HYNES

4610P 1978

THE HIGH COURT

BETWEEN:

THOMAS HYNES

PLAINTIFF

AND

JOHN HYNES

DEFENDANT

JUDGMENT of Mr. Justice Barrington delivered the 21st day of December 1984.

This is an unfortunate dispute between brothers - a dispute into which other members of their family, including their mother and their sister, have been drawn.

The evidence at the trial took some eight days. There was a large number of documents and the case raised complex issues of law and fact. The defendant defended the case on the merits but also raised technical defences under the Statute of Frauds and the Statute of Limitations. Either of these technical defences, if successful, would have defeated the plaintiff's claim but, at the end of the case, counsel asked me to decide all major issues in dispute between the parties and not to confine my judgment to some technical point. This appears to me to be a sensible suggestion as the costs for both parties would be greatly increased if I were to confine my judgment to some technical point and it were later discovered, on appeal, that I had taken an erroneous view of the matter.

The case turns on matters alleged to have occurred in 1969, 1970 and 1971. After such a lapse of time the memories of independent witnesses are naturally impaired. We had many examples during the hearing of patently honest witnesses who had difficulty in recalling dates or details of transactions. To make matters worse, both brothers seem to have had a talent for entering into tangled transactions which are difficult to unravel at this remove in time. I have borne this matter in mind in considering the defence based on the Statute of Limitations discussed later in this judgment.

The Background

The plaintiff and the defendant are brothers, and for convenience, I shall refer to the plaintiff as Tom and to the defendant as John. Their parents appear to have been successful in life and are now living in retirement in Spain. The mother ran her own employment agency and was, according to her children, the business "brain" of the family. One of the daughters, Mary, is now married to an accountant and is living in England. She also runs an employment agency and has property interests in Ireland. At the time of the matters giving rise to the present proceedings all parties appear to have been carrying on business from offices at 52 Lower O'Connell Street, Dublin. They appear to have been a mutually supportive family, but, episodes appear to have occurred when one member of the family was estranged from another or others. There were times when communication took place by notes or through intermediaries. Tom and John both referred to occasions when they were not on speaking terms with their mother and Mary admitted in evidence to having a "vicious, horrible temper" of which she was thoroughly ashamed.

However, these storms did not disrupt the basic unity of the family. The facts giving rise to the present case are different and find Tom, the parents, and Mary ranged on one side and John on the other.

The story begins in the mid-60's when Tom was working in the building industry in London. There he renewed a friendship with a young Irish architect called Edmund Burke, who was also working in London. Both were anxious to return to Ireland. In fact, they did return in 1966, flying home together on the same plane. Tom set up in the building industry in Ireland as a sole trader and opened an account in the Hibernian Bank in Wicklow. His business rapidly expanded. Edmund Burke introduced Tom to his father who was an official of the Department of Local Government and Supervisor of group waterwork schemes for the 26 counties. These schemes were schemes for bringing piped water to remote groups of houses. The schemes were organised by committees of local people who selected and paid the contractor. But a grant was available from the Department of Local Government provided the schemes were up to standard. The local committees naturally looked to the Departmental Inspectors for guidance in selecting contractors and the Department maintained a list of contractors whose work they were prepared to recommend. Tom got together, and trained, a team of five men who specialised in waterworks, and succeeded in having his name placed on the Departmental list of competent contractors. The procedure appears to have been comparatively informal. Once a contractor had earned the reputation of doing good work he became known to the Departmental Inspectors and, through them, to the local committees. Thereafter, it does not appear that anyone enquired whether his name was

actually on the list or not.

Meanwhile, John had been working in the civil engineering business in England. At Christmas 1968 he returned to Ireland and joined Tom in his business. There appears to be agreement as to the status which John held in the firm prior to September 1969. He was not a partner and he was not a mere employee. His status is best described as that of the boss's brother. He was entitled to be reimbursed his expenses, he could withdraw money out of the petty cash and Tom would give him extra money from time to time. He concentrated on the day to day running of the waterworks side of the business.

While in England, John had met a trainee accountant called Mr. John Hourican. Mr. Hourican returned to Dublin in 1969. John introduced him to Tom and Tom offered him a job in the business. At first Mr. Hourican merely looked after the books but he appears to have risen to the status of financial adviser. He and Tom had the right to sign cheques drawn on the bank account in the Hibernain Bank in Wicklow.

Mr. Hourican joined the firm in early 1969. At that time he described Tom as being a sole trader running a business which engaged in housing, civil and electrical engineering and demolition. He described John as a general factotum who worked in Tom's business and attended, in particular, to the waterworks side of it.

At a later stage Mr. Hourican advised Tom to break the business into several divisions and to form limited liability companies to run each division. But Tom never got around to doing this. The business continued to expand, and, at its height, employed some 40 people. But, it was under-capitalised and was being run on a shoe-string. Mr. Hourican described several

devices which were resorted to in an effort to maintain liquidity.

By means of such devices things were kept going until the bank strike of May 1970.

The day of final settlement, at the conclusion of the bank strike, was the 17th January 1971, but some days before that Tom had an interview with his bank manager and realised that he could not possibly meet all the cheques which had been drawn on the company's bank account during the strike. This appears to have resulted from over expansion of the business, under capitalisation, Tom's extravagant life-style and an error as to the balance between cheques due and cheques outstanding.

Tom took professional advice and was advised to seek the protection of the Court. In retrospect, Mr. Hourican thinks that this was not good advice as the business - particularly the waterworks end of it - was fundamentally sound. But, Tom took it and on the 19th January 1971 was declared a bankrupt on his own petition.

Tom says that some days prior to his bankruptcy he entered into a verbal agreement with John whereby John agreed to form two new companies, Pembroke Civil Engineering Limited and Hibernia Construction Limited, to complete Tom's outstanding contracts and to be his successors in business. He says it was further agreed that all the profits of the said companies would, in the first instance, go to discharge Tom's debts and "pay off the bankruptcy". Thereafter, the profits were to be split 60% to Tom and 40% to John.

It is the dispute as to the existence or non-existence of this agreement and the alleged failure by John to honour it which has given rise to the present action.

Propriety of alleged agreement

The defendant has not pleaded that the alleged agreement was illegal, but in the context of credit, his counsel have commented on the initial failure of the plaintiff to disclose the existence of the alleged agreement to the Official Assignee. The agreement, if it existed, appears, in the first instance, to have been for the benefit of the creditors of the bankrupt and, therefore, not illegal in concept. Moreover, when the Official Assignee was informed of the existence of the agreement he ratified it. These present proceedings issued on the 1st August 1978, by leave of the High Court, dated the 31st July 1978 with the Official Assignee, himself, joining as plaintiff. Subsequently, Tom came to an arrangement with his creditors and, on the 11th July 1980, the bankruptcy proceedings were annulled. After the annulment of the bankruptcy proceedings the Official Assignee was struck out as a plaintiff in this action but, the action remains, in the first instance, an action for the benefit of Tom's creditors pursuant to his arrangement with them. In these circumstances I do not think I should regard the alleged agreement as illegal or improper.

Pleadings

The defendant's defence to the proceedings was delivered on the 4th March 1981 and was essentially a traverse of the plaintiff's claim coupled with three special defences. The first of these was that the claim was statute barred. The second was that there was no note sufficient for the purposes of the Statute of Frauds. The third was that the alleged agreement was not intended to constitute a binding agreement between the parties. This defence appeared at paragraph 5 of the defence

and was in the following terms:

"Further and in the alternative, if, which is denied, the defendant entered into the alleged agreement referred to at the fifth paragraph of the Statement of Claim, the said arrangement was not intended to constitute a binding agreement between the first-named plaintiff and the defendant, and the first-named plaintiff well knew that."

On the 15th October 1981 the plaintiff's solicitors wrote to the defendant's solicitor seeking better particulars of paragraph 5 of the defence. They raised the following questions:-

"(a) Please explain exactly what is meant by the contents of paragraph 5 and in particular;

(b) why the said arrangement was not intended to constitute a binding agreement;

(c) in what circumstances was it clear to the first-first-named plaintiff that the arrangement was not intended to constitute a binding agreement;

(d) what was the alleged purpose of the arrangement if it was not intended to constitute a binding agreement; and

(e) which party to the arrangement was not intended to be bound by it."

The defendant's solicitors replied to this letter on the 25th June 1983 and stated as follows:-

"1. The said agreement referred to at paragraph 5 of respectively the statement of claim and the defence was a family arrangement entered into by the defendant with his brother, the plaintiff, and was entered into by the defendant, as the plaintiff well knew, purely out of consideration of family ties and in the premise the same

was not intended to be a binding agreement.

2. It was clear to the plaintiff that the said agreement was not intended to constitute a binding agreement by reason of the fact that the plaintiff had been or was about to be adjudicated a bankrupt, had no means of support, and little or no immediate prospects of making a livelihood and that the arrangement was simply designed, as was stated by the defendant and accepted by the plaintiff, to help the plaintiff over a difficult period in the plaintiff's life.

3. The purpose of the said agreement was as hereinbefore stated at 2 to help the plaintiff over a difficult period in the plaintiff's life and to give the plaintiff some assistance for the plaintiff's support.

4. Neither party to the said agreement was intended to be bound by the same."

At the hearing before me John denied that there was ever any such agreement between him and his brother. He was cross-examined as to how his solicitor could have given particulars of a transaction, which never took place, and the plaintiff's counsel sought to rely on the letter of the 25th June 1982 as constituting an admission that there was an agreement such as Tom pleaded between the two brothers, the only matter remaining to be decided being whether the agreement was or was not binding in law.

The defendant's solicitor, Mr. Conlon, gave evidence before me. He said that until the Spring of 1983 the defendant's case was being dealt with by an assistant in his office. He, of course, accepted professional responsibility for his assistant's actions. But he, himself, had taken over the case in Spring

1983 and read through the file. He took the view that the defendant's case had not been properly pleaded in accordance with the defendant's instructions. Accordingly, on the 16th June 1983 Mr. Conlon wrote to the plaintiff's solicitors informing them of the defendant's intention to apply to amend the defendant's defence by pleading that the defendant had bought the waterworks section of the business from the plaintiff on the 5th September, 1969.

The proposed amendment, which was subsequently granted, was in the following form:-

"If, which is denied as aforesaid, the first-named plaintiff was engaged in the building and civil engineering trade specialising on the waterworks side, the defendant says that the said business was not being run profitably and the first-named plaintiff offered and sold the civil engineering and waterworks business to the defendant on the following terms and on no others - namely

(a) that the defendant would pay to the first-named plaintiff the sum of £3,000 and

(b) that the defendant would take over the hire purchase obligations of the first-named plaintiff and all palnt and machinery engaged in the civil engineering business, and

(c) that the first-named plaintiff would pay all outgoings on four existing contracts which had previously been entered into by the first-named plaintiff with third parties, and that the first-named plaintiff would receive all moneys due on foot of the aforesaid four contracts.

This agreement was concluded between the first-named plaintiff and the defendant on or about the 5th day of

September 1969 and was prior to the institution of these proceedings, adhered to by the first-named plaintiff and by the defendant."

There is some force in the submission of the plaintiff's counsel that the defendant's solicitors should not have been in a position to give particulars of an agreement which his client says was never entered into or even to advance reasons as to why the said alleged agreement should not be binding. Nevertheless, the principal defence pleaded is a traverse and having regard to this fact, to Mr. Conlon's evidence, and to all the circumstances of the case, I do not think I should draw any inference adverse to the defendant from the contents of the defendant's solicitor's letter of the 25th June 1982.

Circumstantial evidence of sale of waterworks

It is surprising that what turned out to be one of John's principal defences at the hearing in answer to Tom's claim should not have been pleaded until the 16th June 1983 - almost five years after the institution of the proceedings and three years after the delivery of the statement of claim. Nevertheless, it is not the only strange feature of the case. There is no evidence from Tom that in the years between 1971 and 1978 he ever directly confronted John about his alleged breaches of the agreement, nor was there any letter from Tom or his solicitors to John prior to the institution of proceedings.

John says he bought the waterworks section of the business from Tom in September 1969 with the sum of £3,000.00 which he borrowed from his mother.

Certainly, something happened in relation to the waterworks section of the business in September 1969. Already John was

in charge of the day to day running of that section of the business. He was the person who met customers. At least, on occasion, he signed contracts with local committees and, I am satisfied, that, at least, some of the committees and Departmental Inspectors thought they were dealing with John as principal in his own right.

Prior to the 5th September 1969 Tom had a number of machines and items of equipment on hire purchase from Foster Finance Limited. These included two JCB's, a Ford 3,000 tractor, a Roadmaster 16 foot caravan, a Ford 400 tractor, a Roll-on caravan, a Vauxhall Cressida motor car and two Ford Escort Estate cars. In September 1969 these items of equipment were sold by Foster Finance Limited to the Hire Purchase Company of Ireland which then hired them to John.

About the same time a number of waterworks workers were marked as having been paid off in Tom's books and were thereafter paid by John out of a bank account which he operated in the Ulster Bank in O'Connell Street.

John also took out employer's liability and public liability insurance in respect of these workers.

John claims that this was the implementation of the verbal agreement by which he purchased the waterworks section of the business from his brother for £3,000.00.

Tom and Mr. Hourican put a totally different construction on these events. They say that they were devices designed to ease the liquidity crisis in the business. They say that by ostensibly transferring some of the workers to a new employer they eased the pressure from the Revenue Commissioners for the payment of tax. They say they obtained a further breathing space

by transferring the plant and machinery to a new hire purchase company. Tom claims that he and John discussed this matter with Mr. Brian Delaney who was then a manager with Foster Finance Limited. Unfortunately, Mr. Delaney has since died and Foster Finance Limited (now Bank of Ireland Finance Limited) has destroyed the relevant files. Tom claims that he guaranteed the transaction with the hire purchase company and remained the sole owner of the business and the person ultimately liable. Unfortunately, the guarantee is also missing and there is now no means of checking this contention. Mr. Hourican, however, corroborates Tom's statement that Tom remained the sole owner of the business.

The sale of the plant to the Hire Purchase Company of Ireland did not bring any new capital into the business as the sum realised was marginally lower than the amount needed to pay off Foster Finance Limited. However, Tom claims that the new contracts were for a longer period than the old ones and that - the contracts being new ones - the business obtained a breathing space while the pressure for repayment of hire purchase instalments was building up.

Moreover, it would appear that the plant and machinery - though used on sites ostensibly controlled by John - continued to bear Tom's name.

A new twist to the story took place after the commencement of the bank strike of May 1970. Mr. Hourican apparently then thought that it would be possible to preserve better financial control over the business if all cheques required to meet the business's liabilities were drawn on the one bank account. Tom and John agreed to this and all cheques were drawn on Tom's

account with the Hibernian Bank in Wicklow. Thus, the workers who, in September 1969 had ostensibly been transferred to John's employment, were now paid by cheques drawn on Tom's account in the Hibernian Bank in Wicklow. The authorised signatories for cheques drawn on this bank account were, as previously stated, Tom and Mr. Hourican. John never had authority to draw cheques on it.

John admits that this took place but puts a different interpretation on it. He says that Tom's name was, at that stage, better known in the business world than his and that he, Tom and Mr. Hourican had agreed that cheques drawn on Tom's account would be more acceptable during the duration of the bank strike.

Under these circumstances I do not think it is possible, from the circumstantial evidence alone, to resolve the issue of sale or no sale in favour of either party. One must look elsewhere to resolve the issue between them.

The loan of £3,000.00

John says that he bought the waterworks business from Tom for the sum of £3,000.00 which he borrowed from his mother. He said that in 1969 the waterworks business was not doing well and Tom offered to sell him the goodwill for £3,000.00 and that he, John, was to take over the plant and equipment. John says that Tom repeated this offer to him in the presence of Mrs Mary O'Connor and her husband. Mr. and Mrs. O'Connor both gave evidence in the case but unfortunately this alleged conversation was not put to them. I gave counsel for the plaintiff an opportunity to recall Mr. and Mrs. O'Connor on this point but he did not avail of the opportunity. John says that part

of the agreement between himself and Tom was that he was to complete for Tom four waterworks agreements which were outstanding at the time of the alleged sale.

John says that he went to several finance houses in an effort to raise the sum of £3,000.00 to buy the business but that he was unsuccessful. He then approached his mother. His mother advised him not to "put a noose around his neck" by buying the businees but, nevertheless, she lent him the £3,000.00 on the 5th of September 1969. She gave him the money in cash and the money was counted in the presence of Tom, John and their mother. According to John, Tom and he then went to John's bank at the Ulster bank in O'Connell Street and lodged the £3,000.00 to John's account. John then drew a cheque for £2,000.00 on the Ulster Bank account in favour of Tom which Tom lodged to his account in the Hibernian Bank in Wicklow. John paid the balance of the £3,000.00 in smaller sums to Tom at a later stage.

Tom tells a totally different story. He says that in September 1969 his business needed a cash injection and that he approached his mother for a loan. His mother lent him the £3,000.00 and it was intended to be a cash injection into his business. For private reasons of her own his mother did not wish the money to be traceable back to her and for that reason it was paid over in cash and was counted in the presence of John, his mother and himself. Tom says that the acount in the Ulster Bank in O'Connell Street was opened to relieve pressure on his Wicklow account and that, though the account was in John's name, the £3,000.00 lodged to it was Tom's money which he had borrowed from his mother. This device also made it more difficult to trace the money back to his mother. He agrees

that John immediately drew a cheque for £2,000.00 in favour of Tom which Tom had lodged to his account in Wicklow. Tom's cashbook for September 5th, 1969 shows this sum of £2,000.00 as coming in from John. However another of the books of Tom's business books (described in evidence for convenience as the black book) shows a loan of £3,000.00 made to the business on the 5th of September 1969 by "Mrs. Hynes". It is clear that this entry was later changed to show the sum of £3,000.00 as coming from "Mr. T. Hynes".

Mrs. Hynes supports Tom's version of this transaction. She says that in September 1969 Tom approached her for a loan of £3,000.00 as he needed the cash injection for his business. She agreed to give it to him. She says that there was no question of it being a loan to John; it was a loan to Tom. She obtained the cash. When Tom came to collect the cash he had John with him. Mrs. Hynes was very annoyed at this as she wished the loan to be confidential to herself and Tom. She was even more annoyed later when she discovered that the loan had been entered in Tom's books as a loan from her. She was annoyed not only because the loan was directly traceable to her but also because the entry meant that Mr. Hourican, who kept the book in question, knew of the transaction which originally she had intended to be confidential as between Tom and herself.

Mrs. Hynes made a cryptic memo in her diary for the 5th of September 1969 in relation to this loan. Unfortunately her entry which reads simply "3 to John and Tom" supports neither version of the story. Mrs. Hynes however says that the entry refers to "John and Tom" simply because both of them were present

when the money was paid over and counted. She is quite adamant that the loan was to Tom and to Tom only.

The story of the repayment of this loan is equally extraordinary.

In June 1970 Tom obtained a personal loan of £5,000.00 from Foster Finance Limited. About the same time John approached him and said that their mother was asking for her money back. Tom gave £2,750.00 to John, in cash, to return to his mother. As this transaction took place in Tom's office in O'Connell Street, and as his mother was in the same building at the time, it may seem strange that Tom should use John as an intermediary. Tom's only explanation for this is that he may not have been speaking to his mother at the time - that they often had rows. In any event it is common case that the sum of £2,750.00 was returned to Mrs. Hynes on the 16th of June 1970. Again Mrs. Hynes has an entry in her diary for that date. The relevant part reads as follows:-

"CASH

John gave me £2,750.00 ?? in office 11.15 a.m. Said he got a loan of it."

Even more extraordinary is the fact that Mrs. Hynes says that she believed that Tom had given £3,000.00 in cash to John for her but that, on the way from Tom's office to her office, John had helped himself to £250.00.

In 1971 Mrs. Hynes sent a bill to John itemising various sums of money alleged to be due by John to her. Among the items listed is the sum of £250.00 described as the balance due of "large loan".

John's counsel submit that, in the context, this is to be read as £250.00, being the balance due of a large loan to

John. Mrs. Hynes says that this is not so. She admits that the sum of £250.00 refers to the balance of the loan of £3,000.00 but says that she billed John in the mistaken belief that he had helped himself to the sum of £250.00 in the circumstances already described. In any event John paid this amount including the sum of £250.00 in February 1974.

The Alleged Agreement

Tom said that the alleged agreement took place because of his impending bankruptcy which would debar him from carrying on business. He says that at that stage the waterworks end of the business was doing very well and he considered it to be fundamentally sound. The intention was to have formed two limited liability companies. The first was to be known as Pembroke Civil Engineering Company Limited and was to take over the group waterwork schemes. The second was to be known as the Hibernian Construction Company Limited and was to take over the rest of the business. In the events which happened the Hibernian Construction Company Limited never traded. Tom said he entered into negotiations with two business colleagues a Mr. Murphy and a Mr. Leonard - under which, one or the other was to take over the business, after the bankruptcy, and was to pay off Tom's creditors out of the profits. For this service he was to receive 30 per cent of the profits once the creditors had been paid, the balance of 70 per cent to go to Tom.

After these negotiations with Mr. Murphy and Mr. Leonard had started Tom says that he was approached by John early in January 1971 in the new Jury's Hotel with the proposition that John should fill the roll contemplated for Mr. Murphy or Mr. Leonard.

Tom says that matters came to a head at a meeting in Mr. Leonard's suite in the Hibernian Hotel on or about the 11th or 12th of January 1971. Things were coming to a head and according to Tom:- "I more or less had to make up my mind whose name I was to use....."

So far as Tom can recall Mick Murphy, Brian Leonard and Frank Byrne were at the meeting and they were discussing Tom's problems when John arrived and said he wanted to see Tom. The pair of them went into the bathroom of the suite, where John repeated his proposition. He said that Tom should trust him. John said it would look bad for him (John) going around town if Tom couldn't trust his own brother. Tom explained the deal he had with Mr. Murphy on the 70 / 30 basis and John asked for 50 / 50. He said he did not want to be a poor member of the family. After some discussion they agreed on a 60 / 40 split after the creditors had been paid off - 60 per cent for Tom and 40 per cent for John. The arrangement was that the bankruptcy would be paid off in full and Tom would then receive 60 per cent of the profits and John would get 40. In the meantime John was to keep going the way he was (taking roughly £60.00 per week and expenses).

John totally denies that there was any such agreement or any such conversation. He recalls attending a meeting in the Hibernian. But he says that his purpose at the meeting was to urge John to get in money to stave off the bankruptcy. He was particularly conscious of the fact that Mr. Leonard owed Tom £16,000.00 which he had not paid. John says that he, John, had left the meeting in a highly agitated state.

Mr. Nicholas Murphy said in evidence that he remembered being approached by Tom with a proposition in January 1971.

Tom explained that he was in financial difficulties and was going bankrupt but that he had one "very viable portion" of his business concerned with group waterwork schemes. Tom put a proposition to him that he (Mr. Murphy) should take over this section of the business on Tom's bankruptcy, that he should pay off Tom's creditors and that thereafter they would divide the business on the basis of 30 per cent to Mr. Murphy and 70 per cent to Tom. He remembered a meeting at the Hibernian to discuss this proposition. He remembered John arriving. It was two or three days prior to Tom's bankruptcy. John and Tom retired to the bathroom. They were there for about a half an hour.

The proposition concerning Mr. Murphy taking over control of the business went no further. Mr. Murphy said that, while he would have undertaken the task for Tom, he personally was relieved to be out of it.

Mr. Edmund Burke was the architect who had helped originally to set Tom up in the group's waterworks business. He at all times regarded that business as Tom's. He was upset when he heard of Tom's impending bankruptcy.

At about the time of the bankruptcy he met John and Tom in Jury's Hotel. They had a few drinks. It was a sad occasion. Witness enquired about what would happen to the waterworks business to which John replied that he was "minding the business for Tom". Witness understood that there was some scheme to pay off Tom's bankruptcy. Witness enquired how long it would take, to which Tom replied that he thought it would take a year or so for him to come back.

John totally denies that he ever said to Mr. Burke that he was "minding the business for Tom". He says that that just did not happen.

The Aftermath

In any event John took over control of the waterworks business and appears to have made a great success of it. Tom says that in or about the time of his bankruptcy he wrote a number of letters recommending the new contractor taking over the group waterwork schemes. No such letters have been produced in evidence nor do any copies of them appear to be available. Letters to the same effect were signed by John. These are dated the 13th of January 1971 and are (subject to variations in respect of figures etc.) in common form but John maintains they were not drafted until many months later and that some of them were never posted or delivered. The letters appear to have been on notepaper headed Pembroke Civil Engineers Limited though in one case the word "Ltd" appears to have been struck out leaving the heading at Pembroke Civil Engineers. A carbon copy of a letter addressed to The Committee, Milltown Group Water Scheme reads as follows:-

"Pembroke Civil Engineers Limited 94 St. Stephen's Green
Tel: 47173 Dublin 2
13th January, 1971

The Committee,
Milltown Group Water Scheme,
Co. Kildare.

Re: Group Water Scheme

Dear Sirs,

As requested we have today measured the work which has not been completed by the previous contractor and thank you for your order to "take over and complete the job" as per GW 60 enclosed.

It is to be understood, of course, that the sum of £750 paid to the previous contractor is, as agreed by the engineer and his agent, in full settlement of work carried on on site by him to date and will therefore not be embodied in our final invoice.

Yours faithfully,

JOHN HYNES."

Tom said in evidence that the "previous contractor" referred to in this letter was himself.

This appears to be confirmed by a further letter dated the 10th of May, 1971 purporting to be signed by Tom Hynes and addressed to the Committee Toger Road Group Water Scheme, Co. Louth. The letter is as follows:-

"The Committee Toger Road Group Water Scheme,

Co. Louth.

10th May, 1971

Re: Group Water Scheme

Dear Sirs,

I have today viewed the works as completed by Pembroke Civil Engineers Limited and agreed there was no further work carried out on this site by my forces when I was trading as Tom Hynes Building Contractor, 52, Lower O'Connell Street, Dublin 1, since October of last year. On November 24th last year I was paid £1,000 which represented all moneys due to me for work carried out on the site.

Yours faithfully,

Tom Hynes

TOM HYNES"

Tom, however, says that the signature on this letter is

not his. John admits that he wrote the letter and signed Tom's name to it but denies that Tom is the earlier building contractor referred to in it. He maintains that after he, John, bought the waterworks business from Tom in 1969 he continued to use the name "Tom Hynes" as a trading name and that he himself is the earlier building contractor referred to.

One grave embarrassment to John after Tom's bankruptcy was that cheques paid to workers working on group waterwork schemes and drawn on Tom's bank account in Wicklow were returned by the bank. During the course of the bank strike many of the workers employed on the group waterwork schemes had cashed these cheques with local traders. When these cheques were returned by the bank the damage done to the credit of the group waterworks contractor (be he Tom Hynes or John Hynes) was enormous. John had to make arrangements for the payment of these cheques over time.

He also paid other debts including sums due to the Wicklow Hotel in Dublin. Tom maintains that the moneysdue to the Wicklow Hotel in Dublin were in respect of wages cheques which he had cashed there. John says that some of these were social obligations o Tom's or even of Mr. Nicholas Murphy and that when he (John) discovered this he declined to pay any more of these debts. It does however appear that the money which paid these debts came from the on-going profits of the waterworks business.

The plaintiff in his statement of claim claims that John paid the plaintiff's debts for the period of some weeks after the bankruptcy but a list of creditors in John's handwriting found in the family home and produced at the hearing would appear to indicate that John continued to pay off Tom's debts for a period of at least some months. The payment of the debts

in respect of the waterworks must have taken considerably longer.

According to Tom, part of the agreement between himself and John was that John was to take over Tom's liabilities to Foster Finance Limited in respect of plant and machinery hired or leased to the business. John, while denying any general agreement with Tom, was prepared to entertain this proposition. He thought however that the liabilities which the hire purchase company was expecting him to assume were too great. He accordingly allowed the hire purchase company to repossess the machinery. The company sold the machinery at auction and proved for the balance in Tom's bankruptcy. John was subsequently able to buy in one of the machines which he needed for the waterworks at a bargain price.

Initially John used Pembroke Civil Engineers Limited as his vehicle for carrying on the waterworks schemes. But later he used another company called Group Waterworks Limited. In some cases he entered into contracts under the name of Group Waterworks Limited but in his office files used paper of Pembroke Civil Engineers Limited for copy letters. As a result a person reading the original file in the hands of the customer would know that the contract was between that customer and a company called Group Waterworks Limited. But a person reading the office file might be excused for thinking that the contract was between the customer and Pembroke Civil Engineers Limited. John says he used this device as an economy measure and it should be said that many of the copy letters, while bearing the heading Pembroke Civil Engineers Limited, also bear a stamp "Group Waterworks Limited".

The confrontation

An unsatisfactory feature of Tom's evidence was that he

was very poor on detail and on dates. By contrast John appeared to have a great grasp of detail. Tom gave no date as to when he considered John finally repudiated the agreement nor did he give any evidence about confronting John about his alleged breach of contract.

Mrs. Mary O'Connor, who was known in the family as Ena, was, generally, on good terms with both her brothers. They were always welcome to stay with her, even for protracted periods, if their business took them to England.

In 1976 Ena had a conversation with Tom. She later met John at the offices at 52 O'Connell Street and availed of the occasion to speak to him about what Tom had told her. She said she had heard a "weird and wonderful story" to the effect that John had made an agreement with Tom which he did not keep; that Tom had formed two companies, Pembroke Civil Engineers Limited and Hibernian Construction Limited; that the waterworks would be put into one of these and that John would have control and would pay off Tom's bankruptcy and then split the business "60 / 50".

At this stage she says that John corrected her and said "60 / 40". Later she says he said to her "so what can anybody do about it now".

She decided to refer back to Tom to make sure she had his story right. She did this and about four weeks later she spoke to John again. She says John said to her "who will you you believe - him or me?". But he also told her that Pembroke had not traded for two years; that he had carried on the business in a different name; and that he had no obligation to honour the agreement which he had made with Tom. He added that he had started to keep the agreement but that at some stage he

had said to Tom "this can't go on: you go north and I'll go south". Mrs. O'Connor is unsure of the exact dates of her alleged interviews with John in 1976. But at one of them she says that the question of the loan of £3,000.00 came up. She put to him Tom's side of the story; how the loan had been a loan of £3,000.00 to Tom; how John had come to Tom and told him that his mother had attacked him verbally and physically because the money hadn't been returned; and how Tom had given John £2,750.00 to return to his mother. She now repeated that this £3,000.00 was a loan which their mother had given to Tom as a cash injection into the business. When John did not accept this Ena asked their mother to come up from her office down stairs. Mrs. Hynes came up. Ena reported her story. When she came to the point about John having said to Tom that their mother had assaulted him verbally and physically to get the £3,000.00 back Mrs. Hynes said, "As God is my judge I never did".

John took out a piece of paper and on it he wrote down on one side "John's story" and on the other side "Tom's story".

He later admitted first that the story about his mother having assautled him to get the £3,000.00 back was a lie. He said he had told this story to Tom to get the money back for his mother. Later he admitted that the whole story about the £3,000.00 being a loan to him was a lie.

At some stage John tore in two the piece of paper on which he had written the two rival stories and walked out of the room. But the paper was retrieved, pieced together, and produced in evidence by Ena at the trial. In fact, the two stories as written down on the piece of paper do not fully, or accurately, reflect either story as told in evidence at

the trial. But what is interesting is that John has written at the end of the piece of paper the question "Do both stories tally correctly or is one a lie?".

Mrs. O'Connor says she made one further approach to John in an effort to resolve the dispute between her brothers. She says she asked John what he was going to do. She says John replied that the best he could do for Tom was to give him £10,000.00. She put this offer to Tom who rejected it.

John denies flatly that he ever made any such offer or that he made any of the alleged admissions attributed to him by Mrs. O'Connor.

In June 1976 a heated scene took place between Mrs. O'Connor and John at the offices in O'Connell Street. It was suggested that this scene coloured Mrs. O'Connor's attitude towards John so that it is necessary to say something further about it.

John and Ena both had offices for the purposes of their respective businesses at 52 Lower O'Connell Street, Dublin. But John was cramped for space and Ena told him that he could use her offices for his personal use and for interviewing clients when she was away in England. In June 1976 Ena discovered that John had, in effect, taken over her offices and moved some of his staff and office furniture into them. A scene then took place between Ena and John and Ena ordered John to remove his furniture out of her offices. John sent for one of his staff, Mr. William Glavin, to assist him in removing the furniture. He then asked Mr. Glavin, in Ena's presence, "Who owns the waterworks?". Mr. Glavin replied, "You do, John".

Ena has not spoken to John since.

It was suggested that this row between Ena and John over

John's attempt to take over her office explained the antipathy which Ena showed towards John at the trial. I do not accept this. It appears to me that the real cause of the row between Ena and John was her indignation at what she regarded as his shabby treatment of Tom. The row over John's attempt to take over her office was merely the occasion on which her indignation broke out. That John understood this is, it appears to me, illustrated by the fact of his sending for Mr. Galvin and asking him the question, "Who owns the waterworks?"

Statute of Frauds

The defendant maintains that the alleged agreement between him and Tom, being a contract not to be performed within the space of one year from the making thereof, required to be evidenced by a memorandum in writing and that there is no such memorandum in existence. The plaintiff denies that the alleged agreement required to be evidenced in writing but pleads that, in any event, there was part performance on the plaintiff's part sufficient to take the case out of the Statute of Frauds. The evidence of part performance is extremely tenuous. It amounts to little more than the writing of letters, no copies of which have been produced. One might also say that the plaintiff co-operated in the takeover by John or his company of the plaintiff's business and that such co-operation must have been necessary to John at this time and was consistent with a contract such as alleged. But here again the evidence is very vague.

However, the plaintiff's principal submission is that the alleged agreement was not governed by the Statute of Frauds at all. In deciding whether an agreement was an agreement

"not to be performed within the space of one year from the making thereof" one looks at the situation which prevailed at the time when the agreement was made and at the intentions of the parties. There was no intention that the agreement should not be completed within the space of one year. It would appear that the intention was that the implementation of the agreement should commence immediately and that the completion of the agreement should take place as soon as possible.

The evidence of Mr. Edmund Burke throws some light on the intention of the parties about the time of the making of the agreement. At the meeting in Jury's Hotel with John and Tom at about the time of Tom's bankruptcy Mr. Burke understood that there was come scheme to pay off Tom's bankruptcy. Witness enquired how long it would take to which Tom replied that he thought it would take a year or so for him "to come back".

I am satisfied that there was no intention that the agreement should not be performed within the space of one year from the making thereof and I am satisfied also that it was not an agreement which, from its nature, precluded such performance. I am satisfied therefore that it was not an agreement "not to be performed within the space of one year from the making thereof" and that the Stature of Frauds does not apply to it.

Statute of Limitations

I now turn to the aspect of the case which has caused me greatest difficulty.

The defendant pleads that the plaintiff's claim, even if well founded, is statute barred.

The date of the alleged agreement is January 1971. The

present proceedings were instituted on the 1st of August, 1978 There was no letter written by or on behalf of the plaintiff prior to the institution of proceedings and no clear statement from him as to when he regarded the defendant as having repudiated the agreement. Tom's apparant inactivity between 1971 and 1978 is difficult to explain even bearing in mind that during all that time he was an undischarged bankrupt. It does appear from his evidence however that for some time prior to July 1978 he was urging the Official Assignee to obtain permission for the institution of the present proceedings. Permission was obtained from the Bankruptcy Court for the issue of the proceedings on the 31st of July 1978 and the Plenary Summons was issued on the 1st of August, 1978.

The relevant portion of the plaintiff's statement of claim states his claim as follows:-

> "In or around the 13th day of January 1971 the first named plaintiff entered into an agreement with the defendant whereby certain companies, namely Pembroke Civil Engineering Limited and Hibernia Construction Limited, would be formed by the defendant. It was agreed, inter alia, between the parties that the defendant would have the controlling interest in the said companies and it was further agreed that the first-named plaintiff would seek out and generate business which would be carried out by the said companies.
>
> .....
>
> " It was further agreed between the first-named plaintiff and the defendant that the defendant would be employed by the companies and he would be paid a wage equivalent to that which he had been previously paid when working for the first-named plaintiff personally. The remuneration

was to include expenses. It was further agreed that all profits of the said companies would go to discharge the first-named plaintintiff's debts, the subject-matter of the said bankruptcy. On the first-named plaintiff being discharged from this bankruptcy the profits of the said companies would be shared as to 60% by the first-named plaintiff and 40% by the defendant.

"The defendant performed the said agreement for a number of weeks and has since failed, neglected and refused to honour same.

"As a consequence of the defendant's failure to honour his commitments under and by virtue of the said contract the first-named plaintiff has incurred loss, damage and expense."

The relief claimed in the Statement of Claim was as follows:-

"(1) Specific performance of an agreement entered into between the first-named plaintiff of the one part and the defendant of the other part whereby the defendant agreed to transfer to the first-named plaintiff 60% shareholding interest in Pembroke Civil Engineering Limited and Hibernia Construction Limited.

(2) Damages for breach of contract.

(3) An Order for the taking of all necessary accounts and enquiries.

(4) An account of the profits of the said companies.

(5) Further other and alternative relief.

(6) Costs."

At an early stage in the proceedings I invited counsel for the plaintiff to consider the pleadings as I did not see

how some of the relief claimed in the Statement of Claim could be obtained on the basis of the case as pleaded. No application was however made to amend the pleadings until after the conclusion of the case, in the circumstances hereinafter described.

As previously stated the plaintiff pleaded in his Statement of Claim that the defendant had performed the said agreement for a number of weeks and that he had since failed, neglected and refused to honour same.

On the 20th of November, 1980 the defendant's solicitors wrote to the plaintiff's solicitors a letter demanding particulars in which they asked (at paragraph 5) the plaintiff to specify:-

(a) the weeks and year in respect of which it is alleged that the defendant performed the alleged agreement: and

(b) the date on which it is alleged the defendant failed to honour the alleged agreement.

The plaintiff's solicitors replied to this query by letter dated the 18th of December 1980 in which they state at paragraph 5 the following -

"(a) The plaintiff contends that the defendant part performed the said agreement for approximately five weeks from the date of the said agreement in January, 1971

(b) See (a) above."

Despite this plea it seems clear from the evidence that John must have performed at least some of the terms of the agreement for considerably longer than this for it must have taken considerably longer to pay off the men's wages-cheques which had been returned at the conclusion of the bank strike.

Moreover, if as I accept, the loan of £3,000.00 was to Tom for the purpose of the business, and as I also accept, was applied by him for that purpose, the repayment by John to his mother of £250 in February 1974, being part of that loan, would represent the fulfilment by John, of one of his obligations under the agreement.

Both parties are agreed, and I accept, that once the Statute of Limitations is pleaded as a defence the onus of proving that the case is not statute barred rests on the plaintiff.

The plaintiff, in his reply to the defendant's defence, denies that his claim is statute barred but does not plead any special defence under the Statute of Limitations.

At the conclusion of the case I was satisfied that a meeting did in fact take place in Jury's Hotel between John, Tom and Edmund Burke at or about the time of Tom's bankruptcy where John admitted to Edmund Burke that he was "minding the business for Tom". It appeared to me that this diversion was consistent with some kind of private arrangement between the brothers of the kind for which Tom contended. It also occurred to me that Section 44, paragraph (b) of the Statute of Limitations 1957 might have some relevance in this context as might also the case of Tito -v- Waddell (1977 3 All England Reports page 129) and in particular the judgment of MeGarry V.C. in that case.

I accordingly re-entered the case to hear Counsel's submissions on these points. Counsel were agreed that Section 44 of the Statutes of Limitations Act 1957 and the decision in Tito -v- Waddell were of no relevance to the present case as pleaded. Counsel for the Plaintiff did however, at that stage, apply to amend the pleadings by pleading Section 44

paragraph (b) of the Statute of Limitations Act 1957. Counsel for the defendant, opposed this application on the grounds that, both parties having closed their respective cases, and the witnesses having been examined and cross-examined on the basis of one set of pleadings, it would not be fair to amend the pleadings now. I thought that defence Counsel's submission on this point was correct and I accordingly refused the application.

Counsel for the plaintiff admits that the proceedings in the present case having been issued on August 1st 1978, the onus is on him to show that the cause of action in respect of which he claims relief arose since August 1st 1972. He admits that Hibernia Construction Limited never traded and that he can obtain no effective relief in respect of that portion of the business. But so far as the waterworks business was concerned he submits that the agreement between the two brothers was one whereby the ongoing profits of the business were to be applied from time to time in payment of the creditors entitled in the plaintiff's bankruptcy and that thereafter they were to be divided as to 60% to the plaintiff and 40% to the defendant. The agreement was therefore one which placed on the defendant an ongoing series of obligations and the plaintiff could sue in respect of each default as each give rise to a separate cause of action. In the present case the relief which the plaintiff was seeking was an account of the profits of the waterworks business limited to 6 years prior to the date of action brought and up to the date of Judgment or Order in the case.

The only clear evidence we have of total repudiation by John of his obligations under the alleged contract comes from

Mrs. Mary O'Connor and dates from 1976. I accept Mrs. O'Connor's version of what happened between her and John at the three interviews in 1976. From her account it would appear that at different times John denied that he had any such agreement with Tom; admitted that he had such an agreement but contended that no one could force him to honour it; admitted that he had such an agreement but contended that as he had only used Pembroke Civil Engineering Limited as his vehicle for carrying on the waterworks business for a period of two years, he could not be forced to honour the agreement; admitted that he had started to keep the agreement but that at some stage he had repudiated it saying to Tom "this can't go on: you go north and I'll go south". Finally I accept that John offered Tom £10,000 in settlement of Tom's claims under the agreement.

I accept the evidence which Mrs. O'Connor gave in respect of these matters. Her evidence may be inaccurate in particulars but I accept it as being true in all essentials. In particular, I accept that John said the things which she attributed to him. Though it does not follow from this that I accept that everything that John said was true.

I do, however, accept that at the end of the scene between John and Ena in June 1976 John sent for Mr. William Glavin and asked him the question "Who owns the waterworks!" to which Mr. Glavin replied "You do John". I totally accept Mr. Glavin as being an honest witness and that the answer he gave was the truth as he understood it. I believe, however, that John knew that the situation was otherwise and that this incident, even on John's case, marks the final repudiation by John of his obligations to Tom under the agreement. I also hold that

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the winding down of Pembroke Engineering Limited and the diversion of the group waterworks business elsewhere was a conscious effort by John to evade his obligations to Tom under the agreement.

In all these circumstances I accept that the submission of Counsel for the plaintiff is correct and that he has made out his case for the limited relief which he claims. I will, accordingly, discuss with Counsel the form which the account is to take.

Dec B

14/3/85