THE HIGH COURT

RECORD NO. 2018/10742/P

BETWEEN

BETTY MARTIN FINANCIAL SERVICES LIMITED

PLAINTIFF

AND

EBS D.A.C.

DEFENDANT

JUDGMENT of Mr. Justice John Jordan delivered on the 13th day of February, 2019

Introduction

1. The Plaintiff is a Tied Agent of the Defendant, having entered into three separate Tied Agency Agreements on the 20th April 2011 in respect of EBS Branches at Athlone, Longford and Lucan. The Plaintiff is the successor of Betty Martin, who died as a result of a terminal illness in 2014 at the relatively young age of 58. One thing is clear in these proceedings and that is that she was a quite extra-ordinary woman of great ability, energy and integrity. As a woman in a male dominated financial industry at the time, she broke the mould in setting up the successful businesses that lie at the core of this dispute. The Plaintiff company is an incorporation of the family business she created and is now run by her son and daughter, Declan and Sheila.

Discussion

2. In these proceedings, the Plaintiff seeks interlocutory injunctive relief as a result of the Defendant having served a "Notice of Termination of the Tied Agency Agreements on the 19th February, 2018" – the validity of which the Plaintiff challenges.

3. The Plaintiff asserts that the reason behind the service of the Termination Notice is the Plaintiff's refusal to fall in with "encouragement" from or "pressure " exerted by a Senior Official of the Defendant to mis-sell financial products and to engage in selling practices which are contrary to regulatory obligations and that are unlawful.

4. In essence, the Plaintiff points to the Consumer Protection Code, which governs financial institutions and which requires certain steps to be taken by financial institutions and financial advisors in order to ensure that customers are not sold financial products which carry a greater investment risk than is appropriate to their circumstances or risk appetite. The Plaintiff's assertions in relation to the actions of the Defendant's Senior Official are set out in some detail in the Grounding Affidavits filed by and on behalf of the Plaintiff.

5. The Defendant is as robust in denying the assertions made by the Plaintiff in this regard as the Plaintiff is in making the assertions. I need not decide where the truth lies but I am driven to the conclusion that this is a serious issue which will form part of those in dispute at the full hearing. It is important to observe that serious and, as yet unproved, assertions are made by the Plaintiff. These allegations are not lacking in detail and I am not prepared to dismiss them as not deserving of a full hearing and determination. In this regard, I do have to say the following about the AIB Group Internal Report which is relied heavily on by the Defendant;

> a. I do not quite understand how it can be afforded the stature the Defendant wishes it to be given when all we are given is an Executive Summary. Where is the full Report?
>
> b. How can the report be set up by the defendant as impartial and independent as it were when it is prepared by AIB Special Investigations Unit - Group Internal Audit?
>
> c. Why is the issue mentioned in the executive summary concerning the disparity between Irish Life's views and those of EBS and under the heading mis-selling despatched in such a cavalier fashion in the Summary when it lies at the core of Mr. Martin's assertions?
>
> d. How does Mr. Fitzgerald, in his affidavit sworn on 4th January 2019, state at paragraph 21 that Irish Life concluded that there was no evidence to support the mis-selling allegations made given the disparity of views referred to in the executive summary?

6. I note also the assertions in affidavit evidence of the Defendant to the effect that Mr. Martin's allegations only materialised after the first Termination Notice dated 18th May 2017 [see paragraph 8 of the affidavit of Mr. Tim Gleeson, dated 18th January 2019 and paragraph 19 of the affidavit of Mr. Des Fitzgerald, dated 4th January 2019]. Mr. Martin says the issue had been complained of as far back as 2010 [see paragraph 24 of this affidavit sworn on 11th January 2019]. Although I am not deciding the issue, I am not persuaded that these issues came as a 'bolt out of the blue' after 18th May 2017. Quite apart from anything else, no reason whatsoever is advanced as to why the first termination notice was served. I am told no allegations had been made beforehand. From what is put before me by the Defendant, it appears that the Defendant simply decided to oust the Plaintiff from three successful branches and to replace it with a new agent in each so that business would continue as normal. 'Move along', I am being told – there is nothing to see here. The Agreements do contain a clause concerning termination without a reason being given, but that does not negate the need for the Court to look for some reason or explanation given the background averred to on affidavit by the Plaintiff. It is the case that I can find no reason other than that advanced by the Plaintiff.

7. In *Campus Oil Limited –v- Minister for Industry and Energy [No.2]* 1983 IL 88 O'Higgins C.J. sets out the test to be applied when considering an application for an interlocutory injunction. The test can be summarized as follows:-

- Whether a fair bona fide question has been raised by the parties seeking relief.
- Whether the apprehended injury or harm is irreparable in the sense that the Applicant could not be fairly or properly compensated by an award of damages.
- Whether inconvenience, loss or damage would be caused to the other party if the injunction is granted.
- Whether the Applicant has shown that the balance of convenience is in his favour.

8. In *Okunade v. Minister for Justice* [2012] 3 I.R 88, 180, Clarke J. stated as follows, in reference to the test formulation by McCracken J. in *B. & S. Ltd. v. Irish Auto Trader Ltd.* [1995] 2 I.R. 142:-

> *"The party seeking the injunction must show that there is a fair or bona fide or serious question to be tried.*

• If that be established, the court must then consider two aspects of the adequacy of damages. First, the court must consider whether, if it does not grant an injunction at the interlocutory stage, a plaintiff who succeeds at the trial of the substantive action will be adequately compensated by an award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial of the action. If the plaintiff would be adequately compensated by damages the interlocutory injunction should be refused subject to the proviso that it appears likely that the relevant defendant would be able to discharge any damages likely to arise.

> • If damages would not be an adequate remedy for the plaintiff, then the court must consider whether, if it does grant an injunction at the interlocutory stage, a plaintiff's undertaking as to damages will adequately compensate the defendant, should the latter be successful at the trial of the action, in respect of any loss suffered by him due to the injunction being enforced pending the trial. If the defendant would be adequately compensated by damages, then the injunction will normally be granted. This last matter is also subject to the proviso that the plaintiff would be in a position to meet the undertaking as to damages in the event that it is called on.
>
> • If damages would not adequately compensate either party, then the court must consider where the balance of convenience lies.
>
> • If all other matters are equally balanced the court should attempt to preserve the status quo."

9. In *AIB –v- Diamond* [2012] 3 I.R. 570, Clarke J. referred to the Campus Oil Principles and the Judgment of Kelly J. in *Shelbourne Hotel –v- Torriam Limited* [2010] 2 IR 52 and stated as follows:-

> "Kelly J. noted a number of authorities from the United Kingdom which suggested an approach based on assessing where the least risk of injustice lay. Kelly J. did not find it necessary to reach any definitive conclusions on the point. As it happens, at much the same time, writing extra judicially in the foreword to Kirwan - *Injunctions Law and Practice* (Thomson Roundhall, 2008), I noted the same developments and suggested that a high value might be placed on an assessment of where the greatest risk of injustice might lie in future applications for interlocutory injunctions - paragraph 46."

10. Clarke J. went on to emphasise the usefulness of the "least risk of injustice" analysis. In *Dowling –v- Minister for Finance* [2013] 4 IR 576, the Supreme Court concluded that the ultimate test for granting an Interlocutory Injunction was where the "least risk of injustice lay".

11. It is clear from the authorities that to satisfy the requirement that there is a fair question to be tried, it is not necessary for the Plaintiff to establish that his case is very strong and the threshold to be surmounted is generally recognised to be low.

***Bona Fide* or Fair Issue to be Tried**

12. Turning then to the first question which I must address – is there a *bona fide* or a fair or serious question to be tried.

The agreements do contain clear provisions concerning termination. Of note are the following :-

> *"The term of the Agreements is from the Commencement Date (being 27th August, 2009) until "termination or earlier expiry of this Agreement pursuant to Clause 15".*
>
> • Clause 15.1 of the Agreements provides:-
>
> *"Without prejudice to any other rights which the parties may have to terminate this Agreement, this Agreement shall terminate, whereupon its Term shall expire:*
>
> • three months from the date on which the Tied Branch Agent gives notice to the Society of its intention to terminate this Agreement;
>
> • twelve months from the date on which the Society gives notice to the Tied Branch Agent of its intention to terminate this Agreement; or
>
> • on the first Business Day after the Society gives notice to the Tied Branch Agent pursuant to Clause 15.3".

> *Clause 15.3 of the Agreements provides that the Defendant may give notice of immediate termination in particular circumstances. In the circumstances, while the Defendant can terminate the Agreements immediately and without notice in respect of a limited number of enumerated circumstances, both parties are the defendant asserts entitled to terminate the Agreements without cause or reason on giving notice to the other (twelve months in the case of the Defendant and three months in the case of the Plaintiff).*
>
> *Clause 28 of the Agreements deals with notices and Clause 28.1 provides:-*
>
> *"All notices and other communications required to be given or made under this Agreement shall be in writing and will be sent to the respective addresses specified at the head of this Agreement or to such other addresses of which notice in writing has been given by the Society or the Tied Branch Agent to the other".*
>
> *The final provision of the Agreement which is relevant in assessing the Plaintiff's claim to have established a fair question to be tried is Clause 24 which provides at Clause 24.1:-*
>
> *"24.1 This Agreement constitutes the entire agreement between the parties hereto and supersedes all prior agreements and understandings oral or written relating to the subject matter of this Agreement.*

24.2 The Tied Branch Agent acknowledges that it has not relied upon any oral or written representations made to it by the Society or its employees or agents and has made its own independent investigations into all matters relevant to the Agency Business".

13. Dealing with the points made by the Plaintiff in relation to the fair question or questions to be tried it seems to me that: -

The point concerning the form of the Notice did generate an amount of discussion in the course of the hearing. Counsel for the Plaintiff exercised some diplomacy in replying to my suggestions that it might essentially be regarded as a pleading point or, if not quite that, then at least a point of dubious merit. In truth, it is neither in my view.

It is true that the letter was the second of two such letters. The earlier letter was better drafted and referred to the three separate Agreements in clear terms. The later February letter and the one on which the Defendant relies is open to a legitimate criticism in that it is not as comprehensive as the earlier letter in that it does not refer to the three separate Tied Agency Agreements. One may say that the message conveyed by the February letter was unambiguous and that it was abundantly clear to the Plaintiff that the letter was in effect a repeat of the earlier letter and was referring to the Tied Agency relationship between the Plaintiff and the Defendant, even though the February letter lacks the specific reference to the three separate actual Tied Agency Agreements which were entered into between the parties.

However, I find that a *bona fide* question or a fair and serious issue does exist on this point and that an argument does exist that the Notice of Termination is defective because it does not refer specifically to the three separate Tied Agency Agreements, refers in fact to an agreement which did not exist and was not in any event served as required by the three contracts. Indeed, with three separate contracts I would expect three tailor made Notices to be served in accordance with each and in respect of each – in circumstances where the defendant wishes to avail of a condition in each agreement which it asserts is a strict condition allowing a Termination of a long standing business relationship without having or expressing a reason and even if the reason is capricious.

Termination Notice and Collateral Agreement
14. I will now consider the following:-

a. The argument that the Termination Notice was served in breach of a collateral agreement that the Tied Agency Agreements would not be terminated without sufficient cause;

b. The argument that the Termination Notice is invalid because it was served capriciously and without a *bona fide* commercial reason;

c. The argument that the Termination Notice was served in breach of an implied term that the Defendant would not terminate the Tied Agency Agreement because the Plaintiff refused to mis-sell investment, savings and insurance related products and/or complained about the pressure applied to do so.

The Plaintiff has opened and relied on authorities which it says support its arguments. The Defendant has replied to these points and advanced and opened authorities in support of its submissions to the contrary. Both sides seek to distinguish the cases relied on by the other. As is usually the position, there is no authority on all fours with this case and the arguments are as interesting as they are complex. It would be easy to dismiss the arguments by reference to Clause 15 and the express wording of the commercial contracts entered into. But to do so would be to find that no bona fide question is there to be tried and that no fair or serious issue is there to be tried. Considering the evidence and authorities before me, I am not persuaded to so find as I believe the contrary to be the case.

The conclusion I have arrived at having regard to the evidence before me , having heard the submissions made and having regard to the authorities is that there is a fair and serious issue to be tried on each of the above grounds. I say this conscious of the threshold which I am concerned with and without expressing a view other than that they are bona fide and fair and serious issues to be tried.

Adequacy of Damages
15. In my view, damages are not an adequate remedy in this case. The Plaintiff's loss is likely to be significant and not easily quantifiable. The Tied Agency Agreements represent the business of the Plaintiff established over a period of seventeen years or more. The business in question requires a reputation for honesty and integrity and stability – all of which the Plaintiff has and this is not in dispute. If the Plaintiff is ousted as the Defendant intends, then its business is gone. Together with this, its reputation and that of its principals, whom I cannot ignore as this is a family company whereby the reputation of the company and that of its Principles overlap, will undoubtedly be dealt a severe blow. This consequence will be extremely difficult to express in terms of damages. In fact, I consider that a court would not be able to adequately compensate the Plaintiff for the harm done by an award of damages. It takes little to destroy the confidence customers have in financial institutions and advisors because of recent experiences in this country and further afield. Lost confidence is not easily restored.

This case is not of the kind identified by the Supreme Court by Finlay C.J. in *Curust Financial Services Limited v. Loew-Lack-Werk* [1994] 1 IR 450 and where he said:-

"In these circumstances, where damages can be quantified, the loss is quite clearly a commercial loss, there is no doubt about the capacity of the Defendants to pay any damages awarded against them and there is no element of new or expanding business which may make quantification particularly difficult, as a matter of principle, I conclude that damages must be deemed to be an adequate remedy in this case, and I would therefore allow the appeal and set aside the Order made in the High Court".

The factual matrix in Rela*x Food Corporation Limited v. Brown Thomas & Company Limited* [2009] IEHC 181, on which the defendant relies and where Laffoy J. refused to grant an interlocutory injunction where the Plaintiff sought to restrain the defendant from terminating the agreement which permitted the plaintiff to operate a restaurant on the defendant's premises was entirely different and the decision is easily distinguished.

Balance of Convenience
16. I turn then to consider where the balance of convenience lies. I have little doubt but that it lies in favour of granting the relief sought. The Plaintiff is operating and has throughout this dispute operated each of the three branches and there is no evidence or suggestion that it is not doing so as before and successfully. It is worth noting that the Notice purporting to terminate the Tied Agency also mandates the Plaintiff to continue to operate the businesses until the date of termination. There is no convincing

evidence that the branches are not as profitable today as they always have been and there is no convincing evidence that the Plaintiff's continued operation of all three branches between now and the full hearing of the action will not continue to reap at least the same rewards for both sides as they always have.

The potential loss and inconvenience to the defendant and the adequacy of the undertaking as to damages given by the Plaintiff have also exercised my mind. The potential loss averred to by the defendant is difficult to fathom. Ganted there may be some postage and administrative costs but these ought to be readily ascertainable and compensatable in damages should the Plaintiff fail at the full hearing. The Woods Agreements, the proposed new Tied Agent for the Athlone, Longford and Lucan branches, are curious in that I am asked to accept that a skilled and careful law office allowed its client to commit to three contracts at a time when their commencement was dependent on three existing contracts being terminated and when that itself was the subject of legal proceedings. Was this all done without making the commencement contingent on the valid termination of the existing contracts? To believe that would be to believe that the Defendant's law office is incompetent, which clearly it is not. I asked and I am told by Counsel for the Defendant, that there is no collateral contract in existence and I accept that to be so. But I am caused to ponder if I am missing something. On close reading, there is a clause in the Woods Tied Agency Agreements which it seems to me may well provide comfort to the Defendant in the event that the interlocutory relief is granted. Clause 16.3.J is not new, as a similar clause exists in the Plaintiff's three Tied Agency Agreements. In the event that the relief sought by the Plaintiff is granted, then I expect the Defendant to rely on this provision to in effect avoid any obligations it may have under the Woods Agreements. Whether or which, I am less than satisfied, and that is an understatement, as to the evidence of the Defendant concerning the damages it may suffer in the event that Interlocutory Relief is granted and the Plaintiff subsequently fails in the action after full hearing. I am even less satisfied as to the evidence and submissions concerning the inadequacy of an award of damages in that regard.

Delay

17. Dealing with the issue of delay - the earlier set of proceedings were commenced on the 8th November 2017 and were ultimately struck out by Order of the Master of the High Court on the 16th October 2018. They do illustrate, at first glance, significant delay on the part of the Plaintiff in seeking interlocutory relief. In effect, one can say with some force that the Plaintiff has left it to the eleventh hour to seek interlocutory relief in circumstances where it has had every opportunity to seek such relief at any time after the Plenary Summons was issued on the 8th November, 2017 [the first Plenary Summons]. Indeed, this dispute has been rumbling on in a very real sense since the service of the first Termination Notice in May 2017. The Plaintiff has been pro-active since then, but still leaves it to the last minute at the end of the legal term before Christmas 2018 to burst into action.

I can only recoil at the vision of the lawyers on both sides wrestling with the urgency foist upon them in having to get this all done and dusted before the last day of term, when I expect they were, they thought, coasting towards the finish line for a well-earned rest after a long legal term.

But it would be unfair and inequitable to refuse the Plaintiff relief on the grounds of delay. I accept that the Plaintiff honestly felt it would not come to this and it would have acted sooner if Mr. Martin and his sister felt otherwise. After all there was an earlier notice that disappeared into the ether. There was an ongoing and normal business in each of the three branches, albeit strained, in so far as some of the personalities involved were concerned. There was a business relationship of over seventeen years in duration and no doubt a well-founded and honest, although sadly naive belief, that the name Betty Martin counted for something in the Head Office in Dublin.

Where then does the least risk of injustice lie. There can only be one answer in my view. It lies in granting the Interlocutory Relief sought. It would, in my view, be unjust not to do so.

18. As an aside, I would have thought that a competent mediator could bring sense to bear and mediate a solution to the dispute between the parties. If the parties are committed to doing business with integrity and in accordance with the regulatory requirements that exist, then what possible obstacle stands in the way of both sides starting on a new page even if some re-arrangements and compromises are required of both sides? Large banks and financial institutions, and smaller ones, wish the public to forgive the past and to move on with a positive attitude. They should lead by example. What the parties have enjoyed in business together ought not to be lost if it can be salvaged. That exercise in itself might serve to help restore in the public mind the trust and confidence and faith that they should have in banks and financial institutions and which is being slowly rebuilt with effort over and above any required to solve this ongoing dispute. That may be a high minded and naive recommendation on my part but it is something I would urge on both sides in any event.

19. I will hear both sides in relation to the form of the order and in relation to costs.