THE HIGH COURT

[2011 No. 3863 P.]

BETWEEN

AVIVA INSURANCE EUROPE S.E.

PLAINTIFF

AND

QUARRYVALE TWO LIMITED, QURARRYVALE THREE LIMITED AND MCLAUGHLIN AND HARVEY LIMITED

DEFENDANTS

AND

THORNTON ROOFING IRELAND LIMITED

THIRD PARTY

JUDGMENT of Mr. Justice Noonan delivered on the 25th day of October, 2017

1. This application is brought by the third defendant (McLaughlin) to dismiss the claim of the plaintiff (Aviva) on the grounds that no reasonable cause of action exists in favour of Aviva against McLaughlin and/or Aviva's claim is bound to fail. The application is brought pursuant to Order 19 rule 28 or alternatively pursuant to the inherent jurisdiction of the court.

Background Facts

2. Aviva were the insurers of Denholme, an unlimited company, which owned and operated a clothing shop known as "Sasha" in the Liffey Valley Shopping Centre. On 3rd May, 2005, flooding occurred in the Sasha shop occasioning extensive damage to the premises and the stock therein. Denholme claimed on their insurance with Aviva who paid out on foot of the claim.

3. Arising from the foregoing, Aviva determined to bring a recovery action against the first two defendants, the owners of the shopping centre and Denholme's lessors and also against McLaughlin, a building contractor which was at the material time carrying out works in the shopping centre immediately above the Sasha shop.

4. Subsequent to these events, it would appear that Denholme was wound up by the court and Mr. David Carson of Deloitte was appointed as liquidator.

5. Aviva instructed their solicitors, Corrigan and Corrigan (Corrigans) to institute proceedings to recover the loss.

Relevant Chronology

6. 18th May, 2010: Corrigans wrote to Mr. Carson indicating Aviva's intention to pursue the claim and asking him to confirm his agreement to proceedings being issued in the name of Denholme (in liquidation). There appears to have been no reply to this letter or a subsequent reminder of the 31st May, 2010.

7. 10th February, 2011: Corrigans again wrote to Mr. Carson asking for his cooperation in the claim. They advised him that there were two ways in which Aviva could bring the claim, first by way of subrogation in the name of Denholme (in liquidation), or by way of an assignment by the liquidator of his right to sue in favour of Aviva, in which event Aviva could bring the claim in its own name. Corrigans advised that if the latter course was being pursued, the liquidator would have to execute a legal assignment in favour of Aviva.

8. 16th March, 2011: Corrigans emailed the liquidator's solicitors, Arthur Cox (Cox), referring to the previous day's telephone conversation and pointing out that the matter was urgent as the Statute of Limitations would expire on 3rd May, 2011.

9. 28th March, 2011: Cox wrote to Corrigans indicating that the liquidator was prepared to execute the assignment and asking for a draft to be sent.

10. 4th April, 2011: Corrigans wrote to Cox indicating that in consideration of the liquidator executing the deed of assignment, Aviva would include Denholme's uninsured losses in the claim and asked Cox to forward a draft deed of assignment. The urgency of the matter was again highlighted in view of the approaching limitation deadline.

11. 28th April, 2011: This was the Thursday before the May bank holiday weekend and the Statute of Limitations was due to expire on bank holiday Monday, 2nd May, 2011. Corrigans wrote by post and fax an extremely urgent letter to Cox stating:

> "The Statute of Limitations is due to expire in this case on 2nd May, 2011. As 2nd May is a bank holiday, we will have to issue the proceedings tomorrow and we will need from you the executed deed of assignment before then so that it can be served upon the defendant companies today."

A handwritten note appears on the copy letter which seems to have been written by a solicitor is Corrigans referring to a telephone conversation of that day with Cox and noting:

> "Liquidator out of country until Tuesday. Tuesday too late…"

By a further letter of the same date, Corrigans again wrote to Cox stating that if Aviva's claim failed as a result of the liquidator failing to execute a deed of assignment as agreed, Aviva would be pursuing him.

By an email timed at 16.43, Cox emailed the draft deed of assignment to Corrigans stating that arrangements were being made to have it executed and inviting comment. The draft deed of assignment contained the following clause:-

> "3.2 The assignee hereby undertakes and agrees to pay to the assignor any monies recouped in the legal proceedings by way of uninsured losses."

12. 29th April, 2011: Cox wrote a letter sent by email to Corrigans at 09.36 in which they said:-

> "We refer to the above matter and confirm out client's instructions that the liquidator has as of today's date assigned the company's claim and chose in action against Quarryvale Two, Quarryvale Three and McLaughlin Harvey Limited relating to a loss which occurred on or about May, 2005 to Aviva Insurance SA.
>
> This assignment will be formally recorded in a deed of assignment to be executed by the liquidator on Tuesday 3rd May, however, as set out above, the assignment has occurred today, 29th April, an unexecuted assignment is attached for your attention.
>
> Yours etc."

The plenary summons herein, was also issued on this date. The evidence does not establish when the summons was issued and in particular if it was after receipt of Cox's email at 09.36.

13. 3rd May, 2011: Cox sent a letter by courier to Corrigans:-

> "Please find enclosed a deed of assignment in duplicate executed by our client on his behalf and for Denholme.
>
> You will not that clause 3.2 has been removed from the executed agreement, as the liquidator is of the view that a return in this matter is unlikely and the existence of should a right would hold up the dissolution of Denholme.
>
> Please arrange to have your client execute the deed and return one copy to this office.
>
> Yours etc."

14. 30th May, 2011: Corrigans returned one copy of the deed of assignment duly executed by Aviva to Cox. The assignment provided for a consideration of €1 to be paid by Aviva to the liquidator and was dated 30th May, 2011.

15. 24th October, 2013: After an interval of over two years, Corrigans wrote to Cox saying, *inter alia*:-

> "I am not sure if the €1 referred in the deed of assignment was ever paid and it (*sic*) was not, it probably should be paid forthwith and I am enclosing the same. It may have been paid already…"

The Arguments

16. Counsel for McLaughlin, Mr. Murphy S.C., makes a simple point. He says that at the time the proceedings were issued, 29th April, 2011, no valid assignment existed in favour of Aviva and consequently it had no cause of action. He argues that the documents to which I have referred above establish beyond doubt that the assignment was not effective until after the proceedings issued.

17. The requirements for a valid legal assignment are set out in s. 28(6) of the Supreme Court of Judicature (Ireland) Act 1877. The requirements are fourfold and were explained in *Waldron v. Herring* [2013] 3 I.R. 323 where Edwards J. said at (p. 331):

> "Four main conditions require to be satisfied for the purposes of s. 28(6), as confirmed recently by the High Court in *O'Rourke v. Considine* [2011] IEHC 191 , (Unreported, High Court, Finlay Geogheghan J., 10th May, 2011):-

– first, the assignment must be for a debt or other legal chose in action;

> – second, there must be 'absolute assignment' meaning that the assignor must not retain an interest in the subject matter of the assignment. Thus, assignment of part of a debt, assignment by way of charge, and conditional assignments are not covered by s. 28(6) of the Judicature Act;
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> – third, the assignment must be in writing by the assignor;
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> – fourth, the debtor must be given express notice in writing of the assignment. A statutory assignment does not need valuable consideration (i.e. any form of payment) to be valid. The assignee can then sue the debtor in their own name, without joining the assignor as a party to the action."

18. Counsel submitted that the absence of any one of these ingredients meant that there was no legal assignment. In the present case, two of these essential requirements were absent, first the assignment was not executed by the assignor and second, no notice of the assignment had been provided to McLaughlin at the time of issue of the summons.

19. It was conceded by counsel for McLaughlin that the issue was to be determined by reference to Aviva's proposed amended statement of claim, para. 1 of which reads:-

> "1. By virtue of an assignment made on April 29th 2011, by David Parson as liquidator of an unlimited Irish company to wit Denholme (in liquidation) and recorded in a deed of assignment executed by the said David Parson on or about May 3rd 2011 and which said deed of assignment is dated May 30th 2011 the plaintiff herein is the party entitled to the benefit, right, title and interest to any payment arising from, under or in connection with the claim pursued herein and/or these legal proceedings and to the benefit of any settlement or arbitration proceedings relating to the said claim and/or these legal proceedings".

20. Counsel made two further points which he submitted pointed clearly to the fact that no valid or binding assignment existed as of the date of issue of the proceedings. The first was that the terms of the assignment had clearly not been agreed on the 29th April, 2011 because when the liquidator executed the document on 3rd May, he did so following deletion of clause 3.2. This constituted a significant change to the terms of the contract and was one to which Aviva had not agreed. Accordingly it could not be suggested that a concluded agreement had been made on the 29th April, 2011. Furthermore, counsel argued that the agreement was in any event unenforceable because the consideration was not paid until some years later.

21. Nor could it be said, counsel contended, that a valid equitable assignment had been entered into prior to the institution of proceedings. The requirements for a valid equitable assignment of a legal chosen action were considered by Barron J. in *Law Society*

of Ireland v. O'Malley [1999] 1 I.R. 162 where he said (at p. 172):

> "(1) A valid equitable assignment of an existing debt does not need valuable consideration for its validity.
>
> (2) Nor does it require notice to the debtor.
>
> (3) A valid equitable assignment of a future debt does require valuable consideration for its validity. See also *Brice v. Bannister* [1878] 3 Q.B.D. 569; *Earle (G. & T.) Ltd. v. Hemsworth Rural District Council* (1928) 140 L.T. 69; and *Coonan v. O'Connor* [1903] 1 I.R. 449.
>
> (4) Until the debt becomes a present debt nothing passes. It is merely a contract to assign, the contract being given validity by the consideration.
>
> (5) The existence of an antecedent debt is not valuable consideration.
>
> (6) Debt includes a sum recovered by action and future debt includes a sum expected to be recovered in an existing action."

22. In the present case, no valid equitable assignment could have taken place until such time as the consideration was received. Counsel relied in that regard on the decision of the Court of Appeal of England and Wales in Raiffeisen *AG v. the Five Star General Trading LLC* [2001] EWCA Civ 68 where Mance L.J. stated at (para. 80):

> "Equity recognises and gives effect to any assignment, for value, of a thing in action depending on a future contingency (an 'expectancy'): see *Chitty on Contract*, p. 1044, para. 20 – 032 and also *Snell's Equity*, 30th Ed (2000), p. 97 para. 5-28, summarising the position on the authorities as follows:
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> > 'The principle that equity regards as done that which ought to be done is applied so that, once the assignor has received the valuable consideration and become possessed of the property, the beneficial interest in the property passes to the assignee immediately …' "

23. McLaughlin accordingly argues that since the valuable consideration had not been received at the relevant time, no enforceable equitable assignment existed. Even if it had, an action based on an equitable assignment by the assignee requires the assignor to be joined save in exceptional cases – see *Central Insurance Company Limited v. Seacalf Shipping Corporation* [1983] 2 Lloyds L.R. 25 (C.A).

24. These submissions were of course made without prejudice to the fundamental contention that there could be no assignment of any kind, whether legal or equitable, in the absence of a concluded agreement and there was clearly none on the 29th April, 2011.

25. On behalf of Aviva, Mr. Danaher S.C. and Mr. Fitzgibbon S.C. submitted that the starting point in applications of this nature is that there is a high bar to be crossed by an applicant to discharge the burden of proof and this could only be done in cases where there are undisputed facts. Counsel submitted that one of the central planks of McLaughlin's application was the assertion that there was no concluded agreement between the liquidator and Aviva as of 29th April, 2011. It was submitted that this is clearly in dispute as the terms of Cox's letter on behalf of the liquidator of 29th April, 2011 made clear that the liquidator regarded himself as having concluded a binding agreement to assign the chose in action as of that date. As this appears to be disputed by McLaughlin, oral evidence will be necessary to enable the court to determine that factual issue.

26. Without prejudice to that contention, Counsel submitted that in fact all the ingredients for a valid legal assignment were in place on 29th April, 2011. On receipt of Cox's correspondence enclosing the draft deed of assignment, Corrigans served notice by registered post and fax on all defendants including McLaughlin. McLaughlin's insurers, Zurich Insurance Company, were also notified. Insofar as there is a dispute about this, it is a matter to be resolved by oral evidence.

27. The statute requires that the assignment be "by writing under the hand of the assignor". Counsel argued that in the modern context, the word "writing" is not to be regarded as merely handwriting. There is ample authority for the proposition that in commercial transactions, "writing" ought to be considered to include electronic writing so that emails emanating from the liquidator should be considered "writing" within the meaning of the section. This is clear from statutory provisions such as contained in the Electronic Commerce Act 2000 and s. 2 of the Interpretation Act 2005.

28. Aviva therefore submits that an assignment generated and signed electronically by the assignor satisfies the statute. In the alternative, counsel argues that Cox's letter of 29th April, 2011, ought to be regarded as satisfying the requirements of s. 28(6) as it is in writing, bears a signature, contains the essential terms and was signed by Cox as agents of the liquidator. Counsel referred to Smith & Leslie, *The Law of Assignment*, 2nd Edition, at p. 351 where although it is conceded that there may be a suggestion that the signature of an agent is not sufficient, there are arguments to the contrary.

29. With regard to the contention by McLaughlin that there was no concluded contract on 29th April, 2011, because the liquidator amended the deed on the 3rd May, 2011, before he signed it, counsel suggested that this was of no moment in circumstances where all the liquidator had done was to waive an entitlement he would have had under the assignment for reasons explained in the correspondence.

30. That did not mean that as of 29th April, 2011, Aviva could not have enforced the assignment as against the liquidator.

31. As a secondary position, counsel submitted that even if the court were of the view that no valid legal assignment had been concluded prior to the institution of proceedings, a valid equitable assignment was so concluded. On the point of there being no payment of the consideration, counsel referred to authorities which suggested that where the consideration was merely nominal, as here, it is not always necessary that it be actually paid to render the agreement binding.

32. On the issue of non joinder of Denholme as a co-plaintiff in the proceedings, counsel said this was a rule of procedure only as opposed to a substantive rule of law or equity. Here again there is at least some authority for the proposition that the joinder is not always necessary in every case. A number of authorities were relied upon in that regard. Counsel submitted that even if the joinder of Denholme was a requirement, it is a procedural rather than substantive one which does not render the proceedings a nullity. As Denholme has not been dissolved, it cannot, of course, be joined as a co-plaintiff.

Discussion
33. The legal principles to be applied to applications of this nature are common case as between the parties. This is not a case where it is suggested that on their face, the plaintiff's pleadings disclose no sustainable cause of action. It is, therefore, a matter that does not fall within the scope of O. 19 r. 28, but rather the court's inherent jurisdiction to dismiss claims that are bound to fail. I recently summarised the relevant principles in *Duggan v. Commission of An Garda Síochána & Ors* (Unreported, High Court, 3rd October, 2017), where I noted:-

> "[13.] It seems to me that the real gravamen of the defendants' application here is not that the pleadings on their face disclose no sustainable cause of action and should thus be dismissed under O. 19 r. 28 but rather that for the reasons they advance, they are bound to fail and accordingly their application falls within the court's inherent jurisdiction.
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> [14.] The law in this regard was accepted by both sides to be authoritatively set out in the judgment of the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] 2 I.R. 301. In delivering the judgment of the court, Clarke J. (as he then was) emphasised the distinction between the court's jurisdiction under the rules and its inherent jurisdiction to dismiss. The court emphasised the principle established in many cases that the jurisdiction is one to be sparingly exercised and only in clear cases. The court should be slow to exercise the jurisdiction. In the course of the judgment, Clarke J. noted (at p. 309):
>
> > 'In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in *Sun Fat Chan v. Osseous Ltd*. [1992] I.R. 425, at p. 428, that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.'
>
> [15.] Of importance, the court considered that because the plaintiff had raised a number of potentially complex legal questions to be addressed, it was not appropriate to dismiss the claim as being bound to fail on the basis of forming a view about those legal issues. Clarke J. felt that determination of those legal issues would more appropriately await a full trial which would also include a detailed consideration of the facts."

34. All the relevant authorities are at pains to point out that the jurisdiction is to be exercised sparingly and only where it is clear that the case is bound to fail. Such a conclusion cannot be arrived at where there is any issue of fact to be resolved by the court, the determination of which could affect the outcome. Similarly, where the case involves the determination of a legal issue, the court ought only dismiss the claim where that legal question has long since been settled beyond argument. If there is a genuine contest between the parties as to the legal principles to be applied and how they should be applied, that is not to my mind a case where the claim should be dismissed as being bound to fail.

35. It is not appropriate in an application of this nature for the court to embark on a determination of novel questions of law. Almost by definition, the fact that the court would be faced with deciding such issues for the first time means that the case could not fall into the category of one that is bound to fail.

36. In the present case, there appear to be, at least, two issues of fact which are in dispute and may require resolution by oral evidence at the trial. The first is whether or not a concluded agreement was reached between the liquidator and Aviva on or before 29th April, 2011. Both Aviva and the liquidator say that it was. McLaughlin disputes this and suggests that the amendment by deletion of the clause in the deed of assignment executed by the liquidator on 3rd May, 2011, must mean that no concluded agreement had been reached before that time. That is an issue yet to be determined.

37. Secondly, McLaughlin says that it received no notice of the assignment prior to the institution of proceedings and again, this seems to be a factual issue which requires determination. There may also potentially be an issue around whether the notice to Zurich, in substance the real defendant, could be regarded as sufficient.

38. Further, there is a dispute between the parties as to whether, as a matter of law, it can be said that a valid and enforceable legal or equitable assignment was in existence prior to the commencement of proceedings. Among the legal questions that appear to arise in this regard, is whether or not s. 28(6) can be construed so as to include electronic writing. Further, it will be necessary to decide whether a signature by email can amount to something that is "under the hand" of the assignor.

39. It may also be necessary to determine the legal question of whether or not the signature of an agent can be regarded as sufficient for the purposes of section 28(6). The issue arises as to whether or not in the event of the court coming to the view that an equitable assignment only was concluded, these proceedings could validly have been instituted in the absence of the joinder of Denholme as a co-plaintiff. Finally, there is an issue regarding whether the non payment of a nominal consideration precludes a valid equitable assignment.

40. Any one of these issues could be decisive to the outcome and none of the legal questions as far as I am aware has yet been the subject of authoritative decision by the courts in this jurisdiction.

Conclusion
41. It seems to me that when one takes account of all these matters, both factual and legal, this falls well short of being a case where the court would be justified in reaching the conclusion that it is bound to fail. The test is not whether the case is weak, difficult to argue or even likely to fail but rather whether the court can conceive of no realistic basis upon which it could succeed.

42. For these reasons, therefore, I will dismiss this application.