THE HIGH COURT

[2026] IEHC 590
[Record No. 2023/1926 HP]

BETWEEN

GREG KAVANAGH AND GREG KAVANAGH DEV CO LIMITED

PLAINTIFFS

AND

ANNE O'NEILL AND BALLYCRAG DEVELOPMENTS LIMITED (IN RECEIVERSHIP)

DEFENDANTS

JUDGMENT of Ms Justice Bolger dated the 12th day of August 2026

1. This is the first defendant's application for summary judgment against the first plaintiff in the amount of €2,200,000, which she seeks pursuant to clause 2.9 of a settlement agreement dated 18 January 2023, revised by agreement on or about 27/28 July 2023. The original settlement agreement of 18 January 2023 provided for three payments to be made within three, eight and twelve months of the date of the agreement, coming to a total of €2,400,000. The terms provided at clause 2.4 that on payment of €2 million, the second plaintiff would acquire the property known as Winestay House (hereinafter referred to as "the property"). Clause. 2.9 provided that in the event of default by the first plaintiff, then the first plaintiff and the second defendant consented to judgment against them in the amount of €2.4 million less any payment made. A draft contract for sale of the property was appended to the settlement agreement, special condition no. 3 of which stated "VAT – [TBC]".

2. On 16 March 2023, the first plaintiff delivered €200,000 to the first defendant's solicitors and sought an executed contract for sale of the property. On 28 April 2023, the plaintiffs issued the within proceedings seeking specific performance of the settlement agreement. On 11 May 2023, a *lis pendens* was filed with the High Court in respect of the property. On 24 May 2023, the first plaintiff delivered an affidavit in which he stated that VAT in a property transaction is a tax specialist matter within the purview of the vendor and not the purchaser and that as a result the contract for sale could not contain a set figure until the defendant had made a tax assessment and confirmed the position. On 31 May 2023, the plaintiffs registered a *lis pendens* on the folio. On 17 July 2023, the plaintiffs delivered a statement of claim seeking specific performance of the original settlement agreement and a declaration that the €200,000 payment constituted a deposit and/or part payment. On 27 July 2023, the interlocutory injunction came on for hearing, and the motion was settled on the basis of agreed terms, which constituted the revised settlement agreement on which these proceedings are now premised. That revised agreement stated that a signed contract for sale in the manner appended to the settlement agreement to include the finalised VAT position at clause 3 would be exchanged by the parties with the signed contract first to be delivered to the plaintiffs by the receiver before 12 noon on the following day, that the *lis pendens* would be vacated and that the original settlement agreement would be varied in terms of the timing of payments to be made but would otherwise remain in being.

3. On the following day, the signed contract for sale of the property was delivered by the receiver in accordance with the revised terms. It included a VAT clause which, the first defendant submits in this application, was in the standard form for receivership sales. However, the plaintiffs' solicitors contested that the form of the contract for sale had been agreed and they circulated the draft contracts for sale that had been previously circulated in March including the clause "VAT – [TBC]". In correspondence, the plaintiffs' solicitors made it clear that the plaintiffs would not agree to the VAT clause inserted into the contract for sale by the receiver and that no agreement would be concluded which might create what they referred to as "*further financial exposure*" for the plaintiffs.

4. On 18 January 2024, the within proceedings seeking specific performance of the revised settlement terms were issued by the plaintiffs and a *lis pendens* was filed for the property. On 30 May 2024, the first defendant delivered a defence and counterclaim seeking judgment pursuant to the default provisions of the revised settlement agreement, in particular, clause 2.9 as set out above. On 27 February 2025, the within application for summary judgment was issued against the first and second plaintiffs. By order dated 28 April 2025, summary judgment was granted in favour of the first defendant as against the second defendant company in the sum of €2,200,000 pursuant to clause 2.9 of the revised terms.

5. On 28 May 2025, the first defendant's solicitors issued correspondence proposing that the purchase would be completed to the second plaintiff following payment of the VAT, being 13.5% of the €2 million consideration, into escrow and the remaining monies due would be paid to the defendants and the issue of VAT could be resolved by this Court as might be necessary. This proposal was not agreed to by the first plaintiff who averred that it was not practically workable as he said it disregarded the very real risk that Revenue would impose interest and penalties for failure to account for the VAT arising on the sale at the time of closing.

6. The first defendant's case in the within application for summary judgment is summarised in her legal submissions as follows:-

> *"Mr Kavanagh has expressly and explicitly consented to judgment in the settlement agreement of 18 January 2023, as subsequently revised in correspondence exchanged in July 2023. Under the revised settlement terms, the total sum due from Mr Kavanagh is €2,400,000, less the sum of €200,000 paid in March 2023. €1,800,000 was due to be paid on or before 18 January 2024 and a further €400,000 was due to be paid on or before 18 March 2024. Neither of these sums were paid. Pursuant to clause 2.9 of the revised settlement agreement, Mr Kavanagh consented to judgment in the sum of €2,200,000 arising out of those defaults. There is no room for debate on these issues."*

The first defendant submits that the first plaintiff is estopped from complaining about the VAT because she says she relied upon his averment in his 24 May 2023 affidavit in entering the revised settlement terms. In the alternative, she argues that specific performance is not available as all of the terms are not agreed. In the further alternative, she maintains that the first plaintiff is liable to her in the sum of €1,930,000 because the maximum he could ever dispute, which she does not accept, is liability for VAT on the €2 million consideration being €270,000. In that regard, she relies on the correspondence referred to above in submitting that judgment in the sum of €1,930,000 should be granted to her.

7. The plaintiff's case is equally succinctly set out at para. 1 of his submission as follows:-

> *"(1) Mr Kavanagh's obligation under the settlement agreement to pay compromise payment No. 2 is not freestanding but is, instead, in consideration for receiving the property.*
>
> *(2) The sale of the property did not complete because of a dispute concerning the allocation of liability for VAT on the sale of the property under the settlement*

agreement. That is a mixed question of law and fact not capable of determination herein. The construction advanced by Mr Kavanagh is, at the very least, arguable.

(3) Assuming Mr Kavanagh is correct in his construction of the settlement agreement then fault for failure to complete the sale of the property will rest with Ms O'Neill and the receiver, not Mr Kavanagh.

(4) In the eventuality Ms O'Neill would not be entitled to rely upon clause 2.9 to seek judgment against Mr Kavanagh."

Summary judgment

8. A party seeking to overcome summary judgment must demonstrate a fair or reasonable probability of having a real or *bona fide* defence at trial (in *Aer Rianta v Ryanair Ltd* [2001] 4 IR 607). The first plaintiff's evidence in assessing the first defendant's application is to be taken at its highest.

9. The *Harris Grange* principles, set out by McKechnie J, are well known. I highlight, in particular, (v), (ix) and (xii) as follows:-

"(v) where, however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

…

(ix) leave to defend should be granted unless it is very clear that there is no defence;

…

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

The revised settlement agreement

10. The terms of the revised settlement agreement of July 2023 fall to be considered in these proceedings. The first defendant seeks to rely on the contents of an affidavit sworn by the first plaintiff in May 2023 in relation to his (then) view of the VAT situation. That cannot, in itself, inform the court of the correct interpretation of the agreement subsequently reached between the parties, which attached a draft contract for sale in which the VAT was stated as "TBC". I return to estoppel further below.

11. The plaintiff emphasises the express full and final nature of the terms of the revised agreement and the reference at clause 2.2 to the first plaintiff paying "*the total sum of €2,400,000*". There is no reference in the terms to the first plaintiff paying additional VAT as part of the settlement, unlike an express reference to the receiver's conveyancing costs that the first plaintiff agreed to discharge, which are expressed to be plus VAT. The first plaintiff highlights that the revised settlement agreement contemplated the sale of the property pursuant to the attached contract for sale which he says is part of the agreement. He submits that the revised agreement never varied the total sum that was to be paid. He argues that the revised agreement never made the purchaser of the property liable for any VAT that may arise and that the receiver was therefore never entitled to require payment of the VAT from them under the settlement agreement. He says the reason the sale did not close was due to a dispute as to whether the settlement agreement required the purchaser to be liable for any VAT due, a dispute that he says requires to be determined prior to considering whether he or the second defendant was in default for not completing the sale, which he says is a mixed question of law and fact and must take account of the context of the revised terms.

12. Bearing in mind the need to take the first plaintiff's case at its highest for the purpose of this application, it seems to me that the first plaintiff has gone far enough to establish the credibility of having a *bona fide* defence. This is not defeated by clause 2.9 of the revised settlement agreement, as it may be necessary at the plenary hearing to consider why the first plaintiff has not made payments Nos. 2 and 3. In effect, the trial judge may have to consider which of the parties has been at fault in the implementation of the revised settlement terms.

13. My view as to the existence of a bona fide defence is not altered by the first defendant's contention that the first plaintiff does not come with clean hands. The first plaintiff is defending the claim for summary judgment. The maxim that unclean hands may defeat equitable relief does not necessarily apply to a defence to a claim, such as it is at issue here, at least for the purpose of an interlocutory application for summary judgment.

14. Neither is my view altered by the first defendant's reliance on an estoppel by convention as I consider that gives rise to mixed questions of law and fact and cannot therefore be conclusively determined in favour of the first defendant in the within application.

15. I do not accept the first defendant's argument that the contract for sale is incomplete given the reference in the settlement agreement to it being in final form. Whether the VAT claim clause in the contract for sale is a material term (and the plaintiff has averred that it is not) will have to be determined at trial with examination and cross-examination of the evidence.

16. I do not accept the first defendant's submission in relation to part judgment, i.e. the amount due less the maximum VAT liability. The first plaintiff's *bona fide* defence applies to the entirety of the monies claimed as he says any VAT due was never part of what he contracted to pay.

17. I emphasise the low bar that establishes a *bona fide* defence and, in this case, the disputes on the facts which will have to be resolved at trial following whatever discovery and examination and cross-examination of the witnesses as may occur. I am therefore of the view that this case must proceed to plenary hearing, and I refuse the first defendant's application for summary judgment.

<u>Indicative view on costs</u>

18. In the circumstances of this case, the first defendant believes that the first plaintiff has no defence to her counterclaim. Ultimately, this will be a matter for the trial judge and, if the first defendant is correct, she may be entitled to the costs of this application as well as to her substantive costs depending on the views of the trial judge. In those circumstances, my indicative view on costs is that the costs of this motion should be treated as costs in the cause by the trial judge.

19. I will put the matter in at 10am on 6 October 2026 for the making of final orders.

Counsel for the first plaintiff: Martin Hayden SC, Ross Aylward BL

Counsel for the first defendant: Gary McCarthy SC, Arthur Cunningham BL