THE HIGH COURT

[2005 No. 321P]

BETWEEN

ROBERT TRACEY

PLAINTIFF

AND
JAMES BOWEN

DEFENDANT

Judgment of Mr. Justice Clarke delivered 19th April, 2005.

1. In this application the Plaintiff seeks a *mareva* type injunction against the Defendant.

2. There is much contention in the matters deposed to in the respective affidavits sworn on both sides. However the following brief facts would appear not to be in dispute.

3. The parties became acquainted when they came to reside in separate apartments within the same apartment complex in Blackrock. While there are disputes as to who instigated the possibility of investments being made by the Plaintiff on the advice of or with the assistance of the Defendant it is common case that the Defendant recommended to the Plaintiff a possible investment and identified to the Plaintiff where certain moneys should be transferred as a means of furthering the investment concerned. The Plaintiff then transferred the moneys in the manner which had been indicated to him by the Defendant.

4. Little more is common case save that the moneys have not yet been returned and that it had been anticipated, by all concerned, that the moneys would have been returned before now.

5. The key differences between the evidence of the parties concerning the investment would seem to concern the role of the Defendant. The Defendant has denied that any investment was made with him. His case is that he recommended to the Plaintiff an investment opportunity of which he had been appraised by a Mr. Ken Nunn who is, apparently, a retired property developer based in the United Kingdom. The Defendant's case is that he was a co-investor in the scheme which he regarded as being low risk high yield and involving currency trading. He points to the fact that the moneys invested by the Plaintiff were in fact transferred directly by the Plaintiff from the Plaintiff's account to a bank account in Spain in the name of the Wells Group. The Defendant's case is, therefore, that he did nothing more than appraise the Plaintiff of an investment opportunity which he regarded as appropriate and attractive and in which he was himself to be a co-investor.

6. As against that the Plaintiff draws attention to the initial introduction by the Defendant of the investment opportunity which was by means of a note on a compliment slip describing the Defendant as "the James Bowen Company" and showing a business address at Foxrock Business Services, Cornelscourt, Foxrock and a Californian address together with a registered office at Herbert Street. He also draws attention to a second document inviting him to consider a separate investment which appears on headed notepaper with the same details as the compliment slip referred to above and which is dated 18th February, 2004. The initial compliment slip note contains writing in the following terms "Bob! I may have two units available – $50,000 x 2".

7. In those circumstances the Plaintiff contends that the true construction that should be placed on the arrangements between him and the Defendant was to the effect that he was investing money with the Defendant and that the money was paid at the direction of the Defendant to the Spanish bank account concerned. It is not possible at this stage to resolve the conflicts of fact and inferences therefrom which arise from that evidence. There is therefore a fair issue to be tried between the parties as to whether the Defendant's role was more central than that for which he contends to a sufficient extent so as to render the Defendant liable for the return of the investment. At the hearing of the interlocutory application before me it was not contended by counsel on behalf of the Defendant that there was not a fair issue to be tried though he strenuously maintained his client's position that the Plaintiff's proceedings herein were misconceived.

8. The real issue between the parties on this application is as to whether the Plaintiff has met the criteria which are required to be established in order that the court might grant *mareva* type relief. In that regard the Defendant places reliance on *O'Mahony v. Hogan* [1995] 2 I.R. 411 in which the Supreme Court set out the criteria which need to be established prior to the grant of such injunctions in the following terms:-

> (a) the Plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the court to know;
>
> (b) the Plaintiff should give particulars of his claim and the amount thereof, fairly stating the points made against it by the Defendant;
>
> (c) the Plaintiff should give some grounds for believing the Defendant has assets within the jurisdiction: the existence of a bank account is normally sufficient;
>
> (d) the Plaintiff should give some grounds for believing that there is a risk of the assets been removed or dissipated; and
>
> (e) the Plaintiff should give an undertaking in damages in the event that he should fail

9. In particular the Defendant contends that the Plaintiff has produced no or no sufficient evidence for suggesting that there are grounds for believing that there is a risk that his (the Defendant's) assets might be removed from the jurisdiction or dissipated.

10. As appears from the judgment of Hamilton C.J. in *O'Mahony* at p. 417 much of the principles identified above stem from the fact that a Plaintiff is not, in the ordinary way, entitled to require from the Defendant, in advance of judgment, security to guarantee satisfaction of a judgment that the Plaintiff may eventually obtain. The precise issues in *O'Mahony* centered on whether the intended expenditure of certain moneys in that case by the Defendant for the purposes of replacing farm buildings, the burning down of which by fire had led to the entitlement to receive the moneys from the Defendants insurers in the first place, or otherwise in the ordinary course of the Defendant's business as a farmer or to pay his lawful debts amounted to the sort of dissipation contemplated in the test established for the grant of *mareva* relief. On the facts of that case the Supreme Court held that an expenditure of the moneys concerned in the way contemplated by the Defendant in those proceedings would not amount to such a dissipation. No such issue arises in this case.

11. The only evidence of any intended or possible dissipation of his assets by the Defendant which the Plaintiff has produced concerns an alleged statement (which is strenuously denied) attributed to the Defendant by a named person whom the Plaintiff claims informed him that she was present in the Defendant's golf club when he indicated an intention of emigrating to Spain where, it is alleged he claimed, he had bought an apartment. The Defendant appears to reside in an apartment in Dublin which he would seem to own and there is no suggestion of that apartment being put up for sale.

12. However counsel for the Plaintiff places reliance on *Bennett Enterprises Inc. v. Lipton* [1999] 2 I.R. 221 where O'Sullivan J. having conducted an extensive review of the authorities up to that time noted, at p. 228, relevant extracts from the judgment of the Supreme Court in *O'Mahony* and continued as follows:-

> "I fully accept those 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 purposes 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 legitimate for me to consider all the circumstances in relation to the case and I do not consider that this approach is in any way prohibited by or at variance with the principles set out in the Supreme Court judgment in *O'Mahony v. Hogan* [1995] 2 I.R. 411."

13. O'Sullivan J. then went on to identify a range of factors which had been urged on the part of the Plaintiff in that case as giving rise to a reasonable apprehension that the relevant assets would be dissipated or removed from the jurisdiction of the courts.

14. On the facts of that case O'Sullivan J. was satisfied that the Plaintiff's apprehensions were reasonably founded. Subsequently in *Aerospace Limited v. Thomson and Others* (Unreported judgment of Kearns J. delivered 13th January, 1999) *Bennett* was followed and judicial approval was also given to a passage from *Gee* on *Mareva Injunctions and Anton Piller Relief* (4th Edition p. 198) to the following effect:-

> "Good grounds for alleging that the Defendants have been dishonest is relevant. Dishonesty is not essential to the exercise of the jurisdiction and there is no need to show an intention to dissipate assets. But if there is a good arguable case in support of an allegation that the Defendant has acted fraudulently or dishonestly (e.g. being implicated in an ingenious scheme for the misappropriation of funds belonging to the Plaintiff) or has acted unconscionably, then it is unnecessary for there to be any specific evidence on risk of dissipation for the court to be entitled to take the view that there is a sufficient risk to justify granting *mareva* relief. Once this is shown, the limit of the *mareva* relief will take into account claims for which the Plaintiff has a good arguable case, including those which do not involve such an allegation. The fact that a Defendant is experienced in intricate sophisticated international transactions involving movements of large sums of money may also indicate that there is a real risk of dissipation".

15. It seems to me therefore that *Bennett* and *Aerospace* are authority for the proposition that in assessing the risk of dissipation the court is entitled to take into account all the circumstances of the case which can include, in an appropriate case, an inference drawn from the nature of the wrongdoing alleged which if fraudulent or unconscionable may lead to the establishment of a risk that further fraudulent or unconscionable actions will be taken so as to place any assets of the Defendant outsides the jurisdiction of the court.

16. However it should be noted that the above principles require the court to look at all the circumstances of the case. Such factors are, therefore, likely to be of much greater significance in cases where the only assets of the Defendant within the jurisdiction are liquid assets capable of being moved about with great ease and in particular where the Defendant is, in the words of the passage quoted from *Gee*, "experienced in intricate, sophisticated, international transactions involving movements of large sums of money". It seems to me that those considerations are of significantly less weight in cases where, as here, the Plaintiff would appear to have real property within the jurisdiction which at least *prima facie* seems sufficient to meet any claim which the Plaintiff might have.

17. In the course of an affidavit sworn on 18th February, 2005 the Plaintiff at paragraph 20 draws attention to a variety of factors which, he asserts, ought permit the court to infer that there is a significant risk of dissipation. I should set out those factors in full:

> a) the defendant has failed to repay the monies pursuant to the terms of the investment or on foot of numerous promises to do so.
>
> b) The Defendant has consistently failed to disclose the whereabouts and or fate of the monies.
>
> c) It is significant that the Defendant has failed in his affidavit to set out the precise workings of the investment.
>
> d) The Defendant has failed to disclose any transaction involving my money subsequent to the transfer made by me on the 21st January, 2004.
>
> e) The Defendant's claim that he was simply a co-investor and denial that he procured the monies for investment in his capacity as a financial advisor fly in the face of the documents provided by the Defendant and the statements made by him and are simply unbelievable.
>
> f) The Defendant's averment that he never solicited any other investment from your deponent is patently untrue having regard to the contents of the investment offer contained in the letter of the 18th February, 2004.
>
> g) The Defendant has hidden behind the actions of Mr. Ken Nunn and Mr. Thomas Wells yet has never provided any clue to the real identity or background of these individuals.
>
> h) Correspondence to Thomas Wells in July 2004, by registered post was returned.
>
> i) I have never received any direct communication, information or explanation from Ken Nunn or Thomas Wells.
>
> j) The Defendant's explanation of how he came to be acquainted with Ken Nunn and the suggestion that the invitation to participate in the "investment" was in appreciation of previous assistance is both vague and unbelievable.
>
> k) The Defendant has provided varying and inconsistent explanations as to the delay in returning the monies.
>
> l) The Defendant has not exhibited a single document to substantiate his claims nor has he provided any evidence that would tend to corroborate his denial of an intention to dissipate his assets with a view to evading his obligations.

m) The one document exhibited by the defendant for the purpose of appraising the court of the up to date position with regard to the monies contains an incomprehensible explanation the gist of which appears to be that the monies are gone but shall be made good through some sort of bank guarantee.

n) It is noteworthy that neither of the Defendant's associates has sworn an affidavit in support of the Defendant's claim.

o) The Defendant has not denied having property in Spain and from his business paper it appears that he also operates from California which may explain his request for the money to be transferred in US dollars.

p) It is clear that the Defendant has the expertise and wherewithal to transfer and dispose of funds and assets internationally through his network of associates.

q) Notwithstanding that the defendant gave an undertaking on the 14th February, 2004, in terms of para. 3 of the notice of motion herein, he has failed to so account.

r) The Defendant has failed to exhibit bank statements or anything which might allay your deponent's fears that the funds are in danger of being dissipated or removed from the jurisdiction of the courts.

18. Many of those assertions are highly contentious. For example the suggestions at sub- paragraphs (a) to (c) and (e) which concern the alleged failure of the Defendant to repay the moneys, to disclose the whereabouts thereof and the workings of the investment, and the Defendants denial that he procured the moneys for investment in his capacity as a financial advisor are dependent on a resolution of the issue concerning the status of the involvement of the Defendant in the Plaintiff's investment in favour of the contentions put forwards by the Plaintiff. These factors are not inherently suggestive of fraud or unconscionable activity. Furthermore a number of the contentions are expressly dependent on the court being satisfied that, in the words of the affidavit, certain statements of or positions adopted by the Defendant are "unbelievable".

19. In all the circumstances of the case I am not satisfied that any of those factors whether taken alone or collectively are sufficient to create a reasonable apprehension that the Plaintiff will dissipate his assets in an inappropriate fashion subject to one caveat to which I now turn.

20. It is correct for the Plaintiff to point out that the Defendant has not, in the course of these proceedings sworn any affidavit which deals with his assets other than a reference to his ownership of his apartment at Blackrock. It seems to me that the Defendant should make clear, on affidavit, that he is the owner of that apartment and give some reasonable estimate as to the net value thereof. Clearly the weight to be attached to the fact that he resides in a property which he owns in Ireland in an overall assessment of all of the circumstances concerning the risk of dissipation require such information to be available.

21. Subject to the Defendant filing a satisfactory affidavit in that regard it would not seem to be appropriate to grant interlocutory relief. However pending the receipt and consideration of such an affidavit this application should not be considered as being at an end and the undertaking previously tendered by the Defendant in terms similar to the *mareva* relief sought will continue.

22. I should not conclude this judgment without passing some comment on the highly argumentative manner in which both parties have presented their evidence in affidavit form. While acknowledging that there has been an increasing tendency on the part of deponents in many interlocutory matters to use affidavits as a means of putting forward argument rather than evidence I am particularly concerned that that practice should not be allowed extend to permitting highly contentious argumentative material to appear in a document which should only include evidence. In his replying affidavit the Defendant describes the Plaintiff's claims as "wholly unsustainable" and "outrageous", he suggest that it is "remarkable" that the Plaintiff could swear an affidavit making certain of the allegations. He further states that the bringing of the application concerned "is completely unacceptable". Similarly in his supplemental affidavit the Plaintiff describes the Defendant's claim that he has no responsibility in respect of the money as "outrageous" and goes on in a subsequent affidavit to describe explanations as "preposterous" and "an extravagant ruse".

23. Furthermore it is difficult to escape the conclusion that some of the matters put in evidence in this case (to which I will not refer so as to avoid giving them any greater currency) were deposed to (certainly as to the detail provided) principally for the purposes of embarrassment rather than because they were matters which were material to the issues which the court had to decide. It is appropriate to reiterate that the primary purpose of an affidavit is to place evidence before the court. While it may be permissible and indeed in certain cases useful if the affidavit makes brief reference to the principal contentions which the party concerned seeks to make (in that it thereby puts the other side upon notice of the principal contentions that would be made) any such contentions should be expressed in unemotive terms. The purpose of permitting any latitude in the making of argument through affidavit is simply to permit a party to draw attention to the arguments that are intended to be made and not for the purposes of advocacy. If it is desired to reduce argument by way of advocacy to writing then same should be done by means of a written submission to the court rather than contained in flamboyant language in an affidavit. While neither side is without fault in the above matters I do have to say that I believe that the Defendant must bear a greater share of the blame.

24. Subject, therefore, to a consideration of the further affidavit referred to above concerning the Plaintiff's residence I would propose making no order at this stage. I note that the undertaking previously given is to continue, but further indicate that in the event of a satisfactory affidavit along the lines indicated above being filed it would be not my intention to grant any interlocutory relief.