Neutral Citation Number: [2008] IEHC 330

THE HIGH COURT

2008 No. 5292P

BETWEEN

BRIAN FRENEY AND GERARD FRENEY

PLAINTIFFS

AND
MYLES FRENEY AND PAUL FRENEY

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on the 22nd day of October, 2008.

Background
1. The plaintiffs in these proceedings are brothers. The first defendant is their father and the second defendant is their brother.

2. There is a long history of contention between the parties which culminated in the settlement of proceedings in the Commercial Division of this Court (Record No. 2007/5691P) (the 2007 proceedings) in which the defendants and another sibling of the plaintiffs were plaintiffs and the plaintiffs were defendants. The 2007 proceedings were settled on 16th April, 2008. Under the terms of the settlement the defendants, as plaintiffs in the 2007 proceedings, confirmed that "they no longer maintain and will not in future assert any claim or interest of whatsoever nature against or in any of the assets of Lauro Enterprises Limited and/or its subsidiaries". Subsequently, by order dated 22nd April, 2008 made by Kelly J., having recited that a settlement had been reached therein, it was ordered, by consent, that the claim of the plaintiffs in the 2007 proceedings be dismissed.

3. These proceedings were initiated by a plenary summons which issued on 1st July, 2008 wherein the plaintiffs claim various injunctive reliefs, including an order restraining the defendants from breaching the terms of the settlement of the 2007 proceedings and an order restraining the defendants, their servants and/or agents or persons acting on their behalf from threatening and intimidating the plaintiffs or contacting them or howsoever inflicting emotional suffering on them concerning or relating to their interest in the assets of Lauro Enterprises Limited or its subsidiaries. The plaintiffs also claim damages for trespass, nuisance, assault and the tort of inflicting emotional suffering in the plenary summons.

4. On 1st July, 2008 the plaintiffs applied to this Court ex parte for an interim injunction and for short service of a notice of motion seeking interlocutory injunctions in the terms*, inter alia* of the orders referred to above. The application for the interim injunction was grounded on an affidavit sworn on 1st July, 2008 by the first plaintiff. On the basis of the plaintiffs' undertaking as to damages, I made an interim order until Monday, 7th July, 2008 or until further order in the meantime restraining the defendants, their servants or agents or persons acting on their behalf, from threatening and intimidating the plaintiffs, contacting them or howsoever before inflicting emotional suffering on them relating to their interest in the assets of Lauro Enterprises Limited or its subsidiaries. The order provided that the defendants should be at liberty to apply to vary or discharge the order on giving the plaintiffs twenty four hours notice of their intention so to do. The plaintiffs were given leave to issue their notice of motion claiming interlocutory relief for 7th July, 2008. The notice of motion was, in fact, issued on 1st July, 2008.

5. The interlocutory application was adjourned from time to time, the interim order continuing. Each of the defendants brought a motion to discharge the order of 1st July, 2008. The affidavits grounding those applications also responded to the plaintiffs' claim for an interlocutory injunction.

6. Eventually, the defendants' motions and the plaintiffs' application for an interlocutory injunction were listed for hearing on 31st July, 2008. On that occasion, I heard the defendants' motions. Having done so, I made an order discharging the interim order made on 1st July, 2008 against each of the defendants, indicating that I would give my reasons later. The purpose of this judgment is to set out those reasons. The plaintiffs' application for the interlocutory injunction stands adjourned.

The factual basis of the plaintiffs' claim for interim relief and the defendants' response
7. The factual basis on which the plaintiffs sought interim relief as averred to in the grounding affidavit of the first plaintiff sworn on 1st July, 2008 was quite narrow. The starting point was the settlement of the 2007 proceedings.

8. The first event thereafter relied on in support of the application was the receipt by both plaintiffs of letters from the first defendant on 30th May, 2008. In each letter the first defendant recognised that there had been "finality in the legal sense" but appealed to the plaintiffs to give him a business asset or some money towards the acquisition of another business asset. On the face of it, there was nothing menacing or sinister or threatening about that letter.

9. However, subsequently each of the plaintiffs received two text messages on their respective mobile phones. The first was received on 16th June, 2008 from an anonymous sender, who represented himself or herself as "associates of your father". The thrust of the message was that the sender had examined the situation and was suggesting that the plaintiffs pay the first defendant for what they had "taken" or do a deal. The plaintiffs were requested to contact "an intermediary" without delay. The second text message was received on 24th June, 2008 and was stated to be sent by "Pat". It stated that the "association" had passed the first defendant's problem on to him. It stated that what the plaintiffs did "was wrong and stupid" and that they would have to come to an arrangement with their father. It was stated that their father would be paid what he was owed and that the sooner the plaintiffs did this "the easier it will be on everyone".

10. The first plaintiff averred that both he and the second plaintiff believed that the threats were genuine and that they constituted a real threat to their safety and to the safety of their respective families. They reported the matters to the Garda Síochána and were advised that the text messages were sent from pre-paid mobile phones. The first plaintiff averred that he contacted the first defendant by mobile phone following receipt of the second text message. While the first defendant denied any knowledge of the text messages, the first plaintiff averred that in the course of the conversation he got the clear impression from the manner of the first defendant's responses and tone that he was aware of the text messages.

11. The final incident of which the first plaintiff complained occurred in Dundrum Shopping Centre on 25th June, 2008. The first plaintiff averred that he met the second defendant there. When he greeted him, the second defendant became very aggressive, shouted at him, pushed him in the chest and came in close to him as if he was going to head butt him. The first plaintiff characterised what occurred as an assault on him by the second defendant. Security personnel and a member of the Garda Síochána arrived on the scene after the first plaintiff had sought assistance. The first plaintiff averred that because of this assault both he and the second plaintiff were left in no doubt that his father was intent on taking whatever steps were necessary in order to re-open the dispute,

which had been the subject of the 2007 proceedings.

12. The solicitors for the plaintiffs wrote to the Garda Síochána on 30th June, 2008 setting out the foregoing facts and asking the Gardaí to investigate the matter. It was stated that the plaintiffs perceived the threats "as genuine and real to their own safety, the safety of their families, their employees and business".

13. In relation to those specific averments, the response of the first defendant was that his letter was intended as an "olive branch", that it asserted no legal entitlement, but was a mere request and that he hoped the plaintiffs would look favourably on it. He did not instruct anyone to send the text messages nor is he aware of anyone who sent them. He had never borne any ill will against the plaintiffs and there was no reason to believe otherwise. If the messages were sent by a person purporting to act on his behalf, he had no control over the matter, and never condoned such actions. His telephone conversation with the first plaintiff after the receipt of the second text message took place while he was abroad and was travelling by car. The reception was not clear. However, he emphatically denied that he gave the impression that he was aware of the existence of the text messages; the first plaintiff's call was the first he had heard of them. The first defendant reiterated that he wished the plaintiffs no ill and that he had no reason to wish them harm. As their father, he would always love them and be concerned for their well being and safety.

14. The response of the second defendant was that he was aware that his father was writing the letter and that he advised him that he should be careful not to contravene the terms of settlement. His belief was that the letter was innocuous and conciliatory. In relation to the text messages, he does not know anything about them, he did not ask anybody to make any communication by text message or any other means with the plaintiffs and he does not recognise the mobile telephone numbers from which they were sent. In relation to the incident in the Dundrum Shopping Centre, the evidence of the second defendant was that he was surprised to see the first plaintiff walking towards him on that occasion. The second defendant had left the family business in 1993 in what he considered to be unfair circumstances and thereafter he had virtually no contact with either of the plaintiffs. The second defendant's version of what happened was that no greetings were exchanged between him and the first plaintiff and that he attempted to avoid making eye contact with him and to ignore him. However, as they passed in close proximity to each other the first plaintiff said that he was "going to sort [him] out". The second defendant felt bullied and threatened. He raised his hand in front of his chest and between each of them in a defensive mode. There were exchanges between them, the thrust of which, according to the second defendant, excising the Anglo Saxon, was that the first plaintiff had said that he was going to sort out both defendants and the second defendant had retorted that the first plaintiff was guilty about what he had done to his father. The second defendant emphatically denied that the incident involved any pushing or head butting gestures on his part. Although he acknowledged that there were raised voices, there was no shouting. There was very minor physical contact. The second defendant felt threatened and felt he had to defend himself. The second defendant averred that he has no intention of having any communication with the plaintiffs in the future other than such occasional and casual communication as may occur because they live in the same community and because they are members of the same family. Therefore, he asserted, there is no need for a Court order restraining him from such communication.

15. There is a conflict on the affidavit evidence as to whether the first defendant was aware of the text messages and, as the plaintiffs imply, was in some way instrumental in the messages being sent with a view to intimidating the plaintiffs. There is an even more fundamental conflict on the affidavit evidence in relation to what occurred in the Dundrum Shopping Centre and as to who was threatening whom. As Lord Diplock stated in *American Cyanamid v. Ethicon Limited* [1975] A.C. 396, in a passage at p. 407 frequently quoted with approval in this jurisdiction, it is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend. Accordingly, I express no view on those conflicts which at this stage cannot be resolved.

16. In the exchange of affidavits between the parties other facts emerged. It is only necessary to refer to two. First, it emerged in an affidavit sworn by the second plaintiff on 25th July, 2008 that both plaintiffs were aware that in November, 2007 the second defendant had made a complaint to the Garda Síochána that the first plaintiff was a person of great violence who had access to firearms and that he, the second defendant, was living in fear of the first plaintiff. Secondly, in the same affidavit the second plaintiff referred to an occasion in March, 2008 on which the defendants parked a car outside the private home of an employee of the plaintiffs and spoke to the employee's young son, suggesting that this conduct constituted an attempt to indirectly harass the plaintiffs. The response of the defendants was that they were merely endeavouring to ascertain the address of the employee in question with a view to seeking his testimony in the 2007 proceedings. It is not possible at this stage to draw any inference as to what the motivation of the defendants was on that occasion.

The defendants' arguments for discharge of the interim order in outline

17. While each of the defendants was separately represented, the totality of the arguments advanced in support of the application to discharge the interim order can be subsumed into four propositions, namely:-

> (1) that the interim order should be set aside on the ground of failure on the part of the plaintiffs to make full and frank disclosure in applying for it;
>
> (2) that the nature of the relief sought, which was characterised as an injunction restraining criminal activity, was not an appropriate form of relief to grant on an interim or interlocutory injunction;
>
> (3) that the application for interim relief was not based on evidence as distinct from mere suspicion; and
>
> (4) that as a matter of discretion the Court should have refused the application.

18. I will deal with each of those grounds in turn.

19. Before doing so, however, it is important to emphasise the nature of the Court's jurisdiction to make an order *ex parte*. Order 52, Rule 3 of the Rules of the Superior Court, 1986 provides as follows:-

> "In any case the Court, if satisfied that the delay caused by proceeding by motion on notice under this Order would or might entail irreparable or serious mischief, may make any Order *ex parte* upon such terms as to costs or otherwise and subject to such undertaking, if any, as the Court may think just; and any party affected by such Order may move to set it aside."

Non-disclosure

20. It is well settled that an order obtained on an ex parte application may be set aside on the ground of breach of the duty of full

and frank disclosure, as is clear from the following passage of the judgment of this Court (Kelly J.) in *Adams v. Director of Public Prosecutions* [2001] 2 I.L.R.M. 401:-

> "On any application made ex parte the utmost good faith must be observed, and the applicant is under a duty to make a full and fair disclosure of all the relevant facts of which he knows, and where the supporting evidence contains material misstatements of fact or the applicant has failed to make sufficient or candid disclosure, the ex parte order may be set aside on that very ground."

21. As to what constitutes failure to make sufficient or candid disclosure, it was urged that the Court should have regard to the factors outlined by this Court (Clarke J.) in *Bambrick v. Cobley* [2006] 1 I.L.R.M. 81 as being "most likely to weight heavily with the Court", namely:-

> "1. The materiality of the facts not disclosed;
>
> 2. The extent to which it may be said the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the Court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the Court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
>
> 3. The overall circumstances of the case which led to the application in the first place."

22. The matters which it was contended should have been disclosed to the Court on 1st July, 2008 were the fact that there had been no relationship between the plaintiffs and the second defendant for fifteen years, the fact that the second defendant had made the report to the Garda Síochána in November, 2007, and the plaintiffs' allegation that the defendants had sought to indirectly intimidate the plaintiffs through the employee in March, 2008. I cannot see how any of the foregoing matters is material to the plaintiffs' case for an interim injunction which was based on events subsequent to the settlement of the 2007 proceedings and the plaintiffs' perception that the defendants were trying to undo that settlement. It is of significance that it was the plaintiffs, in response to the defendants' affidavits in support of their applications to set aside, who brought to the Court's attention the report to the Garda Siochána in November, 2007 and the alleged intimidation through the employee in March, 2008, not the defendants. Having regard to the overall circumstances of the case which led to the application on 1st July, 2008, I cannot find that there was a breach on the part of the plaintiffs of their duty of full and frank disclosure.

Relief inappropriate

23. As I understand it, the basis of the argument that it was inappropriate to seek or grant relief of the nature granted in the interim order of 1st July, 2008 was that the activity sought to be restrained amounted to criminal conduct, for example, conduct proscribed by sections 2, 3, 4, 5, 9 and 10 of the Non-Fatal Offences against the Person Act, 1997. The authorities relied on in support of the argument were two decisions of this Court: the decision of Costello J. in *A. G. v. Paperlink* [1984] I.L.R.M. 373; and the decision of Barron J. in *O'Connor v. Williams* [2001] 1 I.R. 248.

24. In my view, the invocation of the decision in *A.G. v. Paperlink* is misconceived. That was a case in which the Attorney General, as part of his general power to enforce public rights in the public interest, was seeking to restrain the defendant from operating a courier service in breach of the statutory monopoly of the Minister for Post and Telegraphs under the Post Office Act, 1908. In granting the injunction, Costello J. held that the High Court has jurisdiction to grant an injunction in such circumstances but should only exercise the jurisdiction in exceptional cases. He also gave guidance as to the proper exercise of the jurisdiction: the Court will consider the adequacy of alternative remedies, but will not be precluded from granting an injunction by the mere fact that a criminal prosecution has not been brought.

25. This case is distinguishable from *A.G. v. Paperlink* and also from *O'Connor v. Williams* (where the plaintiff taxi drivers were seeking a permanent injunction to restrain the defendant hackney services from operating in breach of the Road Traffic (Public Service Vehicles) Regulations, 1963, (as amended)) in that what the plaintiffs sought in this case was an injunction to restrain activities which would amount to civil wrongs, for example, the tort of assault and the tort of intimidation. The plaintiffs were not seeking to restrain the commission of a criminal offence. The basis on which the plaintiffs sought injunctive relief was their assertion that threatening wrongful behaviour on the part of the defendants was likely to continue. Assuming such assertion is credible, it is a sound basis for seeking the intervention of the Court.

Evidence

26. In support of his submission that the interim application was not based on evidence as distinct from mere suspicion, counsel for the first defendant referred the Court to a passage from the judgment of this Court (Flood J.) in *News Datacom Limited & Ors. v. David Lyons & Ors.* (Unreported, High Court, 20th January, 1994) in which, after referring to the passage from the judgment of Lord Diplock in the *American Cyanamid* case to which I have alluded earlier, Flood J. stated:-

> "Nonetheless to raise a fair question to be tried there must be some positive evidence tendered by the plaintiff, which at minimum gives rise to an implication that copying has taken place and which rescues the Court from the doldrums of unadulterated speculation though falling far short of an establish [*sic*] probability."

27. In that case, the plaintiffs were seeking an interlocutory injunction restraining the defendants from infringing the plaintiffs' copyright in certain software. Flood J. concluded that the evidence tendered on the interlocutory application, which the judgment indicates was of a highly technical nature, had failed to show that they had "sown the seed which could fructify at hearing into a stateable case of infringement by copying of a copyright", in that at most the plaintiffs had merely shown the fruits of the software and not direct evidence of any similarities in the software itself.

28. Counsel for the first defendant posed the question whether there was evidence that the first defendant was likely to harm the plaintiffs and submitted that there was no such evidence. In considering that submission, it is important to emphasise that, in the context of the applications to discharge the interim injunction, the relevant question is confined to the evidence contained in the affidavit of the first plaintiff sworn on 1st July, 2008 to support the *ex parte* application. While averments contained in that affidavit fall far short of establishing, as a matter of probability, that the first defendant was instrumental in the text messages being sent to the plaintiffs, the affidavit as a whole asserted the plaintiff's belief that an irreparable or serious mischief of the type envisaged in Order 52, Rule 3 might ensue if an interim injunction was not granted.

29. Accordingly, I was on 1st July, 2008, and I am still, of the view that there was sufficient evidence to support the application for

an interim injunction.

Discretion

30. In *Adams v. Director of Public Prosecutions*, Kelly J. quoted the following passage from the judgment of Judge L.J. delivering the judgment of the Court of Appeal of England and Wales in *St. George's Healthcare and N.H.S. Trust v. S.* [1998] 3 W.L.R. 936 outlining the circumstances in which an interim injunction is granted (at p. 966):-

> "An interim injunction is granted *ex parte* only in exceptional circumstances and then only subject to the triple safeguard of (i) the duty of full and frank disclosure, (ii) the cross-undertaking in damages which is required as a matter of course and (iii) the right of the party enjoined to apply to vary or discharge the *ex parte* order."

31. In this case, the defendants availed of the third safeguard. In so doing, each of the defendants has put evidence before the Court from which it is reasonable to conclude that the continuation of a Court order in the terms made on 1st July, 2008 is not necessary to ensure that the plaintiffs are protected against continuing threats, intimidation or risks to their personal safety from or at the behest of either of the defendants. It is on that account that I considered it appropriate, in exercise of the Court's discretion, to discharge the interim injunction.