APPROVED **[2024] IEHC 522**

THE HIGH COURT

2010 2596 S

BETWEEN

ALLIED IRISH BANKS PLC
EVERYDAY FINANCE DAC

PLAINTIFFS

AND

THOMAS J DORAN

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 2 September 2024

INTRODUCTION

1. This judgment is delivered in respect of an application to enforce a deed of settlement and release ("*the deed of settlement*"). The application to enforce the deed of settlement is brought by the plaintiffs and is resisted by the defendant. The plaintiffs contend that all claims in the within proceedings have been compromised under the deed of settlement. The defendant contends, conversely, that the deed of settlement is unenforceable on the grounds that the deed was not properly executed and/or that any agreement between the parties is vitiated by mistake.

2. The principal question addressed in this judgment is whether the application to enforce the deed of settlement may be determined in the context of the existing proceedings or whether, alternatively, it is necessary to institute *fresh* proceedings seeking to enforce the settlement as a matter of contract. The answer to this question turns, in large part, on whether the giving of consent to the *adjournment* of the existing proceedings had been sufficient act to allow the proceedings to be used thereafter as a vehicle within which to enforce the supposed settlement.

PROCEDURAL HISTORY

3. The within proceedings commenced by way of summary summons on 3 June 2010. The proceedings seek to recover a debt said to be owed by the defendant to Allied Irish Banks plc ("*AIB*"). This debt is said to arise out of two loan agreements entered into between AIB and the defendant in 2006 and 2007, respectively. The proceedings had, initially, been pursued by AIB as the sole plaintiff. A second plaintiff, Everyday Finance DAC ("*Everyday Finance*"), was joined to the proceedings at a much later date. Everyday Finance had been joined in circumstances where it asserts that the underlying debt has been transferred to it by AIB.

4. It had been a condition of the loan agreements that AIB obtain a valuation in respect of certain properties which were to be mortgaged in favour of the bank as security for the debt and that the value of those properties meet prescribed minimum thresholds. AIB has since exhibited valuation reports which purport to have been prepared on 11 July 2007. The defendant contends that, in truth, no valuation reports had been obtained at the relevant time, and that the reports

now exhibited on behalf of the bank are forgeries. The implication being that the reports had been prepared at a subsequent date, and "*back dated*" to 11 July 2007. The defendant contends that he would never have entered into the loan agreements had he been aware that the requisite valuations had not been obtained. More recently again, the defendant alleges that he only became aware *subsequent* to the supposed settlement of the proceedings on 25 October 2023 that AIB had valued certain lands at €600,000 notwithstanding that the special conditions of the relevant loan agreement had prescribed a minimum valuation of three million euro.

5. Given the nature of the factual dispute between the parties, the proceedings were deemed unsuitable for summary disposal, and the case was remitted to plenary hearing by order of the High Court dated 19 May 2012. The defendant filed a counterclaim. Thereafter, the proceedings wended their way through the legal process at a leisurely pace. There were a number of procedural skirmishes, in relation to interrogatories and the registration of a *lis pendens*, involving, in the latter instance, an appeal to the Court of Appeal. At all events, the proceedings ultimately came on for hearing before me on 24 October 2023. The hearing had been estimated to take seven days.

6. It had been agreed between the parties that the defendant's counterclaim should be presented first. Counsel on behalf of the defendant duly opened his case and the defendant began his evidence-in-chief. The hearing adjourned at 4 o'clock to resume the following morning.

7. The parties entered into settlement negotiations overnight. The court was asked for time the following morning to allow these negotiations continue (25 October 2023). The case was mentioned to the court again just before lunchtime.

8. Having regard to the dispute which has since arisen in respect of the enforceability of the deed of settlement, it is necessary to set out the relevant part of the transcript in full. (The first counsel to speak is counsel for the defendant; the second, counsel for the plaintiffs).

> "MR. CONLAN SMYTH: May it please the court. Can I say thanks to the court for affording us the time this morning, it was very productive and matters have resolved, an agreement for the process is being signed at present. For the purposes of implementation, I wonder could I ask you for date in four months' time?
>
> MR. JUSTICE SIMONS: Of course.
>
> MR. CONLAN SMYTH: If I could suggest maybe a date --
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> MR. HAYDEN: 28th February.
>
> MR. CONLAN SMYTH: 28th February?
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> MR. JUSTICE SIMONS: Yes, if that suits the parties?
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> MR. HAYDEN: That works within the timeframe, Judge.
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> MR. JUSTICE SIMONS: So I will simply adjourn the proceedings to that date?
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> MR. HAYDEN: Yes, Judge.
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> MR. JUSTICE SIMONS: There's no order required today?
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> MR. HAYDEN: No order required today. The agreement is, in essence, a form of a Tomlin order but the court may be required to do nothing or something.
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> MR. JUSTICE SIMONS: All right. But for today's purposes, we're entering an adjournment to 28th February.
>
> MR. CONLAN SMYTH: Simply an adjournment."

9. As appears, no formal order was made by the court on that occasion. Rather, the proceedings were simply adjourned. It should also be noted that the deed of settlement had not been executed at the time of the application for the adjournment.

10. The intended terms of settlement had been embodied in a written document entitled "DEED OF SETTLEMENT AND RELEASE" ("*the deed of settlement*" or "*the deed*").

11. The deed of settlement, if executed, would have obliged the defendant to make scheduled payments. The deed envisaged that the proceedings would be adjourned to allow these payments to be made: see §2.6 to §2.9 of the deed as follows:

> "2.6 The proceedings bearing Record No. 2010/2596S shall be adjourned for a period of 18 weeks, or such other period as the Court shall deem appropriate ('the adjourned date').
>
> 2.7 On the adjourned date, and upon discharge of the Settlement Sum the proceedings will be struck out with no further order save in accordance with clause 2.8.
>
> 2.8 In default of the Obliger discharging the Settlement Sum in accordance with the terms of this agreement he shall on the adjourned date consent to judgment in the sum of €5,073,138.74 (five million, seventy-three thousand, one hundred and thirty-eight euro and seventy-four cents), with credit being applied for any sums discharged in the interim.
>
> 2.9 The proceedings bearing Title and Record No. Allied Irish Bank p.l.c. v Thomas Doran and Thomas Scanlon 2015/1159S shall, on the adjourned date, also be struck out as against Thomas Doran with an Order vacating all previous costs orders and making no order as to costs."

12. It is apparent from both the title/description of the deed of settlement and from the execution clauses that the parties intended that same would be signed and delivered as a deed on behalf of Everyday Finance under a power of attorney. For reasons which have not been properly explained, the deed has never been executed on behalf of Everyday Finance. Somewhat surprisingly, AIB has not been named as a party to the deed notwithstanding that it is a co-plaintiff.

13. The defendant did sign the deed of settlement. Thereafter, an initial payment of €150,000 was made to Everyday Finance's solicitors on 27 October 2023. The defendant's wife has explained, on affidavit, that she had decided that she would

pay this money personally. The implication being that this payment cannot be relied upon as an act of part performance of the intended deed by the defendant himself.

14. In the event, an amount of €150,000 was returned by Everyday Finance's solicitors on 5 January 2024 in circumstances where they did not consider that documentation sufficient to satisfy the requirements of the anti-money laundering legislation had been provided.

15. The firm of solicitors then acting for the defendant issued a motion seeking to come off record. The application was advanced on the basis that there had been a "*complete breakdown in relations and trust*" between the defendant and his legal representatives. An order was made, without objection, on 29 February 2024 permitting the firm of solicitors to come off record. A new firm of solicitors came on record on 19 March 2024 and new counsel instructed.

16. The defendant, through his new solicitors, purported to rescind the deed which had been signed by him. This was done by way of letter to the plaintiffs' solicitors on 5 March 2024. The letter, in relevant part, reads as follows:

> "You will be aware from correspondences form (*sic*) Messrs Cahill & Cahill, formerly acting for Mr. Doran, that requests were made for the signed counterpart of a purported Deed of Settlement and Release dated 25th October 2023.
>
> The same has not been received. We write to advise that our client now formally rescinds the document signed by him on the 25th October 2023. You will be aware therefore that no contract, deed, settlement and or agreement otherwise has ever existed between our respective clients nor is extant."

17. Following an exchange of affidavits and written legal submissions, an application to enforce the deed of settlement was heard before me on 12 July 2024. Judgment was reserved.

PROCEDURE FOR ENFORCEMENT OF SETTLEMENT

18. There is a dispute between the parties as to whether the supposed settlement of these proceedings is enforceable in circumstances where the deed has not been properly executed and where the defendant asserts that any agreement between the parties is vitiated by mistake. Before the court can embark upon an adjudication of this dispute, it is necessary, first, to consider the proper procedure for the enforcement of the supposed settlement. More specifically, it is necessary to consider whether the application to enforce the supposed settlement may be determined as part of the existing proceedings or whether, alternatively, it is necessary to institute *fresh* proceedings seeking to enforce the deed of settlement as a matter of contract.

19. In order to resolve this procedural issue, it is salutary to recall the principles governing the enforcement of settlement agreements. An agreement to settle litigation is, in essence, a contract between the parties. In the event that one of the parties fails to comply with the terms of a settlement agreement, it is open to the innocent party to seek to enforce the settlement agreement as a matter of contract law. The innocent party might, for example, seek damages for breach of contract or seek specific performance. Unless provision has been made otherwise, however, it will be necessary to institute *fresh* proceedings to enforce the settlement agreement. This is perceived as unattractive in that the parties will have to embark upon yet further litigation, with all the attendant delay and expense. To avoid this necessity, the parties to a settlement agreement will often seek to put in place a procedural mechanism which will allow for enforcement of the settlement agreement, by way of a summary application, within the very proceedings which have been compromised.

20. One such procedural mechanism is for the parties to request the court to make an order, on consent, striking out the extant proceedings with liberty to re-enter the proceedings for the sole purpose of enforcing the settlement agreement. A modified form of this procedural mechanism involves the extant proceedings being stayed, rather than struck out. The essential element is that an order is made by the court which recognises—either expressly or by necessary implication—that the underlying claim has been superseded by the settlement agreement but that the parties are entitled to re-enter the proceedings for the sole purpose of enforcing the settlement agreement. This avoids the necessity, which would otherwise arise, of having to institute separate proceedings.

21. The difficulty in the present case is that no order of this type has been made. The only intervention by the court had been to adjourn the proceedings on consent. The question which arises for consideration is whether this is sufficient to allow the plaintiffs to apply to enforce the supposed settlement within these proceedings.

22. Counsel on behalf of the plaintiffs helpfully referred me to the leading authorities on the enforcement of settlement agreements: *Solicitors Mutual Defence Fund Ltd v. Costigan* [2021] IECA 20 ("*SMDF*") and *McCaughey v. McCaughey* [2024] IECA 135 ("*McCaughey*"). The following principles from those judgments are relevant to the particular circumstances of the present case.

    (a). There is a clear public interest in promoting the settlement of proceedings and that interest would be significantly undermined if the courts were not also in a position to ensure compliance with the terms of a settlement agreement. Unless there is some significant countervailing issue, the

courts should aid the parties in enforcing the terms of a settlement. *McCaughey*, [142].

(b). The courts should not, without very good reason, obstruct the implementation of lawfully concluded settlements. On the contrary, as long as no fundamental principle is offended, and as long as no prejudice is caused to either of the parties, the courts should aid the parties in enforcing the terms of settlement. Insofar as there is any doubt as to the meaning or effect of an order, this doubt should be resolved in such manner as to give effect to the express terms of settlement entered into between the parties. *SMDF*, [55].

(c). Where a court makes an order striking out proceedings, but with liberty to re-enter, and that order was clearly made pursuant to written terms of settlement entered into between the parties, which terms of settlement state in clear and unambiguous terms what is to happen upon the re-entry of the proceedings, the order striking out the proceedings must be interpreted as being subject to the condition that the proceedings may be re-entered for the purposes expressed in the terms of settlement, notwithstanding that the terms of settlement themselves are not referred to in the order of the court. *SMDF*, [56].

(d). The procedure to be adopted on an application to re-enter is flexible. If appropriate, the parties may request that there be cross-examination and even oral evidence on an application to re-enter proceedings for the purpose of the enforcement of a settlement. *McCaughey*, [143] to [146].

(e). The existence of an order giving liberty to re-enter proceedings does not preclude a party from issuing *separate* proceedings seeking rectification, amendment, or rescission of the settlement agreement. *McCaughey*, [145].

23. The two judgments of the Court of Appeal arose in circumstances where a formal order had been made striking out proceedings with liberty to re-enter. In *McCaughey*, the order recited that liberty to re-enter had been given solely for the purposes of enforcing the terms of the settlement agreement. In *SMDF*, there had been no express reference to the settlement agreement in the order, but the Court of Appeal held that the order was clearly made pursuant to written terms of settlement. Put otherwise, the omission from the order of language to the effect that the purpose of allowing liberty to re-enter was to enforce the terms of settlement was not fatal.

24. The position in the present proceedings is different. Here, the court was not asked to make any order on 25 October 2023. The only application to the court was to adjourn the proceedings for a period of some four months to a specified date.

25. The judgment of the Court of Appeal in *SMDF* indicates that, in circumstances where an order has been made in the context of a settlement agreement, any doubt as to the meaning or effect of the order should be resolved in such manner as to give effect to the express terms of the settlement entered into between the parties. This approach reflects the public interest in promoting the settlement of proceedings. I have carefully considered whether the consensual adjournment of the present proceedings might be interpreted as allowing for the summary enforcement of the deed of settlement within these proceedings. For the reasons which follow, I have concluded that such an interpretation is not open.

26. First, there is no doubt or ambiguity as to the effect of the adjournment. As appears from the transcript (cited earlier), the parties were expressly asked whether an order was required, and counsel confirmed that none was required and that the proceedings were simply to be adjourned. The circumstances of the present case are in marked contrast to those of *SMDF* where the meaning of the order had, on one reading at least, been ambiguous as to the precise purpose for which the proceedings might be re-entered, i.e. for the purpose of enabling the original claim to be re-entered and litigated to a conclusion or, alternatively, for the purpose of enforcing the settlement agreement.

27. In the absence of any doubt or ambiguity, the consensual adjournment of proceedings cannot be imbued with any greater significance and treated as allowing for summary enforcement of the (then intended) settlement.

28. Secondly, the deed of settlement and release had not been executed by the parties as of the time of the consensual adjournment of the proceedings. The court had been told that same was in the process of being signed. In the event, the deed has never been executed on behalf of Everyday Finance. For present purposes, the point is that the mere adjournment of the proceedings cannot have had the effect of bringing the proceedings to an end, save for the enforcement of an intended settlement agreement.

29. The point may be illustrated by the following hypothesis. Suppose that proceedings had been adjourned prior to the parties executing a settlement agreement, and further suppose that upon sight of the written terms of the settlement agreement one or other of the parties had decided not to execute same. It could not sensibly be said that the mere fact that the proceedings had been adjourned had the consequence that the hearing could not be resumed. The

adjournment of proceedings, in advance of the execution of a settlement agreement, does not have such an effect.

30. For completeness, it is necessary to address briefly the submission that counsel would have had ostensible authority to bind their clients. Whereas this may be correct at the level of general principle, it has no application to circumstances, such as those in the present proceedings, where it is expressly envisaged that the parties themselves will execute a deed of settlement and release.

CONCLUSION AND NEXT LISTING

31. There is a dispute between the parties as to whether the supposed settlement of these proceedings is enforceable in circumstances where the deed has not been properly executed and where the defendant asserts that any agreement between the parties is vitiated by mistake. For the reasons explained herein, this dispute cannot be resolved within the present proceedings in the absence of the parties having put in place a mechanism which would allow the court to determine that dispute on a summary basis.

32. The default position is that a settlement agreement takes effect as a matter of contract and the enforcement of same requires the institution of separate proceedings. It is open to the parties to negate the default position by putting in place a procedural mechanism which allows for the enforcement of a settlement agreement, by way of a summary application, within the very proceedings which have been compromised. The parties must, however, obtain a court order to this effect. The mere adjournment of proceedings, without more, is too neutral a procedural step to be treated as having such effect.

33. The dispute in relation to the enforcement of the deed of settlement—including any claim for the rescission of same—may only be adjudicated upon in separate proceedings. It follows, therefore, that if the plaintiffs still intend to rely on the deed of settlement, it will be necessary for them to institute separate proceedings for this purpose. Alternatively, it is open to either side to pursue their respective claim and counterclaim in the present proceedings. The adjournment is not equivalent to a strike out, and there is no reason, therefore, why the proceedings should not be set down for resumed hearing.

34. This matter will be listed, for mention, before me on 9 October 2024 to hear the parties on what procedural route they now intend to pursue.

Appearances

Martin Hayden SC and Roland Rowan for the plaintiffs instructed by Joynt & Crawford LLP
Paul Comiskey O'Keeffe for the defendant instructed by John P O'Donohoe Solicitors

Approved
Garrett Simons