

THE HIGH COURT

[2022] IEHC 409
[Record No. 2020/84S]

BETWEEN

NOEL CONWAY CONSTRUCTION LIMITED

PLAINTIFF

AND

**CARLY AGENCIES LIMITED T/A TRYST SHOES,
FRANCIS HANRAHAN AND PATRICIA HANRAHAN**

DEFENDANTS

JUDGMENT of Ms. Justice Bolger delivered on the 4th day of July 2022

1. This is the application of the second and third named defendants to be removed from the proceedings pursuant to O.15, r.13 on the basis that neither of them are a necessary party to them. For the reasons I set out below I am refusing this application.

Background

2. The second named defendant is the only director of the first named company (hereinafter referred to as 'the company') and the third named defendant is the company secretary and the spouse of the second named defendant. The company was the leaseholder of a shop premises in Dublin called Tryst and traded under the name Tryst Shoes. In February 2019 the plaintiff was contacted by an architect to quote for fitting out the premises as a shoe shop. The plaintiff provided estimates and agreed to commence work in July 2019 which was completed on 9 December 2019. The plaintiff's claim is for the sum of €201,756.14 which remains due and owing in relation to those works after deduction of some interim payments that were made.
3. There is no dispute that: -
 - (i) The work was done.
 - (ii) The work related solely to the retail premises.
 - (iii) The second and third named defendants derived no personal benefit from the work.
4. The dispute relates to whether the plaintiff's contract was with the company or with the second named defendant in his personal capacity. The third named defendant's involvement in the proceedings derives from a conveyance made between the second and third named defendants on 13 February 2020 when the second named defendant transferred his interest in their unencumbered family home to the third named defendant. No explanation has been proffered by the second or third named defendants for the transfer other than that the second named defendant had no debt against him at that time, and was therefore free to deal with his property as he chose to. The plaintiff claims that the second named defendant was, at the time of the conveyance, aware of what the plaintiff says was his personal liability for the monies due to the plaintiff and that the

conveyance was intended to deprive the plaintiff of access to the second named defendant's asset in satisfaction of the plaintiff's debt to it at that time.

4. In order to establish whether and, if so, when the plaintiff was aware of the company's role in the contract, it is necessary to examine the chronology of events.
5. The plaintiff claims that when it was approached by an architect in February 2019, its understanding was that this was on behalf of the second and third named defendants. The plaintiff's director Noel Conway met the architect and the second named defendant at the retail premises on 27 February 2019 and agreed to provide an estimate based on various drawings provided to him. All those drawings and later plans identified the client as the second named defendant and the project as 'Tryst'. There was no mention of the company. The second named defendant maintains the reference to Tryst was in fact a reference to the company as this was its trading name. However it was also the name of the shop being fitted out. On the basis of the evidence put before the court, I am satisfied that the first occasion on which the company was mentioned during the engagement on this contract was when a payment was made to the plaintiff by a company cheque in September 2019 (as referred to at para. 5 of the second named defendant's grounding affidavit). This does not seem to have been on foot of any documents such as an invoice. The plaintiff claims that this payment did not alert it to the fact that the second named defendant was acting on behalf of a limited liability company, and that it did not mind who paid for the works it had contracted with the second named defendant personally to do.
6. This next involvement of the company, on the evidence before the court, occurred on 5 December 2019. The plaintiff had raised an invoice to the second named defendant personally in the amount of €75,000 including VAT. This was paid by way of bank transfer from the company's bank account on 5 December 2019 and the plaintiff's director Mr. Conway confirmed (at para. 18 of his third affidavit) that the invoice was changed at that time to match the name on the payment. He does not say who, if anyone, asked for this to be done or how or why this reaction to a payment of monies due for work done by the plaintiff for the second named defendant (as the plaintiff contends) was being paid for by a company. On the same day (5 December 2019) the plaintiff raised an invoice for the balance of €201,756.14 addressed to the second and third named defendants at their home address rather than to the address of the shop to which the previous invoice had been sent. Mr. Conway offered no explanation for having sent the second invoice to the second and third named defendants after he had apparently willingly altered the first invoice to address it to the company.
7. As of the date of the amended invoice and the second invoice the works were ongoing and finished a few days later. By January 2020, payment was still outstanding and the plaintiff contacted the second named defendant on a number of occasions and was assured by him that he would discharge the debt. A Lorraine Conway swore an affidavit on behalf of the plaintiff in which she sets out an account of her conversations with the second named defendant including one on 7 February 2020, when she says he told her he

had released funds from his pension to pay the outstanding sums due. Ms. Conway's affidavit does not mention any explanation offered by the second named defendant as to why he would seek to pay the company's debt by releasing funds from his personal pension. Mr. Conway also refers to similar conversations with the second named defendant about paying the debts from his pension in which there was no mention as to why the second named defendant was doing that in relation to a company debt. Neither Mr. nor Ms. Conway's affidavits were replied to and those averments therefore remain unchallenged.

8. The conveyance by the second named defendant to the third named defendant of his interest in their unencumbered family home on 13 February 2019 occurred around the same time that Mr. Conway and Ms. Conway have averred they were having ongoing conversations with the second named defendant about the debt, for which the second named defendant is said by them to have accepted responsibility.
9. The plaintiff issued these proceedings by way of summary summons on 5 March 2020 and filed a notice of motion seeking liberty to enter final judgment against the company, the second named defendant and the third named defendant on 5 October 2020. The second named defendant and third named defendants issued the within motion on 18 March 2021 and, apparently in response to the dispute identified therein about the role of the second and third named defendants in the debt the subject matter of the proceedings, the plaintiff agreed to adjourn the matter to a plenary hearing.
10. The company went into liquidation on 3 June 2021 and the plaintiff's solicitor attended the creditor's meeting by way of proxy as a contingent creditor on 3 June 2021. The plaintiff says the decisions to firstly join the company in the proceedings and secondly to attend the creditor's meeting as a contingency creditor were prudent decisions made with a view to protecting their options.
11. The statement of claim, delivered on 18 June 2021 after the company went into liquidation, only seeks reliefs against the second and third named defendants. The relief against the second named defendant is judgment in the amount of the debt due, and the reliefs sought against the third named defendant arise from s.74(3) of the Land and Conveyancing Law Reform Act 2009 seeking to set aside the purported transfer of the family home.

Submissions

12. The plaintiff claims that the contract was made with the second named defendant personally and that his conveyance to the third named defendant was intended to deprive the plaintiff of access to the second named defendant's asset in satisfaction of the debt.
13. The second and third named defendants say they are not necessary parties to the proceedings. They contend that s.74(3) is not applicable because of subs. 4(b) which provides that subs. 3 does not "affect any other law relating to bankruptcy of an

individual or corporate insolvency". The second and third named defendants argue that the plaintiff required the leave of the court to proceed against the company as a company in liquidation pursuant to s.678 of the Companies Act 2014. The plaintiff argues that no such restriction applies as it has not proceeded against the company, as the statement of claim only seeks reliefs against the second and third named defendants.

14. The second and third named defendants seek to rely on an incorrect averment made by the plaintiff in its affidavit grounding the summary summons to the effect that all three defendants negotiated and entered the lease for the retail premises. In fact, the lease was only ever with the company. I do not place the same significance on this incorrect averment by Mr. Conway and I accept that it was made by him at a time when he believed it to be true.

The evidence

15. For the purpose of this application I am satisfied that the following evidence has been put before the court and has not been contradicted: -
- (i) The lease in relation to the retail property was entered into by the company and the second and third named defendants had no involvement in it.
 - (ii) The second named defendant says he was acting as agent for the company but there is no evidence of him communicating that to the plaintiff.
 - (iii) The first evidence of the company's involvement was in September 2019 when a payment was made to the plaintiff from the company's bank account.
 - (iv) The second named defendant has not averred that he informed the plaintiff that he was acting as agent for the company.
 - (v) The plaintiff was not made aware of anything prior to September 2019 to alert it of the company's involvement in the business.
 - (vi) The works done by the plaintiff were solely on the retail premises for which the second and third named defendants derived no personal benefit other than whatever benefit they had from their involvement with the company.
 - (vii) The interim payments made in September and December 2019 were made by the company.
 - (viii) The first invoice raised by the plaintiff was to the second named defendant and was amended to be addressed to the company after payment was made by the company. The second invoice was addressed to the second and third named defendants at their home address.
 - (ix) The second named defendant discussed payment of monies due to the plaintiff with Mr. Conway and Ms. Conway, on behalf of the plaintiff, in January and February 2019 and made no mention of the company and he proposed accessing monies from his pension to make the payments due.

- (x) The conveyance of the second named defendant's interest in the family home to the third named defendant occurred on 9 February 2019 while the second named defendant was actively discussing payment of the monies due to the plaintiff with Mr. and Ms. Conway and prior to his last conversation with Mr. Conway on 19 February 2019.

Decision

16. Order 15, r.13 allows the court discretion in deciding whether or not parties should be removed from proceedings. The test is, as explained by Baker J. in *Raymond & Ors. v. Moyles & Ors.* [2017] IEHC 688 whether they are necessary parties to the claims as pleaded:

"25. I do not consider that the jurisdiction under O. 15 by which a court may remove a party 'improperly' joined, or a party who was not a necessary party, is one that may be engaged in the present case. It could not be said that the first, second and third defendants were improperly joined in the sense that they are not necessary parties. It may emerge in the course of the trial that they were not the true contracting parties, but it could not be said that they are not necessary parties to the claim as pleaded.

26. Further, I consider that the provisions of O. 15 are more applicable to a case where it can readily be ascertained from the proceedings, from the nature of the relief claimed or the statutory or other basis of that relief that a party is not a necessary party in the true sense to the proceedings".

17. It is clear from what Baker J. said at para. 25 of her decision that it may require a trial to establish whether the second and third named defendants were the "true contracting parties" or not. Whether or not the issues can be resolved at an interlocutory stage such as the second and third named defendants seek here, will also depend on whether there is a prospect that discovery and/or oral testimony may clarify the true nature of the relationship between the plaintiff and the second and third named defendants and/or the true identity of the party or parties with whom the plaintiff was contracting.
18. In relation to s.74(3) it is clear that judgment does not have to be entered for a conveyance to be challenged as having been made with the intention of defrauding a "creditor or other person". The Court of Appeal found in *Doherty v. Quigley* [2015] IECA 297 that this could include a future creditor in relation to the precursor of s.74(3). I note at para. 22 of Peart J.'s decision the reliance that Peart J. placed on the absence of an explanation by the first named defendant for the transfer that was sought to be impugned.
19. I do not consider it sufficient for the second named defendant not to offer any explanation for his decision to transfer what the plaintiff says was the second named defendant's only asset to the third named defendant, particularly after the plaintiff's deponent averred without challenge that the second named defendant had indicated his intention to use his personal pension to discharge debts the second named defendant now says were the sole

responsibility of the company. It is the second and third named defendants who seek at an interlocutory stage to be removed from the proceedings, and the absence of any explanation for the transfer is not helpful to their position.

20. I am not satisfied at this interlocutory point in the proceedings that the second and third named defendants have established that they are not necessary parties to the proceedings. The second named defendant played a role in negotiating the works done by the plaintiff, which he says was done on behalf of and as agent of the company. There was no evidence of the second named defendant having advised the plaintiff of the nature of what he says was his agency role or any evidence of the company's involvement in the contract until September 2019 at the earliest. The third named defendant is the recipient of the transfer that the plaintiff seeks to set aside.
21. Both the second and third named defendants are, on the basis of the evidence currently before the court, possibly necessary parties to the proceedings. It may be that the evidence to be adduced including by way of discovery and oral testimony at trial will satisfy the trial judge that the second and third named defendants are not necessary parties to the proceedings and/or were not parties who can have any liability to the plaintiff. However, I do not consider it appropriate to deny, at this stage and on the basis of the evidence before this Court, the plaintiff its opportunity to make its case against the second and third named defendants at trial. I therefore refuse the application.

Indicative view on costs

22. My indicative view on costs is that as the second and third named defendants as moving parties to this application have not succeeded in their motion, that costs should follow the event in accordance with s.169 of the Legal Services Regulation Act 2015 but with a stay on the costs order until the resolution of the entire proceedings. I will list the matter for mention at 10 a.m. on 21 July for the purpose of any submissions either party wishes to make on costs and/or the final orders to be made. I am not requiring written submissions but if the parties do wish to make them they should be lodged with the court at least 24 hours before the matter is back before me.