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

Delivered: 18/10/00

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

DAIRE JAMES TOMAN (A MINOR) by his mother and next friend, TERESA TOMAN

Plaintiff

and

THE TRUSTEES FOR THE TIME BEING OF ST PETER'S GAELIC ATHLETIC CLUB

Defendants

and

C A HAFFEY & SON LIMITED

Third Party

KERR J

Introduction

On 18 June 1994 the plaintiff was in the defendants' premises when a heavy gate fell on him. On 22 March 1995 he issued proceedings against the defendants, claiming damages

for personal injuries, loss and damage. The defendants in turn issued proceedings against the third party, C A Haffey & Son Ltd, claiming that they were entitled to an indemnity in respect of the plaintiff's claim. In broad terms the claim for indemnity was based on the allegation that the gate had not been properly erected by the third party.

Discussions took place between counsel for the defendants (T.V. Cahill QC) and counsel for the third party (ME Maxwell) in October/November 1998. There was then an exchange of letters between the solicitors for the defendants and third party. On 1 December 1998, by agreement between the parties, leave of the court to discontinue the third party proceedings was obtained.

Subsequently, on 22 October 1999, the defendants applied for and were granted leave by Master Wilson to re-issue third party proceedings against Haffeys. This application was opposed by the third party on the grounds that there was a concluded agreement between the parties that no further claim for an indemnity would be made by the defendants. An appeal by the third party against the Master's decision was unsuccessful. Girvan J (who heard the appeal) suggested that the third party's contention that the defendants were debarred from pursuing third party proceedings against it could be tried as a preliminary issue. On 9 June 2000 Master Wilson ordered that a number of issues (set out in a schedule to the Order) be tried as preliminary issues. The trial of those issues took place before me on 14 and 15 September 2000.

The discussions between counsel

The discussions between Mr Cahill and Mr Maxwell took place because the case had appeared in a review list by reason of its vintage. Before that listing Mr Cahill had approached Mr Maxwell with a view to persuading him to agree to an adjournment of the action. Mr Maxwell refused and, in the course of the discussion about the adjournment,

pointed out to Mr Cahill that the third party proceedings were, in his view, misconceived because he had evidence (in the form of statements from a former employee of the third party, a Mr McCauley) that the third party was not to blame for the failure of the gate on the occasion of the plaintiff's accident. Mr Cahill was shown copies of two statements made by Mr McCauley. In both statements Mr McCauley suggested that he had observed the gate lying beside its retaining post during working operations which had been carried out by other builders. These building operations, Mr McCauley said, had been carried out a number of years after the gate had been erected by the third party. The bolt which secured the gate (and which, according to Mr McCauley, had been in place when the gate had been erected originally) had been removed. Relying on this evidence, Mr Maxwell suggested to Mr Cahill that if the defendants decided not to pursue the third party proceedings, he (Mr Maxwell) would recommend that the third party should bear its own costs.

It is clear that, on foot of this revelation, Mr Cahill recommended to his solicitors, Oliver J Kelly & Co., that the proceedings against the third party should not be pursued. He has said, however, that he did so believing (as a result of representations made by Mr Maxwell) that Mr McCauley had been interviewed by Mr Grahame Loughlin of Tughan & Co., the third party's solicitors, and that Mr Loughlin had formed the impression that Mr McCauley was accurate and honest in his story. This was significant, said Mr Cahill, because he knew Mr Loughlin and respected his judgment. In fact, Mr McCauley had been interviewed by Mr Blackburn, a law clerk in Tughan & Co.

Mr Cahill has also said that, in the course of their discussions, an undertaking was given by Mr Maxwell that Mr McCauley would be available to give evidence on behalf of the defendants. Both Mr Maxwell and Mr Loughlin deny that such undertaking was given. They both point out that, since Mr McCauley had retired, neither the third party nor its insurers

could guarantee his attendance, much less that he would give evidence along the lines of the statements that he had made.

The solicitors' letters

Following the discussions between Mr Maxwell and Mr Cahill, on 12 November 1998, Messrs Oliver J Kelly & Co. wrote to Tughan & Co about the case in the following terms :-

> "I refer to previous correspondence in this matter and in particular a report of a conversation between Mr T V Cahill QC and Mr Michael Maxwell, your counsel.
>
> We understand you might have a statement from a Mr McAuley (*sic*) an employee of C A Haffey & Co
>
> If so I would be obliged if you could give me a copy of Mr McAuley's statement without prejudice. Mr McAuley has made certain information available to you which we would need to investigate for our part."

On 26 November 1998 Mr Loughlin replied. This is the text of the letter :-

> "We understand that our respective counsel, Mr Cahill QC and Mr Maxwell BL, have been discussing this matter and your counsel has indicated that if our clients are prepared to bear their own costs to date, your clients will release and indemnify our clients from this action. We would confirm we have instructions from our clients that if our clients are indemnified and released <u>at this stage</u>, then they will bear their own costs. Thereafter we ca give consideration to the request contained in your letter of 12 November for sight of witness statements."

The defendants' solicitors replied on 27 November as follows :-

> "I acknowledge receipt of your letter dated 26 November 1998. I have spoken to Mr Cahill QC in relation to same and we are agreed that your clients should be released. We seem pretty certain now that this action should have been directed against DoE and Scullion Plant.

> Indeed your clients' foreman was the one who pointed us in the direction of Lavery as the builder. However, Lavery does not appear to have been the builder and we would be reasonably satisfied with that. However, you can be satisfied that we will release your client from any further involvement in this action."

On 30 November 1998, Mr Loughlin replied to Mr Kelly's letter in the following terms :-

> "Thank you for your letter of 27 November. We are pleased to note the contents. As you know the matter is to be reviewed before the senior Queen's Bench judge on Tuesday 1 December. We would be grateful, therefore, if you would confirm in open correspondence that our clients will be released from these proceedings and further confirm that your counsel, at the call-over tomorrow morning, will so advise the court."

There was no reply to that letter.

The 'disposal' of the claim against the third party

It appears that on 18 November 1998 Mr Loughlin received a telephone call from Mr Maxwell informing him that he (Mr Maxwell) had been speaking to Mr Cahill about the case. Mr Maxwell asked Mr Loughlin whether authority could be obtained from the third party's insurers to bear their own costs if the defendants "released" the third party from the action. Mr Loughlin obtained authority for this course the following day and left a message on Mr Maxwell's telephone answering machine to that effect. It does not appear that there was any final agreement between Mr Maxwell and Mr Cahill, however, and negotiations seem to have been taken up by the solicitors in the exchange of letters which I have referred to above.

On 1 December 1998 the action appeared in the review list. Mr Maxwell and junior counsel for the defendants, Gavan Duffy, agreed that the defendants should apply for leave to discontinue the defendants' claim for indemnity against the third party. Leave was granted by

Sheil J on the application of Mr Duffy. The only condition attaching to the grant of leave was that there should be no order as to costs.

Mr Maxwell has said that the option of discontinuance was chosen as a "mechanism" agreed by Mr Duffy and himself "to tidy up the proceedings". Mr Duffy has recalled, however, that he was informed by Mr Cahill or Mr Kelly that the action was to be discontinued and that there should be no order as to costs. When he put this to Mr Maxwell, the latter's reaction was to say that this should have happened much earlier in light of the statements from Mr McCauley. Mr Duffy has said that there was no discussion about the form of order that should be obtained beyond him telling Mr Maxwell and Mr Maxwell accepting that there would be an application for discontinuance. He assumed that it had already been agreed between Mr Cahill and Mr Maxwell that the third party claim should be discontinued and he was merely confirming that agreement.

The agreement

It is clear that no final agreement was ever concluded between Mr Maxwell and Mr Cahill to dispose of the third party claim. The exact dates on which the discussions between them took place cannot now be ascertained but I am satisfied that these were before the exchange of letters between Mr Loughlin and Mr Kelly. The terms of those letters make it unequivocally clear that no final agreement had been reached between counsel. This remained the position even as late as 30 November 1998 when Mr Loughlin wrote to Mr Kelly asking him to *confirm* that the third party would be released. That confirmation would not have been required if the matter had already been settled between the parties.

In any event, Mr Kelly's letter to Mr Loughlin, while stating an intention to release the third party, did not propose how that would take place nor on what terms it could occur. In my view, both elements would have to be present before a final agreement could be

concluded. A range of options was available to the parties at that stage. The third party might have sought the agreement of the defendants that it should have judgment against the defendants on their claim for an indemnity. The defendants claim might have been dismissed, struck out or stayed on terms. Alternatively, the leave of the court to discontinue subject to conditions (such as that the defendants should be debarred from seeking an indemnity from the third party in the future) might have been obtained. Finally, it could have been agreed that there be a discontinuance without conditions (which was how the matter was eventually disposed of). The outcome for the case could have been quite different, depending on which option was chosen. Until one of those options was selected no agreement existed between the parties.

Conclusions

I have concluded that agreement between the parties was not reached until Mr Duffy and Mr Maxwell agreed that an application should be made for leave to discontinue the claim. What then is the effect of that agreement? On behalf of the third party, Mr Elliott QC has argued that it was an implied term of the agreement that the defendants would not seek to revive the claim against the third party on any future occasion. For the defendants, Mr Brian Fee QC submitted that no such term could be implied and that the only agreement represented by the consensual application to the court was that the third party claim be discontinued without conditions.

In support of the third party's position it might be said that there was little incentive to reach agreement with the defendants on terms that effectively allowed them to renew the third party claim at any time in the future, especially since it had agreed to bear its own costs - already in excess of £5,000. On the other hand, the defendants agreeing to abandon forever a claim to an indemnity against the third party might be regarded in the circumstances as

conspicuously less than prudent. Mr Cahill believed that Mr Maxwell had undertaken that Mr McCauley would be made available as a witness but I am satisfied that, in that belief, he was mistaken. Since Mr McCauley was no longer an employee of Haffeys, no guarantee could be given as to his attendance. But success for the defendants against any other party critically depended not only on Mr McCauley attending the trial but also on his giving evidence along the lines of his statement. It also depended on that evidence being accepted. It would have been foolhardy to abandon irretrievably any claim for indemnity against Haffeys without even consulting with Mr McCauley. Haffeys had been the installers of the gate and remained the most obvious target of an indemnity claim in the absence of reliable, clear and available evidence that another agency had been responsible for removing the retaining bolt.

Mr Elliott argued alternatively that the agreement between the parties had been concluded by the exchange of letters on 26 and 27 November. For the reasons that I have given earlier, I consider that agreement was not finally reached until 1 December 1998. I must reject that argument, therefore. But the question arises whether, on the basis of what was contained in the letters, a term should be implied into the agreement to the effect that no further claim would be made by the defendant against the third party for an indemnity in respect of the plaintiff's claim.

In favour of the implication of such a term was the failure of Mr Kelly to demur at the suggestion that the third party should be released *and* indemnified. Mr Elliott argued that this was a generally accepted means of conveying that a release should be on condition that no further claim would be made. In his evidence Mr Maxwell suggested that it meant that the defendants would indemnify the third party in the event that it was joined by the plaintiff or any of the other parties against whom the defendants might claim an indemnity. Mr Loughlin

declined to espouse that meaning, however, stating frankly that he did not contemplate that his client would be joined by any other party.

I do not accept that it is either normal or usual to seek a permanent release from an action by asking to be indemnified where, as here, no claim by any other party is anticipated. I do accept, however, that both Mr Maxwell and Mr Loughlin believed that they had negotiated for their client a permanent release from the action. But I also believe that neither Mr Cahill nor Mr Kelly intended that the third party should be unconditionally and permanently released. I suspect that neither had turned his mind to that question but both have asserted trenchantly that if they had been asked to agree to that course they would have refused. They would have been right to refuse, given the uncertain nature of any claim for an indemnity against other parties and the somewhat indefinite position of Mr McCauley, a witness they had never interviewed.

In any event, it is clear that Mr Kelly had not responded directly to the request made by Mr Loughlin that the third party be released and indemnified. Even if that phrase had been efficacious to convey the meaning that is contended for, I would not be prepared to hold that the term was implied where an explicit request had been made and had not been given a direct reply. Furthermore, the agreement not having been concluded until Mr Duffy and Mr Maxwell agreed on the manner of its disposal on 1 December, what is of critical importance is whether a term should be implied at that juncture. Mr Maxwell has given evidence that he believed that by agreeing that the claim against the third party should be discontinued, he had secured a permanent release for his client but that was, as he frankly acknowledged, because he was unaware of the effect of discontinuance without condition. There is no reason to suppose that Mr Duffy was unaware of the true effect of discontinuance or that he believed that the effect of any earlier exchange between counsel or solicitors was to create an implied term.

None of the conditions prerequisite to the implication of a term into an agreement is present here. In *Hamlyn v Wood* [1891] 2 QB 488 it was held that the court should be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. Here the parties are not *ad idem* as to what was intended and I can find nothing in the contract language (even if that had been contained in the letters of 26 and 27 November 1998) to support the view that the parties must have intended that this be a release for all time. On the contrary, there was every reason that the defendants should not bind themselves to that course and the vehicle chosen to dispose of the third party claim was ineffective to achieve what the third party contends was the intention of the parties. In fact, that mechanism was apposite to bring about the result which the defendants' representatives argue for *viz* the opportunity to revive the action against the third party should circumstances change.

A term will be implied if it is necessary to give business efficacy to the contract but again the underpinning of this principle is the presumed intention of the parties. In *The Moorcock* [1889] 14 P.D. 64, 68 Bowen LJ said :-

> "Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or an express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws upon from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe that if one were to take all the cases … of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have."

Quite apart from Mr Cahill's and Mr Kelly's emphatic assertion that they did not intend that a permanent, irrevocable release be given to the third party, there is nothing about the agreement, as they conceive it to be, which robs it of business efficacy. While it would obviously be preferable to the third party that it should have a binding, irreversible commitment from the defendants that no further claim for an indemnity would be made, it could not be said to be so inefficacious to have a conventional discontinuance of the action that it is obvious that both parties must have had in mind that the discontinuance should be accompanied by an unwritten, unspoken term that it should be permanent. The third party was being released from the action. In all the then foreseeable circumstances it would not be involved in the litigation again. That was a result which, although less than ideal, was not by any means valueless. I am of the clear opinion, therefore, that the term that the release be permanent should not be implied into the agreement.

I have concluded that the defendants are not debarred from pursuing their claim for an indemnity from the third party. In light of that conclusion I do not consider that it is either necessary or appropriate to reach specific decisions on each of the issues set out in the order of the Master of 9 June 2000.

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Plaintiff

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JUDGMENT

OF

KERR J