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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION
(COMPANIES)

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IN THE MATTER OF A & M RETAIL LIMITED
AND IN THE MATTER OF THE INSOLVENCY (NI) ORDER 1989

Between:

1. JOHN APPERLEY
2. LEANN APPERLEY

Petitioners

and

1. ORAN McATAMNEY
2. ELIZABETH McATAMNEY
3. A & M RETAIL LIMITED

Respondents

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William Gowdy QC and Alistair Fletcher (instructed by King & Gowdy) for the Petitioners
David Dunlop QC and William Sinton (instructed by Tughans) for the Respondents

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HUMPHREYS J

Introduction

[1] This application comes before the court by way of a summons seeking relief pursuant to a 'liberty to apply' provision contained in terms of settlement entered into between the parties on 5 October 2020.

[2] The petitioners and the first and second respondents were shareholders in the third respondent ('the company') which carried on business as retail butchers using the trading style 'McAtamneys.' The petitioners exclusively owned and controlled two other companies, Barraine Limited and Barraine Commercials Limited.

[3] Differences having arisen between them, the petitioners commenced proceedings seeking relief by way of winding up of the company on the just and equitable ground or relief from unfair prejudice pursuant to section 994 of the Companies Act 2006. Other satellite litigation ensued whereby various parties sought to restrain one another from taking steps associated with the management of the company.

[4] The terms of settlement provided that the first and second respondents would acquire the petitioners' shares in the company and also their interests in certain jointly owned properties, in each case at values to be determined by independent experts. The court stayed the proceedings on foot of those terms on 22 October 2020, affording the parties liberty to apply for the purpose of carrying the terms into effect.

[5] The transfer of both the shares and the property interests concluded on 7 July 2021 but issues have arisen in relation to the implementation of the terms of settlement, resulting in a sum in dispute being held in escrow.

The Terms of Settlement

[6] In relation to the share purchase, the terms provided that the shares were to be valued by an independent valuer agreed between the parties or in default nominated by the Chairman of the Ulster Society of the Institute of Chartered Accountants in Ireland. The valuation was to be on an open market basis without any minority shareholder discount. The parties agreed that BDO would carry out the share valuation exercise.

[7] Clause 5(13) of the terms provided:

> *"The valuation of the shares shall be on the basis that all debts owed between either or both companies on the one hand and John Apperley, Leann Apperley, Barraine Limited, Barraine Commercials Limited, Oran McAtamney, Elizabeth McAtamney and O&E McAtamney Retail Limited on the other hand as certified by ASM (NI) Limited as noted in paragraph 10 below will be repaid in full."*

[8] Pursuant to clause 10 of the terms, the sum to be paid by the respondents on completion was to be adjusted by:

(i) Deducting such sum as is certified by ASM (NI) Limited as being due to the company by the petitioners, Barraine Limited or Barraine Commercials Limited; and

(ii) Adding such sum as is certified by ASM (NI) Limited as being due by the company to the petitioners, Barraine Limited or Barraine Commercials Limited.

[9] ASM (NI) Limited ('ASM') were the company's accountants and were tasked with addressing any dispute in relation to such sums as were owed by one party to the other and certifying same. There is, of course, nothing to prevent the parties to a commercial dispute who are seeking a means of resolution from providing for the determination of some part of the dispute by an agreed expert.

The Dispute

[10] On 30 April 2016, the end of the tax year, the first respondent's director's loan account with the company was overdrawn by £165,509. A meeting took place on 1 August 2016 between the first petitioner, the first respondent and Michael McAllister of ASM at which the latter advised the company would be subject to section 455 corporation tax on the amount of the first respondent's overdrawn loan account (a reference to section455 of the Corporation Tax Act 2010).

[11] Further advice was given that this could be avoided by debiting the first petitioner's loan account with £165,509 and crediting that sum to the first respondent, thereby reducing his director's loan account to £nil. This would be affected by the movement of a debt owed by Barraine Limited to the first petitioner to the company and then by book entries reducing the amounts owed to the company.

[12] In relation to the tax year ending on 30 April 2017, a similar exercise was carried out whereby the first petitioner's loan account was debited with £7,496 and the first respondent's overdrawn account credited with the same amount and reduced to £nil.

[13] The dispute between the parties resolves to the question of whether or not the sum payable by the respondents on completion should be adjusted by the addition of the sum of £173,005. The first petitioner's case is that the 'offset' must be reversed so that this sum is properly due by the company to him at the date of completion whilst the respondents argue that this is a personal debt, owed by the first respondent to the first petitioner, and therefore not within the scope of clause 5(13) or clause 10 of the terms of settlement.

The role of ASM

[14] In carrying out the task assigned to it under the terms of settlement, ASM issued a certificate on 5 May 2021 at 16:48 which did not include any adjustment to the sum payable in respect of the offset. Two hours later, at 18:50, it revised the figures as follows:

> *"These balances were transferred from John Apperley's director's loan account to Oran McAtamney's director loan account to reduce the balance owed by Oran McAtamney to the company to £nil at each year end. If these offsets had not taken place this would have resulted in s455 tax payable by the company in respect of Oran McAtamney's overdrawn directors loan account…Below we have revised the certified balances to document the offset accordingly."*

[15] On 9 June 2021 ASM issued a further certificate which stated *"we consider that it is appropriate to reverse these adjustments and the certified balances set out below provide for the reversal of the DLA adjustments."*

[16] Tughans, the solicitors for the respondents, reacted to this certificate by declaring themselves *"utterly shocked"* and asserting that this certification *"makes a mockery of this situation."*

[17] In light of this, ASM responded on 15 June 2021 stating:

> *"In the absence of any agreement regarding the treatment of the DLA Adjustments we believe it is appropriate to set out the certified balances under the following assumptions:*
>
> *(1) On the basis that the DLA Adjustments are reversed in the certified balances; and*
>
> *(2) On the basis that the DLA Adjustments are not reversed in the certified balances;*
>
> *and leave it for the parties to determine how this will be resolved."*

The Evidence

[18] The first petitioner and the first respondent swore affidavits in respect of the transactions at the centre of this dispute. The first petitioner's evidence was that Mr McAllister advised both parties that the crediting and debiting of the loan accounts were 'book entries' which would be reversed. He agreed to this on the basis that it was the advice and recommendation of the company accountant. He referred to figures produced by ASM in January and February 2020 which included a reversal of the position with respect to the directors' loan accounts.

[19] The first respondent's evidence was that he had no knowledge or recollection of these transactions. On his analysis, any sum due to the first petitioner would be due by him personally but he would be contending that any such claim was compromised by the terms of settlement and therefore nothing was owed to the first petitioner whether by him or the company.

[20] In a rejoinder affidavit, the first petitioner states that he never understood that he was making a personal loan to the first respondent but rather these were book entries which would be reversed.

[21] The court also had the benefit of evidence from Mr McAllister who swore an affidavit and gave oral evidence which was the subject of cross-examination by both sides. His evidence relied on notes taken at the 'Clearance Meeting' of 1 August 2016 which stated:

> *"Discussed. Agreed with John & Oran that the Barraine DLA balance will be used to offset both of their overdrawn DLAs. Expected Barraine balance will equal £480k – to be confirmed pre accounts being finalised."*

[22] A similar entry appears on the Clearance Meeting notes dated 16 January 2018 for the following tax year, although the evidence was this meeting was only attended by the first petitioner:

> *"Agreed with John & Oran that the Barraine DLA balance will be used to offset both of their overdrawn DLAs."*

[23] At para 12 of his affidavit Mr McAllister explained that overdrawn directors' loan accounts give rise to a liability to corporation tax under section 455 of the 2010 Act and an opportunity existed to avoid this liability by taking two steps:

(i) Assigning the amounts owed to the first petitioner by Barraine Limited to the company in consideration for an equivalent reduction in the intercompany indebtedness between Barraine Limited and the company; and

(ii) The first petitioner using part of the debt owed to him by the company to settle the first respondent's indebtedness by way of an assignment of the first respondent's indebtedness to the company to the first petitioner.

[24] Although he had no particular recollection of either meeting, Mr McAllister averred at para 15 of his affidavit that the outworkings of the steps advised by him and agreed by the individuals required the following actions to be taken:

(i) The first petitioner agreeing to assign his debt with Barraine Limited to the company;

(ii) Barraine Limited agreeing to the assignment of its indebtedness to the first petitioner to the company;

(iii) The first petitioner agreeing to offset his indebtedness to the company by the debt assigned from Barraine Limited;

(iv) The first respondent agreeing to settlement of his indebtedness to the company by way of a loan from the first petitioner.

[25] When challenged in relation to the purported assignments of debts, Mr McAllister's evidence was that no 'formal' assignment was required but that in 'family controlled companies' this could be done informally by making a record of the transaction. It could not have escaped his attention that this was not a 'family controlled company'. It was also evident from the documents that there was no mention whatsoever of a personal loan from one director to the other being affected by this transaction or series of transactions. Mr McAllister's riposte to this was that this "would have been discussed" even though, on his own admission, he did not recall the meetings and one of the directors was not even present at the second meeting.

[26] Mr McAllister was also cross examined about the lack of any board resolution by either the company or Barraine Limited to give effect to the steps which he had advised were necessary. Again, he asserted that things had previously been done 'informally.'

[27] Mr Gowdy QC explored with Mr McAllister at length the absence of any advice to the individuals or the companies in relation to the nature and effect of the transactions which were purportedly put in place. Regrettably, it was quite apparent that he had failed to provide any advice to the directors or the companies concerned whether on the question of section 455 tax liability or the means of avoiding same.

[28] The contemporaneous documentation did not reflect the scenario presented by Mr McAllister. In December 2019 an employee of ASM emailed the first petitioner with a list of debts owed between the various companies and the individuals. There is no reference in this communication to any personal debt owed by the first respondent to the first petitioner. The first petitioner emailed Mr McAllister on 9 December 2019 stating that he did not understand the various intercompany balances. The response was that Grainne Quinn was going to look at this and get back to him. She did this and confirmed that monies were owed by the company to the first petitioner personally.

[29] A spreadsheet was then sent by Ms Quinn to the first petitioner in January 2020 which showed the 'reversal' of the directors' loan account offset and the monies owing by the company to the first petitioner.

[30] The trail of correspondence reveals not one single document suggesting that a personal debt was owed by the first respondent to the first petitioner.

[31] Mr McAllister was also cross examined about ASM's failure to definitively certify the sums required by clause 10 of the terms of settlement. His answer was that this was a matter for the lawyers to determine.

The Settlement Machinery

[32] In *Jones v Sherwood Computer Services* [1992] 1 WLR 277, the Court of Appeal in England & Wales held that where parties had agreed to be bound by the determination of an expert, that decision could not be challenged in the courts unless the expert had failed to follow instructions or there had been some fraud or collusion.

[33] However, where the machinery for determination of an issue has broken down, it is well-established that the court can substitute its own machinery. In *Sudbrook Trading Estate v Eggleton* [1983] 1 AC 444 the court was prepared to ascertain a fair and reasonable price for the purchase of a reversionary interest in circumstances where one party had refused to nominate a valuer.

[34] Having heard the evidence of Mr McAllister, the court is entirely satisfied that it is not possible for ASM to carry out the role allocated it by the terms of settlement, namely that of a fair and independent certifier of the sums due. This conclusion has been reached because of the prevarication on the part of ASM to date and also on the basis that Mr McAllister himself asserted that it was a matter for the lawyers. This clearly indicates that ASM is no longer in a position to carry out the role which the parties agreed it would do and represents a complete abrogation of responsibility. In circumstances where an agreed expert fails to follow the instructions given to it by the parties, then the court ought to intervene and fulfil that role. To do so is entirely consonant with the overriding objective and maintains the strong public policy in ensuring that finality in the settlement of disputes is upheld. The parties entered into a binding contractual arrangement whereby ASM would carry out the certification role. It has both failed to do this and sought to pass the responsibility back to the parties and their lawyers. The agreed machinery has therefore broken down.

[35] The court will therefore make the determination as to the sums properly due and owing under clause 10 of the terms of settlement.

The Personal Loan Issue

[36] This is central to the proper understanding of the nature of the transactions. It is instructive to recognise that neither of the individuals concerned gives evidence that a personal loan was created from one to the other. The first petitioner's evidence is that there were book entries which would be reversed whilst the first respondent has no recollection of the first meeting and, it would appear, was not present at the second meeting.

[37] The contemporaneous notes of the meetings make no reference whatsoever to the creation of a personal loan. Rather the language used is that the Barraine balance will be used to 'offset' the overdrawn directors' loan accounts. This clearly connotes that present and existing liabilities will be offset, one against the other. It most certainly does not purport to reference the creation of new legal relationships, whether by the assignment of debts or otherwise.

[38] In 2019 and 2020 when the first petitioner sought information from ASM in relation to outstanding balances, he was provided with information which indicated that offset had been reversed and he was owed money by the company whilst the first respondent was indebted to the company. No explanation was proffered by Mr McAllister as to why this would have been the case.

[39] It is trite law that in order for a contract to come into existence there must be an offer, ie an expression of willingness to contract on particular terms, and acceptance of that offer. The law applies an objective test in ascertaining whether parties have reached agreement. In the instant case neither of the parties to the purported contract ever believed that a personal loan had been created and there is not one single contemporaneous document which suggests that it was. The case being advanced by the first respondent was hopelessly devoid of merit.

[40] The legal analysis put forward by Mr McAllister in his affidavit was equally ill founded. He failed to recognise that the scenarios painted by him in paras 12 and 15 were mutually inconsistent. Para 12 foresees the creation of an indebtedness from the first respondent to the first petitioner by the means of an assignment of the debt owed to the company whilst para 15 suggests a loan would be made by the first petitioner to the first respondent.

[41] In the event, of course, neither of these events occurred. No assignment could have been created in law by reason of the lack of compliance with the formalities requirements of section 87 of the Judicature (NI) Act 1978. An assignment can be affected in equity without notice being given but there nonetheless needs to be an objective agreement between the parties that rights be assigned. In the absence of any evidence whether from the parties themselves, the companies concerned or the accountants acting at the relevant time, there was no assignment of any of the debts.

[42] There is therefore no basis for the claim that a personal debt exists from the first respondent to the first petitioner.

The Liability to Corporation Tax

[43] Section 455 of the 2010 Act imposes a charge to tax in respect of loans made by a company to a person who is a director or participator in the company. The tax is eligible for repayment once the loan is repaid. The authors of Simon's Taxes state

that a credit balance can be used to repay a debit balance but actual book entries must be made.

[44] The evidence in this case is to the effect that book entries were made but there was no legal transaction underpinning those book entries by way of an assignment of debt or creation of a personal loan. As such, the book entries did not reflect the legal position and therefore the credit balance was not, in fact and in law, used to repay the debit balance. This has come about through no fault of the directors but as a result of the failure on the part of ASM to understand the legal requirements. The purported avoidance of section 455 tax cannot therefore have been effective.

[45] The respondents contend that the directors (or at least two of them) agreed to this 'transaction' and by signing the company accounts they indicated that they gave a true and fair view of the assets, liabilities and financial position of the company. Mr Dunlop QC argues that the court cannot embark upon an exercise to alter the historic accounts.

[46] However, this fails to recognise that the accounts were only signed by the directors on the basis of the advice and preparation by ASM which, I have held, was fundamentally flawed. The directors and the accountants were mistaken as to the legal effect of the proposed off-set. In law, it did not cause the relief from the section 455 charge to tax. The intervention of the court is not required to re-write the company's accounts but to recognise the correct legal position.

Estoppel by Convention

[47] In the alternative, the respondents say that the petitioners cannot seek to object to the position as set out in the accounts as an estoppel by convention has arisen.

[48] The ingredients of estoppel by convention are set out in Spencer Bower on Reliance-Based Estoppel (5th Ed.) at 8.2:

> *"An estoppel by convention is an estoppel from denying a proposition established, not by representation or promise by B to A, but by mutual, express or implicit assent…on a common assumption of facts or law as a basis of their relationship, to which B has so assented as to make B responsible for A's reliance on it."*

[49] In *HMRC v Benchdollar* [2009] EWHC 1310 (Ch.) Briggs J analysed the principles as follows, at para [52]:

> *"i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.*

> *ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.*
>
> *iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.*
>
> *iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.*
>
> *v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."*

[50] It is said that both parties proceeded on the basis that the company accounts correctly stated the financial affairs of the company including the negotiation and agreement of the terms of settlement. Further, the respondents argue that the first petitioner is now estopped from seeking to resile from the position as stated in those accounts.

[51] This submission fails to take any account of the evidence. Properly analysed, the claim of estoppel by convention falls at the first hurdle since there was no common assumption between the parties.

[52] The evidence of the first petitioner at para 11 of the grounding affidavit to this application was:

> *"Mr McAllister advised that the problem could be solved by debiting my director's account with £165,509 and crediting Oran McAtamney's director's loan account with that sum. These were, in effect, book entries, and Mr McAllister advised that the entries would then be reversed, and the sum of £165,509 would be debited to Oran McAtamney's director's account and credited to my account. I went along with this, on the basis that it was the advice and recommendation of our accountant."*

[53] The same principles were said to underlie the offset in the 2017 accounts. The first petitioner went on to explain that he had sought and received financial information from ASM in January and February 2020 which showed the reversal of

the transaction. None of this evidence was challenged, no notice to cross-examine the first petitioner having been served.

[54] The evidence of the first respondent is that he had no knowledge or recollection of the transactions but does aver, presumably on legal advice, that any sum due was a personal debt from him rather than being owed by the company. No issue is taken by the first respondent in relation to the provision of financial information by ASM in early 2020 to both parties. In relation to the purported certification by ASM, he states:

> *"Whilst ASM previously stated…it would be appropriate to reverse the adjustments, they made this statement without any discussion or input from the respondents and certainly they had not previously suggested reversing the transactions during their intervening audits."*

[55] It is manifestly clear that the parties were not labouring under any common assumption of fact or law. The first petitioner believed that the book entries would be reversed and the first respondent either did not know what had happened or believed a personal debt had been created. Simply because they signed the company accounts does not give rise to a common assumption since the basis upon which they signed the accounts obviously conflicted.

[56] Similarly, there was no common and mistaken assumption when the parties executed the terms of settlement. Indeed, it might be observed, there would have been no need for the inclusion of clause 10 in the terms of settlement if these sums were not the subject of an extant dispute between the parties.

Conclusion

[57] In light of the abject failure by ASM to comply with the task of certification, the mechanism prescribed by the terms of settlement has broken down and the court should intervene, not to upset the contractual agreement between the parties, but to uphold the bargain and carry out the task.

[58] There was no legal transaction whereby the liability of the first respondent to the company was replaced with a liability on his part to pay the first petitioner. No personal loan was created nor was there any assignment of a debt whether in law or equity.

[59] All that occurred was that erroneous book entries were made by ASM which must therefore be reversed in order to reflect the true financial position of the company.

[60] Applying the rubric of clause 10, the sum to be paid by the first respondent on completion must have added to it the sum of £173,005, being the sum due by the company to the first petitioner, and I so certify.

[61] There remains the question of interest on the consideration for the purchase of shares. I will afford the parties a period of 14 days to resolve this issue, failing which I will receive submissions.

[62] I will hear the parties on the question of costs.