

**THE HIGH COURT**

**[2012 No. 7134 P]**

**BETWEEN**

**CONOR O'BRIEN**

**PLAINTIFF**

**AND**

**DROMOLAND CASTLE OWNERS ASSOCIATION INC. AND DROMOLAND CASTLE HOLDINGS LIMITED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice O'Keeffe delivered on the 19th day of September, 2012**

1. This is an application by the plaintiff directing the defendants to deliver up possession to the plaintiff of the remainder of a collection of paintings presently in Dromoland Castle now comprising of 36 paintings which are the subject of an agreement dated 18th August, 1993 and are the lawful property of the plaintiff.
2. An injunction is further sought restraining the defendant from preventing the plaintiff from taking possession of the remainder of the collection of paintings, the subject matter of the agreement, or interfering with the plaintiff doing so. Finally, an injunction is sought restraining the defendants from making further copies of any of the paintings of the said collection apparently hanging at Dromoland Castle.
3. The first two reliefs which are sought are in the nature of mandatory injunctions whereby the paintings will be handed over to the plaintiff. The third relief that is sought is in the nature of the restraining injunction restraining the defendants from making copies of the painting.
4. It must be emphasised at the outset that this is an application for interlocutory relief pending the plenary hearing of the action when the court would be in a position to ascertain the precise nature of the agreement which governs the arrangement whereby the plaintiff entered into an agreement in relation to various paintings with the first named defendant and/or the defendants' entitlement to possession and/or to make productions of the paintings.
5. It is clear from the affidavits that have been filed in this case that there are many factual differences between the parties and the resolution of such factual matters must await the trial of the action and the ascertainment of the legal consequences of the relationship between the parties.
6. The plaintiff is the eighteenth Baron of Inchiquin. He says he is the owner of a collection of some 45 paintings which have a value for insurance purposes of STG£1.395m. He says that the collection is a unique record illustrating the history of one of Ireland's most noble families.
7. On 18th August, 1993, the plaintiff entered into what was a Consultancy agreement with the first named defendant whereby he agreed to allow the first named defendant the use of his paintings which at the time were in Dromoland Castle, which was and is a castle and hotel. Eight paintings had been returned to the plaintiff and the collection now comprises some 36 paintings.
8. The agreement provided the first named defendant to pay £5,000 per year.
9. The agreement provided that each of the parties shall have the right at any time to give notice in writing to terminate the agreement in the event of specified matters occurring as set out in para. 8 of the agreement. Specifically, it provided a right to terminate the agreement:-  
  
*"If either party is guilty of any conduct which in the reasonable opinion of the other party is prejudicial to that parties interests. "*
10. It now appears that the first named defendant is no longer the entity which operates the hotel and castle at Dromoland Castle and that it is the second named defendant which operates the hotel business. The court was informed that no relief as such was claimed against such defendant nor was it represented at the hearing.
11. In his affidavit, the plaintiff claimed that the defendant had not cared for his collection of paintings since 18th August, 1993, and had caused very considerable damage to be done to them and that the defendant was grossly negligent and reckless with regard to his collection of paintings. He has retained experts to put a monetary value on the damage done. The cost to reinstate them is the sum of STG£256,800. He also claimed that the defendant has abused the gold gilt leafed frames on seventeen paintings and that this will cost an average of STG£2,400 per frame to reinstate the frames.
12. He claims that without his permission or knowledge and outside the scope of the agreement, the defendant had advised him that copies had been made of eight of the paintings and that he believes that this copying will continue unless restrained by order of the court.
13. He claims that the unlawful copying of the paintings significantly diminishes the value of his art collection.
14. He claims that the agreement was validly terminated by his solicitors on 28th May, 2012. This letter claimed that the defendant had done untold damage to the paintings which was continuing and had also made copies unknown to the plaintiff and without his authority. As a result, it is claimed that the defendant was guilty of conduct prejudicial to the plaintiff's interest and this entitled the plaintiff to terminate the agreement.

15. He stated that on 8th July, 2012, he arranged for expert removers to attend to remove the paintings but that Mark Nolan, General Manager of second named defendant would not permit the paintings to be removed. The cost of this attempted removal of paintings is ST£3,336.

16. The plaintiff states that he has a purchaser for his paintings and that he is most anxious to sell them as soon as possible. No price is disclosed for the proposed sale of the paintings. During the course of the hearing, it was stated that he intended to sell the paintings to a member of the family.

17. Mr. Nolan is responsible for the operation of the hotel since 1989. He stated that the second named defendant by virtue of the agreement of 18th August, 1993, which was made between the plaintiff and the second named predecessor in title, has custody and control of the paintings hung in Dromoland Castle. The paintings had hung in Dromoland Castle since at least 1963. The second named defendant disputed the purported termination. It claims that the plaintiff is not entitled to return of the paintings without valid notice and en masse. Mr. Nolan said that the first named defendant was a company formerly incorporated in a State in the United States of America but which has been dissolved. Such entity has no involvement with Dromoland Castle or the second named defendant (sometimes hereinafter referred as the company).

18. Mr. Nolan disputed the assertion of the plaintiffs that the second named defendant had damaged paintings and had been negligent or reckless with them. He emphasised that Dromoland Castle is a hotel and not an art gallery and that the plaintiff has seen the paintings on many occasions and never voiced any allegations in the past over damages to the paintings.

19. He said that the immediate removal, en masse of 36 paintings from the hotel in the high season cannot be met by an offer of compensation from the plaintiff at a later date. Such removal, he stated, would lead to irreparable damage to the reputation of the hotel which is one of the five leading five star hotels in the country and one of the best known hotels in the US market.

20. The company offered to return the paintings in three separate phases of twelve paintings during the month of August but this offer was dependent upon the company being able to use reproductions of the paintings because of the company's inability to source alternative paintings given the nature of the paintings and their connection with Dromoland Castle. He offered to place a sign beside the reproduced paintings indicating that they were reproductions.

21. He stated that after the first named defendant had ceased to be involved with the hotel that the plaintiff sent requests for payment of fees due under the agreement to the second named defendant which requests were discharged by it.

22. He also referred to a request for joint insurance between the plaintiff and the second named defendant which was communicated and addressed to the second named defendant, by the insurance broker to the plaintiff.

23. He stated that the plaintiff's cousin, Ms. Grania Weir, wrote a foreword to a booklet entitled "*The Portraits of Dromoland*" which contained photographs of some of the paintings in issue. This booklet had a wide circulation of visitors to the hotel over many years. The plaintiff ought to have been aware of such booklet.

24. He claimed that the company was entitled to the continuing benefit of the agreement and that there was no substance to the plaintiff's claim alleging breach of the agreement. Reproductions were made over the last sixteen years and some of the reproductions were on display in close proximity to the originals.

25. In a replying affidavit, the plaintiff disputes the entitlement of the company (the second named defendant) to the benefit of the terms of the agreement of 18th August, 1993. He claims he was never informed of the dissolution of the first named defendant until 20th July, 2012.

26. Mr. Nolan has claimed that copyright in all but one of the paintings has long since expired. He further claims that as copyright was only introduced for paintings in 1862, the bulk of the paintings never had the benefit of copyright in the first place. In his affidavit, the plaintiff does not accept such legal position on copyright. He claims that as the company has acknowledged the claim to copyright in respect of one of the paintings because of the unique nature of his collection, the entire collection should be afforded the same copyright protection as such one painting.

27. He claims that the copying of the painting constitutes breach of his entitlement and that of his family to privacy.

28. He also asserts that there is an implied term of the agreement that it prohibits copying.

29. Counsel for the plaintiff, Mr. Frank Callanan, S.C., submitted that as the original agreement was silent on reproduction of paintings, there was no entitlement to reproduce the paintings. If the agreement was to permit copying, it would have said so. Alternatively, there was an implied term that the paintings could not be reproduced by the defendant. He contrasted this with paragraph 3 of the agreement.

30. In his submissions, he said no claim was made by the plaintiff in copyright.

31. In the course of his submissions, counsel for the plaintiff accepted that reproduction of the paintings by non-parties to the proceedings was not prohibited. Under the agreement, he contended the defendants cannot reproduce but required the permission of the plaintiff to do so.

32. The plaintiff further submitted that the second named defendant was not entitled to the benefit of the agreement as it was not a party to the agreement. The plaintiff contended that there no novation of the agreement and that the company had not established the requisite legal proofs for novation. The plaintiff referred to *Chitty on Contracts*, 13th Ed., para. 19- 087. The company contended that it had satisfied the test and referred to the evidence set out in the affidavit.

33. In the court's opinion, the company has raised a fair issue (which would be determined at the trial of the action) that there has been novation of the original agreement, between the plaintiff and the second named defendant, the company.

34. It is common case that the agreement is silent on permitting reproduction of all or any of the paintings. Mr. Newman, B.L., on behalf of the company submitted that the law will not readily imply a term. He referred to the decision of Finlay Geoghegan J. in *Zurich Bank v. Coffey* [2011] IEHC 12, 28th January, 2011, where the judge stated that the criterion is whether the implication is necessary to render the contract workable. It was not necessary in this case in order to work the contract, he argued.

35. Whether or not the plaintiff will be able to establish in law such an implied term existed will have to await the outcome of the case.

36. In relation to the mandatory nature of the primary interlocutory relief which is sought, namely the return of the paintings, the court accepts the general proposition set out in Kirwan *Law and Practice of Injunctions*, p. 210- 214, that it is generally accepted that is significantly harder to secure a mandatory injunction at an interlocutory stage than a probative one. The court accepts what was stated by Fennelly J. in *Lingam v. Health Service Executive* [2005] IESC 89 at 140, who stated in applying for an interlocutory injunction which was in effect mandatory:-

*"In such a case it is necessary for the applicant to show at least he has a strong case that he is likely to succeed at the hearing of the action."*

37. The court also accepts the principles set out by Clarke J. in *AIB v. Diamond*, 14th October, 2011, where he said cases involving mandatory injunction require a higher level of likelihood that the plaintiff has a good case, before granting an interlocutory injunction.

38. Having regard to these decisions, the court refuses to grant mandatory interlocutory injunction in respect of the return of the paintings. The court also has regard to the company's submissions that there has been novation of the agreement and its contention that there have been no breach of the agreement.

39. In relation to the claim that the company should be restrained from reproducing the paintings, the court will ultimately have to determine whether the paintings are held under the terms of the agreement by the company pursuant to a novation of the agreement or whether the paintings are held pursuant to a simple license agreement which can be revoked. If such matters are to be considered, the courts will again be confronted with the issue whether or not there is an implied term that there should be no such reproduction and the terms of such license.

40. In determining whether or not to grant an injunction restraining reproduction, the court notes that the plaintiff wishes to sell paintings to a member of the family although no consideration or details are supplied. The plaintiff contends that the reproduction of the paintings will cause him damage and affects the value of the paintings. These are matters that can be assessed at the trial of the action and are appropriate matters to be considered under the heading of adequacy of damages.

41. Furthermore, in determining whether or not there was a prohibition on reproduction of the paintings, the court will have to consider at the plenary hearing, the implication of the plaintiff's acceptance in legal argument that there was no prohibition on visitors to the hotel taking photographs of the paintings and developing or producing such images for their own benefit. Reproduction of the paintings by non-parties was not prohibited. Further no claim was made in copyright.

42. I am also satisfied that on the balance of convenience the status quo should be preserved.

43. This application is not an application by the company to make reproductions of the paintings. It is an application by the plaintiff. If the company does so pending the trial of the action, then it is at risk to a claim for damages and such other relief as might be sought.

44. In conclusion, I refuse this application. It is desirable there is an early trial in this case. The statement of claim should be drafted without delay to set out the legal basis to the claim.