

## THE HIGH COURT

## COMMERCIAL

[2012 No. 7293P]

## BETWEEN:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

-AND-

MR. BLAKE O'DONNELL, BRUCE O'DONNELL, BRIAN O'DONNELL AND MARY PATRICIA O'DONNELL

DEFENDANTS

AND BY ORDER OF COURT

HAVERGATE INVESTMENTS LIMITED, HUNTSTON LIMITED AND KENNOR ADVISORY LIMITED

DEFENDANTS

AND BY ORDER OF COURT

CHRISTOPHER LEHANE (OFFICIAL ASSIGNEE IN BANKRUPTCY)

NOTICE PARTY

JUDGMENT of Mr. Justice Twomey delivered on the 23rd day of November, 2016

**Introduction**

1. This is an application by Mr. Blake O'Donnell, who is a solicitor and the first named defendant, representing the fifth, sixth and seventh named defendants, to have the proceedings which were served upon them, as a result of an *ex parte* Order of the High Court, struck out. The primary ground on which they are seeking to have the proceedings struck out is that the proceedings should have been instituted in the British Virgin Islands where the fifth, sixth and seventh named defendants are incorporated. For the reasons set out in this judgment, this Court refuses to strike out the proceedings against the fifth, sixth and seventh named defendants.

**The motions**

2. The main motion by the fifth, sixth and seventh named defendants is one for an order striking out the plaintiff's proceedings against them on the basis of a lack of jurisdiction. There is also a second motion which seeks Orders that the proceedings do not fall within Order 11, rule 1(f) and/or Order 11, rule 1(h), that a Notice of Summons was not served on the fifth, sixth and seventh named defendants, that the affidavit supporting the proceedings under Order 11, rule 5 lacked sufficient candour and that the injunctive orders granted on the 19th February, 2016, and 24th February, 2016, be amended to allow the fifth, sixth and seventh named defendants discharge their legal expenses.

3. The first Order to which the motions refer is an Order on the 19th February, 2016, in which Hedigan J. granted, *inter alia*, an *ex parte* Order pursuant to Order 11, rule 1(f) and (h) of the Rules of the Superior Courts, to commence claims by way of service of an Amended Plenary Summons and Amended Statement of Claim on the fifth, sixth and seventh named defendants, three companies registered in the British Virgin Islands ("BVI Companies"). The second Order to which the motions refer is also of Hedigan J. and is dated 24th February, 2016, and provides, *inter alia*, for injunctive relief against the first and second named defendants preventing them from taking any steps (including as directors or controllers of the fifth, sixth and seventh named defendants) which would dissipate the proceeds of the sale of a property known as Columbus Courtyard, Canary Wharf, London ("Columbus Courtyard").

**Preliminary matter**

4. This Court determined at the commencement of the hearing that the part of the motion by the BVI Companies which seeks payment out with respect to legal fees is premature. This is because the BVI Companies in these motions are seeking to challenge the jurisdiction of the Irish Courts to deal with the claims against them in the first instance. It follows that if they are successful, there would be no need for any application regarding the amendment of the injunctive orders to allow for payment of legal fees, since the proceedings themselves would be struck out. On this basis, it was agreed by the parties that the Court would first determine the other matters set out in the motions.

**Background**

5. The background to this application is that on the 12th December, 2011, the plaintiff, the Bank of Ireland (the "Bank"), obtained a judgment in the sum of €72 million approximately against the third and fourth named defendants, Mr. Brian O'Donnell and Dr. Mary Patricia O'Donnell, who are the parents of the first and second named defendants, Mr. Blake O'Donnell and Mr. Bruce O'Donnell. The third and fourth named defendants were declared bankrupt on the 3rd September, 2013. The Bank has alleged that prior to the Bank obtaining judgment, the third and fourth named defendants represented to the Bank that they owned 74% of Columbus Courtyard, valued at that time at around €124 million.

6. However, the Bank alleges that after the judgment was obtained against the third and fourth named defendants, they asserted that they did not actually own Columbus Courtyard, but owned shares in a company which had an indirect interest in the property and that critically those shares were held on trust for Mr. Blake O'Donnell. The ownership interest in Columbus Courtyard is held in fact through the ownership of shares in the fifth named defendant, Havergate Investments Limited. In addition, it is alleged that the seventh named defendant, Kennor Advisory Limited, manages Columbus Courtyard and receives substantial fee income for this management. It is also alleged by the Bank that the third and fourth named defendants assert that their shares in Kennor, as well as in Havergate, are held on trust for Mr. Blake O'Donnell.

7. It is relevant to note that the Bank alleges that the first, second, third and fourth named defendants (the "O'Donnells") were the owners, controllers and directors of the BVI Companies at all relevant times for the purposes of the claims which are the subject matter of these proceedings.

8. The foregoing is the background to what is known as the Columbus Courtyard Share Dilution Scheme. The Bank claims that the Columbus Courtyard Share Dilution Scheme is a fraudulent conspiracy. This is because the Bank alleges that in March of 2012, after the December 2011 judgment was obtained against the third and fourth named defendants, a fraudulent conspiracy was entered into by the O'Donnells and the three BVI companies they controlled, whereby the ownership of the third and fourth named defendants in Havergate (which held the ownership interest in Columbus Courtyard) was diluted from 100% to 0.033% by means of the issue of shares to Mr. Blake O'Donnell, who in turn transferred those shares to Huntston Limited (Mr. Blake O'Donnell being the sole shareholder in Huntston).

9. Similarly, in relation to the Kennor Share Dilution Scheme, it is alleged by the Bank that the third and fourth named defendant's ownership in Kennor was diluted from 100% to 0.039% by a similar arrangement.

10. The Bank claims that these two schemes are an attempt to transfer the benefit of the third and fourth named defendant's interest in Columbus Courtyard and in its management company, Kennor, to Huntston, a company owned by Mr. Blake O'Donnell and whose directors are Blake and Bruce O'Donnell. The Bank claim that these schemes are part of a fraudulent conspiracy by all the defendants to put the assets of third and fourth named defendants beyond the reach of the Bank and thereby thwart the judgment which the Bank obtained in the High Court on the 12th December, 2011.

#### **The challenge to the service of proceedings on the BVI Companies**

11. This hearing is concerned primarily with a challenge to the service of proceedings on the BVI Companies which are incorporated outside the jurisdiction, and which service was permitted by Order of Hedigan J. of the 19th February, 2016.

#### *Lack of jurisdiction – forum non conveniens*

12. The first ground for the challenge to the service of the proceedings on the BVI Companies is that these proceedings against those companies lack jurisdiction, on the grounds of *forum non conveniens*, namely that there is another more appropriate forum to Ireland for the hearing of the Bank's action.

13. However, it seems clear to this Court that the claim of *forum non conveniens* can have no application to this case, since this is a case which is subject to the Brussels I Regulation. This is because in the High Court, Charleton J. has already decided on the jurisdiction in the proceedings in this case. This was on the 26th October, 2012, when Charleton J. rejected an application by the O'Donnells for the High Court to decline jurisdiction in favour of the courts of England and Wales. At para 6.1 of his judgment Charleton J. states:-

"Applying the Brussels I Regulation, on the balance of evidence put before me and according to the timescale relevant to this application, all the defendants are ordinarily resident in Ireland. If not all of the defendants are ordinarily resident in this jurisdiction, the defendant Bruce O'Donnell is indisputably domiciled here. It is reasonable that the case would be tried here. I can see no countervailing applicable rule."

14. It is clear from the European Court of Justice case of *Owusu v. Jackson* [2005] 2WLR 942 that this is the end of the matter as the Brussels I Regulation precludes this Court from applying *forum non conveniens*. This very point was made by Dunne J. in the High Court case of *Abama v. Gama Construction Ireland Limited & Anor.* [2011] IEHC 308 where she found that because the Irish courts had jurisdiction to hear the proceedings in that case against an Irish company, the first named defendant, she did not retain a common law discretion separate from the Brussels I Regulation to stay the proceedings pursuant to the doctrine of *forum non conveniens*, on the application of a company based on Turkey, the second named defendant. At page 32 of her judgment, she states:-

"The thrust of the decision in *Owusu* is that national courts are deprived of the common law jurisdiction to stay proceedings on grounds of *forum non conveniens*."

15. It is also relevant to note that, in a decision that is binding on this Court, the Court of Appeal, in *Abama v. Gama Construction Ireland Limited & Anor* [2015] IECA 179, rejected an appeal of Dunne J's decision in the *Gama* case, and at para 40, Peart J. states:-

"I am satisfied that the reasons stated by Dunne J. for her conclusion that the plaintiffs are entitled to rely on the provisions of the Regulation as forming the basis of jurisdiction, and therefore that the discretionary application made by the defendants for a stay in these proceedings is precluded by virtue of the application of the Regulation having regard to the decision in *Owusu* are correct."

16. Accordingly, this Court must reject the defendants' application that the British Virgin Islands would be a more suitable venue and rejects the application for a stay or strike-out of these proceedings against the BVI Companies, since it has been conclusively found that the Irish courts have jurisdiction for the claims in this case pursuant to the Brussels I Regulation and it is clear from the Court of Appeal decision in the *Gama* case, that this means that this Court has no discretion to stay or strike out the proceedings on the grounds of *forum non conveniens*.

#### *Proceedings do not fall within the provisions of Order 11, rule 1(f) and/or (h)*

17. The next challenge to the proceedings is a claim that the *ex parte* order of Hedigan J. should not have been granted as the proceedings do not fall within Order 11, rule 1(f) and/or (h).

18. For the hearing before Hedigan J. an affidavit dated 18th February, 2016, was sworn by Brian O'Connor on behalf of the Bank. This thirty seven page affidavit sets out in detail the factual background to the alleged conspiracy and fraud (the Columbus Courtyard Share Dilution Scheme and the Kennor Share Dilution Scheme) regarding the third and fourth named defendant's transfer of their interest in Columbus Courtyard to Blake and/or Bruce O'Donnell.

19. The affidavit avers how the three BVI Companies are parties to the fraudulent scheme to transfer the interest in Columbus Courtyard beyond the reach of the Bank and how the alleged fraudulent transfer of the interest in the property was intrinsically linked with the examination of Mr. O'Donnell, in aid of execution of the judgment obtained against him on the 12th December, 2011, by the Bank. This affidavit avers that the O'Donnells were the owners, controllers and directors of the BVI Companies.

20. Under Order 11, rule 1(h), the High Court is entitled to grant leave to issue and serve claims outside of the jurisdiction where "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction".

21. To consider whether Order 11, rule 1 has been satisfied, the first issue is that there must be in existence an action properly brought against some person duly served within the jurisdiction. The expression an '*action properly brought against some other person duly served within the jurisdiction*' means that the action has been brought against other defendants within the jurisdiction, and not that those defendants must have been served within the jurisdiction. This is clear from the decision of Costello J. in *International Commercial Bank v. Insurance Operation of Ireland* [1989] IR 452 at 460:-

"Order 11, rule 1(h)[...] means that the Irish courts will assume jurisdiction over a claim against a foreign domiciliary, even though the cause of action may have arisen outside the jurisdiction, once the foreign domiciliary can be regarded as a proper party to an action brought by a plaintiff in this country against an Irish domiciliary."

22. In the current case, it is clear that there is in existence an action brought against other defendants in this jurisdiction. This is clear from the earlier proceedings in this case instituted by the O'Donnells, which were decided by Charleton J. on the 26th October, 2012, wherein he found that the Irish courts had jurisdiction to hear the claims of the Bank against the O'Donnells. It is relevant to note that the O'Donnells subsequently withdrew their appeal of Charleton J.'s decision and so the finding that the Irish courts have jurisdiction to hear this case is binding upon them.

23. The next issue to consider under Order 11, rule 1(h), is whether the BVI Companies are necessary or proper parties. It is clear from the Supreme Court case of *Analog Devices B.V. v. Zurich Insurance Company* [2002] 1 IR 272 at p. 284 that, to quote Fennelly J., quoting *Barrington J. in Short v. Ireland* [1996] 2 IR 188:-

"the standard test to be applied in exercising this jurisdiction is whether the person out of the jurisdiction would, if he were within the jurisdiction, be a proper person to be joined as a defendant in the action against the other defendants."

24. Applying this test, and based on the sworn evidence on behalf of the Bank regarding the actions which were taken by the BVI Companies in furtherance of the Columbus Courtyard Share Dilution Scheme and the Kennor Share Dilution Scheme, which evidence has not been controverted to any significant degree by the defendants, it seems clear to this Court that, if each of the BVI Companies were within the jurisdiction they would be a proper person to be joined to this action because of their alleged integral role in the share dilution schemes. This is because in relation to Huntson, it is alleged that it acquired shares in Havergate from Mr. Blake O'Donnell; in relation to Havergate, it is alleged that it issued shares in itself to Mr. Blake O'Donnell; and in relation to Kennor, it is alleged that it issued shares in itself to Mr. Blake O'Donnell. Thus, in relation to each of the three BVI Companies, it seems clear that if they were within the jurisdiction, they would each be proper persons to be joined to the action because of their alleged integral role in the alleged fraudulent conspiracy.

25. On this basis, this Court is of the view that the BVI Companies are proper persons to be joined as defendants in the action before this Court and that there is no basis for challenging Hedigan J.'s order under Order 11, rule 1.

#### *Notice of Summons not served as required by Order 11, rule 8*

26. The next challenge to the proceedings is a claim that the Notice of Summons ordered by Hedigan J. was not properly served. The Order of Hedigan J. dated 19th February, 2016, provides at paragraph 5 of that Order for the Amended Plenary Summons and Amended Statement of Claim to be served by way of hand delivery on the registered offices of the BVI Companies. An affidavit dated 11th March, 2016, was sworn by Greg Leacock and produced to this Court in which sworn evidence was provided to the effect that service was duly made of the Notice of Amended Plenary Summons upon the registered offices of the BVI Companies.

27. While sworn evidence was not provided by the registered office agent of the BVI Companies to the contrary, what was provided was an affidavit by Mr. Blake O'Donnell exhibiting an email from the registered office agent of the BVI Companies which email stated that no Notice of Plenary Summons was served on the registered office of the BVI Companies.

28. In considering this conflict of evidence, it is first to be noted that there is sworn evidence of the person who served the summons on the one hand and on the other hand the evidence of the registered office agent to the contrary is not of the same probative value, since it is not sworn. Secondly, it is relevant that Mr. Blake O'Donnell entered an appearance in these proceedings on behalf of the three BVI Companies on the 24th February, 2016, *albeit* solely to contest jurisdiction. There can be no doubt that the BVI Companies are, through Mr. Blake O'Donnell, on notice of the Notice of Summons since Mr. Blake O'Donnell entered that appearance and when this point was made by counsel for the Bank it was not disputed by Mr. Blake O'Donnell.

29. For these reasons, this Court rejects the challenge to the proceedings which is based on the grounds that the Notice of Summons was not properly served on the BVI Companies.

#### *Affidavit supporting the proceedings under Order 11, rule 5 lacked sufficient candour*

30. The final challenge to the proceedings is a claim that the affidavit of Mr. O'Connor of the 18th February, 2016, on behalf of the Bank, lacked candour.

31. The affidavit of Mr. O'Connor, running to some thirty five pages, is comprehensive and outlines, in great detail, the allegedly fraudulent transactions by the O'Donnells which it is claimed were intended to defeat the judgment obtained by the Bank against the third and fourth named defendants.

32. This allegation of lack of candour is tenuous to say the least, relying as it does on Mr. Blake O'Donnell's submission that Mr. O'Connor's affidavit did not state that Mr. Blake O'Donnell is not resident in Ireland, when in any case Mr. Blake O'Donnell's residency was irrelevant to the application for leave to serve the proceedings on the BVI Companies. Similarly it relies on the fact that the Amended Statement of Claim and Plenary Summons were not amended to update the addresses of the O'Donnells, when this point is equally unmeritorious since the only amendment which it was appropriate to make to this documentation was the amendment caused by the addition of the new defendants.

33. While the O'Donnells may be perfectly entitled to dispute the contention that the Columbus Courtyard Share Dilution Scheme and the Kennor Share Dilution Scheme or their other actions were fraudulent or designed to put Columbus Courtyard beyond the Bank's reach, this Court can find no basis for challenging the proceedings on grounds of lack of candour on the part of the Bank in making out its allegation of a fraudulent conspiracy in the Bank's application to have the proceedings served on the BVI Companies outside of the jurisdiction.

## **Conclusion**

34. For all of these reasons, the relief sought by the defendants is being refused.