

THE HIGH COURT

[2014 No. 2183 P]

BETWEEN

LEE BRADSHAW

PLAINTIFF

AND

WILLIAM MURPHY AND JOSEPH MURPHY AND CLAIRE MURPHY AND COPPER BAR AND GRILL LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 26th day of March 2014

1. The plaintiff is an employee of the fourth named defendant ("the Company"). The Company carries on a business known as 'The Copper Bar and Grill' in the South Beacon Quarter, Sandyford, Dublin. The plaintiff is a Chef and restaurateur.

2. The plaintiff contends that he is in partnership with the first named defendant, Mr. William Murphy, and that the business of the partnership relates to the Copper Bar and Grill. The second named defendant, Mr. Joseph Murphy, is a director of the Company and the third named defendant, Ms. Claire Murphy, who is the wife of the first named defendant, is a shareholder of the Company.

3. It does not appear to be in dispute that the Company now carries on the business of the Copper Bar and Grill and that the plaintiff is employed by the Company.

4. Further, it is not in dispute that there was a meeting between the plaintiff and Mr. William Murphy and Mr. Joseph Murphy on 11th December, 2013. There is significant dispute as to what was said by the Messrs. Murphy at that meeting. The plaintiff deposes that he understood that he was being placed on leave for a month, during which he would be paid, and whilst he acknowledges that Mr. William Murphy said he did not want to work with him any longer, also states that he understood that everything would be looked in a month's time. Mr. William Murphy deposes that he told the plaintiff that he was being dismissed; that the Company would pay him for four weeks on certain conditions which are in dispute.

5. The plaintiff appears, however, to have understood from the meeting of 11th December, 2013, and from a further conversation and information given him of communications to third parties on the following day that the defendants did intend to effect a dismissal, and, as he contends, a dissolution of the partnership.

6. These proceedings were commenced on 31st January, 2014, and on the same date, an application was made *ex parte* to the High Court and Ryan J. granted liberty to serve a motion seeking interlocutory relief returnable for Monday 3rd February, 2014.

7. On 3rd February, 2014, the defendants gave undertakings to the Court pending the hearing and determination of the interlocutory application in which, in summary, they undertook:

(i) Not to interfere with the plaintiff's share in the partnership the subject matter of the proceedings, partnership assets and the business known as the Copper Bar and Grill; the plaintiff's assets or those of the Company and the plaintiff's shareholding the subject matter of the proceedings in the Company;

(ii) not to dismiss the plaintiff or to take any step to effect the dismissal of the plaintiff, and

(iii) to resume payment on a weekly basis of wages and to make other payments to the plaintiff in specified amounts.

8. The above undertakings, in their full detail, subsisted until the time of the hearing of the interlocutory application and continue to subsist pending the delivery of this judgment.

Interlocutory Application

9. Whilst the interlocutory reliefs sought in the notice of motion are multiple, in substance, they are divided into two issues: orders restraining the defendants from terminating or purporting to terminate the employment of the plaintiff with the Company and injunctions restraining the defendants from terminating or purporting to terminate the partnership between the plaintiff and Mr. William Murphy

10. The defendants had proffered an open undertaking to the Court at the outset of the hearing which was limited to the disposal of the assets or business of the Company and sought an early hearing. By the end of the interlocutory hearing, the defendants indicated that they were prepared to give the following undertakings to the Court pending the full hearing of the proceedings:

"1. The Defendants and each of them undertake not to dissipate or dispose of (other than in the ordinary course of business) the assets or business of the fourth Defendant or to wind up the fourth Defendant save on the giving of seven days notice of any intended dissipation, disposal or winding up to the Plaintiff in which case the Plaintiff will have liberty to re-enter this application and to make such further or other application as he sees fit.

2. The Defendants and each of them undertake not to dismiss the Plaintiff or to cause the fourth Defendant to dismiss the Plaintiff on the ground of misconduct including the Facebook issue. For the avoidance of doubt, the Defendants concede for the purpose of the giving of this undertaking only, that misconduct includes the matters raised by the first Defendant during the course of a meeting between him and the Plaintiff that took place on the evening of 11 December 2013.

3. The Defendants and each of them undertake not to communicate to any third party that the Plaintiff's employment has

been terminated on the ground of misconduct including the Facebook issue or for the matters raised by the first Defendant during the course of a meeting between him and the Plaintiff that took place on the evening of 11 December 2013."

11. Notwithstanding the undertakings offered by the defendants, the plaintiff continues to seek an interlocutory injunction:

(i) Restraining the termination of the plaintiff's contract of employment with the Company and

(ii) an injunction restraining the defendants from terminating or purporting to terminate the partnership of the plaintiff and Mr. William Murphy.

I propose dealing separately with the applications insofar as they relate to the employment law issue and the partnership issue. It is necessary to firstly set out the agreed principles in relation to applications for interlocutory injunctions, and in particular, injunctions restraining dismissal or purporting to give effect to a dismissal.

Applicable Principles

12. In accordance with the decision of the Supreme Court in *Campus Oil Ltd. v. Minister for Energy (No. 2)* [1983] I.R. 88, in order to obtain an interlocutory restraining injunction, the plaintiff has to demonstrate a serious issue for trial, inadequacy of damages and that the balance of convenience lies in favour of granting the order. Where the application is such that in substance, the plaintiff is seeking a mandatory interlocutory injunction i.e. an order directing his continued employment and payment of wages, then, in accordance with the decision of the Supreme Court in *Maha Lingam v. Health Service Executive* [2005] IESC 89, the ordinary test of a fair case to be tried is not sufficient. In such a case, it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. For reasons explained below, it is not necessary for me to consider further the latter principle.

13. The claim made on behalf of the plaintiff in relation to the purported or potential dismissal from employment by the Company is that at the meetings on 11th December, 2013, and subsequent communications to third parties, it was indicated that the plaintiff was to be dismissed from his employment with the Company by reason of alleged misconduct. Having made such an allegation of misconduct, counsel for the plaintiff submits that any subsequent termination of the plaintiff's employment invokes a requirement for fair procedures. She submits that the plaintiff has not been accorded fair procedures by the defendants herein. She relies upon the dicta of Clarke J. in *Carroll v. Bus Átha Cliath* [2005] 1 84, where, at p. 209 he stated:

"If the stated reason for seeking to dismiss an employee is an allegation of misconduct, then the courts have, consistently, held that there is an obligation to afford that employee fair procedures in respect of any determination leading to such a dismissal."

14. Counsel for the defendants does not dispute the potential applicability of the above principles, but submits that as the defendants have now given an undertaking to the Court pending the final determination of the plaintiff's claim not to dismiss the plaintiff or cause the Company to dismiss the plaintiff on the ground of misconduct, that the above principles no longer apply in relation to the interlocutory application. Between now and the trial of the action, counsel for the defendants submits that the defendants, and in particular, the Company, may only terminate the employment of the plaintiff in accordance with the contractual terms, including any implied term of reasonable notice. Counsel for the defendants further submits that there is no claim made by the plaintiff that the fourth named defendant is precluded from terminating his employment in accordance with the express or implied contractual terms. He submits that there is, therefore, no serious issue to be tried in relation to the Company's entitlement at common law to terminate the employment of the plaintiff in accordance with its contractual terms.

15. That submission appears to me correct. Whilst the plaintiff may have raised a serious issue to be tried as to whether the Company is entitled to give effect to a dismissal indicated in the meetings of 11th/12th December, 2013, it has not, on the evidence in the affidavits sworn in the interlocutory proceedings, raised a serious issue to be tried as to the Company's entitlement at common law to terminate the employment of the plaintiff, without cause, in accordance with the relevant contractual provisions. The fact that the defendants previously threatened to dismiss, for the reasons stated on 11th December, 2013, does not preclude the defendants from terminating in accordance with the contractual provisions. The defendants have undertaken to the Court not to dismiss by reason of matters raised on 11th December, 2013.

16. Accordingly, I refuse the plaintiff's application for an injunction restraining the termination of his employment by the Company in circumstances where the defendants have given the undertaking not to dismiss the plaintiff on the ground of misconduct (including matters raised by Mr. William Murphy at the meeting of 11th December, 2013) and the Facebook issue.

Partnership

17. Prior to 2012, the plaintiff and Mr. William Murphy had a business relationship in relation to a restaurant known as 'The Station House' in Tralee, County Kerry. Mr. William Murphy was the landlord of the premises and the plaintiff the tenant. From 2010, the plaintiff says he expressed a wish to move back to Dublin and looked for opportunities to start a restaurant and bar business in Dublin. In the meantime, he remained operating the restaurant at the Station House until January 2013. He says that he did scouting and formulated plans which crystallised and became the Copper Bar and Grill. The plaintiff contends that in the summer of 2012, in Spain, he and Mr. William Murphy reached agreement on partnership terms in accordance with a proposal set out in an email dated 12th May, 2012, from Mr. Murphy for the proposed restaurant and bar in Dublin.

18. Mr. Murphy disputes that there was any agreement with the plaintiff to form a partnership. The plaintiff deposes that the alleged partnership agreement included that a company would be formed with himself and Mr. Joseph Murphy (presumably as shareholders and directors).

19. It is agreed that pursuant to what the plaintiff contends to have been a partnership agreement and what Mr. William Murphy refers to as "discussions" between himself and the plaintiff, the Company was incorporated on 29th June, 2012. The initial directors were the plaintiff and Ms. Claire Murphy who also were 50% shareholders. The plaintiff does not dispute that it is the Company which carried on the business of the Copper Bar and Grill and that this was the intention pursuant to the alleged partnership agreement.

20. In August 2012, the plaintiff resigned as a director of the Company, and in January 2013, signed a transfer of the shares he held in the Company. There are significant disputes on the affidavits as to the reasons for which he took either of these steps, but it is not in dispute that he did take the steps.

21. The plaintiff, at para. 16 of his first affidavit, sets out in summary the terms which, he contends, form part of the partnership

agreement. It is not contended by the plaintiff that the partnership, as such, was to carry on any restaurant or bar business separate and distinct from that to be carried on by the company to be formed. There are additional terms relating to the cessation of the plaintiff's involvement in the Station House Restaurant and certain financial terms alleged in relation to the plaintiff's entitlements in respect of the business which became the Copper Bar and Grill.

22. The interlocutory orders sought by the plaintiff insofar as they relate to the alleged partnership are injunctions restraining the defendants from terminating or purporting to terminate the partnership between the plaintiff and Mr. William Murphy and from removing the plaintiff from carrying on the common business or otherwise acting in breach of the partnership agreement. As appears, they are in very broad terms.

23. Counsel for the defendants submits that the plaintiff has not made out on the facts deposed an arguable case that there existed a partnership agreement between the plaintiff and Mr. William Murphy in relation to the business known as the Copper Bar and Grill. He relies, in particular, upon s. 1 of the Partnership Act 1890, which provides in s. 1 insofar as relevant:

"1.-(1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2) But the relation between members of any company or association which is-

(a) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies; or

(b) . . .

(c) . . .

is not a partnership within the meaning of the Act."

24. On the facts deposed to, it appears to be commoncase that the agreement between the plaintiff and Mr. William Murphy included an agreement that a company be formed and that it was the company which was intended to carry on the proposed restaurant and bar business. I am not satisfied that the plaintiff on the facts deposed to has made out an arguable case that he and Mr. Murphy agreed that they would personally carry on a business with a view to profit. He had made out an arguable case that he was to receive certain financial payments for his contribution to the organisation and establishment of the business to be carried on by the Company. It appears to me unnecessary to determine whether or not that agreement is arguably a partnership agreement having regard to the provisions of s. 1(1) and (2)(a) of the Partnership Act 1890, for the following reasons.

25. Even if it is arguable that the alleged agreement between the plaintiff and Mr. William Murphy constitutes a partnership agreement, I am not satisfied that the plaintiff has established that damages would not be an adequate remedy for the alleged breaches or purported termination which he is seeking to restrain. The terms alleged are terms relating to the financial reward due to the plaintiff. If, at the full hearing of the action, the plaintiff succeeds in establishing that he had an agreement with Mr. William Murphy whereby he was to be paid certain sums over and above his salary as an employee, damages will be an adequate remedy. It is important to note that the plaintiff resigned as a director of the Company in August 2012, and transferred his shares in the Company in January 2013, and those two steps occurred long before the current disputes.

26. In reaching the conclusion I have reached, that the plaintiff has failed to establish that damages would not be an adequate remedy, I have also taken into account the undertaking given by the defendants in relation to the non-dissipation or disposal of the assets and business of the fourth named defendant as set out in para. 10 above.

27. As the plaintiff has not established that damages would not be an adequate remedy for breach of the alleged partnership agreement, in accordance with the *Campus Oil* principles, the Court must refuse the interlocutory injunctions sought.

Relief

28. The Court will note the undertakings given by the defendants pending the full hearing of the proceedings set out at para. 10 of this judgment in the order to be made on this interlocutory application. The plaintiff's application for interlocutory relief will be refused. There will be liberty to apply in relation to the undertakings given by the defendants. The Court will give directions for the exchange of pleadings for the purpose of effecting a speedy determination of the matters in dispute between the parties and the matter will be remitted to the Chancery List with leave to apply for an early hearing date.