THE HIGH COURT

[2017 No. 8623 P]

BETWEEN

MORTIMER JOHN WALTERS AND BRIAN CONNELL

PLAINTIFFS

AND

JAMES PATRICK FLANNERY AND LEXINGTON SERVICES LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Creedon delivered on Thursday, 7th day of December, 2017

Background

1. On foot of a plenary summons, issued on 26 September, 2017, the plaintiffs brought an application for an anti-suit injunction, prohibiting the defendants or either of them from further prosecution of proceedings which they had already instituted in the State Court of Virginia, in the United States of America ('State Proceedings') and to restrain them from pursuing any further proceedings in that jurisdiction.

2. The defendants had previously commenced proceedings in the US District Court of Virginia on the 17 May, 2017 ('Federal Proceedings'). The Federal Proceedings were dismissed for lack of subject matter jurisdiction i.e. that the matter was held to be within the jurisdiction of the State Courts.

3. During the interlocutory proceedings, the plaintiffs asserted that the State Proceedings were inextricably linked with the occurrence of certain events of default under the Terms of Settlement agreement ('Terms of Settlement'), which was negotiated between the parties following failed Commercial Court litigation, concerning the ownership and control of a valuable patent ('Patent').

4. The Terms of Settlement contained an exclusive jurisdiction clause which designated Ireland as the forum for all disputes arising from and in connection with said agreement. This formed the basis for the plaintiffs' anti-suit injunction against the defendants' State Proceedings.

5. The defendants argued that the State Proceedings were confined to the validity of an assignment agreement ('PAA'), which post-dated the Terms of Settlement.

6. The PAA was signed by the first named plaintiff, Mr. Walters, on behalf of the second named defendant, Lexington Services Ltd., and had the effect of assigning the Patent to a Delaware company, Delegate LLC, for consideration of €100.

7. There was contention between the parties regarding the capacity in which Mr. Walters signed the PAA. The plaintiffs contended that he signed the document in his capacity as receiver over the Patent, following the second named defendant's breach of the Terms of Settlement. The defendants asserted that Mr. Walters assigned the Patent in his individual capacity, on behalf of the second named defendant, despite not being an authorised representative of the company.

8. The PAA also has an exclusive jurisdiction clause, designating the Federal Court of Virginia as the forum for all disputes arising from and in connection with said agreement.

9. This court delivered its *ex tempore* judgment in this matter on 11 October, 2017, refusing the plaintiffs' application.

10. The court agreed with counsel for the defendant that the State Proceedings, then pending, were concerned with the validity of the PAA and not the Terms of Settlement. Therefore, the Terms of Settlement's exclusive jurisdiction clause, favouring Ireland as a forum for dispute litigation, was not triggered and the defendants' application to rely on it, for the purposes of equitable relief, could not be granted.

11. A separate costs application was heard by this court on 3 November, 2017.

12. At the costs application, the court was informed that the State Proceedings were dismissed due to a lack of personal jurisdiction.

13. Counsel for the defendant also confirmed that the Federal Proceedings, dismissed for lack of subject matter jurisdiction on 30 August, 2017, will be appealed by the defendants to this action.

Defendants Case

14. The defendants opened the Superior Court Rules to the court.

Order 99 of the Rules of the Superior Courts (The Rules) has been amended by the insertion in r. 1 of O. 99 of sub-rule (4A) which provides that the court:

> *"Upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."*

15. The defendants argued that costs should therefore follow the event in this matter, the relevant event being this court's judgment against granting the plaintiffs' anti-suit injunction application.

16. In support of this argument, the defendants referenced the Campus Oil Test, arguing that because at the interlocutory stage, the plaintiffs failed at the very first hurdle of establishing a 'fair question to be tried', the court did not have to go on to consider the balance of convenience or the adequacy of damages.

17. Counsel for the defendant went on to argue: that

> *"In contrast to some of the other cases where costs have been reserved, this is not a case where discovery or oral*

evidence is going to change the Court's mind in relation to the interpretation of what was essentially a question of contractual interpretation of the terms of settlement. That matter, I say, has been determined in a manner which will not be upset ultimately because it was a strict legal interpretation of the terms of settlement and wasn't a factually dependant enquiry."

18. The defendants also opened the judgment of Laffoy J, in the High Court case of *Kavanagh & Ors v. Coras Iompar Éireann* [2009] IEHC 625 and drew the court's attention to the following passage at p. 9 of the judgment:

> *"The question for a Court in applying sub-rule (4A) is whether it is possible to justly make an order for costs at an interlocutory stage or not. While it may be regarded as unwise to generalise about these matters, it would seem to me that one is more likely to be in a position to determine that it would be just to award the costs against the unsuccessful plaintiff where the application for an injunction is refused, than to adjudicate on liability for costs in other circumstances."*

19. The defendants went on to argue that the Plenary Summons was, in effect, exhausted, in circumstances where the bulk of the reliefs sought had been dealt with in the judgment of this court at the interlocutory stage.

Plaintiffs Case
20. Counsel for the plaintiff argued that since the Federal Proceedings had been dismissed for lack of subject matter jurisdiction, that the issue remained live between the parties and the plaintiff would be pursuing Irish litigation in order to secure final interlocutory relief and damages.

21. Counsel for the plaintiffs opened to the court Clarke J's judgment in case of *ACC Bank PLC v. Hanrahan & Sheeran,* [2014] IESC 40. At p. 5, Clarke J considered the philosophy underpinning r. 1 of O. 99, sub-rule (4A):

> *"While, historically, there had been a tendency to reserve the costs of most motions to the trial judge, a view has been taken that this can lead to injustice for, at least in very many cases, a judge who has heard a motion is in a better position than the trial judge to consider the justice of where the costs of that motion should lie."*
>
> *"It is, of course, the case that such motions are very much 'events' in themselves. There are issues as to the appropriate scope of discovery or particulars. They are decided once and for all on the motion. The merits of the results of those motions are not, in the vast majority of cases, in any way revisited at the trial."*

22. Clarke J then, at p. 6 of his judgment, went on to contemplate circumstances where costs should be properly reserved:

> *"Slightly different considerations seem to me to apply in cases where, at least to a material extent, some of the issues which are before the Court at an interlocutory stage arise or are likely to arise again at the trial in at least some form. As I noted in Allied Irish Banks v. Diamond [2011] IEHC 505, and as approved by Laffoy J. in Tekenable Limited v. Morrissey & ors [2012] IEHC 505, somewhat different considerations may apply in cases where the interlocutory application will, to use language which I used in AIB v. Diamond and which Laffoy J. cited in Tekenable 'turn on aspects of the merits of the case which are based on the facts'."*

Conclusion
23. It is important to address the defendants' arguments in respect of the test applied by the court in determining the interlocutory application.

24. The court acknowledged in its judgment that there is no Irish authority setting out the test for anti-suit injunctions in this jurisdiction. However, there exists instructive English case law on this issue.

25. At the interlocutory hearing, the plaintiff opened the case of *OT Africa Line Ltd v. Magic Sportswear Corp & Ors* [2005] EWCA Civ 710 and in particular, Longmore LJ's judgment, where he states at p. 936:

> *"As a broad proposition of law, an anti-suit injunction may be granted where it is oppressive or vexatious for a defendant to bring proceedings in a foreign jurisdiction."*

He also stated:

> *"It is not now a controversial question whether, in a normal case, an anti-suit injunction should be granted, if a party to an exclusive jurisdiction agreement, in breach of that agreement begins proceedings in a jurisdiction other than the one agreed."*

26. There are therefore, two instances where anti-suit injunctions may be properly granted in England.

> i) Where it would be 'oppressive or vexatious' for the defendant to bring proceedings in a foreign jurisdiction; or
>
> ii) Where commencing foreign proceedings would be in breach of an exclusive jurisdiction agreement, which the defendant is a party to.

27. Critically, the Campus Oil Test was not included in Longmore LJ's judgment.

28. It was clear to this court at the interlocutory stage, armed with the evidence available, that the defendants' foreign litigation sought to question the validity of the PAA.

29. In its judgment, the court referenced the defendants' Federal Court submissions, which alleged at para 25-29, that Mr. Walters signed the PAA on behalf of Lexington Services, in his individual capacity as a representative of the company. The defendants argued that Mr. Walters was never made an authorised representative and that therefore, the document is 'fraudulent' in nature.

30. The plaintiff asserted that Mr. Walters signed the PAA in his capacity as a receiver. However, critically, there is no mention of a receiver in the PAA and no mention of Mr. Walters signing the document in his capacity as a receiver on the signature page (eg. 'Signed: Mr. Mortimer Walters, Receiver').

31. The defendants' Federal Court submissions also reference (para 31) the fact that Lexington Services Limited has not received the purported consideration for the PAA of €100. This was cited by the defendants as further proof that the PAA is 'fraudulent' in nature.

32. The court held that the plaintiff's contention- that the defendants' litigation was inextricably linked with the terms of the Terms of Settlement document- was incorrect. The PAA was at the heart of the defendants' foreign litigation and therefore, the defendants were not obliged to use Ireland as the jurisdictional forum to litigate their claims about its validity.

33. Further, the court concluded it would not be 'oppressive or vexatious' for the defendant to bring proceedings in the foreign jurisdiction.

34. It was opened to the court that the defendants were advised by their US attorneys that they had no option to launch Federal and later State proceedings in order to protect their interest in the Patent and challenge the validity of what they considered to be a fraudulent assignment. As a result, the court held that defendants' actions were reactive as opposed to 'vexatious'.

35. The court held that continuation of the State Proceedings did not amount to 'oppression' under the circumstances. In particular, the court noted that Mr. Walters remained fully engaged throughout the previous Federal Proceedings and did not seek injunctive action to restrain same. It was only later, against the State Proceedings that he sought relief.

36. In this way, counsel for the defendant is correct in saying that the plaintiffs fell at the first hurdle of their application. However, that hurdle was not the obligation to establish 'a fair issue to be tried', as per the Campus Oil Test. Rather, it was the obligation to establish that the jurisdictional clause in the Terms of Settlement had been breached by the initiation of foreign proceedings or that it would be 'oppressive or vexatious' for the defendant to bring the State Proceedings.

37. However, even if the Campus Oil Test did apply and it was held by the court that the plaintiffs fell at the first hurdle by failing to establish a 'fair question to be tried', the court is mindful of Clarke J's judgment in the Supreme Court case of *ACC Bank v. Hanrahan and Sheeran* [2014] IESC 40. At p. 6 of his judgment, he held that:

> *"One of the issues which of course, arises on an application for an interlocutory injunction is as to whether the plaintiff has established a fair issue to be tried, and, indeed, whether the defendant has established an arguable defence. In many cases the argument for both plaintiff and defence on those questions is dependant on facts which will not be determined at the interlocutory stage save for the purposes of analysing whether the facts for which there is evidence give rise to an arguable case or an arguable defence.*
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> *However, the point made in Diamond is that those facts may well be the subject of detailed analysis at trial resulting in a definitive ruling as to where the true facts lie. In substance a plaintiff may well secure an interlocutory injunction by putting forward evidence of facts which, if true, would give him an arguable case and by succeeding on the balance of convenience test thereafter. However, if the facts on which the plaintiff's claim is predicated are rejected at trial, then the justice of the case may well lead to the conclusion that the interlocutory injunction was wrongly sought. It may be that, on the basis of the evidence before the Court at the interlocutory state, the injunction was properly granted. However, with the benefit of hindsight, and after the trial, it may transpire that the case for the granting of an interlocutory injunction was only sustained on the basis of an assertion that the facts were other than the true facts finally determined by the Court at trial. It follows that in such cases there may well be good grounds for not dealing with the costs at the interlocutory stage for the trial court may be in a better position to assess the justice of the costs of an interlocutory hearing when it has been able to decide where the true facts lie."*

38. The court acknowledges therefore, that even if the Campus Oil Test was used in the instant case and the plaintiffs failed to establish a 'fair issue to be tried', the trial judge in the substantive proceedings may conclude otherwise, with the benefit of oral testimony and discovery. Indeed, this consideration is especially noteworthy in light of how factually-dependent the instant application was.

39. The court disagrees with the defendant that this case is one:

> *"Where discovery or oral evidence is [not] going to change the Court's mind in relation to the interpretation of what was essentially a question of contractual interpretation of the terms of settlement."*

Or one which:

> *"Has been determined in a manner which will not be upset ultimately because it was a strict legal interpretation of the terms of settlement and wasn't a factually dependant enquiry."*

40. The interlocutory proceedings in the instant case turned on facts. The court determined, with the limited evidence before it, that the foreign litigation in question was concerned with the PAA and not the Terms of Settlement. It therefore held that the exclusion clause in the latter agreement was not triggered and therefore did not prevent the defendants from pursuing litigation in the State of Virginia. If a substantive trial is held, oral evidence and discovery may affect this finding. It may very well be the case that the trial judge will take a different view and interpretation of those facts. For that reason and on balance, this court is of the view that the trial court will be in a better position to assess the justice of the costs of the interlocutory hearing.

Judgment

41. This court will reserve the costs of the interlocutory hearing to the trial of the action.