Neutral Citation No: [2020] NIQB 49 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **MAG11226** ***Delivered:*** **11/05/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF NEWTOWNARDS

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18/039686/A01

BETWEEN:

HUGH BURGESS

Plaintiff;

-and-

JOHN BURGESS

Defendant.

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MAGUIRE J

Introduction

[1] The plaintiff in this appeal is Hugh Burgess ("Hugh"). The defendant is John Burgess ("John"). They are brothers.

[2] Proceedings began on 19 April 2018 by way of civil bill. The endorsement on it is as follows:

> "The plaintiff's claim [is] for £25,426.50 … sustained by the plaintiff as a result of the negligence, breach of contract [and] misrepresentation of the defendant in or about his performance … of settlement terms arising out of a High Court action on or after 22 June 2015."

[3] The civil bill gave rise to a Notice for Further and Better Particulars issued by the defendant seeking information about the claim made. The plaintiff's reply to same was provided on 14 November 2018.

[4] As regards how the figure claimed was arrived at it is indicated that it was comprised as follows:

> "(i) Payment to Joseph F McCollum, the creditor's solicitors, £4,343.32.
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> (ii) Payment to the trustee in bankruptcy, £6,570.47.
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> (iii) Payment to the trustee's agent Jarleith O'Hare £100.
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> (iv) Payment to trustee in bankruptcy's solicitor, Richard Barbour, £1,200.
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> (v) Payment to insurers, Willis, for trustee in bankruptcy, £2,837.02.
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> (vi) Payment to trustee's auctioneers, James Armstrong, £600.
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> (vii) Professional fees incurred on advising on bankruptcy proceedings owing to Russell and Co Solicitors, £3,792.95.
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> (viii) Monies lost on foreign holiday, £575.
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> (ix) Advertisement of annulment order in Belfast Telegraph and Belfast Gazette £249.74.
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> (x) Registration of annulment order in Registry of Deeds £20.
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> (xi) Fee to McAtamney solicitors to apply for annulment of bankruptcy £1,833.
>
> (xii) Fee paid to Shoesmith solicitors for advices on setting aside bankruptcy order £3,000.
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> Total £25,426.50."

[5] The civil bill came on for hearing before His Honour Judge Grant on 1 May 2019. The judge found in favour of the plaintiff. He awarded the sum of £12,113.79.

[6] On 17 March 2019 the defendant (John) appealed to this court against the judge's order.

The background to the litigation

[7] At the core of the present appeal is an earlier round of litigation between what the court shall describe as the Marks family, on the one hand, as the plaintiffs and, on the other hand, the two Burgess brothers, as defendants. This litigation encompassed two claims and these were listed together in the High Court and were the subject of a settlement on 22 June 2015. The terms of the settlement were provided in a schedule and the present litigation arises out of the compliance by John with the terms arrived at. This is plain from paras [2]-[5] of the plaintiff's replies to the defendant's Notice for Further and Better Particulars herein.

[8] Before considering the terms of the settlement, the court will make it clear that it is not in dispute between the brothers that their liabilities to the Marks family set out in the schedule were joint and several.

[9] The settlement terms, inter alia, provided –

> "(1) The defendants shall pay the plaintiffs the total sum of £90,000 general damages and costs in compromise of all claims by all of the plaintiffs in both actions. The said sum of £90,000 shall be paid to the plaintiffs' solicitors Joseph F McCollum and Co [Marks' solicitors] within 10 weeks of 22 June 2015. The said payment of £90,000 shall be inclusive of the plaintiffs' costs in both actions.
>
> (2) In the event that the sum of £90,000 is not paid within 10 weeks of 22 June 2015 daily interest will accrue on any balance remaining outstanding at the rate of 10% per annum.
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> (3) The defendants shall be jointly and severally liable to the plaintiffs to pay the total sum of £90,000 and any interest accruing thereon as set out in (1) and (2) above save that it is agreed between the defendants that pending any further agreements between the defendants that each will contribute 50% of the said sum of £90,000 together with 50% of any interest accruing thereon.
>
> (4) In default of payment of the said sum of £90,000 together with any interest accruing thereon on or before 22 December 2015, the plaintiff shall, subject to paragraph (5) below, be at liberty immediately thereafter to extract consent judgments against the defendants as follows:

(a) £29,000 against both defendants in action 2009/024637 with no order as to costs save an order for legal aid taxation of the plaintiffs' costs;

(b) £116,000 against both defendants in action 2009/024642 with no order as to costs.

(5) In the event of any payments by the defendants and each of them on or before 22 December 2015, then the said payments shall be discounted from the consent judgment set out in (4) above in the proportions of one fifth of any payment shall be discounted from the judgment for £29,000 and four fifths of any payment shall be discounted from the judgment for £116,000.

(6) In the event that either of the defendants fails to discharge his own 50% liability as set out in (3) above and the other defendant is compelled to satisfy any outstanding sum due to the plaintiffs over and above his own 50% share and further has to make any payment over and above his own liability to interest, then it is agreed that the said overpayments beyond 50% and any liability for additional interest shall be recovered as debt against the defaulting defendant …".

[10] In respect of the terms set out by way of summary it can be said that:

(a) In the first phase, which ran for 10 weeks following 22 June 2015 the obligation to the Marks family was to pay the sum of £90,000 to the plaintiff's solicitors.

(b) Other provisions of the settlement only came into play if the obligation supra at (1) was not performed.

(c) If the sum of £90,000 was not paid in the way provided for at (a) above, what would then happen is that daily interest would accrue on any balance which remained outstanding at the rate of 10% per annum.

(d) If by 22 December 2015 there was default in the payment of the £90,000 plus any accrued interest this would entitle the Marks family to extract consent judgments against the defendants for (in total) the sum of £145,000.

(e) Paragraph 6 appears to govern events not as between the Marks family and the brothers but as between the brothers themselves in a context

where one has not paid his share of the payments so that the other has to satisfy any outstanding sum due.

How the brothers met the settlement terms

[11] The stark facts in this case appear to be as follows:

(i) After the settlement was entered into, Hugh on 16 September 2015 paid £45,000 which he viewed as his share of the cost of the settlement.

(ii) However, John failed to do so within the required time frame.

(iii) As a result the Marks family exercised its right to extract judgments in their favour amounting to £145,000.

(iv) These judgments were not met.

(v) As a result the Marks family issued a statutory demand against Hugh. This demand was later withdrawn and replaced by another similar demand. In turn this led to a bankruptcy petition being taken out and ultimately a bankruptcy order being made against Hugh.

(vi) Similar action was taken by the Marks family against John save that ultimately the bankruptcy petition was withdrawn and not proceeded with. This occurred because the Marks family was persuaded to withdraw the petition on being told that John eventually could and would pay. As a result John was not at any stage actually made the subject of a bankruptcy order.

(vii) Eventually, by two instalments (one on 15 September 2017 and one on 3 November 2017) John discharged the obligations which had not been discharged in favour of the Marks family. He did this by paying them the total sum of £116,612.57. John claims that he would have acted sooner but was unable to do so because he was in dire financial straits as a result of the collapse of the property market.

(viii) Hugh was released from the bankruptcy order which had been made against him on 16 June 2017 when the order was annulled on 18 December 2017.

Where matters now stand vis a vis the Marks family?

[12] No issue remains as between the Marks family and the brothers. The Marks family has been paid what was due to them under the settlement agreement of 22 June 2015. No-one has sought in this litigation to re-open that.

Hugh's Case

[13] Hugh's case is based on the law of contract, the contract being based on the agreement referred to above. In essence, he argues that he is contractually entitled to recover in the form of damages the sum claimed as being the losses he has suffered by reason of his brother's failure to pay his share of the original figure of £90,000 due to the Marks family. His losses, set out in detail above at paragraph [4] above, therefore embrace the cost to him of the various steps which he had to take as a result of John's behaviour. They chiefly, if not exclusively, relate to aspects of the issues connected to the bankruptcy order and its later annulment.

John's Case

[14] John's case is that there is nothing in the agreement which enables Hugh to recover the alleged losses. In short, there simply is no contractual basis for the claim. Moreover, even if there was a contractual basis for the claim, which he denies, the damages claim is unsustainable as the losses causally arise not because of what John did or did not do, but arose from Hugh's own failure to act at a time when he could have easily extinguished any remaining liability to the Marks family.

The Judge's judgment

[15] The Judge did not provide a written judgment but the court surmises that he must have accepted the argument that there was in principle a contractual liability owed by John to Hugh. His finding in this regard must have led to a consideration of the quantum of Hugh's loss, which in turn led to the modification of the loss from that claimed to what was awarded in damages.

The hearing

[16] At the hearing before the court, it heard evidence from the two brothers as well as evidence from the solicitor who had acted for John throughout this period.

[17] It is unnecessary for the resolution of this appeal for the court to describe the evidence given before it in detail. In the court's opinion, the bulk of the evidence simply provided the context and it is unnecessary for the court to seek to resolve a number of areas of dispute between the parties which emerged. The court will simply observe that it is satisfied that both brothers were acting largely at the material time in their own interests. Both had assets which ultimately were sufficient to meet the money owing to the Marks family. Hugh appears to have deliberately divested himself of some of his assets (principally to his wife) when it appeared that there was trouble ahead while John, who appears to have been the more experienced businessman of the two, appears to have been unable to liquidise assets for a period due, at least in part, to securities he had over time provided to a bank.

The court's assessment

[18] The crucial document in this appeal is the agreement which was entered into between the parties on 22 June 2015. While this agreement primarily expressed the terms of the resolution of the dispute between the then plaintiffs – the Marks family – and the brothers, it did not only cover this aspect.

[19] There are two terms within the settlement agreement which are about the position as between the brothers: clause 3 and clause 6.

[20] Clause 3 is directed towards the obligations which existed or would exist prior to 22 December 2015. In effect, in this context, it says that "it is agreed between the defendants (the brothers)…that each will contribute 50% of the sum of £90,000 together with 50% of any interest accruing thereon"[1].

[21] Clause 6 deals with the situation where either of the defendants failed "to discharge his own 50% liability as set in" Clause 3 and where "the other defendant is compelled to satisfy any outstanding sum due to the plaintiffs over and above his own 50% share and further has to make any payment over and above his own liability to interest". In those circumstances, "it [was] agreed that the said overpayments beyond 50% and any liability for additional interest shall be recovered as a debt against the defendant in default".

[22] Clause 3 is therefore a 50/50 split mutual provision in respect of the sum due and interest thereon. However, notably, it does not contain any specific provision dealing with the enforcement of its terms.

[23] Clause 6's substantive provisions, in contrast, touch on enforcement, though same only arises where two pre-conditions are met.

[24] In the present case, Hugh, by paying £45k in September 2015, did seek to discharge his own 50% liability. That fulfilled the first pre-condition in clause 6 but he was not compelled to (and in fact did not) pay more. The fact was conceded by Hugh during cross examination. It was John who subsequently paid the outstanding monies due to the Marks family. Accordingly, the second pre-condition in clause 6 has not been fulfilled, with the consequence that the recovery mechanism found in the clause is, in the court's opinion, not in play.

[25] What has happened in this case is that further provisions in the agreement as to what was to happen as between the Marks family and the brothers were triggered giving rise to the former being able to obtain consent judgments against each brother with all that entailed thereafter. However, the agreement does not include

[1] The words excluded in the quotation are "pending any further agreements between the defendants". It does not appear that any further agreements were made.

provisions dealing with other aspects of the relationship as between the two brothers other than those already discussed.

[26] In these circumstances the court is of the view that the agreement has not bestowed on Hugh any contractual right to enforce against John in the way in which he has sought to do in these proceedings.

[27] In short, there is no provision in the agreement conferring such a right. Nor would the court be minded to imply any such provision in the presence of a specific clause – clause 6 – which is directed at aspects of default.

[28] It follows that these proceedings cannot succeed. Accordingly, the court will allow John's appeal and will dismiss the original civil bill.

[29] It is unnecessary for the court to address the question of the quantum of damages had there been a contractual right which could have been enforced in this court.