

**THE HIGH COURT**

**2000 617 S**

**BETWEEN**

**THOMAS WATERS**

**PLAINTIFF**

**AND**

**JARLETH KELLY**

**DEFENDANT**

**JUDGMENT of Ms. Justice Irvine delivered on the 5th day of May, 2009**

By summary summons dated 27th September, 2000, the plaintiff has claimed the return of a sum of £33,550 or its present equivalent in euro in respect of monies loaned by him to the defendant in October, 1999.

The within proceedings were referred to plenary hearing following the delivery by Mr. Kelly of a replying affidavit sworn by him on 1st February, 2001. In that affidavit the defendant contended that any monies furnished by the plaintiff were furnished to a company, Kellcorp Limited, of which he was a director.

The plaintiff advised the court that he knew Mr. Kelly, the defendant, through the local golf club of which they were both members. He also knew him as the former branch manager of the Ulster Bank in Celbridge.

The plaintiff gave evidence that the defendant approached him asking him for a loan of approximately £33,500 in 1999. According to the plaintiff, the defendant stated that he needed the money for a period of approximately 10 days. The defendant told him that the monies were to be used to pay a company that was supplying him with large mechanical garden mowers which he, the defendant, had already pre-sold to his customers. It was therefore, according to the defendant, only a question of collecting the purchase monies from his clients on delivery of the relevant mowers.

The plaintiff in his evidence was adamant that he entered into the loan agreement with Mr. Kelly personally and had no knowledge of any company called Kellcorp.

Following the non-payment of the monies, Mr. Waters approached his solicitors, Messrs Reidy Stafford who wrote to the plaintiff on 30th August, 2000. Following the delivery of the letter of demand by Messrs Reidy Stafford, Mr. Kelly, according to the evidence, delivered a hand written letter dated 11th September, 2000, to Messrs Reidy Stafford which reads as follows:-

"Dear Sirs

Re: Thomas Waters

I refer to your letter and note its content.

I have recently started up the business which is in its infancy state. I am not in a position to clear the amount outstanding in one lump sum.

I propose the following. £1,000 per month commencing 20th October, 1999, until 20th March, 2001. At this stage, given the seasonal nature of my business I will endeavour to increase payments.

I look forward to hearing from you.

Signed, Jarleth Kelly."

Notwithstanding this apparent admission of liability in his own handwriting Mr. Kelly gave oral evidence to the court that the loan was not made to him personally. He stated that at all times the plaintiff was aware that the loan was being provided to his company, Kellcorp Limited, and that the letter he wrote to Messrs Reidy Stafford dated 11th September, 2000, was written on behalf of his company Kellcorp Limited even though the same did not appear on any head notepaper of that company.

**Conclusion**

The court assessed the credibility of both the plaintiff and the defendant in the present case. Having done so, the court has no doubt whatsoever that it is the evidence of the plaintiff that the court should rely on. This evidence is supported by a number of factors which the court has taken into account and they are as follows:-

(i) The letter of demand from Messrs Reidy Stafford dated 30th August, 2000, demanded, on behalf of their client Thomas Waters, payment by Mr. Kelly personally of the outstanding liability. In the reply quoted earlier in this judgment, Mr. Kelly took no issue with the fact that the demand had been made of him personally rather than of any company with which he might have been involved. There was no mention by Mr. Kelly in his letter of the existence of Kellcorp Limited. Neither was there any denial that the plaintiff himself personally had loaned the said monies. His only response was that he needed time to pay.

(ii) Messrs Boyce Byrnes and Company Solicitors acted on behalf of the defendant in the within proceedings. In their letter of 1st February, 2001, they wrote a letter seeking discovery of documents from the plaintiff. In that letter there was no assertion on behalf of their client that the contract was not entered into personally as between Thomas Waters and Jarleth Kelly, their client. They stated, however, that they required sight of certain documents to establish "whether

any such monies paid by the plaintiff were, as alleged, paid to the defendant or in the alternative whether all such monies paid by the plaintiff were paid directly to Axxom". Nowhere in their letter was Kellcorp mentioned as a possible party to any contract. Neither was there any question mark over whether or not the loan monies had been furnished by Mr. Waters personally.

(iii) In his affidavit sworn on 1st February, 2001, Mr. Kelly himself stated that he negotiated with the plaintiff in his capacity as director of Kellcorp Limited. However, nowhere in the affidavit did he state that he advised the plaintiff that he was acting in such capacity or in any capacity other than a personal capacity. Mr. Kelly purported to rely upon the fact that given that the monies were paid by the plaintiff to pay for goods purchased by Kellcorp Limited from Axxon that the plaintiff was in some way disentitled to contend that he could be personally liable for repayment of those monies.

(iv) A further shift in position was adopted by Messrs Boyce Byrnes Solicitors in their letter of 12th June, 2001, a letter written some 10 months after the initial formal letter of demand. In that letter there was no mention made of Kellcorp Ltd in any shape or form. Instead, Messrs Boyce Byrnes contended that the plaintiff's claim was invalid in circumstances where Mr. Waters had paid the monies to Axxom, the suppliers of the mechanical machinery to the defendant.

(v) In the course of the trial, for the first time, an alternative approach was taken by counsel for the defendant wherein he canvassed a defence never muted in the defendant's replying affidavit or in his formal defence. He suggested, in the course of cross-examination of the plaintiff that he had no entitlement to recover the loan monies from anybody in circumstances where the cheque, the subject matter of the loan agreement had been drawn upon his company, Thomas Waters Limited.

The court has no hesitation whatsoever, particularly in the light of the letter of 11th September, 2000, written by Mr. Kelly personally in his own handwriting on non company notepaper, in concluding that Mr. Water's loan was to the defendant personally. Regrettably, the court further concludes that the defendant has sought to defraud one of his personal friends by the manner in which he has attempted to defend these proceedings. Whilst it is irrelevant to the court's conclusions it is nonetheless disappointing to note that in his evidence that Mr. Kelly failed to demonstrate even a morsel of regret for the fact that monies loaned to him, by a person who was principally a friend from his golf club, were not repaid. He seemed entirely unconcerned by the fact that even on his account of events, which the court believes was false, that the plaintiff's monies were lost by virtue of the failure of a company owned and controlled by him.

What the court finds particularly distasteful, given that the plaintiff is a former bank manager, is that he has sought to rely on the existence of the corporate veil to absolve him of any personal liability. If the contract had been as contended for by the defendant, those terms would have been quite abusive of the plaintiff. Kellcorp would not have been able to borrow monies from a bank on similarly favourable terms. Had the Defendant gone to his bank to borrow monies on behalf of Kellcorp Ltd, the bank would in all probability have insisted upon security probably by way of the deposit of title deeds and or the provision of a personal guarantee. Accordingly, for the defendant to contend that this personal friend was willing to provide monies to the company without any of these comforts and in circumstances where there was simply no credible evidence in support of such assertion is untenable.

For the aforementioned reasons the court will grant judgment to the plaintiff in the euro equivalent of £33,550 together with interest from 30th August, 2000, being the date of demand, until payment.