Neutral Citation Number: [2007] IEHC 410

THE HIGH COURT

[2006 No. 3535P]

BETWEEN

ESTUARY LOGISTICS AND DISTRIBUTION COMPANY LIMITED T/A L.S. SALES

PLAINTIFFS

AND

LOWENERGY SOLUTIONS LIMITED AND JAMES TANGNEY

DEFENDANTS

Judgment of Mr. Justice Clarke delivered the 6th December, 2007

1. Introduction

1.1 These, and connected, proceedings have been the subject of a significant number of interlocutory applications over the last number of months. By way of background it should be noted that the proceedings generally involve disputes arising out of commercial arrangements for the distribution of heating devices. There would appear to have been a complete breakdown in relations between the parties to those agreements, resulting in significant litigation. At the core of the dispute between the parties remains an issue as to whether the ongoing supply of product in accordance with the commercial arrangements between the parties ceased by virtue of, on the one hand, non-payment or, on the other hand, non supply. As I have frequently pointed out during interlocutory hearings and judgments to date, the truth of the contentions of the parties in respect of that core issue is a matter which will have to await a full trial.

1.2 However the issue which I have to determine today concerns only one aspect of the history of the relevant litigation but nonetheless raises an important point of law. As part of the process to date the plaintiff ("Estuary Logistics") obtained an interlocutory junction on 15th of February, 2007 which had the effect of requiring the defendant ("Lowenergy Solutions") to continue to supply product, subject to a regime for payment which is set out in the schedule to the order which I made on that date. In the ordinary way, as part of the price which had to be paid for securing that interlocutory injunction, Estuary Logistics gave the usual undertaking as to damages in that it undertook "to abide by any Order which this Court may hereafter make us to damages in the event of this Court being of opinion that the first named Defendant shall have suffered any damage by reason of this Order which the Plaintiff ought to pay". Thereafter on 29th May, 2007, for reasons which it will be necessary to set out in more detail later in the course of this judgment, I ordered that the injunction granted by the previous order of 15th February, 2007 should be discharged.

1.3 In those circumstances the question of how properly to deal with the undertaking as to damages given by Estuary Logistics has now been raised.

1.4 Finally, by way of background, it should be noted that Lowenergy Solutions is now in liquidation. The application which I have to determine is brought by that company but, in substance, by its liquidator. However at all times material to the events giving rise to the issues generally between the parties and, in particular, the grant and subsequent discharge of the interlocutory injunction with which I am concerned, Lowenergy Solutions was under the control of the second named defendant ("Mr. Tangney").

2. The Application

2.1 In its notice of motion Lowenergy Solutions seeks an order compelling Estuary Logistics to make an immediate payment in the amount of €109,500.54 to Lowenergy Solutions on foot of the undertaking as to damages. An additional claim was brought in respect of monies which were believed to have been in the hands of Messrs Actons Solicitors who, at one stage, held monies on behalf of Estuary Logistics. However it is now clear that no such monies were held as of the date of this application or are any longer held and that aspect of the application was not, therefore, pursued.

2.2 Against that background, it is appropriate to turn to the principles by reference to which an application of this type should be judged.

I, therefore, turn to the legal principles applicable.

3. The Law

3.1 There does not appear to be any direct authority in this jurisdiction on the precise issue. However in *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545, the Court of Appeal in the United Kingdom set out the relevant principles to be applied in considering the enforcement of an undertaking as to damages. At pp. 1551/1552 Neill L.J., having reviewed all relevant authorities, set out the following principles concerning the enforcement of an undertaking as to damages:-

> "(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does. (2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted. (3) The undertaking is not given to the party enjoined but to the court. (4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains discretion not to do so. (5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued. (6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial. Even then, as Lloyd L.J. pointed out in *Financiera Avenida v. Shiblaq*, The Times, 14 January 1991; Court of Appeal (Civil Division) Transcript No. 973 of 1990 the court may occasionally wish to postpone the question of enforcement to a later date. (7) Where an interlocutory injunction is discharged before the trial the court at the time of discharge is faced with a number of possibilities. (a) The court can determine forthwith that the undertaking as to damages should be enforced and can proceed at once to make an assessment of the damages. It seems probable that it will only be in rare cases that the court can take this course because the relevant evidence of damages is unlikely to be available. It is to be noted, however, that in *Columbia Pictures Industries Inc v. Robinson* [1987] Ch. 38. Scott J. was able, following the trial of an action, to make an immediate assessment of damages arising from the wrongful grant of an Anton Piller order. He pointed out that the evidence at the trial could not be relied on to justify ex post facto the making of an ex parte order if, at the time the order was made, it ought not to have been made (see [1987] 3 All ER 338 at 378, [1987] Ch 38 at 85). (b) The court may

determine that the undertaking should be enforced but then direct an inquiry as to damages in which issues of causation and quantum will have to be considered. It is likely that the order will include directions as to pleadings and discovery in the inquiry. In the light of the decision of the Court of Appeal in *Norwest Holst Civil Engineering Ltd v. Polysius Ltd*., The Times, 23 July 1987; Court of Appeal (Civil Division) Transcript No. 644 of 1987 the court should not order an inquiry as to damages and at the same time leave open for the tribunal at the inquiry to determine whether or not the undertaking should be enforced. A decision that the undertaking should be enforced is a precondition for the making of an order of an inquiry as to damages. (c) The court can adjourn the application for the enforcement of the undertaking to the trial or further order. (d) The court can determine forthwith that the undertaking is not to be enforced. (8) It seems that damages are awarded on a similar basis to that on which damages are awarded for breach of contract. This matter has not been fully explored in the English cases though it is to be noted that in *Air Express Ltd. v. Ansett Transport Industries (Operations) Pty. Ltd.* (1979) 146 C.L.R. 249, 267 Aicken J. in the High Court of Australia expressed the view that it would be seldom that it would be just and equitable that the unsuccessful plaintiff 'should bear the burden of damages which were not foreseeable from circumstances known to him at the time'. This passage suggests that the court in exercising its equitable jurisdiction would adopt similar principles to those relevant in a claim for breach of contract."

3.2 The process whereby interim or interlocutory injunctions are granted, in the main, only when supported by an undertaking as to damages, is identical, for all practical purposes, as and between this jurisdiction and the United Kingdom. In such circumstances an exhaustive and authoritive review of the law from the Court of Appeal is particularly persuasive. Furthermore, the principles enunciated seem to comply entirely with the justice and equity of the type of situation that can arise where an interim or interlocutory injunction is granted but is ultimately discharged. It, therefore, seems to me that the above passage represents the law in this jurisdiction as well.

3.3 So far as relevant to this case it is clear from point (7) that a range of possibilities arise where an injunction is discharged before trial. Possibility (a) is stated to be one to be rarely exercised because it will rarely be possible, as of the time of discharge, to engage in a proper assessment of the appropriate sum to be awarded in damages. However on the unusual facts of this case no such problem arises. The application for payment was not, in fact, made at the same time as the original discharge was granted although it was intimated at that time that such an application might be moved by motion thereafter. That is what, in fact, occurred. Affidavit evidence was placed before the court on behalf of Lowenergy Solutions which established that the value of the goods supplied as a result of the injunction granted on 15th February, 2007 was €109,500.54. It is common case that no payment in respect of that supply has, in fact, occurred. Neither is there any dispute in respect of the calculation of the value of the goods supplied. There is not, therefore, any dispute but that the consequences of the interlocutory order being in place between February and May were that goods to that value were supplied (which would not have been supplied were it not for the order) and that same have not been paid for. Assessing quantum is not, therefore, a difficulty.

3.4 Possibility (b) does not, therefore, arise on the facts of this case. If it is clear that the undertaking as to damages should be enforced now, then there is no point in directing an enquiry as to damages as the amount of those damages is absolutely clear as of this stage.

3.5 Similarly it seems unlikely that there could, at this stage, be any basis for determining that the undertaking as to damages should not be enforced as per option (d). One of the bases upon which such a determination could be made if it were clear that no, or only trivial, damages could have arisen. For the reasons which I have just set out that is clearly not the case here. There clearly has been damage. The only other basis which could be put forward for suggesting that the undertaking as to damages should not be enforced stems from a contention that, having regard both to the circumstances in which the injunction was originally discharged and the overall issues which arise between the parties in these proceedings, it might be that the court should conclude that the overall equities and justice of the case should not lead to such enforcement. It is said, on behalf of Estuary Logistics, that this possibility exists on the facts of this case. However, whether such a conclusion could be reached could not, if at all, be determined until at or after the trial of the action. On that basis it is suggested that I should adopt option (c) and adjourn this application to the trial of the action.

3.6 On the facts of this case it is, therefore, clear that there are really only two options. Either an immediate enforcement in the sum claimed should be directed or the matter should be adjourned to the trial of the action. Before going on to consider which of those two options is appropriate in all the circumstances of the case, it is necessary to say something more about some of the factual background to these proceedings and in particular the circumstances leading to the making of the orders to which I have referred insofar as they are relevant to the issue which I now have to decide.

4. The Facts

4.1 It is important to emphasise one somewhat unusual feature of this case. The basis upon which the interlocutory order was ultimately discharged stemmed from circumstances where I found, on the basis of undisputed facts, that Estuary Logistics, and its principal Mr. Brosnan, had been guilty of an abuse of process by acting in a manner inconsistent with the interlocutory order which those parties had previously obtained. As will be recalled that order required, in substance, that the supply of product continue on certain terms. There was uncontradicted evidence that Mr. Brosnan had sought to procure an alternative supply of the relevant product and had gone so far to make some of the product produced by Lowenergy Solutions available to an alternative manufacturer to that end. Having secured the interlocutory injunction mandating a continuance of supply on the basis that the commercial arrangements between the parties were to continue until trial, it seemed to me that it amounted to an abuse of process on the part of Mr. Brosnan and, therefore, Estuary Logistics, to seek to go outside those arrangements. The relevant arrangements provided for exclusivity between the parties. In those circumstances the order was discharged. However it is important to note that this is one of those cases where the order was discharged, not because I was concluded that it should not have been granted in the first place but rather because, having obtained it, Estuary Logistics abused its position.

4.2 Against that background it is clear that the question of whether there was, at the material time, a contractual obligation to supply (independent of the injunction) remains alive. The discharge of the interlocutory injunction did not reflect, in any way, on the merits of the underlying dispute between the parties. Rather, it reflected, and significantly so, on the unconscionable actions taken by Mr. Brosnan in seeking to go outside the terms of the contract when he himself had the benefit of an injunction in his favour requiring that Lowenergy Solutions be bound to comply with its side of the bargain.

4.3 However, it remains open to the trial judge to take the view that the various legal and factual issues raised concerning the continuing obligation to supply, should be resolved, at least to a sufficient degree, in favour of Estuary Logistics, so as to establish that Lowenergy Solutions were, during the relevant time, under a contractual obligation to supply. Such a finding could, in my view, be material to the exercise of the court's discretion as to whether to enforce the undertaking as to damages and might amount, in an appropriate case, and depending on other factors, to the sort of special circumstances spoken of in *Cheltenham & Gloucester*. I must also take into account the fact that, on its case, Estuary Logistics has a substantial claim which would, if significantly established,

more than outweigh both the counterclaim made in the substantive proceedings on behalf of Lowenergy Solutions and, indeed, the claim made in this application. It is, of course, the case that the claim made in this application would, in any event, form part of the claim that would have to be adjudicated in the substantive proceedings.

4.4 The fact remains that the supply of the product during the period when the injunction was in place has to be paid for in any event. Whatever view the court takes on the substantive underlying issues between the parties, that sum will need to be taken into account in determining the overall net position at the end of the proceedings. If, notwithstanding having taken that amount into account, the trial judge should take the view that Estuary Logistics are entitled to a net payment from Lowenergy Solutions, then it is necessary to consider what the practical effect of such a determination would be, with particular reference to the effect of making an order now for the payment of the sums concerned.

4.5 As pointed out earlier Lowenergy Solutions is in liquidation. It must be inferred that there is at least a significant risk that it will not be able to meet its liabilities in full. If it were to receive an immediate payment of the sum sought, and on the assumption that no conditions were attached to that payment, then it would seem likely that that sum would be deployed in the course of the proper conduct of the liquidation and, in significant part, might not be available to be repaid in the event that the ultimate finding of the trial judge was consistent with the fact that there should be a net payment in favour of Estuary Logistics. On the other hand if Estuary Logistics are successful in the main proceedings, they will be able to obtain an order in damages representing, amongst other things, the sum which is the subject of this application, in any event. There does not appear to be any particular reason on the evidence to suggest that that sum would be less recoverable to any significant degree after trial than it is now.

5. Conclusions

5.1 Where the choice rests between immediate enforcement and a postponement of a determination to the trial, it seems to me that the Court has to balance all material factors. These include:-

(a) Whether there is a significant possibility that the trial judge may be in a better position to assess all relevant factors;

(b) Whether the nature of the damage alleged is such that it will fall to be considered at the trial in any event; and

(c) Whether the immediate payment of any damages might give rise, in the circumstances of the case under consideration, to a risk of injustice.

5.2 Applying those factors to the circumstances of this case I am, therefore, faced with a situation where, in the event that an order is made now but it should turn out that Estuary Logistics are the net winners of the ultimate proceedings, Estuary Logistics may be at a significant financial loss by being unable to recover the monies. As against that no similar disadvantage to Lowenergy Solutions would appear to flow from postponing the making of a determination in respect of enforcing the undertaking as to damages until the trial.

5.3 Faced with that distinction it seems to me that there would, potentially, be an injustice if I were to direct the enforcement of the undertaking as to damages at this stage. It is important to note that while the events giving rise to the discharge of the injunction were discreet and are unconnected with the underlying merits or otherwise of the substantive proceedings, the losses claimed in respect of the undertaking as to damages are intimately connected with the issues which arise in the substantive proceedings. In that regard this case is very different from one where the damages claimed in respect of an undertaking as to damages are wholly separate from the underlying issues which would be debated at the trial. For example in circumstances where a *mareva* type injunction is given at an interim stage, but is discharged by virtue of, for example, inadequate disclosure, the losses attributable to the existence of the *mareva* injunction are likely to be wholly separate from whatever claims might fall to be disposed of at trial. Even in those circumstances it is clear from *Cheltenham & Gloucester* that the court might, at least in some cases, properly postpone a consideration of the enforcement of the undertaking as to damages concerned until the trial. It is clear that if the trial judge were satisfied that fraudulent activity had, in fact, occurred, same might be an appropriate factor to set against inadequate disclosure in considering whether to enforce the undertaking as to damages.

5.4 That situation seems to me to apply a *fortiori* in circumstances such as those with which I am concerned where the very entitlement of Lowenergy Solutions to the payment of the sum now sought will be the subject matter of a determination by the trial judge. In addition the trial judge will have to determine whether, independent of the interlocutory injunction being in place, Lowenergy Solutions would have been obliged, as a matter of contract, to supply the goods in any event. In those circumstances I am satisfied that the justice of this case requires that a decision as to whether to enforce the undertaking as to damages concerned should be reserved to the trial judge who will, for the reasons which I have sought to analyse, be in a much better position to take into account all appropriate factors.