THE HIGH COURT

[2024] IEHC 180

[Record No. 1468/2018S]

BETWEEN

MARK FORAN

PLAINTIFF

AND

WILLIAM FLOOD AND MICHAEL HUGHES

DEFENDANTS

JUDGMENT of Mr Justice Barr delivered electronically on the 22nd day of March 2024.

Introduction.

1. This action concerns a claim by one partner in a firm, against some of the other partners in the firm, in respect of contributions that he alleges are due from them, in respect of their share of the losses incurred by the firm in pursuing a particular project.

2. The plaintiff alleges that in resolving the outstanding liabilities of the firm, he paid over and above the contribution to the losses which was due from him. In this

action he seeks to recover from the remaining partners, the amounts that he says are due from them as their contributions to the losses incurred by the firm.

Background.

3. A partnership was established between four men. Two of these were brothers, Michael Hughes and Joseph Hughes; the third was a son-in-law of Michael Hughes, one William Flood. At the material time, he was the future son in law of Michael Hughes. The plaintiff was the fourth man. He was known to the Flood family and was a friend of William Flood.

4. The idea was that the partnership would be created so as to purchase an option over 27 acres of land owned by Joseph Hughes in County Roscommon. The option to purchase, was purchased for the sum of €100. It provided that in the event of planning permission being obtained for a substantial development on the lands, the partnership would purchase the lands owned by Mr Hughes for €6m.

5. It was the intention of the parties that when planning permission for the development was obtained, they would be able to sell the land with FPP for approximately €12/13m and, of that sum, it was agreed that the owner of the lands, Joseph Hughes, would be paid €6m, with the remainder of the purchase price being divided equally among the remaining three partners.

6. It was anticipated that in order to make the planning application the three non-landowning partners, being the plaintiff and the two defendants, would each have to contribute in the region of €63,500, giving a total of approximately €200,000.

7. On 13 January 2006, a partnership agreement was executed between the four partners. Over the following months and at varying times, each of the three non-landowning partners, invested approximately €63,500 in the firm.

8. On 01 November 2006, the firm obtained planning permission for 212 dwellings, 6 retail units, a childcare facility and ancillary services on the site. An objection to the grant of planning permission was lodged by a neighbour.

9. On 15 February 2008, an application was lodged with ACC Bank for a loan to the partnership of €1.54m. It was signed by the first and second defendants. On 29 February 2008, the firm drew down a loan from ACC for €1.266m.

10. Withdrawals for "personal use" were made almost immediately by the plaintiff and by the first defendant from the partnership account. These sums came to a total of €600,000. Of that, €350,000 was paid to the plaintiff; with the remaining €250,000 being paid to the first defendant. This sum was paid to the plaintiff by means of cheques drawn on the partnership account, which were cosigned by each of the defendants.

11. The money that was drawn down by the plaintiff and the first defendant, was used to deal with a somewhat complex investment situation that had arisen in Dubai. In short, the plaintiff and the first defendant had each invested in an option to purchase space in an office complex in Dubai, which had been sold to them by an Irish intermediary. Apparently, he had been a conman, who had sold multiple options to purchase the same floors in the office building. As a result, both the plaintiff and the first defendant stood to lose very considerable sums of money, unless they were able to produce the remaining funds and to sign documents in Dubai, shortly after February 2008.

12. Both the plaintiff and the first defendant used the funds that they had withdrawn from the partnership account, to make the necessary payments in Dubai. As a result, they were able to save their initial investment; and ultimately, in August 2008, the plaintiff managed to sell his investment in the property for a considerable

profit. He stated that having paid the necessary capital gains tax on the profit that he made, he repatriated approximately €200,000, which he used to build an extension to his dwelling in Ireland; with the remainder being invested in a company that he owned in Malaysia.

13. On 08 December 2009, An Bord Pleanála overturned the decision to grant planning permission for the development on the site.

14. On 14 May 2015, summary proceedings were issued by ACC against all the partners. By May 2017, ACC were seeking judgment of circa €920,000 jointly and severally against the partners. On 18 May 2017, ACC reached an agreement with the plaintiff, whereby they agreed to accept €390,000 in full and final settlement of the debt owed by the partnership to them. This was funded by a payment of €130,000 from Mrs Rose Flood, the mother of the first defendant. The remainder was provided by the plaintiff. The plaintiff and the second defendant had also redeemed a security which ACC held over the lands that were owned by Joseph Hughes. That security had been redeemed for €108,000, of which the plaintiff paid €88,000 and the second defendant paid €20,000.

The Partnership Accounts.

15. There was no great dispute in relation to the partnership accounts in this case. The evidence that was given by Mr Tim O'Keeffe, the accountant to the partnership from 2005-2018, was not challenged.

16. His evidence was that the partnership losses at December 2018, including a small adjustment due on the drawdown fee, came to a total of €267,739. When that was divided between the three partners, that came out at a net contribution of €89,249 due from each of the three non-landowning partners.

17. To that figure, would have to be added any sums drawn down by the partners from the partnership account for their personal use. Credit would also have to be given for payments into the firm's accounts that were made by each of the partners during the lifetime of the partnership.

18. Mr O'Keeffe stated that when that exercise was done, the net amount that had been overpaid by the plaintiff came to €192,881. There was an underpayment by the first defendant in respect of his contribution to the partnership losses and in respect of his personal withdrawals, of €138,112; and an underpayment by the second defendant of €62,863.

Issues in the case.

19. At the trial, the first defendant raised two inconsistent defences. His first line of defence was that he had never consented to the settlement that had been reached by the plaintiff with ACC Bank in May 2017 on behalf of the partnership, to settle the partnership debt with the bank for €390,000.

20. The first defendant maintained that because he was of the opinion that the bank had charged the incorrect rate of interest on the loan, he had not consented to the negotiations continuing on the basis of the interest that had been charged by the bank. He submitted that he had not consented to the settlement that had been reached with the bank. He argued that because he had not consented to the settlement, he was not bound by it.

21. The first defendant's second line of defence was to the effect that the payment that had been made by his mother of €130,000 towards that settlement, had been in full and final settlement of any liabilities that he had had to the partnership, or to its creditors. Accordingly, he argued that as a result of that payment, which had been

made on his behalf by his mother, he had no further liability in the matter. In particular, he had no liability to make any further contribution to any losses that had been incurred by the partnership.

22. The second defendant argued that the plaintiff and the first defendant had effectively hoodwinked him into agreeing to a loan being taken out by the firm with ACC Bank in February 2008, when the partnership did not require those funds, given that he it had already acquired planning permission some eighteen months earlier, on 01 November 2006.

23. The second defendant argued that the true purpose of the loan, which had been concealed from him, was to provide the plaintiff and the first defendant with funds, which would enable them to save their investments, which were in peril in Dubai. It was submitted that as the plaintiff had admitted that he had made a substantial profit on that investment, through the use of the funds that he had obtained from the firm, he was obliged to account for the firm for the profit made by him. As that had not been done, it was submitted that that was a good defence to the plaintiff's equitable claim for a contribution to the losses incurred by the partnership.

24. In response to the defence raised by the first defendant, the plaintiff submitted that while Mrs Rose Flood had initially sought to make the payment of €130,000 conditional upon it being in full and final settlement to any contribution that the first defendant might have for money withdrawn by him from the firm's account and/or for the losses incurred by the partnership; the plaintiff had not accepted her offer on those terms.

25. This evidence was supported by the evidence of Mr Tim O'Keeffe, the firm's accountant, who stated that when he had sent a draft agreement to the plaintiff, under which the plaintiff would acknowledge that the payment of €130,000 would

extinguish any further liability of the first defendant to the debts or losses of the partnership, the plaintiff had refused to sign that agreement.

26. The plaintiff gave evidence that subsequent to that, Mrs Flood had agreed to release the funds to the plaintiff to enable him to effect the settlement with ACC, but had told him that he would have to look to the first defendant in respect of any further liability that he had to the partnership.

27. In relation to the defence raised by the second defendant, the plaintiff pointed out that the second defendant had signed the application form for the loan; therefore, he could not argue that he was unaware of the amount of the loan that was sought from the bank.

28. He further stated that he had told the second defendant that he needed to borrow funds from the firm's account, so as to deal with difficulties that had arisen in connection with an investment that he had in Dubai. He accepted that he had not gone into specifics in relation to that investment. He stated that the second defendant had agreed to the plaintiff making the necessary borrowings from the firm's account. He stated that after he had sold his investment in Dubai, he had told the second defendant that he had "done well" on the investment.

29. The plaintiff further submitted that the second defendant was aware of the situation in Dubai, because his future son-in-law, the first defendant, was in the same difficulties and had obtained money from the firm's account to deal with the problems that had arisen with the Dubai investment. Accordingly, it was submitted that the second defendant had been aware of the purpose for which the withdrawals were made from the firm's account by the plaintiff and the first defendant.

30. The plaintiff submitted that the second defendant could not argue that he was unaware of the withdrawals having been made by the plaintiff from the partnership

account, as he had been a signatory on the cheques that had been written in favour of the plaintiff and drawn on the firm's account.

31. Insofar as the second defendant had asserted at the trial, that he had pre-signed cheques and left them with his future son-in-law, the first defendant; the second defendant had accepted that he had received bank statements on the account in the ordinary way. Therefore,it was submitted that he had had notice of the withdrawals within weeks of them having been made. He had never raised any difficulty about them.

32. Finally, the plaintiff submitted that insofar as he had withdrawn in total the sum of €350,000 from the firm's account, all that money had been repaid by him into the firm's account.

The law.

33. Before coming to the conclusions in this judgment, it will be helpful to set out the principles of law which are relevant to the issues that arise in this case. Section 20 of the Partnership Act 1890 (as amended) provides that all property brought into the partnership stock, or acquired by the firm, constitute partnership property and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement. Section 29 of the 1890 Act provides that every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connection.

34. It is well established that partners stand in a fiduciary relationship towards one another. In *Best v Ghose* [2018] IEHC 376, Baker J (then sitting as a judge of the High Court) held that the essential material characteristic of a fiduciary relationship,

arose wherever a person had both the power to act on behalf of another, or to act in a way that impacted on the interests of another and had a responsibility to do so in the interests of that other person. The relevant elements included duties of loyalty, responsibility and control over matters that could impact on the interest of another and a duty not to make a secret profit (see para. 67).

35. In *Irish Life & Permanent plc v Financial Services Ombudsman & Ors.* [2012] IEHC 376, Hogan J, (then sitting as a judge of the High Court) stated that the whole object of a fiduciary relationship was based upon a recognition that certain categories of persons owed duties to others, over and above conventional contractual obligations, by virtue of the special nature of their profession, occupation or position, such that, such persons were obliged to act in a completely selfless manner. Trustees, agents, directors and partners were among those normally regarded as fiduciaries.

36. The equitable right of contribution, was considered by the High Court in *Roche v Wymes* [2008] IEHC 141. In that case, the court was considering the equitable right of contribution between co-sureties. One of the sureties had paid a judgment that had been obtained jointly and severally against the co-sureties. He proceeded to seek a contribution from his co-surety.

37. McMenamin J (then sitting as a judge of the High Court) considered the equitable right of contribution at paras. 42 *et seq.* He concluded that as a matter of law, he was satisfied that in an action for equitable contribution, the cause of action by one surety who had paid more than his due proportion of the debt against a co-surety for contribution, arose only when the surety making the claim had paid the debt. He noted that in the caselaw it had been recognised that the right of contribution between co-sureties or co-debtors, though not founded on contract, but on general principles of justice, was analogous to the right of indemnity and was subject to similar rules. No

right of action would lie at common law in favour of a surety against a co-surety, or in favour of one co-debtor against the rest, until he had paid more than his share of the debt; whenever one such surety or debtor had paid more than his proportion of what the sureties could be called upon to pay, then and not until then, it was clear that such part ought to be repaid by the others and an action would lie to recover such contribution. (see para. 90).

Conclusions.

38. The partnership in this case was established by a written agreement dated 31 January 2006. Mr Joseph Hughes, the landowner, was not a party to this action. The remaining partners were agreed that he had not played any significant part in the project, apart from supplying the lands in respect of which the planning permission was sought. He also made one payment into the partnership account of €10,000. Other than giving the partnership the option to purchase the lands for €6m, in the event that they obtained planning permission, he does not appear to have played any active role in the conduct of the partnership.

39. The figures that were presented by Mr O'Keeffe in respect of the loses that were incurred by the partnership and in relation to the various payments into the firm's account and from it, were not challenged at the hearing of the action. Accordingly, the court finds that the overall losses of the partnership amounted to €267,739. When account is taken of withdrawals for personal use and for payments in that were made by each partner, the court finds that there was an overpayment by the plaintiff in respect of the firm's losses of €192,881. The court finds that there was an underpayment in respect of his personal withdrawals and his contribution to the losses

incurred by the partnership on the part of the first named defendant of €138,112. The court finds that there was a similar underpayment by the second defendant of €62,863.

40. On a *prima facie* basis, the court finds that the plaintiff is entitled to recover these contributions from the defendants, unless his right to recover the sums in equity is defeated by the specific defences raised by the first or second defendant.

41. The court finds that the defence raised by the first defendant that he did not consent to the settlement agreement that had been reached between the plaintiff and ACC Bank in May 2017, is unsustainable, due to the fact that payment was made to that settlement on behalf of the first defendant, by Mrs Rose Flood. In making that payment she was acting as agent for the first defendant. Therefore, the first defendant cannot argue that he did not consent to the settlement agreement that had been reached with the bank.

42. In his second ground of defence, the first defendant relies on the settlement agreement that had been reached with ACC Bank. He argued that his contribution of €130,000 was in full and final settlement of his liability for all the debts and losses of the partnership. I find that this defence is also unsustainable.

43. I accept the evidence of Mr O'Keeffe, that when a draft agreement was sent to the plaintiff in those terms, he refused to sign it. I accept the plaintiff's evidence that subsequent to that, Mrs Rose Flood said to the plaintiff that he could use the money from her investment in a company in Malaysia, in the sum of €130,000, as the first defendant's contribution to the settlement with ACC, but that if the plaintiff wanted more, he would have to look to the first defendant for such sums.

44. If the first defendant wished to contradict that evidence, he could have called Mrs Rose Flood as a witness. At the trial, he stated that she was too unwell to give

evidence. However, no medical evidence was produced in that regard. Indeed, Mrs Rose Flood attended at the second day of the hearing of the action.

45. Where a party fails to call a relevant witness, whom it is within their power to call at the trial of an action, the court is entitled to draw an inference from their omission to call that witness. As long as there is some evidence, which could be expected to be countered by the evidence of the witness not called, in the absence of calling that witness, the court is entitled to regard that omission as supporting the account given in evidence by the opposing party: see *Doran v Cosgrove* [1999] IESC 74; *H v St Vincent's Hospital* [2006] IEHC 443; *Dunne v The Coombe Hospital* [2013] IESC 58; *Fyffes v DCC* [2009] 2 IR 714; *Whelan v AIB* [2014] IESC 3.

46. In the circumstances, the court finds that the payment that was made by Mrs Rose Flood on behalf of the first defendant to the settlement with ACC, was not in full and final settlement of the first defendant's liability for the debts and losses of the partnership.

47. Finally, the defences raised by the first defendant are not maintainable due to the principle of law that one cannot approbate and reprobate at one and the same time. It is not possible for the first defendant to simultaneously run the defence that he did not consent to the settlement agreement; while at the same time raising a defence that he could rely on that settlement agreement and his contribution thereto, as being in full and final settlement of his liability to contribute to the debts and losses of the firm.

48. Turning to the defence raised by the second defendant, it is necessary to first examine the loan for €1.266m that was taken out by the partnership on 29 February 2008.

49. The court does not accept the evidence of the plaintiff and the first defendant, that this loan was taken out by the partnership for the purpose of dealing with the appeal before ABP and/or for purchasing the objector's lands.

50. By the time the loan was taken out in February 2008, the firm had long since obtained planning permission for the development, on 01 November 2006. In evidence, the plaintiff and the first defendant stated that in resisting the appeal before ABP, they would incur additional expenses of approximate €80,000. There was no evidence provided of these expenses. Even assuming that that figure may be broadly accurate, that does not justify taking out a loan that was over ten times greater than the amount needed to resist the appeal.

51. To explain that contradiction, the plaintiff proffered the explanation that the additional funds may have become necessary to purchase the objector's lands. Again, there was no evidence that any negotiations, much less any purchase price, had been agreed with the objector in this regard. It is hard to see why any businessman would draw down a loan prior to reaching any agreement to purchase lands at a particular price. It does not make commercial sense.

52. The plaintiff then sought to explain the size of the loan by stating that the bank would only lend an amount of money that was 10% of the anticipated market value of the lands with FPP. No evidence was produced of this attitude on the part of the lending bank. Even allowing for the fact that one must look at this transaction through the prism of the economic climate that existed in February 2008, that suggestion is farfetched.

53. The court rejects the evidence given by the plaintiff and the first defendant in relation to the explanation for the size of the loan taken out on behalf of the firm in February 2008.

54. The court is of the opinion that the true purpose of the loan, was an exercise in leveraging the credit of the partnership, so as to obtain a large source of funds that could be used by the partners as a temporary source of funding, while they awaited the windfall that would come their way upon the anticipated positive outcome of the planning appeal, which they expected to come to hand in the near future.

55. When one looks at the timing of the loan against the difficulties being faced by the plaintiff and the first defendant in connection with their investments in Dubai, the true picture emerges.

56. The first defendant described the scramble by Irish investors, who had been duped by the conman into investing in the purchase of floors in an office block in Dubai, as being akin to the cartoon series, the Whacky Races. He said that once the fraud became known, such that there were too many investors for too few floors in the building, there was a mad dash by investors to go to Dubai to pay the balance outstanding and to sign the required documentation.

57. The plaintiff described the need to make payments to the contractors in Dubai, as being akin to a ransom payment. The choice was stark. They either paid the money, or lost the funds they had invested up to that point. It was against that imperative that the dates of the loan and of the withdrawals from the firm's account, fall into place. The application for the loan was made on 15 February 2008. It was drawn down on 29 February 2008. Withdrawals were made by the plaintiff and the first defendant almost immediately thereafter. The first withdrawal was made by the plaintiff on the same date as the loan was drawn down.

58. Both the plaintiff and the first defendant accepted that having received the money, they went to Dubai very shortly thereafter to make the necessary payments and to sign the required documentation, to secure their shares of the office block. In

the events which transpired, everything worked out well for them. They each made a substantial profit on the disposal of their Dubai investments.

59. Why the loan drawn down was twice as large as the amount needed for their Dubai investments, remains a mystery. It could have been accepted simply because it was on offer; or it could have been that the bank official with whom they were dealing, was anxious to increase the size of his loan book. The true reason for the size of the loan remains unknown.

60. The size of the loan was largely immaterial to the plaintiff and the first defendant at that time, because they firmly believed that the planning appeal would be determined in their favour within a short period. At which time, they would have had plenty of funds to repay the loan in full and make a large profit.

61. Given the court's findings on the true nature of the loan, the question arises as to what affect that has on the plaintiff's claim in these proceedings, or on the defence raised by the second defendant.

62. The answer is that it has no affect on either. While the purpose of the loan was not for the primary purpose of the partnership, it was agreed to by all the non-landowning partners. The first and second defendants signed the loan application form on 15 February 2008, in which they clearly sought a loan of €1.54m. As the second defendant signed that document, he cannot argue that he did not consent to the loan being taken out by the partnership.

63. In relation to the withdrawals by the plaintiff and the first defendant, I accept their evidence that they had discussed in broad terms with the second defendant, the reason why the withdrawals were necessary; namely to deal with difficulties that had arisen with their investments in Dubai. The court is satisfied that the second defendant gave his consent to these withdrawals being made.

64. The second defendant co-signed the cheques that were made out to the plaintiff on the firm's account. Insofar as he alleged at the hearing of the action, that he had pre-signed cheques for use by the first defendant in discharging expenses of the firm; two things flow from that evidence. First, by so doing, he was giving the first defendant, the co-signatory on the account, implied authority to make payments out of the account.

65. Secondly, the second defendant's home address was the firm's address for business purposes as per clause 2.3 of the partnership agreement. The second defendant accepted in evidence that he had received bank statements at that address in the ordinary way. He accepted that he was aware of the withdrawals that had been made by the plaintiff and the first defendant, when he had received the bank statements. Accordingly, he was aware of the withdrawals, within weeks of their having been made. He did not object to these withdrawals.

66. The second defendant also made a withdrawal from the firm's account of €69,551, which he stated he regarded as being a reimbursement of his original investment in the firm.

67. Lastly, I accept the evidence of the plaintiff and the first defendant that after they had dealt with the Dubai investment issues, they told the second defendant that they had done well out of the investments, or words to that effect. Accordingly, he was aware that they had made a profit on their investments.

68. Having regard to the evidence on this aspect of the case, I make the following findings of fact: first, I find that the second defendant was aware that a loan for in excess of €1m had been taken out in the name of the firm; secondly, he was aware that the plaintiff and the first defendant proposed to make withdrawals from the account to deal with issues arising in connection with their Dubai investments; thirdly,

he consented to such withdrawals by signing the cheques and by failing to raise any objection to the withdrawals when he received the relevant bank statements; fourthly, he was told later on that the Dubai investments had worked out well for the plaintiff and the first defendant.

69. In these circumstances, I hold as a matter of law, that the plaintiff and the first defendant did not make any secret profit from the use of partnership accounts. The essence of a secret profit is that a partner uses partnership funds or assets without the knowledge of the other partners and makes a profit from the use of such partnership property, which he does not declare to the other partners.

70. There is nothing to prevent partners making a loan of the firm's money to one of the partners. If that partner makes a profit on the use of the loan received from the partnership, that is not a secret profit for which he must account to the partnership.

71. In this case there was an oral agreement between the parties that the plaintiff and the first defendant could withdraw funds from the partnership account to deal with their problems concerning their Dubai investments. The plaintiff and the first defendant had already invested their own funds in that venture. The second defendant knew that was why they required the additional funds from the firm's account. The fact that they managed to save their investments in Dubai and to ultimately make a profit on the disposal thereof, does not constitute such profit as a secret profit, for which they had to account to the partnership. Their only obligation was to repay their loans to the partnership account. It is accepted that the plaintiff repaid his borrowings in full.

72. That there was no such duty to account in respect of profit made on such withdrawals, is supported by the fact that the second defendant made a similar, though

much smaller, withdrawal from the account in the sum of €69,550, for which he was not asked to account for any profit that he may have made on the use of those funds.

73. I find that in making the withdrawals from the partnership account in the sum of €350,000, the plaintiff was effectively borrowing that sum from the firm. His only obligation was to repay this money. He did that. I hold that he was not obliged to account to the firm for any profit that he made on his Dubai investment.

74. Having regard to these findings, I conclude that there is no substance in the defence raised on behalf of the second defendant.

75. As I am satisfied that the figures provided by Mr O'Keeffe are accurate in relation to the extent of the firm's losses and in relation to the payments in and out made by the various partners to the firm's account, I find that the plaintiff is entitled to a contribution from the defendants in respect of the firm's losses, which had been discharged in full by the plaintiff. The plaintiff is entitled to the following contributions in respect of such losses: from the first defendant he is entitled to receive the sum of €138,112; and from the second defendant he is entitled to receive the sum of €62,683.

Proposed order.

76. Having regard to the findings made by the court in its judgment herein, it is proposed that the final order of the court should reflect the following: judgment for the plaintiff against the first defendant in the sum of €138,112; judgment for the plaintiff against the second defendant in the sum of €62,863. As the plaintiff has been entirely successful in this action, it would appear that he is entitled to an order for his costs against the defendants jointly and severally; such costs to be adjudicated in default of agreement. The court would propose to make an order granting each of the

parties liberty to take up a copy of the DAR for the hearing, at their own request, for the purpose of an appeal, if necessary.

77. As this judgment is being delivered electronically, the parties shall have three weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

78. The matter will be listed for mention at 10.30 hours on 24 April 2024 for the purpose of making final orders.