Neutral Citation: [2013] IEHC 316

THE HIGH COURT

2012 10065 P

BETWEEN

EUGENE F. COLLINS

PLAINTIFF

AND

GHARION

DEFENDANT

JUDGMENT of Mr. Justice Birmingham delivered the 9th day of July 2013

1. In the application before the court the plaintiff is seeking two reliefs, on an alternative basis, namely a *Mareva* type injunction restraining the defendant from reducing the cash balance in a bank account below a particular figure and a declaration, pursuant to s. 3 of the Legal Practitioners (Ireland) Act 1876 and s. 21(7) of the Arbitration Act 2010 which extended the 1876 Act to arbitration, that the plaintiff is entitled to a charge upon the funds held by the defendant in respect of an unpaid balance of costs claimed to be due by the defendant to the plaintiff.

2. The background to these applications is that the plaintiff, the well known Dublin law firm, acted on behalf of the defendant an unlimited company, in relation to High Court proceedings, a petition under s.205 of the Companies Act, and also linked arbitration proceedings. The arbitration proceedings and the petition were compromised on terms which saw the defendant Gharion receive the sum of €5,350,000.00 in return for disposing of a shareholding.

3. While the defendant has made some criticisms of certain aspects of the service it received and in particular has been critical of certain tactical decisions taken by the plaintiff, it is not disputed that the plaintiff is entitled to be paid professional fees in respect of the services it provided. The plaintiff submitted a bill of costs in the amount of €463,935.99. However, on behalf of the defendant it is contended -and it appears this will be the key issue at trial -that it, through Mr. John Gilroy, director and shareholder of the defendant, reached an agreement with Mr. Terry Legget, partner in the plaintiff that the fees payable should be €335,000.

4. When regard is had to interim payments made during the course of the proceedings and to a payment made by the defendant following the issue and service of the notice of motion, the plaintiff is claiming that the sum of €253,047.77 is due to it in respect of fees and the orders sought now are in respect of that sum.

5. At this stage, it may be noted that Gharion, which I have pointed out is an unlimited company, acquired a 40% shareholding in Carton Group Holding in 2004. Gharion was described as a "Special Purpose Vehicle", incorporated to hold the shares in Carton Group Holding. Under the settlement agreement which was arrived at, Gharion was required to sell its shareholding in the group to the other parties to the proceedings, the Carton shareholders. Its role subsequent to the settlement was to receive the proceeds of the settlement. It is not in dispute that Gharion intends to transfer the funds it has received unless restrained by order of this Court. Specifically, it intends to transfer the funds to a company called College Protein, also an unlimited company. It may be noted that the sole shareholders in Gharion are John Gilroy and his brother Martin Gilroy, with Mr. John Gilroy holding 99 shares and Mr. Martin Gilroy one share. The shares are held in trust for College Protein. College Protein it may be noted is engaged in and has for many years been engaged in the waste disposal business from its premises at Nobber, County Meath. It is a substantial undertaking. It has assets of approximately €44.6M and its turnover for 2012 was in the region of €19M. It employs 85 people.

6. So far as the *Mareva* injunction is concerned, where the plaintiff is seeking injunctive relief restraining the defendant from reducing the amount in its bank account below €253,047.77, the applicable tests for a *Mareva* injunction have been summarised in Kirwan, *Injunction Law and Practice* (2008) as follows (at 8.30):-

"Derived from case law, there a number of key tests which will have to be satisfied before the *Mareva* injunction will be granted:

- First, the applicant for such an order must demonstrate that he has a substantive cause of action.

- Secondly, he must show that has a good arguable case (which means that an apparently higher threshold is applied to *Mareva* injunctions, rather than the *bona fide*/serious question test used in other interim and interlocutory applications).

- Thirdly he must show that the defendant has assets. He must also show that the anticipated disposal of the defendant's assets is for the purpose of preventing the plaintiff from recovering damages and not merely for the purpose of carrying on a business or discharging lawful debts.

- Fourthly, as with other interlocutory injunctions, the balance of convenience is a relevant factor.

- Finally the behaviour of the defendant will be considered by the court."

7. In the present case it is clear that a number of these tests are met. There is no doubt that the plaintiff has an underlying substantive action in terms of its pursuit of the fees that it claims to be due to it. Equally, in my view there is no doubt the plaintiff comfortably crosses the threshold of having a good arguable case. The plaintiff's claim is that the amount sought in respect of fees is actually due and is recoverable. In so far as the defendant has put forward a defence which is that an agreement was reached that the fees payable would not be the sum claimed but the lesser sum of €335,000, the plaintiff has pointed to a number of factors which go a distance towards undermining the credibility of the defendant's position. At this stage it is neither possible nor desirable to reach a concluded view in relation to the disputed facts but that the plaintiff has a good, indeed a strong arguable case, seems to me to be beyond argument. Again, there is no doubt that the defendant has assets and in particular no doubt that the funds, the disposal of which are sought to be restrained, are lodged at Bank of Ireland branch at John Street, Kells, County Meath. Rather, in a situation

where it is acknowledged that it is the intention of the defendant to dispose of the assets now to be found in Kells to College Protein, the question is whether the anticipated disposal of those assets is for the purpose of preventing the plaintiff from recovering damages and not merely for the purpose of carrying on a business or discharging lawful debts. In that regard it may be noted there is no suggestion that Gharion is paying a debt due by it to College Protein. Indeed, quite the contrary, in that the defendant is owed €4,695,379.00in respect of loans which it advanced to College Proteins which loans are repayable on demand.

8. On the question of the nature of the anticipated disposal of funds, there has been reference to the observations of Hamilton C.J. in *O'Mahony v. Horgan* [1995] 2 I.R 411 at 419 where he commented:-

"Consequently, the cases establish that there must be an intention on the part of the defendant to dispose of his assets with a view to evading his obligation to the plaintiff and to frustrate the anticipated order of the court. It is not sufficient to establish that the assets are likely to be dissipated in the ordinary course of business or in the payment of lawful debts."

9. There has been much focus on the phrase that it is not sufficient to establish that the assets are likely to be dissipated in the ordinary course of business, with the plaintiff asserting that the proposed disposal of funds to College Protein cannot be said to be in the ordinary course of business. When one is dealing with an entity like Gharion, that has never traded, has never carried on a business as such but which was a "Special Purpose Vehicle" which came into existence for one reason only, then the phrase "ordinary course of business" may not be a particularly helpful one. Rather, it seems to me that the focus should be on whether the proposed disposal is with the intention to evade obligations to the plaintiff and to frustrate anticipated court orders. *In Bennett Enterprises v. Lipton* [1999] 2 I.R. 221, O'Sullivan J. having referred to the passage from the judgment of Hamilton C.J. made the following comment:-

> "I fully accept these quotations. It is clear, of course, that if any dissipation of assets were to occur in the ordinary course of business this of itself would not justify the granting of a *Mareva* injunction. ***The anticipated dissipation must be for the purpose of the defendant evading his obligation to the plaintiff***. Equally, however, I consider that direct evidence of an intention to evade will rarely be available at the interlocutory stage. I consider it is legitimate for me to consider all the circumstances in relation to case and I do not consider that this approach is in anyway prohibited by or at variance with the principles set out in the Supreme Court judgment in *O'Mahony v. Horgan*, [1999] 2 I.R 421" [Emphasis added]

10. In the case of *Aerospares Limited v. Thompson* [1999] IEHC 76 (Unreported, High Court, 13th January, 1999), Kearns J. (as he then was) quoted a passage from Gee on *Mareva Injunctions and Anton Pillar Orders* which referred to a defendant having acted fraudulently or dishonestly (e.g. being implicated in an ingenious scheme for the misappropriation of funds belonging to the plaintiff, or acting unconscionably). The passage quoted referred to the fact that a defendant was engaging in intricate, sophisticated, international transactions involving movements of large sums of money which may also provide an indication that there is a real risk of dissipation.

11. The equivalent summary in Courtney on *Mareva Injunctions and Related Interlocutory Orders* (1999) to the extract from Kirwan to which I have referred which is at para 1.15 (point 3) and states as follows:-

"There must be a risk that the defendant will remove his assets from the jurisdiction or otherwise dispose of them with the intention of defeating of his obligation to a plaintiff and frustrating the anticipated court order."

12. In the opening paragraph of Chapter 6 of that textbook which is headed "The Risk of Removal or Disposal of Assets" Courtney comments:-

"Indeed, it can be said that a defendant's nefarious intention has become the *raison d'étre* of the *Mareva* injunction in Ireland."

13. It seems to me therefore from the review of the case law and from what the textbooks have to say that the question that needs to be considered in this case is whether the proposed disposal to College Protein is for the purpose of evading obligations to Eugene F. Collins or is it with a view to frustrating orders that may be made in the substantive proceedings.

14. It seems to me that the starting point for consideration of this issue has to be that Gharion is an unlimited company and that accordingly there is potential for making John and Martin Gilroy personally liable. They have not sought to provide themselves with the shield of limited liability. It is true that making John and Martin Gilroy personally liable may be a cumbersome procedure involving a liquidation, but there seems no reason to believe that the defendant, or the Gilroys would render themselves judgment proof or any real fear that the plaintiff would be left with a paper or worthless judgment.

15. I have commented that the phrase, "ordinary course of business" is of limited assistance when dealing with a "Special Purpose Vehicle". However, it may be useful to substitute a phrase such as "in the ordinary way" or "in the ordinary course of events". If one does that then one is pushed towards the view that there is nothing untoward, or nothing nefarious about the proposed transfer, it is precisely what was to be expected would occur. Had there never been a dispute between Eugene F. Collins and Gharion, or indeed any other dispute involving Gharion, then the likelihood is that the transfer to College Protein would have taken place as a matter of routine, entirely without controversy.

16. It seems to me that the plaintiff has not established an intention on the part of the defendant to put its assets beyond the reach or frustrate future orders of the court. Most fundamentally the proposed transfer will not have the effect of rendering Gharion or its members judgment-proof.

17. No doubt making the orders sought would smooth the path of the plaintiff. However, while there would be obvious advantages for the plaintiff and things would be more convenient, perhaps a good deal more convenient, it does not seem to me that this consideration would justify a *Mareva* injunction. The old legal principle that ordinarily an individual is not entitled to an order preventing another person from dealing with its own assets, known as the rule in *Lister and Co. v. Stubbs* [1890] 45 Ch. D1, has not been displaced.

18. On the question of the balance of convenience, the defendant has pointed to the fact that the funds proposed to be transferred are required by College Protein to aid a capital expenditure project involving the acquisition of a set of evaporators for the sum of €1.5M which would then be used to recycle and reuse waste energy. It is acknowledged that there are other options open to College Protein, whether by accessing a sterling account from which cash reserves could be drawn, but this would involve currency conversion costs or an alternative would see the use of an overdraft facility, but again there would be a cost involved in this. These considerations do not weigh particularly heavily on me. Nonetheless the fact that the funds to be transferred are earmarked for a

particular purpose is a further indication that this is not a contrived transfer designed to defeat the plaintiff.

19. So far as the conduct of the defendant is concerned there is little to commend, the defendant paid the sum of €210,880.12 only on 26th March, 2013, after the motion before the court was issued and served. Even on the view of the facts most favourable to the defendant, this sum was always due and yet it was paid almost nine months after the plaintiff's invoice was sent to the defendant and it was left unpaid until then even though the defendant had received a payment of €4.85M arising from the settlement.

20. This dilatory approach to the payment of substantial fee admitted to be due is far from impressive. The sense one has is not diminished by the approach that the defendant has taken to these proceedings. Although the Statement of Claim was delivered on 22nd October 2012, the Defence was not delivered until 22nd March, 2013 and then only after a motion for judgment in default of defence had been brought. While these factors certainly do not impress to my mind, they do not go so far as to justify the intervention of the court by way of a *Mareva* injunction.

Section 3 Declaration

21. So far as the s. 3 Legal Practitioners (Ireland) Act 1876 application for a declaration is concerned it seems to me that the structure of the section does not require that the amount of fees due to a solicitor has been quantified. That emerges from the reference in the section to the court making an order for taxation and it is also supported by decisions such as *McGowan Roofing Contractors Limited v. Manley Construction Limited [*2011] IEHC 317 (Unreported, High Court, Laffoy J. 25th, July 2011).

22. However, while it is not necessary that the amount of the costs has been determined, it seems to me to be clearly implicit in the section that it has to be established that there are some fees due. However that is precisely what is hotly disputed in the present case. The defendant says that a specific agreement in relation to fees was reached and that the amount agreed has been discharged in full, so that there are no sums whatever outstanding.

23. The plaintiff has suggested that there is nothing to prevent the court making the declaration sought and that the charge will bite when the amount due is determined. It is said that if it is determined at the end of the day that there is no sum due, then no harm has been done.

24. However, in my view where there is such a fundamental dispute on the facts, it would not be appropriate to make a declaration at an interlocutory stage. The order sought is by any standard a significant one. It has implications, not just for the solicitor and the client but also for third parties. In *Mount Kennett Investment Company v. O'Meara* [2012] IEHC 167 (Unreported, High Court, Clarke J. 29th March, 2012) commented as follows:-

> "Finally, it is well established that a charging order under s.3 gives the relevant solicitor priority over all other creditors and all claims except that of a purchaser for value without notice of the right of the solicitor to a charging order."

17. It seems to me that an order so potentially far reaching is not one that is appropriately made at interlocutory stage where there is a major disagreement as to fact which remains unresolved. I am of that view, even though I recognise that the only third party likely to be affected is College Protein. As that is my view I must refuse the order sought under this section. As I have already indicated that I do not regard this as a case for a *Mareva* injunction, it follows that both reliefs sought are refused.