THE HIGH COURT

COMMERCIAL

[2016 No. 10991 P.]

BETWEEN

CHRISTOPHER LEHANE AS OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE OF SEAN DUNNE

PLAINTIFF

AND

YESREB HOLDING LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on the 24th day of July, 2017

Introduction

1. The plaintiff is the Official Assignee in the estate of Sean Dunne who was adjudicated a bankrupt on the 29th July, 2013. Prior to that, he was adjudicated bankrupt on his own petition in the United States on the 23rd March, 2013. In these proceedings, the plaintiff claims that Walford, Shrewsbury Road, Dublin 4 ("Walford") was beneficially owned by the bankrupt on the date of his adjudication and therefore that it vested in the Official Assignee for the benefit of the creditors of the estate pursuant to s. 44 of the Bankruptcy Act 1988.

2. The bankrupt contracted to purchase Walford on the 1st July, 2005, and paid the purchase price of €57,950,000 to the vendors but the bankrupt did not take a deed of conveyance of Walford from the vendors, Caroline Crowley and Aiden Walsh, in whom the legal title remained. By a memorandum of agreement dated the 22nd March, 2013, between the bankrupt (as trustee for his wife, Gail Dunne) and the defendant, the bankrupt agreed to sell Walford to the defendant for the sum of €14 million. By deed of conveyance dated 29th March, 2013, the vendors of Walford in 2005, conveyed Walford to the defendant. The defendant is a limited liability company registered in Limassol in Cyprus and is ultimately beneficially owned by the bankrupt's son, John Dunne.

3. The plaintiff's case is that the bankrupt was the beneficial owner of Walford as of the 1st July, 2005, and that he remained the beneficial owner as of March, 2013, and that the transactions whereby the property was purportedly transferred to the defendant was a series of sham transactions. He pleads that the transfer on the 29th March, 2013, to the defendant was entered into with a view to delaying, defeating or defrauding the creditors of the bankrupt who at the time of the purported transfer was the lawful and beneficial owner of Walford. It is pleaded that the defendant was not a *bona fide* purchaser for value without notice and the plaintiff seeks declarations that Walford forms part of the estate in bankruptcy of Sean Dunne pursuant to s. 44 of the Bankruptcy Act 1988 and a declaration that the defendant was not a *bona fide* purchaser for value in good faith within the meaning of the Bankruptcy Act, 1988 in respect of any interest it claims in respect of Walford. He also seeks a declaration that the conveyance of the 29th March, 2013, is void and of no effect by reason of the provisions of ss. 57 to 59 of the Bankruptcy Act 1988 as amended and, in the alternative, that it is void and of no effect by reason of the provisions of s. 74 of the Land and Conveyancing Law Reform Act 2009.

4. The proceedings were commenced by way of plenary summons on the 9th December, 2016. However, on the 6th December, 2016, the defendant contracted to sell Walford to Celtic Trustees Ltd. On the 6th December, 2016, Celtic Trustees Ltd transferred to the defendant's solicitor the sum of €12,112,500, being the entirety of the purchase price less capital gains withholding tax. On the 15th December, 2016, the defendant conveyed its title to Walford to Celtic Trustees Ltd and on the 23rd December, 2016 the deed was lodged in the Registry of Deeds for registration. On or about the 25th January, 2017 the Deed of Conveyance and Assurance was registered in the Registry of Deeds.

5. In view of the fact that the plaintiff had commenced these proceedings the defendant and Celtic Trustees Ltd entered into an escrow agreement whereby the purchase monies would be held in an escrow account pending the determination of the plaintiff's claim against the defendant.

6. On the 23rd February, 2017, the plaintiff obtained a *Mareva* injunction restraining the defendant and any party having notice of the making of the order from dealing with reducing or transferring the funds the subject matter of the escrow agreement dated 20th December, 2016, between the defendant, Celtic Trustees Ltd and Lenz Staehelin, the escrow agent in Geneva, Switzerland.

7. Celtic Trustees Ltd applied and was joined as a notice party to these proceedings. The parties reached an agreement that the defendant would give an undertaking in terms of the *Mareva* injunction granted on the 3rd February, 2017, while reserving its right to apply to be discharged from its undertaking. The plaintiff confirmed the terms of his undertaking as to damages and confirmed that it was supported by the principal creditor of the bankrupt, Ulster Bank. The defendant disclosed its ultimate beneficial owner and so this issue also was resolved.

The Issue

8. The only issue to be determined at the hearing of the motion was the application by the defendant for the partial release of funds to enable it to finance its defence of the proceedings.

Submissions Of The Defendant

9. The defendant says that it has no other assets or funds other than the monies held in the escrow account. It says it is incapable of raising debt financing as it has sold Walford and its only asset is the money in the escrow account. The account is frozen and therefore it has no prospect of raising debt finance.

10. Mr. Charalampos Charalampous, a director of the sole corporate director of the defendant, swore an affidavit on behalf of the defendant confirming these facts and exhibiting the defendant's abridge financial statements for the year ended 31st December, 2016. These show that as at 31st December, 2016, the shareholder's deficit was €12,724,879. I am satisfied that the defendant has demonstrated that it has no other assets with which to discharge its legal expenses and thus would not be able to fund its defence if the order sought is refused.

11. The defendant emphasises the fact that the plaintiff claims that the beneficial interest in Walford has vested in him. Specifically,

in these proceedings the plaintiff makes no claim to the monies held in escrow. Therefore there is no proprietary claim insofar as the monies in escrow are concerned.

12. The defendant relies upon three English authorities, two of the Court of Appeal and one of the High Court, to support the proposition that it should be entitled to access the funds to pay its reasonable legal and other fees in defending the proceedings.

13. In *Halifax Plc v. Chandler* [2001] EWCA Civ. 1750 Clarke L.J. stated that a freezing injunction is not granted in order to provide the claimant with security for its claim and that ordinarily the order permits the defendant to spend money on legal expenses. He quoted with approval the decision of Sir Thomas Bingham MR in *Sundt Wrigley Co. Ltd. v. Wrigley* (unreported, 23rd June 1993) where he stated that: -

> *"…since the money is the defendant's, subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence…."*

Lord Justice Clarke approved the statement of Gee in the fourth edition of *Mareva Injunctions and Anton Piller Relief* at p. 318 where the author stated: -

> *"The court will always be concerned to ensure that a Mareva injunction does not operate oppressively and that a defendant will not be hampered in his ordinary business dealings any more than is absolutely necessary to protect the plaintiff from the risk of improper dissipation of assets. Since the plaintiff is not in the position of a secured creditor, and has no proprietor claim to the assets subject to the injunction, there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with other creditors, even if the effect of such dealings is to render the injunction of no practical value."*

14. In the case of *Furylong Ltd v. Masterpiece Technology Ltd* [2004] EWHC 3103 (Ch) Mr. Justice Park considered an application by the defendant to authorise the expenditure of money in connection with its defence to the claim brought against it by the plaintiff where the order provided that: -

> *"This order does not prohibit the respondents from spending a reasonable sum for legal advice and representation."*

The defendant wished to instruct a VAT expert who was not a lawyer as part of its defence. It was therefore argued that amounts expended upon obtaining advice from this expert were not amounts for "legal advice". Mr. Justice Park held at paras. 11 and 12 of his judgment as follows: -

> *"11. …the court ought to be very slow to second guess the judgment of the defendant about how it wishes to equip itself and how it wishes to put together a professional team to resist a large claim which has been brought against it.*
>
> *12. I would accept that the form of the order referring to a 'reasonable sum'*
>
> *for legal advice and representation, does leave scope for the court which, in appropriate cases, it must implement to say that a sum being sought to be expended for legal advice and representation is not reasonable. Nevertheless, I accept Mr. Graham's submission that the underlying purpose of a freezing order is to prevent a dissipation of assets and not to prevent the payment of money on legal costs. Broadly a defendant should be given a considerable latitude to decide for itself how it wishes its defence to be prepared and presented. That is what Masterpeice wishes to do here. I am not prepared to substitute a different view of my own, where I to hold one (which I do not) for the view of Masterpiece's directors and solicitors about how it wishes to resist this very large claim against it."*

He acceded to the application to authorise the sum of £40,000 as a reasonable sum for the defendant to spend on legal advice and representation in the context of a claim brought against it for an amount in excess of £7 million pounds.

15. The third case referred to by the defendant was *Frédéric Marino v. FM Capital Partners Ltd* [2016] EWCA civ. 1301. In this case, the Court of Appeal emphasised that the position is that a defendant who has resources of his own which are not effected by a good arguable claim by the claimant that they are his (the claimant's) property should be required to use those unaffected resources to finance his legal defence and to meet his living expenses. The court held that the onus was on the defendant to persuade the court that he, the defendant, has no, or inadequate, assets of his own, unaffected by proprietary claims, so that he potentially has good grounds to argue to be allowed to have recourse to the proprietary assets the subject matter of the claim.

Submissions of The Plaintiff

16. The plaintiff accepted that his claim in these proceedings was to Walford and not to the proceeds of sale. In separate proceedings which I discuss below, Celtic Trustees Ltd pleads that if and insofar as the plaintiff had an interest in Walford, it was overreached and attaches to the proceeds of sale, the monies now held in escrow. The plaintiff contests this, but insofar as this argument may be successful and if the fund is depleted by paying the defendant's legal costs, then he will be prejudiced if the defendant is permitted to access the monies to pay for the defence of the proceedings. He also criticises the fact that there was no attempt to estimate the costs and no mechanism to ensure that exorbitant costs were not charged. Ultimately it is a matter for the court as to whether and on what terms the court permits the defendant to access the funds.

Discussion

17. I accept the submissions of the defendant that the plaintiff's claim in these proceedings is not a proprietary claim to the monies. I also accept that ordinarily it would therefore be entitled to access the funds to pay its reasonable legal expenses in defending the claim for the reasons enunciated in the decisions cited by the defendant.

18. The concern in this case arises from a second set of proceedings instituted by Celtic Trustees Ltd against the Official Assignee where Celtic Trustees Ltd seeks a declaration that it has acquired good title to Walford. In these proceedings entitled "*The High Court Record No. 2017/2146P Between Celtic Trustees Ltd, plaintiff and Christopher Lehane as Official Assignee in Bankruptcy in the Estate of Sean Dunne, defendant*" at para. 13 and 14 of the statement of claim it is pleaded: -

> *"Contrary to the position adopted by the Official Assignee CTL has acquired good title to the property, and neither Sean Dunne nor the Official Assignee have any interest in the Property.*
>
> *To the extent that Sean Dunne, the Official Assignee or any other person had any beneficial or other equitable interest in the property prior to the conveyance to CTL, which is denied, under Section 21 of the Land and Conveyancing Law*

Reform Act, 2009, the conveyance to CTL dated 15th December, 2016 overreached any such equitable interest. As a result, any such equitable interest ceased to affect CTL's legal estate in the Property, irrespective of whether CTL had notice of any such equitable interest, and any such equitable interest now attaches only to the proceeds arising from the said conveyance."

19. Thus, in these proceedings, Celtic Trustees Ltd raises the argument that the interest of the Official Assignee in Walford, assuming the property vested in him for the purposes of the argument, was over reached and therefore his interest attaches to the proceeds arising from the conveyance, i.e. the monies held in the escrow account. The Official Assignee does not make this case. In fact, in his defence to the claim of Celtic Trustees Ltd he pleads at para. 13: -

"It is denied that the plaintiff is entitled to rely on Section 21 of the Land and Conveyancing Law Reform Act, 2009 as pleaded at para. 14 or at all. The Property was vested in the Defendant by reason of the Bankruptcy Act, 1988 and insofar as any purported transactions in relation to the Property are set aside, it remains vested by operation of statute and not by way of an equitable interest."

It is clear that the plaintiff maintains that by virtue of the provisions of s. 44 of the Bankruptcy Act, 1988 he is entitled to the property and he is not making a claim to the proceeds of the sale by the defendant to Celtic Trustees Ltd in 2016.

Nonetheless, one possible outcome of the multiple litigation surrounding Walford (and there are other cases which have not been referred to in this judgment) is that the plaintiff may be entitled to the monies in the escrow account rather than Walford itself. Another possible outcome is that the plaintiff may be successful in his applications and may obtain a declaration that Walford is vested in him, in which case Celtic Trustees Ltd will be entitled to recover the monies held in the escrow account. Thus, if the fund is reduced it may be at the ultimate expense of the plaintiff or Celtic Trustees Ltd.

20. Under the terms of the escrow agreement, the monies may not be released to fund the defence of the defendant to these proceedings without the consent of Celtic Trustees Ltd. They have indicated that they will grant their consent, subject to the submission of invoices to their solicitors for their consideration. So, Celtic Trustees Ltd, one of two parties who may be prejudiced by the relief sought by the defendant, is agreeing to the release of funds to pay the defendant's reasonable expenses.

21. In the circumstances, I do not believe that the potential prejudice to the plaintiff outweighs the prejudice to the defendant if the relief were refused. Even if it did, the English authorities underscore the fact that the purpose of a freezing order is to prevent dissipation of assets. The order does not confer any security on the plaintiff.

22. Once the defendant satisfies the court that it has no or insufficient assets from which to fund its defence of the proceedings, then the defendant is entitled to access the funds which would otherwise be frozen in order to fund its defence where the claim in the proceedings is not a proprietary claim to the frozen funds. In this regard the defendant must act reasonably and the funds may not be improperly dissipated under the guise of paying excessive legal expenses. I am conscious of the caution of Mr. Justice Park in *Furylong* that the court should be slow to impose its views on the manner in which the defendant approaches the defence of the proceedings. For this reason, I propose in principle to permit the defendant to draw from the fund to meet its reasonable legal expenses in defence of the proceedings.

23. I am aware that the defendant and Celtic Trustees Ltd are to agree procedures whereby the two parties can agree on the amounts to be withdrawn from the fund in accordance with the escrow agreement. Given that it is intended to put in place such an arrangement, I believe that it would be appropriate to take advantage of this fact in circumstances where it may ultimately be the plaintiff rather than Celtic Trustees Ltd who may be at a loss of the monies from the fund. I therefore propose to take the defendant up on its offer to place estimates before the court of the legal costs to assist me in finalising the order.

24. I shall adjourn the application for further submissions from all parties on the means, if any, to be ordered by the court to assess the reasonable legal expenses of the defendant in its defence of these proceedings.