Neutral Citation [2015] IEHC 665

THE HIGH COURT

[2015/6548P]

BETWEEN

CONOR BRENNAN

PLAINTIFF

AND

IRISH PRIDE BAKERIES (IN RECEIVERSHIP)

DEFENDANT

JUDGMENT of Mr. Justice Gilligan delivered on Thursday, the 22nd day of October, 2015

1. The plaintiff herein on this interlocutory application seeks the following reliefs:

- An injunction restraining the purported termination of the plaintiff's employment or removing him from the position of Sales and Business Development Manager.

- An injunction restraining the defendant from taking any steps for the purpose of effecting or implementing the purported termination of the plaintiff's employment by letter dated 18 August, 2015.

- An injunction restraining the defendant from treating or purporting to treat the plaintiff as otherwise than employed as Sales and Business Development Manager.

- An injunction restraining the defendant from terminating the employment of the plaintiff, save in conformity with his contractual entitlements.

- An injunction restraining the defendant from appointing any person to the position of Sales and Business Development Manager.

- An order directing the defendant to continue to discharge payment of the plaintiff's salary, emoluments and other benefits under his contract of employment.

- An injunction restraining the publication of any statement, whether verbal or written, internally or externally, in respect of the purported termination of the plaintiff's employment.

- Directions in relation to an expedited hearing and such matters pertaining to the exchange of pleadings and discovery as may be necessary.

- Such orders as this Honourable Court shall deem fit.

- Costs.

2. An interim order was obtained by the plaintiff from this Court (Hanna J.) on 24th August, 2015, whereby it was ordered that the defendant, its servants and/or agents be restrained until after the 27th August, 2015, or until further order in the meantime from:

1. Terminating the plaintiff's employment or removing him from the position of sales and business development manager pending further order of this Court.

2. Taking any further steps for the purpose of effecting or implementing the purported termination of the plaintiff's employment by letter dated 18th August, 2015 pending further order of this Court.

3. That the defendants do continue to discharge payment of the plaintiff's salary, emoluments, and other benefits under his contract of employment.

3. The defendant is one of the leading bakeries in Ireland and comprises two production facilities, together with a number of depots.

4. The plaintiff commenced employment with the defendant on 1st February, 2015, initially in the position of Sales and Business Development Director at a substantial salary in excess of €100,000.00 and subsequently assumed the position of Sales and Distribution Director in April, 2015. The terms of his employment with the defendant are contained in a contract of employment with his employers as dated the 1st February, 2015. At Clause 18 of the plaintiff's contract, entitled "notice of termination of employment," the following provision is made in respect of notice:

> *"Except in circumstances justifying summary termination or termination consequent on the application of formal disciplinary procedure, the employee will be entitled to receive three months written notice of the termination of his employment. Such termination of employment shall be a "no fault" termination. The company reserves the right to pay the employee's remuneration in lieu of notice or continue payment during the notice period, while relieving the employee of any and all of his duties and responsibilities during the notice period."*

5. It is not disputed that the plaintiff has been an exemplary employee of the defendant and there are no reasons to justify summary termination of his employment. The plaintiff makes the case that he is contractually entitled to a period of three months' notice of the termination of his employment and that the defendants in the present circumstances are bound by his contract.

6. On the 16th June, 2015, Kieran Wallace and Shane McCarthy of KPMG were appointed as receiver managers by reason of the purchase of the debt of the defendant as held by the defendant's bankers to Baker Holdings (Luxembourg) S.A.R.L. They have remained in place to date and have operated the defendant's business as a going concern.

7. The plaintiff was advised by the receivers following their appointment that the defendant company would continue to trade pending a purchase of the business.

8. The plaintiff makes the case that he met with Mr. Kieran Wallace, joint receiver of the defendant on the 6th August, 2015, and to his considerable surprise was informed of the termination of his employment by reason of redundancy which was to take effect on 21st August, 2015.

9. On the 7th August, 2015, Kieran Wallace and Shane McCarthy, in their capacity as joint receivers of the defendant, issued a press release advising of the sale of the majority of the defendant's assets and business to Pat the Baker and that two hundred and fifty jobs would be secured and that a consultation period would commence with the employees of one of the defendant's facilities which would cease as there had not been a bid for this particular business asset. The press release stated that the purchase was subject to a decision of the competition and consumer protection commission giving its approval.

10. The plaintiff makes the case that the purported termination of his employment will result in a denial of his rights and entitlements of a transferring employee when the sale has been effected pursuant to the application of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003.

11. It has been agreed by the defendants with the purchaser that the TUPE Regulations will apply to the transfer and that, separately, a redundancy process was ongoing in relation to the defendant's senior executive team and Mr. Wallace avers that these processes could logically only commence at the point when it became clear that those roles were at risk of redundancy i.e. the point at which the agreement was entered into with the purchaser and the likely redundancy of those roles becoming apparent as a matter of fact. Mr. Wallace sets out that part of his duties include the necessity to reduce staffing costs in respect of those employees who are not critical to the continued operation of that part of the defendant's business that has been acquired by the purchaser and that this includes the cost of employing the plaintiff.

12. Mr. Wallace refers to the fact that he and Mr. McCarthy identified that there was no present or ongoing need in the business for the plaintiff's role as sales and business development director and that, in view of the need to create cost savings in the business, they jointly considered that the ongoing monthly salary costs pertaining to the plaintiff's role were no longer economically viable within the business and that, further, in the course of the sale negotiations, the purchaser indicated that he would not have a further need for a stand alone management team or for certain management positions in the defendant's business post-completion and that this included the plaintiff's role as sales and business development director. Mr. Wallace avers that this made it clear to him that not only was there no present or future need for the plaintiff's role in the business pre-completion of the sale but there was also no future need for the role post-completion.

13. Mr. Wallace further sets out that in simple terms there is no requirement whatsoever for the plaintiff's function in light of what has occurred to the defendant, there is no work for him to do or work that he could reasonably be assigned, and that none of what has occurred is intended to cast any aspersion upon the plaintiff but, in truth, Mr. Wallace says this is one of the clearest cases of redundancy that one could ever come across.

14. It is clear that the decision to make the plaintiff redundant came about at the same time as the sale of the defendant's business was finalised to Pat the Baker and this Court is not clear as to whether Pat the Baker indicated at some stage that is was a condition of the sale that the plaintiff be made redundant or that it was clearly indicated to Mr. Wallace and Mr. McCarthy that there was no particular role for the plaintiff into the future or as to whether it was Mr. Wallace and Mr. McCarthy who decided that, pending the completion of the sale, they saw no role for the plaintiff.

15. In any event, the plaintiff is not questioning the validity of the circumstances leading into his being made redundant but is questioning the essential feature of his contract of employment that requires the defendant and, it follows, Mr. Wallace and Mr. McCarthy, to give him three months' notice of termination of his employment.

16. Unfortunately, the situation that arises is not simplistically the difference in the term of the notices given on redundancy by the defendants to the plaintiff but the fact that three months' notice in accordance with the plaintiff's contract will, on the balance of probabilities, give him the opportunity to avail of his rights pursuant to the application of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 and, in effect, this protection would afford the plaintiff the opportunity to be legally entitled to participate in the information and consultation process required of the defendant as the transferor seller and the transfer purchaser pursuant to the regulations. Further, the plaintiff would be entitled to continue his employment subject to any provision of the regulations of which the purchaser as the transferee may seek to rely.

17. The question which arises for determination on this interlocutory application is as to whether the plaintiff's contractual entitlements are to be set at nought, thereby enabling the defendants to terminate the plaintiff's employment by reason of redundancy on, effectively, two weeks notice.

18. A further complicating feature from the plaintiff's perspective is that, because he was only in employment with the defendant for a number of months, various statutory protections that are in place for employees and which may have entitled him to determinations and compensation are not available to him.

19. The plaintiff accepts that he is, in effect, seeking a mandatory injunction which would have the effect of continuing his employment.

20. The strong case test in employment injunctions has centred on the test enumerated by Fennelly J. in *Maha Lingham v. Health Service Executive* [2006] 17 ELR 137 where, on page 3-4, Fennelly J. states:

> *"In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. So it is not sufficient for him simply to show a prima facie case and in particular the Courts have been slow to grant interlocutory injunctions to enforce contracts of employment".*

21. More recently, this Court on a number of occasions has posed a question as to whether the *Campus Oil* principles should be refined particularly in relation to contracts of employment. Hogan J. in *Wallace v. Irish Aviation Authority* [2012] 23 ELR 177 stated as

follows:

> *"It is, however, also necessary to look at the matter from the standpoint of the plaintiff. If an injunction were to be refused by reason of the special factors which have just been mentioned, it would mean that she was denied the benefit of a key contractual protection just at the time when such protection was vitally necessary to protect her interests. Can it be the case that under such circumstances the Court must shut its eyes to the underlying merits of the claim and helplessly wash its hands of the claim for interlocutory relief simply because to do so would involve the grant of mandatory relief at a interlocutory stage or because this would involve the specific enforcement of a contract of employment?*
>
> *Here three separate – but in some respects, inter-locking – observations are called for. First, it cannot be the case that the Campus Oil principles are to be applied in some purely formalistic fashion, divorced from the underlying context. These principles were designed to ensure that the courts could best grapple with an application for interlocutory relief against a background of disputed facts and complex legal questions, the resolution of which would be determined in a more leisurely fashion at a later oral hearing. Quite independently of binding authority, these are principles which have been refined over the decades to ensure that the courts are best placed to achieve the fairest result at the interlocutory stage. Specifically, as Clarke J. pointed out in Allied Irish Banks Plc. v. Diamond [2011] IEHC 505; unreported, High Court, Clarke J., October 14, 2011, there are sound practical reasons for the fair question rule, for if the courts were generally required to go beyond this at interlocutory stage and strive for a detailed examination of the facts, they would be quickly overloaded with detailed arguments on the merits at this stage. This would in many cases convert the interlocutory hearing into the virtual equivalent of a form of a full hearing, thus defeating the very object of the exercise. But this does not mean that the Campus Oil principles must be unbendingly applied, without refinement, to a case such as the present one where the point at issue is a net one of construction, not calling for the elaborate argument, still less for oral evidence or the lengthy cross-examination of witnesses of the kind envisaged by Lord Diplock in American Cyanamid or by Griffin J. in Campus Oil.*
>
> *Second, it must be recalled that the modern principles governing the grant of interlocutory injunctions were forged in the crucible of the modernisation of the Court of Chancery in 1850s and 1860s in the lead-up to the enactment of the Supreme Courts of Judicature Acts of 1873 for England and 1877 for Ireland. As Clarke J. noted in Diamond, the underlying object of these principles was to ensure that the court could, to the greatest degree possible, avoid doing an injustice in the absence of a full hearing. These principles were, however, designed to be flexible and to be capable of adaption to the specific circumstances of the cases at hand.*
>
> *Third, the Supreme Court's decision in Attorney General v. Lee [2000] 4 I.R. 298 demonstrates that the Campus Oil principles are not to be applied rigidly or in some formalistic way in all possible types of cases, irrespective of the circumstances. Here the High Court granted the plaintiff an interlocutory injunction compelling the defendant to attend at an inquest in circumstances where she had contumeliously disregarded previous witnesses summons. The Supreme Court allowed the appeal, ruling that the fact that the grant of an interlocutory injunction would finally dispose of the case was a hugely material consideration. In those circumstances, the court considered that the plaintiff should establish his likelihood of success to a high standard and that it would have been shown that the defendant's presence was essential to the satisfactory conclusion of the inquest."*

22. This Court (Kelly J.) in *Shelbourne Hotel Holdings Ltd. v. Torriam Hotel Operating Co. Ltd*. [2010] 2 I.R. 52 at page 67, having reviewed a number of both English and Irish authorities, states at paragraph 85:

> *"[85] To return to Ireland, there seems to be an inconsistency of approach on the standard that must be met in order to obtain an interlocutory mandatory injunction. On one view it is the demonstration of a fair case or serious issue for trial, on the other, a higher standard of proof must be achieved that has variously been described as a strong case likely to succeed at the hearing of the action or a strong and clear case.*
>
> *[86] Faced with these conflicting approaches and pending a final determination of the issue by the Supreme Court, I am much attracted by the approach of Hoffmann J. in Films Rover Ltd. v. Cannon Film Sales Ltd. [1987] 1 W.L.R. 670 where he took the view that the fundamental principle on interlocutory applications for both prohibitory and mandatory injunctions is that the court should adopt whatever course would carry the lower risk of injustice if it turns out to have been the "wrong" decision.*
>
> *[87] Whatever standard applies it is clear that the grant of mandatory interlocutory relief is exceptional. In many if not all cases, the mandatory nature of the relief will also be a factor to be taken into consideration when the balance of convenience falls to be considered."*

23. This Court (Laffoy J.) in *Philip Burke v Independent Colleges Ltd. trading as Independent Colleges* [2010] IEHC 412, considered a situation were an employee of the defendant for some three years was seeking relief in the form of interlocutory injunctions restraining the defendant, pending the trial of the action, from terminating the plaintiff's employment by way of redundancy or otherwise, and/or carrying out any steps for the purpose of effecting and/or implementing the purported termination of the plaintiff's employment as communicated by letter from Independent Newspapers (Ireland) Ltd. or otherwise. The plaintiff's case was that the purported termination was unlawful, invalid or void and was procured in breach of fair procedures. The plaintiff had a contract of employment with his employer, the relevant clause providing that the plaintiff's employment might be terminated during its term by either party giving to the other sixteen weeks notice in writing.

24. The plaintiff's position of employment was terminated by his position as Chief Operating Officer being made redundant from the 25th October, 2010, and to that effect he was given two weeks notice.

25. The legal basis of the plaintiff's claim to entitlement to relief and the defendant's answer to it was somewhat different to the precise circumstances that arise in the present case but, in effect, there were two relevant basis for the termination; the first being that the plaintiff's employment had not been terminated by his employer in the manner stipulated in the relevant Articles of Association, and the second being that the decision communicated in the relevant letter as regards length of notice did not comply with the requirements of clause 16 of the plaintiff's contract of employment relating to a notice period, and on that ground alone, was not effective to terminate the plaintiff's employment.

26. Laffoy J. held that there was, in fact, a lack of authority to terminate the plaintiff's employment on the part of the sender of the relevant letter but went on to decide that if the sender of the letter did have authority to terminate the plaintiff's employment with

the defendant by redundancy and properly invoked the relevant statutory provisions to make the plaintiff redundant, in her view, the contention of the defendant that the plaintiff could not challenge the redundancy in the proceedings was correct having regard to the decision of the Court in *Nolan v. EMO Oil Services* [2009] IEHC 15. However, Laffoy J. went on to state if the plaintiff was constrained to argue that there was no basis or that he was improperly selected for redundancy for the reasons set out in the *Nolan* case she considered that the argument would not form the basis of a remedy at common law or in equity and that he would be constrained to pursue a remedy in accordance with the statutory code. However, given that he could rely upon the argument that the letter of the 11th October, 2010, was not effective to terminate his employment either on a contractual basis or on the basis of statutory redundancy he was not so constrained as regards pursuing relief outside the statutory code.

27. Laffoy J. went on to state at paragraph 7.6 of the judgment that as regards the specific relief sought by the plaintiff that:

> *"(a) There is no basis on which the Court could restrain the defendant from terminating the plaintiff's employment in accordance with clause 16.1 of his contract of employment or by way of redundancy in accordance with the statutory code if it does so properly."*

28. Laffoy J. took the view that the plaintiff had made out a strong case that was likely to succeed in establishing the ineffectiveness of the notice communicated in the letter of 11th October, 2010, to terminate his employment and she considered it appropriate to grant an order in the terms as sought. But she accepted that if the defendant moved in accordance with the plaintiff's contract of employment the defendant must be given liberty to apply to the Court to discharge the order in the event that it satisfied the Court that it had properly terminated the plaintiff's employment.

29. For the purpose of this application for interlocutory relief the situation that arises brings into play the position of all employees who have contracts of employment but who have less than two years service prior to being made redundant, and in particular, the aspect of the position of receivers, as in the present circumstances, taking over the effective running of a business for the purpose of a sale, as in this case on behalf of a Luxembourg venture capitalist who has bought the loan, and there is also an issue as raised in both of the judgments of Kelly J. and Hogan J. as referred to herein as to the precise appropriate test to be applied and I find myself in agreement with the views of Kelly J. particularly in the circumstances of this case.

30. The Court has to give consideration to whichever course would carry the lower risk of injustice if it turns out to have been a wrong decision having regard to the consequences of the position in which the plaintiff finds himself in with no remedy pursuant to statute and yet holding a valid contract of employment which provides for three months' written notice of the termination of his employment.

31. The decision of the Supreme Court in *Sheehy v. Ryan and Moriarty* [2008] 4 I.R. 258 is of some relevance in that this Court (Carroll J.) held that in the absence of a special condition in her contract of employment entitling a person to a job for life meant until she was sixty-five and the employee could be dismissed on reasonable notice and on appeal the Supreme Court held, *inter alia*, that a general appointment could be terminated on reasonable notice in the absence of clear terms to the contrary which were unambiguous and unequivocal.

32. This Court (Laffoy J.) in *Nolan v. EMO Oil Services Ltd* [2009] IEHC 15, considered a situation where an employee was seeking an interlocutory injunction restraining the defendant from giving effect to his purported dismissal by reason of redundancy from the position of credit manager. He held a contract of employment, clause 7 of which provided for the appropriate period of notice which was required to be given by the defendant to the plaintiff to terminate his employment, and the particular period in the case of service between five and ten years was a period of four weeks which also coincided with the requirement of the minimum notice in terms of the Employment Act 1973 and it was common case that the plaintiff's employment was terminable by four weeks notice in accordance with the contract. In *Nolan* the plaintiff was contesting as to whether or not there was a genuine *bona fide* redundancy. The central issue in Nolan, as noted by Laffoy J, was that, although not articulated precisely by counsel for the plaintiff, the plaintiff's case was that it was an implied term of his contract of employment that notwithstanding the express right to terminate his contract on notice the plaintiff is entitled to litigate the fairness or otherwise of the termination of his contract on the grounds of redundancy by reference to the statutory code in plenary proceedings in the court. Laffoy J specifically refers to the fact that, in essence, what the plaintiff was trying to achieve by the proceedings was to get his job back but he had been given the required notice under his contract of employment and his contract of employment was lawfully terminated. Laffoy J. went on to say that if, as the plaintiff contended, his dismissal was unfair then the remedy available to him was the remedy provided by statute and as a matter of fact Laffoy J. took the view that that was the only remedy he could pursue because in her view he had not acquired a cause of action for breach of contract or otherwise prior to his dismissal and in the circumstances there was no remedy that he could pursue in this Court.

33. By contrast with the situation in *Nolan*, the plaintiff in these proceedings holds a valid contract of employment which is absolutely clear to the effect that he has a three month notice clause for any termination of his employment, save for particular circumstances which do not apply.

34. It is contended on the defendant's behalf that the receivers have been appointed as joint receivers and managers because the defendant is insolvent and they must act having regard to the duties pursuant to the deed of appointment and to their obligations under the Companies Act 2014. It is further contended that any resources that are being applied to continue the operation of the defendant's business is limited to those functions that are necessary to ensure the continued operation of that part of the business that has been purchased.

35. It is further contended on the defendant's behalf that, in the circumstances that arise, the plaintiff has no entitlement to remain in the defendant's employment beyond the minimum statutory notice period which, in this instance, is one week, as the employee has been in continuous service for less than two years. It is submitted on the defendant's behalf that it is not permissible for the receivers to elevate the plaintiff's contractual entitlements beyond those of all other unsecured creditors of the defendant by reason of an order granted by this Court. It is contended that sections 440 and 621 of the Companies Act 2014 do not allow for the payment of compensation to an employee where the notice period specified in his contract of employment has not been given and that, accordingly, the plaintiff does not rank ahead of other unsecure creditors and the receivers are not permitted to elevate his claim ahead of the claim of the other unsecured creditors by continuing to employ him contrary to the requirements of the defendant's business.

36. It is submitted that the business is insolvent and there is no work for the plaintiff and if the plaintiff takes the view that it is not a genuine redundancy any claim can only be pursued on a claim under the Unfair Dismissal Acts 1977 to 2008.

37. Mr. Collins, on the defendant's behalf, submits that the plaintiff has to show a strong case that the termination was invalid, and

he has not met that test. The plaintiff's argument that once there is a notice period in the contract you cannot invoke a redundancy ground is not correct in law and is not consistent with the judgment of Laffoy J. in *Burke v. Independent Colleges.* Mr. Collins submits that if he is correct in this point, then that is the end of this injunction application. The plaintiff must meet the strong case test.

38. In relation to the separate question of whether the Court should direct the defendant to pay the plaintiff on top of restraining his dismissal, Mr. Collins submits that there is no ground to make this second order even if the Court finds against the defendant on the first ground. If the Court grants the order restraining the dismissal of the plaintiff then the plaintiff has a claim for three months' salary and he simply joins the queue of the other unsecured creditors, some of them employees, some of them banks, etc. Mr. Collins refers to the case of *In the matter of Irish ISPAT Limited (In Voluntary Liquidation)*, Unreported, 29th July, 2004, in this respect and in particular paragraph 126 of the judgment wherein the Court (Carroll J.) stated:

> *"126 An interpretation of s. 281 arose in Burns v Hearne [1989] ILRM 155 concerning liability to tax on money placed by the liquidator on deposit at interest. It was held by the Supreme Court (Griffin J.) that the word "charge" is sufficiently wide to encompass any imposition such as tax or whatever constitutes a burden of duty on the land or property and income tax and corporation tax are clearly "charges".*
>
> *The "charges" contemplated in this case are not charges property incurred in the winding up. They are neither charges as defined by the Supreme Court or incurred in the winding up such as costs of recovery, preservation and realisation of assets. In my view the Court could not make an order directing the costs of mitigation or remedial work to be made under s.281.*
>
> *Issue 3*
>
> *127 Among the debts of the company are large shareholder loans owing to its parent company. It was suggested that these should be considered differently from other debts and presumably in some way be made amendable to mitigating or remedying pollution.*
>
> *128 Under s. 283 all debts which are admissible to proof against the company are set out. Under s. 275 (subject to preferential claims) the property of a company on its winding up should be applied in satisfaction of its liabilities pari passu.*
>
> *129 I know of no principle of law which would permit some debts which have been proved in the winding up to be excluded from benefiting from the pari passu rule and be diverted to another purpose. Nor has any basis been suggested."*

39. Mr. Collins contends that an employee's claim cannot thus be elevated above other creditors, merely by dint of coming to Court and seeking an injunction.

40. Mr. Collins submits that it is a valid termination and no strong case has been made to the contrary. If he is wrong on this, then there is no warrant for the second relief to be granted.

41. In essence, it is contended on the defendant's behalf that while it may be unfortunate that the plaintiff has no rights pursuant to statutory redress that is what the legislature intended and, accordingly, the plaintiff cannot succeed in his common law action where the allegation is that he has been unfairly selected for redundancy and/or that no genuine redundancy exists in the first place, and against this background he cannot be taken to show a strong case or even an arguable case that he is likely to succeed at the hearing of the action.

42. Ms. Bolger, on the plaintiff's behalf, submits that it would be a radical departure from existing jurisprudence if the Court was to grant an injunction restraining termination with the effect that the plaintiff ostensibly remains an employee but is not being paid a salary. To allow him to stay on as an employee but without directing the defendant to pay him a salary would not represent the correct balance to be struck between the interests of the employee, and his entitlements to remuneration, as versus the interests of a receiver, where we are dealing with one employee in a situation where there are hundreds of other employees still working and still being paid a salary.

43. Ms. Bolger accepts that the statutory obligations of the receiver include an obligation to secure the best price possible for the sale of the company. However, she contends that there is no statutory power allowing the receiver to override an employee's contractual and legal entitlements in order to secure the best possible price. If the termination falls away, then all of Mr. Brennan's contractual rights must subsist, the most important of these being his right to remuneration.

44. Ms. Bolger submits that the *Irish ISPAT* case, which Mr. Collins refers to, involved a liquidator, not a receiver. In her judgment, Carroll J. specifically recognised the entitlement on the part of the liquidator to disclaim the license, it being a statutory power the liquidator can avail of with the leave of the Court. But the liquidator is court-appointed and can only disclaim property with the leave of the Court. The receiver, as in the present circumstances, is not appointed by the Court, but by the debenture holder, and as such the facts of the *ISPAT* case are fundamentally different.

45. The plaintiff is not making out a case before this Court that he has been unfairly selected for redundancy or that no genuine redundancy exists. The real issue, as previously referred to herein, is as to whether or not a person such as the plaintiff in a senior position earning a very substantial salary who has been employed for less than any relevant period pursuant to the relevant statutes entitling him to redress is to have his contractual entitlements set at nought particularly, as in the circumstances of this case, where the overriding of his common law contractual entitlement gives rise to the loss of what appears to be the only potential statutory provisions which may entitle him to continued employment with Pat the Baker and at least the possibility of an information and consultation process with the defendant and the purchaser of the business in accordance with the plaintiff's statutory entitlements pursuant to the transfer of undertaking regulations.

46. This Court does not, for the purpose of this application, take the view that the plaintiff is in some way attempting to rank ahead of other unsecured creditors, nor is the receiver being asked to elevate the plaintiff's claim ahead of the claims of other unsecured creditors.

47. The issue before the Court is the entitlement of the plaintiff to rely on his contractual obligations against the background where the defendants are perfectly entitled to terminate the plaintiff's employment on the basis of giving him three months' notice in accordance with his contractual entitlements. Thus the position arises as to whether or not the plaintiff is entitled to the longest

period of notice. Meenan on *Employment Law*, (Roundhall, 2014), at page 1026, paragraph 21.54, takes the view that *"an employee is entitled to the benefit of the longest period of notice – that is statutory notice or contractual notice."*

48. Mr. Brennan is not challenging the validity of his redundancy on this application; he is merely suing for breach of his contractual terms. I take the view that the present facts are distinguishable from both the *Nolan* and *Burke* decisions as opened to the Court. In *Nolan* the plaintiff had been given the requisite notice and was merely challenging his redundancy, a challenge which could not be litigated on that application, whereas in *Burke* the central issue was as to whether the sender of the letter had the proper authority to issue the redundancy, which the Court found it did not. The submissions on the defendant's behalf relating to unsecured creditors and preferential treatment is, in my view, a secondary issue to the plaintiff's claim for breach of his contractual terms.

49. Having regard to the plaintiff's contractual entitlements, I take the view that he makes out a strong case for the interlocutory relief as sought and I am adopting the course of action which carries the lower risk of injustice if for any reason it turns out to be the wrong decision, and I do so on the basis of accepting a higher level of likelihood as regards the strength of the plaintiff's case.

50. Both parties make contrary submissions in respect of the adequacy damages.

51. I bear in mind in this context the views as expressed by Laffoy J. in *Giblin v. Irish Life & Permanent Plc.* [2010] 21 ELR 173 wherein she states:

> *"As with all other applications for interlocutory injunctions in deciding to grant an injunction in an employment context the court must be satisfied that damages would not be an adequate remedy for the plaintiff and that the balance of convenience favours the grant of an injunction. As a general proposition in the context of employment injunctions the jurisprudence of the court has developed over the last quarter century so that it is generally considered that the prospect of an award of damages following the trial of the action is not an adequate remedy for a successful plaintiff who has been deprived of his salary pending the trial of the action. In relation to where the balance of convenience lies because of the nature of the employers/employee relationship that issue must be determined having regard to the precise form of relief sought by the plaintiff and will bear in the type of relief the court is prepared to grant."*

52. Further, in *Burke v. Independent Colleges*, as already referred to herein, this Court (Laffoy J.) had regard to the financial implications in respect of the termination of the plaintiff's employment by reason of a purported redundancy. In the particular circumstances of this case the Court is on notice that the loss of the plaintiff's position will have particularly severe consequences for him because of his personal domestic circumstances and the commitments that he has to meet. The Court also has to have regard to the fact that on the defendant's own admission the defendant is insolvent. In all the circumstances of this case I am satisfied that damages are not an adequate remedy.

53. As regards the balance of convenience, I favour the position of the plaintiff. No wrongdoing is alleged against him and it is reasonably apparent that the relationship of trust and confidence between the parties remains intact and the defendant does not criticise in any way the plaintiff's ability to carry out his designated duties and that is a factor that ought to weigh heavily in favour of granting the relief sought. It also appears that the defendant is not alleging that it will suffer any irreparable loss or damage or harm or that its arrangement with Irish Pride will in some way be affected if the defendant's notice of termination of the plaintiff's employment is rendered ineffective.

54. For the reasons set out herein, I come to the conclusion that the plaintiff is entitled to interlocutory relief pending the determination of these proceedings by way of an injunction restraining the purported termination of the plaintiff's employment and removing him from the position of sales and business development manager with the defendant company.

55. I am satisfied that it follows that it is always open to the defendant to give the plaintiff three months' notice of termination of his employment. I accept Ms. Bolger's contention that to bring about a situation where the plaintiff's purported termination is to be restrained pending a full hearing, but that he is not to be paid, would be a radical departure from existing jurisprudence and would not represent the correct balance to be struck between the interest of the parties. Accordingly, I direct that the plaintiff be paid his salary in accordance with his contractual entitlements.