Neutral Citation Number: [2008] IEHC 376

THE HIGH COURT
COMMERCIAL

2008 9112 P
[2008 No. 241 COM]

BETWEEN

SHELBOURNE HOTEL HOLDINGS LIMITED

PLAINTIFF

AND
TORRIAM HOTEL OPERATING COMPANY LIMITED

DEFENDENT

Judgment of Mr. Justice Kelly delivered on the 18th day of December, 2008

Background
1. Four years ago, in December 2004, the plaintiff purchased the well known Shelbourne Hotel situated at St. Stephen's Green, Dublin. It purchased it from the Royal Bank of Scotland for €145m. Following the purchase, an extensive refurbishment of the hotel was effected at a cost of €120m. With 262 rooms in the hotel, the plaintiff has expended, between purchase and refurbishment, a sum of about €1m per room.

2. On 23rd August, 2006 a management agreement (the Agreement) was executed between the plaintiff and the defendant.

3. The defendant is an affiliate of the well known Marriot Hotel Group. Marriot International Holding Company B.V. is a guarantor of the defendant's obligations to the plaintiff under the terms of the Agreement.

4. The Agreement has an initial term of 20 years. During that period, the defendant is constituted as manager of the hotel, has exclusive control of it and is responsible for its proper and efficient operation.

5. For reasons which I will return to later in this judgment, the plaintiffs have become extremely dissatisfied with the defendant's performance on foot of the Agreement. That dissatisfaction has given rise to these proceedings.

These Proceedings
6. On 5th November, 2008 the plenary summons in this action was issued. On the same day, a notice of motion seeking interlocutory injunctive relief was issued. Two days later the defendant issued a motion seeking to stay these proceedings pursuant to s. 5 of the Arbitration Act 1980.

7. Thereafter, the plaintiff applied to have the case transferred to the Commercial List. Such an order was made on 24th November, 2008 and the hearing of both motions was directed to take place on 2nd December, 2008. I heard both applications on that and the following day.

The Agreement
8. The Agreement runs to in excess of 90 closely typed pages exclusive of schedules and exhibits. It is divided into twelve different sections.

9. The following are the relevant provisions of the Agreement for the purposes of the two applications before me.

10. Under Article 1.01, the defendant is obliged to manage and operate the hotel to a standard of managerial expertise and financial control consistent with the operating standards applicable to other similarly situated first class, full service hotels that are operated by the defendant or its affiliates in Ireland as well as international hotel standards. The defendant is required to act as a reasonable and prudent operator and has to do so with the goal of optimising the profitability of the hotel over what is called "a reasonable duration". The Agreement provides that it is understood "that a reasonable duration shall encompass a horizon of at least five years".

11. Under Article 1.02, the plaintiff authorised and engaged the defendant to supervise, direct and control the management and operation of the hotel in accordance with the terms and conditions of the Agreement.

12. Under Article 1.03, all of the hotel employees are employed by the defendant which is responsible for payment of their remuneration and deduction of all tax and other liabilities. The defendant is given absolute discretion with respect to all hotel employees including their hiring, promoting, transferring and dismissing. In the case of some employees however, there are certain rights reserved to the plaintiff. For example, whilst the defendant has the authority to hire, dismiss or transfer the hotel's general manager and director of sales and marketing, it is obliged to keep the plaintiff informed with respect to such actions, and must give prior notification to the plaintiff of the defendant's desire to effect a transfer of either of those persons. In certain defined circumstances the plaintiff's consent is required before the general manager and sales director may be transferred. (See Article 1.03B)

13. In the case of the hiring of a general manager, the plaintiff has to be consulted and has a limited right of veto in respect of candidates for that post. (See Article 1.03B(2))

14. Under Article 1.04, the plaintiff is given a right of inspection of the hotel. The article provides:-

> "Owner and its agents shall have access to the hotel at any and all reasonable times for the purpose of inspecting the hotel and the business carried on at the hotel or showing the hotel to prospective purchasers, tenants or secured lenders, provided that owner and its agents shall exercise such right in cooperation with manager and with the goal of minimising the adverse impact of such access on manager's operation and management of the hotel."

15. The defendant is obliged, at the plaintiff's request, to hold meetings on a monthly basis with a view to discussing the performance of the hotel and related issues. Amongst the items which are specifically mentioned as appropriate to be dealt with at such meetings are material deviations from either the business plan for the preceding month or the most recent accounting period statements.

16. The Agreement also provides for the defendant to be able to share services with other hotels that it manages but subject to the owner's approval.

17. Article 1.08 places certain limitations on the defendant's authority by requiring it to obtain the plaintiff's approval in respect of the matters which are listed in that Article.

18. Article IV of the Agreement deals with accounting matters.

19. Article 4.02A requires that books of control and account pertaining to the operations of the hotel are to be kept on "the accrual basis" and in all material respects in accordance with what is described as "Uniform System of Accounts". That term is defined as meaning:-

> "The Uniform System of Accounts for the Lodging Industry, 9th Revised Edition, 1996, as published by the Educational Institute of the American Hotel and Motel Association, as revised from time to time to the extent such revision has been or is in the process of being generally implemented within the Renaissance System."

20. No evidence has been placed before me as to what that system of accounting requires.

21. The Article goes on to confer a right on the plaintiff at reasonable intervals during the defendant's normal business hours to examine such records. Furthermore, it expressly provides that if the plaintiff desires to engage an auditor to audit, examine or review the annual operating statement or the final accounting statement, it is entitled to notify the defendant in writing within 60 days after receipt of such statements of its intention to so audit.

22. Article 4.02B insofar as it is relevant provides as follows:-

> "In connection with Owner's responsibility to maintain its own effective internal controls over financial and tax reporting and the requirements for complying with statutory audit and tax requirements applicable to owner, owner may request manager to provide reasonable access to the hotel, including to the books of control and account and other records maintained for the hotel, and reasonable assistance necessary to owner that will allow owner to conduct activities necessary to satisfy such responsibilities (to the extent applicable). Manager shall provide such assistance and access to the extent consistent with the assistance and access it generally provides to similarly situated owners of hotels managed by manager and its affiliates."

23. Article 4.04 requires the defendant to deliver to the plaintiff for its review and approval a draft of a business plan on an annual basis. In certain circumstances the owner may disapprove of such business plan. The defendant is obliged to operate the hotel in accordance with the business plan so as to achieve the budgetary goals reflected in it for each fiscal year. The Agreement provides for consultation between the plaintiff and the defendant with a view to reducing the effects of any adverse deviations from such a business plan. Somewhat similar provisions apply in respect of all capital expenditures.

24. Article IX of the Agreement deals with defaults.

25. The Article defines what a default is and the rights of the parties should such occur. One of the events of default is the failure by either party to perform, keep or fulfil certain of the material covenants, undertakings, obligations or conditions of the Agreement. If an event of default occurs the non-defaulting party is given the right to pursue any one or more of a number of courses of action. They include the institution of any and all proceedings permitted by law or equity in respect of such event of default including, without limitation, actions for specific performance and/or damages, or the termination of the Agreement subject to certain terms.

26. There are also some unusual rights which are given to the defendant under the terms of the Agreement. For example, the plaintiff does not have an unfettered right to sell the premises but is subject to the defendant's veto in that regard under Article 10.02.

27. The final element of the Agreement which is relevant is that which deals with the applicable law and arbitration.

28. Article 11.04 provides as follows:-

> "Applicable Law
>
> A. This agreement shall be construed under and governed by the law of Ireland without regard to the conflict of laws provisions of such jurisdiction.
>
> B. Notwithstanding anything to the contrary herein, either party may seek injunctive or equitable relief (including, without limitation, restraining orders and preliminary injunctions) in any court of competent jurisdiction; either party shall be entitled to make an application to the court requesting that the proceedings be referred to arbitration in accordance with s. 11.05 without prejudice, however, to preliminary or interim injunctions or enjoining orders granted by such court."

29. Paragraph 11.05 insofar as it is relevant provides as follows:-

> "Arbitration
>
> A. Except for any determinations to be made by an Expert pursuant to this agreement, any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the International Centre for Dispute Resolution (the ICDR) in accordance with the international arbitration rules of the ICDR (the ICDR Rules). The ICDR Rules are deemed to be incorporated by reference into this clause, save that any provision in this clause which is inconsistent with the ICDR Rules shall prevail over such ICDR Rules. The seat, or legal place, of arbitration shall be Dublin, Ireland. The language to be used in the arbitral proceedings shall be English…
>
> D. Any dispute, controversy or claim to be settled by arbitration pursuant to this section 11.05 shall at the request of owner or any Marriot Company be resolved in a single arbitration before a single arbitral tribunal together with any dispute, controversy or claim arising out of or relating to any other Marriot Agreement."

The Dispute

30. Lengthy affidavits have been filed by both sides in respect of the two motions before the court. At this stage it is not possible to resolve any conflicts of fact which emerge on those affidavits and indeed I am precluded from so doing. It is, however, possible to

extract from the affidavits a number of matters that are not in dispute. They appear to be as follows.

31. The defendant is obliged under the terms of the Agreement to manage and operate the hotel to the standard prescribed. It is obliged to keep books of control and accounts pertaining to the operations of the hotel.

32. Because the plaintiff is liable to account for the tax liability arising from the business of the hotel, the Agreement provides for its right, as owner, to have access to the hotel and its business generally and specifically to inspect the systems of control and accounts and other records maintained. (See Article 4.02B of the Agreement)

33. Within a short time of the hotel re-opening for trading in March 2007, it became clear to the plaintiff that there were problems with the financial management of the hotel by the defendant. The fact that the financial director of the defendant and his assistant financial controller were not at work for a period of months from March 2008, for understandable health and personal reasons and that both subsequently left the defendant's employment, did not help in this regard.

24. The plaintiff's auditor in the course of carrying out audit work in respect of the year ended 31st December, 2007 uncovered serious problems with the financial management of the hotel and as yet has not been able to sign off on accounts for that year. Ms. Sharon Gallen, a partner in the plaintiff's accountancy firm (Horwath Bastow Charleton) says that:-

> "It became clear very early on during the audit field work that there had been a systemic breakdown in the accounting systems and controls in place in the hotel."

25. In June 2008, a Marriot task force team was placed in the hotel with the task of reconciling the accounts. That team produced a series of revisions and restatements of the accounts for 2007. Prior to the issue of those revisions and restatements, the defendant had indicated a net profit figure for the hotel to the plaintiff of €1,429,000. However, a certified restatement of 15th September, 2008 recorded a net loss of €65,309. On any view that is a dramatic change.

26. Ms. Gallen recounts that at a meeting which she attended with Ms. Cynthia Braak, a regional vice-president of finance of Marriot Hotel International Limited, Ms. Braak admitted that the system breakdown at the hotel was the worst she had ever seen.

27. Ms. Gallen goes on to say that her firm will have to qualify its audit of the financial statements of the plaintiff for the year ended 31st December, 2007.

28. Because of the serious problems identified by Ms. Gallen's firm, the plaintiff appointed KPMG Chartered Accountants in September 2008, with a view to conducting a review of the financial systems in place in the hotel. In particular, the plaintiff wished to ascertain whether the hotel was compliant with its revenue obligations. KPMG set out a list of the books, records and information it required in connection with its review. They are described in para. 22 of an affidavit sworn by Kieran Wallace, a partner in KPMG on 5th November, 2008. It is not necessary at this juncture to consider them in detail. The defendant denies that it is under any obligation to provide these documents. Mr. Wallace views that approach as a wrongful refusal on the part of the defendant which has totally frustrated the progress of his investigation. As a result he and his team had to withdraw from the hotel on 22nd October, 2008.

29. It was as a result of this standoff that these proceedings were instituted.

Marriot's Letter of 5th November, 2008

30. Much reference was made during the course of the hearing to an open letter written on 5th November, 2008 by Edmund D. Fuller, the President and Managing Director of Marriot International Inc.

31. That letter candidly admits that Marriot is not proud of the financial errors that occurred at the hotel in 2007, but asserts that it does not understand how those errors translate into the kind of relief that the plaintiff is now seeking. It contends that what started as a good faith and expeditious effort to correct those errors and ensure that financial controls were being followed had been "virtually hijacked" into what is described as a letter writing campaign which:-

> "was obviously designed to create a significant rift between hotel management and ownership with the goal of terminating our operating agreement."

32. The letter goes on to assert that Marriot was candid and open regarding the errors made at the hotel and that its goal is to resolve the issues and continue to manage it.

33. The letter makes an offer to the plaintiff in an effort to settle the matter. Marriot offered a sum of €1,200,000 which is described as the approximate difference between the original 2007 statements and the revised statements that had been prepared. This was described as a good faith gesture to put the plaintiff in as good a position as it possibly could be. Marriot also offered to reimburse accounting and legal fees incurred by the plaintiff up to a maximum of €350,000.

34. The letter went on as follows:-

> "To address an issue that, according to your solicitors is an ongoing problem, although we are not obligated, (sic) we will provide for your review our (sic) internal financial control documents, which by policy and practice are proprietary, provided that only such review be undertaken under reasonable confidentiality guidelines. Your solicitors also take issue with information that we believe we are constrained to provide due to Irish privacy laws; I am sure that between your solicitors and our lawyers we can come to a mutual agreement of what can and cannot be provided under Irish privacy laws; it can't be that difficult."

35. The letter makes it clear that it is an offer to resolve the situation and get on with business. In return, a release of claims on the part of the plaintiff is expected and its cooperation in completing the books for 2007 and finishing the plaintiff's audits.

36. This offer was not accepted by the plaintiff.

The Referral to Arbitration

37. On 26th November, 2008 the defendant sent a request for arbitration to the ICDR. That request has not been put on evidence before me. I have, however, been told on affidavit that it seeks declaratory relief on the question of whether or not the plaintiff in these proceedings may terminate the Agreement and on the question of damages. I am told that it also seeks that tribunal's assistance on the interpretation of clause 4.02 of the Agreement.

38. It is to be noted that this referral to arbitration came long after the commencement of these proceedings, two days after the date for the hearing of these two motions had been fixed and less than a week beforehand.

The Current Position
39. The defendant admits that there has been a serious breakdown in the financial control systems in the hotel. The final picture in relation to 2007 is not yet complete. That is so despite six restatements of the accounts for 2007 since August of this year.

40. It is also clear from the defendant's own evidence that there has been a problem with VAT payments at the hotel. It has made a voluntary disclosure to the Revenue Commissioners and is attempting to negotiate a settlement in that regard.

41. The defendant also accepts that it has made underpayments to the plaintiff relating to VAT on Marriot rewards and advance booking deposits during the period 2007/2008. It has made a payment of €46,094 to the plaintiff "to hold towards any interest charges it may incur as a result of the full extent of any underpayment".

42. The taskforce is still installed and is reviewing the hotel's accounts so the position is as yet not clear.

43. The Agreement is still in force. The question of the entitlement to terminate it has been referred by the defendant to an ICDR Arbitration.

44. Pending the resolution of that issue the parties remain contractually bound to each other and must operate the Agreement which includes the necessity to hold monthly meetings to review the business plans and the entitlement on the part of the plaintiff to both inspection and access to books and records.

45. It is in this context that I must now turn to a consideration of the reliefs sought.

46. Logically, I ought to begin with a consideration of the defendant's motion to stay the proceedings.

The Arbitration Clause
47. These proceedings do not seek to address either the plaintiff's entitlement to terminate the Agreement (which it wishes to do) or any question of damages which may be recoverable by it. Both of those questions have already been referred by the defendant to an ICDR Arbitration.

48. These proceedings are much narrower in focus. The plenary summons seeks three injunctions. The first is one which asks the court to direct the defendant to grant access to the plaintiff to the hotel's books and records on foot of its rights under the Agreement. A prohibitory injunction is sought restraining the defendant from obstructing such access. The third injunction sought is rather repetitive of the preceding two, seeking to enjoin the defendant from denying or obstructing access by the plaintiff to the books and records, business and staff of the hotel.

49. The interlocutory injunction which I am asked to grant seeks to direct the defendant to grant access to the plaintiff to the books, records, business and staff of the hotel in accordance with the plaintiff's alleged entitlements under the terms of the Agreement.

50. I have already reproduced the text of the arbitration clause in the Agreement.

51. Article 11.05A is in fairly conventional terms providing for the reference of any dispute arising out of or in connection with the Agreement including any question regarding its existence, validity, or termination to arbitration.

52. Article 11.04B is a peculiar confection. Under its terms the parties agreed that, notwithstanding the arbitration clause either of them might have recourse to the courts to seek injunctive or equitable relief. Having identified that entitlement, it then goes on to provide that either party shall be entitled to apply to such court seeking a stay of the proceedings with a view to them being referred to arbitration under Article 11.05. So the Article creates an entitlement to litigate a dispute whilst at the same time builds in an ability to trigger Article 11.05. So very little seems to be achieved by Article 11.04 save this - it is quite clear that everything in it is without prejudice to preliminary or interim injunctions or enjoining orders. It follows that applications for such orders are not captured by Article 11.04 or 11.05. Therefore the present application to stay can only relate to the substantive proceedings but not to the application for interlocutory injunctive relief.

53. Such would be the situation even without Article 11.04 since the Agreement is clearly subject to the provisions of s. 22 of the Arbitration Act 1954.

54. That section insofar as it is relevant provides:-

> "The Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of –
> …
>
> (h) interim injunctions or the appointment of a receiver, as it has for the purpose of and in relation to an action or matter in the Court."

55. Article 11.04 does no more than reproduce the same effect as s. 22 albeit in less clear language.

56. Both by virtue of that section and the provisions of Article 11.04, a specific exclusion from the arbitration clause is created so as to permit either party to seek preliminary injunctive or enjoining orders. Clearly, such an application is not captured by the provisions of the arbitration clause.

57. I should make it clear that whilst both Article 11.04B and s. 22 of the Act speak of "interim injunctions" that term must be interpreted to include interlocutory injunctive relief. If it did not do so and was confined only to relief granted *ex parte* (i.e. interim relief in the strict sense) the section would be unworkable.

58. I am supported in this view by the observations made by O'Sullivan J. in *Telenor Invest A.S. v. I.I.U Nominees Limited* [1999] IEHC 188 where he said in the context of s. 22(1)(h) of the Arbitration Act 1954:-

> "I consider that while it may well be appropriate to grant the first defendant a stay on part of the plaintiff's proceedings that this in no way trammels the court's jurisdiction to afford interim relief (which clearly includes what is usually termed

interlocutory relief) to the plaintiff pending the determination of the dispute."

59. If the injunctive relief sought before me is interlocutory it is expressly excluded from the purview of Article 11.04B by its very terms. Such an approach is entirely consistent with the statutory framework of s. 22 of the Arbitration Act 1954.

60. The application to stay has to be considered by reference to the terms of s. 5(1) of the Arbitration Act 1980. That section insofar as it is relevant provides as follows:-

> "If any party to an arbitration agreement… commences any proceedings in any court against any other party to such agreement… in respect of any matter agreed to be referred to arbitration, any party to the proceedings may… apply to the court to stay the proceedings, and the court, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties…shall make an order staying the proceedings."

61. As s. 5 of the 1980 Act confers no discretion on the court, once I am satisfied that its terms have been met I must stay the proceedings and refer them to arbitration. On the substantive issue raised in this action there is a valid arbitration agreement which can be performed and can address the dispute between the parties. There is no arbitration agreement which covers the interlocutory application. Accordingly, this action but not the motion will be stayed in favour of the arbitration agreed to between the parties.

62. I must now proceed to consider whether I ought to grant the interlocutory injunctive relief which is sought.

Principles Applicable

63. The single interlocutory relief which is sought by the plaintiff seeks an order directing the defendant to grant access to it, its servants or agents to the books, records, business and staff of the hotel in accordance with the plaintiff's entitlements to such access under the terms of the Agreement. In fact the relief sought is narrower and more limited than this. Nonetheless, the injunction sought is mandatory in nature.

64. The parties are in disagreement as to the principles which ought to be applied by the court in considering an application for interlocutory mandatory relief.

65. On the one hand the plaintiff contends that the test is that prescribed by the Supreme Court in *Campus Oil Limited v. Minister for Energy No. (2)* [1983] I.R. 88. It is the same test as that prescribed by the House of Lords in *American Cyanamid Co v. Ethicon Limited* [1975] A.C. 396. The test requires that in order to obtain such an interlocutory injunction the plaintiff has to demonstrate a serious issue for trial, inadequacy of damages, and the balance of convenience lying in favour of the grant of the order.

66. The defendant contends that a different test must be met on the first of those three issues. It argues that it is not enough to show a serious issue for trial but rather, the issue must be such as to allow the court to feel a high degree of assurance that the injunction is being rightly granted or to put it another way a likelihood or strong likelihood of success at the trial.

67. The plaintiff, in support of its contention, cited the decision of Laffoy J. *in Cronin v. Minister for Education* [2004] 3 I.R. 205 where that judge in explicit terms rejected the argument that a plaintiff seeking mandatory relief at an interlocutory stage must demonstrate a likelihood to succeed at the trial. She said that she did not consider that that was the appropriate criterion to apply. She said:-

> "It involves making a judgment at this juncture as to the strength of the respective cases of the plaintiff and the first defendant, which the court is not entitled to do, as was made clear by the Supreme Court in *Westman Holdings Ltd. v. McCormack*."

68. Mr. McDowell, for the defendant said that this approach of Laffoy J. is wrong.

69. *Campus Oil* was itself a decision given on an application for a mandatory interlocutory injunction. It has been followed in such a context on many occasions. There is Cronin's case, which I have just mentioned as well as decisions of Carroll J. in *A & M Pharmacy Limited v. United Drug Wholesale Limited* [1996] 2 ILRM 46 and the decision of Peart J. in *Sheehy v. Ryan* (Unreported, High Court, 29th August 2002).

70. There have however been other dicta suggestive of the necessity to demonstrate a strong or clear case redolent of the language used by Megarry J. (as he then was) in *Shepherd Homes Limited v. Sandham* [1971] Ch. 340 where he spoke of the necessity for the case to be "unusually sharp and clear" before a mandatory injunction would be granted.

71. Indeed, the approach of Megarry J. was subsequently approved by the Court of Appeal per Mustill L.J. (as he then was) in *Locabail International Finance Limited v. Agroexport* [1986] 1 All E.R. 901. There that judge noted that although the judgment of Megarry J. antedated the decision in American Cyanamid, nonetheless the statement of principle in relation to the case of a mandatory injunction was not affected by what the House of Lords said in the *Cyanamid* case. Mustill L.J. went on to prescribe the test applicable to applications for interlocutory mandatory injunctions by reference to a passage from Halsbury's Laws of England which states as follows:-

> "A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not be granted on motion. If, however, the case is clear and one which the court thinks ought to be decided at once…a mandatory injunction will be granted on an interlocutory application."

72. That very passage was cited with approval by Costello J. (as he then was) in *Irish Shell Limited v. Elm Motors* [1984] 1 I.R. 200.

73. In *Boyhan v. Tribunal of Enquiry into the Beef Industry* [1993] 1 I.R. 210, Denham J. then a High Court judge, described a mandatory injunction as a powerful instrument and said that:-

> "In seeking this exceptional form of relief, a mandatory injunction, it is up to the plaintiffs to establish a strong and clear case – so that the court can feel a degree of assurance that at a trial of the action a similar injunction would be granted."

74. This approach has been adopted by the Supreme Court in *Lingam v. Health Service Executive* [2006] 17 E.L.R. 137 where Fennelly J. held that:-

> "The implication of an application of the present sort is that in substance what the plaintiff/appellant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried in not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. So it is not sufficient to simply show a prima facie case, and in particular the courts have been slow to grant interlocutory injunctions to enforce contracts of employment."

75. This approach seems very different to that adopted by the Supreme Court in the Campus Oil case and by Laffoy J. in this Court in Cronin's case. It is more in harmony with the approach of the English courts beginning with the observations of Megarry J. and culminating more recently in the Court of Appeal decision in *Zockoll Group Limited v. Mercury Communications* [1998] F.S.R. 354 where that court said:-

> "…the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong' in the sense described by Hoffman J. in *Films Rover International & Ors v. Cannon Film Cells Limited* [1986] 3 All E.R. 772'.
>
> Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.
>
> Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance that the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted."

77. If one pauses at this juncture, one might think that at least in England the test was clear. However, the very next paragraph adds further confusion where the court went on to say:-

> "But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if the injunction is refused sufficiently outweighs the risk of injustice if it is granted."

78. To return to Ireland, there seems to be an inconsistency of approach on the standard that must be met in order to obtain an interlocutory mandatory injunction. On one view it is the demonstration of a fair case or serious issue for trial, on the other, a higher standard of proof must be achieved that has variously been described as a strong case likely to succeed at the hearing of the action or a strong and clear case.

79. Faced with these conflicting approaches and pending a final determination of the issue by the Supreme Court, I am much attracted by the approach of Hoffman J. (as he then was) in the *Films Rover* case [1987] 1 WLR 670 where he took the view that the fundamental principle on interlocutory applications for both prohibitory and mandatory injunctions is that the court should adopt whatever course would carry the lower risk of injustice if it turns out to have been the 'wrong' decision.

80. Whatever standard applies it is clear that the grant of mandatory interlocutory relief is exceptional. In many if not all cases, the mandatory nature of the relief will also be a factor to be taken into consideration when the balance of convenience falls to be considered.

81. I have already set forth the relevant provisions of the Agreement relied upon by the plaintiff to support this application. The plaintiff has a clear contractual right to certain information. Provision of such information is vital so as to enable the plaintiff to know its true position and for the agreement to work. What that information amounts to in practical terms is attested to by two chartered accountants. Mr. Wallace at para. 22 of his affidavit sets out seven species of information required. He gives it as his professional view that that is what is covered by clause 1.04 and clause 4.02 of the Agreement. That is further attested to by Ms. Gallen where she says that the information:-

> "falls within the type of documentation and information which should be made available as part of books and records maintained for the hotel as per clause 1.04 and 4.02 of the management agreement."

82. No expert testimony was adduced by the defendant to suggest that either of these deponents were wrong. Furthermore the defendant led no evidence as to what precisely is required under the Uniform System of Accounts for the lodging industry.

83. I am satisfied on the basis of the evidence before me that the plaintiff has achieved the higher of the two tests namely the demonstration of a clear case on this aspect of the matter.

Adequacy of Damages

84. If damages would be an adequate remedy for the plaintiff then no question of granting the injunction should arise. At present the plaintiff is deprived of information to which it is entitled.

85. If it was simply a case of the plaintiff being deprived of information between now and the ultimate determination of its substantive entitlements, it could well be said that damages would be an adequate remedy but that is not the case here. It is being deprived of information in circumstances where the hotel continues to be run by the defendant with the plaintiff ignorant as to what the true financial position is. How can the plaintiff make a decision in the context of its rights under the Agreement when in such a state of ignorance?

86. Even in such circumstances it might be said that if, ultimately, the plaintiff succeeds, damages can be awarded in respect of any further financial mismanagement. But here the position is even more serious. For the first time in its dealings with the defendant the plaintiff became aware when it had sight of the replying affidavit of Ms. Chugh sworn on the 28th November, 2008, that it may have a liability to the Revenue Commissioners in respect of VAT. The defendant undertook a review of the maximum extent of underpayments, and has on its own evidence made a payment of €46,094.00 to the plaintiff, to hold towards any interest charges which may be incurred as a result of the full extent of any underpayment. This information was a complete surprise to the plaintiff. It is entirely in the dark as to the extent of the liability, and it is the defendant that has made the calculation to attempt to prevent interest running on such liabilities. Obligations to the Revenue Commissioners are serious matters and underpayments frequently result not merely in the necessity to pay the amount outstanding together with interest, but also to the possibility of penalties and even

perhaps prosecution. It also raises the question of the reputation of the plaintiff company with may reflect also on the business people behind it.

87. In these circumstances, I am satisfied that damages would not be an adequate remedy were the plaintiff to be further denied access to the information sought.

Balance of Convenience
88. I am satisfied that the balance of convenience lies in favour of the grant rather than the refusal of the injunction. There is an urgency about this matter which must be addressed. To deny the plaintiff relief would defer the issue for a further as yet undetermined period until such time as the ICDR arbitration would get under way. At that stage the arbitrators would have to reconsider all of the material which has been put before me, with a consequent waste of not merely time, but also money.

89. In addition there appears to be little by way of practical difficulty in giving effect to the order which is sought. Indeed in the much quoted letter of the 5th November, 2008, the defendant offered to provide for the plaintiff's review, its internal financial control documents which it is said by policy and practice are proprietary, provided only that such review be undertaken under reasonable confidentiality guidelines. That letter offers even more than what the defendant contends to be the plaintiff's entitlement, but yet it continues to deny the information which is sought here.

90. In so far as there may be a genuine concern on the part of the defendant involving confidentiality, I propose to make the order subject to a requirement that information obtained by the plaintiff as a result of this order should be used solely for the purposes of this litigation, the arbitration and the plaintiff's dealings with the business of the hotel and its creditors, including the Revenue Commissioners. If it is sought to utilise the information for any other purpose the consent of the defendant must be obtained and in the absence of such consent, leave of this Court.

91. In granting the relief I am, of course, mindful of the argument which was made to the effect that if the order sought is granted there will be little left to be considered by the arbitrators on the plaintiff's rights to access of these documents. Nonetheless, given the seriousness of the situation, the clarity of the plaintiff's case having regard to its contractual entitlements and the serious consequences for it, should this order be refused, I take the view that relief should be granted. There will therefore be an order in the plaintiff's favour requiring the defendant to forthwith grant access to the plaintiff its servants or agents to:-

A. The minutes of the defendant's management meetings.

B. The defendant's internal control system manual and details of internal audits carried out by Marriott Group Internal Audit Function and any reports issued by them.

C. Details of any actions taken by the defendant as a result of any risk identified by the Marriott Group Internal Audit Function, and the scope of the Marriott's task force team's recent review/investigation and any reports issued as a result of that review.

D. Details of access rights to each computer system.

E. Details of customer names.

F. Details of employees including names, addresses, salaries, bonuses, benefits, staff advances, disciplinary action and tax information.

G. Details of who made any journal postings.

92. I direct the provision of that documentation and information for the reasons which are set out under each specific subheading at para. 22 of the affidavit of Kieran Wallace, sworn on the 5th November, 2008.