

THE HIGH COURT

Record No. [2005] 174P

BETWEEN

MARCO MONTANI

PLAINTIFF

AND

FIRST DIRECTORS LIMITED JULIE PLOWMAN GEORGE PLOWMAN AND RAYMOND KEARNEY

DEFENDANTS

Judgment delivered by Mr. Justice Hanna in Dublin on the 3rd day of March, 2006

1. Mr. Justice Hanna: This case involves the ownership of certain assets comprising, almost entirely, real property and related assets which are physically located in Italy. Those assets were accumulated over a number of years by the plaintiff's father, Aldo, and uncle, Armando, now both deceased. The ownership of the assets subsequently vested in an Italian limited-liability company, MG srl, and the shares in that company ended up being held by an Irish limited-liability company, Limited Securities Limited, hereinafter referred to as 'Liberty'. This occurred in July, 1993 and the company was incorporated apparently for that purpose.

2. Liberty's shares, in turn, were vested in two limited-liability companies registered in the British Virgin Islands, First Directors Limited, the first named defendant, and First Nominees Limited.

3. Upon the death of Armando in 1997, the plaintiff claims that he and his brother, Bruno, equally inherited the shares in Liberty.

4. The plaintiff claims that, by virtue of a declaration of trust dated the 23rd October, 1997, his interest in Liberty was held in trust for him by the First Directors Company as nominee. The plaintiff alleges that as a result of a series of unlawful transactions, including conspiracy, the assets to which he is entitled, namely the 50% shareholding in Liberty, has been the subject of an unlawful attempt to put the assets beyond his reach.

5. The transactions, briefly stated, comprise a transfer of the shares in Liberty from directors to George Plowman, one of the defendants named in these proceedings, in July, 2001. In July, 2002, the shares were transferred to Julie Plowman, the daughter of George Plowman, also named as a defendant in these proceedings. In September, 2003, the shareholding in Liberty was transferred to the plaintiff's brother, Bruno. Bruno is not a party to these proceedings, but I understand an application is presently before the courts in this jurisdiction applying to join him as a co-defendant. On the 1st October, 2003, the shares were transferred from Bruno, the plaintiff's brother, to one Simonetta Martiradonna. She, currently, is bringing proceedings against various parties; I shall briefly refer to those subsequently.

6. It is important that I set out the *dramatis personae* in some little detail.

7. These alleged events have spawned a number of proceedings. Currently, there are three sets of civil proceedings before the courts in Italy and one set of criminal proceedings. One set of proceedings presently stands before the courts of Ireland and, for the sake of clarity and by way of an explanation for the involvement of the parties at the plaintiff's behest, I very briefly set out the details of the proceedings of the parties.

8. The Irish proceedings consist of Marco Montani as plaintiff and First Directors Limited, Julie Plowman, George Plowman and Raymond Kearney as defendants. An application was made to join liberty in these proceedings and was successful before the Master, and that order currently stands; one of the reliefs sought is an appeal against that order, seeking to set it aside.

9. In these proceedings, the plaintiff seeks a number of orders against the defendants, including, *inter alia*, a declaration that the plaintiff is the beneficial owner of 50% of the shares in Liberty. He also seeks an order setting aside a transaction whereby First Directors Limited transferred its interests in Liberty to Julie Plowman and George Plowman. Raymond Kearney is a company formation agent and he is also a defendant and he is joined in the proceedings as a result of his involvement, the plaintiff alleges, in the transfer of First Directors' shares in Liberty to Julie Plowman and George Plowman.

10. The plaintiff also seeks a declaration to the effect that First Directors Limited remains a trustee for the plaintiff in respect of what the plaintiff says are the proceeds of a wrongful disposal of the assets of Liberty. The plaintiff also seeks damages for conspiracy, breach of trust and for breach of duty. Included in that claim is a claim, *inter alia*, of conspiracy against the fourth defendant, albeit pleaded in the tersest way.

11. The plenary summons contains an endorsement inviting the Court to assume jurisdiction under the provisions of Chapter 2, s. 2, Articles 5(3), 6(1) and s. 6, Article 22(2) of the Council Regulation E.C./44/2001, hereinafter referred to as the 'Brussels 2 Convention', and says that "there are no proceedings between the parties herein pending in another contracting Member State arising from the said cause of action."

12. In the light of what I say hereafter, I think a question-mark has to be raised over the validity and propriety of that endorsement. That, however, may not be a matter to be dealt with by the court on this occasion.

13. The Italian proceedings comprise four sets of proceedings, including the criminal proceedings to which I have referred, and these latter proceedings are not of any materiality to the application with which we are presently dealing, but are, of course, of considerable importance in terms of the courts of Italy. The first set of proceedings were instituted on the 8th April, 2004, by Marco Montani against MG srl and Hi-Tech Solutions. These proceedings have the record number 34771/04. The second set of proceedings were instituted on the 8th July, 2004, by Aldo Montani and Marco Montani, and the defendants in those proceedings are Mg srl, Bruno Montani, Julie Plowman and one Alberto Placidi. These proceedings have record number 34775/04.

14. There are further proceedings involving one Simonetta Martiradonna, which I will leave to one side for the moment.

15. Now, in the proceedings to which I have referred, Aldo Montani and Marco Montani claim that Bruno Montani, with the complicity of Julie Plowman and George Plowman, unlawfully acquired the shares of Liberty. The proceedings seek orders that the Italian courts make a judicial assessment, so referred to in the translation of the proceedings, of the ownership of the shares of Liberty and protect the assets of Mg srl, which is a subsidiary of Liberty, and which, as I have said before, owns the substantial real property assets which are located in Italy, and I think specifically in Rome.

16. The further set of proceedings to which I referred were instituted on the 24th of May of last year, and have record number 836682/04, and the parties in these proceedings are Simonetta Martiradonna, Bruno Montani, Julie Plowman, George Plowman, Marco Montani, First Directors Limited and First Nominees Limited. Simonetta Martiradonna is, she alleges, the ultimate purchaser of Liberty Securities, and that she purchased from Bruno Montani.

17. Now, the reliefs sought are to be found in two motions: one bearing the date the 15th June, 2005, inviting the Court to decline jurisdiction in respect of the second and third defendants, and to place a stay, in the alternative, on the proceedings in respect of defendants 1 to 4. Another motion seeks to appeal an order of the Master made on the 25th November, 2005, joining liberty as a co-defendant. I note that this matter before the Master had been adjourned on a number of occasions while the Master waited for this matter to proceed.

18. Unfortunately, due to difficulties with the list, the matter did not proceed and the Master then proceeded to join Liberty as a party; hence, Liberty is before this Court, though as of right now, has scarcely had time to draw breath in the proceedings, let alone get meaningfully involved.

19. As I have said, also, there are pending matters before these courts in the form of a motion or motions seeking to join Bruno Montani and Simonetta Martiradonna as parties. I am not concerned with those motions; I am only concerned with the present parties and, as I have said, Liberty is one of those parties, but has scarcely become involved in the proceedings. Of these parties, only the fourth named defendant, Raymond Kearney, is domiciled in Ireland. The second and third defendants are, it would appear, citizens of the United Kingdom, and, as already noted, First Directors Limited is a limited-liability company registered in the British Virgin Islands.

20. First Directors has entered an appearance and has filed a full defence. The second, third and fourth named defendants have not yet taken part in the proceedings, save that they have entered an appearance. The entry of appearance was accompanied by two letters written by the defendants' solicitors (and I note that all four defendants are represented by the same solicitor), one letter enclosing the appearance and another stating that the appearance is a conditional appearance. Both letters are dated the same day, although the letter stating that the appearance was conditional for the purpose of contesting jurisdiction arrived the next day.

21. I am satisfied, on the authority of *Campbell International Trading House Limited and Another v. Van Aart and Another*, [1992] 2 I.R. 305, that this was a valid and appropriate mechanism to put in issue jurisdiction, without compromising the denial of it as far as the second, third and fourth defendants go.

22. These are my findings:

Firstly, the onus of proof:

I am satisfied that the onus of proof rests with the plaintiff and I refer to the judgment of the Supreme Court in the case of *Gannon v. British and Irish Steam Packet Company Limited and Others* [1993] 2 I.R. 359. I am satisfied, equally, that there must be some evidence to ground the plaintiff's claim to jurisdiction. However, I stress that the inquiry which I must make, and I hold that I must make an inquiry, is not a determination of the issues; it is a search, as it were, to see if sufficient, by way of grounding, material is laid before the Court so that the Court may then go on and consider the question of jurisdiction. This is not a determination of the issues in this case, and it may well be that, were matters to proceed, the case could fail, and could fail fairly promptly, but, nevertheless, I am entitled to look at all the surrounding circumstances, including such matters as might be deposed to on affidavit, even if those affidavits comprise, as they do in this case, affidavits of advice and belief.

23. The questions, therefore, having satisfied myself that the onus rests with the plaintiff, are: firstly, does Brussels 2 apply and secondly, if so, does it give cause for the proceedings or does it permit the proceedings to proceed within the jurisdiction.

24. The Brussels 2 Convention, in my view, is not a steeplechase, it is not a hurdle race. The plaintiff does not have to satisfy every single ground for derogating from the clear principle enunciated in Article 2(1) of the Convention, but he must satisfy one or the -- more of the grounds for derogating.

25. I turn to Article 6 of the Convention, and it may be useful if I read that out, having already referred to Article 2(1), which says that, as we know, "That persons domiciled in a Member State, shall, whatever their nationality, be sued in the courts of that State." Article 6 provides as follows:

"A person domiciled in a Member State may also be sued

1. Where he is one of a number of defendants in the courts for the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

26. And that is the material party of that particular Article.

27. It is beyond question that Raymond Kearney is domiciled in this jurisdiction. His involvement is here as an alleged conspirator, according to the statement of claim filed in this case, and that involvement, so far as the factual matters are concerned -- and this does not, apparently, cause any dispute between the parties -- was as him having filed a form, M1. This is a form required by law to be filed where the status of a private company changes. It is an important matter and it is a matter which, if not done, attracts a criminal penalty. As I have said, the pleadings allege conspiracy. This is pleaded very tersely, but, having said that, the defendants, by not consenting to jurisdiction, which they are perfectly entitled to do, and properly so, then place themselves in a situation where the pleadings, albeit terse, cannot be challenged by them. One would have thought if one had been well-rooted in this jurisdiction and such a pleading were to arrive, that, at the very least, a notice for particulars would follow forthwith; indeed, one would have thought, in the appropriate circumstances, a motion to strike out the pleading on the grounds that it is frivolous and vexatious, would be taken. Unfortunately, this cannot be done in this case, through no fault of the defendants, I stress, but, at the same time, the Court is left with a situation where conspiracy is pleaded and conspiracy is an actionable tort. It may not succeed but, since the proceedings are frozen at this moment in time because of the conditional nature of the appearance, the Court cannot disregard the allegation or the pleading. The circumstances in which it is alleged is that the said Mr. Kearney, a defendant in these proceedings, was acting at the behest of this co-defendants, and it should also be noted that he may also have the status of a concurrent wrongdoer, if wrong has arisen, under the terms of the Civil Liability Act, 1961.

28. So it seems to me that, on a *prima facie* basis, the plaintiff has satisfied what I might call the first let of Article 6(1). As to the

other provisions of that article, having considered, as best one can, the very able translation of the Italian court documents and considered the subject matter of the statement of claim, all these cases are about identical subject matter, being a series of transactions in which the plaintiff, Marco Montani, claims that his assets, namely the shareholding in Liberty, have allegedly made their way as far as Mrs. Martiradonna, in circumstances where he did not give the consent to them. That is what this case is about. And stripping all the other matters away, that is, and will remain, what this case is all about.

29. I now turn to Article 22, which should really be considered in conjunction with Article 28, but the material section of Article 22 provides as follows; but opening line is, "The following courts shall have exclusive jurisdiction, regardless of domicile." And subclause 2 says,

"In proceedings which have, as their object, the validity of the Constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat, in order to determine that seat, the court shall apply its rules of private international law."

30. Central to this case is the ownership of and purported disposing of the assets; that is the shareholding in Liberty. This is the key issue. The determination of who owns these shares resolves the central question in this case. If the plaintiff is correct and this asset has unlawfully been removed from him, then certain consequences will flow. The matter cannot, ultimately, be resolved on any reading of the circumstances of this case without the involvement at some level of the Irish courts. This is a matter of practicality. What, for example, if the proceedings in Italy ran into the sand? What if the proceedings there had commenced, only to stop while the Italian courts, halfway through an action, then waited for a decision from the Irish courts on the ownership of the shares under Irish law? We could end up with the possibility of two completely different findings from the respected courts of two different jurisdictions. Having two courts embarking on parallel hearings in a case of this nature would invite precisely the sort of difficulty which Article 6 seeks to avoid.

31. It is beyond question but that Liberty is an Irish limited-liability company and subject to Irish law. The fundamental issue in the case, it seems to me, is the validity of the decisions of the organs of that company causing the shares, the shareholding in that company, to move to a number of parties, ultimately to Ms. Martiradonna. Article 22, in my view, therefore, renders mandatory the determination of that issue by the courts of Ireland and Article 28 must defer to Article 22 in those circumstances. The central issue to be determined here is the validity of the decisions of the organs, as I have said and the company is incorporated within this State and subject to Irish law. No issue to be determined here is the validity of the decisions of the organs, as I have said and the company is incorporated within this State and subject to Irish law. No issue arises as to the location of the seat of this company; it is Ireland and therefore the validity of transactions which have allegedly purported to transfer the shares through a series of transactions from the plaintiff, as alleged rightful owner, as *cestui qui* trust, to the current purported owner, must be determined by the courts of Ireland.

32. Article 28, therefore, does not fall to be considered by me, but I should perhaps observe, for the sake of completeness, that I expressly adopt the decision of the British House of Lords in the case of *Sarrio S.A. v. Kuwait Investment Authority* [1999] A.C. 32. It is page 32, just to confirm the reference. And also, I have read and approved the extract from Brinks & Rees, *Civil Jurisdictions and Judgments*, 3rd ed., (Informa Professional, 2002), at p. 293.

33. I think the Court has to adopt a common-sense approach, and this applies as much to Article 22 as it would were we to go on to consider Article 28. It has to be pragmatic. It is further worthy of note that the Italian proceedings have the appearance of conditionality in that they expressly look forward to and await decisions of the Irish courts, and this is not surprising because, as I have said, the assets are here and no decision of the Italian courts, however much respected and honoured in this jurisdiction, can have a binding effect with regard to the assets in this jurisdiction which are regulated by Irish law. Therefore, as I say, were I to have gone on to consider Article 28, I would have been satisfied that the plaintiff has satisfied the onus to derogate from the general principle enunciated in Article 2 of Brussels 2, and it follows, from what I have said and the general tenor of my judgment, that I would have found in favour of the plaintiff.

34. Accordingly, I am satisfied as follows:

firstly, Brussels 2 Convention applies to this case; and

secondly, the plaintiff is entitled to bring proceedings in this jurisdiction.

35. In the circumstances, therefore, I refuse the motion seeking to decline jurisdiction or to stay the proceedings. And with regard to the motion appealing the order of the Master, it would seem grossly illogical if I were to set aside that order, given my findings.

Mr. Delahunt: Cleary, My Lord, I would be seeking my costs. I have so far successfully resisted the application, both the appeal from the Master and this jurisdictional application.

Mr. Justice Hanna: Yes, Mr. McCarthy?

Mr. McCarthy: Yes, My Lord, I would ask the court to reserve the question of costs. There's obviously a dispute --

Mr. Justice Hanna: I will reserve the question of costs because it may turn out that some of the allegations made by the plaintiff are grossly unfounded and unsupportable.

Mr. McCarthy: Yes, My Lord. Just in relation to the further proceedings. First of all, My Lord, just in relation to the actual -- Your Lordship's judgment. I wonder, before -- I haven't been instructed in relation to asking the Court for a stay in relation to Your Lordship's order, given the fact that Your Lordship has said now that the Irish case is proceedings, and I don't want to make that without further consideration. I wonder could Your Lordship -- I haven't got instructions; obviously I need instructions to apply for a stay on Your Lordship's order, and I haven't got that yet, My Lord.

Mr. Justice Hanna: You would like me to put it in for mention?

Mr. McCarthy: Would Your Lordship mind?

Mr. Justice Hanna: Not at all.

Mr. McCarthy: I am very much obliged.

Mr. Justice Hanna: When would you like me to put it in for mention?

Mr. McCarthy: It shouldn't take me very long, My Lord.

Mr. Justice Hanna: This day week?

Mr. McCarthy: This day week, yes, My Lord.

Mr. Justice Hanna: Very good. Next Friday, this case in for mention.

Mr. Delahunt: I wonder, My Lord, just in relation to that; the other two motions to join the other two defendants are actually before the Master on that day as well, so perhaps Your Lordship might say 10 o'clock on that day. I didn't realise I was going to get that reaction from the Court.

Mr. Justice Hanna: You have got no reaction the Court.

Mr. Delahunt: The only reason being because those two motions are before the Master on that day as well, My Lord.

Mr. Justice Hanna: Mention it to me at --

Mr. McCarthy: We could do it the day before.

Mr. Justice Hanna: Very good, Thursday at 11 o'clock.

Mr. Delahunt: I am actually, My Lord, taking -- no, sorry, My Lord, I thought I was taking judgment from Mr. Justice O'Leary on that day.

Mr. Justice Hanna: You will have to control your staggering success at the Bar, Mr. Delahunt.

Mr. Delahunt: Your Lordship does me more than an injustice.

Mr. McCarthy: Just one -- a couple of other matters, My Lord, and that is the prosecution of the proceedings, but I suppose that is really dependent on the stay, I suppose --

Mr. Justice Hanna: -- purports you --

Mr. McCarthy: -- yes, My Lord.

Mr. Justice Hanna: There could be motions flying in this before very long.

Mr. McCarthy: I am very much obliged to Your Lordship.

Mr. McCarthy: If those matters could be mentioned at 11 o'clock next Thursday.

Mr. Justice Hanna: Mention whatever you like at 11 o'clock next Thursday.

Mr. McCarthy: Very much obliged for the speed Your Lordship gave judgment.

36. The proceedings then adjourned to the 9th of March, 2006, at 11am.