Neutral Citation Number: [2010] IEHC 164

THE HIGH COURT

2009 6975 P

BETWEEN

EAMONN McCANN

PLAINTIFF

AND

DENIS DESMOND

DEFENDANT

JUDGMENT of Mr. Justice Charleton delivered on the 11th day of May 2010

1. This is a motion to have a series of preliminary issues tried on oral evidence, with the remainder of the issues between the parties to be decided later, depending the outcome.

2. The plaintiff and the defendant entered into either a partnership or an arrangement whereby they would, in cooperation with each other, promote outdoor rock and pop concerts in Ireland. This venture apparently proceeded profitably from the late 1970s up to 2006. Then, both parties agree that they entered into an arrangement to terminate their relationship. It is the nature of what that agreement was that is at issue between the parties. Secondary to that, within the pleadings exchanged by the parties, assertions and counter assertions are made on the proper form of accounting as to their business venture, on the corporate vehicles that were to be used in that regard, whether these were the true principals, what arrangement was to be made concerning both expenses and promotion, what was to be the relevant profit share and whether scrupulous accounting of monies can now be relied on by each party so that they know where they stand. I will remark, on reading the pleadings, that every issue raised seems to have a response in fact as well as in law, and that every response seems to call out further opposed points of view on the main and subsidiary issues.

3. It is claimed to be within the terms of the arrangement entered into between the plaintiff and the defendant that the profits of the partnership would be distributed in agreed shares as between them after a prior allocation of 10% of the profits to the defendant. However, this is denied. Instead, the defendant said that he looks at profits differently to the plaintiff and that all overheads in relation to the concerts and that all promotion work were to be valued and subtracted before a profit could be assessed. When the parties agreed with each other that their business relationship should come to an end, some time in 2006, a multiplier was agreed for a buy-out on the level of profit. This was to be 4.66 times the profits, averaged out, as I understand it, over a few years. Because each side claims to understand this differently, the ultimate figures come out at variables of somewhere between, using round figures, €4M and €16M.

Preliminary Issues

4. The order sought from the court would see three issues tried in advance of assessing the precise calculation in monetary terms resulting from the multiplier. These issues are:-

> (1) Who were the proper parties to the agreement/s on which the plaintiff sues?
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> (2) What was the agreement regarding the distribution of profits and, in particular, was it agreed that the "nett profits" to be distributed were to be calculated without deduction in respect of overheads or costs (as the plaintiff contends) or after deduction of such overheads and costs (as the defendant contends)?
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> (3) What was the agreement regarding the buy-out of the interest allegedly held by the plaintiff (which, the defendant contends, was actually held by *Wonderland [Limited]*) and, in particular, was the agreement that the plaintiff would be paid 100% of the business valuation of 4.66 times the average nett profits for the relevant period (as the plaintiff contends) or that the plaintiff would be paid 45% of the business valuation of 4.66 times 45% of the average nett profits (as the defendant contends that this 45% of the business valuation represents his agreed stake in as a business)?

5. In the event of any variation from the wording of the above to the relevant notice of motion, the latter prevails. The nature of the preliminary issues to be sought is not simply legal, as in O. 25, r.1 of the Superior Courts, rather, the order sought pursuant to O. 63A, rr. 4 and 5 of the Rules of the Superior Courts, a set of rules which governs the Commercial Court. This provides that the Court may make such order for the proper hearing of the cause as will enable it to dispose fairly and efficiently of the proceedings. This application might be termed a motion seeking an order of the court for a modular hearing, as opposed to an order for the trial of a preliminary legal issue. There is no doubt that, provided that it is just, a court may make the order sought in this motion. In *P.J. Carroll and Co. Limited v. Minister for Health (No. 2)* [2005] 3 I.R. 457 Kelly J., at p. 466 stated:-

> "There is a jurisdiction inherent in the court which enables it to exercise control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process. It is a residual source of power which the court may draw upon as necessary whenever it is just equitable to do so."

6. In *Cork Plastics v. Ineos Compound* [2008] IEHC 93 Clarke J. discussed the circumstances in which the High Court may order a modular trial. The default position, he said, was that the trial should take place in the normal way: in other words all questions as to the facts, the damages resulting therefrom, and the applicable law should be disposed of at a single hearing. A different view can be taken, however, in appropriate circumstances. If because of the complexity of the case, and the ease with which issues might be separated, questions as to liability and damages might be heard separately, consideration should be given to making this kind of order where there was the potential for saving the parties costs and the court time. Whereas an appeal process might be rendered more complex and burdensome in circumstances if a modular hearing was ordered by the court, whether a fair disposal could still take place

was an important factor. As to whether any issue, tried by way of a preliminary module, would be worthwhile must be judged in part upon the length and complexity of subsequent modules. If such subsequent issues were dependent upon the disposal of a clearly defined and readily separable issue, then the court would incline towards a modular trial. That might not be the case where significant overlaps to occur in relation to the evidence and witnesses that would be need to be heard. Where prejudice might occur by reason of an order for a modular trial, then the court should return to the default position. Where the court was not satisfied that an application was brought in good faith, so that it was likely to be of benefit to both parties, but was instead sought so that discovery of an issue to the embarrassment of the plaintiff or defendant was avoided, then such an order should be refused.

7. Therefore, given that the default position is a full hearing, I believe that the questions which would naturally address themselves to the mind of a court in considering an application such as this for a modular hearing, would include:-

> (1) Are the issues to be tried by way of a preliminary module, readily capable of determination in isolation from the other issues in dispute between the parties? A modular order should not be made if the case could be characterised as an organic whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate so that the case of either of the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues.
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> (2) Has a clear saving in the time of the court and the costs that the parties might have to bear been identified? The court should not readily embark on a modular hearing, simply because of a contention that a saving in time and costs has been identified, but rather it should view that factor in the context of the need to administer justice in the entire circumstances of the case.
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> (3) Would a modular order result in any prejudice to the parties? If, for instance, the issue as to what damage was occasioned by reason of the wrong alleged by the plaintiff was so intricately woven in to the proofs that were necessary to the proof of liability for the wrong, so that the removal of the issue of damages would undermine the strength of the plaintiff's cases, or the response which a defendant might make to it, then the order should not be made.
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> (4) Is a motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues? I return to the idea that a judge should always be aware that tactical decisions are made, often out of an abundance of enthusiasm, by parties to litigation, who may seek to put the other party at a disadvantage through the obtaining of an order under the Rules of the Superior Courts or one capable of being made within the inherent jurisdiction of the court. Obvious examples of pre-trial motions that may merely be tactical are motions to strike out proceedings as being vexatious or frivolous or to seek an order for security for costs under s. 260 of the Companies Act 1963. Other instances include the lengthy arguments that can sometimes ensue in relation to discovery. If the removal of issues in to a modular hearing is likely to disadvantage the proper process of pre-trial preparation that discovery orders, notices for particulars and notices to admit facts, involve, then such a motion should be refused as resulting not from a genuine process that will assist the trial but for tactical reasons related to wrong-footing the other party.

The situation here

8. A strong objection is taken by the defendant to any modular order being made in this case. That was backed up by forceful argument. Mr. McCann, in his affidavit, asserts that the order, if granted, is likely to delay the determination of the issues and to lengthen the discovery process. He points out that in addition to the main dispute between the parties, that he is seeking orders dissolving the partnership and for the taking of an account. His belief is that the exchange on discovery of documents both up to 2006, and thereafter, will show how the parties ordered the business relationship in question and thereby cast light upon the nature of the contract between them, prior to the termination agreement, and illuminate the termination agreement itself. He says there would be a considerable overlap in the litigation as to the deduction of overheads and the appropriate multiplier that would have to be calculated upon decision on that issue as to damages.

9. The defendant, on the other hand, claims that the issues are readily capable of being decided through being isolated and determined by oral evidence in the ordinary way. Huge savings on the quantum of costs, it is asserted, will result. The formulation of the issues, the defendant contends, in the motion, are sufficient for their proper disposal but the court may engage in a reformulation if that is appropriate.

Decision

10. I am convinced that I should make the order sought on the notice of motion herein. It is crucial to the determination of all the issues in this case as to who the parties were. It is virtually a daily occurrence in the courts that one or other parties to a contract will contend that they were not of the true contracting entity but that, instead, a corporate vehicle, of which they are a director or shareholder, entered into the agreement as an artificial person. As to how these issues can be decided, it seems to be me that reason plays a very heavy part. Since contract law is based upon the express agreement of parties, but since people are presumed, in the absence of express terms that suggest a contrary notion, to be both reasonable and to be desirous of acting reasonably, the situation as it appears in all the circumstances to the alleged parties to the agreement will tend to be the best guide as to whether human or artificial persons came together to form a contract. In saying this, I am inviting the parties to produce relevant evidence as to their dealings, as to their accounts and as to the division of responsibility between them. Certain passages from correspondence and emails have been opened to the court with a view to the contention that the wrong defendant has been chosen and that it should, in fact, be an unlimited company. I express no view on this. As against that, the tenor of the emails seems very much to focus on the human personality of both the plaintiff and the defendant. Perhaps, at trial, another picture will emerge.

11. The profit distribution is crucial to the determination of all issues. Again, the question of how the profits were to be distributed and were to be calculated invites the reception of oral evidence on that issue and the exchange of relevant documentary proofs. These can also, as in any normal trial, be used for the purposes of examination and cross-examination as to the contending issue. Nothing is cut out by isolating that issue. It is hard to imagine that it is incapable of relatively ready proof given the long history of dealings between the parties. It is difficult to know how, in the context, for instance, of one very large outdoor concert, how the parties did not discuss with each other how they had done in their venture, what their expenses were, what the proceeds were likely to be, and how they were to be divided up. If the nature of the relations between the plaintiff and the defendant were so complex as to call forth accountancy evidence on that, or the consideration of relevant documents from the corporate vehicles, as it was tellingly put "plucked out of the sock drawer", then so be it. That is relevant, and therefore receivable in evidence, on that issue.

12. The agreement on the buy-out also has to depend on that issue being resolved. All relevant documentary evidence is crucial. That, no doubt, will be produced. The exchange of communications between the parties, the understanding of the position as to

contract from which each of them were coming, both as to the nature of their relationship, and the relevant financial position as they understood it to be, together with the figures which commonsense would suggest they must have discussed as being likely or possible prior to entering into the buy-out out agreement, are all highly relevant to this issue.

13. I do not therefore see any injustice in terms of the disposal of this matter through a modular hearing, as contended for. Further, I see a large saving in time and costs. There is no appreciable prejudice to the parties. Given the breath of evidence that is relevant to these crucial issues, I also see no basis upon which it could realistically be contended that the purpose of this motion has been to disadvantage the plaintiff. Therefore, I propose to grant the order sought.

14. Since the matter was adjourned at my suggestion for mediation, I have learned that the mediation efforts were unsuccessful. I will discuss with the parties what further orders are necessary on foot of this notice of motion. Any further directions in order to move this matter on will be made by Kelly J. in the commercial list tomorrow.