Neutral Citation No. [2008] IEHC 196

THE HIGH COURT

2008 No. 4248P

BETWEEN

SEAN JACOB

PLAINTIFF

AND

IRISH AMATEUR ROWING UNION LIMITED

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on the 10th day of June, 2008.

The relief claimed

1. On this application for an interlocutory injunction the plaintiff seeks injunctions in the following terms:

> (a) an injunction restraining the defendant from preventing the plaintiff competing at a regatta in Poznan, Poland (the Poznan Regatta) on 15th June, 2008 in his chosen discipline and;
>
> (b) an injunction requiring the defendant to take all necessary steps to ensure the plaintiff's participation in the Poznan Regatta.

Factual Background

2. The factual background to the application is that the plaintiff, who is an oarsman, for the past two and a half years has devoted his life to international rowing with the ultimate objective of qualifying for and competing at the 2008 Olympics Games in Beijing. During that period he has participated in the international selection and training programme organised by the defendant leading to the 2008 Olympics Games. For part of the period he has been in receipt of a grant from the Irish Sports Council, which he used to fund training camps and also subsistence.

3. Organisation of international rowing in Ireland is under the aegis of the defendant, which is affiliated to the Federation Internationale des Sociétés de l'Aviron (F.I.S.A.), which in turn is affiliated to the International Olympic Committee. F.I.S.A organises the World Rowing Championships and series of International Regattas. Only national associations such as the defendant can make entries to F.I.S.A. regattas. The defendant organises a national squad and appoints a team manager and a coach. It receives subvention from the Irish Sports Council.

4. The plaintiff was selected for the national team for the 2006 season and the 2007 season. He represented Ireland in the single scull class at the World Championship in 2006 and also in 2007. On each occasion he finished in thirteenth position. There are fourteen places available in the 2008 Olympic Games in the single scull class for the category of nations to which Ireland belongs. Eleven of those places were filled on the basis of ranking at the 2007 World Championship. The remaining three places will be filled on the basis of ranking at the Poznan Regatta.

5. Following the 2007 World Championship, not having qualified for the 2008 Olympics Games, the plaintiff had to decide whether he would continue to participate in international rowing with a view to qualifying at the Poznan Regatta. He decided that he would and his case is that he did so on the basis of encouragement from the defendant's then team manager and of the team coach and on the basis of a representation that he would compete at the Poznan Regatta in 2008. The defendant's position is that no such representation was made; that selection on an national squad for international competitions is on the basis of capability of the athlete at the time of selection; retention of a place in the squad is dependant upon performance and performance of all athletes is subject to continuous assessment; and, in the event of a decreasing level of performance, an athlete may be dropped from the squad at any time. There is a conflict of evidence between the parties as to when a member of the national squad for international competitions may be de-selected. In particular, the plaintiff has denied that there was a process of continuous assessment in place under which a member of the squad might be dropped at any time and has asserted that he never had any knowledge of such a process.

6. The plaintiff was selected for the 2008 season and participated in the defendant's training plan throughout the spring of 2008. Following an injury and an illness earlier in the season, the plaintiff contracted a viral infection in April, 2008, and, as is common case, that illness affected his performance. The first major competitive event of the year was the World Cup Regatta in Munich between 9th and 11th May, 2008. It is common case that prior to that event, because he was recovering from the viral infection, the plaintiff was performing below his potential, but it is also common case that at that stage he was improving and that it was envisaged that he could be fit enough to compete at the Poznan Regatta over a month later. His preparation for Munich was approached on that basis and he did not do the type of "sharpening up" he would normally do before such an event. It is also common case that the plaintiff did not perform well at the Munich Regatta. On the 11th May, 2008, the plaintiff was informed by the team manager and the team coach that he would no longer take part in the 2008 Irish rowing team for the Poznan Regatta, on the basis of their assessment that he would not achieve qualification for the Olympics.

7. Following that decision, the plaintiff was informed of his entitlement to appeal to the International Rowing Committee of the defendant. On the 14th May, 2008, he submitted his appeal in writing to that Committee. He made his case on the basis of his past performance, including his performance in 2008 despite illness. He argued that he would be able to return to top form within the succeeding five weeks. He also asked the Committee to take into account that his understanding was that the Munich Regatta was going to be a stepping stone, that he did not prepare for it on the basis that it was a selection event, and that he had never been informed of any criteria he might have to meet in order to be selected for Poznan. The plaintiff's appeal to the Committee was rejected. He was informed on the 15th May, 2008, of his right of appeal to the Board of the defendant. The defendant did appeal and on the 20th May, 2008 he was informed of the decision of the Board to uphold the decision of the International Rowing Committee.

8. On the 22nd May, 2008, the plaintiff's solicitors wrote to the defendant calling on the defendant to reverse its decision and to allow the plaintiff to participate in the Poznan Regatta and threatening to bring an application for injunctive relief if the defendant did not do so by 5pm on the 23rd May, 2008. At that stage, the plaintiff's solicitors were under the impression that the deadline for entry to the Poznan Regatta was the 2nd June, 2008. The response of the defendant was that the "legal approach" being proposed was inappropriate and that the interests of both parties would be better served by using the services of an arbitrator to rule on the issue. The defendant suggested that the matter be referred to Just Sport Ireland, a body established by the Federation of Irish Sport for dispute resolution. The plaintiff's solicitor's response was that they did not consider it feasible to establish an arbitration hearing and resolve the matter within the time available.

The course of the proceedings
9. These proceedings were initiated on the 26th May, 2008 by the issue of a plenary summons and on that day the plaintiff was given leave to issue a notice of motion returnable for the 28th May, 2008. Subsequently, but on the same day, the defendant's solicitors indicated that arbitration could be dealt with by Just Sport Ireland as early as the 28th May, 2008. The plaintiff did not take up the offer.

10. On the 28th May, 2008, the application for injunctive relief was listed for hearing on the 4th June, 2008. It subsequently emerged that the defendant had entered the plaintiff for the Poznan Regatta and that what remained to ensure that the plaintiff could compete (apart from transporting his boat to Poznan, which the defendant has undertaken to do because this application is pending) was that the defendant include him in the declaration of competitors, the latest date for submission of which is 13th June, 2008. The defendant's solicitors suggested that a hearing of the full action was essential prior to that date and that the plaintiff should agree to that course. The plaintiff did not agree. Realistically, I do not think that a full hearing preceded by an exchange of pleadings and compliance with requests for particulars and discovery was feasible in the time frame available.

11. The interlocutory application was heard over two days on the 4th and 5th June, 2008. The application raised conflicts of fact of the type which cannot be resolved on affidavit evidence and it also raised difficult questions of law which cannot be definitively decided on an interlocutory application. The Court has had the benefit of comprehensive written submissions from counsel for both parties, but because of time constraints the Court cannot deal with all of the arguments so this judgment is confined to addressing an argument which it is considered is dispositive .

The submissions in outline
12. The plaintiff's case against the defendant is based on two complaints. The first is that it was always understood, which I take to mean understood between the plaintiff and the defendant, that he would compete at the Poznan Regatta without being required to prove his competency to compete and that this understanding was based on what transpired between the defendant and the then team manager and the team coach in September, 2007 and subsequently. It is implicit in the plaintiff's case that the defendant has wrongfully resiled from that understanding. The defendant's position is that no such representation was made by the agents of the defendant and that no such understanding existed. The plaintiff's second complaint, which counsel for the defendant submitted has its root in the first complaint, is that the defendant used the Munich Regatta as a selection race to determine whether he would be allowed to compete at the Poznan Regatta and that, in doing so, the defendant acted in a manner which was unfair and in breach of the plaintiff's rights in a number of respects: that he had the right to be told that the Munich Regatta was being treated as a selection race, but was not; that he had the right to object to that process, if he felt it was unfair, but was not afforded the opportunity to do so; that he had the right to be told what criteria he would have to fulfil in order to be selected, but was not told; and that he had the right to make representations as to the nature and effect of the selection process, but was not afforded the opportunity to do so. It is implicit in the second complaint that the then manager and team coach made a wrong assessment.

13. It was argued on behalf of the plaintiff that he had three distinct causes of action: that, as a matter of public law, his right to have his legitimate expectations fulfilled had been infringed; that, as a matter of private law, there was a contractual relationship between him and the defendant which had been breached; and that his constitutional right to fair procedures had been infringed.

14. The plaintiff argued that his entitlement to interlocutory relief should be determined by the application of the principles set out by the House of Lords in *American Cyanamid v. Ethicon Limited* [1975] AC 396, as adopted by the Supreme Court in *Campus Oil Limited v. Minister for Industry and Commerce (No. 2)* [1983] I.R. 88.

15. Counsel for the defendant contested all of the plaintiff's complaints and bases of seeking relief and, on a number of grounds, contended that the *American Cyanamid* principles do not apply to the current application, one of the grounds being that the grant of interlocutory injunctions in the terms sought would effectively resolve the case in favour of the plaintiff and that it is unlikely that a trial of the action would take place. Counsel for the defendant based her submissions on this point largely on the commentary to be found in Delany "Equity and the Law of Trust in Ireland" (Fourth Edition, 2007) at p. 538. I have come to the conclusion that this argument is dispositive of the application for the reasons set out below.

The law
16. The starting point of Lord Diplock's analysis of the principles applicable to the determination of an application for an interlocutory injunction was that the grant of an interlocutory injunction is a remedy that is both temporary and discretionary. Similarly in *Campus Oil*, O'Higgins C.J. prefaced his analysis of the principles applicable to an application for an interlocutory injunction with the following observations (at p. 105):-

> "Interlocutory relief is granted to an applicant where what he complains of is continuing and is causing him harm or injury which may be irreparable in the sense that it may not be possible to compensate him fairly or properly by an award of damages. Such relief is given because a period must necessarily elapse before the action can come for trial and for the purpose of keeping matters in *statu quo* until the hearing. … The application for an interlocutory injunction is often treated by the parties as the trial of the action. When that happens, the rights of the parties are finally determined on the interlocutory motion. In cases where rights are disputed and challenged and where a significant period must elapse before the trial, the court must exercise its discretion (to grant interlocutory relief) with due regard to certain well-established principles."

17. Four years after the decision of the House of Lords in *American Cyanamid*, in *N.W.L. Limited. v. Woods* [1979] 3 All E.R. 614, Lord Diplock addressed the type of situation, which was not present in *American Cyanamid*, in which the grant or refusal of an interlocutory injunction would dispose of the action finally in favour of whichever party was successful in the application. He stated that there was nothing in the decision in *American Cyanamid* to suggest that in considering whether or not to grant an interlocutory injunction the Judge ought not to give full weight to all "the practical realities of the situation to which the injunction will apply" (p. 625). He recognised "exceptional" cases, which, when they occur, bring into the balance of convenience an important additional element and stated (at p. 626):-

> "Where, however, the grant or refusal of the interlocutory injunction would have the practical effect of putting an end to an action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other."

18. Although Lord Diplock's comments were made in the context of the application of a statutory provision which mandated the Court,

on an application for an interlocutory injunction against a party claiming that he acted in contemplation or furtherance of a trade dispute, to have regard to the likelihood of such party at the trial of the action establishing a defence of statutory immunity, they have been treated by the Courts in the United Kingdom as having general application, as is illustrated by the judgments of Court of Appeal in *Cayne v. Global Natural Resources plc*., [1984] 1 All E.R. 225 (at p. 235). The facts in that case, adopting the summary in Delany, were that the plaintiff shareholder sought an interlocutory injunction to restrain the defendant company from implementing a merger agreement and proceeding with the allotment of shares prior to the company's impending annual general meeting. If the injunction was granted, the balance of power in the company would remain the same until after the crucial vote was taken and the plaintiffs would therefore obtain the result which they sought, whereas if the injunction was refused, the votes of the new shareholders would ensure that the plan of the incumbent directors succeeded. Kerr L.J. identified the overriding consideration on the hearing of the interlocutory application as being that, if an injunction was granted, the effective contest between the parties was likely to have been "finally decided summarily in favour of the plaintiffs" (p. 236).

19. May L.J., in his judgment, having referred to *American Cyanamid* and *N.W.L.* suggested that, while the expression "balance of convenience" is useful shorthand, in truth the balance that one is seeking to make is more fundamental, more weighty, than mere "convenience"; "balance of the risk of doing injustice" might better describe the process involved. It is clear from the judgment of May L.J. that the Court of Appeal in *Cayne* had not concerned itself with the weight of either side's case. Having referred to the speech of Lord Diplock *in N.W.L.*, May L.J. stated (at p. 238):-

> "With those considerations in mind, I do not think that in cases such as the present, whatever the strengths on either side, where the decision on an interlocutory application for an injunction will effectively dispose of the claim, the court can legitimately, nor is it bound, to apply the *Cyanamid* guidelines, which as I have already said, I think are based on the proposition that there will be a proper trial at a later stage when the rights of the parties will be determined.
>
> It may well be that it is the same ultimate consideration which the court has in mind, namely the question whether it is likely to do an injustice. Where a plaintiff brings an action for an injunction, I think that it is, in general, an injustice to grant one at the interlocutory stage if this effectively precludes a defendant from the opportunity of having his rights determined at a full trial. There may be cases where the plaintiff's evidence is so strong that to refuse an injunction and to allow the case to go through to trial would be an unnecessary waste of time and expense and indeed do an overwhelming injustice to the plaintiff. But those cases would, in my judgment, be exceptional."

Application of law to the facts

20. When one analyses the practical realities of this application, the crucial step which the plaintiff seeks that the court enjoin the defendant to take is to include the plaintiff in the declaration of competitors for the single scull class in the Poznan Regatta. If the Court grants an injunction in the terms sought by the plaintiff, the defendant will be ordered to do that and, in reality, the plaintiff's claims against the defendant will have been finally disposed of. Effectively, the plaintiff will have got a summary judgment against the defendant in circumstances in which the defendant controverts the facts asserted by the plaintiff and contends that there is no basis in law for granting the plaintiff the relief he seeks either on this application or in the substantive proceedings.

21. The plaintiff is not seeking a temporary remedy. He is not seeking to keep the matters in *statu quo* until the hearing of the substantive action. He is striving to have a claim, which at its core involves the defendant in the performance of a single act, conclusively and finally determined in his favour, his inclusion in the declaration for Poznan which, if implemented, will mean that the issues in the substantive proceedings will be moot. Apart from injunctive relief in the terms sought on the interlocutory application, the only relief which the plaintiff seeks in the proceedings is declaratory relief stating that his contentions as to his legal position represent the position at law, for example, that the defendant has breached its contract with him and that the defendant has breached his constitutional rights. Whether the plaintiff is or is not correct in his contentions, the grant of an interlocutory injunction will have afforded the plaintiff the only real remedy he is pursuing, the order directing the defendant to include him in the declaration for Poznan. If he is wrong, there is no way that could be taken away from him.

22. Looking at the matter from the defendant's perspective, it has taken a stance in principle on the issues between it and the plaintiff. There are no complicating factors in this case, such as a rival competitor for entry in the Poznan Regatta. The position of the defendant is that it made a decision within its discretion and area of expertise that the plaintiff would not be able to meet the required level of performance to participate successfully in Poznan, a decision it views as regrettable but unavoidable. However, its position is that it is essential that it be in a position to reach difficult, informed and fair assessments in the matter of selection and de-selection of members of the national squad. The defendant contends that the plaintiff does not even have an arguable case that it is in breach of any of his rights. What then would be the position of the defendant if the injunction was granted and the defendant wished to progress the matter to a full hearing in order to establish that its position is correct in law? Apart from the fact that the issues would be effectively moot because the plaintiff would have obtained the only real remedy which he seeks, the defendant could not compel the plaintiff to litigate the matter to a plenary hearing. The defendant, in all probability, could have the plaintiff's proceedings dismissed with costs and it could seek to recover any losses it has incurred as a result of the grant of the injunction on foot of the undertaking as to damages given by the plaintiff. However, there is no way in which the defendant would be able to effectively dispute the plaintiff's claim at trial and, if it be the case, be able to establish that the stance in principle which it has adopted is correct in law.

23. Because of the nature and effect, if granted, of the injunctions sought by the plaintiff, it seems to me that it is very much a case of balancing the risk of injustice. In doing so, an important factor to be weighed in the balance is that, by being denied the opportunity of competing at the Poznan Regatta and of possibly qualifying for the 2008 Olympics Games, the plaintiff is being deprived of the only opportunity he will ever have to qualify for the Olympics Games, which, if he is correct in his contentions, would constitute a serious injustice. It is not an injustice which the trial of the action, if the plaintiff were prepared to pursue it, could redress, because, as regards the plaintiff's chances of ever competing in any Olympic Games, the die will be cast on 13th June, 2008. As against that, counsel for the defendant submitted that the plaintiff's refusal to participate in arbitration or engage with the possibility of an early trial are relevant factors to be weighed in the balance. While arbitration was a realistic option, I have already stated that, in my view, an early trial of the type the plaintiff would wish to prosecute prior to 13th June, 2008 was not a realistic proposition.

24. Given the state of the evidence in this case, I do not think that it is possible to assess the relative strengths and weaknesses of the case put forward by the plaintiff and the defendant. Obviously, one could form a view on a theoretical basis of the propositions of law advanced by counsel by the plaintiff as to the cause of actions which he asserts the plaintiff has against the defendant, but, in my view, that would be a meaningless exercise because the real problem in this case is the conflict on the evidence. The best one can do, it seems to me, is to consider the question suggested by May L.J. in the *Cayne* case: whether the plaintiff's case on the evidence is so strong that to refuse an injunction would constitute an injustice.

25. It is not possible to conclude that the plaintiff's case on his own evidence, leaving aside the conflicts, bears that weight. First, submissions made on behalf of the defendant point to weaknesses inherent in his evidence. In relation to specific complaints made by the plaintiff against the defendant, it was submitted on behalf of the defendant that, insofar as the plaintiff believed that from September, 2007 that he was on track to compete at the Poznan Regatta irrespective of any requirement to prove competency, such belief was either not credible or, alternatively, entirely unreasonable. Further, it was submitted that the plaintiff must have known or, alternatively, ought to have known that his performance was subject to continuous assessment and his return to fitness and his likely progress to full fitness was being monitored at the Munich Regatta. Secondly, the assessment of the plaintiff's potentiality on the basis of performance and fitness to participate effectively at the Poznan Regatta was made by his team manager and his team coach. While the plaintiff does not agree with their assessment, it is difficult to see a basis for concluding that, as a matter of probability, the team manager and the team coach were wrong in their assessment. Thirdly, it is difficult to see how the outcome would have been different if the plaintiff had been told in advance that the Munich Regatta was going to be the crucial test of his continued membership of the national team. Finally, the plaintiff has had the benefit of two appeals, albeit internal appeals, and was proffered independent arbitration for resolution of his dispute with the defendant.

26. Apart from those matters, it is pertinent to ask whether it is appropriate at all, in the absence of proof of *mala fides*, for a Court to intervene in a decision of an organisation governing a particular sport as to matters of selection and de-selection for competitive events of team members based on performance and fitness. The Court has been referred to cases in which the Courts in this jurisdiction and in the United Kingdom have intervened, or been prepared to intervene, to overrule the decision of a sporting organisation, but the focus of such interventions has primarily been concerned with the conduct of disciplinary proceedings, frequently involving drug testing. An example in this jurisdiction is the decision of this Court in *Quirke v. B.L.E.* [1988] 1 I.R. 83. The issues in this case, issues involving retention on the national team on the basis of performance and fitness, are radically different and, in the absence of obvious bad faith on the part of the defendant or some obvious egregious injustice to the plaintiff, it is difficult to countenance how the Court's involvement could be warranted.

27. Having regard to all of the foregoing factors, notwithstanding admiration for the plaintiff's pursuit of Olympian status, I have come to the conclusion that proper exercise of the Court's discretion, balancing the risk of injustice, is to refuse the interlocutory injunction.