Neutral Citation No. [2012] NIQB 17

Ref:	**WEA8435**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered:	**29/02/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

OXIGEN ENVIRONMENTAL LIMITED

Plaintiff;

-and-

SHAUN MULLAN AND BRIAN MULLAN

Defendants.

WEATHERUP J

[1] This is the plaintiff's application for summary judgment under Order 14 of the Rules of the Court of Judicature claiming the sum of £200,000 on a promissory note dated 22 September 2009 and signed by the defendants and said to have been dishonoured on 13 June 2011. Mr McNamee appeared for the plaintiff and Mr David Dunlop for the defendant.

[2] The plaintiff relies on the defendants' failure to make payment on demand under the promissory note signed by the defendants. The defendants, by Defence and Counterclaim, have pleaded their case as follows. The defendants operated B Mullan & Sons Contractors Limited ("the company"). The company owned a quarry and lands at Limavady and the site was considered suitable for landfill. A tender for landfill at the site was submitted to the North West Region Waste Management Group and was successful, subject to planning permission.

[3] The plaintiff approached the company with a view to developing a partnership or alternatively a joint venture agreement for the development of the landfill site. On 6 July 2009 an oral agreement was entered into between the plaintiffs and the company which involved, first of all, the plaintiff paying £2M,

secondly, the plaintiff and the company setting up a joint venture, thirdly, with a 50% shareholding each the plaintiff and the company would each inject £1M into the new venture, fourthly, the company costs that had been incurred to that date of around £700,000 would be invoiced to the new company and fifthly, the plaintiff would staff and manage the landfill operations on site.

[4] The company then proceeded to incur additional costs in obtaining planning permission and undertaking necessary works for the purposes of the joint venture. According to the defendants the plaintiff agreed to make a down payment on the moneys due under the contract and on 13 August 2009 the plaintiff transferred to the defendants £200,000 as 10% of the agreed input of £2M. On 28 August 2009 a promissory note was executed by the defendants in the sum of £200,000. The Counterclaim pleads that the promissory note was 'for value received' which the defendants contend was the agreement that the plaintiff would supply its skill and expertise to the proposed joint venture. The original promissory note was lost and was replaced on 22 September 2009, this being the promissory note on which the plaintiff now sues.

[5] On 13 June 2011 the plaintiff's solicitors sent a letter indicating that the joint venture would not be proceeding and seeking repayment of the £200,000. The defendants contend that the plaintiff is in breach of contract and that the company has incurred considerable costs and expenses.

[6] The defendants' Counterclaim seeks –

(1) A declaration that the so called promissory note is not a promissory note and is not repayable on demand but is in fact a down payment or deposit paid in respect of the agreement between the parties.

(2) Specific performance of the terms of the agreement for the joint venture.

(3) Specific performance based on part performance of the agreement for the joint venture.

(4) A declaration that the plaintiff is estopped from seeking repayment of the £200,000 pending the implementation of the agreement entered into between the parties.

[7] There is an outstanding application by the defendants to join the company as a defendant to the plaintiff's claim and as a plaintiff to the Counterclaim, an application that awaits the outcome of this application for summary judgment.

[8] An affidavit grounding the application for summary judgment was sworn by Sean Doyle, managing director of the plaintiff, which sets out the plaintiff's case as

follows. In the latter part of 2008 the plaintiff made contact with the defendants as they believed the plaintiff had expertise to run a major landfill site. In December 2008 a confidentiality agreement was entered into between the plaintiff and the company, subject to two conditions, namely, that the company delivered a site which had the appropriate planning permission and licences and secondly that the tender for landfill was successful to the extent of providing a minimum of 150,000 tons of waste per annum. On 6 July 2009 the plaintiff and the company concluded 'heads of agreement' (being referred to above by the defendants as an agreement) which heads of agreement are said to have been non-binding and subject to contract and subject to the two conditions referred to above concerning permission and licences and quantity of waste.

[9] Mr Doyle avers that subsequently the defendants indicated that there were cash flow problems and a request was made for a loan to the company of £200,000. The plaintiff was not content to lend money to the company as there was concern about security but it was indicated that the plaintiff would be prepared to lend money to the defendants personally and that that should be secured by way of a promissory note. The result was the promissory note of 28 August 2009 to be replaced by the promissory note of 22 September 2009. On obtaining the promissory note the £200,000 was released by the plaintiff and paid to the defendants in September of 2009.

[10] In January 2011 the company prepared a draft written contract incorporating proposed terms for the joint venture company. In June 2011 the company had not, it is said, complied with the two preconditions about permission and licences and quantity of waste and accordingly it was decided by the plaintiff that the joint venture was not viable. On 13 June 2011 a letter was written on behalf of the plaintiff demanding repayment of the £200,000.

[11] A further affidavit grounding the application was sworn by Gerry Fee, a chartered accountant and director of the plaintiff. He recounts that he was involved in the discussions that took place between the plaintiff and the company and that in July 2009 he was told of the discussions about a proposed payment to the company and he expressed reservations about advancing money without some level of adequate security. The discussions about security for any payment led to the use of the promissory note, which he describes as the most effective method of securing any payment in the circumstances. He concludes his affidavit by stating that the payment was always expressed as being a goodwill gesture and was never expressed in any discussion or document as representing a percentage of any agreed input. By a supplementary affidavit Mr Fee confirmed that the promissory note of 22 September 2009 was received by the plaintiff.

[12] A replying affidavit was filed by the first defendant, a director of the company. He refers to the history of the dealings between the parties and recounts that on 13 August 2009 the defendants sought some financial commitment from the

plaintiff and this led to the payment of £200,000 which was 10% of the agreed input by the plaintiff. The defendants' minute of a meeting held in Dundalk on 13 August 2009 states -

> "After discussion on current progress Sean Doyle agreed to transfer £200,000 sterling to BMS being 10% of the agreed input by Oxigen to the partnership."

[13] The first defendant's affidavit refers to events of June 2011 when the plaintiff's solicitor's letter was sent indicating that the plaintiff was not proceeding with the joint venture and seeking repayment of £200,000. He states that the defendants and the company dispute any obligation to repay the money. They sent a letter stating that they considered the plaintiff to be in breach of contract and the affidavit concludes by stating:-

> "I do not believe that the plaintiff can credibly maintain that all of the issues in this case can be resolved down to a simple claim on a promissory note. The discussions were always with the company. The expenditure which was incurred was incurred by the company and the plaintiff has unilaterally attempted to resile from its agreed position and walk away from the entire project."

[14] The terms of the promissory note of 22 September 2009 signed by each defendant and witnessed are as follows -

> "We Shaun Mullan and Brian Mullan both of Bovalley House, 11/13 Anderson Avenue, Limavady, BT49 0TF hereby jointly and severally promise to pay on demand the sum of Two Hundred Thousand pounds sterling (stg£200,000) to Oxigen Environmental Limited of Coes Road Industrial Estate, Dundalk, Co Louth for value received."

[15] What is a promissory note? Chitty on Contracts (30th ed.) at paragraph 34-185 defines a promissory note as "an unconditional promise made in writing by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money, to, or to the order of, a specified person or to bearer."

[16] Promissory notes are governed by the Bills of Exchange Act 1882, an Act which codified the law relating to bills of exchange, cheques and promissory notes. Two particular provisions fell to be considered. First of all, under section 84 a

promissory note is inchoate and incomplete until its delivery to the payee or bearer. An issue arose as to whether the plaintiff had established delivery of the promissory note. By his supplementary affidavit Mr Fee averred that the promissory note had been delivered. This issue resolves for the plaintiff.

[17] Secondly, section 27 bears the heading 'Value and holder for value'. Valuable consideration may be constituted by any consideration sufficient to support a simple contract or an antecedent debt or liability. The defendants argue that the reference in the promissory note to 'value received' concerns the plaintiff's contribution to the joint venture which consideration they say has wholly failed by reason of the plaintiff's breach in terminating the agreement. The plaintiff argues on the other hand that the value received is the £200,000 paid to the defendants and that the promissory note concerns an agreement that is independent of the agreement for the joint venture. This issue will be considered below.

[18] Where the claim and the counterclaim arise out of the same subject matter and the grounds of defence to the claim give rise to the counterclaim, in general the defendant will be given unconditional leave to defend. If however the claim and counterclaim arise out of the same subject matter but there is no defence to the claim, the plaintiff will have judgment, with a stay pending determination of the counterclaim. The position is different when the claim is on a promissory note. The White Book, paragraph 14/4/15 is headed 'No set off in an action on dishonoured bill or cheque'. The text states that in an action on a dishonoured bill of exchange, or cheque or promissory note, a wholly different practice prevails as far as setting up the defence of set off or counterclaim is concerned. In such an action, save in exceptional circumstances or upon strong grounds the defendant will not be allowed to set up a set off or counter claim for damages for breach of some other contract or the commission of a tort, and the plaintiff is entitled to judgment for the amount of his claim without a stay of execution.

[19] In Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 1 WLR 713 an English company agreed to supply a German company with machinery in Germany as part of a joint venture. The goods were sold in exchange for 24 bills of exchange which were subsequently dishonoured after allegations of fraud. The English company sued on the bills of exchange and the defendant claimed set-off and counterclaim for in the first place mismanagement of the business and secondly breach of contract for delivering second hand rather than new machinery. The defendant sought a stay that was refused. Lord Wilberforce stated at page 720

> "I take it to be clear law that unliquidated cross claims cannot be relied upon by way of extinguishing set off against the claim on a bill of exchange.
>
> As between the immediate parties, a partial failure of consideration may be relied upon as a pro tanto

> defence, but only when the amount involved is ascertained and liquidated.
>
> The amount claimed here in respect of the machines is certainly neither ascertained nor liquidated and the claim in respect of mismanagement is one of a wholly unrelated tort, so that there would seem to be no basis for denying the appellants' claim that, as regards the bills, there is no dispute."

[20] Whatever the background to the relationship between the plaintiff and the defendants and the company, the promissory note was in exchange for payment of £200,000. Thereafter the conditions existed for repayment on demand and payment fell due when payment was demanded. The plaintiff is entitled to judgment unless there are exceptional circumstances or strong grounds. The exceptional circumstances relied on by the defendants to resist judgment for the plaintiff are that the plaintiff is in breach of an agreement for the development of the landfill joint venture, which breach the defendants formulate as a total failure of consideration. I do not accept that these are exceptional circumstances that prevent judgment on the promissory note. There was an agreement about the joint venture that was related to but separate from the agreement for the promissory note. The consideration for the promissory note was the payment of the £200,000. The defendants wish to link the agreements inextricably but the reality is that the arrangements for the payment of the money were made by way of a promissory note and a promissory note is treated as cash and is a free standing independent agreement.

[21] What the defendants contend for is not a total failure of consideration for the promissory note but a total failure of consideration in respect of the joint venture agreement. Even assuming that the plaintiff should not have withdrawn from the joint venture in the circumstances, that is a separate issue. The promissory note arises out of an independent agreement for repayment of the stated sum and the obligation arises to pay on the promissory note. There is no failure of consideration in respect of the promissory note. The alleged breach of the joint venture agreement does not constitute exceptional circumstances or strong grounds that would prevent the plaintiff having judgment on the promissory note.

[22] Accordingly I am satisfied that the plaintiff should have judgment against the defendant on the promissory note.

However the promissory note, while distinct from the joint venture agreement, arose in relation to the dealings about the proposed development of the landfill site by the company and the plaintiff that gives rise to the defendants Counterclaim for damages for breach of contract, to which it will be sought to add the company as a party. In the circumstances there will be a stay of execution of the

judgment against the defendants pending the hearing of the Counterclaim for damages for breach for contract.

As there was no defence to the plaintiffs claim on the promissory note it is ordered that the defendants make payment into Court of the amount due on the promissory note pending the hearing of the Counterclaim.