THE HIGH COURT

[2011 No. 1406 S.]

BETWEEN

JOHN BARRETT

PLAINTIFF

AND

MAURICE LEAHY

DEFENDANT

(No. 2)

JUDGMENT of Ms. Justice Baker delivered on the 23rd day of January, 2018

1. On 13th January, 2012 the plaintiff obtained an order from the Master of the High Court granting liberty to enter final judgment against the defendant in the sum of €450,000 together with interest pursuant to the Courts Act 1981. The amount of the judgment was amended on 25th January, 2012 to €455,000 and judgment was entered on foot of orders on 14th May, 2012.

2. No steps have been taken by Mr. Leahy to impugn the judgment which is final and unassailable.

3. On the 16th July, 2015 the defendant lodged in to court the amount of €426,602.41, the amount including interest then due "without admission of liability" by way of security for the balance of the judgment. That lodgement was made in response to a motion brought by the plaintiff for the attendance and examination of the defendant in aid of execution and for the appointment of a receiver by way of equitable execution over the proceeds of sale of land then sold, or about to be sold, by the defendant.

4. In a judgment delivered 25th November, 2015, *Barrett v. Leahy* [2015] IEHC 734, I refused to grant the relief then sought by Mr. Leahy that a judgment mortgage registered on his lands by the plaintiff as part of an execution process be discharged or removed from the Register on account of the lodgement in to court of the monies.

5. The present judgment is given in respect of a motion brought by the plaintiff for an order directing payment out to him of €246,000, part of the monies in court, to assist the plaintiff in the prosecution and defence of other proceedings brought by Mr. Leahy and his wife: plenary proceedings bearing record number 2014 No. 4092 P. and summary proceedings 2013 No. 3715 S. Those two sets of proceedings are likely to be heard during the current or following legal term, and counsel for both parties agree that the trial of the two actions is likely to last eight days.

6. The grounding affidavit of Mr. Barrett avers to the fact that he does not have sufficient means to fund the defence of the two proceedings issued against him. He exhibits a statement of means which bears this out. He avers that this fact is "causing me severe prejudice" and says that he believes that the proceedings commenced against him are vexatious, frivolous and unlikely to succeed. The plaintiff's income is a combination of small dividends, a small salary and pension income. He exhibits his current expenditure and outgoings, and shows ownership of a third share of what appears to be a residential property. No contrary evidence or argument is tendered to show that the plaintiff's assets or income is sufficient to fund the anticipated costs.

7. The plaintiff also exhibits an estimate from Messrs. Lowes, Legal Cost Accountants, of the projected costs of defending the plenary and summary proceedings, estimated at €257,439 and €112,483 respectively, totalling €369,922.

8. The judgment obtained by Mr. Barrett against Mr. Leahy will, at the commencement of the trial of Mr. Leahy's proceedings, be almost seven years old and apart from a relatively small amount received on foot of instalment orders, Mr. Barrett has not had the benefit of his judgment.

9. Mr. Leahy opposes the application. He avers that the limited means of Mr. Barrett now disclosed in his affidavit is a cause of "very serious concern" to him. He now has trepidation that should he succeed in the proceedings, as he anticipates, there will be insufficient funds to meet any judgment.

10. Mr. Leahy avers that the claims in his proceedings "far exceed" the monies lodged in court and argues that those monies in court should be "safeguarded and remain in court" to avoid loss to him in the event of an anticipated difficulty in the execution of any future judgment. Mr. Leahy denies any delay, although his affidavit does accept that some delay has occurred, occasioned and caused, he argues, by both parties who have "for one reason or another" not been in a position to apply for a hearing date. No argument is made that the case has been delayed owing to a lack of court resources, and Mr. Leahy's evidence is that "significant time" was taken up between the parties concerning the issue of discovery.

11. Mr. Leahy does not contest the evidence estimating the quantum of the costs of defending the proceedings should they proceed to full trial.

12. The possibility, even probability, that Mr Barrett may not have sufficient funds to meet a successful claim by Mr. Leahy can not influence my determination of the present application. It would appear from the course of the three sets of proceedings that both parties are somewhat concerned as to the ability of the other to meet a judgment. Further, there are no circumstances identified that would permit me to make an order giving Mr. Leahy security for a future judgment, and no circumstances that might justify Mareva type relief. Mr. Leahy is at best a contingent creditor not entitled to any security for a future judgment. His stated argument for the retention of the monies in court is the hope that they will be available to satisfy his claim in whole or in part.

Is the matter already decided?

13. Counsel for Mr. Leahy argues that the issue giving rise to the application is *res judicata* and that the judgment delivered by me determined that the monies lodged in court were to remain in court "to abide the outcome of the proceedings".

14. At para. 45 of my judgment I identified the purpose of the lodgement by Mr. Leahy of monies in court as follows:-

> "The purpose of the lodgement in court was for the defendant to avoid the cumbersome procedure of execution already commenced by the plaintiff. The defendant did not tender the amount of the judgment to the plaintiff, but rather offered

> to lodge the money in court on the basis that the monies in would in due course, and subject to an order of the court, be paid out to the plaintiff. It is not therefore correct to say that the monies in court are "available" to the plaintiff, although they may eventually become available to the plaintiff if an order of the court is made to that affect. The court is effectively holding the monies lodged by the plaintiff in a class of escrow pending further application or order."

15. I rejected the argument made by Mr. Leahy that the monies lodged in court "replace the security represented by the judgment mortgage", and considered that the monies in court were not immediately available to the plaintiff. I therefore refused the application to substitute the lodgement of money in to court for the registered judgment mortgage. I noted in particular that the monies were stated to be lodged in to court "without admission of liability", the phrase used in parenthesis to reflect uncertainty as to the real legal meaning or effect of the conditionality, having regard to the fact that judgment had been entered on consent and that no appeal had been brought.

16. I do not consider that the effect of my ruling on the 25th November, 2015 determines the question now before me. The question determined was whether the judgment mortgage ought to be vacated. The fact that the monies were lodged in court was the basis on which Mr. Leahy sought to vacate the judgment mortgage, a relief which I refused.

17. Mr. Leahy himself had chosen to lodge the money in court to avoid the then current process of execution, most especially to avoid the appointment of a receiver by way of equitable execution and/or cross-examination in aid of execution. I consider for this reason that the question raised in the present motion has not already been determined.

Relevant test

18. No authority directly on point has been opened by either counsel, but this is understandable as the factual circumstances are unusual. Reference was made to the decision of Costello J. in *Lehane v. Yesreb Holding Ltd.* [2017] IEHC 512, where she was asked to permit the partial release of the proceeds of sale of certain property in the title of the defendant held in escrow pending the determination of the claim of the Official Assignee in bankruptcy against the monies.

19. She accepted the general proposition found in three English authorities opened to her. First, *Halifax Plc v. Chandler* [2001] EWCA Civ. 1750 where Clarke LJ. stated that a freezing injunction would ordinarily permit a defendant to spend money on legal expenses in reliance on a judgment of Bingham MR in *Sundt Wrigley Co. Ltd v. Wrigley* (Unreported, 23rd June. 1993) as follows:-

> "since the money is the defendant's, subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence…."

20. Second, Costello J. relied upon a judgment of Park J. in *Furylong Ltd. v. Masterpiece Technology Ltd.* [2014] EWHC 3103, that a *Mareva* type order did not prohibit a respondent from spending a reasonable sum for legal advice or representation.

21. Third, she referred to the decision of the Court of Appeal for England and Wales in *Frédéric Merino v. FM Capital Partners Ltd.* [2016] EWCA Civ 1301, and summarised the principles at para. 15 of her judgment:

> "… the Court of Appeal emphasised that the position is that a defendant who has resources of his own which are not effected by a good arguable claim by the claimant that they are his (the claimant's) property should be required to use those unaffected resources to finance his legal defence and to meet his living expenses. The court held that the onus was on the defendant to persuade the court that he, the defendant, has no, or inadequate, assets of his own, unaffected by proprietary claims, so that he potentially has good grounds to argue to be allowed to have recourse to the proprietary assets the subject matter of the claim."

22. Costello J. accepted the general proposition that "ordinarily [a party] would therefore be entitled to access the funds to pay its reasonable legal expenses in defending the claim" (at para. 17) and considered that the potential prejudice to the plaintiff outweighed the prejudice to the defendant in not having sufficient access to his own funds to defend the action.

23. The authorities relied on by Costello J. related to the impact of a *Mareva* type order and whether a court could direct the payment out to a person subject to such order of reasonable anticipated legal expenses. Her analysis is useful in that it identifies the principles of equality of arms and the interests of justice and reflects the proposition that the effect of a freezing or *Mareva* order ought not unreasonably deprive a person to reasonable access to his or her funds.

24. I adopt the approach of Costello J. insofar as it suggests that the starting point of my consideration ought to be that Mr. Barrett should not be unreasonably prejudiced in his defence of the proceedings by reason of an unavailability of access to funds to meet the projected legal costs of defending the action. However, Costello J. gave her decision in a context where, pending determination of the court, *prima facie* the applicant held the beneficial interest in the monies in the escrow account from which payment out was sought.

25. In the present application the monies are held in court to the benefit of the present suit, in essence to the benefit of the judgment, and as security for Mr. Barrett who has a security interest in the monies lodged in court. The lodging of monies was intended to replace other processes of execution. Mr. Barrett has a claim to the monies held as security for him, albeit it could not accurately be said that he has an immediate entitlement to the release of the monies having regard to the existing order that the monies be lodged in court pending further order. The effect of the lodgement of monies was that an instalment order made by the District Court was vacated. Mr. Barrett has an entitlement to make an application in respect of the monies, but it could not be said he is unconditionally beneficially entitled to the monies and that they are held on trust for him.

26. I accept Mr. Barrett's evidence that he does not have sufficient funds to defend the proceedings brought against him. It seems to me having regard to the evidence of means that both of the parties are broadly speaking in the same financial position. Were I to refuse to provide Mr. Barrett with some of the funds necessary to defend the action, Mr. Leahy's financial position could be improved and Mr. Barrett's position prejudiced. This is because Mr. Leahy states frankly that the actions he and his wife have commenced are, in his view, likely to result in a judgment far in excess of the amount held in court, and he considers the monies held in court to be available to him by way of security for any future judgment.

27. Mr. Leahy is not entitled to security for a judgment not yet obtained. He has not made out in this application, no more than in the pervious application, the proofs required for a *Mareva* type injunction against Mr. Barrett. He appears to accept that the monies in court now belong to Mr. Barrett and wants them retained to meet a judgement he hopes to obtain against Mr. Barrett.

28. The person with the strongest argument in relation to the monies now in court is Mr. Barrett, albeit his interest in the monies is a security interest encumbered by a court order. The court order was not final and it is clear from my judgment that the monies were

lodged pending further order.

29. It does not seem to me that it matters who was responsible for the delay in bringing the Leahy proceedings on for trial or indeed whether either party was responsible. The fact is that the judgment of Mr. Barrett is now five years old and is unassailable. Mr. Leahy has no legal basis to seek that the monies which might satisfy that judgment be retained in court to the prejudice of Mr. Barrett if his ultimate aim in the retention of these monies is that they be available to satisfy a judgment he anticipants or hopes he will achieve, but which has not yet come to a conclusion.

30. The amount sought to be released is approximately 60% of the monies held in court and less than 70% of the anticipated costs of defending the proceedings. Adopting the approach of Costello J. in *Lehane v. Yesreb*, but noting the differences in the factual and legal contexts of the present application, I consider that the payment out to Mr. Barrett of €246,000, part of the monies lodged in court, is proportionate and reasonable and in the interest of justice, and I will so order.