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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**18/01/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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Between:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

Plaintiff

and

ANSON LOGUE

Defendant

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KEEGAN J

Introduction

[1] I am concerned with two applications namely:

(i) An application by the plaintiff to lift a stay agreed as part of a commercial settlement dated 18 September 2017; and

(ii) An application by the defendant to strike out the application to lift the stay dated 15 February 2018.

[2] These applications arise in the context of protracted commercial litigation. I do not intend to rehearse the entire history of proceedings. However, in broad terms, the plaintiff was a lender to the defendant, a property developer. Over the course of many years loans were provided by the plaintiff to the defendant and his business associates to facilitate the purchase of large shopping centres and retail parks in both Northern Ireland and the Republic of Ireland. These enterprises suffered with the property market crash in 2007/2008. Thereafter, the plaintiff brought proceedings in the Commercial Division due to default by the defendant in paying its loans. This led to a settlement being reached on 22 September 2015 that the defendant would pay the plaintiff £112,446,988.72 plus costs stayed on

agreement of the parties with liberty to apply. This case focuses on the terms of the agreement and whether the stay should be removed thereby allowing the plaintiff to proceed with enforcement proceedings.

[3] Mr Humphreys QC appeared with Mr David Dunlop BL on behalf of the plaintiff. Mr Simpson QC and Mr Shields BL appeared for the defendant. I am grateful to all counsel for their assistance in this matter. In determining this case I have considered the affidavits filed by both parties and all of the submissions made. I also heard evidence from one witness, Mr David Byrne. I note that the defendant is subject to an enduring power of attorney due to ill health and so affidavits have been field on his behalf by his wife and son.

[4] A preliminary issue was raised in this case as to how to proceed with the two applications. This was after I had taken carriage of the case and suggested a collaborative course to include an accountancy meeting to clarify the core issues of valuation which had arisen. Whilst that structure was initially acceptable to both parties the position changed during the currency of the proceedings. I was then asked to deal with the application to strike out the summons to lift the stay as a discrete standalone application. This was initially mounted pursuant to Order 18 Rule 19 of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules") however as proceedings progressed all parties agreed that the applications both came under the inherent jurisdiction of the High Court. I decided that I would have to hear both applications together.

The Terms of Settlement

[5] I set this out in full as this was core to the case:

> "It is hereby agreed between the parties in the above entitled action as follows:
>
> (1) The defendant shall submit to judgment in favour of the plaintiff in the sum of £112,446,988.72 ("the money judgment").
>
> (2) The defendant shall not obstruct, object or take any steps or action whatsoever to restrain, impede or infringe the plaintiff or its servants or agents or any fixed charge receiver appointed by the plaintiff from taking steps to enforce its security over all assets over which the plaintiff holds security for the debts, whether sole or joint, of the defendant.

(3) In consideration of (1) and (2) above, the plaintiff agrees that enforcement of the said money judgment and costs shall be stayed subject to:

(a) the defendant paying the plaintiff's solicitors, Messrs Tughans Solicitors, the sum of €250,000 as follows:

(i) €100,000 on or before 31 October 2015.

(ii) €50,000 on or before 31 October 2016.

(iii) €50.000 on or before 31 October 2017.

(iv) €50,000 on or before 31 October 2018.

(b) The defendant confirming that the statement of net worth furnished by him to the plaintiff in June 2011 was a fair and accurate representation of his net worth at that date.

(c) The defendant providing the plaintiff with an affidavit, in the plaintiff's standard form, save for the section relating to asset transfers, verifying all assets and liabilities held by the defendant in providing a full, frank and accurate account of the defendant's net worth within 21 days of the date hereof.

(4) In the event that the defendant –

(a) fails to make the payments as set out in (3)(a) within the time stated (for which time shall be of the essence; or

(b) fails to provide the confirmation and affidavit as set out in (3)(b) and (c), confirming the position that the defendant has an overall negative net worth;

then the plaintiff shall be entitled to have the stay of enforcement contained in paragraph 3 removed.

(5) For the avoidance of doubt if the confirmation and affidavit is set out in (3)(b) and (c) above should be subsequently established by the plaintiff to be inaccurate or incomplete in any material respect the plaintiff shall be entitled to have the stay of enforcement contained in paragraph (3) removed.

(6) The defendant agrees that in the event that he becomes entitled to a material asset, as defined in the Schedule hereto, in any calendar year, for the 4 year period following the date of this agreement he shall, within 14 days of becoming entitled to such material asset, pay to the plaintiff the value of the material asset which is over £50,000. In the event that the defendant fails to account to the plaintiff for such portion of any such material asset which is above £50,000 then the plaintiff shall be entitled to have the stay of enforcement contained in paragraph 3 removed and in addition to this the portion of the material asset which is above £50,000 will stand as a liquidated sum due and owing from the defendant to the plaintiff.

(7) For the purposes of Clause (4) above the defendant shall provide the plaintiff with an affidavit verifying all assets and liabilities held by the defendant on each of the anniversaries of this agreement.

(8) For the avoidance of doubt the obligation of the defendant in Clause 6 hereof is an annual obligation, such that at the commencement of any calendar year for the 4 years following this agreement the defendant's obligation, for the purposes of calculating a material asset, will return to zero. Hence, if the defendant is entitled to a material asset in every calendar year during the 4 years following this agreement he will be obliged to discharge to the plaintiff the balance of each material asset over £50,000 for each year the entitlement accrues.

Schedule

"Material assets" means:

(i) any asset with a value greater than £50,000; or

(ii) any asset of a value less than or equal to £50,000 but which is connected or related to a series of assets whose cumulative value is greater than £50,000; and acquired or otherwise received by or for the account or benefit of the defendant after the date of this agreement and includes but is not limited to any gift, inheritance, lottery win, prize bond win, compensation and windfall excluding any assets, income or remuneration disclosed to the plaintiff in the defendant's sworn Statement of Affairs dated 22 September 2015."

Events Post Settlement

[6] In compliance with Clause 3(a) the defendant had at the date of this hearing paid the instalments required totalling €200,000 with the final payment of €50,000 due on or before 31 October 2018. There was no indication that there would be any difficulty with this.

[7] In compliance with Clause 3 the plaintiff was also provided with the defendant's first Statement of Affairs verified by affidavit.

[8] In compliance with Clause 7 the plaintiff was provided with the defendant's second Statement of Affairs for 2016 and third Statement of Affairs for 2017.

The Mareva Injunction

[9] By application dated 18 September 2017 the plaintiff applied on an ex parte basis for a Mareva injunction against the defendant to freeze any proceeds due to the defendant from an impending sale of Riverside Retail Park in Coleraine. This application was largely based upon an affidavit filed by the plaintiff's solicitor, Mr Toby McMurray, and from knowledge obtained by him in the course of his commercial practice. He provided an affidavit dated 13 September 2017 to the effect that he understood that the sale of the Retail Park in Coleraine was agreed for £30m and that the defendant had some interest in this. The application was also supported by affidavits of David Byrne, Associate Director with the plaintiff's Specialist Property Group, dated 12 September 2017 and 6 November 2017. It was stressed in the application for the Mareva injunction that there was no intention to prevent the sale, rather it was directed at securing any profits of sale due to the defendant. An ex parte application was granted, however the injunction was discharged by consent in December 2017 when it became clear that the proposed sale of the Retail Park was not going to proceed.

The issues in this case

[10] The defendant's interest in two assets is under the spotlight in this case. These are the O'Connor Trust and Westside Developments Ltd. In paragraph 17 of his affidavit of 12 October 2017 Mr Geoffrey Logue explains his father's interest in these entities as follows:

> "O'Connor is a discretionary trust deed that was settled in 1991 by the defendant. A redacted copy of the trust deed is at pages 8-51. The trust period is 80 years or such lesser period as the trustees shall in their sole discretion determine. The trustees are Equiom Trust Company Limited, which was previously named Skanco Trustees Limited. The defendant has a life interest in the trust as set out in clause 4(a) of the trust deed. This life interest entitles the defendant to pay income generated by the trust but not to any capital. O'Connor owns 33.33% of Kelvin Properties Limited and Kelvin owns 66% of Riverside Retail Park in Coleraine. Westside owns the remaining 34% of Riverside. However, Westside is only entitled to approximately 12.82% of the equity in Riverside because of liabilities owed by Westside to Kelvin."

[11] In the 2015 Statement of Affairs and the subsequent statements reference was made to the defendant's interest in the O'Connor Trust and his shareholding in Westside Developments. In all of the Statement of Affairs the defendant states that the value of his interests in the O'Connor Trust is nil. He states the value of his interest in Westside as minus £25,000 in the 2015 Statement of Affairs and £50,000 in the 2016 Statement of Affairs.

[12] The application by the plaintiff is made on the grounds that the Statement of Affairs in 2015 and 2016 did not accurately record the defendant's interest in the O'Connor Trust and in Westside Developments Limited having regard to the value of Riverside Retail Park.

The arguments

[13] I am grateful to counsel for the helpful skeleton arguments they have provided which have directed me to the relevant legal principles in determining this case. The defendant's application to strike out the summons to lift the stay is based on the argument that the summons is frivolous, vexatious and an abuse of process and so should be struck out. Counsel for the defendant relied on a number of core propositions which I summarise as follows:

(i) As explained in the skeleton argument at paragraph 8 reliance is placed upon the plaintiff's knowledge of the defendant's interests. It is asserted there that

"for a period of time up to 30 June 2010, the plaintiff was the sole lender to both Kelvin and Westside in respect of their interests in Riverside and held security in the form of a first charge over these interests for such loans. Accordingly, it would be surprising if the plaintiff is not in possession of an extensive amount of information about, and therefore, has an intimate understanding of, the structure of O'Connor and the ownership interests of Kelvin and Westside in Riverside."

(ii) The defendant also states that a number of inaccurate statements were made in affidavit submitted on behalf of the plaintiff during both the ex parte and inter partes stages of the injunction proceedings.

(iii) The defendant argues that the issues under consideration do not fall within the provisions dealing with material assets.

(iv) The defendant also refers to the plaintiff's points of claim document which had been directed by Horner J and which is dated 21 December 2017. The defendant contends that the plaintiff has not set out any facts, and offered no evidence whatsoever – either in the points of claim or in the affidavit submitted in the injunction proceedings, which is the same evidence it relies on in the current proceedings – in support of its bald allegation that the defendant underestimated the value of his interest in Westside and O'Connor. The defendant makes further reference to Notice of Particulars which repeats this information.

(v) The defendant argues that the discovery the plaintiff seeks is confidential information that, in any event, does not belong to the defendant, but to Kelvin, Westside and O'Connor to which the plaintiff in its pleaded case has no entitlement.

(vi) The defendant also relies upon on the evidence of Mr Thompson on behalf of the defendant during the injunction proceedings. In his first affidavit Mr Thompson avers as follows:

> "Moore Stephens have been providing accountancy and advisory services to the defendant for over 10 years. I have been the main point of contact for the defendant during that time and, as a consequence, I have an intimate understanding of his financial affairs over this period. In particular, I am very familiar with the estimated valuations of the Riverside Retail Park in Coleraine arising from my dealings with lenders and the other part owners of Kelvin Properties Limited. I am familiar with the respective apportionments of the ownership of Riverside between the respective owners. I have relied upon this knowledge in my professional

experience when advising the defendant in his preparation of his annual Statement of Affairs required by the terms of settlement entered into with the plaintiff on or about 22 September 2015. In fact, the Statements of Affairs were prepared by my firm with the defendant's input …

4. The description of the defendant's interests in the O'Connor Trust in his 2015 and 2016 Statement of Affairs as having nil value is correct in my professional opinion. The defendant has no right or entitlement to any capital under the terms of the Trust Deed. My firm secured counsel's opinion in respect of the interest of another client of the firm who is involved in an identical discretionary Trust with identical terms. That opinion confirmed that the potential beneficiaries of the Trust had no entitlement to the Trust capital and for that reason, along with the fact that the Trust has not been income producing for several years, we concluded that the value of the defendant's interests in O'Connor was nil and the Statement of Affairs was completed accordingly.

5. In relation to the value attributed to the defendant's interests in Westside Developments Limited in his 2015 and 2016 Statement of Affairs, it was based on the assessment of the value of Riverside derived from our knowledge of the asset and our dealings with various lenders in respect of it.

6. The defendant's interest in Westside is 16.67% Westside's apportioned share of the ownership of Riverside was approximately 13% in 2015 and 2016. This interest was an estimate arrived at following discussion with the defendant and based upon our professional assessment of the relative value of Westside's share of Riverside to the value of Kelvin's share, taking into account indebtedness between the companies. In my professional opinion this estimated apportionment and value was reasonable.

7. Contrary to the suggestion implied by paragraph 26 of Mr Byrne's first affidavit there was nothing sinister or contrived behind the differences between the 2015 and 2016 Statement of Affairs in terms of the value of the defendant's share in Westside. The simple reason for the change from minus £25,000 to £50,000 was because the

> assumed value of Riverside in 2016 was greater than the assumed value in 2015, as it was believed that the property had increased in value due to the rise in the market in general. Insofar as I am aware, the plaintiff raised no queries about the contents of the Statement of Affairs in the two years since it received the 2015 Statement of Affairs or one year since it received the 2016 Statement of Affairs.
>
> 11. It is entirely contrary to established accountancy practice to refer to the assets or liabilities of a company in the Statement of Affairs of an individual who owns a minority shareholding in such company. The correct practice is to set out the size of the shareholding and attribute a value to that. That is exactly how the defendant dealt with his interest in Westside and, insofar as I am aware, the plaintiff has taken no issue with the manner in which he dealt with his interest under the current ex parte proceedings."

(vii) The defendant also relies on the second affidavit of Mr Thompson which was filed in answer to Mr Byrne and again which refers to his valuation and how he reached his valuation. The defendant refers to the fact that no other independent accountancy view has been obtained or put to the defendant by the plaintiff and therefore asserts that there is nothing to contradict Mr Thompson's professional opinion.

[14] In reply counsel for the plaintiff highlighted the following points which I summarise below:

(i) The plaintiff states that it will immediately be apparent that Mr Thompson has had access to a considerable amount of documentation which the defendant has refused to disclose to the plaintiff.

(ii) The plaintiff accepts that the bank provided finance to the retail park owners until 2010 however that ended the relationship. The defendant seeks to establish that the plaintiff's application is frivolous or vexatious or an abuse of process and could not possibly succeed in that context.

(iii) The plaintiff also refers to the fact that detailed information was sought from a year ago in October 2017. In relation to this not one piece of information has been forwarded. The plaintiff therefore says that the absence of an independent accountancy view is because information has not been provided.

(iv) The plaintiff argues that the overwhelming implication to be drawn from the defendant's pursuit of this application is that he has good reason not to

provide the documents sought by the plaintiff. It is time that the parties moved on the question of discovery, whether directly from the defendant or non-parties to the litigation, and provided full and proper instructions to the experts in order that the court may be assisted in the disposal of the issue before it.

Legal Principles

[15] I am grateful to counsel for the helpful legal arguments which have directed me to the core legal considerations as follows:

(i) To strike out any summons for abuse of process requires a high degree of justification. The White Book 1999 Volume 1 18/19/26 states that the court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process. The commentary goes on to explain that such jurisdiction is discretionary and "will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed". Reference is made to various decisions in that regard.

(ii) This case was settled on the basis of a Tomlin Order whereby proceedings were stayed on agreement. The meaning of a stay in a Tomlin Order was addressed by the Court of Appeal in England and Wales in *Hollingsworth v Humphrey* [1987] CAT 1244 which states as follows:

> "The first question … is the meaning of the agreement reached between the parties. That agreement … consists not only in the schedule terms of compromise, but includes the provision for the stay itself, which is an integral part of the compromise.
>
> … as between the parties … while the action is not discontinued or dismissed, the bargain was that the action would not be resorted to therefore save for the purposes of enforcing the terms. That is the plain meaning of the language used … the liberty to apply for the purpose of enforcing the terms gave a summary method of securing a compliance."

(iii) Foskett on Compromise 8th Edition states an operative stay prevents the action from moving forward any further, or resuming its active life without an order of the court, such an order not being granted lightly and only in a proper case.

(iv) Halsbury's Law 5th Edition Volume 12 paragraph 1040 states that:

"Good cause or proper grounds are required in order to remove a stay."

Halsbury's 1044 also states that the most important ground on which the court exercises its inherent jurisdiction to stay proceedings is that of an abuse of process.

(v) Foskett 8th Edition states:

"9-21 In cases where some or all of the terms of the compromise go beyond that which could be provided for by means of a straightforward consent order or judgment, care must be taken in selecting the most appropriate machinery but giving effect to the agreement. When agreement is reached which contains provisions of this nature, it is not good practice (nor indeed lawful) merely to recite the terms of the agreement in a document purporting to be a consent order or judgment and placing the words by consent it is ordered or by consent it is adjudged at the beginning of the document. A consent order or judgment drawn up in a way that is not focussed clearly upon whether any or all of its constituent provisions are within the normal jurisdiction of the court can present great problems when the question of enforcement arises.

9-23. The method most commonly adopted to effectuate a compromise involving terms going beyond the court's normal jurisdiction is to incorporate the agreement into a Tomlin Order. This provides for a consensual stay of the proceedings on the agreed terms save for the purpose of carrying the agreed terms into effect, permission to apply to the court for this purpose being reserved. The terms are usually incorporated into a schedule to the order or are recorded in a separate document which is identified clearly on the face of the order. The great advantage of this procedure is that it enables the enforcement of the terms of the settlement within the existing action by summary procedure. The terms may, of course, be complex and, as already indicated above, can be of a nature which goes beyond the normal jurisdiction of the court. Indeed, the terms of the settlement can go outside the ambit of the original dispute between the parties.

9-33. A compromise embodied in the Tomlin Order is just as susceptible to being set aside on any of the usual

> invalidating grounds as any other compromise. The invalidating grounds are traditionally those of misrepresentation, mistake, undue influence, duress, incapacity. These are set out in Chapter 4 of Foskett."

(vi) My attention has also been drawn to Order 24 Rule 7 of the Rules which provides that discovery can be triggered by the court "at any time".

Consideration

[16] The first port of call is the terms of settlement. The wording of this should be construed along established lines of principle; that is by way of their ordinary and natural meaning; they should be interpreted in such a way as to give effect to the agreement rather than invalidate it and the agreement should be considered as a whole, in context. This agreement was entered into in September 2015 by the plaintiff and defendant with the assistance of experienced legal advisers after substantial litigation. I bear that in mind. It is also clear that the stay is conditional upon the payment of some monies and verification that the defendant does not have assets to meet the debt.

[17] I have considered the fact that no query appears to have been raised about the 2015 or 2016 Statement of Affairs when received. I understand the point however the issue only became live when the sale of Riverside Park was discovered. This was raised by Mr McMurray and in my view he was entitled to protect his client's interests to ensure that the settlement was not undermined. I agree that there were some inaccuracies in the evidence presented for the injunction. Mr Byrne was cross examined about these matters in detail and to some effect. However, the fact that the defendant succeeded in the injunction proceedings does not automatically mean that this application is an abuse of process. I am also of the view that the plaintiff's knowledge of the relevant entities up to 2010 does not mean that the defendant is absolved from any responsibility to provide information. I accept the evidence of Mr Byrne in this regard and in particular his point that it would not have been possible to re-finance the retail park unless there was substantial equity in it.

[18] When broken down the case is really about whether the 2015 and 2016 Statement of Affairs are inaccurate, in breach of Clause 5. This is the substance of the point of claim document and it is the only sustainable argument. I am not satisfied that there is a viable argument regarding Clause 6 given that these assets pre-date the agreement. If I am wrong about that any Clause 6 obligation only arises after crystallisation of the asset.

[19] So regarding Clause 5 and the potential breach of that, the burden of proof is upon the plaintiff. The plaintiff relies on the top line for Riverside in staking its claim, that is the £30m sale. There are however a number of other matters to take into account including liabilities before there can be any accurate assessment of what the defendant might be entitled to. The accountancy evidence is material in assisting

with this however it does not set out an exact methodology of how the shares in the O'Connor Trust and Westside are valued, the basis of valuation and the methodology applied. This information is not within the plaintiff's possession and the case is truly about whether the plaintiff can obtain discovery from the defendant regarding these matters.

[20] Having considered all of the arguments I am not inclined to accept the argument that it is a frivolous or vexatious application or that it is an abuse of process to bring such an application. This is a high hurdle and the context of the case must not be forgotten. The debt in this case is significant and if there is any suggestion that in settling a claim such as this a party has under-represented assets to avoid enforcement of a debt it seems to me it would be unconscionable for a court to stand back and allow such a course of action. So I am not inclined to permit the application made by the defendant that the stay application should be struck out.

[21] The other consideration is whether the court should lift the stay. I bear in mind the law which refers to the need for care in relation to this given that a compromise has been reached. There have to be good arguable grounds. It seems to me that in this case the grounds are really that the plaintiff does not have enough information to assess whether or not the Statement of Affairs is accurate. I do place some weight upon the affidavits from Mr Thompson but I have to bear in mind that I do not have a full accountancy report from him and he was working on the basis of information given to him.

[22] I cannot help but think that the issue could be clarified with relative dispatch if there were further information provided. It seems to me that this does not have to be sensitive commercial information or voluminous information about the company interests. It simply has to be an assessment of how Mr Thompson reached the figures given in the 2015, 2016 (and now 2017) Statement of Affairs in terms of the shareholding, particularly what valuation was used and what methodology was applied. This is a relatively modest exercise which I am prepared to permit. I stress that I am not allowing a wide and unfocussed enquiry and if necessary I will determine the precise limits of the discovery request in due course. I also consider that any arguments about possession and control of relevant information are best addressed within the discovery process.

[23] This issue is not as pressing given that the sale of Riverside has fallen through. However, I understand that the plaintiff wishes to pursue the point at this juncture. If that remains the case it is incumbent upon the defendant to provide relevant information to the plaintiff to prove that the financial picture underlying the compromise is accurate. I agree with the plaintiff that the disclosure obligation does not cease. If the information confirms the Statement of Affairs as accurate the stay will remain in place. I will allow a reasonable time for the parties to undertake this process before the Commercial Court.

[24] Accordingly, the defendant's application to strike out the summons is dismissed. The application to lift the stay is adjourned for the discovery process I have discussed above. I will also hear the parties in relation to any other matters that arise.