lopatin* [1995] 3 I.R. 503.

Order 19 Rule 2

6. Order 19, rule 2 RSC provides that:

"A defendant in an action may set-off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court may, on the application of the plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

7. O. 19, r. 2 imposes the burden of proof on the plaintiff. Mr Howard SC for the defendant says this is not discharged if he can establish a plausible case on the basis of the material before the court. Clause 5 of the Agreement, on which the plaintiff relies, does not resolve the convenience requirement of O. 19, r. 2. It does, however, fit around whether the counterclaim ought not to be allowed. The defendants are, in principle, bound by what they signed but whether or not they ought to be allowed to pursue the warranty claim that the plaintiffs says was withdrawn, requires consideration of the estoppel/unconscionable arguments made by the defendant and, in particular, the duty to speak up, for which Mr Howard SC relies on the decision of the UK Court of Appeal in *Ted Baker Plc v. AXA Insurance UK Plc* [2017] EWCA Civ 4097 which identified the basis for a duty

to speak out, in particular, from paras. 72 to 77 of their judgment. Paragraphs 72 and 73 merit quotation:-

"72. *In relation to commercial contracts generally there is authority supporting a duty to speak in certain circumstances. In The Lutetian [1982] 2 Lloyd's Rep 140 , 157 Bingham J, as he then was, regarded the dissenting speech of Lord Wilberforce in Moorgate Mercantile Co Ltd v Twitchings [1977] AC 890 at 903 as having provided persuasive authority for the proposition that the duty necessary to found an estoppel by silence or acquiescence arose where a reasonable man would expect the person against whom the estoppel was raised acting honestly and responsibly to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations. In Moorgate Mercantile Lord Wilberforce said that the question whether there was an estoppel had to be asked " having regard to the situation in which the relevant transaction occurred, as known to both parties " and the reasonable man was to be one in the position of the party asserting the estoppel. His formulation has found favour subsequently: see the Indian Endurance [1998] AC 878 , 913 where Lord Steyn said:*

'Lord Wilberforce said, at p 903, that the question is whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the "acquirer" of the property, would expect the "owner" acting honestly and responsibly, if he claimed any title in the property to take such steps to make that claim known...' at p 903. Making due allowance for the proprietary context in which Lord Wilberforce spoke, the observation is helpful as indicating the general principle underlying estoppel by acquiescence'

and the cases cited below.

73. *In ING Bank NV v Ros Roca SA [2011] EWCA Civ 252 Rix LJ observed obiter that a duty to speak might arise pursuant to either contractual obligations involving collaboration and co-ordination with other business advisors or obligations as an honest business partner. He adopted the general principle contained in Moorgate Mercantile and The Indian Grace . In that case the question arose in circumstances where ING Bank failed to disclose what it knew to be a difference between it and Ros Roca on the calculation of its fee."*

8. The court went on to find para. 82:-

"82. That is not, however, necessarily the end of the matter. The authorities show that whether an estoppel arises is not wholly dependent on whether the person sought to be estopped has made some representation express or implied. It may arise if, in the light of the circumstances known to the parties, a reasonable person in the position of the person seeking to set up the estoppel (here TB) would expect the other party (here the insurers) acting honestly and responsibly to take steps to make his position plain. Such an estoppel is a form of estoppel by acquiescence arising out a failure to speak when under a duty to do so."

9. And then at para. 88:-

"88. An estoppel of this nature in a contract of this kind does not require dishonesty or an intention to mislead; nor any impropriety beyond that inherent in the conclusion that the insurers should have spoken but did not. In the circumstances to which I have referred the insurers were, in my view, under a duty to tell TB that the Category 7 material was indeed outstanding and was required before the upshot of any instructions was revealed. If they had done so the documents would no doubt have been supplied. Since they did not do so it would be unjust and unconscionable to allow them to escape any liability on the ground of non-compliance with a condition precedent in relation to the Category 7 material."

10. A similar reasoning on the consequences of a party saying silent on an issue during pre-action correspondence can be seen in the decision of McKechnie J. in *Finnegan v. Richards* [2007] IEHC 134 , [2007] 3 I.R. 671 where the court held that the defendants were estopped from challenging the validity of the plaintiff's proceedings on the grounds of having issued prior to the defendants obtaining grants of administration in circumstances where the defendants stayed silent on the issue in pre-action correspondence.

11. I find merit in the defendant's submission that the plaintiffs were under a duty to speak up, or at least not stay silent from December 2020 until after the 11 May 2021 (being the date on which the plaintiffs say clause 5 required the service of the counterclaim) had passed, during which time the plaintiffs say that they were focused on the expert determination process. The plaintiffs subsequently actively engaged in consenting to the order of Hanna J. of 12 July 2021 and agreed that the deferred monies, to which the defendant accepted they were entitled, should be lodged in court and paid out in accordance with the defendants' proposed counterclaim of which they had been

notified but not yet served. The also agreed a timescale for the delivery of the proposed counterclaim pleadings and requests for voluntary discovery. In those circumstances, insomuch as there is a case to be made that the defendant is bound by clause 5 of the agreement, there is also a case to be made that the plaintiffs are bound by their engagement with that consent order - and I make no finding on either point as they will be matters for the trial judge.

The plaintiffs have not satisfied the burden of proof that O.19 r.2 imposes on them vis a vis the convenient disposal of the warranty counterclaim in the pending action or whether the claim ought not to be allowed at this interlocutory stage.

Order 21 Rule 14

12. Order 21, rule 14 RSC provides that:

“Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action, he may at any time before reply apply to the Court for an order that such counterclaim may be excluded, and the Court may, on the hearing of such application, make such order as shall be just.”

13. In seeking to make orders “*as shall be just*”, I take account of the plaintiffs’ participation in the consent order of July 2021, as set out above. I also consider the prejudice, if any, that the plaintiffs will suffer if the warranty counterclaim is permitted to proceed. The plaintiffs claimed at paragraph 35 of Mr Brady’s grounding affidavit that they will suffer prejudice, but they have not identified anything tangible in that regard. If the counterclaim proceeds, they will be able to make their case in full at trial and possibly with the additional assistance to be gained from oral evidence and/or discovery. The defendant, by contrast, will suffer the very real prejudice of not being able to pursue their warranty claim at all due to the passage of time. On two occasions when the Court of Appeal did not permit a counterclaim in summary proceedings (*National Asset Loan Management Ltd v. Kelleher* [2016] IECA 118, [2016] 3 I.R. 568 and *National Asset Loan Management Ltd v. Crosby* [2016] IECA 188), the fact that the defendants were not precluded from issuing separate

proceedings to pursue their respective crossclaims, was material to the court's decision (*Kelleher* per Peart J. at para. 76 and *Crosby* per Finlay Geoghegan J. at para. 21).

14. In those circumstances I do not consider it would be just to exercise my discretion in favour of striking out the warranty counterclaim at this interlocutory stage.

Determination of the Agreed Expert

15. The parties had agreed that the determination of the agreed expert was to be final and binding between them. As confirmed by Dunne J in *Dunnes Stores v McCann* [2020] IESC 1 [2020] 3 I.R. 1:-

"the fact that a decision of an independent expert is stated to be final and binding on the parties to the agreement does not mean that the matter is forever precluded from being considered by a court... [A]n expert who goes outside his remit does not make a decision which is binding on the parties".

16. There is a clear disagreement between the plaintiffs and the defendant contained in the affidavits whether the monies claimed by the warranty counterclaim are, or should have been, covered by the agreed expert's determination. Given that level of disagreement on whether the determination of the expert was within her remit and therefore whether the warranty counterclaim undermines her determination, or is a collateral attack on it, are matters more properly addressed at trial rather than by way of an interlocutory application on affidavit.

17. I refuse the plaintiffs' application to strike out the defendant's counterclaim.

Indicative view on costs

18. As the defendant has succeeded in resisting the application to strike out the warranty counterclaim, my indicative view on costs is that they are entitled to their costs in accordance with s. 169 of the Legal Services Regulatory Authority Act 2015 but with a stay on the execution of those costs pending the resolution of the entire proceedings. I will put the matter in before me at 10:30am on 10 October 2023 to allow make such further submissions as the parties may wish to make in relation to costs and/or final orders.

Counsel for the plaintiff: Marcus Dowling SC, Ian Boyle Harper BL

Counsel for the defendant: Michael Howard SC, Ross Aylward BL

AGREED CHRONOLOGY

Date	Step
6 September 2019	Date of Share Purchase Agreement (" SPA ")
18 October 2019	" <i>Completion Date</i> " as defined in SPA
17 February 2020	defendant sends email to plaintiffs outlining Warranty Claims
27 February 2020	plaintiffs send email to defendant in response to Warranty Claims
18 March 2020	defendant sends draft Completion Accounts to plaintiffs
18 April 2020	Date by which payment of " <i>Retention Deferred Consideration</i> " was required under the SPA
6 May 2020	Crowley Millar, for the plaintiffs, issue demand to the defendant for payment of " <i>Retention Deferred Consideration</i> " of €500,000
12 May 2020	Mason Hayes & Curran send Warranty Claim Notice on behalf of defendant to plaintiffs
15 May 2020	Crowley Millar issue 21 day demand pursuant to s.570 Companies Act 2014
5 June 2020	AMOSS letter stating defendant has counter claims against plaintiffs for breach of warranties
9 June 2020	Crowley Millar letter stating defendant is entitled to pursue claim for breach of warranty but no right of set off under the SPA
11 June 2020	Crowley Millar respond to Warranty Claim Notice of 12 May 2020 sent by Mason Hayes & Curran
17 June 2020	AMOSS letter stating it is not a matter of set off
18 June 2020	Crowley Millar letter stating no right of set off
22 June 2020	defendant issues plaintiffs with invoice for €150,000 pursuant to Indemnity in respect of Ms. Gallagher
30 June 2020	(2020/160S) Summary Summons issued
1 July 2020	AMOSS letter stating warranty claim would be pursued expeditiously
6 July 2020	(2020/160S) Summary Summons served
8 July 2020	Crowley Millar letter requesting warranty claim be submitted in detail
26 August 2020	AMOSS emailed revised draft Completion Accounts to Crowley Millar

8 September 2020	(2020/160S) Notice of Motion for liberty to enter judgment issued, grounded on Affidavit of Seamus Brady sworn on 1 September 2020 returnable to 30 November 2020
17 September 2020	(2020/160S) Notice of Motion for judgment served
1 October 2020	plaintiffs issue Dispute Notice in respect of Completion Accounts
1 October 2020	Crowley Millar letter claiming additional sum of €79,800 due to plaintiffs under the SPA and legal proceedings will issue if not paid within 7 days
13 October 2020	AMOSS letter seeking clarification of basis for claim of €79,800
11 November 2020	PWC letter of appointment as Expert to determine dispute on Completion Accounts
30 November 2020	(2020/160S) First return date for plaintiffs' Motion for liberty to enter final Judgment
22 December 2020	(2020/160S) Replying Affidavit Timothy Frogley to Motion for liberty to enter judgment sworn and served on Crowley Millar. This affidavit set out the defendant's counter claims.
12 May 2021	Expiration of 12 months from date of Warranty Claim Notice
14 May 2021	(2020/160S) plaintiffs request adjournment of Motion for Judgment to file Affidavit
23 June 2021	(2020/160S) First Supplemental Affidavit Seamus Brady in reply to that of Timothy Frogley sworn on 22 December 2022
2 July 2021	(2020/160S) Second Supplemental Affidavit Seamus Brady in reply to that of Timothy Frogley sworn on 22 December 2022
9 July 2021	(2020/160S) Second Affidavit Timothy Frogley to Motion for liberty to enter judgment
10 July 2021	(2020/160S) AMOSS letter proposing compromise of Motion for liberty to enter judgment
12 July 2021	(2020/160S) Crowley Millar email confirming proposed compromise of Motion subject to two changes
12 July 2021	(2020/160S) AMOSS letter confirming agreement to two proposed changes and confirming terms of compromise of Motion for liberty to enter judgment
12 July 2021	(2020/160S) Crowley Millar email confirming agreement to terms of compromise of Motion for liberty to enter judgment and instruction to

	counsel for the plaintiffs to make the necessary application before the Court
12 July 2021	(2020/160S) consent Order of Hanna J. entering Judgment against defendant in the sum of €500,000, remitting counterclaim to plenary hearing, placing stay on Judgment with monies to be paid out in accordance with determination of counterclaim, and directions in respect of plenary hearing of trial of counterclaim
26 July 2021	(2020/160S) defendant delivers counterclaim
29 July 2021	(2020/160S) plaintiffs raise Notice for Particulars on counterclaim
10 September 2021	Crowley Millar letter sent to defendant claiming additional monies due to plaintiffs under the SPA failing payment of which proceedings will issue
15 September 2021	AMOSS letter requesting clarification as to the basis for the sums claimed in the Crowley Millar letter of 10 September 2021
27 September 2021	(2020/160S) defendant delivers Replies to Particulars on counterclaim
6 October 2021	(2020/160S) plaintiffs raise Rejoinders to Replies to Particulars on counterclaim
11 October 2021	(2020/160S) plaintiffs Defence to counterclaim due to be delivered as per consent Order made on 12 July 2021
29 November 2021	(2020/160S) defendant delivers replies to Rejoinders to Replies to Particulars on counterclaim
3 December 2021	PWC issue revised Expert Determination
8 December 2021	Crowley Millar letter on behalf of plaintiffs demanding payment of €480,253 on foot of Expert Determination
22 December 2021	(2021/710S) plaintiffs issue Summary Summons seeking judgment in the sum of €480,253 on foot of Expert Determination
23 December 2021	(2020/160S) AMOSS send 28 day warning letter in respect of plaintiff's default to deliver Defence to counterclaim
23 December 2021	(2021/710S) Summary Summons served
28 January 2022	(2020/160S) defendant issues and serves Notice of Motion for judgment in default of Defence to counterclaim (Motion subject of the hearing before Bolger J.)

2 February 2022	(2020/160S) plaintiffs issue Notice of Motion to exclude Warranty Claims from counterclaim (Motion subject of the hearing before Bolger J.)
4 March 2022	(2022/882P) plaintiffs issue Plenary Summons against defendant seeking " <i>Damages for breach of contract</i> ", " <i>Interest</i> ", " <i>Such further or other order as to this Honourable Court may deem fit</i> ", " <i>Costs</i> "
7 March 2022	(2022/882P) plaintiffs serve Plenary Summons
8 March 2022	(2022/882P) AMOSS letter noting no letter before action
22 March 2022	(2022/882P) Crowley Millar letter stating letter before action sent on 10 September 2021 (addressed above in chronology and response of 15 September 2021)
20 April 2022	(2021/710S) plaintiffs issue Notice of Motion seeking liberty to enter judgment against defendant in the sum of €480,253
5 August 2022	(2021/710S) Replying Affidavit of Timothy Frogley to Notice of Motion seeking liberty to enter judgment against defendant in the sum of €480,253 and suggesting Judgment be entered against the defendant, with a stay thereon pending determination of counterclaim in proceedings 2020/160S and monies to be paid out in accordance with that determination
7 November 2022	(2021/710S) consent Order of Hanna J. entering Judgment against the defendant in the sum of €480,253, and placing stay on Judgment with monies to be paid out in accordance with determination of counterclaim in proceedings bearing record number 2020/160S
11 May 2023	(2020/160S) Hearing of plaintiffs' Motion to exclude Warranty Claim from counterclaim before Ms. Justice Bolger.