

**THE HIGH COURT
COMMERCIAL**

[2005/807 S]

BETWEEN

KAY-EL (HONG KONG) LIMITED

PLAINTIFF

AND
MUSGRAVE LIMITED

DEFENDANT
[2005/893 S]

BETWEEN

KAY-EL (HONG KONG) LIMITED

PLAINTIFF

AND
MUSGRAVE LIMITED

DEFENDANT
[2005/829 S]

BETWEEN

MUSGRAVE LIMITED TRADING AS MUSGRAVE SUPERVALU-CENTRA LIMITED

PLAINTIFF

AND
KAY-EL (HONG KONG) LIMITED

DEFENDANT

Judgment of Mr. Justice Kelly delivered the 2nd day of December, 2005

Background

1. Since 1995 the parties to these three actions have had a substantial commercial relationship. The Kay-el party has during that time supplied the Musgrave party with products for consumer promotions run by it, mostly in its SuperValu supermarkets.

2. Until the disputes which are the subject of these proceedings broke out it appears that the trading relationship between the parties was mutually beneficial. Unfortunately relationships have soured giving rise to these three sets of proceedings.

The Present Application

3. The court is now confronted with three applications for summary judgment. Two are brought by Kay-el in respect of its summary proceedings and the third by Musgrave in the summary proceedings in which it is plaintiff.

4. At the conclusion of the applications for summary judgment I took the view that given that the parties were by then fully alive as to the issues in dispute, that they had had a long and valuable trading relationship for about ten years and that further bills of exchange would mature soon, it was an appropriate case in which to exercise the power conferred by Order 63A, rule 6(1)(xiii), so that an alternative form of dispute resolution (in this case mediation) might be considered.

5. The parties not merely considered mediation as a way of solving their problem but actually proceeded to such a mediation within the permitted time. On foot of the order which I made I was furnished with a report by the mediator who, unfortunately, had to record that although very substantial progress was made in the mediation she was unable to finalise a solution. I should mention that the mediator expressed the view that the parties came to the mediation in good faith and made genuine efforts to reach a compromise. Such being so the lack of success at mediation carries no costs implication for the litigation.

The Kay-el Claims

6. I propose dealing with the Kay-el proceedings first, since one of them antedated the Musgrave claim and in any event both Kay-el claims are brought on foot of dishonoured bills of exchange.

The Bills of Exchange

7. Each bill of exchange was drawn by Kay-el on Musgrave and accepted by it. Each bill relates to contracts for the supply of goods.

8. Musgrave does not deny that it received the goods, the subject of each contract, nor does it deny liability in respect of each bill of exchange. Rather Musgrave contends a right of set off in respect of the sums due on foot of each bill.

9. Kay-el contends that there is no basis upon which Musgrave can seek to set off the liability due on foot of the dishonoured bills nor for the granting of any stay upon the execution of any judgment which may be granted in Kay-el's favour.

The Law

10. The law on the enforcement of bills of exchange in this jurisdiction is authoritatively stated in the judgment of the Supreme Court in *Walek and Co. v. Seafeld Gentex* [1978] I.R. 167. There the acceptor of a bill of exchange attempted to oppose the entry of judgment or alternatively sought a stay on execution on the basis of there being a cross claim for unliquidated damages. Henchy J. adopted the dictum of Lord Wilberforce in *Nova (Jersey) Knit v. Kammgarn* [1977] 2 All E.R. 463, where he said:-

"I take it to be clear law that unliquidated cross claims cannot be relied upon by way of extinguishing set off against a claim on a bill of exchange. As between the immediate parties, a partial failure of consideration may be relied upon as a pro tanto defence, but only when the amount involved is ascertained and liquidated."

11. In the same case Griffin J. said:-

"Bills of exchange are international instruments for the payment of obligations and it is important in the interest of businessmen, whether they be exporters or importers, that the negotiability of such bills be maintained so that they are

'equivalent to cash'."

12. Both Supreme Court judges also approved of the views of Sir Eric Sachs in the case of *Cebora v. SIP* [1976] 1 Lloyds Reports 271 where he said:-

"Any erosion of the certainties of the application by our courts of the law merchant relating to bills of exchange is likely to work to the detriment of this country, which depends on international trade to a degree that needs no emphasis. For some generations one of those certainties has been that the bona fide holder for value of a bill of exchange is entitled, save in truly exceptional circumstances, on its maturity to have it treated as cash, so that in an action upon it the court will refuse to regard either as a defence or as grounds for a stay of execution any set off, legal or equitable, or any counterclaim, whether arising on the particular transaction upon which the bill of exchange came into existence or, a fortiori arising in any other way."

13. Kenny J. delivered a concurring judgment in which he said:-

"It has been established by a line of cases... that an unliquidated claim for damages cannot be set off or be the subject of a counterclaim against a claim based upon a negotiable instrument. These authorities also establish that the existence of such an unliquidated claim is not a ground for staying execution on a judgment given on a negotiable instrument, even when it was given in connection with a transaction out of which the counterclaim arises."

14. This decision is binding upon me and it identifies the very limited defences or entitlements to set off or stay which are available to a party that has dishonoured a bill. Bills are to be treated as the equivalent of cash. An unliquidated claim, whether for breach of the underlying contract or otherwise, cannot be relied upon as a defence to a claim on foot of the bill nor as a basis for obtaining a stay of either the proceedings or judgment granted on foot of them. The only exception which provides an answer is in circumstances where there is a total or partial failure of consideration of the underlying contract which results in a liquidated claim or where there has been fraud. There is no suggestion of any fraud in the present case. The claims must of course be as between the immediate parties to the bill and not as against a holder in due course.

15. If Musgrave has a defence by way of set off it is one which must arise under the underlying contract, giving rise to a total or partial failure of consideration and resulting in a liquidated claim.

Does Musgrave Fall Within the Requirements?

16. In coming to my conclusions on this question I have taken into consideration the voluminous affidavit evidence and the legal submissions which have been made. In the light of the decision which I have arrived at I do not think that anything will be achieved by rehearsing *in extenso* the disputed factual material since at this juncture I am precluded from making final or binding determinations on disputed facts. No cross examination took place on the affidavits which were exchanged.

17. If Musgrave fails to demonstrate the existence of any one of the three elements which I have identified it is not entitled to resist judgment on foot of the bills of exchange.

18. Whatever may have been the position beforehand it is clear that the parties in November, 2003, entered into an exclusive supply agreement. By that agreement Kay-el was appointed as the sole supplier to Musgrave for all products which were to be used for consumer promotions through its franchisee's, SuperValu and Centra. It operated on the basis that individual sales contracts would be entered into in respect of goods to which the agreement applied.

19. It is said by Kay-el that the provisions of this exclusive supply agreement were incorporated into the individual and specific agreements (or in the alternative that the sale or return obligations in the specific agreements were conditional upon compliance by Musgrave with its obligations under the exclusive supply agreement). The assertion that the exclusive supply agreement governed individual sales contracts has not been denied. It seems to me that the terms of this exclusive supply agreement are not consistent with a right of set off of the type which is now relied upon by Musgrave.

20. This alone might be sufficient to dispose of the matter but lest I am wrong in the conclusion which I have come to I will proceed to consider what appears to me to be a difficult contention for Musgrave to support, namely, the assertion that their claim is one for liquidated damages.

21. The Musgrave summary summons of 24th June, 2005, seeks recovery of a total sum of €4,213,571.70. That sum is made up in respect of amounts allegedly due under what is described as the Gilmore drinks cabinets agreement, the Stanfield rocking chairs agreement, the Glendale chest of drawers agreement and the Hampton luggage sets agreement. The total sum claimed takes account of an alleged right of set off on the part of Musgrave in respect of other items.

22. The principal defence of Kay-el is that Musgrave was guilty of serious breaches of the exclusive supply agreement and it was thus relieved of any obligation to accept returns in respect of the goods in question. Kay-el contends that the sale or return provision of the agreements has not in the circumstances given rise to a debt currently due and owing and that any liability is one which sounds in damages. Kay-el furthermore points out that the goods remain in the possession of Musgrave and with the exception of the Glendale chest of drawers no invoice was received prior to the commencement of the proceedings. In addition it is said Kay-el has a substantial counterclaim for damages.

23. It seems to me that on any reasonable view of the affidavit evidence and despite the valiant efforts of counsel for Musgrave it cannot be said that its claim amounts to one for liquidated damages.

24. Rather it appears to me that the proceedings brought at the suit of Musgrave are ones where the court will to a very considerable extent have to involve itself in making an assessment of damages, particularly having regard to the issues in dispute which can be identified from the exchange of affidavits.

25. It is in these circumstances that I conclude that Musgrave has not demonstrated that it falls within at least two of the requirements which would be necessary in order to be able to stave off judgment in the Kay-el proceedings. In the light of that it isn't necessary for me to consider any other aspects of the matter.

Conclusions

26. I am satisfied that Kay-el is entitled to judgment on foot of its bills of exchange for the full amount as sought in each of the summary summonses.

27. Having regard to the controverted matters which are dealt with in the affidavits in Musgrave's proceedings I am satisfied that that action must be adjourned to plenary hearing and I will give directions as to the appropriate exchange of pleadings so as to ensure an expeditious disposal of that action.

28. As is clear, I am not satisfied that the cross action at the suit of Musgrave's provides it with an entitlement to either resist judgment or to obtain a stay on judgment in respect of Kay-el's proceedings.

29. There will therefore be judgment in favour of Kay-el on its summary summonses and the proceedings brought by Musgrave will be adjourned for plenary hearing.