**Neutral Citation No. [2012] NIQB 34** | *Ref:* **WEA8476**

*Judgment: approved by the Court for handing down* | *Delivered:* **30/03/2012**

*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (COMMERCIAL)**

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**JOHN KELLY FUELS (IRELAND)**

**Plaintiff;**

**-v-**

**WILLIAM JOHN MAHER,**
**KEVN PHELAN,**
**WILBAY UK LIMITED**

**and by consolidation**
**EMERALD HOSPITALITY LIMITED**
**(formerly GLEBE TAVERNS (IRELAND) LIMITED)**

**Defendants.**

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**WEATHERUP J**

[1] By Order of the Master dated 4 March 2011 the action of John Kelly Fuels (Ireland) against William John Maher and Kevin Phelan and Wilbay UK Limited (2011/1345), as guarantors of the debts of Glebe Taverns (Ireland) limited, was consolidated with John Kelly Fuels (Ireland) against Glebe Taverns (Ireland) Limited, now Emerald Hospitality Limited (2011/11889), for the sum claimed as due for oil deliveries, the consolidated action being known by number 2011/1345.

[2] A further action was commenced by John Kelly Fuels (Ireland) against Maher, Phelan and Wilbay UK Limited (2011/1330) as guarantors of the debts of Glebe Taverns Limited for the sum claimed as due for oil deliveries.

[3] In the consolidated action the plaintiff marked judgment against the defendants in default of defence on 21 April 2011. The defendants applied to the Master to set aside the judgment in default of defence and on 17 October 2011 the

Master allowed the application. The plaintiff appealed against the decision of the Master. The consolidated action was then transferred to the Commercial List.

[4] In the other action the plaintiff marked judgment on 21 April 2011 and 7 September 2011 against the first and second defendants in default of appearances. The first and second defendants applied to the Master to set aside the judgment and on 17 October 2011 the Master refused the application. The first and second defendants appealed against the decision of the Master. The action was then transferred to the Commercial List. The appeal by the plaintiff in the consolidated action and the appeal by the defendants in the other action were heard together. In both actions Mr Ringland appeared for the plaintiff and Mr Gowdy appeared for the defendants.

[5] In the consolidated action the first issue concerned the contention made on behalf of the defendants that the judgment was irregular.

[6] The Writs of Summons endorsed with statements of claim issued on 6 January 2011 in action 2011/1345 and on 27 January 2011 in action 2011/11889. The Order for consolidation of 4 March 2011 resulted in an amended consolidated Writ of summons endorsed with a statement of claim being issued on 30 March 2011. What the defendants describe as the purported judgment in default of defence was dated 21 April 2011. The irregularity was said to arise because the amended consolidated Writ of summons was served on 13 April 2011 and the defendants contend that the time limit for service of a defence or an amended defence, as provided by Order 20 rule 3, is the later of the time fixed for entering the defence or 14 days from service of the amended statement of claim. The 14 days had not expired on 21 April 2011. Accordingly the defendants contend that the time for service of the defence had not expired when the plaintiff purported to mark judgment in default of defence on the 21 April 2011.

[7] The plaintiff contends that when the two actions were consolidated the defendants were already out of time for delivery of defence and the Master was aware of the issue of time limits and dealt with that issue in the terms of the Order consolidating the two actions. The terms of the Order provided that the plaintiff be at liberty to amend the specially endorsed Writ of Summons within 28 days and further that any appearance or defence already served should stand but that any defendant who had not already entered an appearance or served a defence "shall not have the time for service extended by the consolidation of the actions".

[8] The defendants counter by drawing a distinction between the consolidation of the actions and the amendment of the pleadings. This distinction leads the defendants to contend that while the Master's Order referred to there being no extension of time for service of a defence by the consolidation of the actions the Order does not refer to there being no extension of time for a defence by the service of amended pleadings by the plaintiff. Therefore it is suggested that the Order did

not affect the time for service of a defence within 14 days of the plaintiff's amendment and therefore did not allow for the marking of judgment on 21 April 2011.

[9] I am satisfied that the terms of the Order provided for the amendment of pleadings by the plaintiff within 28 days and that the time for service of the defence was not extended by the consolidation of the actions or by the consequences of the consolidation of the actions or by the amendment of the pleadings by the plaintiff. The Master provided for the plaintiff's amendment and provided for no extension of time for the defence, the effect of which was to disallow the defendants any further time. Accordingly the judgment obtained in default of defence was not irregular.

[10] The judgment being regular it is necessary, upon an application to set aside judgment, to consider the merits of the case. A judgment will not be set aside if the defendant does not have an arguable defence. Tracy v O'Dowd [2002] NIJB 124 confirmed that on an application to set aside judgment the defendant was required to demonstrate some prospect of success. Issues raised on affidavit may not be suitable to be resolved on affidavit and may require the giving of evidence, in which case the judgment should be set aside for the issues to be tried.

[11] The defendants challenge the validity of the guarantee signed by the first defendant and the second defendant. The grounding affidavit states that the plaintiff sues the first, second and third defendants for some €661,000 allegedly due and owing on foot of guarantees of the liabilities of Glebe Taverns (Ireland) Limited for goods sold and delivered by the plaintiff. The defendants contend that the guarantee on which the plaintiff relies against the first and second defendants purports to be executed as a deed and there being no seal on the guarantee and no attesting witnesses to the signatures, as required by Article 3 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Act 2005, the document is not valid.

[12] The plaintiff contends that guarantees are governed by the Statute of Frauds (Ireland Act) 1695 section 2 which provides that no claim is to be brought by which to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which the claim is brought or some memorandum or note is in writing, signed by the party to be charged with it or by some other person thereonto lawfully authorised by him.

[13] The signatures on the guarantee are not in dispute as being those of the first and second defendants. Article 3 of the 2005 Order does indeed require certain formalities in relation to deeds. However the document in question is not a deed. The document is a guarantee that was signed by the first defendant and by the second defendant and satisfies the Statute of Frauds. The guarantee binds the first defendant and the second defendant.

[14] The defendants challenge the validity of the guarantee against the third defendant, the limited company. The Companies Act 2006, section 44, provides that a document is executed by a company –

(1) by the affixing of its common seal;
(2) by being signed on behalf of the company by two authorised signatories;
(3) by being signed on behalf of the company by a director of the company in the presence of a witness who attests the signature.

[15] The guarantee was signed by one director, the first defendant, on behalf of the company. The first defendant, who signed on behalf of the company, is not disputing that it is his signature on the guarantee. There is exhibited an authority for the signing of the guarantee by the first defendant on behalf of the company. The third circumstance set out above in which a document is executed by a company, namely being signed by a director of the company, make provision for confirmation of an authorised signature by an attesting witness. This is directed to securing confirmation of the relevant signature. In the present case it is not disputed that the director signed the guarantee or that he was authorised to do so. That being so I am satisfied that the third defendant executed the guarantee. The guarantee binds the third defendant.

[16] The next point is that the sum of €224,000 is owed by a Michael Doherty. Glebe Tavern (Ireland) Limited took over management of the relevant service station from Michael Doherty on 14 June 2010 on foot of a management agreement. The defendants contend that the liability for the €224,000 was that of Michael Doherty while he remained responsible for the business. A letter of 4 August 2010 between solicitors for Glebe Taverns (Ireland) Limited and solicitors for Michael Doherty contains a reference to the €224,000, indicating that the sum was due in respect of fuel ordered by Glebe Taverns (Ireland) Limited on behalf of Michael Doherty to facilitate Doherty's continued trading pending Glebe Taverns (Ireland) Limited's take over under the management agreement. The letter states - "We are instructed that the order was placed on the basis that TOP (the supplier) would no longer supply your client directly due to his financial difficulties and our client undertook to facilitate the placing of the order on the strict understanding that your client would reimburse our client for placing the order. We are instructed that your client enjoyed full use and benefit of the fuel supplied as per the attached letter."

[17] The letter states that the fuel was indeed ordered by Glebe Taverns (Ireland) Limited, although this was undertaken on foot of an arrangement with Doherty. I have been asked to take account of the fact that parties are taking positions in the light of disputes about liabilities for this fuel. I do take account of that as a matter which may influence the way in which correspondence was structured. However I conclude from the whole of the correspondence that this fuel was ordered by Glebe

Taverns (Ireland) Limited and that company remains liable for the discharge of the debt due for the delivery.

[18] It is apparent that an arrangement was made between Glebe Taverns (Ireland) Limited and Michael Doherty whereby the latter would reimburse the former for the fuel. That is a matter between Glebe Taverns (Ireland) Limited and Michael Doherty and not a matter for the plaintiff. This is a liability that falls on Glebe Taverns (Ireland) Limited and hence on the guarantors in so far as the debt has not been discharged by the company.

[19] The defendants then raise an issue about non delivery of some 6,000 litres of fuel on 4 September 2010. The affidavit of Cecilia Tinney, a director of the delivery company, outlines that there was an enquiry into the delivery and the conclusion was that on 13 September 2010 the second defendant telephoned Ms Tinney and said that there was a lot of fuel in the interceptor and that must have accounted for the fuel and he apologised. Ms Tinney described that as the end of the matter.

[20] It was not to prove to be the end of the matter as far as this claim is concerned because subsequent to the issue of proceedings further affidavits raised the dispute about whether or not this delivery was actually made and indicated issues about short deliveries. Ms Tinney filed a further affidavit insisting that the matter was concluded in September 2010 and she states "…. Mr Phelan did not at time make complaint to me or anyone else or in my company in relation to alleged short deliveries. I am surprised and annoyed that Mr Phelan now seems to be making allegations for the first time, after 16 months, that there were other incidents. I take great exception to this and am extremely surprised that this allegation is made now."

[21] So as far as the plaintiff is concerned the issue about the delivery was settled in September 2010. The defendants have not accounted for events on and after 13 September 2010 in relation to the disputed delivery. It does not appear that the defendants raised the issue again before the commencement of proceedings. I am satisfied that this is an issue that was only revived after the issue of proceedings. There is no explanation for the silence about the matter if it was not that the dispute about the delivery was treated as settled in September 2010. I am not satisfied that the revival of the issue in the face of legal proceedings to recover the amount due provides any basis for a defence in the absence of such an explanation. I am content that I can reach that conclusion on the affidavits that have been filed on the issue, there being an opportunity to offer some explanation on affidavit and no explanation being offered.

[22] In the other action of John Kelly against Maher, Phelan and Wilbay (2011/1330) the plaintiff claimed £24,562 due on foot of a guarantee of the liabilities of Glebe Taverns Limited. Judgment was entered for £9,265 as, after proceedings were issued, a part of the debt was paid. The defendants solicitor states that there was an error on his part in that he overlooked the fact that the plaintiff had

commenced separate actions and having entered an appearance in the consolidated action he did not appreciate that there was another action (2011/1330) in which he had not entered an appearance.

[23] As to the substance of the matter, the defendants, by the affidavit of their solicitor, contend that there was an agreement for the supply of delivery dockets with the deliveries and that the plaintiff failed to provide any delivery dockets. This led to suspicions that the plaintiff had not delivered all the fuel that had been claimed had been delivered. Further, reliance was placed on discrepancies as to the amount of fuel delivered to a sister company of the principal debtor, namely Glebe Taverns (Ireland) Limited, this being a reference to the incident of 4 September 2010 discussed above, further to which the defendants made a more general challenge to the deliveries actually made to the defendants.

[24] An affidavit from Neville Kerr, the plaintiff's solicitor, stated that after proceedings were issued he received a letter from Glebe Taverns Limited which contained 14 post-dated cheques, each made payable in the sum of £1,754. The cheques were successfully negotiated up to 21 March 2011 when one was returned marked 'payment stopped'. The subsequent cheques of 28 March and 4 April were also stopped. The plaintiff did not furnish the two further cheques. The plaintiff relies on the ability to proceed against the defendants on foot of the dishonoured cheques in any event as a ground for not setting aside the judgment.

[25] An affidavit filed by the second defendant states that the deliveries claimed for were actually in respect of deliveries to an Eric Campbell with whom an agreement had been entered to take over the service station for a period of 3 years from 7 June 2010 and that Mr Campbell entered into possession of the petrol station on that date and was responsible for payment for the deliveries.

[26] In relation to the cheques the second defendant states that the cheques were post dated but they were stopped because the £24,562 was not a liability of Glebe Taverns Limited but of Mr Campbell. The affidavit does not explain how the cheques came to be written to discharge the debt if the defendants claim that the debt was due by another. The cheques were written to discharge the debt. It is not stated why they were stopped after some were cashed.

[27] Further, the affidavits took up the issue of delivery of the 6,000 litres on 4 September 2010. As noted above the defendants have failed to offer any explanation for the silence in relation to the issue from 13 September 2010 to the issue of proceedings.

[28] The post-dated cheques undermine the whole basis on which the defendants challenge liability for the debt. I am not satisfied that there is a prospect of success in relation to the defences that have been raised. That being so I am not prepared to set aside the judgments.

[29] In relation to action 2011/1345 there will be judgment for the plaintiff against the first and second and third defendants for the sterling equivalent of 400,000 euros plus interest at 4% from the date of the call in of the guarantees and judgment against Emerald Hospitality Limited for £596,867.84. In relation to action 2011/1330 there will be judgment for the plaintiff against the first and second defendants for £9,365 together with interest at 4% from the date of the call in of the guarantees.