THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 107

[2015 No. 547]

Finlay Geoghegan J.
Irvine J.
Hedigan J.

BETWEEN

CONOR BRENNAN

PLAINTIFF/RESPONDENT

AND

IRISH PRIDE BAKERIES (IN RECEIVERSHIP)

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 29th day of March 2017

1. This is an appeal against an interlocutory order made by the High Court (Gilligan J.) on 22nd October 2015 restraining the appellant pending the determination of the proceedings from:

> (1) Taking any steps for the purpose of effecting or implementing the purported termination of the respondent's employment by letter dated 18th August 2015; and
>
> (2) terminating the respondent's employment save in conformity with his contractual entitlements; and
>
> Ordering that the appellant continue to discharge the payment of the respondent's salary, emoluments and other benefits under his contract of employment.

Background Facts

2. The background facts, as distinct from the motive for or effect of certain steps taken are not in dispute. The appellant, a company, was at the relevant time a manufacturer of branded and own label bread products which it sold nationwide. It had two plants, in Wexford and Ballinrobe. It also had a senior management team at an office in Dublin.

3. The respondent was employed by the appellant as Business Development Director upon the terms of an agreement in writing dated 1st February 2015. His normal place of business was at an office of the appellant at Rathcoole, Co. Dublin. His remuneration package comprised a salary of €110,000; employer pension contribution of 8% of salary; annual bonus; company car and health insurance for him and his family.

4. Clause 18 of the respondent's contract provided:

> "Except in circumstances justifying summary termination or termination consequent on the application of formal disciplinary procedure, the employee will be entitled to receive three months written notice of the termination of his employment. Such termination of employment shall be a 'no fault' termination. The company reserves the right to pay the employee's remuneration in lieu of notice or continue payment during the notice period, while relieving the employee of any and all of his duties and responsibilities during the notice period."

5. There was no contention of any circumstance justifying summary termination of the respondent's employment or any disciplinary procedure leading to same. The appellant had granted security to Close Brothers Ltd. for financing. It appointed receivers on 11th June 2015, pursuant to a debenture dated 25th April 2014. On 15th June 2015, Bakers Holdings (Luxembourg) S.A.R.L. ("Bakers") bought the loans due to Close Brothers Ltd. together with the rights and entitlements of Close Brothers under the debenture. By deed of appointment dated 15th June 2015, Bakers appointed Kieran Wallace and Shane McCarthy of KPMG Accountants as joint receivers (the "receivers"). The earlier appointment of receivers by Close Brothers was presumably brought to an end.

6. The receivers, pursuant to the deed of appointment of 15th June 2015 were appointed "to be the receivers and managers of and over all the undertaking, property and assets of Irish Pride Bakeries . . ."

7. The receivers initially maintained the business as a going concern. Mr. Wallace deposed that this was to ensure that all of the business could potentially be sold or acquired as a going concern.

8. The receivers sought bids and Pat the Baker (the "purchaser") was deposed to have submitted the most attractive bid. A business and asset purchase agreement was entered into with the purchaser on 6th August 2015. Mr. Wallace stated on affidavit that:

> "The Agreement provides for the sale and purchase of the defendant's business excluding the Ballinrobe facility. It is envisaged that approximately 250 jobs will be secured by the proposed sale to the purchaser".

It was also agreed with the purchaser that the EC (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the "TUPE Regulations") would apply to the transfer of the business. A purchaser was not found for the business and assets of the Ballinrobe facility and it was determined that a collective redundancy process would be carried out by the appellant in relation to the Ballinrobe facility prior to the completion of the sale of the business. The sale agreed was subject to approval by the Competition and Consumer Protection Commission.

9. Mr. Wallace also deposed that a separate redundancy process was commenced with the appellant's senior executive team. He further stated that it was his understanding that "the purchaser does not require a stand alone executive management team for that part of the defendant's business that it is acquiring".

10. There was a meeting between Mr. Wallace and the respondent on 6th August 2015. Whilst there is some dispute about the detail of the meeting, which is not relevant, it is agreed that Mr. Wallace informed the respondent of a proposed termination of his employment by reason of redundancy on 21st August 2015.

11. The decision was formally communicated by Mr. Wallace as "joint receiver and manager" of the appellant by a letter of 18th August 2015. The respondent was informed in that letter that his "position as sales director will be made redundant with effect from 22 August next". Further, he was informed that his last day of employment would be 21st August 2015; he would continue to receive salary and benefits up to that date and one week's notice in lieu of a statutory notice entitlement.

12. The respondent applied for and was granted ex parte an interim order on 24th August 2015, restraining the appellant from terminating his employment or taking any further steps to effect same pursuant to the letter of 18th August 2015 pending further order.

13. Following an exchange of affidavits, the interlocutory application was heard and a written judgment delivered by Gilligan J. on 22nd October 2015, setting out the reasons for which he made the order under appeal.

Subsequent Events

14. By a letter dated 29th October 2015, the appellant purported to terminate the respondent's employment with effect from that date and made a payment in lieu of his contractual entitlement to three months' notice. The respondent contends that the respondent's contract of employment did not terminate until 28th January 2016. The purchaser completed its acquisition of that part of the business of the appellant which it was acquiring on 12th December 2015. At the hearing of the appeal, the Court was informed that there are ongoing disputes in relation to alleged entitlements of the respondent against the purchaser pursuant to the TUPE Regulations. The events subsequent to the High Court decision are not relevant to the issues to be determined on appeal, save that they may be considered to render moot the appeal against the High Court interlocutory order.

15. The appellant has submitted that notwithstanding the undisputed termination of the contract of employment of the respondent (whether as of 29th October 2015 or 28th January 2016), the appeal raises important points of principle which have general application in receiverships. It is further contended that the respondent gave an undertaking as to damages (whilst this is not referred to in the order of 22nd October 2015, it is referred to in the order of 24th August 2015) and an order for costs was made in favour of the respondent against the appellant by a subsequent order of 29th October 2015.

16. The Court determined in all the circumstances of this particular appeal that it should hear and determine the appeal, notwithstanding the subsequent events. I would emphasise however that it is not the intention to express any view by this judgment in relation to matters in dispute by reason of steps taken after the High Court order of 22nd October 2015.

High Court Judgment

17. The trial judge considered carefully in his judgment the test set out by Fennelly J. in *Maha Lingham v. Health Services Executive* [2006] 17 ELR 137, of "a strong case" in relation to an application for what in substance was a mandatory interlocutory order. He concluded that the respondent, having regard to his contractual entitlement, had made out a strong case. He also considered the judgment of Kelly J. (as he then was) in the High Court in *Shelbourne Hotel Holdings Ltd. v. Torriam Hotel Operating Company Ltd.* [2010] 2 I.R. 52, where, at para. 86, he indicated that he was:

> "much attracted by the approach of Hoffmann J. in Films Rover Ltd. v. Cannon Film Sales Ltd. [1987] 1 WLR 670, where he took the view that the fundamental principles on interlocutory injunctions for both prohibitory and mandatory injunctions is that the court should adopt whatever course would carry the lower risk of injustice if it turns out to have been the 'wrong' decision."

The trial judge followed this approach and concluded that granting the injunction sought carried the lower risk of injustice if it turned out to be the wrong decision.

18. There were opposing submissions on the adequacy of damages which were considered by the trial judge. Having considered and referred inter alia to decisions of Laffoy J. in the High Court in *Giblin v. Irish Life & Permanent Plc.* [2010] 21 ELR 173, and *Burke v. Independent Colleges* [2010] IEHC 412, he concluded that damages would not be an adequate remedy and that the balance of convenience favoured the granting of the injunction.

19. The trial judge rejected the submission made on behalf of the appellant that the respondent was in some way attempting to rank ahead of other unsecured creditors. He accepted a submission on behalf of the respondent that to restrain a purported termination but not require that the respondent be paid his salary "would be a radical departure from existing jurisprudence and would not represent the correct balance to be struck between the interests of the parties".

Appeal

20. The appellant advances essentially two submissions against the granting of the interlocutory order restraining termination of the employment and a further submission against the order directing payment of salary. The appellant firstly submits that the trial judge was in error in failing to accept that the respondent's claim was in substance a claim for damages for breach of contract. Secondly, he submits that the trial judge was in error in not concluding that damages were an adequate remedy. In support of both these submissions, it was contended that the issue, both before the trial judge and this court, really related to the question of priorities in an insolvency situation and that the trial judge, in making the interlocutory orders, wrongly elevated the position of the respondent from a category of unsecured creditor to one of a preferential or super preferential.

21. A separate submission was made that even if the trial judge was correct in granting an interlocutory injunction restraining termination of employment, that he was wrong to direct the continuing payment of salary given the insolvency of the appellant.

22. Counsel for the respondent seeks to uphold the decisions of the trial judge on these issues by reference to the case law to which he referred and certain other decisions.

Discussion and Decision

23. Counsel for the appellant sought in submission to rely heavily on what he referred to as the insolvency of the appellant.

Insolvency is a general term which can have many meanings. The issues must, it appears to me, be considered in the context of the factual circumstances of both the appellant and the respondent as disclosed on the affidavits before the High Court.

24. The appellant is a company in relation to which a debenture holder has appointed the receivers to act as receivers and managers of and over all of its undertaking, property and assets. The appointment of a receiver does not of itself alter or interfere with contracts entered into by the appellant with third parties, including its employees, see, *inter alia, Griffiths v. Secretary of State for Social Services* [1974] QB 468. In that sense, it must immediately be contrasted with the situation where either a resolution is passed or an order made for the winding up of a company and a liquidator is appointed. Where a receiver is appointed over assets of a company, existing contracts of employment between the company and the employees continue to subsist. No new contracts of employment come into being.

25. Mr. Wallace, in his affidavit, refers to his obligations as receiver to the debenture holder to realise the assets and minimise costs or losses associated therewith. Undoubtedly, such an obligation arises. However, insofar as the receiver is carrying on the business of the company or is taking decisions in relation to actions which are required to be done by the company, he is doing so as agent of the company. The debenture was not exhibited before the High Court, but there was no dispute to the submission made that the receiver was acting as the agent of the appellant in his dealings with the respondent. The claim made by the respondent is against the appellant alone and not against the receivers. The Court's attention was drawn to sub-ss. 437(2) and (3)(m) of the Companies Act 2014, which expressly confer a power on a receiver "to engage or discharge employees on behalf of the company". However, correctly, in my view, it was not submitted that this section confers a power on a receiver to do anything which the company itself could not do.

26. The trial judge was, in my view, correct in not considering that the claim of the respondent was, in substance, a claim for damages for breach of contract. The respondent had a contract of employment with the appellant. He was entitled to continue to be employed by the appellant subject to termination in accordance with the terms of the contract. The respondent established before the High Court a strong case that the purported termination for the reasons set out and on the terms set out in the letter of 18th August 2014, was not in accordance with the notice provisions in the contract.

27. It is important to recall that whilst the term 'redundancy' or 'making a person redundant' is used, that is a short term label and it is more correctly the dismissal of an employee by reason of redundancy or the termination of a contract of employment by reason of redundancy, see, for example, s. 7(1) of the Redundancy Payments Act 1967 (as amended). Thus, in relation to the respondent, the receivers on behalf of the appellant sought, in the letter of 18th August 2014, to terminate his contract of employment, by reason of redundancy, giving him only one week's notice. However, the respondent established before the High Court that in reliance on clause 18 of his contract of employment, he had a strong case that redundancy was not a reason which permitted the appellant to depart from the 3-month notice provision. At the time of application for the interlocutory injunction, the appellant had not given three months' notice. By only giving one week's notice, there was a strong case that it had not validly terminated the contract of employment and therefore the respondent's contract of employment subsisted. He was entitled, in accordance with his contract of employment, to remain in employment. Insofar as the giving of a one-week notice may be considered to have been a repudiation of the contract of employment, it is well established that unless the repudiation is accepted by the innocent party, it does not bring the contract to an end.

28. On the facts before the trial judge, there was a potential practical benefit to the respondent in restraining a purported termination of employment which was not permissible under his contract. If the respondent remained in employment with the appellant at the time of the proposed sale to Pat the Baker, it was contended that he might be able to benefit from the TUPE Regulations. The Court's attention was drawn to Regulation 5 which provides that the transfer of an undertaking or business shall not of itself constitute grounds for dismissal, but paragraph (2) expressly provides that nothing in the Regulation is to be construed as "prohibiting dismissals for economic, technical or organisational reasons which entail changes in the workforce". Nevertheless, it is submitted that the respondent, if he continued in employment, would be entitled to certain consultation and information under the TUPE Regulations and would also have the potential of opportunity of engaging with Pat the Baker.

29. Accordingly, I have concluded that the trial judge was correct in not considering the substance of the claim made by the respondent as being one for damages for breach of contract.

30. It is a separate question, although connected, as to whether the trial judge was or was not correct in concluding on the facts before him that damages would not be an adequate remedy.

31. The trial judge referred to and relied upon the approach taken by Laffoy J. in *Giblin v. Irish Life & Permanent Plc.* [2010] 21 ELR 173, where she stated:

> "As with all other applications for interlocutory injunctions in deciding to grant an injunction in an employment context the court must be satisfied that damages would not be an adequate remedy for the plaintiff and that the balance of convenience favours the grant of an injunction. As a general proposition in the context of employment injunctions the jurisprudence of the court has developed over the last quarter century so that it is generally considered that the prospect of an award of damages following the trial of the action is not an adequate remedy for a successful plaintiff who has been deprived of his salary pending the trial of the action. In relation to where the balance of convenience lies because of the nature of the employers/employee relationship that issue must be determined having regard to the precise form of relief sought by the plaintiff and will bear in the type of relief the court is prepared to grant."

32. I respectfully agree with the views expressed by Laffoy J. and relied upon by the trial judge herein. The trial judge had before him affidavit evidence of the respondent in relation to the employment position he gave up when he took up employment with the appellant and his total remuneration package. In addition, there was the sale to Pat the Baker agreed, albeit subject to regulatory approval and the potential benefit to the respondent of being employed at the date such sale completed. Accordingly, I would also uphold the determination of the trial judge that damages were not an adequate remedy for the respondent on the facts herein.

33. The final matter relates to the order made directing the payment of salary to the respondent. It appears to me that it is in respect of this order that what was deposed to as being the insolvency of the appellant is primarily relevant.

34. The origin of making such orders as part of an interlocutory order restraining termination of a contract of employment is stated to be the judgment of Costello J. in *Fennelly v. Assiuanazioni Generali* (1985) 3 I.L.T.R. 73 and approved of by the Supreme Court *inter alia* in *Maha Lingham v. Health Service Executive* [2006] 17 ELR 137, where Fennelly J. stated:

> "There have been developments in the law in recent years and it is necessary to refer very briefly to the nature of these

developments. The first is that, in this jurisdiction the development can be traced to the judgment of Costello J. in a case of *Fennelly v. Assiuanazioni Generali* (1985) 3 I.L.T.R. 73, in which an injunction was granted directing an employer to continue payment to the respondent, in that case, pending the hearing of the action, and that type of jurisdiction was exercised in an number of subsequent cases. It is fair to say however, that there is a very strong trend in those cases to the effect that where a person has a clear right to either a particular period of notice or a reasonable notice or has a fixed period of employment, a summary dismissal or a dismissal without notice or without any adequate notice is a first step in establishing the ground for an injunction in those sort of cases."

35. The obligation to pay forms part of an employer's obligations under a contract of employment. It is the obligation of the appellant on the facts herein. The receivers only act as the agent of the appellant in dealings with the respondent in relation to his contract of appointment. The appointment of the receivers did not affect the subsisting contract of employment nor did its terms permit termination without notice upon such appointment.

36. On the facts before the trial judge, whilst it was stated that the appellant was insolvent, nevertheless, the facts were that the appellant was continuing to carry on its business. Mr Wallace averred that the appellant's business had "limited resources" to meet its liabilities. He further stated the receivers were obliged to make costs savings; that there was no need for the plaintiff either pre or post the proposed sale and that the "ongoing monthly costs pertaining to the plaintiff's role were no longer economically viable within the business". However, at the date of the purported termination of the respondent's employment contract in breach of its terms, all of the business, other than possibly the business at the Ballinrobe plant, continued to be carried on. All other employees who remained in employment were being paid. The facts did not disclose an inability by the appellant to meet the payment on a current basis of employees who remained in employment. The plaintiff remained in employment.

37. The question as to whether or not the High Court should make an order directing payment of salary to an employee whose dismissal has been restrained by an interlocutory order depends, it appears to me, upon a determination of where the balance of convenience lies in the particular factual circumstances. In a situation where a receiver has been appointed over property and assets of the company, there could well be factual circumstances where the balance would mitigate against making such an order. If the facts of the case were such that an employer through its receivers could demonstrate an inability to pay current salaries and that inability to pay related not only to the individual employee but to a general body of employees, then of course the factual circumstances would be different and the balance of convenience might lie elsewhere.

38. However, this was not such a case. There was no evidence before the High Court that the appellant was unable to meet, out of current trading revenues, salaries payable to employees. It retained, at the time, in excess of 250 employees (the figure referred to in relation to the sale to Pat the Baker) and no suggestion that wages or salaries were not being paid in full.

39. Accordingly, I have concluded on the facts of this case that the trial judge was entitled to exercise his discretion on the balance of convenience in favour of making the order directing payment of salary. If no such order was made, then it would set at naught the very reasons for which, as identified in the judgments already referred to, the Court favours granting an injunction restraining dismissal, or in effect, a mandatory injunction requiring a continuation of employment in cases where an employee makes out a strong case that the dismissal is in breach of the contract of employment.

40. Finally, I do not accept that the order made interfered with any statutory priority applicable pursuant to s. 440 and Part 11 Companies Act 2014. The order made was against the appellant which then continued to trade. The payments to be made to the plaintiff were not in respect of any debt due at the date of appointment of the receivers nor was his employment terminated prior to or by the effect of the appointment of the receivers.

Relief

41. The appeal is dismissed.