Neutral Citation [2017] IEHC 74

THE HIGH COURT

[2014 No. 2862 S.]

BETWEEN

PATRICK O'LEARY

PLAINTIFF

AND

VOLKSWAGEN GROUP IRELAND

DEFENDANT

(No. 2)

JUDGMENT of Mr. Justice Binchy delivered on the 14th day of February, 2017

Introduction

1. This is a ruling arising out of my decision in the substantive proceedings delivered on 9th December, 2016. It will be recalled that prior to the hearing of the substantive proceedings I dealt with an application for a "split trial" moved on the part of the plaintiff, to which I acceded. As a result, having concluded as I did in the substantive proceedings that there was a breach of contract on the part of the defendant, for which the plaintiff's remedy should be in damages (rather than the other reliefs sought by the plaintiff) the parties asked to address the Court as to the manner in which assessment of damages should be addressed, having regard to my conclusions in the substantive proceedings. The parties are not agreed as to the approach to be applied to the assessment of damages, and this disagreement in turn arises out of differing interpretations of the parties of the judgment handed down on 9th December, 2016. References in this judgment to "the contracts" and "the termination notice" shall have the same meaning as in the substantive judgment.

Submissions of the plaintiff

2. Firstly, counsel for the plaintiff, Mr. Sreenan SC, refers to the application for injunctive relief, which was brought by the plaintiff, contemporaneous with the issue of the proceedings, whereby he sought orders from this Court restraining the defendant from taking any steps to terminate the plaintiff's Volkswagen dealer contracts, pending the determination of these proceedings.

3. That application was declined by Moriarty J. in a judgment delivered on 4th July 2013, the Court noting the undertaking of counsel on behalf of the defendant, to refrain from contacting customers of the plaintiff without the plaintiff's prior consent, which undertaking has continued to this day. Moriarty J. declined to grant injunctive relief on the grounds that the plaintiff failed to meet the test articulated by Fennelly J. in the case of *Maha Lingham v. HSE* (Unreported, Supreme Court 4th October, 2005) i.e. the plaintiff failed to satisfy Moriarty J. that he had a strong case likely to succeed.

4. It is submitted on behalf of the plaintiff that had Moriarty J. had the benefit of this Court's judgment at the time he refused the injunction application, he would have decided that application differently on the basis that he would have had the benefit of knowing that the plaintiff had succeeded in establishing that the defendant had terminated the plaintiff's contracts in a manner that was contrary to Article 20 thereof. In that event, the plaintiff would have been able to continue trading as an authorised Volkswagen dealer from 2013, up to the present day and would not have sustained any loss of profits as a consequence of the termination of the contracts during that period.

5. Secondly, the plaintiff points to that part of my judgment in which I stated, at para. 216 the following:-

> "*In this case of course the issue is not about the interpretation of the notice served, but about compliance with a separate condition of the contract which must be complied with when serving the notice to terminate the contract under either article 17 or article 18. If the defendant had failed to give any reasons at all at the time of service of notice of termination then there could hardly be any doubt but that the notice of termination would be invalid. Similarly, if it were found that the defendant had terminated the contract for any of the "hard core" reasons described in Article 4 of the BER, I think it likely that that would inevitably lead to a declaration that the termination was invalid. But I have found that the contracts were not so terminated, and that they were terminated by the defendant following a bona fide review of its network requirements. The only difficulty is that in terminating the contracts the defendant has failed to give reasons that are sufficiently detailed and transparent for the purposes of Article 20 of the Contracts*."

6. It is submitted that in circumstances where I determined elsewhere in the judgment that the explanation proffered on behalf of the defendant for terminating all of the contracts was "highly implausible", it cannot be the case that a person who gives incorrect reasons for terminating the contracts could be in a better position than a person who has given no reasons at all. Furthermore, since the Court has held that the reason for terminating all contracts was implausible, the true reason for termination of the same (including the plaintiff's contracts) remains unknown. While I identified three possible reasons why the defendant chose to terminate all of the contracts (rather than just those of the dealers who were not to be offered new contracts), it is submitted that those reasons might have been amenable to challenge by the plaintiff had they been given. Attention is also drawn to the fact that I held the breach of contract to be more than a technical breach, while at the same time saying that it was not egregious, for the reasons stated. Accordingly, it is submitted, that since I held that the plaintiff's remedy for breach of Article 20 of the contracts on the part of the defendant lies in damages, rather than by way of a declaration that the termination of the contracts is invalid, such damages should be assessed on the basis of profits lost, by reason of the termination of the contracts, from 30th April 2013, onwards, when termination of the contracts took effect.

7. It is further submitted on behalf of the plaintiff that I made no finding that the contract had been validly terminated; that all I held was that the plaintiff's remedy for the defendant's breach of contract lies in damages rather than by way of a declaration that the contracts had not been validly terminated, as sought by the plaintiff. Therefore damages should be assessed on the basis that termination of the contract was ineffective and that the plaintiff should be compensated for profits lost since the end of the termination notice period i.e. 30th April 2013.

8. The defendant also has a counterclaim in the proceedings. The relief sought in the counterclaim includes, *inter alia*, orders directing the plaintiff to remove from his premises any and all Volkswagen signs and to cease to make use of the Volkswagen trademark. The plaintiff argues that the Court should make no order on the counterclaim, pending an appeal, because otherwise the plaintiff's business would be destroyed in the intervening period and would render nugatory the outcome of any appeal. The plaintiff argues that the defendant could suffer no prejudice if the question of the counterclaim is simply deferred at least until such time as this Court deals with assessment of damages. The plaintiff submits that in the intervening period the plaintiff will simply be selling vehicles produced by the defendant, albeit that he would be competing with their authorised Cork city dealer.

9. Moreover, it is argued, for the defendant to succeed with its counterclaim, it must establish that the plaintiff's contracts have been validly terminated. This is because the entitlement to require the plaintiff to cease holding himself out as an authorised Volkswagen dealer only arises in circumstances described in Article 21 of the contracts i.e. upon termination of the contracts. The plaintiff contends that since I made no express determination that the contracts have been validly and effectively terminated the defendant is not entitled to rely on Article 21 of the contracts, or to any relief by way of counterclaim.

10. As to the legal principles to be applied in assessing damages for breach of contract, the plaintiff agrees with that part of the defendant's submissions (referred to below) in which it is stated that:-

> "*an award of damages following a breach of contract is designed to put the plaintiff in the same situation as if the contract had been performed*."

However, it is submitted that in this case what that means is that if the defendant had complied with the contract, it would not have attempted to terminate the contract with a notice which did not comply with Article 20. Moreover, the Court cannot assume, for the purposes of assessing damages, that the defendant would have served a valid notice of termination. It is not for the Court to hypothesise what the defendant might have done in order to optimise its position.

Submissions of the defendant

11. The defendant submits that, since I have held that the plaintiff's remedy in respect of the breach of Article 20 of the contracts by the plaintiff lies in damages, that such damages fall to be determined on the basis that an award of damages for breach of contract is primarily designed to put the plaintiff in the same position he or she would be in if the contract had been performed. The defendant relies upon the dictum of Parke B. in *Robinson v. Harman* (1848) 1 Exch 850 at p. 855:

> "*The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed*."

12. The defendant further relies upon the dictum of Geoghegan J. in *Doran v. Delaney* (No. 2) [1999] 1 I.L.R.M. 225 where he said at p. 308:

> "*If a party to a contract breaks that contract the other party is entitled to be compensated on the basis of what he has lost by reason of the contract not being performed… subject to the special principles of mitigation of damages and remoteness of damage*."

13. Accordingly, the defendant submits that since I have declined to grant the plaintiff an order that the contracts were invalidly terminated, it follows that they were validly and effectively terminated under Article 17, on foot of the termination notice of the defendant dated 18th April, 2011. Damages for failing to comply with the requirements of Article 20 should be assessed on the basis of the above principles. What that means is that damages should be assessed on the basis that the plaintiff is entitled to be compensated for any losses that he may have sustained by reason of not having received reasons for termination sufficient to comply with Article 20 of the contracts i.e. the plaintiff is entitled to be placed in the same position that he would have been if a compliant notice had been served under Article 20. The defendant submits that it is difficult to see how any financial losses would flow only from the failure on the part of the defendant to comply with Article 20 of the contracts. The defendant also disagrees with the proposition advanced on behalf of the plaintiff that had Moriarty J. known that this Court would find that the defendant had terminated the contracts in breach of Article 20 thereof, then he would have granted the plaintiff injunctive relief. It is submitted that had Moriarty J. had the benefit of the judgment in the substantive proceedings, no injunction could have been granted because this Court declined to grant a declaration that termination of the contracts was invalid, and that the plaintiff's remedy for breach of Article 20 lay in damages only.

14. Furthermore, the defendant submits that had the plaintiff obtained injunctive relief in June 2013, he would have been required to give an undertaking as to damages to the defendant. Since this Court has found that it would have been wrong to declare termination of the contracts void *ab initio*, the defendant would be entitled to rely on that undertaking.

15. In relation to the its counterclaim, the defendant submits that the plaintiff is now in an ongoing breach of Clause 21 of the contracts, which is prejudicial to the legitimate business interests of the defendant and its sole authorised Cork city dealer which is due to open its flagship premises in Cork at the start of April of this year. Accordingly, the defendant is entitled to require the plaintiff to comply with Article 21 of the contracts forthwith.

16. Article 21 of the contracts is not set out in the judgment of 9th December, 2016. It states:

> "*Article 21 – Procedure at end of contract*
>
> *(1) Upon and following termination of this agreement the dealer shall immediately and in any event within 14 days of termination of this agreement:*
>
> > *(a) cease using the Supplier's trademarks or any marks liable to be confused with them. Signs and trademarks specific to the Supplier shall be removed, otherwise the Supplier shall be entitled to have them removed at the Dealer's expense. The Dealer hereby grants the Supplier authority and licence to enter onto its business premises and operating facilities in order to remove them. This also applies to a third party instructed by the Supplier to remove such signs*."

17. Counsel for the defendant robustly dismisses the suggestion made on behalf of the plaintiff that, since I did not expressly grant a declaration that the termination of the contracts was valid and effective, their status remains undetermined and it does not follow that the contracts have been validly terminated. It is submitted that since I did not set aside the notice of termination and did not

declare it to be ineffective or invalid, it follows inextricably that the notice of termination took effect in accordance with its terms on 30th April, 2013 and that the contract cannot survive in some sort of "grey half life". Counsel makes the point that I concluded that compliance with Article 20 was not a condition precedent for the effective termination of the contracts and that there is no doubt at all but that the contracts were terminated as of 30th April 2013, following the expiration of the notice period. As such, it follows that from the expiration of the notice period the plaintiff has not been entitled to hold himself out as an authorised dealer of the defendant.

18. While at the time of the application for an injunction, the defendant gave an undertaking to the Court that it would not attempt to contact customers of the plaintiff pending determination of the proceedings, at that time it was envisaged that the proceedings would be heard in November 2013. For a variety of reasons that did not occur, and the plaintiff has had the benefit in the meantime of that undertaking on the part of the defendant and also of being able to hold himself out as being a dealer of the defendant. Additionally, the authorised dealer for Cork City is about to open its new premises and this is an additional and substantial reason to require the plaintiff to comply with condition 21 of the contracts.

19. In view of the disagreement between the parties as to the effect of my decision as regards the status of the notice of termination, counsel for the defendant requested me to clarify that the notice of termination of the contracts is valid and effective and is not in any way modified or qualified by anything I have said in my substantive judgment.

Ruling

20. The defendant was under an obligation to give the plaintiff detailed, objective and transparent reasons for termination of the plaintiff's contracts. The defendant decided to terminate all dealership contracts in its network at the same time and for the same reason stating that it was "necessary" to do so in order to give effect to a reorganisation of its network. The defendant did not say why it was necessary to terminate all contracts and for reasons given in the substantive judgment, I found that the reason given to the plaintiff for the termination of the contracts – which was the same reason given to every dealer – was lacking in the detail and transparency to which he was entitled under his contracts with the defendant.

21. During the course of the hearing, Mr. Willis, former managing director of the defendant, explained that the reason the defendant considered it "necessary" to terminate all contracts at the same time was in order to give all of the dealers the opportunity to tender for dealerships at points in the new ideal network. I found this explanation to be highly implausible and not supported by the other evidence in the proceedings.

22. In the course of my judgment, I opined, *obiter*, as to the circumstances in which a failure to serve notices compliant with Article 20 of the contracts would be very likely, or certain, to give rise to a declaration of invalidity of the notice of termination. One of those circumstances was where no reasons at all were given when serving a termination notice. The plaintiff argues that a supplier who has given no reasons at all for terminating a contract can hardly be in a worse position than a supplier who has given reasons that are found to be highly implausible. That being the case, it is submitted that the plaintiff should be entitled to have damages assessed on the basis that I have given a declaration of invalidity of the notice of termination of the contracts, even though I have declined to do so.

23. While there is much force in this argument, it ignores the reasons why I declined to grant an order declaring the termination notice to be invalid. These were:

> (i) It was not disputed that the defendant had an entitlement to terminate the contracts for any reason upon two years' notice provided:
>
> > (a) termination was not for one of the "*hardcore*" reasons referred to in Article 4 of the BER, i.e. that termination was not related to pro-competitive behaviour on the part of the plaintiff, and
> >
> > (b) that when terminating the contracts, the defendant provided the plaintiff with detailed, objective and transparent reasons for doing so;
>
> (ii) I found that the termination of the contracts was not motivated by any of the "*hardcore*" reasons referred to in the BER, or on account of any pro-competitive behaviour on the part of the plaintiff;
>
> (iii) Termination of the contracts was a consequence of a *bona fide* review of the network;
>
> (iv) The plaintiff delayed in the issue of proceedings until the very end of the termination notice period;
>
> (v) The defendant had proceeded to implement its ideal network plan and its duly appointed Cork city dealer was proceeding with the construction of a new state of the art dealership premises. Following considerable delay, that premises is due to open in April of this year.

24. Furthermore, regard should be had to the fact that notwithstanding that the termination notice took effect from the end of April 2013, the plaintiff has remained in a position to hold himself out as an authorised Volkswagen dealer and the defendant gave an undertaking to the Court (which continues) not to contact the plaintiff's customers. Accordingly, the plaintiff has been able to continue trading as an authorised Volkswagen dealer, although not without difficulty and at a lower profit margin, because he has had to source vehicles through third party dealers. This became even more difficult from 2015 onwards, when the defendant enforced its entitlement to require other dealers to register vehicles that they purchased on behalf of the plaintiff before supplying them onwards to the plaintiff, which had the effect of adding additional costs to the acquisition of vehicles by the plaintiff, thereby reducing his margin further.

25. In the substantive judgment, I held that the failure to give detailed, objective and transparent reasons for termination was something more than a technical breach of the contract because of the *raison d'être* of that requirement, but on the other hand I also held that it was not an egregious failure because of all of the factors that I have mentioned above. Therefore, I took the view that it would be disproportionate to grant a declaration that the contracts had not been validly terminated, which would have the effect of requiring the defendant to serve a fresh notice of termination, thereby giving the plaintiff two more years as an authorised dealer, against the background outlined above. As stated in the substantive judgment, I consider that the appropriate remedy for the plaintiff against that background lies in damages and such damages can only be measured in accordance with the applicable principles.

26. There does not appear to be any dispute as to the applicable principles. What is in dispute is whether or not damages are to be assessed on the basis that the contracts were effectively terminated by the termination notice. The termination notice is either effective or it is not. I expressly declined to grant the relief sought by the plaintiff declaring the notice to be invalid. In the circumstances it did not seem to me to be necessary to give an express declaration confirming its status, but since that is now the crux of the issue I confirm that damages are to be assessed on the basis that the contracts were effectively terminated by the termination notice with effect from 30th April 2013, and in respect of such losses, if any, as have been sustained by the plaintiff as a result of the defendant's breach of contract.

The defendant's counterclaim

27. Since the termination notice is and has been affected since 13th April 2013, it follows that the defendant is entitled to an order requiring the plaintiff to comply with Article 21 of the contracts without further delay.