[2020] IEHC 114

THE HIGH COURT
COMMERCIAL

[2018 No. 9598 P]

BETWEEN

PATRICK WHEELOCK

PLAINTIFF

AND

PROMONTORIA (ARROW) LIMITED AND STEPHEN TENNANT

DEFENDANTS

JUDGMENT (Ex Tempore) of Mr. Justice Twomey delivered on the 28th day of February, 2020

Summary

1. This case involves an unjust enrichment claim by the first named defendant, Promontoria, against the plaintiff, Mr. Wheelock. The within judgment relates to a motion for discovery issued by Mr. Wheelock against Promontoria.

2. Mr. Wheelock claims that the nature of the remedy sought by Promontoria against him, is such as to entitle Mr. Wheelock to know the price that Promontoria paid for Mr. Wheelock's loan and security, which it purchased from National Asset Loan Management Limited ("NAMA"). This loan had originally been extended by Irish Bank Resolution Corporation (formerly Anglo Irish Bank Corporation Limited ("Anglo Irish Bank" and the "Bank")).

3. In particular, Mr. Wheelock claims that for there to be unjust enrichment it must be at the 'expense' of the claimant, and that therefore this issue can only be determined by considering the price paid for his loan and security by Promontoria, which Mr. Wheelock seeks in this discovery application. This Court concludes that based on a consideration of the nature of the unjust enrichment remedy, it is not relevant and necessary for the price of the loan and security to be disclosed by Promontoria. This Court therefore refuses the discovery sought by Mr. Wheelock.

Background

4. This is an application by the plaintiff, Mr. Wheelock for an order for discovery against the first named defendant, Promontoria, pursuant to Order 31, rule 12 of the Rules of the Superior Courts. Mr. Wheelock seeks the discovery of:

> "All documents evidencing or recording the purchase price, or sum, paid by Promontoria in acquiring the Loan Facility and/or Deeds or Mortgage."

5. The proceedings themselves are concerned with an application by Mr. Wheelock for a declaration that, *inter alia*, the Deeds of Mortgage pursuant to which the second named defendant, Mr. Tennant, was appointed as Receiver over lands in Waterford (the "Monvoy Lands"), are void as a result of the alleged forgery of Mr. Wheelock's signature on the mortgage with Anglo Irish Bank, by his former accountant, Mr. Michael O'Leary ("Mr. O'Leary"). This mortgage and the related facility letter were subsequently acquired by Promontoria.

6. There are separate proceedings between the parties in which Promontoria seeks judgment under the facility letter and in which Mr. Wheelock claims that the sums owed under the relevant facility letter of some €2.6 million are not due, as his signature thereon was similarly forged by Mr. O'Leary (in linked proceedings *Promontoria (Arrow) Limited v. Wheelock & O'Leary* [2014/9112 P]).

7. Mr. Wheelock entered a settlement agreement with Mr. O'Leary, who allegedly forged his signature on the mortgage and the facility letter, and he received a sum of €1.5 million in order to compromise the proceedings that he had instituted against Mr. O'Leary.

8. It is alleged by Promontoria that all or part of this sum is compensation received by Mr. Wheelock for his being allegedly bound to repay the sums under the facility letter and to have the Monvoy Lands subject to a mortgage, arising from the alleged forgery.

9. In the current proceedings, Promontoria counterclaims that Mr. Wheelock benefited from the purchase and development of the Monvoy Lands using the funds obtained under the facility letter and secured by the mortgage and that he also benefited from the payment of the settlement sum of €1.5 million from his former accountant.

10. On this basis, Promontoria alleges that if the mortgage is held to be void in these proceedings, that this will lead to the unjust enrichment of Mr. Wheelock, in that he will own the Monvoy Lands mortgage-free *and* he will have the benefit of €1.5 million compensation for having his signature forged on that allegedly void Mortgage.

11. In order to defend this counterclaim of unjust enrichment, counsel for Mr. Wheelock argues that it is relevant and necessary for the purchase price paid by Promontoria for the loan facility and mortgage to be disclosed to him. This, he argues, is because a key ingredient in any unjust enrichment claim against a defendant is that the enrichment was at the plaintiff's expense.

12. On this basis, counsel for Mr. Wheelock argues that in order to determine whether the alleged enrichment was at Promontoria's expense, it is relevant and necessary for Mr. Wheelock to be informed of the price at which Promontoria acquired Mr. Wheelock's loan and security. For example, counsel for Mr. Wheelock argues that if Promontoria acquired Mr. Wheelock's loans and security for €100,000, then it would be inequitable for Promontoria to get the benefit of the entire settlement sum of €1.5 million. This is why in Mr. Wheelock's view, it is relevant and necessary for Mr. Wheelock to be provided with the details of the price paid by Promontoria for his loans and related security.

13. Counsel for Mr. Wheelock relied on the decision in *Promontoria (Aran) Ltd v. Sheehy* [2019] IEHC 613, in which the disclosure of the amount paid by the plaintiff for the purchase of loans by the plaintiff from a predecessor bank was ordered, on the grounds that the proceedings in that case concerned equitable relief, including unjust enrichment, and so that while it was not normally appropriate to disclose price paid for loans in regular debt collection cases, it was appropriate to make the order in that case.

14. In this case, it is this Court's view that in order to determine whether the discovery sought is relevant and necessary, it is important to consider the nature of the unjust enrichment remedy.

15. In this regard, a number of cases were opened to this Court which do not appear to have been opened in the *Sheehy* case. One of those decisions is the case of *Bank of Ireland Mortgage Bank v. Murray* [2019] IEHC 234, in which Baker J. dealt with a claim of unjust enrichment and in which she relied on the judgment of the House of Lords in *Lipkin Gorman v. Karpnale* [1991] 2 AC 548 in which Lord Goff stated that unjust enrichment:

> "[…] is founded simply on the fact that [….] the third party cannot in conscience retain the money – or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money."

16. It seems clear to this Court that the essence of the unjust enrichment action is whether in conscience the defendant can retain money at the expense of the owner of that money. On this basis, the core issue for Baker J. was determining whether the defendant in that case received the benefit of the money. At paragraph 159 of her judgment in Murray she stated:

> "Application to the facts: Did Mr Murray receive the benefit of the monies?
>
> In the light of the clear and non-controverted evidence that the money advanced in four separate tranches between 2007 and 2009 were paid directly into a joint current account which was utilised for various day-to-day purposes and other purposes by Mr and Mrs Murray, I am satisfied that the defendants have each been shown to have had the benefit of the monies advanced by the Bank."

17. A second case on unjust enrichment which does not appear to have been opened in the Sheehy decision is that of *HKR Middle East Architects Engineering LC & Ors. v. English* [2019] IEHC 306. At paragraph 394 *et seq*., McDonald J. set out the principles applicable to unjust enrichment (namely whether the defendant has been enriched, whether the enrichment was at the claimant's expense and whether the enrichment was unjust) and then concluded:

> "In these circumstances, it seems to me that this is a classic case in which the remedy of unjust enrichment applies and accordingly I find that HKRME [as opposed to the other two plaintiffs] is entitled to a remedy against Mr. English arising out of the transfers in question. […] In these circumstances, it seems to me that the appropriate order to make at this point in the proceedings is to direct an account and enquiry be taken of the unpaid and lawful liabilities of HKRME."

18. In light of McDonald J.'s order in the *HKR* judgment, it is relevant to note that one of the reliefs sought by Promontoria in its counterclaim for unjust enrichment in these proceedings is an order directing the taking of all consequential and necessary accounts and directing the amount found due to be paid to it.

19. A UK Supreme Court case which is of particular relevance to this case is that of *Bank of Cyprus UK Ltd v. Menelaou* [2016] 2 All ER 913. In that case, the UK Supreme Court first set out the principles of unjust enrichment in a similar manner to that done by McDonald J. in the *HKR* case.

20. The UK Supreme Court (at p. 920) then went on to apply those principles to the facts of that case as follows:

> "Was Melissa enriched at the expense of the Bank?
>
> According to Goff & Jones on *The Law of Unjust Enrichment* (8th edn, 2011), para 6–01, the requirement that the unjust enrichment of the defendant must have been at the expense of the claimant "reflects the principle that the law of unjust enrichment is not concerned with the disgorgement of gains made by defendants, nor with the compensation of losses sustained by claimants, but with the reversal of transfers of value between claimants and defendants". I agree.
>
> In my opinion the answer to the question whether Melissa was unjustly enriched at the expense of the Bank is plainly yes. The Bank was central to the scheme from start to finish. It had two charges on Rush Green Hall which secured indebtedness of the £2.2 m. It agreed to release £785,000 for the purchase of Great Oak Court in return for a charge on Great Oak Court. It was thus thanks to the Bank that Melissa became owner of Great Oak Court, but only subject to the charge. Unfortunately the charge was void for the reasons set out above. In the result Melissa became the owner of Great Oak Court unencumbered by the charge. She was therefore enriched at the expense of the Bank because the value of the property to Melissa was considerably greater than it would have been but for the avoidance of the charge and the Bank was left without the security which was central to the whole arrangement." (Emphasis added)

Decision

21. It seems to this Court that the principles of unjust enrichment as applied in *Menelaou* and as encapsulated in Lord Clarke's judgment are decisive in determining in this case whether to order the discovery sought by Mr. Wheelock.

22. It seems to this Court that the key principle underlining unjust enrichment is that Mr. Wheelock should not be in a position where the value of the lands in his ownership are considerably greater to him, at the expense of the bank (Anglo Irish Bank), or in this case its successor in title (Promontoria), than it would have been but for the impugned transaction (i.e. the allegedly forged mortgage).

23. In this instance Mr. Wheelock is allegedly enriched in two ways, firstly if the mortgage is held to be void, then he becomes the owner of the Monvoy Lands security-free. Secondly, he received a settlement of €1.5 million from his former accountant which is alleged to be compensation for the forged facility letter and the forged mortgage.

24. This possible windfall for Mr. Wheelock is at the expense of Promontoria because if the mortgage and facility letter are held to be void, Promontoria lose valuable rights pursuant to those agreements.

25. In this Court's view, it is this loss which is the 'expense' of Promontoria for the purposes of determining whether an unjust enrichment is at a plaintiff's 'expense'. It is not the purchase price which it has paid for those facility letters and mortgage. Hence, the purchase price is not relevant and necessary information for the purpose of these proceedings and so discovery in this regard is not required.

26. To put the matter another way, the conscience of equity is engaged by the fact that it would be unconscionable for Mr. Wheelock to walk away with the Monvoy Lands, free of the mortgage and free of the obligation to pay back the Bank (or more accurately its successor in title, which acquired the Bank's rights) which Bank had lent the money on that security, and, it would be further unconscionable for Mr. Wheelock to retain €1.5 million in compensation from his settlement with Mr. O'Leary for, *inter alia*, being bound by a mortgage, which is then found to be void.

27. This is why in this Court's view *it would be inequitable* for Mr. Wheelock to retain that benefit of development land worth say €1 million with no obligation to pay back the loan and with no mortgage on the development land and with the benefit of having also received cash of €1.5 million.

28. This is also why *it would not be inequitable* for the purchaser of the loan and the mortgage, from the original bank, to become entitled to the development land of say €1 million or part or all of the settlement sum of €1.5 million, even if it paid only say €500,000 for that loan and security.

29. The former scenario is unconscionable, the latter scenario is as a result of an astute commercial decision made by a purchaser of the Bank's loans.

30. This is why this Court believes that the price that Promontoria paid for the loans and mortgage is not relevant and necessary for these proceedings and why the discovery order is not being granted.

31. In any case, this Court does not believe that Mr. Wheelock is unduly prejudiced by this order, since if an account is ordered by the trial judge and if Mr. Wheelock can persuade the trial judge that it is in fact relevant and necessary to know the purchase price, that is something that the trial judge can order at that stage.