Neutral Citation Number: [2006] IEHC 233

THE HIGH COURT

[2001 No. 11447P]

BETWEEN

MAUREEN HUGHES

PLAINTIFF

AND
HITACHI KOKI IMAGING SOLUTIONS EUROPE

DEFENDANT

AND
STANDARD LIFE ASSURANCE COMPANY

THIRD PARTY

Judgment of Mr. Justice Clarke delivered 21st July, 2006.

1. Introduction

1.1 The plaintiff ("Ms. Hughes") is employed by the defendant company which is, I understand, now called Ricoh Printing Systems Europe ("Ricoh"). In the substantive proceedings Ms. Hughes claims that Ricoh has been guilty of a wrongful termination of a disability benefit payment to which, Ms. Hughes claims, she was entitled under the terms of her contract of employment. While such a payment was made for an initial period of time, the amount of the payment was subsequently reduced and ultimately the payment was discontinued. The payment was subsequently reinstated. Up to date there is, therefore, a claim which is based on the contention that Ms. Hughes should have been in receipt of full disability benefit from the time when she was first in receipt of same. The claim to date would appear to involve a sum of approximately €133,000.

1.2 Ricoh joined the third party ("Standard Life") basing it's claim on an agreement entered into between Ricoh and Standard Life for the provision of disability benefit to nominees of Ricoh. Ricoh's claim against Standard Life centres around a contention that, in substance, the decision as to whether Ms. Hughes was to be treated as qualifying for disability benefit was made by medical assessors appointed by Standard Life. In those circumstances it is contended, that if those decisions were incorrect in a manner which entitles Ms. Hughes to compensation, Standard Life is obliged to indemnify Ricoh against any sums awarded. Ms. Hughes contends that there is no privity of contact between her and Standard Life and, for that reason, has not brought any direct claim against the third party.

1.3 The proceedings have been ongoing since 2001 but have now been complicated by the fact that Ricoh has made a decision to cease to trade and is in the course of winding down its business. In those circumstances Ms. Hughes contends that she is entitled to require that sufficient sums be retained by Ricoh to meet her potential claim and has brought an application for a *mareva* type injunction designed to secure that eventuality. In those circumstances it is necessary to turn to the procedural history of the application for a *mareva* type injunction.

2. The *Mareva* Application

2.1 In the grounding affidavit sworn in support of the application for an interlocutory injunction, Ms. Hughes' solicitor deposed to the background matters referred to above and also referred to the fact that Ms. Hughes had a further claim in respect of what she contended was an ongoing disability. It was stated that a further sum of €500,000 should be retained to cover the eventuality that disability payments might be wrongly stopped in the future. As appears from that affidavit, Ricoh, on 3rd May, 2006, wrote to Ms. Hughes indicating that Ricoh's operations in Ireland (and indeed Europe) would cease as of 30th June, 2006. The letter included a number of options in relation to redundancy. As a result of correspondence with Ricoh's solicitors it was confirmed that it was not intended to seek to have Ricoh placed in liquidation at this time.

2.2 As a result of a replying affidavit, it is clear that Ricoh is part of a large group of companies. The relevant detailed corporate structure was deposed to in that affidavit by Mr. John Doyle the Finance Director of Ricoh. The ultimate parent company is called Ricoh Co. Limited and is a Japanese public company with, it would appear, assets of €13 billion and 75,000 employees in 318 companies across 150 countries. The immediate parent of Ricoh is Data Products (Santa Clara) which is in turn a subsidiary of Ricoh Printing Systems America Inc. Ricoh is an unlimited company having share capital and thus, in the event that it might be dissolved in circumstances of insolvency, its shareholders would be required, under the provisions of the Companies Acts, to contribute any shortfall (including the costs of liquidation).

2.3 It appears from the affidavit of Mr. Doyle, that while the operations of Ricoh ceased on 30th June, 2006, no decision has yet been made as to whether Ricoh is to be dissolved. The stated principal reason for that state of affairs centres around a defined benefit pension plan which Ricoh sponsors and which has assets of approximately €17 million. It is stated that there are many complex issues to be addressed relating to whether the pension plan should be wound up or not and that it is intended to keep the company in existence, at least until all such matters are resolved.

2.4 One aspect of Ms. Hughes concerns was resolved at the time of the swearing of Mr. Doyle's affidavit. It was made clear in that affidavit that Standard Life has agreed to maintain Ms. Hughes' disability cover beyond the 30th June, 2006, notwithstanding the termination of her employment on that date. That matter has been confirmed by Standard Life. It is clear, therefore, that with effect from 1st July, 2006 Ms. Hughes is entitled to claim disability benefit directly from Standard Life. If any dispute arises in the future as to whether she is entitled to the payment of any benefit, that dispute can be resolved in proceedings directly between Ms. Hughes and Standard Life. Any question of the necessity of Ricoh to make a provision in respect of a possible future claim no longer arises in those circumstances.

2.5 The affidavit of Mr. Doyle further makes clear the current financial status of Ricoh. He suggests that Ricoh has realisable assets of approximately €7,200,000 with liabilities of approximately €10,700,000. Those liabilities include the costs associated with the winding down of the business of the company. In his affidavit Mr. Doyle indicated that it was the company's intention to meet the entire liabilities of €10,700,000 by the conversion of the assets into cash and by borrowing the deficit (which it would appear would be of the order of €3,500,000) from its parent Ricoh Printing Systems America. The affidavit also notes that Ricoh already owes that parent company €12,700,000 so that the debt, after the anticipated borrowing to meet the shortfall, would increase to €16,200,000. It was also indicated in the affidavit that it was the intention to make further borrowings above and beyond the above sum of €3,500,000 from the parent company in the event that further liabilities emerge (including any liabilities that might arise to Ms. Hughes).

2.6 At the time of swearing his affidavit Mr. Doyle was dealing with an application on behalf of Ms. Hughes to freeze €700,000 of assets to meet her claim (including the possible claim in respect of future benefit) together with costs. On the basis of such a claim

he indicated that, if such an amount of assets were required to be frozen, it would be necessary for Ricoh to borrow an equivalent additional sum from its parent so as to allow it to meet all of its other liabilities while retaining the sum involved. It was asserted that the parent company would, in turn, have to borrow such a sum from outside banks at an interest cost of approximately €40,000 per annum. While that sum would obviously be significantly lower in the light of the fact that it is no longer sought, for the reasons which I have set out above, to freeze any moneys to meet possible future claims, nonetheless, it is said that it is inappropriate to require Ricoh to enter into such borrowing in all the circumstances of the case.

2.7 When the matter was first argued before me an issue arose which led to a suggestion that a further affidavit be filed. I will turn to that issue in due course. However, as a result, an affidavit of Bradley Fletcher, who is the secretary of the parent company of Ricoh, was put before the court at a resumed hearing. I will refer to the content of that affidavit in the context of dealing with some of the legal issues which have arisen.

2.8 In the context of the factual background which I have set out it is necessary to turn to the legal arguments.

3. The Law

3.1 In *Bambrick v. Cobley* [2006] ILRM 81 at p. 90 I noted the following:-

> "It is trite to say that a plaintiff is not entitled to security for every claimed liability. The *mareva* injunction is not intended to provide plaintiffs with security in respect of all claims in relation to which they may be able to pass an arguably test. The true basis of the jurisdiction is the exercise by the court of its inherent power to prevent parties from placing their assets beyond the likely reach of the court in the event of a successful action".

3.2 That passage was based, in part, on the judgment of Hamilton C.J. in *O'Mahony v. Horgan* [1995] 2 I.R. 411 at p. 419 from which it is clear that, before a plaintiff will be entitled to a *mareva* injunction, "there must be an intention on the part of the defendant to dispose of his assets with a view to evading his obligation to the plaintiff and to frustrate the anticipated order of the court."

3.3 However it is clear that the jurisprudence in respect of what might be called the "requisite intention" has developed since O'Mahony. In *Bennet Enterprises Inc. v. Lipton* [1999] 2 I.R. 221 O'Sullivan J. acknowledged that direct evidence of an intention to evade will rarely be available at the interlocutory stage and concluded that it was legitimate to consider all the circumstances of the case in reaching a decision on whether to grant relief in the form of a *mareva* injunction.

3.4 In *Tracey v. Bowen* (Unreported, High Court, Clarke J. April 19th 2005) I considered the judgment of O'Sullivan J. in Bennet Enterprises and the judgment of Kearns J. in *Aerospace Limited v. Thompson* (Unreported, High Court, Kearns J. January 13th 1999) and expressed the view that those cases were authority for the proposition that:-

> "In assessing the risk of dissipation the court is entitled to take into account all the circumstances of the case which can include, in an appropriate case, an inference drawn from the nature of the wrongdoing alleged, which, if fraudulent or unconscionable, may lead to the establishment of a risk that further fraudulent or unconscionable actions will be taken so as to place any assets of the defendant outside the jurisdiction of the court."

3.5 I followed the same approach in *McCourt v. Tiernan* (Unreported, High Court, Clarke J. July 29th 2005).

3.6 While all of the above cases were concerned with circumstances where the court was invited to infer from the nature of the contended for cause of action that there was a real risk that assets might be placed beyond the jurisdiction of the court, those cases are, in my view, nonetheless examples of a more general consideration. For the reasons pointed out by O'Sullivan J. in *Bennet Enterprises* it will rarely be possible to produce direct evidence of the intention of a defendant against whom a *mareva* injunction is sought. The "requisite intention" will, therefore, in most cases, have to be established by inference from other facts. It will, therefore, in some cases be appropriate to infer the intention of the defendant concerned from what can be established about the way he has, or intends to, deal with his assets.

3.7 Most of the cases involve a situation where the contended for fear of the plaintiff is that the defendant will retain ownership of the assets concerned but move the assets to a place where they are outside the reach of the courts. It is, however, possible that assets might be placed outside the reach of the court by other means. While *O'Mahony v. Horgan* is clear authority for the proposition that the payment of lawful debts in the course of an ongoing business should not give rise to any inference sufficient to justify the grant of a *mareva* injunction, it seems to me that there is, at least in principle, a necessity to give different consideration to a corporate entity which may be insolvent. In Re *Frederick Inns Limited* [1994] ILRM 387 the Supreme Court had to consider the question of the duties of the directors in a situation where a company was being wound up or where any creditor could have it wound up on the ground of insolvency. Blayney J., in giving the judgment of the court, found that in such circumstances the directors owed a duty to the creditors to preserve the assets so as to enable them to be applied in *pro tanto* discharge of the company's liabilities.

3.8 In the context of an application under s. 150 of the Companies Act 1990 in *McLoughlin v. Lannon* [2005] IEHC 341, and having referred to *Frederick Inns* I noted that:-

> "there can be little doubt, therefore, that amongst the important duties of directors is to ensure that, when it becomes clear that a company is insolvent, the assets are preserved and dealt with in the way in which the Companies Acts require. There would not seem to be any real doubt but that the directors in this case did not comply with that obligation."

3.9 It is, therefore, clear that the directors of any company are under a fiduciary obligation (which arises in circumstances where the company does not have sufficient assets to meet its liabilities) to have regard to the insolvency provisions of the Companies Acts in the way in which the assets are managed. While an inappropriate disposition of the company's assets in such circumstances might not act for the benefit of the company itself, it seems to me that, nonetheless, in an appropriate case, it may be open to a plaintiff to seek *mareva* relief where it can be shown that an insolvent company intends to deal with its assets in a manner which would prevent those assets being dealt with in accordance with the provisions of the Companies Acts. In the ordinary way such a company must be taken, at least *prima facie*, to intend the natural consequences of its acts. Where it can be demonstrated that the company concerned intends to deal with its assets in such a manner as would be in breach of the obligations of the company and its directors under *Frederick Inns* and where such action would be likely to affect the position of the plaintiff, it seems to me that "requisite intention" required to justify the grant of a *mareva* type injunction would be established.

3.10 I am, therefore, satisfied that, in principle, it is open to a plaintiff to seek a *mareva* type injunction in circumstances where it can be shown that an insolvent corporate entity intends to deal with its assets in a manner which would be in breach of the

obligations on the company and its directors to ensure that those assets are maintained in a fashion which would enable them to be applied in accordance with corporate insolvency law. This situation may arise even where the company proposes to pay its lawful debts. It should, however, be emphasised that the primary means available in law for the enforcement of any such entitlement is to seek to place the company in liquidation so that the assets would, then, be dealt with by the liquidator in accordance with corporate insolvency law. However where, for whatever reason, it may not be possible for the plaintiff to seek to have the company put into liquidation or where, for whatever reason, liquidation may not be appropriate at that stage, it seems to me that it is open to a plaintiff, in such circumstances, to seek a *mareva* type injunction.

3.11 Against that legal background it is now necessary to turn to the facts of this case.

4. Applications to Facts of Case

4.1 It is clear that Ricoh is insolvent in the sense that its assets are less than its liabilities by an amount of approximately €3,500,000. An additional shortfall will arise in the event that the plaintiff is successful. The stated position of Ricoh is that it intends to distribute all of its assets to its creditors (including paying liabilities arising to its workforce on the winding down of its business). In order to do this it will need to borrow a further sum of €3,500,000 from its parent to meet the existing shortfall. If there were no further factors involved, then it would seem to me that that intended action would be a clear breach by the directors of their obligations as defined in *Frederick Inns* in that the assets would not, therefore, be dealt with in the manner required by corporate insolvency law on the basis that no provision would be made for the contingent claim of the plaintiff in these proceedings (and, perhaps, for other contingent claims).

4.2 However there are other factors involved which require that the overall intent of Ricoh cannot be inferred from what is set out at par 4.1 above. The stated intention of Ricoh has to be seen against the background of two additional matters.

4.3 Firstly there is the claim as against Standard Life. I agree with counsel for Ms. Hughes that there was good reason for Ms. Hughes not suing Standard Life directly. The contractual documents entered into between Ricoh and Standard Life would appear, on their face, to exclude any direct contractual liability between Standard Life and the employees of Ricoh (such as Ms. Hughes). While there may be arguments which could be made to get around that difficulty, it seems to me to be reasonable for Ms. Hughes and her advisors to take the view that it is not incumbent upon them to engage in additional problematic litigation directly against Standard Life.

4.4 That being said the existence of the third party claim against Standard Life must, as cogently argued by counsel for Ricoh, be taken into account in assessing the intended actions of Ricoh. On the basis of my understanding of the substantive litigation (on foot of the submissions of counsel at the hearing before me) it would appear that, in practice, the decision to disallow disability benefit to Ms. Hughes was taken by medical officers of Standard Life. It is clear that the contractual decision to disallow disability benefit must have been taken by Ricoh (because that is what the contract of employment says). However, if it is established at the trial that any such decision was, in substance, taken by Standard Life, then it seems probable that, in the event that the decision may be taken to have been wrongful, and that Ricoh is, therefore, liable to Ms. Hughes, that Standard Life will, in turn, be liable to indemnify Ricoh. While it would be neither possible nor appropriate to reach any concluded view on that issue at this stage it does seem to me that the actions of Ricoh and its directors must be assessed in the light of all the circumstances (as noted by O'Sullivan J. in *Bennett Enterprises*) including the fact that they have every reason to believe that, in the event that a liability in favour of Ms. Hughes is established at the trial, Ricoh will be entitled to obtain an indemnity from Standard Life.

4.5 The second matter that needs to be taken into account is the stated position of the parent company of Ricoh to the effect that it will lend further sums to Ricoh, in the event that such sums are necessary to meet any liabilities which Ricoh may transpire to have above and beyond those presently identified. In the course of the initial hearing before me I queried the fact that only evidence of such an intention came from Mr. Doyle, who was an officer of Ricoh. Ricoh, of course, had no right to insist on a loan being made. It was in that context that the additional affidavit of Mr. Fletcher was filed which makes a clear and unequivocal sworn statement to the effect that it is the intention of Ricoh Printing Systems America to lend to Ricoh any sums that may be required to satisfy further legitimate liabilities that might arise, including any sums that Ricoh might be found liable to pay to Ms. Hughes. There is no reason to doubt that Ricoh Printing Systems America is a large and reputable company in an even larger and equally reputable group.

4.6 The existence of the indemnity claim as against Standard Life and the existence of the sworn statement on behalf of the parent company to advance further moneys do not provide an absolute guarantee that funds would be available in the event that Ms. Hughes should succeed. However, it is clear, as I pointed out in *Bambrick*, that a plaintiff is not entitled to absolute security. The very point at issue in *O'Mahony v. Horgan* was the entitlement of a corporate entity to pay its lawful debts for the purposes of carrying on its business. While slightly different considerations may arise where the corporate entity concerned is insolvent (for the reasons which I have sought to analyse) nonetheless the very fact that a corporate entity is entitled to carry on business, in an appropriate case, carries with it the risk that some of its assets may be lost in the ordinary way in the course of that business. That is a risk which any plaintiff must take.

4.7 Similarly it seems to me that the directors of a corporate entity which may appear to be insolvent, are entitled to exercise a reasonable judgment as to the availability of funds to meet liabilities. In much the same way as the directors may be absolved from a charge of reckless trading if they are demonstrated to have acted responsibly in circumstances where there was good reason to believe that further funding, sufficient to allow the company to continue, might be forthcoming, so also would directors be absolved from any breach of the obligations identified in *Frederick Inns* where they acted responsibly in circumstances where there was good reason to believe that funds would be available to ensure that no party was left worse off than the position that would obtain in the event of a liquidation.

4.8 In my view, as a result of the two matters identified above, the directors of Ricoh have ample reason to believe that funds will be available to meet any claim that Ms. Hughes may ultimately succeed in establishing. In those circumstances it does not seem to me that it can be said that it is appropriate to infer that it is the intention of the directors to deal with the assets of the company in a manner which would have the effect of defeating Ms. Hughes' entitlement to recover any damages which she might be able to establish at the trial, or indeed, that their intended actions are likely to have that effect.

4.9 In those circumstances I am not satisfied that the conditions necessary for the grant of a *mareva* injunction have been established and I would, therefore, propose refusing the application.