THE COURT OF APPEAL

Ryan P.
Irvine J.
Hogan J.

BETWEEN/

No. 2014/634

[Article 64 Transfer]

PHILIP LYNCH

PLAINTIFF/RESPONDENT

-AND-

CHANDELA INVESTMENTS LIMITED AND CHANDELA NOMINEES LIMITED AND ONE FIFTY ONE PLC

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 26th day of February 2016

1. This is an appeal brought by the third named defendant, One Fifty One plc, against the decision of the High Court (O'Neill J.) delivered *ex tempore* on 16th October 2012 whereby he granted summary judgment against it in favour of the plaintiff, Mr. Philip Lynch, in the sum of some €1.48m.

2. The background to these proceedings may be summarised as follows. Mr. Lynch is the former Chief Executive of One Fifty One ("the company"). During his term as Chief Executive of the company, Mr. Lynch entered into a deed of indemnity on 1st July 2009 with the second defendant, Chandela Nominees Ltd. ("Nominees"). Clause 2 of that deed provided that on the instructions of the beneficiary (namely, Mr. Lynch), Nominees was to subscribe "for [certain] loan notes and shares forthwith and hold them for the benefit of the beneficiary." While one of the curiosities of this case is that neither the background to or the purpose of these loan note arrangements has been explained in any detail by either party, other material supplied to the court indicates that the arrangement in question related to a patent income scheme.

3. In July 2011 Mr. Lynch terminated his employment with the company. In a letter of 7th July 2011 dealing with the consequences of the resignation, the Chairman of the company, Mr. Buckley, indicated that the company would be writing to him shortly in relation to the patent income scheme.

4. On 13th July 2011 Mr. Lynch's solicitors wrote to the company's solicitors stating that:-

> "For the avoidance of doubt and as you are aware, the monies due and owing to our client are the following:-
>
> (i) €1.48m. representing monies owed to our client under the patent income scheme and
>
> (ii) [Other monies due in respect of shares].
>
> The above sums were due for payment and your commitment to discharge the payment "in due course" is simply not acceptable. In the circumstances we require a commitment from your client by close of business tomorrow, 14th July, confirming a date when the sums due will be discharged to our clients. These figures/payments have been discussed for a number of months and the Board must know their position in relation to same at this stage. My client reserves his rights to initiate legal proceedings seeking payment of the above as outlined in the previous correspondence."

5. The company's solicitors responded on 15th July stating by way of response to the letter of 13th July from Mr. Lynch's solicitors that there had been confirmation from the company that the "€1.48m. representing the sums due under the patent income scheme… will be paid by the end of this month, 31st July 2011". The correspondence then addressed other sums that were due. The letter writer added:-

> "The above payments are in discharge of your clients' accrued entitlements and, together with the termination payment previously referred to, on full and final discharge of all sums due to your client arising from his employment or his termination. We trust this is in order.
>
> As previously indicated there is no need for your client to threaten legal proceedings and same would be entirely inappropriate in the circumstances."

6. A further letter then issued from the company's solicitors on 29th July 2011 where it was stated that:-

"Logistical constraints make it impossible to facilitate the re-payment of Loan Notes made by Chandela Nominees on behalf of Philip Lynch to Chandela Investments Limited by 31st July 2011. It would not be possible to complete it for a further two weeks. The repayment of the Loan Notes of Philip Lynch in the amount of €1.48m. will be made by 19th August 2011."

7. This new date for payment came and went but the payment was not made. The present summary summons proceedings were then commenced by the plaintiff in April 2012 against the company, Nominees and Investments.

The loan notes

8. Clause 1.1 of the July 2009 instrument defines the Note Holders as "the several persons for the time being entered in the register as holders of Notes". Clause 4.2.3 provides that the Notes should be repaid in accordance with the terms of the Loan Note agreement. This deed of authorisation envisaged that the repayment would be triggered by the delivery of the appropriate certificates or, *in lieu*, an indemnity on reasonable terms to Chandela Investments at its registered office against receipt of a cheque of Chandela

Investments in favour of the Note Holders. Clause 10.1 provides that Chandela Investments shall only recognise the registered holder of any Notes as the sole and absolute owner thereof. Any notice served on Chandela Investments in relation to the Loan Notes must comply with the requirements of Clause 14.

9. As it happens, Clause 14 simply requires that any notice be delivered by hand, by facsimile or sent by prepaid post to the company at a particular Dublin address for the attention of the company director along with a copy to be posted to the company's solicitors.

10. For completeness it should be noted that Mr. Lynch gave the appropriate authorisation on 1st July 2009 to Chandela Nominees. The directors of Chandela Nominees Ltd. had previously confirmed, *inter alia*, that:

> "We are willing to continue to act as trustee in relation to your interest in Chandela Investment Limited and to apply for the Loan Notes and the AA shares on your behalf should you require us to do so. We have included a trust deed in respect of the Loan Notes and the AA shares which is on the same terms as those previously entered into between us in respect of the shares. Please sign the trust deeds and return them to us should you require us to acquire the Loan Notes and the AA shares on your behalf and hold them in trust on your behalf.
>
> To indicate your preference that we acquire the Loan Notes and AA shares on your behalf, please sign the duplicate copy of this letter and return to us without delay."

11. The authorisation (but not the draft trust deed) was then duly signed and executed by Mr. Lynch on that day.

12. The three defendants each advanced defences to the plaintiff's claim in the High Court. It may be convenient to deal with these defences in turn.

The defence of Chandela Investments Ltd.
13. The argument advanced by Chandela Investments Ltd. ("Investments") by way of defence is that the essence of the plaintiff's claim is that he is beneficially entitled to monies allegedly owing by Investments to Chandela Nominees Ltd. ("Nominees"). Investments notes, however, that Mr. Lynch is not the registered holder of the loan notes. It submits that as Investments has neither received the loan notes nor any indemnity from Nominees it has no current obligation to pay. It contends that Investments is not aware of any trust in favour of Mr. Lynch and it states that it has not received any notice from Nominees seeking repayment of the loan.

14. It notes that there is no suggestion that Investments is indebted to Mr. Lynch.

The defence of Chandela Nominees Ltd.
15. Nominees acknowledges that Mr. Lynch is the beneficial holder of the loan notes, but it nonetheless insists that there was no instrument of trust created by the deed of 1st July 2009 and nor is it a trustee on behalf of Mr. Lynch. It further states that by virtue of Clause 9 of the July 2009 authorisation deed Mr. Lynch had waived any claim in respect of the exercise or non-exercise of its discretion under the deed.

16. Nominees also notes that there is no suggestion that it is indebted to Mr. Lynch.

The defence of the company
17. The company maintains that it is only sued by virtue of the alleged acknowledgments contained in the correspondence sent by its solicitors in July 2011. It says, however, that this was no more than confirmation that "monies would be paid according to the terms of the loan note." It was submitted that this assurance was further predicated on the assumption that there would be compliance with the terms of the loan note agreement, but, for the reasons advanced by both Nominees and Investments, it was contended that there had not yet been compliance with the conditions which would have entitled Mr. Lynch to the payment he seeks.

18. In September 2012 the board of Investments wrote to Nominees seeking repayment of the Loan Notes.

The judgment of the High Court
19. In his judgment O'Neill J. found that both Investments and Nominees had both raised an arguable defence in respect of the plaintiff's claim and the claims against these defendants were adjourned to plenary hearing. No appeal was taken by the plaintiff against this aspect of the High Court decision.

20. So far as the case against the company is concerned, O'Neill J. stated the money was due unequivocally to the plaintiff from the company. While the judge acknowledged that the company had a counter-claim, this did not defeat the right to a judgment. Given the "inchoate" state of the counter-claim, this was not a case where a set-off would be appropriate or applicable. It was on this basis, therefore, that O'Neill J. awarded the sum of €1.48m against the company. As I have already noted, the company have appealed this decision to this Court and this is the sole issue before us.

Whether the plaintiff is entitled to summary judgment against the company
21. It is impossible to avoid the correspondence which the company's solicitors sent to the plaintiff's solicitors in July 2011 following the termination of his employment as anything other than an unequivocal acknowledgment that the sum of €1.48m. would be paid to him. It was first indicated that such payment would be made by the end of July 2011, but the second letter from the company' solicitors indicated that "logistical constraints" made it impossible to "facilitate the payment by Chandela Nominees Ltd. on behalf of Philip Lynch to Chandela Investments Ltd. by 31 July 2011." That letter indicated that such payment would be made by 19th August 2011. In the event, as we know, all that has happened subsequently in relation to this matter is that Investments has written in September 2012 to Nominees seeking payment on behalf of Mr. Lynch.

22. At the hearing of the appeal in this Court, the argument on behalf of the company was that this correspondence was predicated on the assumption that there would be compliance with the terms of the loan note agreements. The company noted, however, that the arrangements for such compliance had not yet been put in place. This, it was submitted, was further evidenced by the fact that O'Neill J. had refused to grant summary judgment against Investments and Nominees, thus implicitly acknowledging that the claim against them was premature pending the completion of these formalities.

23. The striking thing, however, about the correspondence of July 2011 is that there was never any suggestion by the company that the completion of these formalities was not within its effective control or that the actual execution of the payment to Mr. Lynch was now somehow contingent on him taking particular steps which were in his sole and exclusive power to take. Thus, for example, while the letter of 29th July, 2011, referred to "logistical constraints" which made it impossible to facilitate the repayment of Loan Notes

made by Nominees on behalf of Mr. Lynch to Investments by 31st July 2011, the writer nonetheless stated that the repayment of the sum of €1.48m. "will be made by 19th August 2011."

24. All of this suggests that Nominees and Investments were simply corporate vehicles which were within the complete control of the company and that the repayment of these monies to Mr. Lynch was a matter which could be readily accomplished by it without any further reference to him.

25. In these circumstances, I consider that the correspondence amounted to an unequivocal admission by the company that these sums were due to the plaintiff. The fact that these admissions were also made in a context where the plaintiff had threatened litigation may also be regarded as significant. I admit that in strictness the repayment in question was to be effected by Nominees, rather than by the company as such. The correspondence nonetheless clearly conveyed – and was doubtless intended to convey - the impression that a sum which was plainly due to the plaintiff would be effected through the repayment of Nominees by Investments, but that this was also a matter to which the company would promptly attend and, if necessary, arrange. There was, after all, no suggestion that either Nominees and Investments were entirely independent companies.

Conclusions

26. In summary, therefore, I have concluded that the High Court was correct in ordering summary judgment in favour of the plaintiff, Mr. Lynch, as against the company in the sum of €1.48m. given that it had unequivocally acknowledged the sums which were due to the plaintiff in the formal correspondence emanating from its solicitors in July 2011. In view of these admissions, it cannot be realistically stated that the company has any credible defence to this action.

27. It was for these reasons that I have concluded that the decision of O'Neill J. was correct and that the appeal should accordingly be dismissed.