Neutral Citation: [2013] IEHC 489

THE HIGH COURT

[2013 No. 6852 P]

BETWEEN

KEVIN ANDERSON

PLAINTIFF

AND

FINAVERA WIND ENERGY INC. AND FINAVERA RENEWABLES IRELAND LTD AND CLOOSH VALLEY WIND FARM LTD

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered on the 31st October, 2013

Introduction

1. The plaintiff Mr Anderson is a retired businessman of great age. In March 2010, when he was aged 95 years, he made a loan of Can$ 1.5 million to a Canadian company engaged in developing wind farms. The agreement for the loan was contained in a written document that provided for security for the lender in the form of a lien over 110 shares in the wholly owned Irish subsidiary company that was developing a major wind farm project in Co. Galway. The issued share capital was 220 shares, made up of33 class A and 187 class B shares, so Mr Anderson's security was over 50% of the company's shares.

2. The claim in the proceedings arises out of this loan transaction. Mr Anderson is seeking a number of reliefs in order to protect his position. His son who is a solicitor has taken over the running of the case in view of his father's age and with the latter's consent. The Andersons senior and junior became concerned about the loan in early 2011 and sought repayment. When Mr Anderson Jr failed to get satisfactory results from his enquiries with the first defendant and his investigations of the company's activities revealed transactions that potentially affected his father's security, he instituted proceedings and applied for injunctive relief.

3. This court granted interim injunctions on the 3rd July 2013 restraining the first and second defendants from disposing of or reducing or transferring or otherwise dealing with their shares in the third defendant and from reducing their assets below the present value of the plaintiff's investment.

4. The matter then came back before the court on the interlocutory application by the plaintiff on 31 July, 2013 on which date the parties consented to continuing orders until the 16th September when the motion was heard. On that occasion, the first and second defendants submitted to injunctions in a modified form of those granted by Gilligan J as interim relief. The third defendant, however, did not consent and proceeded with an application to dismiss the plaintiffs claim as against that party.

5. The application by the third defendant is to dismiss the plaintiffs claim under the inherent jurisdiction of the court on the basis that there is no cause of action and/or there is no reasonable prospect or possibility on which it might succeed. Among the points relied on is the fact that the statement of claim does not seek any specific relief against the third defendant; neither is it suggested that this party has done anything wrong or has been guilty of any conduct amounting to a civil cause of action.

6. In his statement of claim, the plaintiff seeks a variety of reliefs which are based on the underlying claimed legal foundation that he has an equitable claim over the shares in Cloosh Valley Wind Farm Ltd. Thus, he applies for declarations and orders to give effect to the promised pledge that he says applies to the shares in the third defendant.

7. The applicant company submits that the plaintiff cannot succeed in its claim insofar as it relates to their shares or any interest in the third defendant. The grounds for the application may be summarised as follows:--

> a. The third defendant did not exist at that time when the loan and the agreement in respect of the shares pledge were made;
>
> b. The first defendant, the borrower, never had any legal or equitable interest in the shares of the third defendant;
>
> c. The agreement to pledge the shares was never executed and was and remained ineffective to impose any charge on them;
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> d. The articles of association of the third defendant do not permit a transaction whereby its shares would be pledged, without the consent of the company owning the class A shares and contractually entitled to purchase the bulk of the issued class B shares and such consent was not obtained.

8. It is not in dispute that the plaintiff lent Can$ 1.5 million to the first defendant company, which agreed to execute and deliver to him, inter alia, a share pledge agreement over 110 common shares in the capital of the company, Cloosh Valley Wind Farm Ltd. But what is not agreed is that that pledge applies to the shares of the third defendant, which is a company with the same name but which is claimed by the third defendant and SSE Renewables (Ireland) Ltd, the owner of its 33 'A' voting shares, to be an entirely different corporate entity. Two related questions are central to the third defendant's application to dismiss, namely

> a. what happened to the security the plaintiff got for his €1.5m?
>
> b. what happened to the shares of the original company?

The Plaintiff's Claim

9. The statement of claim describes a series of transactions involving changes in the structure, assets and identity of Cloosh Valley Wind Farm Ltd that took place without notice to the plaintiff and notwithstanding the fact that he had been granted a prior lien over 110 shares in the company as security for his loan.

10. The plaintiff pleads that the first named defendant was in a position to discharge his loan but in breach of contract did not do so.

11. The plaintiff demanded repayment of his loan but the first named defendant has failed, refused and neglected to discharge the monies owed and, further, failed at all material times to disclose any of the aforementioned transactions to the plaintiff. It is pleaded that on 19th April, 2013, Mr. Jason Bak stated in a telephone conversation with the plaintiffs solicitor that the first named defendant intended to complete the sale of the Cloosh Valley wind farm without repaying the plaintiff his loan.

12. In May 2013, the plaintiff registered a Notice and Affidvait as to Stock in this Court in respect of his interest in the shares of Cloosh Valley Wind Farm Ltd. On 3rd May, 2010, a charge was purportedly created over all of the assets of the second defendant, including its 187 shares in the third defendant, in favour of Pattern Renewable Holdings Canada ULC. This charge was created despite the fact that the first defendant's financial statements record the plaintiffs loan as being secured against that company's interest in Cloosh Valley Wind Farm.

13. The plaintiff claims that as of the gth July, 2013, the sum of Can$ 2,170,440.55 was due and owing by the first defendant.

14. The plaintiff pleads that the shareholding in the third defendant held by the second defendant is held subject to a constructive trust in his favour and that a constructive trust ought to be imposed against the second named defendant's shareholding in the third named defendant to hold the same subject to the repayment of the plaintiffs loan and contractual interest.

The Affidavit Evidence
15. In his affidavit filed on behalf of the first and second defendants, Jason Bak says that SSE Renewables (Ireland) Ltd owns shares in the third defendant Cloosh and that the loan to Mr. Kevin Anderson is not concerned with the Cloosh shares. It is important to note that Mr. Bak's references to Cloosh, that is the third defendant, are not references to the original company of that name - Cloosh Valley Wind Farm Ltd. The original company of that name is now called Finevera Renewables Galway Ltd.

16. At para. 15, Mr. Bak says the following:-

> "It did not come to the attention of Finevera that Kevin Anderson had not registered his security and when a subsequent loan agreement was agreed with General Electric (with the use of proceeds focused only on the BC wind projects). Consequently, General Electric ("GE") obtained a ranking security. When Pattern Energy recently assumed the GE loan, it also inherited GE's security position."

I do not know precisely what this means, but its import in general is clear in saying that because the plaintiff did not register his security, he suffered a disadvantage and the loss of priority when a subsequent loan was made and security given to the lender. But I do not at all understand how it could be that Finevera was unaware of Kevin Anderson's interest and his entitlement to security that Finevera had agreed since all these events were quite recent.

17. Mr. Bak says that the loan agreement does not contain an obligation that Cloosh "would end up with any assets whatsoever". He says that it is incorrect of David Anderson the deponent on behalf of the plaintiff to assert that Finevera intended to dishonour its agreement with Kevin Anderson. "This is entirely inaccurate". Mr. Bak says that the old company changed its name on the 13th October, 2010 and the third defendant changed its name to Cloosh on the 26th October, 2010 and both of the changes were promptly notified to the Companies Registration Office and that that was done as part of the transaction with SSE and on the basis of tax advice. He says that the transaction with SSE, if it is permitted to proceed, will enable Finevera to repay the plaintiff. It follows therefore, that Mr. Bak is anticipating that the closing of this sale will result in the repayment of the plaintiff of his money and presumably such interest as has accrued on it.

18. Having regard to this expectation if not promise by Mr. Bak, it is not obvious why there should be an objection to giving the plaintiff some security over the shares in the third defendant. The intention is that SSE Ireland Ltd will then proceed with the development of the wind farm project. Mr. Bak says that the second defendant, Finevera Renewables Ireland Ltd, registered a charge against it in favour of Pattern on the 3rd May, 2013, two days after David Anderson registered the Notice as to Stock but says that the second defendant was not aware of that notice until after the execution of the charge in favour of Pattern.

19. It appears from this affidavit that the company in respect of which the plaintiff Kevin Anderson was given the pledge or lien - Cloosh Valley Wind Farm Ltd- changed its name and its shares became the property of a separate and new company which changed its name to Cloosh Valley Wind Farm Ltd. We therefore have Cloosh (old) which was the subject of Mr. Anderson's protection and we have Cloosh (new). Mr. Bak does not describe just how this transmutation came about, how the 33 A and 187 B shares in the original company were transplanted from the donor company to their new location in Galway West Wind Farm Ltd which became Cloosh Valley Wind Farm Ltd. He does say that it happened because of tax advice but the precise mechanism of the transfer is not described. Mr. Bak says that there was no obligation in the loan agreement, whereby the borrower undertook that the shares would remain in the ownership of the original Cloosh company, a proposition that strikes me as being perhaps somewhat audacious but it is not my function to decide that at this stage. Having said that, he does appear to accept that Mr. Anderson is entitled to be paid out of the sale of the windfarm company.

20. The affidavit of Mr. Stephen Wheeler, a director of the third named defendant, was sworn on 12th July, 2013 and is the basis of the application made by the third named defendant to be released from the proceedings. It is Mr. Wheeler's contention that no cause of action has been made against the third named defendant and he also seeks the removal of the Notice as to Stock filed on 1st May, 2013.

21. Mr. Wheeler is vague as to how the shares in Cloosh old became the shares in Cloosh new. He does give details of the various inter-company transactions and changes but it is to be noted, I think, that these are not always consistent with other affidavits and there may accordingly be questions of fact that arise.

22. Mr. Wheeler says that the acquisition of Cloosh new was a joint venture between Coilte, SSE Renewables and Finavera Ireland under which SSE would acquire the 33 voting class A shares. As I understand, SSE would control Cloosh by reason of having the A voting shares and would provide most of the finance. SSE would be entitled by contract to purchase the majority of the non-voting B shares retained by Finavera when they reached financial close as defined with consideration for the 147 B shares up to €7.14 million. Coilte would have an option to subscribe for shares in Cloosh new so that it would be or become a partner with SSE and Finavera

Ireland and Finavera Ireland would retain a minority shareholding with no voting rights. Absent from this explanation is of course any reference to the plaintiffs interest in any shares.

23. At para. 12 of his affidavit he states:-

> "Shortly after its incorporation in June 2010, Cloosh Valley had an authorised share capital of €100,000 divided into 50,000 voting class A ordinary shares of €1.00 each and 49,998 non voting class B ordinary shares of €1.00 each and 2 redeemable shares of €1.00 each. The issued share capital of Cloosh Valley as of August 2010 was 33 class A ordinary shares ("the A shares") and 187 class B ordinary shares ("the B shares") which were fully paid up."

This can only be a reference to Cloosh old. Galway West Wind Farm Ltd had been incorporated but there had not been a change of name and there does not appear to have been any transfer of shares at this point.

24. Mr. Wheeler describes a share purchase agreement dated 24th August 2010, between SSE and Finavera Ireland, whereby Finavera sold SSE all of the A class shares in Cloosh Valley for €1.26 million. A redacted version of the agreement was available at the hearing. Under Clause 16 of the share purchase agreement, Finavera Ireland is restricted from transferring its shareholding in Cloosh new to any other party without first offering them to SSE. Clause 13 precludes Finavera Ireland from charging its shares or providing security without the consent of SSE or pursuant to Project Finance Agreements:

> "Prohibition on Charging the Shares
>
> Except pursuant to the Project Finance Agreements, no shareholder shall, except with the prior written consent of the other shareholder, create or permit to subsist any Encumbrance over or in any of the Shares held by it (otherwise than by a transfer of such Shares in accordance with the provisions of this Agreement) and any person in whose favour any such Encumbrance is created is permitted to subsist shall be subject to and bound by the same limitations and provisions as embodied in this Agreement".

25. Regarding the loan agreement between the plaintiff and Finavera Incorporated, Mr. Wheeler makes a number of observations:-

> (a) Finavera Incorporated is not and never has been the owner of any of the issued Shares in the third named defendant and therefore it was never within its authority to offer shares on its behalf.
>
> (b) At the time of the pledge being granted to the plaintiff in respect of the shares, the third named defendant company did not exist.
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> (c) The Cloosh company which existed then is now Finavera Renewables Galway Ltd.
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> (d) Therefore any charge over the shares in the third named defendant is invalid as it contravenes the Shareholder Agreement.
>
> (e) No pledge has ever been delivered to the third named defendant by the plaintiff, nor was any pledge ever executed on his behalf.

26. It is apparent from the affidavits of Mr. Bak and Mr. Wheeler that Finavera has entered into a share purchase agreement with SSE. However, there remains uncertainty. It does not appear the case that Cloosh old, with its 33 A shares and 187 B shares was taken over. Nor is it the evidence that those issued shares were sold by one company to another company.

27. Eimear Lyons, Counsel for SSE, swore an affidavit dated 19th July, 2013 where she followed much of the same line of argument as Mr. Wheeler, averring that Finavera Incorporated had no authority to offer any legal or beneficial interest in any shares in Cloosh new to the plaintiff. Ms. Lyons noted that in the 'Notice as to Stock and Affidvait as to Stock', the share description is stated as 'one hundred and ten (110) common shares in the capital of Cloosh Valley Wind Farm'. This, she stated, does not correspond with the issued shares in Cloosh new.

Chronology

28. As gleaned from the affidavit and exhibits, the wind farm project in Galway comprises a series of different companies whose names and identities have changed a number of times over the course of the last few years. It may be helpful at this point to set out a chronology of the principal changes.

> • 20th April, 2005: Finavera Renewables Ireland Ltd (Company No. 400923) incorporated.
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> • 15th January, 2010: Cloosh Valley Wind Farm Ltd (Company No. 479704) incorporated.
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> • 24th January, 2010: General Electric register charge over 200 ordinary shares in Finavera Renewables Ireland Ltd (Company No. 400923)
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> • 8th April, 2010: Plaintiff lent CND$1.5 million to Finavera Renewables Incorporated (Company No. 400923).
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> • 15th March, 2010: 1% BC wind projects. Finavera agrees to provide security in the form of a lien over 110 shares in Cloosh Valley Wind Farm Ltd (Company No. 479704)
>
> • 9th June, 2010: Galway West Wind Farm Ltd (Company No. 485334) incorporated.
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> • 24th August, 2010: Cloosh Valley Wind Farm Ltd (No. 479704) transferred all of its assets and interest in the Cloosh Valley Wind Farm to a company called Galway West Wind Farm Ltd (No. 485334). The only shareholder in this company is Finavera Renewables Ireland Ltd (No. 400923).
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> • 25th August, 2010: Confidential share purchase agreement between Finavera Renewables Ireland Ltd (No. 400923) and SSE Renewables Ireland Ltd. SSE purchased all 33 A voting shares for €1.26 million and is entitled to purchase 147 of the 187 B shares for a maximum sum of €7.14 million when 'financial close' occurs.
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> • 13th October, 2010: Cloosh Valley Wind Farm Ltd (No. 479704) changed its name to Finavera Renewables Galway Ltd.

- 26th October, 2010: Galway West Wind Farm Ltd (No. 485334) became Cloosh Valley Wind Farm Ltd.

- 29th April, 2013: Notice as to Stock to Cloosh Valley Wind Farm Ltd regarding 110 common shares.

Submissions

29. Mr Declan McGrath SC for the third defendant submitted that the jurisdiction to strike out a claim arose in two circumstances; by virtue of the court's inherent jurisdiction and following the rule on O.19, r. 28 of the RSC which provides:-

> "The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

30. Citing the decision of Costello J. in *Barry v. Buckley* [1981] IR 306, Mr. McGrath submitted that the court has an inherent jurisdiction to strike out proceedings where there is no prospect of success in the claim. The circumstances in *Rogers v. Michelin Tyre Plc* [2005] IEHC 294 were similar to this case insofar as the decision of Clarke J. striking out the proceedings was based on the construction and application of contractual documents.

31. He argued that the fact that the plaintiff entered into the loan agreement with Finavera Canada did not equate to the creation of a lien over shares Cloosh new. The charge which the plaintiff claims Finavera Canada agreed to grant over the shares in consideration for the loan has never been executed and, in the absence of execution, an agreement by Finavera Canada is not sufficient to create any security interest over those shares.

32. No charges can be created over the shares in Cloosh new without the consent of SSE and the articles of Cloosh new prohibit the transfer or disposition of any interest in a share. Mr. McGrath referred the court to the decision of Arden L.J. in *McKillen v. Misland (Cyprus) Investments Ltd & Others* [2013] ECWA Civ. 781 where it was held that because the share transfer in contention was contrary to the pre-exemption rights in the shareholders agreement, the transfer was invalid.

33. Mr Robert Barron SC for the plaintiff argued that Finavera agreed to repay the plaintiffs loan out of the proceeds of sale of the Cloosh Valley transaction and in doing so they created an equitable charge over the shares over Cloosh Valley Wind Farm. The third defendant cannot rely on s. 123 of the Companies Act 1963, which provides:-

> "No notice of any trust, express, implied or constructive, shall be entered on the register or be receivable by the registrar."

because actual notice or knowledge is involved and the third defendant had actual notice of the plaintiffs claims.

34. Counsel submitted that the third name defendant's reliance on the change to the articles of association is not sufficient for the plaintiffs claim to be struck out in accordance with the principles laid down in *Barry v. Buckley* [1981] IR 306. That case establishes that for O. 19, r 28 application to be invoked, the vexatiousness or frivolousness must appear from the pleadings only. Costello J. stated at 308:-

> "...the court can only make an order under this rule when pleading discloses no reasonable cause of action on its face."

Costello J. further emphasised that the jurisdiction of the court to strike out proceedings is one to be exercised sparingly and only in clear cases.

35. Mr. McGrath referred to the decisions in *Tett v. Phoenix Property and Investments Company Ltd* [1986] BCLC 149; in *Re Claygreen Ltd* [2005] EWHC 2032 (CH) and in *Re Champion Publications Ltd* (The High Court, Unreported, 4th June 1991). In the last case Blayney J. considered the validity of shares which were transferred contrary to the articles of a company and said:-

> "It seems to me that there is only one construction that could be put on the article. While article 11 is far from being clear, when one takes every provision of it into account, in particular clause (g), the construction that must be given to it is that where a member wishes to sell, the other members must be given an opportunity of purchasing. It seems to me that this is the only construction that can be given to clause (g) of article 11."

36. Mr Barron referred to *HKN Invest Oy v. Incotrade PVT Ltd.* [1993] 3 IR 152, where Costello J. held at p. 162:-

> "A constructive trust will arise when the circumstances render it inequitable for the legal owner of property to deny the title of another to it. It is a trust which comes into existence irrespective of the will of the parties and arises by operation of law. The principle is that where a person who holds property in circumstances which in equity and good conscience should be held or enjoyed by another, he will be compelled to hold the property in trust for another."

37. This proposition was applied by Barr J. in the subsequent decision in *Kelly v. Cahill* [2001] 1 IR 56, where the Court said at p. 62:-

> "In my opinion a "new model" constructive trust of that nature the purpose of which is to prevent unjust enrichment is an equitable concept which deserves recognition in Irish law."

38. The plaintiff argued that the decision of Gilligan J. in *In Varko Ltd* (In Liquidation) (Unreported, High Court, Gilligan J. 3rd February 2012), supports the plaintiffs claim that a constructive trust is an appropriate remedy. In that case Gilligan J. deals with the new model constructive trust, referring to the authority in *Eves v. Eves* [1975] 1 W.L.R. 1338 where Lord Denning held:-

> "It is a constructive trust imposed by law whenever justice and good conscience require it.....
>
> It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution."

39. The plaintiff relied on *Fitzpatrick v. DAF Sales* [1988] 1 I.R. 464 to support the claim that a promise to pay someone out of a particular fund creates an equitable charge. In that case O'Hanlon J. held that in order to give the second named defendant's claim priority over that of the first named defendant, the plaintiff had to prove a specific agreement with the second named defendant that

his liability to the second named defendant would be discharged out of a particular fund. Mr. Barron says that the same consideration extends to this case because the plaintiff had an agreement by virtue of the promissory note that he would be repaid with interest on the completion of the Cloosh Valley transaction.

Conclusions

40. The first question is whether the plaintiff's case should be dismissed as against the third defendant pursuant to Order 19 rule 28. That company has been joined to the proceedings because its shares are alleged to be the subject of the plaintiff's lien and any alienation would eviscerate or destroy that security. Although the plaintiff does not allege wrongdoing against the third defendant, he considered it prudent to join the company to the proceedings to protect his security. The claim against the third defendant is made in pursuance of the right to security for the loan.

41. The fact that a case may require some amendment of pleadings is not sufficient for dismissal *in limine*. If the plaintiff can demonstrate a rational basis that is sound in law, assuming the facts he asserts were to be established, the case cannot be dismissed.

42. The second question is whether the applicant has established that there is no reasonable prospect that the plaintiff could succeed if the case were to proceed to a hearing.

43. My conclusions are as follows.

> 1) The plaintiff may establish at the hearing that he is entitled to a lien over 110 of the 220 shares issued in Cloosh. In those circumstances, it would greatly diminish the plaintiff's security to treat the shares of Cloosh new as being free of any claim by him to a lien over them.
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> 2) It would deprive the plaintiff of security that was agreed with the first defendant without examining or evaluating the evidence as to the circumstances in which it is contended that he lost his security.
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> 3) The transactions involving the Cloosh companies and the other defendants and others as outlined in the affidavits are open to challenge by the plaintiff as to their contractual and legal validity in depriving him of the agreed security. That is not to say that they are *prima facie* unlawful but rather that, at this stage, it is legitimate for the plaintiff to question and examine their legality and their impact on his interest.
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> 4) The plaintiff, while disavowing any case of impropriety against SSE, has raised sufficient ground for exploring whether that company, the owner of the 33 A class shares in the third defendant and claimant to a contractual right to purchase the remainder, was, or ought to have been, on notice of his interest in 50% of the issued shares in Cloosh Valley Wind Farm Ltd.
>
> 5) It is at least arguable that the transactions that are alleged to have deprived the plaintiff of his agreed security are of such nature as to give rise in all the circumstances to a constructive trust in his favour over the shares in the third defendant.

44. The motion to dismiss will accordingly be dismissed and the plaintiff is entitled to interlocutory orders in respect of this defendant's shares. The question arises as to whether the 33 A and 187 B shares in Cloosh Valley Wind Farm Ltd, the third defendant, should be the subject of an injunction prohibiting their sale or whether an order should be confined to the sale proceeds of the shares. In the course of the proceedings, Mr. Barron SC expressed himself satisfied if only the purchase price of the shares were to be the subject of an injunction.

45. Mr. McGrath submitted that there could be commercial implications and serious disadvantage if an injunction were to be imposed. It seems to me that any such risks do not defeat the claim of the plaintiff to the protection he was granted over the shares and, in addition, the balance of justice demands that Mr. Anderson's protection be given priority over this potential risk.

46. I propose therefore to make an Order restraining the payment or other distribution or disposal of the proceeds of sale of shares in the third defendant until the hearing of the action otherwise than (a) on notice to the plaintiff and (b) with his consent. I will however give Counsel an opportunity of agreeing the form of the restraining order.