

THE HIGH COURT**2008 10842 P****BETWEEN****FRANK BURKE AND LORNA BURKE****PLAINTIFFS****AND****ANGLO IRISH BANK CORPORATION PUBLIC LIMITED****AND****ANGLO IRISH BANK LIMITED****DEFENDANTS****Judgment of Mr. Justice Birmingham delivered the 15th day of December 2011**

1. The plaintiffs in this case are husband and wife and are both solicitors by profession. The matter before the Court arises from a notice of motion brought by the defendants dated the 5th January, 2011. Three reliefs were sought in the notice of motion namely:-

1. An order directing the trial of a preliminary issue as to whether the plaintiffs have privity of contract or any sufficient interest with regard to the contracts.
2. An order pursuant to O.19, r. 28 of the Rules of the Superior Courts, 1986 striking out the plaintiffs' claim on the grounds that it discloses no reasonable cause of action and is frivolous or vexatious.
3. An order striking out the plaintiffs' action for the reasons as set out in para.2 pursuant to the inherent jurisdiction of the Court. In the event only the relief at para.3 has been pursued.

2. In summary, the plaintiffs' claim as set out in the statement of claim is that in December, 2002 they entered into a contract with the defendants, pursuant to which the defendants would lend them €546,000. The plaintiffs' intention in seeking to borrow this sum was so as to purchase six sites situated at Kinvara, County Galway. The plaintiffs contend that of the agreed €546,000, only €54,000 was advanced, which was linked to the payment of a deposit, that the defendants wrongfully, in breach of contract and breach of duty, failed to advance the balance, and that as a result of this the plaintiffs were unable to complete the purchase of the site and so suffered loss and damage. Of note is that the statement of claim refers to proceedings initiated by the defendants in which the bank sought possession of the plaintiffs' family home and it is said that there will be an attempt to consolidate these proceedings commenced by the bank with the present proceedings. In fact the proceedings were not consolidated, and an order for possession was made by McGovern J., that order is under appeal. It may be noted that the possession proceedings initiated by the bank were commenced on the 18th June, 2008, and the plenary summons in the present proceedings issued on the 17th December, 2008.

3. Two arguments have been advanced by counsel on behalf of the moving party in seeking to have the proceedings dismissed. First of all, it is said that the plaintiffs, Frank and Lorna Burke never had contracts with the bank and secondly it is said, that even if the plaintiffs had a contract, which is strongly denied, a condition precedent for the drawdown of the second tranche of funding was that the bank had to receive net proceeds of approximately €700,000 from the sale of a property, No. 6 Averard, Taylors Hill and this has never been complied with.

4. The background to the contention that the plaintiffs did not have a contract with the bank is that in December, 2002 sites in Kinvara were about to go to auction. The plaintiffs, and more particularly the first named plaintiff was anxious to acquire the sites and approached the defendant bank, dealing with an associate director of the bank, Mr. Stephen Mackey, who was the area manager in the West for the bank. A loan of €54,000 was advanced, and in that regard a bank draft was made out in favour of Keane Mahony Smith, the auctioneers who are acting for the vendors. A promissory note was signed by Frank Burke on the 17th December, 2002, which was stated to be signed for and on behalf of Burdale Limited.

5. While the loan of €54,000 was actually paid on the 17th December, 2002, the formal loan offer letter did not issue until the 7th January, 2003. That letter was addressed to the Directors of Burdale Limited. It stated that Anglo was confirming its willingness to make a loan facility available to Burdale Limited. Of note is that in relation to the repayment date, the facility was stated to be repayable on demand, and without prejudice to the demand nature of the facility, was to be repaid on or before the 30th April, 2003. The section of the letter dealing with acceptance required a duplicate copy of the facility letter to be returned signed within seven days, together with a resolution of the board of directors approving the terms and also the certificate of incorporation.

6. The borrowers' acceptance which was stated to be an acceptance for and on behalf of Burdale Limited states the signatories have read the facility letter of the 7th January, 2003, to Burdale Limited and the bank's General Conditions and agreed to be bound by them. This was signed by Mr. Frank Burke.

7. There is sharp disagreement in relation to the role of Burdale Limited. The first named plaintiff has sworn that neither he, nor the second named plaintiff initiated the setting up of that company, acted as directors of it, or had any involvement with it in any capacity in the day to day running of the company. Attention is drawn to a Company Registration Office printout which indicated that the company was incorporated on the 22nd February, 1989, was struck off the register on the 11th January, 1999, and refers to apparently completely unconnected individuals as directors and secretary of the company. More surprisingly, given the terms of the promissory note and the acceptance of the loan offer to which I have referred the first named plaintiff avers that he never engaged or purported to engage or represented to the defendant that he was a director of Burdale Limited.

8. Burdale Limited also features prominently in relation to the documentation generated in relation to the second tranche. On this occasion a facility letter dated the 25th September, 2003, issued addressed to the directors of Burdale Limited. The body of the letter which was issued confirms the bank's willingness to make an advance to Burdale Limited. The borrowers acceptance section records the signatories, Frank Burke and Lorna Burke, as stating that they have read the facility letter to Burdale Limited, and it is expressly stated to have been signed for and on behalf of Burdale Limited. The acceptance section required a certified copy of a resolution of the Board of Directors of the borrower. Attached to this is a document headed "Resolution" this records that at a meeting of the Board of Directors of Burdale Limited when there was present Frank Burke, in the chair, and Lorna Burke, it was proposed by Frank Burke and seconded by Lorna Burke that the company borrow from Anglo Irish Bank on the terms of the bank's letter of the 25th September, 2003. This was signed by the first named plaintiff as chairman and the second named plaintiff as secretary. Also signed by both Frank Burke and Lorna Burke on the 25th September, 2003, was a guarantee, which referred to Burdale Limited as the "Principal". A similar guarantee had been signed by Lorna Burke in January, 2003 at the time of the earlier advance where again Burdale Limited was referred to as the "Principal".

9. In terms of how the involvement of Burdale Limited arose, Mr. Pat McHugh on behalf of the bank has averred that Mr. Burke informed the bank that Burdale Limited was to be the vehicle used by him to purchase the lands and develop the site. Mr. McHugh does not seem to have been employed by the bank in December, 2002 and certainly was not present for such discussions as took place during that month. However, Mr. Stephen Mackey who was, has sworn an affidavit confirming the contents of the McHugh affidavit and asserts that it was Mr. Burke who proposed Burdale Limited as the borrower and he refutes any allegation that he came up with the name Burdale, which he says is just simply untrue. Mr. Burke, it must be said alleges just that. He says that Mr. Mackey had said that he should use a corporate vehicle to develop, as distinct from purchasing the lands, but that the site should be kept in the plaintiffs' names, which was advantageous for tax reasons. He says that it was Mr. Mackey who came up with the name after the first named plaintiff had said that he would like a name that was linked with him.

10. The first named plaintiff has pointed to an amount of correspondence between his solicitors and the solicitors for the vendors and also correspondence with third parties, referring to Frank Burke as the purchaser. In truth I do not attach any great significance to this as the issue is not what was being said to third parties but what was being said to Anglo Irish Bank. Of greater interest is that the actual contract refers to the purchaser as Frank Burke (in trust).

11. In November, 2003 Burco Properties Limited entered the picture. Mr. McHugh indicates that what happened was that Mr. Burke stated that the vehicle with regard to the lands was now going to be Burco Properties Limited. Mr. Mackey, in his affidavit, deals with this aspect by saying that it appears that there was a problem with Burdale Limited and that the proposal to use Burco Properties Limited was a proposal put forward by the plaintiffs' solicitors and discussed between the parties and eventually accepted by the bank. For his part Mr. Burke explains that in October, 2003 he initiated the setting up of a company called Burmack Limited but that the Company's Registration Office refused to register this entity and that he renamed the entity Burco Properties Limited, receiving a certificate of incorporation dated the 2nd December, 2003.

12. The account operated by the defendant bank reflects the change of identity. The account, which uses the same account number throughout, refers initially to Burdale Limited and then this changes to Burco Limited, as distinct from Burco Properties Limited.

13. There is broad agreement between the parties as to the legal principals applicable to cases such as this. In particular there is agreement that the principles have been concisely and helpfully summarized by Charleton J. in *Millstream Recycling Limited v. Gerard Tierney and Newton Lodge Limited* (Unreported, High Court, Charleton J., 9th March, 2010). From the summary and by reference to a number of the authorities referred to therein I identify the following principles as particularly relevant in the present case.

- (i) The High Court is entitled to dismiss a claim, if it is clear that the plaintiff's claim must fail.
- (ii) The jurisdiction is to be exercised only upon the closest scrutiny and in clear cases.
- (iii) A court should generally be slow to entertain applications of this kind.
- (iv) Disputed oral evidence of fact cannot be relied upon by a defendant to succeed in such an application.
- (v) In so far as there is a conflict of fact in any case, this must be resolved in favour of the party against whom the application to strike out has been brought.
- (vi) The fact that a case appears weak and not likely to succeed provides no basis for dismissing the plaintiff's claim.

14. There is no doubt that the documentation signed by the plaintiffs and in particular by the first named plaintiff with its frequent references to Burdale may present considerable difficulty for the plaintiffs, if this matter is permitted to proceed to trial. However, that of itself is clearly not sufficient for the defendant to succeed. In *Ruby Property Company Limited v. Kilty* (Unreported, High Court, McCracken J., 1st December 1999) McCracken J. went so far as to say that, if there is a dispute as to the facts on affidavit which is not resolved by admitted documents, then it will be virtually impossible for a defendant to have proceedings struck out as being unsustainable.

15. In this case, there are a number of complicating factors. As of December, 2002 Burdale Limited did not exist and as of September, 2003 neither Burdale Limited nor Burco Properties Limited existed, the latter not coming into existence until significantly later. In these circumstances despite the documentation signed by the plaintiffs which would certainly seem to create formidable obstacles for the plaintiff, I cannot be confident that the plaintiffs will not find a way to overcome them. The question is not whether the plaintiffs will overcome these obstacles, or even whether it is likely that the obstacles will be overcome, but whether I can be confident that cannot happen. I find myself in a situation where, whatever doubts I entertain in relation to the proceedings, that I cannot be entirely confident that cannot be so.

16. In the course of her oral argument Ms. Eileen Barrington S.C. has urged that even if there was no issue in relation to privity of contract, there would remain an insuperable obstacle for the plaintiffs in the form of the fact that the condition precedent to a drawdown of further funding has never been met. While the fact of non-compliance with the pre-condition is referred to in the course of affidavits sworn by the defendants, the issue was not expanded upon there and it was not suggested that this of itself would provide a basis for dismissing the plaintiffs' claim. Again, the failure to comply with the condition precedent referred to in the facility letter may present difficulties for the plaintiffs if the matter goes to trial. By way of example it would appear to restrict the scope for the plaintiffs to rely on s.37 of the Companies Act 1963. It provides so far as material:-

"37(i) Any contract or other transaction purporting to be entered into by a company prior to its formation or by any

person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by it and entitled to the benefit thereof, as if it had been in existence at the date of such contract or other transaction and had been a party thereto.

(ii) Prior to ratification by the company the person or persons who purported to act in the name or on behalf of the company shall in the absence of express agreement to the contrary be personally bound by the contract or other transaction and entitled to the benefit thereof.

It would seem that if the plaintiffs are able to establish an entitlement to the benefit of the contract in accordance with s.37(2), they would still have to face the argument that if entitled to the benefit of the contract, they are also bound by the conditions of the contract including the condition precedent. The plaintiffs' response to this is to say that they, as of December, 2002 had a contract which obliged the defendants to fund the Kinvara sites purchase. Even, assuming that there was such an obligation in December, 2002 the plaintiffs would still have to overcome the argument that in September, 2003 the existing contract was varied. The suggestion, which is implicit in the plaintiffs' case that the Area Manager West for the bank, agreed to fund the acquisition of the sites unconditionally and irrevocably without reference to a credit committee meeting, would once have been unthinkable and even now would be seen by many as improbable.

17. However, that a suggestion or allegation might seem improbable is not a basis for dismissing the plaintiffs' claim. On the contrary, it is clear that disputed areas of fact must at this stage be resolved in favour of the party against whom the application to strike out and dismiss the proceedings has been brought. In that regard it seems to me that this is a case where there is a dispute between the parties in relation to the facts and accordingly this is not a case where the jurisdiction to dismiss the proceedings should be exercised at this stage. It is not a question of deciding how that conflict in relation to fact should be resolved or even how the conflict is likely to be resolved but identifying whether a conflict of fact exists. In my view it does, and that being so, this is not an appropriate case for the court to exercise its jurisdiction to dismiss the proceedings at this stage.