

THE HIGH COURT

2010 7651 P

BETWEEN

DANNY JENKINS

PLAINTIFF

AND

MXSWEEP LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 14th day of February, 2011.

1. The application

1.1 The launch pad for these proceedings, which were initiated by a plenary summons issued on 12th August, 2010, is the settlement of two previous actions in this Court, namely:

(a) a plenary action brought by the plaintiff against the defendant (Record No. 2008/10922P) (the plenary proceedings), wherein the plaintiff sought relief against the defendant for the alleged wrongful dismissal of the plaintiff from his employment with the defendant; and

(b) proceedings under s. 205 of the Companies Act 1963 between the plaintiff, as petitioner, and Eugene Murtagh, Paul Murtagh, Edward Grant and the defendant, as respondents (Record No. 2009/87 COS) (the Companies Act proceedings) in which the plaintiff, as a shareholder of the defendant, made various allegations against the respondents and sought various reliefs, including an order directing the purchase by the respondents of his shares in the defendant.

1.2 On this application the plaintiff is pursuing the following reliefs sought in the notice of motion which was presented to the Court on 18th August, 2009, namely:

(a) an interlocutory injunction pending the trial of the action restraining the defendant its servants or agents from making any further allegations against any party of software theft, improper conduct and/or illegal copying which allegations arise from, were considered in and/or relate to the plenary proceedings and the Companies Act proceedings; and

(b) an interlocutory injunction pending the trial of the action restraining the defendant from prosecuting its complaints of software theft against V-Clouds Ltd. (V-Clouds) and Enable Software Ltd. (Enable) to the Federation Against Software Theft Ltd. (FAST).

The Court was informed that the plaintiff was not pursuing the remainder of the reliefs sought in the notice of motion at this interlocutory stage.

1.3 On 12th August, 2010, on foot of an *ex parte* application made by the plaintiff, it was ordered by this Court (McMahon J.) that the defendant its servants or agents be restrained until further order from making any further allegations against the plaintiff and/or companies associated with him of software theft, improper conduct and/or illegal copying which allegations arise from, were considered in/or relate to the plenary proceedings and the Companies Act proceedings. That order has continued in being. Although it is not clear on the face of the order, I am satisfied that an undertaking as to damages was given on behalf of the plaintiff to the Court as a condition of the granting of the interim order.

2. The historic facts

2.1 The terms of settlement (the settlement) of the plenary proceedings and the Companies Act proceedings were dated 21st January, 2010 and were signed by Edward Grant on behalf of the defendant and the respondents. In clause 1 it was agreed that the defendant and the other respondents in the Companies Act proceedings would pay a certain sum of money to the plaintiff. Clause 2 provided:

"The said payment is to be in full and final settlement of all claims between the Parties made in or arising out the above entitled proceedings by the [plaintiff] against the [defendant], its directors and shareholders and in full and final settlement of the [defendant's] counterclaim against the [plaintiff]."

As part of the settlement the plaintiff's shareholding in the defendant was to be transferred to one of the respondents in the Companies Act proceedings. Clause 8 of the settlement provided:

"This Agreement shall be confidential as between the Parties and their respective advisers save for such disclosure as may be required in accordance with law."

2.2 In order to ascertain the scope of the settlement, it is necessary to consider the pleadings in the proceedings which were thereby compromised and, in particular, the defence and counterclaim in the plenary proceedings. In its defence delivered in the plenary proceedings, the defendant had pleaded reliance on various matters in mitigation or extinction of any award for damages and costs to the plaintiff. The matters relied on included allegations that the plaintiff had:

(a) used, or procured the use of, the defendant's software and source code to develop software for a rival company,

(b) encouraged the defendant to exit from a contractual arrangement and business opportunity with a client, a company known as TTA Asia (TTA), and had then provided a service to that company in his personal capacity and/or through the auspices of a company, Enable t/a Enable TS, and

(c) permitted TTA to use the defendant's software without the defendant's knowledge or permission.

In its counterclaim the defendant justified the termination of the plaintiff's contract of employment on the basis, *inter alia*, of an allegation that the plaintiff had been engaged in misconduct of so fundamental a character as to show repudiation of his contract of employment, to wit, the setting up of a rival company and the procurement and use of the defendant's intellectual property, including source codes, to design and build a rival software product.

3. The plaintiff's case for relief

3.1 The plaintiff's complaints of breach of the settlement at the core of these proceedings are based on the actions on the part of the defendant subsequent to the settlement outlined below:

3.2 First, sometime prior to 26th April, 2010 the defendant made a complaint to FAST, which describes itself as a not for profit company, which I understand to be registered in the United Kingdom, representing "software publishers, resellers and other producers in the IT industry", the object of which is to safeguard the intellectual property rights in law of its members. The defendant is a member of FAST. While the defendant's position is that the complaint was not against the plaintiff personally, by letter dated 26th April, 2010 from FAST, which was addressed to "Mr. Daniel Jenkins Director Enable Software Ltd." at the plaintiff's home address in Ireland, which was expressed to be written on behalf of the defendant, it was stated that the defendant was concerned that there had been an unauthorised copying and subsequent development of software owned by it and it appeared that it involved "your company". The letter went on to state:

"We understand that employees and/or directors in/of your company, Enable ..., t/a Enable TS ("the Company"), during their time at MXSweep and/or using their relationship, acted without permission and or the required authority facilitating the access and copying of source code owned by MXSweep, leading to unauthorised use and development."

The letter went on to state that it was further alleged that, following unauthorised copying of the source code, it was subsequently used to develop the software "that the Company used to build its current market offerings upon". The evidence which had been furnished to FAST was then described as –

"... evidence produced by experts through testimony given in court which appears to verify that the origin of the source code and its use within the software used by the Company, originated with the source code owned by [the defendant]."

It was then stated that FAST had been advised that –

"... your company may have made use of such unauthorised copying and development to supply services to, amongst others, a former client of [the defendant], namely [TTA]."

Following correspondence from the plaintiff's solicitors to FAST referring to the earlier litigation and the settlement, FAST, in a response dated 4th June, 2010, sought to protect its own position on the basis that it at all times had acted in good faith. However, it did not state that it was not pursuing the investigation of the complaint. Further, it refused to disclose the material which the defendant had furnished to it.

3.3 Secondly, the plaintiff has averred that the defendant made a similar complaint against V-Clouds to FAST. I am somewhat puzzled by that averment as the only letter from FAST which has been exhibited does not refer to V-Clouds, although in the defendant's replying affidavit sworn by Mr. Grant on 23rd September, 2010 it is acknowledged that FAST sought information from V-Clouds. Further, in his second affidavit sworn on 15th October, 2010 the plaintiff explained why he was seeking an order restraining the further prosecution of a complaint of software theft against V-Clouds. If I understand the evidence on affidavit from the plaintiff correctly, he has become associated with V-Clouds since the settlement of the earlier proceedings.

3.4 Thirdly, FAST copied the letter of 26th April, 2010 "to a shareholder of Enable TS" (*sic*) and the plaintiff contends that this was done with a view to causing damage to the plaintiff's business and his relationships. The letter in question was addressed to David Lovatt as "CEO" of a company which is now known as Cloud Centric Systems Inc. The plaintiff has averred that Mr. Lovatt is his "associate".

3.5 Fourthly, through Mr. Lovatt the plaintiff became aware that the defendant informed a customer of V-Clouds and Enable of the FAST investigation. That this happened was acknowledged on behalf of the defendant by Mr. Grant, in the replying affidavit, in which he averred that he had a discussion with a representative of a named company in relation to a possible technology partnership between the defendant and the named company. It had come to the attention of the defendant that the named company had partnered V-Clouds. The named company was informed that the defendant "would not consider a partnership with them whilst the FAST investigation was taking place".

3.6 Fifthly, on 25th June, 2010 the defendant wrote to the Chief Executive Officer of TTA in Hong Kong alleging that there was a joint venture, the implication being that the joint venture involved both the plaintiff, through Enable or otherwise, and TTA, which had developed software which included "the use of MXSweep software as a basis for at very least parts of" its development. The foundation of that allegation was stated to be, *inter alia*, evidence given at the trial of the plenary proceedings and the Companies Act proceedings in November 2009 and in January 2010. Having referred to a response from TTA dated 16th June, 2009 to an earlier complaint made on behalf of the defendant, in which it had been stated that the software development relationship between TTA and Enable TS "did not involve any Intellectual Property" of the defendant, the letter of 25th June, 2010 went on to state:

"Unfortunately, it is now established that this is untrue as it would appear from the evidence of two directors of Enable TS and/or related companies, Mr. Danny Jenkins and Mr. David Lovatt as well as two expert witnesses, that Enable TS was using at least parts of the MXSweep software."

The "key evidence" was then summarised and there was attached to the letter, *inter alia*, copies of selected extracts from the transcripts of the hearing which led to the settlement, including the evidence of witnesses and an observation of the trial judge, all taken out of context.

4. The defendant's response

4.1 The essence of the defendant's answer to the plaintiff's case as set out in the replying affidavit of Mr. Grant is that the defendant has made no allegation whatsoever against the plaintiff personally. It appears from Mr. Grant's replying affidavit that the same material as was furnished to TTA had been furnished to FAST, although on the basis that "it was made clear to FAST that the plaintiff had no case to answer". Mr. Grant has also averred that the defendant's letter to TTA "does not make any allegation against the plaintiff". He denied targeting customers of Enable or V-Clouds.

4.2 Further, the defendant's position, as set forth in the replying affidavit, appears to be that the factual circumstances have altered to a certain extent since the interim order was made. As regards the complaint to FAST, in his replying affidavit Mr. Grant has averred that he understands that FAST has ceased its investigation and he has ascribed that to lack of co-operation from Enable, V-Clouds and TTA. However, Mr. Jenkins, in his second affidavit has averred that he has at all times co-operated and sought to vindicate his rights through the FAST procedure. He has also averred that neither V-Clouds nor Enable has received any confirmation from FAST that the complaints against them have been withdrawn, and the defendant has refused to withdraw its complaints to FAST when requested to do so by the plaintiff. As regards the dispute between the defendant and TTA, the response dated 18th August, 2010 of TTA to the defendant's letter of 25th June, 2010, in which it was stated that Enable had developed the software for TTA and had warranted that it was the sole and absolute owner thereof and had indemnified it in relation to any infringement of copyright, is the final communication put in evidence by the defendant. It is not clear whether that dispute is ongoing.

4.3 Finally, Mr. Grant has made averments which appear to be based on hearsay evidence that V-Clouds was actively pursuing the defendant's customers and giving erroneous information and that the plaintiff provided confidential information in relation to the defendant to a competitor. I do not consider it proper to reach any conclusion on the basis of that hearsay evidence, when the facts alleged are denied by the plaintiff.

5. The issues

5.1 The issues on this interlocutory application are:

- (a) whether the plaintiff has demonstrated that there is a fair issue to be tried between the parties;
- (b) whether –
 - (i) damages would be an adequate remedy for the plaintiff if an injunction is not granted and the plaintiff is ultimately successful against the defendant; or
 - (ii) alternatively, if an injunction is granted and the defendant has to seek redress in reliance on the plaintiff's undertaking as to damages if it is ultimately successful, it would be adequately protected; and
- (c) where the balance of convenience lies.

I will deal with each of those issues in turn.

6. Fair issue to be tried?

6.1 It is the plaintiff's case that there is a fair issue to be tried that the actions of the defendant complained of by the plaintiff, which I have outlined in para. 3 above, amount to a breach on the part of the defendant of its obligations to the plaintiff under the settlement, so that the relief sought by the plaintiff is to restrain a breach of contract. The defendant's answer is that the settlement merely ended the dispute between the plaintiff and the defendant and that the defendant has not, and will not, pursue allegations against the plaintiff personally contrary to the settlement. Further, the defendant contends in Mr. Grant's replying affidavit that, when the settlement was being negotiated, it was made clear to the plaintiff's legal advisers that there would be no warranty or agreement given by the defendant in relation to not pursuing Enable or any other company and none was given and that the allegation that the software code had been copied would not be withdrawn. In support of that contention, what occurred during the course of the trial of the plenary proceedings and the Companies Act proceedings on the sixth, seventh, eighth and ninth days, including certain elements of without prejudice negotiations which were taking place, has been averred to by Mr. Grant and is being relied on. In particular, an e-mail from the defendant's wife is exhibited.

6.2 Issues of fact, for example, whether the defendant's wife had authority to send the e-mail, and difficult questions of law as to the admissibility of the evidence of Mr. Grant in relation to the negotiations prior to the settlement and, in particular, the admissibility of the e-mail in question, underlie the fundamental question as to whether the defendant is in breach of the settlement. Referring to Foskett on *The Law and Practice of Compromise*, 7th Ed., at para. 5.10, counsel for the defendant acknowledged that it is established law that, in order to determine the common intention of the parties to an agreement reduced to writing, evidence of pre-contractual negotiations as an aid to construction is inadmissible. However, he pointed out that Foskett states at para. 5.14 that it has always been the case that extrinsic evidence may be admitted to assist in identifying the commercial purposes of the contract and in the context of compromise such evidence has been admitted (a) to explain the meaning to be attached to an ambiguous word or expression and (b) to identify the disputes which the parties, by their agreement, were endeavouring to resolve. While accepting that those principles are relevant to the issue of admissibility, it is no part of the Court's function at this stage in the process to attempt to apply them to the controverted affidavit evidence before the Court.

6.3 What cannot be controverted is that clause 2 of the settlement is explicit in stating that it was in full and final settlement of the defendant's counterclaim against the plaintiff. As the extracts from the defence and counterclaim to which I have referred earlier illustrate, the plaintiff's involvement with Enable, and the plaintiff's and that company's involvement with TTA, were issues in the proceedings and they were issues on the basis of which the defendant's cause of action in its counterclaim against the plaintiff was grounded. The instigation by the defendant of the FAST investigation, which on the face of the letter of 26th April, 2010 and, in particular, the paragraph thereof which I have first quoted earlier, was directed at the plaintiff, albeit through the medium of Enable, was expressly directed to the matters which were issues in the plenary proceedings. Accordingly, I am satisfied that the plaintiff has

established that there is a fair issue to be tried that, following the execution of the settlement, the defendant was precluded from pursuing those issues in any guise any further in any forum and has acted in breach of the settlement in making the complaint to FAST.

6.4 It was contended on behalf of the defendant that there is a lacuna in the plaintiff's approach in that the settlement covers only relations between the parties to the proceedings, that is to say, the plaintiff and the defendant and that the plaintiff has conflated the position of the plaintiff and companies with which the plaintiff is associated. I do not accept that such contention is an answer to the plaintiff's case that there is a fair issue to be tried. The complaints of the defendant against the plaintiff which were issues in the plenary proceedings specifically encompassed the plaintiff's actions through the medium of the companies with which he had an involvement or connection before the settlement was executed, namely, Enable and TTA. In his affidavit Mr. Grant has averred that it was always the defendant's intention to investigate and address any illegal use of the defendant's software by third parties. That approach is wholly understandable. However, I consider it utterly disingenuous, if not naïve, on the part of Mr. Grant to represent the defendant's complaint to FAST and the letter of 25th June, 2010 to TTA, both of which concern the very same allegations as were made against the plaintiff in the defence and counterclaim in the plenary proceedings, as not reiterating those allegations against the plaintiff.

6.5 Insofar as the factual situation has changed since the grant of the interlocutory injunction, the question as to whether there is still a fair issue to be tried was addressed by counsel for the plaintiff by reference to the decision of Clarke J. in *Collen Construction Ltd. v. BATU* [2006] IEHC 159 and, in particular, paras. 3.2 and 3.3 of the judgment. I find it unnecessary to explore this issue in any depth because it was not pressed by counsel for the defendant at the hearing of the application. However, I feel constrained to comment that the attitude evinced by Mr. Grant in his affidavit as to the scope of the settlement raises a concern that the defendant intends to persist in making allegations which are based on the allegations made in the earlier proceedings, which may, in due course, be found to be directed at the plaintiff and in breach of the settlement.

6.6 While Mr. Lovatt testified at the hearing of the plenary proceedings and the Companies Act proceedings, and while the plaintiff's connection with V-Clouds was explored in the evidence, and notwithstanding that the plaintiff may now be associated with V-Clouds, I am not satisfied that the plaintiff has established that there is a fair issue to be tried that a complaint against V-Clouds of alleged software misappropriation would be precluded by the settlement agreement. Therefore, insofar as the plaintiff has an entitlement to an interlocutory injunction, I consider that it must be limited to complaints against the plaintiff, either directly or indirectly through Enable or otherwise, in relation to matters which were issues in the earlier proceedings and, in particular, the plaintiff's involvement or connection with the TTA.

7. Adequacy of damages?

7.1 It was contended on behalf of the defendant that there was no evidence of any damage to the plaintiff personally, as distinct from damage to Enable or other companies with which he is associated. This ignores the damage which the plaintiff, as a shareholder, may suffer through the medium of Enable through which he is carrying on his business, by reason of that company not being able to raise finance or being inhibited in attracting new customers by reason of the allegations of the defendant. While any such loss incurred by the plaintiff via Enable would be primarily pecuniary loss, which could be adequately compensated in damages, that would not be the position in relation to the reputational damage to Enable, which would inevitably tarnish the plaintiff. Aside from the likelihood of damage to the plaintiff as a result of reputational damage to Enable, the most significant damage which is likely to ensue from the defendant's allegations is reputational damage to the plaintiff personally. Despite the defendant's assertions to the contrary, *prima facie*, the FAST investigation can only be construed as having been designed to impugn the plaintiff, the plaintiff being the only employee or director of Enable who spent "time at MXSweep". On a plain reading of the FAST letter of 26th April, 2010, the plaintiff must be the person against whom FAST made the allegation of copying the source code and using and developing it without authority. Accordingly, the plaintiff is at risk of serious reputational damage for which damages would not be an adequate remedy because of the impossibility of quantifying damages which would adequately compensate him for such loss in a breach of contract context.

7.2 Referring to the decision of the Supreme Court in *Westman Holdings Ltd. v. McCormack* [1992] 1 I.R. 151, counsel for the defendant raised issues as to the ability of the plaintiff to meet a claim for compensation in the event that the defendant would wish to pursue it on foot of the plaintiff's undertaking as to damages if, an interlocutory injunction having been granted, it should transpire at the hearing of the action that it should not have been granted. The type of analysis carried out by the Supreme Court in the *Westman Holdings* case – consideration of the damages which the plaintiff would incur if an injunction was not granted to restrain picketing of its licensed premises against the ability of the defendant picketers to compensate for the damage in the event that the defendant trade union would establish statutory immunity – is not possible here. There is no evidence on the basis of which it is possible to form a view on the likelihood, or the probable level, of damage which the defendant would incur if it is restrained from pursuing complaints against the plaintiff or Enable pending the trial of the action and it transpires in due course that it should not have been. In view of the fact that the defendant's complaints relate to matters which arose prior to the settlement of the plenary proceedings and the Companies Act proceedings and on which the defendant was prepared to compromise with the plaintiff, albeit in his personal capacity, it is difficult to conclude that the defendant would be inadequately compensated or irrecoverably damaged if it was restrained from pursuing those complaints further pending the trial of the action.

7.3 The fact that the plaintiff now resides in Malta, which is within the European Union, is not a factor which should give rise to prejudice to the defendant.

8. Balance of convenience?

8.1 Consideration of where the balance of convenience lies in determining whether the defendant should or should not be restrained from alleging software theft and other wrongdoing against the plaintiff, either directly or indirectly through Enable or otherwise, turns largely on the issues addressed in the preceding paragraph concerning adequacy of damages. For the reasons set out in addressing those issues, I am of the view that the balance of convenience lies in favour of granting the injunction pending the trial of the action.

9. Form of the order

9.1 The order I propose making against the defendant will be in the following terms:

An order restraining the defendant its servants or agents from making any further allegations or prosecuting any

complaints in any forum against the plaintiff either directly or indirectly through Enable Software Limited or otherwise of software theft, improper conduct or illegal copying in relation to matters which arise from, were considered in or relate to the proceedings in this Court bearing Record No. 2008/10922P and 2009/97 COS, including the plaintiff's involvement or connection with TTAAsia Limited until the trial of the action.

The plaintiff's undertaking as to damages will be noted in the order.