Neutral Citation: [2014] IEHC 465

HIGH COURT

[2011 3181 P]

VANGUARD AUTO FINANCE LIMITED

PLAINTIFF

AND

PAUL BROWNE, BROWNE CORPORATE FINANCE LIMITED, BAIRBRE WALL AND DAVID CONWAY

DEFENDANTS

JUDGMENT of Mr Justice Bernard Barton delivered the 14th day of October 2014

1. The plaintiff brings these proceedings as the assignee of a lease and guarantee on foot of a legal assignment made between the plaintiff and Lombard Ireland Ltd (hereinafter the bank) and dated 18th December, 2012. The lease was entered into between the bank and Arnosford Ltd (hereinafter Arnosford) on the 21st August, 2008 and the due performance of the lease was guaranteed by the fourth named defendant.

2. The first named defendant is the managing director and beneficial owner of the majority shareholding in the second named defendant company.

3. The third named defendant is the spouse of the first named defendant. She is an interior designer carrying on practice as Bairbre Wall Interiors and is the owner of one share in the second named defendant company.

4. A judgment for €123,175.18 on foot of the guarantee having been obtained by the plaintiff on the 9th July, 2012, but which remains unsatisfied and the second named defendant being in liquidation with no assets, the court is concerned only in these proceedings with the plaintiffs claim as against the first and third named defendants.

5. As against the first and third named defendants the plaintiff claims to recover the sum of €111,320 being the proceeds of a cheque dated the 28th August, 2008 drawn by the bank in favour of the third named defendant and being a transaction which the bank alleges arose as a result of fraud, deceit and/or misrepresentation the consideration for which has wholly failed, further or alternatively, the plaintiff seeks a return of the said sum as being monies had and received by these defendants to the use of the plaintiff.

6. As against the plaintiffs claim the first defendant delivered a full defence save that he admits that on or about the 3rd September, 2008 upon receipt of the cheque, he advised the third named defendant that the cheque should be returned to the second defendant whilst he made enquiries with the fourth defendant for the purposes of clarifying certain matters.

7. The third named defendant delivered a defence denying liability to account to the plaintiff for the payment, however, in that defence she made a number of admissions and assertions to which reference will be made later in this judgment and which the court considers significant given the nature of the plaintiffs claim and the election by the third defendant, as was her right, on her application for a non suit at the close of the plaintiff's case, not to give evidence at the trial of the action.

Factual background to the case

8. The evidence given at the trial of this action established the following factual background. The second named defendant in these proceedings was involved in a contract as project manager to develop the grounds of Kilkea Golf Club, Kilkea, Co. Kildare. The development involved a tax incentivised scheme for the construction and fit out of a number of golf lodges. The scheme was structured so as to enable investors obtain tax relief on their investment upon completion of which the lodges would then be sold back to the developer, Arnosford, which in turn would then let the lodges to golfing clients. Initial financing was provided by Anglo Irish Bank. Lodges one to ten were completed to plan in 2007 and this included the payment of project management fees due to the second defendant.

9. The second phase of the development involved lodges eleven to nineteen and these were completed in early 2008 at which stage work on the development ceased due to difficulties experienced in arranging further financing. Those lodges were fully fitted out and ready to be bought by investors. As to the payment of project management fees for the second stage it was agreed between the second defendant and Arnosford that those would be paid on a rollover basis out of the proceeds of sale of the lodges.

10. Whilst some work had been done on lodges 20 to 28 those lodges were at a less advanced stage of construction than lodges numbering 28 to 32 and which were ready to be fitted out.

11. In July 2008 the bank agreed to finance the fit out of lodges 28 to 32. Security for the facility was to be achieved by a sale of the fit out goods to the bank which would then let them to Arnosford. To this end the bank required an invoice for the goods and this was issued in the name of the third defendant and dated the 1st August, 2008 totalling €111,320 inclusive of VAT. This invoice did not, however, satisfy the requirements of the bank since it had failed to identify the bank as being the customer, accordingly, and so as to comply with the banks requirements, an amended invoice was issued in the same terms as the first except that it identified the bank as the customer and also bore the mobile telephone number of the first named defendant.

12. Thereafter the bank entered into the lease and issued a cheque dated the 28th of August, 2008 for the payment of the goods which was then sent to the third defendant who negotiated it through her number two bank account.

13. Having negotiated the cheque, the sum of €106,320 was transferred by the third defendant to the account of the second defendant in respect of fees claimed by the second defendant to be owed to it by Arnosford. As to the balance of €9,600 this was initially retained in the account of the third named defendant but subsequently transferred by her to the account of Arnosford.

14. The third named defendant was retained by the second named defendant as the interior design consultant in respect of the development and habitually received her instructions from the first named defendant as to the services to be rendered and goods to be supplied in connection with the fit out of the lodges.

15. At the time of the negotiation of the cheque by the third named defendant she had not received any instruction to purchase or supply the goods the subject matter of the invoice issued in her name, nor, as it happened, were any instructions ever received by

her with the consequence that the goods were never purchased or supplied, a fact unknown to the bank at the time the cheque was issued. The invoices were a fiction.

16. Throughout this period the fourth named defendant was engaged in negotiations with a view to securing additional financing and about which the first named defendant was aware. At the time of the negotiation of the cheque Arnosford was indebted to the second named defendant in the sum of €106,320.

17. In 2008 the procedures adopted by the bank in relation to the purchasing and letting of goods did not involve enquiries being made for the purposes of establishing the actual supply of the goods being purchased. It seems to have been assumed by the bank that the lessee would not enter into a lease and make payments for goods it did not receive, however, certain internal invoice checks were carried out and if these were completed satisfactorily then a pro-forma document with a cheque attached would issue. That document, described as a perforated printout, would give details of the lease agreement number, dealer code, date, suppliers name and address and the name of the customer to which the payment referred.

18. Acting on foot of the invoice the bank issued and drew a cheque in favour of the third defendant and to whom the cheque was sent.

19. In 2009 Arnosford went into arrears on the lease and was subsequently placed into receivership. The bank first became aware of this event in or about October 2010 at which stage it wrote to the receiver terminating a number of leases with Arnosford including the lease the subject matter of these proceedings.

20. In an attempt to realise its security for the facility the bank sought to identify the goods the subject matter of the fit out with the receiver and to that end an inspection of the lodges to which the facility related, was carried out. As a result of that inspection it became apparent that no fit out had occurred and that the goods had never been supplied.

21. In the course of further enquiries by the bank the third defendant, through her solicitors by letter dated 13th December, 2010, asserted that the sum of €111,320 had been offset against fees owed by Arnosford to the second defendant under and by virtue of an agreement with the fourth defendant and in respect of which the third defendant denied all liability.

22. The bank having assigned its rights under the lease and the guarantee by the assignment dated the 18th December, 2012, the plaintiff instituted these proceedings.

23. Whilst repeating a denial of liability maintained in pre litigation correspondence, the third defendant in her defence made a number of admissions and assertions to which reference might now usefully be made.

Admissions
24. The admissions made by the third named defendant in her defence may be summarised as follows:

(a) That an invoice in the name of the third defendant was supplied to the plaintiff dated the 1st August, 2008 purporting to show the passing of title in the goods to the plaintiff with an invoice price of €92,000 plus €19,320 VAT totalling a sum of €111,320.

(b) That the plaintiff paid the third named defendant the sum of €111,320 by means of cheque drawn in her favour on the 28th August, 2008.

(c) That the third named defendant had contended that the fake invoice was prepared by the first named defendant (her husband) and/or the second named defendant and asserted that she had "returned" these funds to the first and/or second named defendants.

(d) That the third named defendant negotiated the cheque through her bank account on the 3rd September, 2008.

Assertions
25. The third named defendant made a number of assertions in her defence which can be summarised as follows:

(a) That since the appointment of the receiver to Arnosford the third named defendant had learned that the author of the invoice was Ms. Aine Boland, a servant or agent of the second defendant, and that the contact details supplied on the invoice were those of the first defendant.

(b) That on receipt of the cheque the third named defendant contacted the second named defendant, its servants or agents, in relation to the same and that the third named defendant was advised by the second named defendant its servants or agents, that the said cheque was for monies which related to the project at Kilkea and was for the fit out of the lodges.

(c) That the second defendant its servants or agents instructed the third defendant to lodge the cheque and to return the sum of €106,320 to the second named defendant and to retain the balance of the said monies until further instructions were received from the second named defendant which said instructions were confirmed to the third named defendant by letter in writing sent by the second named defendant and dated the 16th September, 2008.

(d) That acting on the faith of the said instructions and representations made by the second defendant, its servants or agents, as fully representing and disclosing all relevant facts relative to the plaintiff, the third defendant negotiated the cheque through her bank account on the 3rd September, 2008.

(e) That the second named defendant, its servants or agents, instructed the third defendant its servants or agents to transfer the balance of monies in the sum of €9,600 to Arnosford and which said instructions were received under cover of letter dated the 28th February, 2009.

(f) That the third named defendant had no knowledge of the arrangements between the second and fourth named defendants as alleged by the plaintiff and that at the time of negotiating the cheque through her bank and the passing of monies to the second named defendant as well as to Arnosford, the third named defendant honestly believed that she

was entitled to do so by virtue of the instructions and express representations she received from the second defendant, its servants or agents.

26. The position of the third named defendant, therefore, is that she was an innocent party, that she received no financial benefit from the transactions, that she acted in good faith on the instructions and representations made to her by the first defendant and/or second defendant and that accordingly she has no liability to account to the plaintiff for the sum being claimed.

27. The position of the first named defendant is that he too was an innocent party, received no financial benefit from the transactions, and was entitled to give the instructions he did pending clarification of matters from the fourth defendant. In addition the first named defendant maintains that at all times he acted as a servant or agent of the second defendant and cannot be personally liable for the amount claimed.

28. In the result the defendants deny any liability to the plaintiff for the amounts claimed on foot of the several causes of action joined in these proceedings.

Summary of the evidence.

29. Evidence was given on behalf of the plaintiff by Mr. Dermot Lawlor who, at the material time, was employed by the bank as an account executive based in Carlow.

30. He gave evidence that the contact requesting finance for the fit out of the lodges at Kilkea Castle came from an employee of Arnosford, Noelle Wall, and that it was from her that he requested an inventory of the goods and an invoice. It was his evidence that the first invoice which was dated the 1st August, 2008, had identified Arnosford as the customer instead of the bank. As it was the bank's requirement that the bank be named as customer he requested an amended invoice be issued to the bank. It was his recollection that he conveyed this request by phoning a mobile telephone number which appeared on the face of the invoice. In that regard he believed that he had spoken to a woman to whom he had outlined the bank's requirements. It was his evidence that no cheque would have been issued by the bank without an invoice from the supplier of the goods and that it was always to the supplier of the goods that the cheque would have been made payable by the bank as it required legal title to the goods which were to be the subject matter of the lease.

31. At the time when he was giving his direct evidence the first invoice was not before the court; that was produced on the following day. It was apparent from that invoice that it bore no mobile telephone number. Mr. Lawlor was recalled and asked to explain as to how he had made contact and to whom he had spoken for the purposes of obtaining an amended invoice given that the first invoice bore no contact number. He accepted that he had not spoken with a man but rather with a woman and that in all probability it was not as a result of anything on the first invoice that had enabled him to make the call. In this regard it transpired that the mobile telephone which appeared on the amended invoice was the mobile number of the first defendant.

32. Mr. Lawlor insisted, however, that he did make a request for an amended invoice and that the request was most likely made of Noelle Wall since he had previously dealt with her in relation to the matter. He confirmed that his communications were with Arnosford and that he did not communicate directly with either the first or third named defendant in connection with the invoice.

33. Mr. Lawlor gave evidence that the sum of €111,320 was still due, that the second named defendant was in liquidation, had no assets, and that the judgment obtained by the plaintiff against the fourth defendant on the 9th July, 2012 remained unsatisfied.

34. Under cross examination Mr. Lawlor accepted that in 2008 the bank did not, as a matter of policy, carry out any inspection with a view to ascertaining or confirming for itself the delivery of goods the subject matter of any invoice issued to the bank and on foot of which the bank made payment. As to the request for the amended invoice he believed that he had dealt with Noelle Wall of Arnosford but that he might also have had a conversation with Aine Boland, an employee of the second named defendant. He accepted that he had no direct dealings with the third defendant and knew nothing of her business other than what appeared on the face of the invoices. As to the source of the invoice, however, he gave evidence that he assumed that the invoices had originated with the third defendant and that the bank acted accordingly.

35. In response to a query from the court concerning the nature of the documentation, if any, accompanying the cheque, a supplemental affidavit of discovery was sworn on behalf of the plaintiff by Mr. Colm McLoughlin. He deposed to the procedure which was followed by the bank in relation to settling supplier's invoices in 2008. In that regard certain internal invoice checks would have been carried out and that if these were completed satisfactorily then a pro-forma document with a cheque attached would issue. That document, described as perforated printout, would give details of the lease agreement number, dealer code, date, suppliers name and address and the name of the customer to which the payment referred. It was not normal practice at that time to scan a copy of either the cheque or the perforated attachment onto the banking system, however, Mr. McLoughlin deposed to the fact that in this instance he believed the normal practice of the bank had been adhered to with regard to the processing and issuing of the cheque.

36. The first named defendant, who was unrepresented, gave evidence at the hearing of the action. He confirmed that he was the managing director and beneficial owner of the shareholding in the second defendant with the exception of one share held by his wife, the third defendant. He gave evidence as to the relationship between the second defendant and Arnosford and the procedure which was used for the drawing down of funds from Arnosfords then bankers, Anglo Irish so that suppliers invoices could be discharged. He gave evidence in relation to the development at Kilkea and the fact that the third named defendant had been retained in connection with the development as the interior design consultant to whom he habitually gave instructions in relation to the fit out of lodges.

37. His evidence in relation to the receipt of the cheque was that this was unusual and came as a surprise both to him and to the third defendant. In this regard he explained that both he and the third defendant were unaware as to why the cheque had issued since not only did they know nothing of the invoice but they also knew nothing of any request for payment having been made in accordance with the agreed procedure for the discharge of supplier's invoices.

38. It was also his evidence that at the time of the negotiation of the cheque, the fourth defendant was in the process of negotiating alternative finance facilities in the United States. The first defendant decided, pending the return of the fourth defendant, to instruct the third defendant to forward the amount of €106,320 to the second defendant. His evidence was that he gave those instructions because that was the amount which he said was then owed by Arnosford to the second defendant in respect of project management fees. As to the balance of the funds the first defendant instructed the third defendant to retain those in her account until advised further and his evidence in this regard was that the balance was to be used in due course to pay for the supply and fitting of carpets to the lodges. This subsequently proved unnecessary and, accordingly, the first defendant instructed the third defendant to pay that money to Arnosford.

39. As to the fit out items for the lodges in question, the evidence of the first defendant was that these were never ordered or supplied and that no instructions in this regard were ever given by him to the third defendant.

40. By way of explanation as to how the sum of €106,320 came to be transferred by the third defendant to the second defendant, the first defendant gave evidence that he had met with the fourth defendant in September 2008 and that as a result of an agreement between them those monies were to be retained by the second named defendant in respect of project management fees then owed and with the balance being ultimately remitted to Arnosford. In his evidence the first defendant stressed that at that time he was not aware of the precise circumstances or arrangements which had been put in place by Arnosford with the bank, in particular, he gave evidence that he knew nothing about the lease until in or about 2010 when he himself first became fully aware of the true state of affairs. When asked as to when he first became aware of the invoices and as to how these had come to be issued, his evidence was that this was as a result of enquiries he had made with Aine Boland and Noelle Wall in 2010. As to what had become of the €106,320 it was his evidence that this was used by the second defendant to discharge its liabilities.

41. The first defendant was cross examined by senior counsel for the plaintiff, Mr. Trainor. He accepted that there was a money trail and had he known at the time what he subsequently discovered he would have acted very differently in terms of the instructions he gave the third defendant. He also accepted that if he had been aware of the existence of the invoices and had seen them he might also have acted differently and conceded that the instructions which he did give the third defendant would have been inappropriate especially as it would have been clear that the invoice naming the bank as a customer had been issued in respect of goods which had not been purchased and which were in fact never supplied.

42. When questioned in relation to the relationship with the third defendant, the first defendant gave evidence that she carried out the interior design work specifically for the project and that this was the only project on which she was engaged. She was provided with a budget for the fit out of the lodges. Retaining the third defendant was a cost effective option. The third defendant was responsible for the fit out of the lodges and would have herself ordered the goods in respect of the fit out as and when a fitting out of the lodges was due to take place and that instructions in this regard would usually or most likely have come from him.

43. As to the day to day operations of the second defendant in terms of details of orders, invoices and the like, the first defendant said he had no particular recollection. In general, however, his evidence was that the third defendants suppliers would issue her with invoices and that she would then give the second defendant a summary of the invoices which the first defendant would then submit to Anglo Irish Bank having signed off on these with a view to drawing down the necessary funds so that they could be discharged. The first defendant was unable to say whether invoices for suppliers were made out to Arnosford or to Bairbre Wall Interiors. Her fee for the fit out of each of the units would have been €2000 and in that regard she would have issued an invoice to the second defendant.

44. As to the third defendants book-keeping, accounts and VAT returns, the first defendant gave evidence that Aine Boland of the second defendant looked after that aspect of matters on her behalf and that all paperwork including the invoice issued in the name of the third defendant and on foot of which the bank make payment originated in and emanated from the second defendant except for any invoices received by the third defendant from her suppliers. He accepted that the only person who controlled the third defendant's bank account was the third defendant herself.

45. As to the inventory list it was his evidence that this was prepared by Aine Boland and that it was likely that the list had been requested by Noelle Wall. He accepted that the invoice emanated from the second defendant and also accepted that up until the 1st August, 2008 any invoices raised were for goods and services already supplied. As far as he was aware the first occasion on which an invoice had been issued in the name of the third defendant by the second defendant without instructions for the purchase of goods or services and without the supply of goods, was the invoice issued to the bank. He confirmed that at that time there had been no instruction to proceed given to the third defendant. The reason for this was that the fourth defendant had not yet managed to raise further finance facilities. He insisted, however, that the issuing of the invoice by Aine Boland at the request of Noelle Wall occurred without his knowledge.

46. On being asked as to what enquiry if any he or the third named defendant had made of the bank or the second defendant as to the reason or purpose for the payment of the cheque, the first defendant gave evidence that he could not recall whether himself or his wife had made any enquiries at all. On being questioned as to the invoices he accepted that they were fictitious although he denied any knowledge of that fact at the time.

47. The first named defendant was asked about a letter dated the 16th September, 2008 written by him on the second named defendant's note paper and addressed to the third defendant concerning the fit out of a number of lodges at Kilkea.

48. That letter was written in the following terms

> "Dear Bairbre,
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> Further to my most recent conversation with you, I wish to confirm to you as requested, that I wish to temporarily suspend the fit out of the above units. Can you kindly put on hold the fit out of the above properties until further advised and in the interim please return to Browne Corporation Finance Ltd. funding of €106,320. Can you kindly hold the balance of such funds until advised.
>
> We shall put you in funds to complete the fit out when financing issues are resolved."

49. The first defendant accepted that he had written that letter and further accepted that on a reading of the letter there could not have been any doubt but that the monies received were in respect of the fit out of the lodges. With regard to the instructions which he had given to the third defendant to make the payment she did to the second named defendant, his evidence was that this was a security for monies owed by Arnosford to the second defendant. He agreed that he had neither authority nor instructions from Arnosford to give the instructions he did, however, as far as he was concerned he was waiting for the fourth defendant to return from the United States so as to clarify matters which included the discharge of project management fees due by Arnosford to the second defendant.

50. As to the letter of the 16th September, 2008, and addressed to the third defendant, he did not agree that that letter was a fiction. He said he knew nothing of the true state of affairs at that time. He accepted, however, that the letter was his idea and that it confirmed a conversation which he had already had with the third defendant. It was also his suggestion that the third defendant lodge the cheque to her own account.

51. Furthermore, it was his evidence that the third defendant was working solely for the second defendant and that she had had no hand act or part in the generation of the invoices, and about which she knew nothing. He believed that had the third defendant known the reason for the payment of the cheque she would most likely not have accepted instructions to transfer the funds to the second defendant especially as she herself knew that she not received any instructions from the second defendant to fit out the lodges and that no goods had in fact been supplied.

52. When asked about how his mobile telephone number came to be on the amended invoice the first defendant said that this would have been known to Aine Boland and that he was neither the author of the invoice not of the placing of his telephone number upon it.

53. The first defendant insisted that he had acted at the time on the basis of the information known to him and that the instructions he gave to transfer the funds were temporary in the sense that the funds were being transferred temporarily pending the return of the fourth defendant from the United States. As to why he did not know more about what was going on in the second defendant at the time the invoices were issued, he said that he was involved with two other companies and that these were his priority in terms of time with the result that he was a lot less hands on when it came to dealing with the affairs of the second named defendant.

Submissions

54. On behalf of the plaintiff it was submitted that there could be no doubt but that the third defendant had received and negotiated the cheque albeit on the instructions of the first defendant, that those instructions had been confirmed by the letter of the 16th September, 2008 written by the first defendant on the second defendant's notepaper, and that the negotiation of the cheque by the third defendant to her own account in respect of which she had no entitlement amounted to a wrong on the plaintiff by both the first and third named defendants. The first named defendant had conspired with the third named defendant as it was he who had given the instructions to negotiate the cheque, moreover, the monies in question were wrongfully received not only by the third defendant but also by the second defendant.

55. It was also submitted that the evidence established beyond question that the invoices were a fiction and even if that had not been known by the third defendant at the time, never the less, she knew that she had received no instructions in respect of a fit out and that neither the goods nor the services had been purchased or supplied, accordingly, there was a complete failure of consideration for the payment of the cheque made to her by the plaintiff and that was something about which she had to have been aware at the time when the cheque was negotiated.

56. It was further submitted that the third defendant was responsible for the fictitious invoices because she had in fact given both actual and implied authority to the second defendant to act on her behalf in the conduct of her entire business affairs and that this included not only the issuing of invoices but all of her accounts and other paperwork associated with her business: the invoices and other documentation raised by the second defendant in the name of the third defendant were, therefore, expressly or impliedly issued with her authority. She could not now say that such documentation was generated by the second defendant without her knowledge or authority when in fact she must have known that Aine Boland had issued invoices in the past and did so again in relation to the invoice issued on her behalf and on foot of which the bank acted.

57. With regard to the third named defendant, it was submitted that she let the second named defendant do whatever it wanted and that she maintained no control over her affairs insofar as these were being carried out on her behalf by the second defendant nor did she interest herself in any way concerning what the second defendant did, specifically, in relation to invoicing. The third defendant had in fact received the monies. She must have known that she had no right to receive them since it was clear, and confirmed by the letter of the 16th September, 2008 that these were in respect of goods and services which had never existed. If the third defendant had any complaint arising from the transaction it was a complaint against the first and/or alternatively the second defendant. Indeed, with regard to her entire business in relation to the project at Kilkea, the second defendant had acted as the third defendant's agent.

58. The plaintiff contended that as there had been a complete failure of consideration and that as the third defendant had received the monies for goods and services which she knew at the time had not been ordered or supplied she had in law received the monies to the use of the plaintiff and was therefore liable.

59. With regard to the claim for restitution, it was submitted that had the third named defendant sought information in respect of the cheque she would have had to have been shown the invoices which were generated by the second defendant and had she been shown these invoices she would have herself become aware that the invoices were fictitious. It was submitted that the law does not permit a defence to the third defendant by virtue of the fact that she failed to enquire from the first or second named defendants or from the plaintiff as to the reason for and the sourcing of the funds. The first named defendant had admitted that his behaviour was inappropriate in terms of the instructions and transactions concerned although he denied any real knowledge of the true state of affairs at the time, however he too must have known that at the time when he gave the instructions he did with regard to the cheque that the goods and services in respect of which the payment had been made did not exist.

60. What the first defendant did was to misrepresent everything to everybody. The letter which the third defendant received from the first defendant was itself a misrepresentation and called into question the first defendant's credibility it was simply not credible that the first named defendant was unaware of the true state of affairs. There was no evidence in relation to any enquiries having been made by the third or first defendant either of the second named defendant or of the plaintiff but nevertheless he still gave instructions to negotiate the cheque.

61. In reply counsel for the third defendant said that the law of restitution was based on an unjust enrichment. In this case the third defendant did not benefit personally in any way. She was absolutely innocent of any wrongdoing. Her defence was clear. The contentions in her defence were corroborated by the evidence of the first defendant. Whilst it was accepted that there had been a deception of the plaintiff so too had there been a deception of the third named defendant. The first named defendant had given evidence that had the third defendant known of the true state of affairs it was most likely that she would not have acted in the way she did. She was deceived in the same way as was the plaintiff. She could not, therefore, be liable in circumstances where she herself was the subject matter of a deception. At all times it was contended that the third defendant acted in good faith. How could she be placed, therefore, in a position worse or at least the same as someone who actually had used and benefited improperly from the monies received?

62. It was submitted that the whole agency suggestion was a myth. The fact that the company acted in the administration of the third defendants business was actually evidence that that relationship was more one of employee and employer. It could not be said that she was a principal and that the company was an agent, if anything, it was the other way around. There was no sufficient evidence to allow a conclusion that the plaintiffs witnesses had actually spoken to the third defendant nor was there any evidence to support the proposition that the invoice produced emanated from her.

63. Counsel for the plaintiff in reply posed a question as to whether the first defendant intended to make the third defendant a victim. He submitted that the answer to that question was obvious and that the only intended victim was in fact the plaintiff and no one else.

64. With regard to the submission in relation to the question of agency, counsel for the plaintiff submitted that the fact of the matter was that the invoice issued in this case was issued in the name of the third defendant and not in the name of the second defendant. If the second named defendant was the principal then one would have expected that company to issue the invoice in its name and not that of the third named defendant.

65. As to why the first named defendant had not made any enquiries in relation to the paperwork emanating from the second named defendant, the first named defendant submitted that that was because he was focussed on other businesses at the time and which were his primary concern. He maintained that he did not know of the lease or even of the existence of the lease. Had the fourth named defendant been able to arrange further facilities it was submitted by the first defendant that he would not have found himself in the position in which he now found himself, moreover, he contended that the plaintiff had had its relief by obtaining a judgment against the fourth named defendant on the guarantee. He was convinced that had he been contacted by Mr. Lawlor at the time he would have confirmed to Mr. Lawlor that the goods had not been supplied or purchased and that accordingly there were no monies due. He accepted, however, that if that had happened then the second defendant would most likely have had to have obtained funds from another source. At the end of the day the monies received were properly due by Arnosford to the second defendant and as for the balance that had been paid to Arnosford so that personally neither he nor the third named defendant had benefited from the transactions in any way.

The Law

66. The plaintiff seeks to recover from these defendants the sum of €111,320 on foot of a number of causes of action comprised in these proceedings and the first of which, is in essence, constitutes a claim for restitution.

67. By their nature restitutionary claims involve the enrichment of a defendant at the expense of a claimant in circumstances where the law considers it unjust for the defendant to retain that enrichment.

68. The enrichment of the defendant in law may be said to arise in the following ways:

> (a) Where the enrichment is in the form of money since this is said to be a medium of exchange and store of value, the receipt of which incontrovertibly benefits a defendant.
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> (b) Where the enrichment is in the form of a non money benefit. Because different values can be placed on non money benefits (so called subjective devaluation) the plaintiff must prove, before his claim can succeed, that the defendant has been "incontrovertibly benefited, and
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> (c) Where the enrichment takes the form of a benefit conferred on the defendant by virtue of a wrong committed by the defendant against the plaintiff. The wrong in question can be tortious (exceptionally) in breach of contract, or breach of a fiduciary duty or breach of confidence.

69. The unjust enrichment comprised in (a) and (b) is said to be an unjust enrichment by subtraction since the enrichment of the defendant can be related to a corresponding loss of the plaintiff. The enrichment comprised in (c) is described as an unjust enrichment by wrongdoing because the enrichment of the defendant arises by virtue of the commission of legal or actionable wrong against the plaintiff.

70. The law of restitution recognises certain categories of "unjust" enrichment which may be categorised as follows:

> (a) Mistake, where an enrichment is conferred on the defendant by reason of the plaintiff's mistake.
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> (b) Contracts discharged by breach, where the plaintiff seeks to recover a benefit that was conferred by him as part of his contractual performance, the contract itself having been discharged by breach of either the plaintiff or the defendant.
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> (c) Contracts discharged by frustration, where the plaintiff seeks to recover a benefit that was conferred by him as part of his contractual performance, the contract itself having been discharged by frustration.
>
> (d) Legally recognised transactions which are void, voidable or otherwise ineffective where the plaintiff seeks to recover a benefit that was conferred by the plaintiff but where the transaction becomes unenforceable in law.
>
> (e) Claims for the recovery of money or the recovery of a non money benefit and where the plaintiff has discharged the defendant's debt.
>
> (f) Restitution for "wrongs".

71. A defendant who has received a benefit which is readily returnable but who chooses not to retransfer it on request is said to be enriched. See (*Cressman v. Coys of Kensington Sales*) (2004) 1 W.L.R. 2775. An enrichment also takes place where a defendant has had an opportunity to reject the benefit advanced, but decides to keep it. See *Chief Constable of Greater Manchester v. Wigan Athletic A.F.C.* (2009) 1 W.L.R. 1580.

72. In this case the court is concerned with the payment made by the plaintiff to the third defendant in a mistaken belief that the plaintiff was purchasing goods the subject matter of a fit out of a number of lodges and which the bank intended to let to Arnosford on foot of the lease.

73. Historically it was said that for a plaintiff to succeed in such a claim it was necessary for the plaintiff to establish that the mistake was such that if true it would have made the plaintiff liable to make the payment and that there had to be a mistake of fact rather than a mistake of law. The distinction between mistakes of law and mistakes of fact was abrogated by the judgment of the House of Lords in *Kleinwort Benson Ltd v. Lincoln City Council* (1999) 2 A.C. 349 where the court held that in order for the plaintiff to succeed it was necessary to establish that the benefit conferred arose as a result of the plaintiff's mistake and that this was irrespective of whether or not the plaintiff believed that there was a liability to confer the benefit in question and whether or not the benefit was conferred as a result of a mistake of law. It is an essential requirement, however, that there be a mistake and not just a doubt as to the plaintiff's liability to make the payment.

74. In *Dublin Corporation v. Building and Allied Trade Union* (1996) 2 ILRM 547 the Supreme Court recognised unjust enrichment as a distinctive legal concept, separate from contract and tort. The court held that the principal no longer rested on the fiction of an implied promise to return the money or property but rather that a person could be obliged to effect restitution to another where it would be unjust for him or her to retain the money or property.

75. Two essential preconditions for the application of the doctrine are required to be met, namely the enrichment of the defendant at the expense of the plaintiff and that the enrichment should be regarded as unjust. As to the difficulties arising in determining whether or not any given enrichment is unjust and if so as to whether there are any reasons why even if unjust restitution should nevertheless be denied to a plaintiff, Keane J. delivering the judgment of the court observed at p 558

76. "As to the first of these difficulties, the law, as it has developed, has avoided the dangers of palm tree justice by identifying whether the case belongs in a specific category which justifies so describing the enrichment: possible instances are money paid under duress or as a result of a mistake of fact or law or accompanied by a total failure of consideration."

77. In this case the plaintiff claims that not only was there a misrepresentation by the third defendant which led to the mistake of fact by the plaintiff but there was also a total failure of consideration for the payment of the cheque since the goods the subject matter of the contract were not only never supplied but never existed.

78. In relation to the legal proposition that payments made on the basis of a mistaken belief are generally recoverable if the mistake is fundamental and relates to the terms of the contract, Parke B. in *Kelly v. Solari* (1841) 9 M. & W. 54 stated

79. "Where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back."

80. This dictum was approved by Budd J. in *National Bank Ltd. v. O'Connor and Bowmaker Ireland Ltd* (1966) 103 I.L.T.R. 73 and where the court also held that the mistake need not apply inter partes there being "no logical reason why a mistake between the payer and the person to whom the supposed obligation exists should not also involve a mistake as between the payer and the payee. In other words why a mistake between the payer and the other two parties should not be equally well a mistake inter partes as regards both."

81. Insofar as these defendants by their defences seek to rely upon a defence of honest receipt of the payment that defence was rejected by the House of Lords in *Kleinwort Benson Ltd v. Lincoln City Council*

82. Even in a case where there is no mistake on the part of the payer of the cheque but where the proceeds are used by the defendant for purposes other than those for which the cheque was drawn the plaintiff is entitled to recover the amount of the cheque as money had been received for the use of the plaintiff. See *Blue Station Ltd. v. Kamyab C.A.* (2007) EWCA Civ 1073.

83. Where the payee of a cheque who receives it without actual knowledge that it was a payment made under a mistake and there are circumstances which would cause a reasonable person to doubt whether the payment was intended, it is no defence to a claim to recover the monies that the cheque was negotiated and the proceeds disposed of innocently. In such circumstances there is a requirement that at the very least the payee should make enquiries as to the intended purposes for which the payment was made. See *Jones v. Churcher and Anor.* (2009) Vol 2 Lloyds Law Reports 94.

84. In these proceedings the plaintiff also claims to be entitled to recover the proceeds of the cheque on the grounds of deceit, misrepresentation and/or conspiracy.

85. The essential features of the tort of conspiracy were succinctly described in the judgment of O'Neill J. in *Iarnrod Eireann v. Colbrook* (2000) I.E.H.C. 47 where having reviewed a number of earlier authorities the learned judge stated

> "1. The agreement or combination of two or more people the primary or predominant object of which was to injure another, is actionable even though the act done to the party injured would be lawful if done by an individual.
>
> 2. An agreement or combination of two or more persons to carry out a purpose lawful in itself but by using unlawful means is actionable, in circumstances where the act in question might not be actionable against the individual members of the combination, as individuals."

86. This tort requires the participation of two or more legal or natural persons to injure the plaintiff. The parties need not all act at the same time nor are they required to be of the one aim but there must be an agreement on acting together. Conspiracy is not actionable per se. It is a necessary proof on the part of the plaintiff to establish both the fact of the conspiracy and that this resulted in damage to the plaintiff.

87. That an agreement causing injury to a person by unlawful means is an actionable conspiracy not withstanding that the party to the agreement might be a person and a limited liability company under his control, or two or more companies under the control of a single person and whether or not the predominant objects of the agreement be lawful or unlawful such as the protection of the interests of parties acting in concert is a conspiracy if unlawful means are used and the plaintiff suffers injury see *Taylor v. Smith* (1991) 1.R. 142.

88. Turning to the plaintiff's claim to recover the monies on the grounds of deceit Shanly J. in his judgment in *Forshall and Fine Arts Collections Ltd. v. Walsh* (18th June, 1997) HC at page 64 set out the requirements for the establishment of this tort in the following terms:

> "(i) The making of a representation as to a past or existing fact by the defendant;
>
> (ii) That the representation was made knowingly, or without belief in its truth or recklessly, careless whether it was true or false;
>
> (iii) That it was intended by the defendant that the representation would be acted upon by the plaintiff;
>
> (iv) That the plaintiff did act on foot of the representation;

(v) That the plaintiff suffered damage as a result."

89. Apart from denying that they had no knowledge of the true state of affairs and that they acted in good faith it is contended by these defendants that they have no liability for the invoice issued by the second defendant in the third defendant's name. In response the plaintiff submits that with regard to the third named defendant she is vicariously liable as principal for the actions of the second defendant as her agent.

90. In law it is well settled that a principal is liable for a tort committed by his agent acting within his authority whether expressed or implied. In the tort of deceit a representation made by an agent which the agent knows to be false and which if made with actual or ostensible authority, will render the principal liable even if the principal is entirely innocent. If the principal is not innocent then both are liable as joint tortfeasors. See *Briess v. Wooley* (1954) A.C. 333; *Pearson v. Dublin Corporation* (1907) A.C. 351 and *Anglo Scottish-Beet Sugar Corporation Ltd. v. Spalding UDC* (1937) 2 K.B. 607 at 621.

91. Where, however, the principal is the intended victim of the fraud the principal will not be vicariously liable to other victims of that fraud see *Kwei Tek Chao v. British Traders and Shippers Ltd.* (1954) 2 Q.B. 459.

92. Vicarious liability will also attach to a blameless employer for a deceit committed by a dishonest employee in the course of his employment provided the employee has actual or ostensible authority to act. An employer has no liability in law for unauthorised statements. See *Armagas Ltd v. Mundogas S.A.* (1986) A.C. 717. It is an essential proof that the employee acted dishonestly and committed the act amounting to the tort of deceit. See *Credit Lyonnais Nederland N.V. v. Export Credits Guarantee Department (*2000) 1 A.C. 486.

93. It is contended by the first defendant that he acted at all times in his capacity as the managing director of the second defendant company which raises the question as to whether the director of a company can be liable in deceit in his personal capacity as well as jointly with the company in which he is a director.

94. This question was considered by the Court of Appeal in *MCA Records Inc. and Anor v. Charly Records Ltd. and Ors* (2003) 1 B.C.L.C. 93. Having reviewed a number of authorities Chadwick L.J. enunciated a number of propositions supported by those authorities as follows:

> "First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company – that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as joint tortfeasor if he does no more than exercise his power or control through the constitutional organs of the company – for example by voting at general meetings and by exercising the powers to appoint directors….I would accept that if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed. That is not to say, of course, that he might not be liable for his own separate tort as Aldous L.J. recognised at paras. (16) and (17) of his judgment in the *Pakistan National Shipping* case.
>
> Second, there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint tortfeasor with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control."

95. The learned judge went on to enunciate two other propositions relating to liability in the field of intellectual property and whether or not a director may be liable as a joint tortfeasor under a separate tort of procuring an infringement of a statutory right, actionable at common law but which are not pertinent to this case.

96. The second of these propositions was cited with approval in this jurisdiction by Carroll J. in her judgment in *Tommy Hilfiger Europe Inc. and Tommy Hilfiger Euro BV v. Derek McGarry t/a Life Jacket, Goodstock Ltd and Life Jacket Ltd.* (2005) I.E.H.C 66. In that case the court held that the first defendant was personably liable as he had both procured and directed the wrongful acts complained of in those proceedings.

97. The director of a company cannot escape liability for deceit on the grounds that his or her act had been committed on behalf of the company, moreover, whilst an agent might assume responsibility on behalf of another without incurring personal liability in respect of a negligent misrepresentation, that reasoning does not apply to fraud. See *Standard Chartered v. PNSC* (2003) 1 B.C. L.C 244.

Decision

98. Having carefully considered the evidence given in this case and applying the law to which I have referred the court finds as a fact that the bank relied on the invoice and issued a cheque under a mistake of fact namely that it was purchasing the goods the subject matter of the invoice and that these goods were to be supplied in the fitting out of the lodges in question. The invoice was a fiction. The goods were not only not supplied but were never ordered with the result that the payment was made for a consideration which has wholly failed.

99. There was evidence, which I accept, that the cheque issued by the bank was attached to a pro-forma printout which contained details of the lease agreement number, dealer code, date, supplier's name and address and the name of the customer to which the payment referred. The first defendant gave evidence that neither he nor the third named defendant, his wife, were aware of the reason for and that they were surprised by the payment. Although the third defendant did not give evidence if, in truth, she was surprised by receipt of the cheque even a cursory examination of the printout must have alerted her as to the purpose of the payment, moreover, at the time when the cheque was received as the person contracted to fit out the lodges she must have known that not only had she not received any instructions to do so but that she had not ordered any goods for that purpose and that no such goods existed.

100. The evidence of the first named defendant that he could not recall whether he or his wife had made any enquiries as to the purpose and reason for the payment was less than convincing. In my view any reasonable person receiving a cheque which was unexpected and by which they were surprised would be bound to enquire both as to the purpose and reason for the payment and

that this would be especially so had there been nothing else in the envelope but the cheque. Whilst the court is satisfied, on the balance of probabilities, that the cheque was attached to the perforated printout containing the details to which reference has already been made this did not negative the requirement on these defendants to make enquiry as to the reason and purpose for the payment.

101. The third defendant asserts that on receipt of the cheque she had a conversation about it with the first defendant. That discussion was confirmed by the letter dated the 16th September, 2008 which clearly referred to the fit out of lodges at Kilkea. On the face of that letter the entire proceeds of the cheque were at that time still in the account of the third named defendant. If in truth there was any surprise at the receipt of the cheque there cannot, in my view, have been any doubt but that by the date of that letter both the first and third named defendants must have known and did know the purpose for which the cheque had been paid by the bank.

102. It was submitted on behalf of the plaintiff that the letter itself was a concoction or a fiction created to in someway justify the actions of these defendants in disposing of the monies in the way they did. It was the evidence of the first defendant that he had never given any instructions to the third defendant to order the goods or to fit out the lodges. I accept that evidence, and given as it was, under oath, it completely contradicts the suggestion to be inferred from that letter that the first defendant had given instructions to the third defendant to fit out the lodges and to suspend the fit out. On the evidence of the first defendant, the third defendant must have known at the time of the conversation which preceded that letter and at the time of the receipt of the letter itself that the reference to a suspension and putting the fit out on hold was untrue, a fact on his own evidence also then known to the first defendant.

103. By her defence the third defendant asserted that all times she acted in relation to these matters in the honest belief that she was entitled to do what she did and that she only acted on representations and instructions given to her by the first defendant and at a time when she was unaware of the true state of affairs.

104. The evidence supports neither the defence nor the assertions of the third defendant. It was submitted by the first defendant that neither himself nor the third defendant were aware of the invoice and that the first defendant had not requested a payment in accordance with the established procedures. The surprise of both the first and third defendants required both of them to make an enquiry as to the purpose and reason for the payment, in the first instance from the bank, and secondly from the second defendant before negotiating the cheque and disposing of the proceeds. As it is the court is satisfied that there was sufficient information on the perforated printout to answer the enquiry which, in the view of the court, any reasonable person receiving a cheque in those circumstances would be bound to make.

105. If the content of the perforated printout provided insufficient information to satisfy the enquiry as to the purpose and reason for the payment of the cheque the obligation to obtain the answer remained and in either event must have led to both the first and third defendants ascertaining the true state of affairs. If these defendants were unaware as to the purpose and reason for the payment, a failure to make an enquiry in relation thereto affords neither a defence to the plaintiffs claim.

106. As it is the court finds that at the time of the negotiation of the cheque and the subsequent transfer of the monies to the second defendant and to Arnosford these defendants were aware of the reason and purpose for which the cheque had been paid, namely the purchase of goods for the fit out of the lodges.

107. It was conceded by the first defendant in cross examination that had he known the true state of affairs he would have acted differently and that it was likely that the third defendant would not have accepted his instructions. Having regard to the finding of the court that these defendants knew that the reason and purpose for which the payment was made at the time that the first defendant's instructions were given to negotiate the cheque and dispose of the proceeds, the disposal of the funds by them for different purposes, namely, to satisfy a debt owed by Arnosford to the second defendant and a payment of the balance to Arnosford amounted to a wrong against the plaintiff for which they are both personally liable.

108. The Court accepts the evidence as to the relationship between the third defendant and the second defendant and that in law this was one of principal and agent. Aine Boland, an employee of the second defendant was authorised by the first defendant not only to look after the third defendant's accounting affairs but also to issue invoices on her behalf, a fact also known and agreed to by the first defendant. To that end the second defendant through Aine Boland acted with actual and ostensible authority of the third defendant in connection with the third defendant's business affairs. Insofar as either of these defendants may have a complaint in relation to the issuing of the invoice in question it is as against the second defendant. The issuing of the invoice by the second defendant in the circumstances of this case cannot and does not afford them a defence to the plaintiff's claim.

109. With regard to the plaintiff's case against these defendants in relation to the torts of deceit and conspiracy the Court is not satisfied that the evidence would warrant a finding that Aine Boland herself acted dishonestly nor is there sufficient evidence to enable the court reach a conclusion that she was aware that no instructions had been given to the third defendant to order or supply the goods for the fit out of the lodges. Furthermore whilst the plaintiff was undoubtedly injured by the actions of these defendants in disposing of the monies in the way they did and with the knowledge they possessed I am not satisfied that this would warrant the court in coming to the conclusion that they were acting in concert on foot of an agreement the predominant object of which was to injure the plaintiff. That being so the evidential requirements to establish the torts of deceit and conspiracy between either of these defendants and the second defendant in and about the issuing of the invoice are not satisfied.

110. The court is, however, satisfied on the evidence that these defendants negotiated the cheque and disposed of the proceeds at a time when they were both aware of the purpose for which the bank made the payment, accordingly, this constitutes an unjust enrichment remediable in law and for which these defendants are jointly and severally liable to the plaintiff.

111. The Court is further satisfied on the evidence that the first defendant in giving the instructions he did and with the knowledge he possessed committed a wrong for which he is personally liable, accordingly, the law does not afford the first defendant a defence to the plaintiff's claim on the grounds that he acted solely as managing director of the second named defendant company. As to whether or not the second defendant is also liable the court makes no finding since that issue was not before the court.

112. As both the first and third named defendants were personally involved in the negotiation of the cheque and disposal of the monies, which were paid by the bank under an mistake of fact for which there has been a total failure of consideration, and with the knowledge they had that that payment had been made for a reason and purpose other than that in respect of which the monies were utilised, the court will give judgment for the plaintiff against the first and third named defendants jointly and severally and will direct payment by them to the plaintiff of the sum of €111,320 together with interest in accordance with s. 22 (1) of the Courts Act 1981.