

HIGH COURT**[2013 No. 3980 S]****BETWEEN****SEAMUS MAGUIRE, NOEL MCDONALD, RICHARD CLINCH AND TOMMY GIBBONS CARRYING ON PRACTICE UNDER THE STYLE
AND TITLE OF SEAMUS MAGUIRE AND COMPANY SOLICITORS****PLAINTIFFS****AND****ALAN HYNES AND NOREEN HYNES TRADING AS A&N PROPERTIES****DEFENDANTS****JUDGMENT of Mr. Justice McDermott delivered on the 14th of October, 2016**

1. The plaintiffs' claim is for summary judgment in the amount of €2,320,000.00 said to be due and owing by the defendants on foot of a cheque dated 30th November, 2007 drawn on National Irish Bank at their branch located at 27 College Green, Dublin 2 payable to the plaintiffs' client account. The cheque was signed by the first named defendant drawn on the account of A&N Properties. At the defendants' request, the cheque was held by the plaintiffs and not presented for payment. The defendants advised the plaintiffs that there were no funds to meet the cheque but that the defendants would advise them when there were sufficient funds in place for payment. However, the cheque remained unpaid and the whole of the sum is now said to be due and owing by the defendants to the plaintiffs.

2. At the hearing of this motion, counsel on behalf of the plaintiffs indicated to the court that, having regard to the matters raised by the defendants in their respective affidavits, they would not resist the submission of the case for plenary hearing by the court. The first named defendant, Alan Hynes, the husband of the second named defendant did not appear on this motion though a number of affidavits were submitted by him in the course of the proceedings and upon which his wife also relies. Counsel appeared on behalf of the second named defendant, Noreen Hynes, and submitted that the plaintiffs' claim should not be sent for plenary hearing but should be dismissed.

3. Order 37, rule 7 provides that:-

"Upon the hearing of any such motion by the court, the court may give judgement for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just."

Counsel on behalf of the second named defendant submits that the claim should be dismissed because:

- (i) There is no averment or evidence that the cheque was dishonoured; and
- (ii) The action should be dismissed by reason of cause of action estoppel.

4. The plaintiffs claim that the cheque was given to them by the defendants in the following circumstances. The plaintiffs acted as solicitors for the defendants in relation to the purchase of a site at Moongate, Clonard, Co. Wexford. This site had been previously purchased by a syndicate of persons including the second named defendant and the parents of the first named defendant in or about 2005. The plaintiffs claim that the purchase was financed by a loan from Anglo Irish Bank subject to a charge in favour of the bank. It was agreed that the defendants would purchase Moongate for a consideration in the amount owing to Anglo Irish Bank calculated on 4th July, 2007 to be €2,200,870.71 with interest accruing at a daily rate. The plaintiffs claim that the defendants sought to borrow monies from Allied Irish Banks Plc. to acquire and re-finance Moongate and the defendants were sanctioned to borrow the sum of €3 million for that purpose by facility letter dated the 22nd May, 2007. The plaintiffs claim that a sum of €2,992,500.00 (the sanctioned amount less an arrangement fee) was released to the plaintiffs on the 7th June, 2007 on foot of an undertaking given by them on behalf of the defendants to Allied Irish Banks Plc. on the 5th June, 2007. The undertaking provided that the plaintiffs would apply all sums received by them exclusively towards the purchase of the property or the discharge of existing third-party mortgages or encumbrances affecting the property.

5. The plaintiffs claim that the defendants requested that the monies released by AIB be paid by an assistant solicitor employed by the plaintiffs to the defendants by way of a payment to Taylor and Buchalter solicitors in or about June and August, 2007. That firm was then acting for the vendors of a property at Cunningham Road, Dalkey, Co. Dublin to Tuskar Asset Management Plc., a company of which the first named defendant was a director and was controlled by the defendants. It is claimed that Tuskar Asset Management Plc. submitted a tender offer for the Dalkey site on the 15th May, 2007 and made an offer to buy it for €20 million with a closing date of the 27th June, 2007. Tuskar Asset Management Plc. furnished a cheque for €2 million as deposit but that cheque was stopped and High Court proceedings were instituted by the vendors of the Dalkey site seeking its payment and specific performance of the contract. A motion to have those proceedings admitted to the Commercial Court was returnable for the 11th June, 2007. On foot of subsequent negotiations the closing date was extended. As a result the monies released by AIB to the plaintiffs were not used to redeem the mortgage held by Anglo Irish Bank on Moongate but were diverted to ensure that the deposit on Dalkey was paid.

6. Against this background the plaintiffs claim that the defendants acknowledged that the monies the subject of the cheque were due and owing to the plaintiffs and provided assurances to the plaintiff that they would repay the sum drawn down from AIB to the plaintiffs and therefore, on the 30th November, 2007 the defendants presented the cheque to the plaintiffs.

7. Mr. Hynes gives an entirely different account of these events. He rejects any suggestion that instructions were given to the plaintiffs for any money to be transferred from his client account to solicitors acting for the vendors of the Dalkey site. He maintains that a compromise of the proceedings relating to the Dalkey site were financed by monies provided under loan facility by Bank of Scotland (Ireland) Ltd. He claims that in September, 2007 a solicitor employed by the plaintiffs contacted him requesting a cheque for €2.32 million because the plaintiffs had omitted to discharge the Moongate Investors liability to Anglo Irish Bank Plc. He claimed there was never any debt owed by him to Anglo Irish Bank Plc. and that:

"I gave Mr. D... a cheque drawn on the bank A&N Properties for €2.3 million which the plaintiffs knew could not be presented until such time as the investors put me in funds."

It is said that the plaintiffs as solicitors had carriage of the matter of the transfer of ownership of the Moongate property to the Moongate Investors but did not fulfil their obligations in that regard. A number of documents said to be relevant to these matters were identified and alleged to be false by Mr. Hynes and not signed by the defendants. This includes a deed of charge executed by the defendants on 19th December, 2008 which acknowledges a debt of €2,450,000.00 due and owing to the plaintiffs. It appears to be signed by them and witnessed.

8. It is clear that the factual narrative presented in Mr. Hynes' affidavits and that of Mrs Hynes is far from complete.

(i) The Cheque

9. The cheque was given to the plaintiffs on the 30th November, 2007 but the plaintiffs were asked by the first named defendant not to present the cheque as funds had not arrived into the defendants' account. The plaintiffs claim that the cheque was not "honoured" by the defendants' bank due to lack of available funds in the defendants' account. It is clear that the cheque was not physically presented to the bank and Mr. Hynes in his first affidavit complains that the plaintiffs never presented the cheque to obtain payment. However, it is accepted at para. 7 of Mr. Hynes' affidavit of 15th December, 2015 that in September 2007 he was requested to furnish a cheque for €2.32 million to the plaintiffs and did so. He claims that the plaintiffs sought the cheque because of their failure to discharge the liability of Moongate Investors to Anglo Irish Bank Plc. He confirms that he gave a solicitor then employed by the plaintiffs a cheque drawn on the bank account of A&N Properties for €2.32 million which the plaintiffs knew could not be presented until such time as the investors put him in funds.

10. The real issue in the case raised by the defendants appears to relate to the condition precedent for the presentation of the cheque to the bank.

11. A further point is taken that since there is no averment in the Special Indorsement of Claim that the cheque was presented to the bank and dishonoured and no evidence adduced to that effect, the case should be simply dismissed. Reliance is placed upon the rules as to presentment set out in s. 45 of the Bills of Exchange Act 1882 which provides inter alia that a bill must be duly presented for payment and that if not so presented the drawer and the indorsers "shall be discharged". Section 45(2) provides that:

"Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case."

12. Section 46 provides for various excuses which may be raised in respect of delay or non-presentment for payment. It provides that delay in doing so is excused when it is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. Reliance is placed on subs. (2)(a) which provides that presentment for payment is dispensed with:

"Where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected, the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment."

Under subs. (2)(e) delay or non-presentment may be excused:

"By waiver of presentment, express or implied."

13. Section 47(1) provides that:

"(1) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder."

14. In essence, the defendants claim that the cheque was not properly presented and therefore not dishonoured and no facts have been advanced to excuse presentment and/or there has been an inexcusable delay in presenting the cheque. There is agreement that the cheque was issued to the plaintiffs and that it was not to be presented immediately. There is a factual dispute between the parties as to whether a condition precedent for presentment existed and/or has been fulfilled namely, whether presentment of the cheque for payment was conditional upon the defendants being put in funds by the Moongate Investors in respect of the amount covered by the cheque. Counsel has also raised an issue as to whether the cheque has been dishonoured within the meaning of the statutory provisions set out above. The defendants reject this argument which will be determined on the proper application and interpretation of the statute in the light of the facts. The defendants are entitled to raise this matter if the case is sent for plenary hearing. The court, of course, does not offer a final conclusion on this matter on this motion save to find that the point passes the low threshold necessary under the relevant authorities to enable the court to grant leave to defend. However, the relevant facts deposed to and highlighted by the defendants allege and accept that the parties agreed that the cheque would not be presented immediately which appears to be the main relevant issue under this element of the proposed defence.

15. I am satisfied that the affidavits submitted on behalf of the defendants disclose an arguable defence to the plaintiffs' claim under ground (i) and should be sent for plenary hearing. I am not satisfied that the defendants have established a basis upon which to dismiss the plaintiffs' claim under this heading.

(ii) Cause of Action Estoppel

16. The defendants also claim that the same cause of action was previously raised in 2013 in Circuit Court proceedings relating to the same facts entitled "Ulster Bank Ltd. Plaintiff -and- Alan Hynes and Noreen Hynes, Defendants,- and- Seamus Maguire, Noel McDonald, Richard Clinch and Thomas Gibbons practicing as Seamus Maguire and Company solicitors, Third Party - Dublin Circuit Court: Record No. 2011/04019". The plaintiffs submit that these proceedings were dismissed by order of Mr. Justice Deery on the 3rd December, 2013 with an order for costs against the defendants and that the learned judge found that there was no case for the plaintiffs to

answer and that the counter claim did not proceed and was not determined. The defendants claim that the plaintiffs in these proceedings did not obtain judgment in respect of their counter claim against the defendants but had a full opportunity to litigate the issues set out in the counterclaim at that hearing.

17. The counter claim is set out in the "Defence to Third Party Notice" and seeks judgment in the sum of €2,320,00.00 against Mr. and Mrs. Hynes. The claim is not on its face limited to the jurisdiction of the Circuit Court nor had the parties agreed to unlimited jurisdiction on the face of the order. The plaintiffs' counter claim is set out as follows:

"(1) On or about the 30th November, 2007 the defendants purported to discharge a debt, due and owing to the third parties by way of bank cheque, signed by the first named defendant, No. 500098951505003814809 drafted in the sum of €2,320,000.00 to be drawn down on the defendants' National Irish bank account held and maintained at 27 College Green, Dublin 2.

(2) The cheque was not honoured by the bank owing to lack of available funds in the defendants' account.

(3) The aforementioned debt has not been discharged and the full amount continues to be owing to the third party.

AND THE THIRD PARTY COUNTER CLAIMS:-

(4) Judgment in the sum of €2,320,000.00

(5) An order for directions as to the proper disposal of the within proceedings and in particular the within counter claim.

(6) Interest pursuant to statute.

(7) Such further or other orders.

(8) Costs."

18. The order of Mr. Justice Deery of 3rd December, 2013 states:

"The defendants having been duly served with the Civil Bill for Possession herein and having counterclaimed with their defence and the same coming for hearing before the Court on the 2nd day of December 2013 and further on this day. WHEREUPON and on reading the pleadings and documents filed herein and on hearing the evidence adduced and what was offered by counsel for the plaintiff and counsel for the defendants and counsel for the third party.

AND IT APPEARING TO THE COURT that the defendants had failed to prove their counterclaim as against the third party

THE COURT DOTH ORDER

1. That the Defendants' Counterclaim as against the Third Party be and the same is hereby dismissed.

2. That the third party do recover from the defendants the cost of the proceedings to be taxed in default of agreement.

AND IT APPEARING TO THE COURT that the defendants have failed to prove their counterclaim as against the plaintiff

THE COURT DOTH ORDER

1. That the defendants' counterclaim as against the plaintiff be and the same is hereby dismissed with no orders to costs

AND IT APPEARING TO THE COURT that the plaintiff is entitled to possession of the premises as claimed in the Civil Bill for Possession

THE COURT DOTH ORDER

1. That the plaintiff do recover from the defendants possession of ALL THAT AND THOSE the dwelling house and premises known as Chivuna, 1 Rose Hill, Carysfort Avenue, Blackrock in the County of Dublin.

2. That the plaintiff do recover from the defendants the costs of the proceedings to be taxed in default of agreement.

3. That any rent as and from the 3rd day of December 2013 be paid to the plaintiff.

AND THE COURT DOTH FURTHER ORDER that execution for possession hereon be stayed to the 1st day of April 2014

AND THE COURT DOTH grant liberty to apply"

19. The plaintiffs in these proceedings state that they did not pursue the counterclaim as against the defendants in those proceedings and that the proceedings by the defendants as against the plaintiffs were simply struck out with costs to the plaintiffs. It is said that no order was made on foot of the plaintiffs' counterclaim. Therefore, it is submitted that no prior adjudication and/or determination on the merits was made in those proceedings in respect of the plaintiffs' cause of action which would prevent this Court from determining the issue.

20. The defendants, for their part, submit that the precise issues raised in these proceedings were the subject of the counterclaim raised in the third party notice and ought properly to have been pursued in the Circuit Court proceedings. Reliance is placed on *Henderson v. Henderson* [1843] 3 HARE 100 as applied in *McFarlane v. DPP* [2008] 4 I.R. 117, *S.M. v. Ireland* [2007] 3 I.R. 283 and

A.A. v. Medical Council [2003] 4 I.R. 302. It is submitted that this matter having been the subject of pleadings in matters which went to trial in the Circuit Court, it was and/or should have been advanced before that court. It is submitted further that the plaintiffs should not be permitted to raise points for a second time which were or could have been raised in the Circuit Court proceedings and that the defendants should not be exposed to successive suits in relation to the same subject matter. It is a peculiar feature of the counterclaim in the third party notice that such a sum was claimed in those proceedings. Leaving that aside, I am satisfied that the defendants have raised an arguable defence on ground (ii) sufficient to pass the low threshold required and I am satisfied on this ground also that the matter should be sent for plenary hearing. I am not satisfied on the basis of the affidavits submitted to dismiss the plaintiffs' claim when there are identifiable and clear issues of law and fact to be determined between the parties in respect of the intended plea of cause of action estoppel.

Conclusion

21. I am satisfied that the defendants have raised an arguable defence and that the matter should be sent for plenary hearing.