Neutral Citation Number: [2011] IEHC 20

THE HIGH COURT

2010 1023 P

BETWEEN

SEAN MACKIN

PLAINTIFF

AND

JOHN McCANN

DEFENDANT

AND

JAMES OSBORNE

CLAIMANT

JUDGMENT of Mr. Justice Birmingham delivered the 21st day of January, 2011

The present proceedings as between the plaintiff and the claimant relate to a sum of £400,000ST lodged to the credit of this action following an application for interpleader relief by the claimant's solicitor Ivor Fitzpatrick and Company. The background to these proceedings is that the defendant John McCann and the claimant James Osborne had been involved in business together for a number of years. Differences arose between them and the claimant at least was anxious to see the relationship terminated. According to the claimant a degree of acrimony entered the discussions that followed, but ultimately an agreement providing for the basis on which they would go their separate ways was arrived at following protracted negotiations in the presence of solicitors and accountants.

The applicant was of the view that the defendant did not perform his obligations under the agreement and this resulted in proceedings being issued in the Commercial Court to enforce the terms of the agreement. That matter went to hearing and indeed was at trial for some two weeks but before it concluded a settlement was agreed which was the subject of a formal legal document dated the 8th July, 2009. In broad terms the settlement provided for the claimant extricating himself from a number of companies in which he and the defendant had been involved. This involved him transferring his shares in those companies to the defendant and there was provision for him to receive phased payments.

The clauses of the agreement most relevant to the present dispute would appear to be the following:

> "2.1 In consideration of the following payments and in accordance with the provisions of this Agreement, Jim Osborne agreed to transfer his shares and/or interests in Castleway Properties LLC, Walnut Rittenhouse LP and Walnut Rittenhouse GP LLC and Castleway Developments Limited to John McCann or such person or entity as is nominated by John McCann.
>
> 3.1 A payment in the amount of US $2,500,000 will be made by John McCann to Jim Osborne on or before the 30th September 2009.
>
> 3.2 A payment in the amount of US $2,100,000 will be made by John McCann to Jim Osborne, on or before the 30th September 2010.
>
> 3.3 Subject to Clause 6.5 and 8 below, a payment in the amount of US $4,000,000 will be made by John McCann to Jim Osborne on or before the 31st December 2011.
>
> 3.4 The parties agree that time is of the essence in relation to the above payments.
>
> 4.1 John McCann agrees that in the event that the payment of US $2,500,000 referred to in Clause 3.1 above is not made on or before the 30th September 2009, judgment may be entered against him by Jim Osborne by consent in the amount of €2,000,000 and this Agreement stands discharged.
>
> 5.1 Immediately after payment of the US $2,500,000 provided for in Clause 3.1 Jim Osborne shall transfer his shares in Castleway Developments Limited to John McCann and/or such person/entity as nominated by John McCann.
>
> 5.2 Jim Osborne will resign as director of Castleway Developments Limited no later than the date of such transfer.
>
> 6.1 On the making of the payment as provided for in Clause 3.1, Jim Osborne will execute all documents necessary to transfer his shares/interests in Castleway Properties LLC and Walnut Rittenhouse LP and Walnut Rittenhouse GP LLC to John McCann and deliver same to the stakeholder to be agreed by the parties and in default of Agreement to be nominated by the President of the Law Society (such person hereinafter referred to as "the Stakeholder"). The Stakeholder shall hold the executed documents in accordance with the terms of this Agreement. Upon completion of all payments in accordance with Clause 3 above the Stakeholder will release the executed documents to John McCann. In default of any payment the executed documents will be released to Jim Osborne."

It appears that the defendant, Mr. McCann experienced difficulty in making the payments provided for by the agreement of the 8th July, 2009. In particular Mr. McCann appeared to have difficulties in making the payment of the sum of US $2,500,000 which was required to be paid on or before the 30th September 2009.

In these circumstances negotiations followed which involved direct contact between the plaintiff and the defendant which resulted in a variation agreement. In summary this now provided for payment of the sum of US $2,500,000 which had been required originally to

have been paid by the 30th September 2009, to take place in three instalments up to the 15th February 2010. Clause 3.1 of the agreement was amended so as to provide:

> "A payment in the amount of US $2,500,000 will be made by John McCann to Jim Osborne in the following manner:
>
> (a) A payment of US $1,650,000 will be made by John McCann to Jim Osborne on or before the 30th September 2009.
>
> (b) A further payment of US $350,000 will be made by John McCann to Jim Osborne on or before the 1st December 2009.
>
> (c) A further payment of US $500,000 will be made by John McCann to Jim Osborne on or before the 15th February 2010."

Clause 4.1 was amended so as to provide the following:

> (i) "John McCann agrees that in the event that any of the payments referred to in Clause 3.1 above are not made on or before the dates specified by which they are to be paid, namely the 30th September 2009, 1st December 2009 and 15th February 2010, judgment may be entered against him by Jim Osborne by consent in the amount of €2,000,000 in default of any or all of the instalments and this Agreement stands discharged."

The variation agreement also specifically stated that it was agreed that all the other terms and conditions of the agreement and settlement terms dated the 8th July 2009 remain in full force and effect.

The solicitors for the claimant, Ivor Fitzpatrick and Company received two payments on the 6th and 14th October 2009 which together totalled $1,650,000. Accordingly, the obligation at 3.1(a) was complied with, albeit that payment took place in October rather on or before 30th September 2009.

The amount of US $350,000 required to be paid on or before the 1st of December 2009 was not paid by Mr. McCann. Accordingly, in accordance with terms of Clause 4.1 of the Agreement as varied the claimant was entitled to enter judgment in the sum of €2,000,000 and the Agreement stood discharged.

Arising from the failure of the defendant, Mr. McCann to pay the sum of US $350,000 on or before the 1st December, 2009, an application was made by the claimant, Mr. Osborne for judgment by consent in the sum of €2,000,000. On the 21st December 2009 judgment was entered in favour of the claimant against the defendant in the sum of €2,000,000 in the Commercial Court.

In a further development on the 21st December 2009 a letter was sent by fax at 11.10 a.m. on that day by Catherine Allison and Company solicitors acting on behalf of the plaintiff in the present proceedings, Sean Mackin. In that letter to Ivor Fitzpatrick and Company, solicitors for the claimant, they stated that funds which were held by Ivor Fitzpatrick and Company in their client account which had been released to them on trust by BCM Hanby Wallace, solicitors for Mr. McCann, included monies belonging to their client, Mr. Mackin. They requested the immediate return of the monies to BCM Hanby Wallace and subsequently to themselves or alternatively that the monies be returned directly to them. It was explained that the letter related to the sum of £400,000ST which they stated they calculated equated to at least €440,000.

The contentions in that letter of the 21st December 2009 are at the heart of the present proceedings.

In essence the case made on behalf of the plaintiff is that the monies were paid by him to Mr. McCann as payment for portion of the shares that the defendant was in the process of acquiring on foot of his settlement agreement with the claimant as varied. It is said that the sole basis for the payment of the money and the whole purpose for which the money was paid was for the purchase of shares and it is argued that until the shares were transferred by the defendant, Mr. McCann to the plaintiff that the monies were held on trust for the plaintiff. It is said that the authorities demonstrate that where money is paid by one party to another expressly for a purpose which is not fulfilled, the money in question remains the property of the provider and is held by the recipient in trust, and that the recipient is under a fiduciary duty to the donor.

While the written submissions that have been filed have raised interesting legal issues particularly in relation to the operation of so called Quistclose Trusts, i.e. trusts which arise to the benefit of the donor when property is advanced for a specific purpose and that purpose fails, at the hearing it has emerged that there is an absolutely fundamental disagreement between the plaintiff and the claimant in relation to the facts. In particular there is a fundamental disagreement between them as to when and in what circumstances they were first in contact with each other. The plaintiff says that there was significant contact between them by phone as early as September 2009 and that arising from this contact that the claimant was fully aware that Mr. Macken was the source of part of the monies that the defendant, Mr. McCann was paying over pursuant to the agreement and was also aware that the money was being provided by the plaintiff only for a particular purpose, and was being provided on the basis that his provision of the funds was conditional on them being returned to him if the defendant was not in a position to transfer shares to him. The claimant utterly rejects this and says there were absolutely no contacts whatever between them as alleged by the plaintiff and as of the time when the plaintiff says that they were in extensive phone contact that for his part he had never heard of Mr. Mackin, even the name was unknown to him. Mr. Osborne says that the first he heard of any suggestion that Mr. Mackin was claiming an entitlement to part of the funds that had been furnished by Mr. McCann was when informed of this by John McCann in a conversation on the eve of the court application for judgment of December 21st 2009.

In so far as this is a fundamental conflict, I must make clear that I unhesitatingly accept the evidence of the claimant and unhesitantly reject the evidence of the plaintiff. The claimant gave his evidence in a straightforward manner and presented as a careful and conscientious witness, careful on points of detail and willing to acknowledge where he was uncertain in his recollection. In contrast I am bound to say that the plaintiff was a singularly unimpressive witness. Throughout his evidence he prevaricated and equivocated. He was unwilling to give a direct answer to almost any question he was asked. An examination of aspects of the plaintiff's evidence reinforced the view that his testimony has to be treated with the greatest caution. The contention he now advances that the claimant was aware that he, Sean Mackin was the source of part of the funds available to the defendant and aware that the funds were made available to the defendant on a particular basis would appear to have been made for the first time in court during the present proceedings. Indeed, this much appeared to be acknowledged by his counsel in opening the case. This is really quite remarkable. Leaving to one side for the moment some of the subtleties of the legal arguments that have been made on both sides, it is hard to imagine an issue that could be of greater significance than whether the claimant had been told that part of the funds that the defendant was providing to his solicitors for onward transmission to the solicitors for the claimant and ultimately on

to the claimant was not the defendants to dispose of.

The proceedings that are now before the court were commenced by plenary summons which named as defendants, John McCann, BCM Hanby Wallace (solicitors for Mr. McCann) and Ivor Fitzpatrick and Company (solicitors for the claimant) but did not name the claimant as a defendant. The statement of claim makes no reference whatever to any suggestion that the claimant had been informed of the situation as the plaintiff now alleges him to have been. When Ivor Fitzpatrick & Company sought to interplead it was then required that points of claim be delivered and again that document makes no reference to any suggestion that Mr. Osborne had been made aware of the situation by Mr. Mackin. Again, an examination of the extensive correspondence in which his current solicitors engaged after December 21st 2009 discloses no reference to any such suggestion. An affidavit sworn by Mr. Gary Byrne, solicitor and partner in BCM Hanby Wallace refers to a telephone call that he received from Ms. Allison solicitor for the plaintiff. Mr. Byrne has sworn that he told her that he knew nothing of the arrangement which it was now suggested existed. Indeed, it has been formally conceded during the present proceedings that BCM Hanby Wallace had never been told anything about the alleged arrangement. A similar concession was made earlier by Ms. Allison in the course of a letter of 6th January 2010 in which she stated that it was her understanding that Mr. Byrne's client had not communicated to him the source of the funds.

On 22nd December, 2009, Ms. Murphy, solicitor of Ivor Fitzpatrick and Company responded to the letter from Ms. Allison of December 21st 2009 by saying that her firm and Mr. Osborne were strangers to the matters which were alleged in the correspondence and that this was viewed as a last minute and desperate attempt to delay matters and designed to frustrate Mr. Osborne's legitimate interest. Even this very specific statement that Mr. Osborne was unaware of the situation was allowed to go unchallenged and did not produce a response.

I have already referred to the fact that the plenary summons, statement of claim and points of claim makes no reference to any knowledge on the part of Mr. Osborne or any reference to Mr. Osborne ever having been informed of the situation by Mr. Mackin. That position was, despite an assertion to the contrary which was made, also maintained in the plaintiff's written legal submissions dated 21st July 2010. The written submissions contain the statement "the claimant was aware at all material times <u>from the defendant</u> that the sum of £400,000 ST was being provided by the plaintiff" (emphasis added). If at that stage the plaintiff's case was that the claimant was aware of the situation because he himself had told him then that sentence is a truly remarkable one. The maxim *expressio unius est exclusio alterius* – the expression of the one is the exclusion of the other comes to mind.

The claimant has put before the court a memorandum that he prepared at the time setting out his recollection of a number of phone conversations that he had with the plaintiff during the first half of February 2010. In evidence the plaintiff indicated that he didn't disagree significantly with the contents of the memorandum. The tone that the plaintiff was striking in these conversations as evidenced by the memorandum seems to be quite inconsistent with what one would expect from someone who was speaking to a person that he had told about the details of the arrangement.

That I reject the evidence of the plaintiff on this issue as to whether he had made the claimant aware of the situation has implications for other aspects of the case where credibility is in issue.

In the course of an affidavit of discovery dated 14th July 2010 the plaintiff exhibited a document, only one of two documents discovered, dated the 29th September 2010. The document was in these terms:-

> "Dated 29th September, 2009
>
> I, John McCann, acknowledge receipt of the sum of £400,000 ST bank draft from Sean Mackin for the purchase of a 5% shareholding by Sean Mackin of shares in U.S. companies Castleway Property (*sic*.) LP and Walnut Rittenhouse LP and Castleway Developments LP. This is subject to formal valuation by valuer to be agreed jointly between us provided the price shall not be increased if the valuation is higher. John McCann shall be allowed to use the £400,000 ST to pay Jim Osborne in full so as to settle fully together with his own funds the sums due to Jim Osborne to be paid by 30th September 2009 under the July 2009 settlement agreement provided and strictly conditional upon the transfer to Sean Mackin of 5% shareholding as above taking place which shares are held in the name of Jim Osborne and which John McCann has agreed to purchase pursuant to said July 2009 agreement. If this does not take place the £400,000 ST will be returned to Sean Mackin and it is released only for this purpose. Sean Mackin shall have no liability to Anglo Irish Bank for sums owned to it by the said companies and existing shareholders but simply acknowledges the charge to the bank exists and will not be released on transfer of the shares and all legal papers will be completed as required on transfer of the shares.
>
> Signed: John McCann.
>
> Signed: Sean Mackin"

This was the first reference to the existence of such a written document.

The statement of claim does refer to an agreement but it does not allege that the agreement was in writing. While perhaps not strictly necessary it is usual when pleading to refer to the fact that an agreement to which reference is made was in writing, if that was in fact the case. One might expect that would be particularly likely if the person who it was intended should be affected most by the agreement was not a party to it. There are some surprising aspects to the agreement. The agreement refers to the purchase by Sean Mackin of a 5% shareholding in US Companies Castleway Properties LLC and Walnut Rittenhouse LP and Castleway Developments LP but there is no reference to any timetable within which this was to occur. This seems somewhat surprising if one has regard to the provisions of the settlement agreement between the defendant and the claimant, the implementation of which by the defendant this document sought to make possible. The settlement agreement of the 8th July, 2009 provided at Clause 5.1 and 5.2 that immediately after payment of the US$2,500,000 referred to in Clause 3.1 that James Osborne, the claimant should transfer his shares in Castleway Properties Limited to John McCann, the defendant, or a person or entity nominated by John McCann and that the claimant would resign as director of Castleway Properties Ltd. no later than the date of that transfer. However, so far as the claimant's share/interest in Castleway Developments LP, Walnut Rittenhouse LP and Walnut Rittenhouse GP LLC was concerned the situation was quite different. On the payment of US$2,500,000 the obligation of the claimant was to execute the necessary documentation and deliver these to an agreed stakeholder who, if all payments under the settlement were made would release the documents to the defendant John McCann, but in the event of default of any payment the executed documents were to be released to the claimant Jim Osborne. The settlement agreement had provided for payment of $2,100,000 on or before the 30th September 2010 and $US4,000,000 on or before the 31st December 2011.

The account that the plaintiff gave of how the document came to be created was a somewhat surprising one. The plaintiff reports

that on the evening of 28th September 2009 he had a number of telephone conversations with the defendant. He made notes of some of these conversations on the back of his hand. Some of the notes in bullet point form were then transferred to "post-it" stickers and the document was then produced by the plaintiff on his computer. The document, it is said was then presented on the following day to Mr. McCann for his signature and he signed the document without making any changes.

Even taking into account that if matters had occurred as described by the plaintiff that he and Mr. McCann were operating against a tight deadline, I find the account given of the creation of the document very hard to believe. Mr. Mackin was challenged strongly in relation to the document by counsel for the claimant during the course of cross-examination. In those circumstances one might have expected that Mr. McCann would have been called to give evidence to confirm that the sequence of events was as described by the plaintiff. I have already referred to the fact that concessions were made both in correspondence and during the course of the court hearing on behalf of the plaintiff which could only have been made on the basis of what Mr. McCann had told the plaintiff that he had said to his solicitor. Those concessions are indicative of a degree of communication between the plaintiff and the defendant. That is reinforced by the fact that Mr. McCann attended the hearing, sat behind the plaintiff's legal team and engaged in conversation with the solicitor for the plaintiff at various stages as the evidence was given. Although he obviously had highly material evidence to give he was not called as a witness. When the failure of the plaintiff to call Mr. McCann as a witness was the subject of comment in the written and oral closing submissions on behalf of the claimant, counsel for the plaintiff offered the explanation that Mr. McCann was still in dispute with the claimant and that in those circumstances he was reluctant or not prepared to testify. The explanation offered is not altogether an implausible one. Nonetheless, in a situation where it is alleged that two parties have entered into an arrangement with dramatic implications for a third party it is surprising that the court was denied the opportunity to hear the defendant's account of the transaction.

This is more particularly so when the plaintiff's own credibility must have been seen to have been called into question, to put matters no further. The plaintiff was and must have been seen to be a witness whose evidence would benefit from being corroborated. In the circumstances the plaintiff has failed to persuade me, that, on the balance of probabilities, the document was created on the 28th September 2009 and signed by him and by the defendant the following day as he contends was the case.

The claimant contends that if the plaintiff is disbelieved in relation to the telephone contact between the plaintiff and the claimant and not believed in relation to the execution of the document that has been produced dated 29th September 2009 that the question arises as to whether the plaintiff has discharged a burden of proving that he was the source of any funds at all and if he was that the £400,000 ST was being paid by the plaintiff on terms similar to those that are now contended for by the plaintiff.

In a situation where part of the funds received by BCM Hanby Wallace was accounted for by a bank draft issued by the Northern Bank, Newry branch made payable to a firm of solicitors in Newry, which is consistent with the plaintiff's account. I am, though with some hesitation minded to accept that Mr. Mackin was indeed the source of the funds in question. I am also mindful of the fact that Mr. Gary Byrne, solicitor, would appear to have been told by his client, Mr. McCann, that a friend Sean Mackin was in a position to come up with some funds. However, I am not at all persuaded that the arrangements between the plaintiff and the defendant were as the plaintiff now states. If the question of the acquisition of shares in the various US companies by the plaintiff was ever the subject of discussion and I am prepared to accept that might well have been the case, I am not at all convinced that there was ever an agreement between the plaintiff and the defendant, that the monies being provided by the plaintiff were specifically for the purpose of purchasing shares, and that while they could be used by the defendant to assist him in meeting his obligations to the claimant were returnable to the plaintiff if matters did not proceed as planned and if the defendant was not in a position to transfer shares to the plaintiff. I am also not persuaded by the plaintiff that the shares to be acquired by him could only be shares that were to be acquired by the defendant from the claimant and then passed on to the plaintiff. The plaintiff has also failed to persuade me that it was agreed that monies released by the plaintiff to the defendant could only be parted with by the defendant if he was thereby acquiring title to the claimant's shares.

I have not been satisfied by the plaintiff that any trust, whether in the nature of a Quistclose Trust or otherwise ever arose and accordingly he has failed to satisfy me that the transfer of the £400,000 ST to BCM Hanby Wallace and onward by them to Ivor Fitzpatrick and Company for onward transmission to the claimant constituted a breach of trust.

Had the sum of £400,000 ST constituted trust funds it would have been necessary to consider whether the solicitors for the defendant, the solicitors for the claimant and the claimant himself were aware of the situation. Lest the view that I have formed in relation to the facts be wrong and lest the matter go further I propose to express some views in that regard.

The exact level of knowledge required to impress a claim of constructive trust against a recipient of trust monies is the subject of some controversy. The matter was considered by the Supreme Court in the case *Re Frederick's Inns* [1994] 1 ILRM 387. There the Supreme Court found that the Revenue Commissioners, the recipients, had constructive knowledge of the breach by directors of their duties in making certain payments. However, it seems to me that no matter where the bar is set that the plaintiff fails. It is conceded that neither BCM Hanby Wallace nor Ivor Fitzpatrick & Company knew anything of the situation and there was no reason why they should. Significantly, Mr. Gary Byrne, solicitor while in the course of cross-examination by counsel for the plaintiff volunteered that the first that he had seen or heard of the alleged agreement of the 29th September 2009 was when he was told about it by the solicitor for the claimant in the days coming up to the court hearing. The suggestion that Mr. Osborne was aware of the situation is dependant on the claim that there were telephone conversations between the plaintiff and Mr. Osborne in the course of which Mr. Osborne was informed. That is a proposition which I have firmly rejected. I accept the claimant's account of his dealings with Mr. Mackin. I also accept the claimant's evidence that the first specific suggestion that Mr. Mackin was the source of funds was on Sunday evening, the 20th December, 2009, the eve of the application to court for judgment. I also accept the evidence that Mr. Mackin was first introduced into the picture as a counsellor or facilitator and that Mr. Osborne was also given to understand that Mr. Mackin was heading up a group of people involved in putting together a rescue package for Mr. McCann who was experiencing financial difficulties at the time which were not at all limited to the problems that have surfaced in this case. Having regard to these findings of fact, it seems to me that whether the test is one of actual knowledge, or constructive knowledge or whether a reasonable and prudent person would be put on enquiry matters not. The plaintiff is not in a position to meet any test that might be applied.

On the assumption that there was in fact a trust but that Mr. Osborne had no knowledge of this, there remains for consideration the question as to whether he received the monies that he did as volunteer or whether he offered consideration or value. The answer to that is to be found in the protracted difficulties that Mr. Osborne was experiencing with Mr. McCann. An agreement had been reached and had not been implemented. Litigation followed and a lengthy hearing was compromised on terms set out in the agreement of the 8th July 2009. Mr. McCann was not in a position to implement the terms of the agreement. In those circumstances Mr. Osborne was entitled to enter judgment against Mr. McCann in the sum of €2,000,000 and the agreement stood discharged with him retaining his shares in Castleway Properties LLC, Walnut Rittenhouse LP and Walnut Rittenhouse GP LLC. He would also have been entitled to retain his shares in Castleway Developments Limited and to remain as a director of that company.

By agreeing to the variation of the original settlement agreement the claimant was postponing his entitlement to enter judgment immediately and was postponing the date on which he would come into possession of the various sums referred to in the agreement. This was a commercial transaction between two business men. Mr. McCann was the person best positioned to judge whether his interests were best served by acknowledging defeat and consenting to judgment in accordance with the terms of the original agreement, or whether it was in his interest to retain the prospect of acquiring these shares in the American companies. He made that decision and in agreeing to allow the defendant make that decision the claimant was offering him something of real value and was offering valuable consideration. Accordingly, even if the funds were the subject of a trust, on this ground too, the plaintiff's claim would fail.

I will hear counsel in relation to the terms of the orders that should now follow.