

THE HIGH COURT**2000 666 S****BETWEEN****DES FINAN****PLAINTIFF****AND****JARLETH KELLY****DEFENDANT****JUDGMENT of Ms. Justice Irvine delivered on the 5th day of May, 2009.**

The within proceedings were instituted by summary summons on 18th October, 2000. The plaintiff claims payment from the defendant of the euro equivalent of a sum of £31,634.01 allegedly due in respect of monies loaned to the defendant in June 2000. The proceedings, which were referred to plenary hearing on the 8th February 2001, are now maintained by Breeda Finan, the widow of the plaintiff who regrettably died on 10th April, 2002.

Because of the death of Mr. Finan, it was agreed between the parties that the affidavits filed before the Master of the High Court would be admissible as evidence in the proceedings which were heard by this court on the 27th April 2009. In addition, the court heard evidence from Mrs. Finan and from Mr. Coady, the solicitor in Messrs Reidy Stafford Solicitors who acted on Mr. Finan's behalf prior to his death. The court also heard evidence from Mr. Kelly.

Mr. Coady gave evidence to the court as to the instructions given to him by Mr. Finan regarding his dealings with Mr. Kelly. He told the court that Mr. Finan had agreed to lend Mr. Kelly a sum of £68,000 on the basis that, in return for that loan, he would receive profits on a number of containers of garden machinery which the defendant was importing into the country for onward sale to his customers. The plaintiff's profit share was to be a sum of £10,095 in respect of the first container and £6,000 in respect of each of three further containers. He advised the court that at all stages his instructions from Mr. Finan were that the monies were loaned to the defendant personally for use by him in his business. He had denied to Mr. Coady the defendant's assertion in these proceedings that he had agreed to lend money to a limited liability company of which the defendant was a director.

Mr. Coady explained that the initial loan of £68,000 was furnished by Mr. Finan to the defendant in three separate sums of £28,000, £20,000 and £20,000. Messrs. Reidy Stafford had at the relevant time money standing to the credit of Mr. Finan in their client account and at his request the firm drew three cheques in his favour in the aforementioned sums which were then duly endorsed by Mr. Finan and given to the defendant.

Mr. Coady advised the court that the defendant be paid a sum of £14,460.99 on 15th September, 2000 and a further sum of £50,000 on 6th October, 2000, leaving a balance due and owing to the plaintiff of £31,634.01 as of the date of the issue of the proceedings.

Mr. Coady referred the court to his letter of 19th September, 2000 addressed to Mr. Kelly personally at his home demanding on behalf of his client, payment of the sum of £69,634.01. Mr. Coady further informed the court that shortly after he posted this letter his client called to the door of his home one evening. Mr Finan gave him the letter of demand which letter Mr. Kelly had apparently handed back to him. The letter had a handwritten note appended to it which reads as follows:-

"I Jarleth Kelly owe the above amount of money.

Jarleth Kelly."

Mr. Finan told Mr. Coady that he had attended Mr. Kelly's house and that Mr. Kelly had signed the letter as acknowledgement of the outstanding sum telling him that he would receive a payment in early course. Mr. Coady advised the Court that shortly thereafter, the sum of £50,000 already referred to herein was paid by the defendant.

Under cross examination a number of propositions were put to Mr. Coady including Mr. Kelly's contention that Mr. Finan had invested in a company of which the defendant was a director, namely Southdell Limited. Mr. Coady stated that he had discussed this assertion with his client and that Mr Finan had denied this fact and had reaffirmed his earlier instructions that he had given the loan to Mr. Kelly personally. Further, insofar as it was suggested to Mr. Coady that Mr. Finan owed monies to the defendant and/or Southdell Limited for goods made available to him or bills paid on his behalf, Mr. Coady stated that he went through the invoices provided by the Defendant with his client and that he had conceded that he owed the Defendant £3,360 in respect of certain equipment he had received.

The defendant's defence to the within proceedings commenced with his replying affidavit dated 1st February, 2001. In that affidavit, the defendant contended that the monies provided by the plaintiff were provided on a rollover basis and that there had been no agreed date for repayment. Mr. Kelly alleged that the monies were not loaned to him personally but were monies invested by the plaintiff in Southdell Limited. He maintained that as one of the three cheques forming part of the initial loan had been lodged to the account of Southdell Limited at Allied Irish Bank, Stillorgan on 22nd August, 2000 that this fact was good evidence that the loan was to Southdell Ltd. Mr. Kelly asserted that the plaintiff had taken an active part in Southdell's business and that he had attended trade shows and that his attendance costs at one such

show, namely £1,400, had been discharged by Southdell Limited. Mr. Kelly also maintained that the plaintiff had purchased goods to the value of £7,553 from Southdell Limited and that payment for these goods remained outstanding. Finally, Mr. Kelly had asserted in his affidavit that Southdell had discharged monies due and owing on behalf of the plaintiff to third parties to the tune of £2,800.

It is noteworthy that in the aforementioned affidavit that all of the liabilities alleged to be outstanding by the plaintiff to the Defendant were sworn to be liabilities owing by Mr. Finan to Southdell Limited.

In his Defence dated 6th March, 2001 the defendant put the plaintiff on proof of all aspects of his claim. The defendant specifically maintained that any monies provided by the plaintiff were provided to Southdell Limited and not to him personally. Further, he contended that the plaintiff was in breach of his agreement with Southdell Limited insofar as he maintained that the plaintiff withdrew his investment from Southdell Limited without notice in breach of the agreement between the parties. As a result, the defendant maintained that Southdell Limited lost profits on two containers of garden mowers which it was then not in a position to import. This left Southdell Limited with a loss of £12,000. Further, the defendant maintained that the liabilities totalling £13,862 which in his replying affidavit he had maintained were liabilities outstanding to Southdell Limited where now asserted to be monies which "remained due and owing to the defendant" in respect of bills for goods unpaid.

The court heard oral evidence from Mr. Kelly who stated that he, on behalf of Southdell Ltd, entered into something akin to a joint venture agreement with the late Mr. Finan whereby they would import garden machinery goods together and split the profits. The profit on the first container load of goods was to be a sum of £10,095. The following three containers would give Mr. Finan a profit of £6,000 on each container. He advised the court that the plaintiff put his money into the business in June 2000 and he maintained that Mr. Finan had wrongly sought repayment of the monies he had loaned to Southdell Limited in September 2000. As a result he was then not able to import the final two container loads of goods as a result of which Southdell lost the profit it would otherwise have gained on those transactions.

The Court found the evidence of Mr Kelly to be entirely lacking in terms of credibility. The defendant was not able to show that the two cheques of £20,000 each drawn on the account of Messrs. Reidy Stafford, the same being part of the initial loan monies, were ever lodged to the account of Southdell Limited. Neither could he produce any documentation to show that Southdell Ltd had defrayed any expenses incurred by Mr. Finan in attending at any trade show. Mr. Kelly was not in a position to give any adequate explanation as to how he came to acknowledge his liability to the plaintiff on the letter of demand prepared by Messrs Reidy Stafford on 19th September, 2000. In this regard the court rejects the defendant's assertion that this letter was not received by him in the post and that it was Mr. Finan who brought the letter to his doorstep. In addition, Mr. Kelly failed to explain to the court why it was that subsequent to that letter he had hand delivered a cheque in the sum of £50,000 to the offices of Messrs. Reidy Stafford in circumstances where he was maintaining that the demand for payment of these monies by Mr. Finan was in breach of his agreement to invest in Southdell Limited. No letter accompanied that payment alleging any breach by Mr. Finan of the agreement or threatening to hold him accountable for losses that might result to Southdell by the wrongful withdrawal of the monies. The defendant produced no evidence that it was Southdell Limited that had repaid the monies to Mr. Finan. The defendant could not explain why in his replying affidavit he had not claimed the monies allegedly lost by Southdell Ltd on two container loads of equipment by virtue of Mr. Finan's wrongful demand for repayment of £69,634.01 on 19th September, 2000.

At all stages, Mr. Kelly maintained in the course of his evidence that the plaintiff's dealings were with Southdell Limited a company of which he maintained he was a director. However, he was unable to explain how it was that no F.10 form reflecting this fact had been lodged with the companies office. Neither could he explain why no annual returns had been made nor why there appeared to be no VAT number or Tax number on relevant documents produced to the court purporting to emanate from Southdell Ltd. The court notes that Southdell Limited was, according to the defendant, dissolved in June 2002.

The court concludes that the defendant was an unreliable witness. He sought to resist payment of monies based upon a Defence of corporate liability in circumstances where he was shown as someone who had scant regard for the statutory duties and obligations which attach to those who wish to trade with the benefit of such protection.

The court rejects the defendant's contention that the plaintiff provided monies to Southdell Limited on the basis of the joint venture agreement contended for by the defendant but finds as a fact that these monies were loaned to the defendant personally on the basis pleaded. In coming to this conclusion, the court relies on the unsatisfactory nature of the defendant's evidence referred to earlier in this judgment and also relies in addition upon the following matters which emerged from the *inter partes* correspondence namely:-

(a) Messrs. Boyce Byrnes Solicitors acted on behalf of the defendant in the course of these proceedings. In their letter of 4th December, 2000 addressed to the plaintiff's solicitors, their response to the proceedings instituted against their client, Jarleth Kelly, was confined to an assertion that there were monies due by the plaintiff, Mr. Finan which would have to be taken into account. These monies were scheduled to the letter. No mention was made of Mr. Kelly being the wrong defendant or that the liability contended for was that of Southdell Limited.

(b) In their subsequent letter of 12th December 2000, Messrs. Boyce Byrnes again on behalf of their client, Jarleth Kelly, enclosed nine invoices relating to goods allegedly purchased by the plaintiff asking that those monies be offset against the monies being claimed against Mr. Kelly. Once again, there was no mention of Southdell Limited. Further, all of the invoices delivered with that letter were on invoices of Newbridge Tool Centre.

(c) The first suggestion by the defendant's solicitors that the loan provided by Mr. Finan was not provided to him personally is to be found in a letter dated 16th January, 2001 from Messrs Boyce Byrnes and Company. However, even in that letter, the said firm of solicitors refers to the liability being that of "the Company" rather than the defendant. However, there was no mention of Southdell Limited even in that letter.

(d) An even more sinister position was adopted by the defendant in May 2002 when his solicitors, in a letter of 14th May, having noted the plaintiff's death, then contended that any contract which had previously existed was frustrated in circumstances where the contract had been a personal contract. When Messrs. Reidy Stafford Solicitors wrote by letter of 7th June, 2002 to express satisfaction that at last the defendant had recognised and admitted that the contract had been between the late Mr. Finan and Mr. Kelly as a personal contract, Messrs.

Boyce Byrnes in their subsequent letter of 17th July, 2002 took up a somewhat opportunistic position on behalf of their client in trying to reverse the import of their earlier letter by stating the following:-

"We confirm that to clear up any misunderstanding that may have arisen in relation to this matter and in particular any reference to a personal contract. This was intended to refer to the fact that your late client personally entered into a contract, the subject matter of proceedings which of course was not with our client but was with a limited company which our client worked for at the time of the alleged contract."

The reference in this letter to the defendant being a mere employee of the Company with whom the late Mr. Finan had been dealing is inexplicable in circumstances where Mr. Kelly was the owner and himself and his wife the alleged Directors of that company. This, in the courts view, was yet a further and unmeritorious effort on the defendant's behalf to distance himself from his responsibilities on foot of the loan agreement.

The court has come to the conclusion arising from the aforementioned correspondence and from the evidence given by the defendant to the court that he has sought to adopt any convenient strategy, irrespective of the truth of the underlying facts, to seek to avoid his liability to the plaintiff herein including seeking to take advantage of the plaintiff's death. The defendant's solicitors engaged in the aforementioned correspondence on his behalf for an extended period of time without ever mentioning the name of the company Southdell Ltd with whom the defendant now alleges Mr. Finan had entered into some type of joint venture agreement.

Regrettably I must conclude that Mr. Kelly has sought to defraud a personal friend, now regrettably deceased, in the manner in which he has attempted to defend these proceedings. Whilst it is clearly irrelevant to the court's conclusions it is nonetheless disappointing to note that in his evidence Mr. Kelly did not demonstrate even the slightest regret for the fact that monies lent to him were not repaid. He seemed entirely comfortable to attribute the non-payment of any monies outstanding to the fact that Southdell Ltd went out of business; something which he seemed to think should not concern him, even though that company was allegedly owned and controlled by him.

What the court finds particularly reprehensible in this case is that the defendant has sought to rely upon the corporate veil so as to absolve himself of any personal liability in this case where the evidence suggests that he did not comply with a number of Statutory obligations which apply to those who wish to trade with the benefit of the protection that such status affords.

In his efforts to defend this case Mr. Kelly contended for the existence of a contract which, if it had been on the terms contended for by him, would have been quite extraordinary. Mr. Kelly asserts that the plaintiff gave him contractual terms which he could never have obtained, as he well knows as a former bank manager, from any bank. Had he gone to his bank on behalf of Southdell Limited to borrow these monies, the bank as a high probability not only would have to have been satisfied as to Southdell's trading history but undoubtedly would have required Mr. Kelly to provide security for any loan either by the deposit of title deeds and/or the provision of personal guarantees. Consequently, to contend that his friend Mr. Finan was happy to provide the money concerned to Southdell without any of these comforts is simply hard to credit and is a contention for which there was simply no credible evidence.

Given the defence which has been maintained by the defendant in the within proceedings, it is doubtful as to whether or not this Court should even consider setting off any monies which the defendant has maintained at all times were due and owing by the plaintiff to Southdell Limited. Southdell Limited, as the court has heard was apparently dissolved in June 2002. However, having regard to the concession made by Mr. Coady in his evidence, the court will set off the sum of £3,360 which Mr. Finan apparently agreed was due in respect of equipment provided to him by the defendant or one of his companies.

In the foregoing circumstances, the court will grant judgment to the plaintiff in the euro equivalent of £28,274.01 together with interest from 19th September, 2000.