Neutral Citation Number: [2014] IEHC 117

THE HIGH COURT

[2008 No. 379 S]

BETWEEN

MICHAEL BROWNE

PLAINTIFF

AND

IARNRÓD ÉIREANN – IRISH RAIL (No.2)

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 5th day of March, 2014

1. In my first judgment in this matter, *Browne v. Iarnród Éireann* [2013] IEHC 620, I held that the defendant, Iarnród Éireann, was guilty of a breach of contract inasmuch as it had wrongfully refused to honour an early retirement package which it had offered to the plaintiff, Mr. Browne, a long standing employee of the company, in September, 2006 and which he had then accepted. In that judgment I pointed out that the plaintiff (who was then aged 62) found himself compelled by economic circumstances to return to work. He continued in that position until September, 2009 when he retired having reached the compulsory retirement age.

2. Had Mr. Browne retired in September, 2006 as part of the early retirement package he would have received a voluntary severance offer of €148,157, together with a monthly annuity of €2,174 per month. The plaintiff now claims that latter sum plus the voluntary severance payment for a period of three years up to retirement (this being €78,249), together with interest as a contract debt.

3. It is important to stress that the plaintiff did well financially during the final three years of employment, as he earned just over €300,000 in total over these three years. His capital sum was increased by €10,000 and his annual annuity was increased by a figure of €2,800

4. The fundamental question now is whether the plaintiff should be permitted to recover the contract debt to which he says he is entitled as the full measure of his compensation. The defendants object on the basis that this would amount to a form of double recovery, given that the plaintiff did in fact work for a further three years and his retirement package was, in fact, enhanced by reason of the fact that he worked these extra years. The issue thus presented is a difficult one in terms of the assessment of damages for breach of contract.

5. It is true that the literature is in entire agreement that debt is to be treated differently from the question of damages for breach of contract. Thus, for example, the editors of *Chitty on Contracts* (29th ed.), Vol. 1 at para. 26-009 summarise the distinction thus:

> "There is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract. A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition; damages may be claimed from a party who has broken his contractual obligation in some way other than failure to pay such a debt."

6. While the distinction thus drawn between a debt on the one hand and an action for damages for breach of contract on the other is well established - this is, after all, at the heart of the distinction between liquidated and unliquidated claims – yet it would not seem right that the plaintiff should nonetheless be entitled to any element of windfall damages, even if (as I have already found) Mr. Browne was the innocent victim of an unwitting breach of contract on the part of Iarnród Éireann. This might be so if the plaintiff could claim the benefit of a significant voluntary severance package which was designed to compensate him in respect of his early retirement even though he did, in fact, work until the compulsory retirement age.

7. Counsel for the plaintiff, Mr. Conlon S.C., relied heavily on the leading decision of the House of Lords in *White and Carter (Councils) Ltd. v. McGregor* [1962] A.C. 413. In that case the defendant's representative had signed a contract on behalf of a garage proprietor whereby he had agreed to have his services advertised on plates which were mounted on litter bins in then local area. On the same day the defendant himself wrote to the plaintiffs, who were advertising agents, repudiating the contract on the ground that his agent had misunderstood his wishes. The plaintiffs nonetheless ignored the repudiation and proceeded to advertise the defendant's services. The defendant had, however, refused to have anything to do with this advertising project and refused to pay the plaintiff for the sums otherwise required under the contract.

8. The House of Lords held by a majority that the plaintiffs were entitled to the sum due under the contract. Even though the majority judgment was given by Lord Reid – an acknowledged master of the common law in general and of private law in particular – I confess that I nonetheless find myself unpersuaded by its reasoning. Even if the reasoning may be correct as a matter of strict logic, it nonetheless leads to results which are distinctly unpalatable and, in truth, unacceptable. As Lord Keith observed in his dissenting judgment ([1962] A.C. 413, 442):

> "If it is right, it would seem that a man who has contracted to go to Hong Kong at his own expense and make a report in return for remuneration of £10,000, and who, before the date fixed for the start of the journey and perhaps before he has incurred any expense, is informed by the other contracting party that he has cancelled or repudiates the contract, is entitled to set off for Hong Kong and produce his report in order to claim in debt the stipulated sum. Such a result is not, in my opinion, in accordance with principle or authority, and cuts across the rule that where one party is in breach of contract the other must take steps to minimise the loss sustained by the breach."

9. These criticisms of the majority judgment seem unanswerable. For my part, I cannot think that an action for debt is so sacrosanct that the ordinary rules as to mitigation do not apply to a breach of an obligation of the kind at issue in the present case just as much

as they do in the case of an action for damages for breach of contract. Besides, if *White and Carter* were to be adopted without, at least, significant qualifications, the reasoning contained in the majority judgments might well bring about the over compensation of (the admittedly innocent) plaintiff, even if this result was prompted by an understandable desire to see that the party in breach did not profit from its own wrong.

10. As, moreover, the editors of Cheshire, Fifoot and Furmston's *Law of Contract* (16th ed.) have observed (at 785), it might just as readily be said that even if (as they suggest) the plaintiffs in *White and Carter* were under no duty to mitigate their loss, nevertheless:

> "[The plaintiffs in that case] embarked upon a course of conduct which cost money, served no useful purpose and was, as they knew, unwanted by the respondent. They had chosen, in other words, to inflate their loss; and, while under no duty to mitigate, they were surely bound not to aggravate the damage….Their expense was self-imposed and was not caused by the breach of contract."

11. There were, in any event, singular features of *White and Carter* which I will touch on in a moment which limit the scope of its general application. Yet it is first necessary to recall the general principles regarding wrongful repudiation, so succinctly set out by Lord Reid in his speech ([1961] A.C. 413, 427):

> "If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract, whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect."

12. In *White and Carter* it was striking that the plaintiff company was in the fortunate position that it could perform the contract without any assistance from the defendant whatever. In his speech for the majority Lord Reid acknowledged this unusual feature of the litigation, adding that ([1961] A.C. 413, 426):

> "In most cases by refusing co-operation the party in breach can compel the innocent party to restrict his claim to damages."

13. So it is in the present case, because Mr. Browne's capacity to perform his side of the contractual bargain (*i.e.,* to take early retirement) was entirely dependent on the willingness of the company to accept this state of affairs. Yet the company was not so willing, even though by so refusing they were (as I found in the first judgment) wrongfully repudiating the contractual offer which Mr. Browne had already accepted.

14. It was at that point that Mr. Browne had an option, namely, to accept the repudiation and to sue for damages for breach of contract or, alternatively, to refuse to accept it and, if necessary, to sue to enforce the (subsisting) contract. As applied to the facts of this case it meant that he could accept the repudiation and return to work, while later suing for damages. Or, alternatively, he could refuse to return to work and insist that the early retirement contract was still in full force and effect. This would not have been an easy choice to make. Specifically, as I noted in the first judgment, it would probably have been financially unrealistic for the plaintiff to elect to ignore the wrongful repudiation of the early retirement contract by Iarnród Éireann. This would have left him bereft of any income while he sued to enforce the September, 2006 agreement.

15. In these circumstances, it can scarcely be a surprise that Mr. Browne elected to carry on working despite his most profound misgivings. This may thus be regarded as another example of where, in the words of Lord Reid in *White and Carter*, by refusing co-operation (i.e., namely to pay out on the early retirement agreement) the party in breach "can compel the innocent party to restrict his claim to damages." This is effectively what happened here since, for all the practical reasons I have just mentioned, Mr. Browne must be regarded as having accepted the repudiation by then returning to work and, indeed, continuing to work for another three years.

16. It is by reason of those facts that Mr. Browne forfeited his right to sue in debt for the liquidated sum promised by the early retirement package. Having being compelled by force of circumstances to accept the repudiation, his remedy now is confined to damages for breach of contract. What, then, was his loss?

17. Mr. Browne did not suffer any direct financial loss as a result of working the three extra years. Indeed, his lump sum and final retirement pension were all enhanced by virtue of the fact that he did, indeed, work a further three years. His loss was, therefore, a different loss, namely, being deprived of his right to take early retirement after long years as an exemplary employee. The defendant's breach of contract effectively forced him to work for a further three years instead of being entitled to take retirement at an age in life (62 years of age) when he was best placed fully to enjoy that retirement.

18. Just as the law endeavours to compensate for the disappointment associated with an unsatisfactory holiday (*Jarvis v. Swan Tours Ltd.* [1973] 2 Q.B. 233) or the inconvenience suffered by the homeowner resulting from the defective construction of a residential dwelling (see, *e.g., Johnson v. Longleat Properties Ltd.* [1976-77] I.L.R.M. 93, *Quinn v. Quality Homes Ltd.* [1976-77] I.L.R.M. 314, *Leahy v. Rawson* [2004] 3 I.R. 1 and *Mitchell v. Mulvey Developments Ltd.* [2014] IEHC 37), the same can certainly be said by analogy in respect of the disappointment which Mr. Browne suffered in September 2006 when he was compelled to return to work.

19. As McMahon J. put it in *Johnson* ([1976-77] I.L.R.M. 93, 105):

> "It appears to me that in principle damages may be awarded for inconvenience or loss of enjoyment when these are within the presumed contemplation of the parties as likely to result from the breach of contract. That will usually be the case in contracts to provide entertainment or enjoyment, but there is no reason why it should not also be the case in other types of contracts where the parties can foresee that enjoyment or convenience is likely to be an important benefit to be obtained from the due performance of that contract."

20. The type of loss and inconvenience suffered by the plaintiff is undoubtedly intangible and very difficult to measure. It is nevertheless a real one. Who, for example, contemplating a difficult and taxing day at work as he or she set out from their house in teeming rain on a cold winter's morning, would not long for the leisurely life of the retired? Mr. Browne must surely have wistfully reflected on this from time to time as he continued in the workforce. This loss can really be regarded as a form of inconvenience and lost expectation, inasmuch as Mr. Browne was deprived of an important benefit – a restful and less stressful life – associated with the early retirement contract. The present case is accordingly one where, in the words of McMahon J. in *Johnson*, the convenience of the

plaintiff was an important benefit which was to be obtained from the due performance of the early retirement contract.

Conclusions
21. While the measurement of this loss in monetary terms is in many ways all but impossible, I think that the yardstick should be that any damages award should be tangible and significant, without being excessive or even generous.

22. In these circumstances I propose to award Mr. Browne a sum of €20,000 for each of the three years he was obliged to work by way of damages for breach of contract, thus making a total award of some €60,000.