Neutral Citation : [2016] IEHC 461

THE HIGH COURT

[2014 No. 6176P]

BETWEEN

BONICE PROPERTY CORP., OCTARA LIMITED

AND STEPHEN EVANS-FREKE

PLAINTIFFS

AND

ANNE OAKES

(OTHERWISE JULIANA MARY THORNTON)

DEFENDANT

Judgment of Mr Justice David Keane delivered on the 29th July 2016

Introduction

1. This is an interlocutory application for a *Mareva* injunction.

2. The first and second named plaintiffs ("Bonice" and "Octara", respectively) are each non-trading property holding companies incorporated under the laws of the British Virgin Islands. The third plaintiff, Mr Evans-Freke, is the controlling director and ultimate owner of both Bonice and Octara. That ownership is exercised through Laxton Holdings Limited ("Laxton"), of which Mr Evans-Freke owns the entire issued share capital. It is the parent company of both Bonice and Octara. On a date subsequent to the hearing of the present application, Laxton successfully applied to be added to the proceedings as a plaintiff.

3. Mr Evans-Freke lives and works for much of each year in the United States of America.

4. The defendant, Ms Oakes, is a property restorer. She currently resides in the United Kingdom but, during the period material to the plaintiffs' claim, was living in West Cork.

Background

5. In or about 1999, using Bonice as a vehicle, Mr Evans-Freke acquired a then derelict property called Castle Freke near the village of Rathbarry in West Cork. As the name suggests, that property has historical associations with his family. In 2001, Mr Evans-Freke met Ms Oakes who, through Octara, then owned a property in the same area named Rathbarry Castle, which she was in the process of restoring. That property also has historical associations with the family of Mr Evans-Freke.

6. In or about 2004, Mr Evans-Freke and Ms Oakes agreed that she would become the project manager of the restoration of Castle Freke. In the same year, Mr Evans-Freke purchased Rathbarry Castle from Ms Oakes. This was accomplished by the transfer to Mr Evans-Freke of a controlling interest in Octara, the vehicle through which Rathbarry Castle was held by Ms Oakes. Thereafter, the agreement between them was that Ms Oakes would manage the restoration and maintenance of both buildings. Ms Oakes contends that she assumed additional responsibilities as, in effect, caretaker, housekeeper and personal assistant to Mr Evans-Freke.

7. The arrangement between the parties involved Ms. Oakes assuming responsibility for the payment of the tradesmen, casual labourers and third party contractors who were engaged in connection with the restoration works. Ms Oakes kept a handwritten record of those payments in notebooks that she maintained for that purpose. Mr Evans-Freke made transfers into Ms Oakes' bank account in Clonakilty in line with regular payment summaries that she provided to him and, during the course of his frequent visits to Ireland, sat down with her to reconcile those payments with the contents of the notebooks.

8. Ms Oakes was paid €3,000 *per* week by Mr Evans-Freke in the period between 2004 and 2009 and €1,500 *per* week thereafter. Mr Evans-Freke contends that Ms Oakes agreed the reduction in that weekly payment in 2009 in line with a reduction at that time in the scale of the works she was managing. Ms Oakes contends that, rather than agreeing a reduction of €1,500 in the weekly payment due to her, she agreed to accept the indefinite deferral of payment of that amount in response to the plaintiff's request that she do so by reference to his personal financial position at that time.

9. As part of the arrangements between the parties, Ms Oakes was permitted to reside rent free in an apartment in the stable block at Rathbarry Castle.

10. Mr Evans-Freke provides what he considers a conservative estimate of the amounts that he transferred to Ms Oakes during the period between 2004 and 2014, inclusive of her own remuneration, in the total sum of €3,407,901.

11. In June 2014, an employee of Mr Evans-Freke informed him of his belief that there was a discrepancy between what was recorded in the notebooks held by Ms Oakes concerning the level of payments made to certain tradesmen and what those tradesmen had told that employee about the payments they had actually received. In response, Mr Evans-Freke began to carry out enquiries.

12. As a result of those enquiries, Mr Evans-Freke alleges that the Ms Oakes engaged in the following fraudulent conduct:

> (a) Paying tradesmen that she engaged at significantly lower rates than those recorded in the notebooks by reference to which she obtained reimbursement from Mr Evans-Freke.
>
> (b) Recording in the notebooks that certain tradesmen were employed and paid all year round and claiming reimbursement accordingly when those tradesmen were not employed or paid all year round.
>
> (c) Recording in the notebooks that certain tradesmen were involved in the relevant restoration works for particular periods and claiming reimbursement accordingly when those tradesmen were engaged instead during those periods in works for Ms Oakes' sole personal benefit at a property that she owned near Glandore or at a property in which she has an interest in France.

(d) Recording in the notebooks that payments were made to certain tradesmen in respect of holiday periods and claiming reimbursement accordingly when no such payments were made.

(e) Recording in the notebooks that certain tradesmen were still working on the restoration project after those tradesmen had ceased working on it and claiming reimbursement accordingly

(f) Recording in the notebooks that higher payments had been made to third party suppliers of goods and services than those that actually were made and claiming reimbursement accordingly.

13. Ms Oakes denies each and every one of these allegations.

14. The plaintiffs' original estimate of the amount wrongly appropriated by the defendant was €1,076,000. However, in the course of the hearing before me the defendant drew to the Court's attention certain mistakes in the assumptions and the documentation underpinning the relevant calculations. This prompted Mr Evans-Freke to swear a corrective affidavit, which he did on the 3rd July 2015, acknowledging that a more accurate current estimate is €855,000.

Procedural History
15. A plenary summons issued on the plaintiffs' behalf on 17th July 2014. In the general indorsement of claim that it contains, the plaintiffs seek against the defendant: damages for deceit, breach of contract, negligence and negligent misstatement; equitable compensation for breach of trust and breach of fiduciary duty; all necessary accounts, inquiries and directions; and various ancillary reliefs.

16. On the same date, the plaintiffs sought and obtained, on an interim *ex parte* basis, a worldwide *Mareva* injunction, restraining the defendant from removing from Ireland, disposing of, dealing with or diminishing the value of her assets to the sum of €1,076,000.

17. On the 30th July 2014, the Court made a further order, the effect of which was to amend a proviso in the original order to permit the defendant to spend €8,000 *per* month towards her ordinary living expenses; €20,000 towards the discharge of a debt owed to Lisavaird Co-op; and a reasonable sum on legal advice and representation in relation to these proceedings.

18. On the 29th July 2015, subsequent to the hearing of the present application, the Court made a further order permitting the sale of the defendant's property in Glandore; directing that the proceeds of sale be lodged in an identified bank account of the defendant; and, in effect, permitting up to 40% of the sum representing those proceeds to be applied for the purposes of the proviso already described.

The legal test
19. The necessary criteria to obtain a *Mareva* injunction are those endorsed by the Supreme Court in *O'Mahony v. Horgan* [1995] 2 I.R. 411 at 416. As the judgment of Hamilton C.J. records, the trial judge in that case (Murphy J.) had listed them as follows:

'1. The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.

2. The plaintiff should give particulars of his claims against the defendant, stating the grounds of his claims and the amount thereof and fairly stating the points made against it by the defendant.

3. The plaintiff should give some grounds for believing that the defendant had assets within the jurisdiction. The existence of a bank account is normally sufficient.

4. The plaintiff should give some grounds for believing that there is a risk of the assets being removed or dissipated.

5. The plaintiff must give an undertaking in damages, in case he fails.'

20. As Hamilton C.J. went on to point out in *O'Mahony*, these are the five criteria that were laid down by Lord Denning in *Third Chandris Shipping Corporation v. Unimarien SA* [1979] Q.B. 645 at pp. 668-669 because of the draconian nature of such orders.

21. The test that the Court must apply in considering an application for a *Mareva* injunction was also set out by Hamilton C.J. in *O'Mahony v. Horgan* at p. 418 in the following terms:

"[A] *Mareva* injunction will only be granted if there is a combination of two circumstances established by the plaintiff *i.e.* (i) that he has an arguable case that he will succeed in the action, and (ii) the anticipated disposal of a defendant's assets is for the purpose of preventing a plaintiff from recovering damages and not merely for the purpose of carrying on a business or discharging debts."

22. In formulating that test, Hamilton C.J. cited the following passage from judgment of Kerr L.J. in *Z Ltd. v. A-Z and AA-LL*[1982] Q.B. 558 at p. 585 of the report:

'… *Mareva* injunctions should be granted, but granted only, when it appears to the court that there is a combination of two circumstances. First, when it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum. Secondly, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him.'

23. I now propose to address the arguments of the parties on the evidence so far presented in light of the foregoing principles.

The five criteria
24. The defendant has raised an issue concerning whether the plaintiffs have breached the duty that they owe to the Court to make full and frank disclosure in seeking a *Mareva* injunction. In order to provide context for that argument, I propose to re-order my consideration of the relevant criteria and to consider that one last instead of first.

(i) Is the plaintiffs' claim sufficiently particularised?

25. I am satisfied that the plaintiffs have adequately particularised the grounds of their claim and the amount of their claim. That was

initially done in the grounding affidavit that Mr Evans-Freke swore on the 16th July 2014. As previously noted, the manner in which the amount of that claim was calculated, was further particularised in a subsequent affidavit that Mr Evans-Freke swore on the 19th January 2015 and when the defendant drew the Court's attention to errors in that calculation in the course of the hearing before me, Mr Evans-Freke swore a corrective affidavit on the 3rd July 2015 acknowledging, and apologising for, those errors and correcting them.

26. I am further satisfied that the plaintiffs endeavoured to fairly state the points that Ms Oakes might wish to make against their claim in the form of the averments set out at paragraphs 44 to 47 of the grounding affidavit of Mr Evans-Freke.

ii. assets within the jurisdiction

27. The presence within the jurisdiction of assets belonging to the defendant – in the form of real and personal property and certain choses in action, including identified bank accounts and rather less well identified debts due to her – is not in issue for the purposes of the present application.

iii. risk of dissipation

28. In considering the requirement that a plaintiff establish a risk of the defendant's assets being dissipated or moved beyond the reach of the Court to defeat the plaintiff's claim, O'Sullivan J. observed in *Bennett Enterprises Inc. v. Lipton* [1999] 2 I.R. 221 that:

> '…direct evidence of an intention to evade will rarely be available at the interlocutory stage. I consider it is legitimate for me to consider all the circumstances in relation to the case.'

29. In *Aerospares Ltd v. Thompson &Ors* [1999] IEHC 76, Kearns J. quoted with approval the following statement from Gee, *Mareva Injunctions and Anton Piller Relief* (4th ed. p. 198):

> 'Good grounds for alleging that the defendant has 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 further 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.'

30. This is a case in which the underlying claim is one of fraud or dishonesty, involving a scheme (whether considered ingenious or not) for the misappropriation of the plaintiffs' funds through the unconscionable acts of the defendant with the result that, should the Court find there to be a good arguable case to that effect, no further specific evidence of risk of dissipation of assets would be strictly necessary for the Court to be entitled to take the view that such risk has been established.

31. Nevertheless, at the hearing of the present application, the plaintiffs have put forward seven factors which, they say, whether considered individually or cumulatively, also go to establish a risk of the dissipation of her assets by the defendant in order to defeat their claim for relief.

32. Having considered those submissions carefully, it seems to me that three of the factors identified more properly and obviously go to the question of whether the plaintiffs have made out a good arguable case against the defendant. Those factors are: first, that the plaintiffs say they have clearly made out a case of fraud against the defendant based on information obtained from multiple sources, which case, though denied, has not been significantly rebutted; second, that the plaintiffs have adduced specific evidence that two particular tradesmen were not in Ireland during certain periods when the defendant claimed and received payment for work that was ostensibly being done by them, and that the defendant has offered no explanation in the face of that evidence; and third, that the plaintiffs have adduced evidence of payments that the defendant made to settle the claims of two other tradesmen who had become aware of the holiday pay that had been claimed on their behalf by the defendant though not passed on to them, in the face of which the defendant has offered an inadequate denial in conjunction with an innately implausible explanation for making those payments.

33. It does not seem to me appropriate to consider any of those three factors in the context of the question of whether the plaintiffs have established a risk of the dissipation of assets by the defendant in order to defeat the plaintiffs' claim.

34. There are, however, four other factors that it does seem to me I should consider in that context and I will briefly deal with each of those in turn.

35. The first is the defendant's failure to disclose certain of her assets in the affidavit that she swore on the 29th July 2014 in purported compliance with the interim order of the Court made on the 17th July 2014. Those assets comprise certain monies owed to the defendant. They came to light when the plaintiffs discovered documentation evidencing charges registered over certain properties as security for that indebtedness. In the corrective affidavit that the defendant swore on the 14th July 2015 to deal with this omission, an apology is tendered and an account is given of the circumstances in which those charges came to be created, culminating in an averment that the defendant does not expect to benefit significantly from the realisation of the security that they provide, though still not disclosing the precise nature and extent of the indebtedness (*i.e.* the asset) that they came into existence to secure.

36. The second such factor is the evidence that the plaintiffs have adduced that the defendant used a particular alias several years ago for which she has offered no explanation beyond a bare denial.

37. The third factor concerns the circumstances of the defendant's abrupt departure from West Cork in July 2014 and the fourth comprises the related circumstance whereby the defendant withdrew effectively all of the funds from her bank in Clonakilty, in the form of bank drafts, at or about the time of her departure. The explanation provided by the defendant in that regard is that she left West Cork to visit her daughter in the United Kingdom with the prior intention of travelling on to France and that she had effectively emptied her Irish bank accounts in the form of two bank drafts for the purpose of applying the entire of those monies (representing £15,000 sterling and €58,500) towards the renovation of a property in France owned by a company in which she has a shareholding.

38. Having carefully considered the relevant evidence, I have come to the conclusion that it is appropriate to draw from it the inference that, if not restrained by the Court, there is a risk of the dissipation, or disposal, of the defendant's assets to defeat the

plaintiffs claim.

iv. undertaking as to damages

39. In the context of the interim order already made, the plaintiffs have given an undertaking to abide by any order that the Court may make as to damages, if it forms the opinion that the defendant has suffered any damage by reason of the making of that order that the plaintiffs ought to pay.

40. The defendant raises concerns about the value of that undertaking. She avers that there is a judgment outstanding against Mr Evans-Freke in the United States in respect of which he currently owes $2,415,026. She further avers that there are two sets of proceedings pending against the plaintiff before courts in the United States in which claims of the value of $5 million and $8.25 million are made. As regards Bonice and Octara, the defendant exhibits Land Registry searches evidencing charges against both Rathbarry Castle and Castle Freke.

41. In response, Mr. Evans-Freke has averred that , when all of his liabilities are taken into account his net worth is 'substantially more than US$20million.' For the purpose of the present application, it is difficult to see how the Court could purport to go behind that averment.

v. full and frank disclosure

42. The defendant submits that the plaintiffs failed to make the necessary full and frank disclosure in applying for an interim order.

43. The defendant's principal criticism in this regard concerns the failure of the plaintiffs to exhibit copies of the notebooks already described when seeking, and obtaining, interim *ex parte* relief. The defendant accepts, as I think she must, that the plaintiffs did disclose to the Court the existence of the notebooks (which they were then describing as ledgers) and that a broad description was given of their contents. That much is obvious as the alleged discrepancies between what those notebooks record and what the plaintiffs allege the true position is in fact are at the very kernel of the case that the plaintiffs seek to make.

44. The defendant's complaint in this regard appears to be based on the proposition that the notebooks provide 'primary evidence that is not consistent with an allegation of fraud.' However, that proposition does not seem to me to be correct. The contents of the notebooks, copies of which the defendant has since exhibited, are entirely neutral on the question of whether the fraud alleged has occurred. If at trial, the defendant is proved or admitted to be their author (a proposition that does not appear to be in issue) and if their contents concerning payments made to labourers, tradesmen or third party suppliers are found to be significantly at variance with other admissible evidence concerning the payments actually received by those persons, then it is possible that fraud may be established. If they are not found to be significantly at variance with any such evidence, then it seems likely that the plaintiffs' claim will fail. But it is difficult to see how it can be suggested that the contents of the notebooks, in and of themselves, were, or are, capable of determining the issue, one way or the other.

45. The defendant does make a more specific criticism of the plaintiffs' failure to exhibit the notebooks in seeking interim *ex parte* relief. It is that a careful study of the notebooks suggests recorded holiday payments to workers amounting in the aggregate to something under €40,000 whereas, in his grounding affidavit on behalf of the plaintiffs, Mr. Evans-Freke provided an estimate of holiday payments for which the defendant was – the plaintiffs would say, wrongly - reimbursed in the amount of €105,000. This estimate appears to have been based upon an assessment of the wages covered multiplied by the number of holiday periods understood to have been involved.

46. In response to the submission that this amounted to a failure to make full and frank disclosure, the plaintiffs make two observations. First, they point out that the notebooks are not spreadsheets, comprising handwritten entries in notebooks equivalent to the copy books that children use in school, and were not readily susceptible, whether by the plaintiffs or the Court, to the kind of analysis the defendant has now done in respect of the aggregate figures disclosed in her own notes. Second, they submit that the plaintiffs' estimate of the reimbursement that they allege was wrongly claimed by the defendant for holiday payments never actually made was conducted in the context of an interim application under significant time constraints. That is a point to which I will return.

47. The defendant makes certain other allegations of material non-disclosure. One is that, in pointing to the possible use of a number of aliases by the defendant, the plaintiffs failed to properly disclose, or sufficiently emphasise, that she has consistently used her own name in the locality during the period of well over a decade that she has resided there. In response to that point, the plaintiffs say that they never made any suggestion to the contrary, which they say is unsurprising because, where it is intended to use an alias for an evasive purpose, it would entirely defeat the object of the exercise were someone to use that alias in the local community before that purpose could be put into effect.

48. Another allegation of want of candour is that, in exhibiting a bank statement of the plaintiff that disclosed a balance of €1.2 million in or about 2004 in attempting to apprise the Court of the assets held by the defendant in the jurisdiction, the plaintiffs were instead deliberately seeking to wrongly insinuate that money from mysterious sources was passing through the defendant's hands, whereas the defendant avers that the funds concerned represented the proceeds of the sale of Rathbarry Castle by her to Mr Evans-Freke and that this should have been obvious to the plaintiffs and, thus, ought to have been disclosed by them as such but was not. The plaintiffs respond that no such insinuation was intended or made and that the sale of Rathbarry Castle by the defendant to Mr Evans-Freke in 2004 was plainly disclosed.

49. In making the criticisms just described, I understand that Counsel for the defendant was careful to emphasise that no suggestion is being made that the non-disclosure concerned (if non-disclosure it be) was done in bad faith. But he does submit that the Court should find they amount to material non-disclosure nonetheless, sufficient to warrant the refusal of the relief now sought.

50. I do not consider that any of the matters just described amount to an infringement of the golden rule of full and frank disclosure as identified by Sir Nicholas Brown-Wilkinson in in *Tate Access Floors Inc. v. Boswell* [1991] Ch. 512, and endorsed by Clarke J. in *Bambrick v. Cobley* [2006] 1 I.L.R.M. The circumstances described are very far from coming within the type of situation that arose before Smyth J. in *Balogun v. Minister for Justice*, (unreported, High Court, Smyth J., March 19, 2002).

51. It seems to me, as it did to Peart J. in *European Paint Importers Ltd v. O'Callaghan* (unreported, High Court, August 10, 2005), that "[t]here will inevitably in applications for interim relief be some haste in the preparation of affidavits and exhibits", such that what must be considered in deciding on whether to discharge an interim order or to grant or withhold interlocutory relief is whether the process has "been abused to the extent of obtaining an order under false pretence." Having carefully considered the evidence, I am satisfied that no such abuse has occurred in the circumstances of the present case.

Good arguable case
52. The defendant submits that the plaintiffs have failed to make out a good arguable case on the basis that the preponderance of the evidence upon which they rely for the purpose of the present application consists of indirect evidence of the payments actually made by the defendant in the form of information received from various labourers, tradesmen and service providers, supported by exhibited documentation the contents of which have not yet been formally proved.

53. The defendant argues that, in applying the good arguable case test to the evidence presented, the Court should go a step further and purport to conduct an assessment of the 'quality' of the evidence upon which the plaintiffs seek to rely. Taking this submission on another step, the defendant argues that the absence of direct evidence from any of the workers concerned (in the form of an affidavit), together with the absence of any averment in the affidavits laid before the Court by the plaintiffs to the effect that they have received an assurance from each and every such worker that he or she will attend to give evidence at the trial of the action, should be seen as, establishing that the plaintiffs' claim is bound to fail and, thus, as fatal to the plaintiffs' action.

54. Of course, Order 40, rule 4 of the Rules of the Superior Courts ("RSC") provides that hearsay evidence is to be admissible on interlocutory applications. That rule provides in relevant part as follows:

> '4. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted...'

55. It cannot be ignored in the context of the submission made on behalf of the defendant that, while the plaintiff's rely heavily on indirect evidence, the defendant has adduced little or no evidence of any kind in support of her denial of the plaintiffs' claims.

56. In conducting an assessment of the evidence before it, the Court must consider all of the evidence. Just as it follows that, at one end of the spectrum, direct evidence may be insufficient to make out a claim if it is either inherently incapable of belief or contradicted by more persuasive or compelling evidence tendered by the other side, at the other end of the spectrum it is clear that indirect evidence, where admissible, may be, and frequently is, perfectly sufficient to make out a claim, especially in the absence of any significant countervailing evidence. I reject as entirely misconceived the submission that, were the Court to consider as part of its deliberation the paucity or absence of evidence adduced by the defendant to rebut the plaintiffs' claims, it would be in some sense reversing the burden of proof in the present application or casting an unwarranted onus of proof on the defendant.

57. Having considered the evidence as carefully as I am able, I find without hesitation that the plaintiffs have made out a good arguable case. In reaching that conclusion, I wish to make clear, as Hardiman J. did in *Dunne v. Dún Laoghaire-Rathdown County Council* [2003] 1 I.R. 567, that in dealing with the present interlocutory motion, I am not purporting to finally decide any factual or legal aspect of the conflict between the parties.

Conclusion

58. The plaintiffs are entitled to succeed in their claim for an interlocutory *Mareva* injunction. I will hear the parties on the terms of the appropriate order.