Neutral Citation: [2017] IEHC 177

THE HIGH COURT

[2013 No. 13066P]

BETWEEN

DAVID WALSH

PLAINTIFF

AND

MARY WALSH

DEFENDANT

(No. 2)

EX TEMPORE JUDGMENT of Mr. Justice Richard Humphreys delivered on the 13th day of February, 2017

1. In *Walsh v. Walsh (No. 1)* (Unreported, *ex tempore*, High Court, 2nd February, 2017) I gave judgment in favour of the plaintiff in the substantive action in this matter, together with a stay on that decision conditional on the lodgement of €929,965.66 in court, and granted a time-limited post-judgment injunction restraining the defendant from reducing her assets below €929,965.66 pending the issue of a notice of motion in that regard. Before the court now is the plaintiff's Notice of Motion dated 6th February, 2017, seeking the following principal reliefs:

> (i). An injunction restraining the defendant either by herself, her servants or agents or any person acting on her behalf, or any person having knowledge of the making of this order or otherwise, from removing from the State or in any way disposing of, reducing, transferring, charging, diminishing the value thereof or otherwise dealing with all or any of her assets which are in the State save and insofar as the value of the said assets shall exceed the sum of €929,965.66 pending enforcement and/or execution of the judgment in the proceedings herein.
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> (ii). An order directing the defendant to disclose to the plaintiff in writing within such period as this Honourable Court shall deem meet all of her assets, and whether held in her own name or by nominees or otherwise and whether held solely or jointly, and detailing the value, location and specific descriptions of all such assets and without prejudice to the generality of the foregoing, that the defendant shall identify all bank accounts or accounts with financial institutions, and whether held in own name or by nominees or otherwise and whether held solely or jointly.
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> (iii). An order directing the defendant to disclose to the plaintiff in writing forthwith all financial transactions effected with respect to the monies she received from the lotto win on or about the 27th day of January 2011, together with an order for discovery of all financial records, bank statements, instructions, and other documentation and correspondence in connection with the transactions aforesaid since the 27th January 2011.
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> (iv). Further or other order, including if necessary an order for discovery in aid of execution and directions as to service of the order, as to this Honourable Court shall deem meet.

2. I would like to express my gratitude to Mr. Kenneth Bredin B.L. for the plaintiff, and Mr. Darren Lehane B.L. for the defendant, for their assistance with the issues arising on the motion.

Is an undertaking as to damages required in a post-judgment injunction?

3. The first issue is whether an undertaking as to damages is required in this case. In that regard I accept that the law is as stated in Steven Gee, *Commercial Injunctions*, 5th Ed. (London, Sweet and Maxwell, 2004), at p. 322, as follows:

> *"If a claimant succeeds at trial on a claim which results in the granting of a final injunction, no cross-undertaking in damages is required. This is because the claimant has succeeded and the final injunction is relief to which he has been adjudged entitled…*
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> *If Mareva relief [i.e., under Mareva Compania Naviera SA v. International Bulk Carriers SA [1975] 2 Lloyd's Law Rep. 509] is sought post-judgment, the purpose is to preserve assets so that the judgment can be satisfied. If such an injunction is sought ex parte, or whilst there is the possibility that it may be said that the injunction was wrongly granted, the cross-undertaking must be given. If the relief is granted inter partes, after the judgment debtor has had an opportunity to dispute the granting of the injunction if he wishes, then if there is no prospect of an issue about the injunction being "wrongly granted" or improperly used, it may be appropriate to dispense with the cross undertaking in favour of the judgment debtor. This is because the judgement debtor has brought about the position by defaulting on the judgment."*

4. The situation is that in the week-and-a-half since the substantive order, the defendant hasn't paid anything to the plaintiff or lodged anything in court; and it seems to me based on what is said by Gee that an undertaking in damages is not required. However, the plaintiff was prepared to offer one if the court required it, so in fact it doesn't make a huge amount of difference to the manner in which I am going to deal with this motion, but having regard to the position as I have just outlined it I don't in fact require it.

What needs to be established for the grant of an injunction post-judgment?

5. Secondly, an issue arises as to the basis of the jurisdiction to grant an injunction in a case such as this. It seems to me that the situation arising here has to be viewed as a distinct situation from a normal *Mareva* injunction. This is a claim for an injunction post-judgment and in particular a proprietary claim and it seems to me, therefore, that the plaintiff does not have to establish a risk of dissipation as far as the amount of the award is concerned.

6. As far as the amount of costs are concerned I will assume without so deciding that the granting of an injunction at this stage does require proof of either risk of dissipation or an intention to dissipate. On that issue I have no doubt that there is both a risk of dissipation and an intention to dissipate on the part of the defendant, and I have regard to the factors to which I referred when giving judgment and when giving a ruling on the immediate post-judgment injunction; in particular, the following:

> (a). that the defendant completed a Revenue affidavit which she knew to be false;
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> (b). that she did so for the purpose of concealing assets from persons entitled to have access to that information,

including the plaintiff;

(c). that her evidence in the witness box was inaccurate and evasive;

(d). that I held that she was a person of considerable calculation and design, particularly having regard to her lengthy, detailed and elaborate efforts to secure all of the assets of her late husband through survivorship whereby it was intended by her that he would not leave any estate;

(e). that this conclusion as to her calculation and design can only be reinforced by what's happened since, which I will come back to;

(f). that the money has never been fully accounted for;

(g). that replies to particulars were not fully complete in terms of disclosure as to what payments had been made;

(h). that her latest affidavit only purports to be an overview or summary of her asset position;

(i). that even with this latest affidavit, what has happened to the rest of the money is still a mystery; the lotto win was €3,389,790.66; the present assets of the plaintiff are, according to her, €673,465.89, so that leaves €2,716,324.77 unaccounted for;

(j). that, what is more striking even than that figure, is the fact that her liquid assets in bank accounts are minimal, amounting to only €6,991.61 - essentially, the money has been cleaned out apart from fixed assets that are difficult to dispose of.

7. I am therefore hugely apprehensive that there will be inadequate assets left to satisfy the judgment and costs. Certainly the assets that are identified by the defendant are inadequate to meet the reasonable estimation of costs (or at least the estimate that I have been given, which has not been challenged), together with the amount of the judgment. The fact that the defendant has such limited assets and in particular minimal liquid assets at the moment is in my view powerful evidence of dissipation or hiding of assets, and of an intention to dissipate and hide assets. She has done a great deal that somebody who had wished to conceal and dissipate assets would do in that regard.

Should a post-judgment injunction include provision for the costs of the successful party?

8. The next issue is the amount of money that should be covered by any injunction and Mr. Lehane has ably submitted that the amount should not include any sums for costs. In that regard there has been some differences of view in academic and judicial writings on the subject. In Brendan Kirwan's *Injunctions Law in Practice* (2nd Ed.) (Dublin, Round Hall, 2015), the author notes at p. 393, para. 8.130:

> *"There is a live question in this jurisdiction as to whether a Mareva order should encompass the costs of litigating the substantive cause of action. In England, the position is that an element for recoverable costs is usually included in the Mareva order, as accepted in the case of Charles Church Developments plc. v Cronin [[1990] F.S.R. 1 at p. 10]. However as noted by Gee [in the 5th ed. of Commercial Injunctions, at p. 118], "[u]sually the addition made is comparatively modest."*

9. Kirwan then cites an unreported decision of Keane J. in *I.C. Ltd. and C.C. Ltd*. which seems to have been *ex tempore* and only appears in the Irish Times, 26th February, 1991. In that case, Keane J. was not disposed to give an order which would secure costs, and confined the maximum sum ordered to be covered by the injunction to the amount of a deposit paid, together with estimated damages for breach of contract.

10. It seems to me that very little can be read into that somewhat skeletal newspaper report of a ruling in an individual case. It does not seem to be a decision that there is any reason in general why an injunction, particularly post-judgment, should not include a figure as to costs, and if anything it seems to be related to the facts of the particular case.

11. More fundamentally there is no reason for the decision outlined in the version of the ruling given in Kirwan, and in the absence of a *ratio decidendi*, a decision is not a precedent. It is hard to see how it can significantly influence the present case.

12. Kirwan's own comment is that there is merit to the approach in *Charles Church Developments* and he says at pp. 393-394:

> *"There is an attractiveness to the approach in Charles Church Developments, in that it correlates neatly with the basis of the jurisdiction of the court to grant a Mareva injunction, expressed by Clarke J. in Bambrick v. Cobley [[2005] IEHC 43]. If the court is to exercise its inherent jurisdiction to prevent assets being placed beyond the reach of the court in the event of a successful claim, it should be the case that a court has the ability to grant an order which would encompass some measure of costs. This is particularly so where in general terms, it will be the plaintiff seeking a Mareva order. As such, the traditional remedy used to secure costs, namely an application for security for costs, will not be available to the plaintiff."*

13. The view that costs can or should be included in such an injunction gets some support from the decision of Clarke J. in *Dowley v. O'Brien* [2009] 4 I.R. 752 at p. 763, where he says that:

> *"[31] The starting point for any consideration has to be the fact that a Mareva type injunction, in the standard form, simply does what the order says. It restrains the defendant from removing his assets from the jurisdiction, at least to the extent that assets remaining in the jurisdiction cannot thereby be reduced below a threshold normally estimated by reference to the claim in respect of which the plaintiff has established a prima facie case, together with costs."*

14. Again, without reading too much into that final comment, it is supportive of the view that costs should be included.

15. However, ultimately the reason why I think that an injunction of this type, particularly a post-judgment injunction (but potentially also a pre-judgment *Mareva* injunction) should at least in principle include the potential for provision for costs is by reason of the right to an effective remedy under art. 13 of the European Convention on Human Rights, a right which I would be inclined to consider should also be regarded as an unenumerated right under Article 40.3 of the Constitution.

16. It seems to me that to deprive a successful plaintiff of the right to a guarantee of access to funds which would be capable of satisfying the costs of obtaining and enforcing the judgment would be to significantly dilute the value of the award made to the plaintiff after a full hearing. To that extent it seems to me to be necessary to take the view that a successful plaintiff (or a defendant who has successfully counterclaimed) has a right in principle to seek to preserve assets, including assets that would be capable of satisfying not only the judgment but also a costs award, because otherwise the award given to the plaintiff could be nullified, or at least significantly diluted.

17. The defendant of course has a constitutional right to appeal, but to some extent that right is not equally in the balance as far as the right to an effective remedy is concerned, because the defendant has already had access to an effective remedy. She has not succeeded in the litigation; but just because you lose your case does not mean that you haven't had an effective remedy. The right to an effective remedy is not a right to win your case. The defendant has had her right to an effective remedy in full at first instance and is now proposing to exercise her right of appeal but the plaintiff's situation is different in the sense that he has only had a partial remedy at first instance to the extent of obtaining a decree in his favour. The full remedy would be in having that judgment satisfied or in having a guarantee that is will be satisfied; and that is where, in my view, his constitutional and ECHR right to an effective remedy has to take priority.

18. Mr. Lehane submits that the top-up to the injunction by including costs is very significant in this case. I leave aside the point that there is no counter-proposal from the defendant as to estimated costs; and there is no suggestion or evidence that the plaintiff's estimate is excessive, nor any counter-argument that the amount of costs to be included in an injunction should have been calculated on a different basis; but it seems to me if the costs are significant, that is all the more reason why they have to be included because otherwise the effectiveness of the plaintiff's remedy would be significantly diluted by the inevitable subtraction of substantial costs from whatever limited sum is ultimately recovered.

Should there be provision in the injunction for payment of living expenses, business expenses and the defendant's costs?
19. The next issue is the question of deductions. It seems to me that deductions cannot arise in relation to a proprietary claim. The governing authority is *Re Hallet's Estate* (1880) 13 Ch. D. 696; and given the approach set out in that case that the defendant must have been presumed to have spent her own money first it seems to me that there can be no payment out from any of her assets (except potentially if a modest balance were to arise if the judgment was satisfied from sale of the defendant's house, assuming that it realised more than the amount of the award). The fact that this is a post-judgment injunction also militates against making any provision for deductions.

20. In relation to that aspect, I would respectfully follow the views of Lord Scott in *Polly Peck International plc v. Nadir (No. 2)* [1992] 4 All E.R. 769, at 784:

> *"This would not be a Mareva injunction. It would not be subject to provisos enabling the use of the money for normal business purposes, or for the payment of legal fees, or the like. There is, in general, no reason why a defendant should be permitted to use money belonging to another in order to pay his legal costs or other expenses".*

21. Reliance was placed by way of a contrary view on *Sundt Wrigley and Co. Ltd. v. Wrigley* (1993) CA Transcript 685 which is an unreported judgment of Lord Bingham M.R. and referred to at p. 16 of Thomas B. Courtney, *Mareva Injunctions and Related Interlocutory Orders,* (Dublin, Butterworths, 1998), but that is very much in the context of interlocutory claims rather than post-judgment injunctions and does not assist the defendant in this case.

22. In relation to living expenses, while the defendant says that she should be allowed to continue the style of life to which she has been accustomed as she puts it at para. 16 of her affidavit, it seems to me that she is not entitled to fund that lifestyle out of the plaintiff's money.

23. There is some absence of information about what are her full financial circumstances and I can review the position depending on what further information is put before the court, depending on the outcome of the application for discovery and disclosure in aid of execution.

24. In relation to her business expenses she says the business is running at a loss of €53,000. Again, it seems to me that it would be inappropriate and unjust to allow the defendant to use the plaintiff's money to keep a loss-making business going. Indeed the fact that she is proposing to do so indicates her attitude and mind-set in relation to the dissipation of the funds involved, which she would rather spend on a loss-making business than use to satisfy her legal obligation to the plaintiff under the judgment.

25. As regards her intention to spend money on legal proceedings, certainly it is unfortunate that the defendant finds herself in a situation where she is involved in legal proceedings but as she is not entitled to pay for the prosecution of those proceedings, including the prosecution of her appeal, with the plaintiff's money, particularly so where the amount of the award together with the estimated costs are significantly more than the amount of gross assets, as the defendant has acknowledged, and that is before taking into account the proposed expenditure by the defendant which would reduce the available assets even further.

26. So in terms of the balance of justice it seems to me that that is very firmly against the defendant being allowed to spend the plaintiff's money on legal proceedings. The issue of the stamp duty for a notice of appeal has been raised, but that can be paid out of her old age pension.

27. It seems to me any other approach to the question of payments out, whether for living expenses, business expenses or legal proceedings, would be to deprive the plaintiff of his right to an effective remedy under the ECHR and the Constitution, or alternatively, at a minimum, to interfere with that right and dilute it in an unjust and inappropriate manner.

28. In terms of living expenses the defendant relies on the Insolvency Service of Ireland figure of €1,050.48 a month. The old age pension is €233.30 a week, which averages at €1,010.96 a month, so it seems to me her living expenses are met anyway by virtue of having the pension available to her.

29. As far as discovery and disclosure in aid of execution is concerned, the objections to that application are that it is premature because the defendant intends to appeal and that to provide for such orders now would give rise to costs. However it seems to me that there are very strong reasons apparent from what I have already said that the plaintiff must be entitled to that information if he is to be given an effective remedy.

Order
30. So the order I will make is as follows:

(a). firstly, that there be orders for disclosure and discovery in aid of execution in terms of paras. 2 and 3 of the notice of motion;

(b). secondly, that there be an injunction restraining the defendant from reducing her assets below the figure of €929,965.66, and, insofar as her assets are below that figure from dissipating her assets at all, until further order or until satisfaction of the judgment and costs, subject to an entitlement on the part of the defendant to spend her old age pension on her living expenses and on any stamp duty that may be payable in the Court of Appeal;

(c). there will be liberty to apply, in particular if it can be established as a matter of evidence that the house is not subject to any charge. I am told verbally that it is in the defendant's own name and if it can be established on the evidential record that the house would be available in full, and as to what its value is, backed up by an appropriate written valuation, there will be liberty to apply in that event, because that might have an influence on what the precise figures should be in terms of the injunction, but clearly that needs to be established by way of evidence;

(d). the stay already provided for in the substantive judgment continues as previously provided, if the amount of €929,965.66 is lodged; and

(e). to ensure that this matter is dealt with promptly subject to hearing anything counsel would say I would be minded to give the defendant until the morning of 17th February, 2017 to put in her affidavit and make discovery and then I can put this in for mention on 20th February, 2017 to make sure there are no outstanding issues.

Postscript

31. When this matter came back before me on 20th February, 2017 it was adjourned to 6th March, 2017, when I made a conditional order of garnishee in relation to a financial policy in the name of the defendant. However, on that occasion Mr. Lehane expressed concern that the plaintiff could expend any such funds pending the hearing of an appeal and I discussed with counsel whether a term of any garnishee order could be that the plaintiff would be required to lodge the funds in the High Court for the benefit of the action, so that they would be available to whichever side was appropriate once matters were finally determined. I will discuss this issue further with counsel when the matter is next listed, on 20th March, 2017, *inter alia* for determination of the plaintiff's application for an absolute order of garnishee.

32. For completeness I should perhaps also mention that subsequently to the foregoing decision, in *Y.Y. v. Minister for Justice and Equality* (Unreported, High Court, 13th March, 2017), I discussed in a little more detail the question of whether the right to an effective remedy should be recognised as a constitutional right, an issue which is touched on in this judgment.