THE HIGH COURT

[2017 No. 9524 P.]

BETWEEN

STENA LINE LIMITED

PLAINTIFF

AND

DOYLE SHIPPING GROUP

DEFENDANT

THE HIGH COURT

[2017 No. 9692 P.]

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DOYLE SHIPPING GROUP

PLAINTIFF

AND

STENA LINE LIMITED

DEFENDANT

JUDGMENT of Mr Justice Brian McGovern delivered on the 1st day of December, 2017

1. These two sets of proceedings essentially arise out of the same facts and concern the purported termination of a contractual relationship between Stena Line Limited ("*Stena*") and Doyle Shipping Group ("*DSG*"), whereby DSG provided stevedoring and related services at Dublin Port up to the present and Dun Laoghaire up until 2015. Stena issued a termination notice on 31st August, 2017, in accordance with clause 9.6 of a contract between the parties dated 25th November, 2011. Stena gave DSG three months' notice of its intention to terminate the 2011 agreement. The termination notice was suspended by agreement for a period of three weeks commencing on 20th September, 2017, during which the parties attempted to reach a resolution of this dispute. This attempt was unsuccessful and on 12th October, 2017, Stena entered into a contract with North Quay Associates Limited ("*NQA*") for the provision of stevedoring and related services at Dublin Port. The terms of that agreement provide that NQA will commence work at the Stena Line terminal in Dublin on 1st December, 2017.

2. As this judgment deals with two actions involving an application for interlocutory injunctive relief in each case, I will simply refer to the parties as "*Stena*" and "*DSG*" respectively. The Stena proceedings were issued two days before the DSG proceedings and nothing turns on this. Both have been admitted into the Commercial List.

3. At the hearing of the motions for interlocutory injunction, the matter proceeded on the basis of the DSG application for an injunction restraining the purported termination of an agreement entered into between the parties on 25th November, 2011. DSG also contends that it entered into a valid contract with Stena on 14th April, 2015, which replaced the 2011 agreement and provides only for termination "*with cause*". The 2011 agreement provides at Clause 9.6 for a right of termination without cause, on giving three months' notice.

Issues

4. DSG raises two issues. The first is an assertion that an oral contract was concluded at a meeting in Holyhead in Wales on 14th April, 2015 which does not entitle Stena to terminate the contractual arrangement without cause. The second issue concerns Clause 9.6 of the 2011 agreement which provides as follows:-

> *"Either party may terminate this contract with three months notice, provided that no such notice may be given at any time before the expiry of twenty one months from the Commencement Date such notice to expire on or after 31st December, 2012 …"*

5. DSG maintains that Stena, through its authorised agents, orally represented that it would never utilise the option provided for under this clause and that it was inserted merely to provide cover for Stena with the trade union representing its employees. Accordingly, DSG argues that Stena is estopped from relying on that clause.

6. For its part, Stena maintains that no agreement was concluded at the Holyhead meeting and that the parties continued to be bound by the terms of the 2011 agreement which allowed it to terminate the contract with DSG on giving three months notice. Stena denies that it represented that it would not utilise this option and claims that the option was for the benefit of both parties to the contract and was unambiguous in its terms.

7. Stena contends that the injunction sought by DSG is both in substance and effect, mandatory in nature while the injunction sought by Stena is prohibitive. DSG disputes this contention claiming that the injunction it seeks is one restraining Stena from breaching its contract with DSG by terminating the 2015 agreement or alternatively, the 2011 agreement and restraining Stena from transferring DSG's contractual obligations or entitlements to another party. It also seeks an injunction restraining Stena from ceasing to make payments to DSG and evicting or removing DSG from the properties or location at Dublin Port where it operates and an order restraining Stena from interfering with DSG conducting its business.

The Law

8. The legal principles applicable to interlocutory injunctions were set out by the Supreme Court in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88, and in more recent times *Okunade v. Minister for Justice* [2012] 3 I.R. 152.

9. In Kirwan on *Injunctions* (2nd Ed.) at para. 6-24, the author discusses the difference between a prohibitory and a mandatory injunction in the following terms:-

> *"A prohibitory injunction requires, in general terms, a party to refrain from performing or continuing to perform specified*

acts. A mandatory interlocutory injunction, which mandates a party to take action, can require that party to do something or to undo the consequences of an allegedly wrongful act. The former is known as an enforcing mandatory injunction, the latter as a restorative mandatory injunction."

10. If the interlocutory injunction sought by DSG is mandatory in nature then it would be required to demonstrate not just an arguable case but rather a strong case which is likely to succeed at the hearing of the action. See *Okunade v. Minister for Justice* [2012] 3 I.R. 152 at paras. 76 and 77 where Clarke J. cited with approval *Maha Lingam v. Health Service Executive* [2005] IESC 89 and *Allied Irish Banks plc v. Diamond* [2012] 3 I.R. 549.

11. I am satisfied that in this particular case, the injunction sought by DSG is not mandatory in nature. It might have been otherwise if the Stena contract with NQA was up and running but that contract is not due to commence until 1st December, 2017 and it has been agreed between the parties that nothing will happen with regard to the commencement of that contract until the judgment of the Court is delivered on this injunction application. Accordingly, the usual concerns which might arise where a party is ordered to undo the consequences of an alleged wrongful act do not apply here. On the contrary DSG argues that if no injunction is granted and Stena proceeds to employ NQA under the new contract then, in the event that DSG succeeds at the trial of the action, the other contract will have to be completely unravelled. This is primarily an issue to be taken into account if the Court has to consider the balance of convenience.

12. In Campus Oil, the Supreme Court adopted the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Limited* [1975] A.C. 396. In *Okunade*, Clarke J. summarised the test for interlocutory injunction in the following terms at p. 180 (para. [70]):-

> *"• The party seeking the injunction must show that there is a fair or bona fide or serious question to be tried.*
>
> *• If that be established, the court must then consider two aspects of the adequacy of damages. First, the court must consider whether, if it does not grant an injunction at the interlocutory stage, a plaintiff who succeeds at the trial of the substantive action will be adequately compensated by an award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial of the action. If the plaintiff would be adequately compensated by damages the interlocutory injunction should be refused subject to the proviso that it appears likely that the relevant defendant would be able to discharge any damages likely to arise.*
>
> *• If damages would not be an adequate remedy for the plaintiff, then the court must consider whether, if it does grant an injunction at the interlocutory stage, a plaintiff's undertaking as to damages will adequately compensate the defendant, should the latter be successful at the trial of the action, in respect of any loss suffered by him due to the injunction being enforced pending the trial. If the defendant would be adequately compensated by damages, then the injunction will normally be granted. This last matter is also subject to the proviso that the plaintiff would be in a position to meet the undertaking as to damages in the event that it is called on.*
>
> *• If damages would not adequately compensate either party, then the court must consider where the balance of convenience lies.*
>
> *• If all other matters are equally balanced the court should attempt to preserve the status quo."*

13. This means that the first question which the Court has to decide is whether or not there is a fair or *bona fide* or serious question to be tried. The Court must then decide whether or not damages are an adequate remedy for the party seeking the injunction because if they are, and the party against whom the injunction is sought is in a financial position to pay them *"…no interlocutory injunction should normally be granted* **however strong the plaintiff's claim appeared to be at that stage***"*. (Emphasis added) Diplock L.J. in *American Cyanamid* at 408.

14. It is only if damages are not an adequate remedy for the party seeking the injunction that the Court must go on to consider such issues as the undertaking as to damages or whether such undertaking would adequately compensate the defendant in the injunction application if it is successful in its defence. If damages are not an adequate remedy, the Court must consider where the balance of convenience lies and how best to preserve the *status quo*. In this case, an issue which the Court has to consider is what is the *status quo* and at what point it must be determined.

Serious Question to be Tried

15. As this is a motion for an interlocutory injunction, the Court cannot make final findings on the issues between the parties at this stage. However, I am quite satisfied on the evidence that both DSG and Stena have raised serious questions to be tried in each of their applications for injunction. In the case of DSG, it has raised an issue of substance on whether or not the Holyhead meeting in 2015 led to the replacement of the 2011 agreement and whether such agreement could be terminated without cause. Secondly, it has raised the issue as to the applicability of Clause 9.6 in the 2011 agreement and whether Stena is entitled to rely on that clause or is estopped from doing so on the basis of representations made to DSG.

16. For its part, Stena has raised a fair or *bona fide* or serious issue to be tried on whether or not the 2015 "*agreement*" was concluded and became operative and whether or not it is entitled to terminate the contract with DSG under the 2011 agreement pursuant to clause 9.6 which it argues is unambiguous in its terms. Since the interlocutory injunction hearing proceeded on the basis that DSG's claim for an injunction would be considered and that the Court's decision on this issue would effectively deal with the Stena application for interlocutory injunction, I will proceed to consider DSG's application in the light of the legal principles outlined above.

Adequacy of Damages

17. DSG started as a stevedoring business approximately 125 years ago and since the 1980s has acquired various other shipping companies diversifying into other aspects of the shipping business. DSG has been in business with Stena for 22 years on the Dublin to Holyhead route and it also worked with Stena on the Dun Laoghaire to Holyhead route prior to that route ceasing to operate in 2015. The services provided by DSG include check-in and check-out of foot passengers, loading and unloading cars and freight in the form of trailers, some of which are accompanied by a driver and others which are not. Where freight remains in the terminal for a period of time prior to collection, DSG provides security for these goods and performs all required administration. 18. In an affidavit sworn on 27th October, 2017, Mr Brian McCarthy, the Chief Executive of DSG sets out in some detail why damages would not be an adequate remedy if it was refused an injunction. The group has rights at Dublin Port on foot of its general stevedoring licence with Dublin Port Company and has a caretaker's agreement dated 29th September, 2009, over lands including those used by Stena at the Port. Some of its rights are independent of the operations it carries out on behalf of Stena but would be affected by the failure to grant an injunction.

19. The contract with Stena Line is material to the credit facility of DSG and forms a fundamental part of the group's viability and consistency of cash flow. Its facilities with AIB and its ability to fund other acquisitions at Greenore Port (2014) and Lee Towage (2017) and capital expenditure (Titan Tug 2016) would be imperilled by the loss of the contract. Specifically, the termination of the Stena Line contract is specified as an "*event of default*" under the facility agreement with AIB.

20. The Greenore Port expansion project is the biggest project that the DSG has undertaken in the past ten years and that investment will be endangered if it fails to obtain an injunction in these proceedings.

21. Stevedoring contracts such as that between Stena and DSG are quite rare in that they operate on a regular fixed basis. Apart from that contract, the vast majority of the group's business is based on liner type service including roll-on roll-off (ro-ro) and lift- on lift-off (lo-lo) ships which dock for a period of time and operate on a regular schedule and also handling "*tramp ships*" which operate on a short term ad hoc and unscheduled basis. The group depends on the Stena contract in order for its other business to remain viable. Mr McCarthy avers to the fact that revenue from tramp or project ships is impossible to predict and it would not be possible to calculate that loss.

22. DSG operates 27 terminal tractors at an average cost of €150,000. The group has undertaken a considerable capital expenditure involving purchases and replacement of these tractors and it apprehends that it would not be able to dispose of the tractors which would be surplus to its requirements given the very limited market for stevedoring services.

23. Stevedoring is a specialist service industry. DSG has approximately 55 employees in whom the group has invested significant time and effort in training staff and perfecting systems of loading and unloading vessels and other related services. While some of the staff might be able to transfer to NQA, this would have the effect of depleting an experienced workforce which the group has built up and which would affect its ability to continue its other operations in a way which could not be compensated in damages.

24. DSG calls into question the financial stability of Stena and the value of its undertaking as to damages. However, I am satisfied, from the evidence adduced in the Affidavit sworn by Leslie Stracey on 16 November, 2017 that the company is in a position to meet its undertaking. But since I am dealing with the DSG application for an injunction the issue of more relevance is whether its undertaking as to damages is adequate. I am satisfied that it is and I heard no serious objection being raised by Stena on that point.

25. I do not accept that some of the headings of damage that might occur to DSG are incapable of calculation. I refer in particular to any tramp shipping losses or the difficulty in disposing of tractor units. There should be sufficient records of tramp shipping movements in and out of Dublin Port in recent years to enable some estimate to be arrived at if damages arise under this heading. Similarly, any difficulty in disposing of tractor units may simply involve disposing of them at a loss or at some expense (if, for example, they have to be disposed of abroad). But any such losses are capable of calculation. Difficulty, as opposed to impossibility, in determining damages does not mean that they cannot be assessed. See *Curust Financial Services Limited v. Loewe-Lack-Werk* [1994] 1 I.R. 450. Nevertheless, I am satisfied that DSG have established on other grounds outlined above that damages would not be an adequate remedy in the event that an injunction was refused. Accordingly, I must now proceed to consider where the balance of the convenience lies.

Balance of Convenience

26. Stena's contract with NQA is not due to commence until 1st December, 2017. Stena have agreed that pending the Court's decision on the interlocutory injunction application, it will continue to engage with DSG as heretofore.

27. No details of the contract between Stena and NQA were given to the Court nor were they exhibited in any affidavits. This is of some significance and hampers the Court in its assessment of the balance of convenience. No complaint was made by Stena about the quality of the stevedoring services rendered by DSG over the past 22 years. From the evidence adduced on affidavit, it appears that Stena wished to part company with DSG on the basis of the cost of obtaining their services. To that extent this case can be distinguished form others where an injunction might result in parties being forced to stay in a contractual relationship which has fundamentally broken down.

28. If I grant an interlocutory injunction to DSG, this will have consequences for Stena because it has entered into a contract with NQA. The extent of those consequences is difficult to measure at this stage, not least because the Court has no information about the nature of that contract. But the fact that this contract exists is something which suggests that it has to be weighed in determining the balance of convenience. Having considered the evidence before the Court, I am satisfied that the balance of convenience favours granting an injunction to DSG for the following reasons:-

> (i) There is an existing business relationship between the parties and this has been in place for approximately 22 years. If I fail to grant an injunction, this could have a significant impact on all or a significant number of the employees of DSG.
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> (ii) Furthermore, if I fail to grant an injunction it leaves the way open for Stena to pursue its contractual arrangement with NQA. While an undertaken has been given not to alter the existing relationship between the parties pending the Court's determination of this injunction application there is no undertaking up to the determination of the proceedings.
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> (iii) In the event that no injunction is granted and DSG succeeds at the trial of the action, it will involve the unravelling of Stena's agreement with NQA. That is a significant factor which I take into account.

29. If all matters are equally balanced, the Court should attempt to preserve the *status quo*. No matter what decision the Court reaches on this application it has effects on both parties. As this judgment is given on the application of DSG for an injunction and the Court has "parked" the application of Stena for an injunction, it is difficult to conclude whether and to what extent matters are equally balanced between the parties. Accordingly, I think this is a case where the Court should attempt to preserve the *status quo*. I accept the submissions made on behalf of DSG that the *status quo* means the *status quo* ante which in this case is the *status quo* that existed before the purported termination of the 2011 contract. In my view that can best be done by granting an interlocutory injunction to DSG.

30. I will grant an interlocutory injunction restraining Stena Line Limited, its servants or agents from:-

> (i) terminating the agreement of 24th March, 2011;
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> (ii) transferring any of the plaintiff's contractual obligations or entitlements to any other party;
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> (iii) ceasing to make payments to the plaintiff in respect of work carried out under the agreement of 24th March, 2011;

(iv) evicting or removing the plaintiff from any of the properties or locations at Dublin Port from where it operations; and

(v) interfering with the conduct of the plaintiff in carrying out its stevedoring activities at the Port of Dublin.