Neutral Citation: [2015] IEHC 559

THE HIGH COURT

CHANCERY

[2011 No. 2466P]

BETWEEN

BRYAN FOX Practising under the style or title of BRYAN F. FOX SOLICITORS

PLAINTIFF

AND

SANDRA COUGHLAN

DEFENDANT

Judgment of Mr Justice David Keane delivered on the 14th August 2015

Introduction

1. This is an application to have a statement of claim struck out on the ground that it discloses no reasonable cause of action and on that basis, or on the basis that the action is shown by the pleadings to be frivolous or vexatious, to have the underlying proceedings dismissed.

2. As originally conceived, the application relied upon a pleading point, whereby objection was taken to the manner in which the claim was pleaded as between the general indorsement of claim in the plenary summons, on the one hand, and the reliefs sought in the statement of claim, on the other. However, in the course of argument it became clear that a more fundamental question arises concerning whether the plaintiff commenced suit for the recovery of his fees at a time when he was prohibited from doing so by s. 2 of the Solicitors (Ireland) Act 1849 ("the 1849 Act").

The pleading point

3. The proceedings are certainly unusual (if not unprecedented) in that the only meaningful reliefs claimed in the general indorsement of claim in the plenary summons are Mareva injunctions preventing the defendant from reducing her assets within the jurisdiction below the sum of €154,398.24 and, in particular, from dissipating her share in the proceeds of sale of an identified investment property ("the property") below that amount. It should be said that there is also a claim for 'interest pursuant to statute' but that plea is meaningless, as it appears in the absence of any asserted entitlement to either damages or judgment in a liquidated sum upon which such interest might accrue. In the statement of claim, delivered some months later, for the first time the plaintiff claims from the defendant the sum of €154,398.24, representing legal fees that he alleges the defendant owes to him. In that pleading, the plaintiff also seeks for the first time, if necessary, an order that that portion of the proceeds of the sale of the property, due to the defendant, be paid to the plaintiff instead in part payment of that sum.

Background

4. It is common case that the plaintiff has represented the defendant in four separate sets of legal proceedings dating back to 2002. Those proceedings appear to involve the financial and family law consequences of the breakdown of the defendant's personal relationship with her partner and, in particular, the resolution of the couple's indebtedness to a particular financial institution. It seems that an agreement was reached whereby the property, in which the defendant and her partner each held a 50% interest, was to be sold by the financial institution and the proceeds used to discharge the borrowings secured on both that property and the family home. The plaintiff contends that the defendant specifically agreed that her share in the anticipated surplus from the sale of the property, after the discharge of the associated outlay and the repayment of those borrowings, was to be applied in partial discharge of the plaintiff's fees. The plaintiff asserts that those fees – on a solicitor and own client basis – then amounted to €154,398.24.

5. In consequence of various inquiries that the plaintiff made in early March 2011, he discovered both that the property had been sold, resulting in net proceeds due to the defendant of approximately €85,000, and that the defendant had retained another firm of solicitors to represent her interests in connection with that transaction. The plaintiff believes that the defendant's decision to retain another firm of solicitors for the purposes of that transaction was an attempt on her part to avoid paying the legal fees due to him.

6. The plaintiff wrote to the defendant on the 8th March 2011 requiring her both to confirm her willingness to enter negotiation concerning the amount of the legal fees due to the plaintiff and to direct the financial institution's solicitors not to release her portion of the proceeds of sale pending agreement between the parties or court direction. The plaintiff's letter went on to state that, failing provision of such confirmation by midday on the 11th March 2011, the plaintiff would apply for an order freezing the monies due to the defendant pending the taxation of his fees.

7. On the 15th March 2011, the plenary summons in these proceedings issued in the terms already described and the plaintiff, having sought interim ex parte injunctive relief, was instead granted leave to effect short service of a motion seeking that relief on an interlocutory basis returnable for the following day, the 16th March 2011 i.e. on approximately 24 hours notice to the defendant. In the affidavit grounding that application, the plaintiff averred that "there is a grave risk that the proceeds of the sale will be removed or dissipated by the [d]efendant" based upon his stated belief that the the defendant's only other asset is her family home and that her only income comprises maintenance payments or state benefits, or both.

8. When the matter came before the Court on the 16th March 2011, Laffoy J. granted an Order, broadly in terms of one of the reliefs sought by the plaintiff, "that half of the proceeds of sale of [the property] due and owing to the [defendant] be retained by the [mortgagee's solicitors] on behalf of the defendant until further Order."

9. There is a dispute between the parties in relation to the circumstances in which that Order was made. The defendant swore an affidavit on the 21st January 2014, in which she avers that the Order was granted "by consent of the parties." The plaintiff, an officer of the court, swore an affidavit in response on the 18th June 2014 in which he avers that "contrary to what the [d]efendant

avers in her [a]ffidavit, the original order for the interlocutory injunction was not made by consent." There are two difficulties with the latter averment. The first is that it ignores the express terms of a letter sent by the plaintiff to the defendant's solicitors on the 16th March 2011 (and exhibited to an affidavit sworn by the plaintiff on the 12th May 2011) which commences with the words: "Further to the [c]onsent [o]rder made… in Court 3 this morning…." The second and more fundamental difficulty is that it flies in the face of the relevant Order made on that date, which records in material part:

> "And it appearing that agreement has been reached between the parties herein
>
> By consent it is Ordered…."

10. The significance of the controversy lies in another averment of the plaintiff in his affidavit sworn on the 18th June 2014 to the effect that, on the 16th March 2011, Laffoy J. had ruled that the plenary summons in these proceedings is "fully in order." No judgment in respect of any such finding nor note of any such ruling has been produced. If such a ruling was made (which seems innately unlikely), it is certainly not reflected in the terms of the Court's Order made on that date and, for reasons set out later in this judgment, it would have been a ruling made *per incuriam* in circumstances where there is no suggestion that any relevant authority was drawn to the Court's attention.

11. A memorandum of appearance was entered on the 4th April 2011. A statement of claim, in the terms already described, was subsequently delivered on the 19th July 2011. The defendant delivered an 'objection and defence' on the 28th November 2011. The defendant's primary objection relates to the pleading point already mentioned i.e. that in his statement of claim the plaintiff has added a new and distinct cause of action not covered by the indorsement of the plenary summons, which goes beyond the amplification of his case permitted by the Rules of the Superior Courts ("the Rules"). The defence admits that the plaintiff provided legal services to the defendant in connection with the various proceedings concerned but denies that he is entitled to legal fees in the amount that he claims or, in particular, that the defendant promised, much less formally agreed, to pay those fees from the proceeds of sale of the property.

12. It is common case that the plaintiff did not deliver a bill of costs to the defendant in respect of any of the legal fees that he now claims until a firm of legal costs accountants did so on his behalf on the 1st March 2012 in respect of each of the four separate actions in which the defendant was involved. The plaintiff's Counsel asserted in argument that an interim bill of costs had been delivered earlier in respect of each of two of those actions but there was no evidence to that effect before the Court. Little would have turned on the point anyway, in light of the view expressed in O'Callaghan *The Law of Solicitors in Ireland* (Dublin 2000) (at para. 8.32) that it is a necessary prerequisite to the commencement of proceedings in accordance with s. 2 of the 1849 Act that a 'final statute bill of costs', rather than an interim bill of costs, must be delivered at least one month prior to doing so. That is a view with which I agree.

13. After the case had been set down for trial, the defendant brought the motion now at issue, seeking to have the action dismissed. That motion was originally made returnable on the 30th January 2014. It seems that it was ultimately adjourned to the trial of the action. It was certainly in that context that it came before me, as the designated trial judge to be dealt with at the commencement of the trial.

Argument

14. At the very outset, Counsel for the plaintiff acknowledged that the general indorsement of claim on the plenary summons does not include a claim for any substantive relief. Counsel submitted that this was not an accidental omission or oversight but rather a considered and deliberate approach in circumstances where, by operation of the provisions of s. 2 of the 1849 Act, the plaintiff acknowledges that he did not have any entitlement to sue the defendant for his fees at the time when the summons issued. Presumably, this was the proposition behind the elliptical statement in the plaintiff's affidavit, sworn on the 18th June 2014, that in seeking the interlocutory relief already mentioned "it was pointed out to the learned judge that there were certain impediments to an immediate claim for payment on the part of the Plaintiff."

15. Indeed, Counsel for the plaintiff further conceded that, in strict law, the plaintiff was not entitled to maintain the present action when he delivered his statement of claim on the 19th July 2011 (as each bill of costs in respect of which his claim is alleged to arise was not delivered until the 1st March 2012).

16. S. 2 of the 1849 Act is a striking example of the rather cumbersome style of legislative draftsmanship prevalent in the nineteenth century, in that it comprises a single compendious sentence, containing several hundred words and including a long series of subordinate clauses. In *Brooks & Ors v. Woods* [2011] IEHC 416, its essential elements were very helpfully set out by Laffoy J. in the following truncated version:

> "…no attorney or solicitor…shall commence or maintain any action or suit for recovery of any fees, charges or disbursements for any business done by such attorney or solicitor, until the expiration of one month after the solicitor… shall have delivered unto the party to be charged therewith… a bill of such fees, charges and disbursements…: and upon the application of the party chargeable by such bill within such month it shall be lawful… to refer such bill, and the demand of such attorney or solicitor… to be taxed and settled by the proper officer of the court in which such reference shall be made, without any money being brought into court; and the court or judge making such reference shall restrain such attorney or solicitor…from commencing any action or suit touching such demand pending such reference; and in case no such application as aforesaid shall be made within such month as aforesaid, it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor… whose bill may have been so as aforesaid delivered, … or upon the application of the party chargeable by such bill, with such directions, and subject to such conditions as the court or judge making such reference shall think proper; and such court or judge may restrain such solicitor… from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper: Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill… after the expiration of twelve months after such bill shall have been delivered…except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made."

17. In the case of *State (Gallagher Shatter & Co.) v. de Valera* [1986] ILRM 3, McCarthy J., speaking for the Supreme Court (*nem.diss*), summarised the requirements of ss. 2 and 6 of the 1849 Act in the following terms:

> "The combined effect of ss. 2 and 6, in respect of a Bill of Costs for solicitor and client charges duly delivered, would appear to be that: (1) The solicitor cannot lawfully sue for one month after delivery. (2) The client has a period of twelve months within which to demand and obtain taxation. (3) After the expiry of twelve months or after payment of the

amount of the bill, then the court may, if the special circumstances of the case appear to require the same, refer the bill to taxation, provided the application to the court is made within twelve calendar months after payment. (4) After the expiry of the latter period, there is no statutory power to refer for taxation."

18. Plainly viewing the obstacle posed by s. 2 as one of form rather than substance, the plaintiff submits that he was entitled to issue a plenary summons without reference to any substantive cause of action whatsoever, claiming instead in those proceedings only ancillary relief pending the determination of a claim that he was at that time prohibited from commencing or maintaining in respect of the recovery of legal fees that were not then due to him from the defendant.

19. The plaintiff bases his argument in that regard on the proposition that, unless permitted to seek injunctive relief in the manner and on the basis that he had done, he would have been left without a remedy in the face of fraudulent, or, at the very least, unconscionable conduct on the part of the defendant who had clearly demonstrated an intention to dissipate her assets in order to defeat his lawful claim, and that this is something that the courts should not, and cannot, permit.

Discussion

20. I cannot accept the plaintiff's submission for several reasons.

21. In the first place, as Counsel for the plaintiff very properly drew to the Court's attention in the course of argument on the present application, s. 2 of the Legal Practitioners (Ireland) Act 1876 ("the 1876 Act") provides in relevant part as follows:

> "It shall be lawful for any judge of any of the superior courts of law and equity to authorise an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, and also to refer his bill of fees, charges, and disbursements, and the demand of such attorney and solicitor thereupon, to be taxed and settled by the proper officer of the court in which such reference shall be made, although one month shall not have expired from the delivery of the bill of fees, charges, or disbursements, on proof to the satisfaction of the said judge that there is probable cause for believing that the party chargeable therewith is about to quit Ireland, or to become a bankrupt or a liquidating or compounding debtor, or to take any other steps or do any other act which, in the opinion of the judge, would tend to defeat or delay such attorney or solicitor in obtaining payment."

22. Thus, s. 2 of the 1876 Act created a statutory jurisdiction whereby the appropriate court can authorise a solicitor to commence an action for the recovery of fees due to him or her, prior to the expiration of one month from the delivery of a bill of costs, if satisfied that there is probable cause to believe that the client concerned is about to take any step or do any act that, in the opinion of the court, would tend to defeat or delay the solicitor in obtaining payment.

23. The law in this regard is not entirely straightforward because s. 2 of the 1876 Act was repealed by s. 1 of the Statute Law Revision Act 1883 ("the 1883 Act"). Thus, a solicitor can no longer directly rely upon the provisions of s. 2 of the 1876 Act in order to obtain the leave of the court releasing him from his obligation to comply with s. 2 of the 1849 Act, as amended. However, the jurisdiction created by s. 2 of the 1876 Act was not extinguished by the repeal of that provision by s. 1 of the 1883 Act. This latter provision provides in relevant part as follows:

> "The enactments described in the schedule to this Act are hereby repealed, subject to the exceptions and qualifications in the schedule mentioned:
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> …
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> nor shall this Act affect any principle or rule of law or equity, or established jurisdiction, form or course of pleading, practice, or procedure, or existing usage, franchise, liberty, custom, privilege, restriction, exemption, office, appointment, payment allowance, emolument, or benefit, notwithstanding that the same respectively may have been in any manner affirmed, recognised, or derived by, in, or from any enactment hereby repealed..." (emphasis added)

24. While the Schedule to the 1883 Act confirms the repeal of s. 2 of the 1876 Act, the saving language of s. 1 of the 1883 Act, just quoted, establishes that the jurisdiction of the court to grant leave to a solicitor to initiate proceedings to recover costs due and owing, prior to the expiry of a period of one month after the delivery of a bill of costs, was not extinguished by that repeal.

25. This was confirmed in the case of *Scott v. Crawford* [1910] 44 I.L.T.R. 19. In that case the plaintiff solicitor had discovered, after issuing a bill of costs but prior to the expiration of the period of one month afterwards, that the defendant intended to realise all his property and go to America. The solicitor sought the leave of the court, under s. 2 of the 1876 Act, to initiate proceedings against the defendant. Boyd J. held that the repeal of s. 2 of the 1876 Act had not abolished the jurisdiction which that provision had vested in the court.

26. That conclusion was buttressed by the earlier decision in *Sayers v. Collyer* [1884] 28 Ch. D. 103, which concerned the question of whether the jurisdiction to grant damages in lieu of an injunction, which Lord Cairns' Act had conferred upon the courts of equity in certain specified circumstances, had been extinguished by the Statute Law Revision and Civil Procedure Act 1883. In answering this question in the negative, Baggallay L.J. made the following statement, albeit by way of *obiter dictum*:

> "Our attention was called to the fact that *Lord Cairns' Act* had been repealed since the former hearing of this case, being included in the schedules to the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), but that Act contains words preserving the jurisdiction of the Court notwithstanding the repeal. By sect. 5 it is enacted that any jurisdiction, or principle, or rule of law or equity, established or confirmed, or right or privilege acquired, by or under any enactment repealed by the Act shall not be affected by the repeal."

27. Accordingly, I am quite satisfied that, notwithstanding the repeal of s. 2 of the 1876 Act, this Court has the jurisdiction, upon the making of an application, to authorise a solicitor to commence an action for the recovery of his fees prior to the expiry of a one month period following the delivery of a bill of costs. Nor is there any suggestion that the relevant jurisdiction has fallen into desuetude. Its continuing effect is acknowledged in the commentary on Order 99, rule 15 of the Rules contained in Ó Floinn *Practice and Procedure in the Superior Courts* 2nd ed. (Dublin 2008) (at p. 1120).

28. In O'Callaghan, *The Law of Solicitors in Ireland* (Dublin 2000) (at para. 8.37, fn 44), it is suggested that, in addition to the preservation of the statutory jurisdiction formerly exercisable under s. 2 of the 1876 Act, the Court's inherent jurisdiction may also be invoked to permit the commencement of an action for the recovery of fees prior to the expiration of the required one month period. For my part, I would be sceptical of the suggestion that this Court can invoke an inherent jurisdiction to disapply a statutory

requirement. And even if the inherent jurisdiction of the Court could be invoked in principle, the Supreme Court has made clear in *G. McG. v. D.W. (No. 2)(Joinder of the Attorney General)* [2000] 4 I.R. 1 (per Murray J. at 27) that the normative value of the law and the imperative of certainty concerning the scope of the judicial function exclude its exercise where the parameters of the relevant power have been expressly and completely delineated by statute law.

29. It is unnecessary to decide that issue in the present case in circumstances where I am satisfied that, by operation of s. 1 of the 1883 Act, the statutory jurisdiction created by s. 2 of the 1876 Act has survived the repeal of that section and that, on the facts before me, no application of any kind was made for leave to commence the present action. Instead, the plaintiff argues that the requirements of s. 2 of the 1849 Act (and the protection that it is plainly intended to provide to the consumers of legal services) can be properly and lawfully circumvented in the novel manner that has been attempted in this case i.e. by commencing proceedings seeking no substantive relief whatsoever at a time when the commencment of an action for the recovery of fees is statutorily prohibited and, having obtained interlocutory relief, only afterwards seeking to amend those proceedings by the addition of such a claim.

30. Even if it did not completely ignore the existence of a statutory jurisdiction to disapply the strict requirements of s. 2 of the 1849 Act and his failure to invoke that jurisdiction, the plaintiff's argument that he was entitled to proceed as he has done would face a veritable litany of difficulties.

31. First, the plaintiff's argument presupposes that no reasonable objection can be taken to the issue of proceedings identifying no substantive cause of action whatsoever. Order 4, rule 2 of the Rules clearly states that a plenary summons shall have endorsed upon it "the relief claimed and the grounds thereof expressed in general terms in such one of the form in Appendix B, part II, as shall be applicable to the case, or, if none be found applicable, then such other similarly concise form as the nature of the case may require."

32. In giving judgment for the Supreme Court in *Caudron v. Air Zaire* [1985] I.R. 716, Finlay C.J. (Henchy and Hederman JJ. concurring), having set out the rule just quoted, continued as follows (at 721):

> "Consideration of the forms contained in Appendix B, Part II would indicate that whilst, of course, under the terms of the rule they are not exclusive, they universally bear a single characteristic which in my view is that they are the ultimate relief being sought by the plaintiff in the action commenced by his originating summons. There are, of course, many forms of relief which may be sought and obtained from the court between the issue and service of an originating summons and the final determination of the claim endorsed on it. Such can be an order for discovery of documents, an order for the delivery and answering of interrogatories, and orders by way of injunction the overall intention of which on an interlocutory basis is to maintain the status quo so as to permit the just realisation of the plaintiff's claim in the event of his being successful. Such relief can and, in my view, should be obtained either on an interim basis ex parte or on an interlocutory basis by notice of motion served after the issue of the originating summons or in the matter of an intended action. They are not, however, the relief being sought in the action and are not, in my view, on the true interpretation of the Rules, matters which should be claimed by way of endorsement on the summons itself."

33. A *Mareva* injunction is an ancillary order which falls clearly within the description provided by Finlay C.J. of an order "by way of injunction the overall intention of which on an interlocutory basis is to maintain the status quo so as to permit the just realisation of the plaintiff's claim in the event of his being successful." As the Supreme Court made clear in Caudron v. Air Zaire, it is a relief that should be sought on an interim ex parte basis by ex parte docket or on an interlocutory basis by notice of motion. It should not be claimed by way of endorsement on the plenary summons. Conversely, the plaintiff's claim for the recovery of stated legal fees bears the obvious characteristic of being the ultimate relief sought in these proceedings and, as such, should have been endorsed on the originating summons in these proceedings (which, being an action in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant arising upon a contract of retainer, may have been a summary summons). In short, the form of plenary summons issued in this case was entirely irregular.

34. For the foregoing reasons, if there is any substance to the suggestion that, in acceding to the application that was made for a consent order granting certain interlocutory injunctive relief, this Court has already ruled either directly or indirectly that the said summons is "fully in order," I am quite satisfied that any such ruling would have been made per incuriam in circumstances where there is no suggestion that either the requirements of s. 2 of the 1849 Act or the relevant passage from the decision of the Supreme Court in Caudron v. Air Zaire were drawn to the attention of the Court.

35. Putting to one side for a moment the irregular manner in which the proceedings were commenced, the next insuperable difficulty the plaintiff faces is that of persuading the Court that the introduction for the first time of a claim for judgment in a liquidated sum in the prayer for relief in his statement of claim delivered on the 19th July 2011 is merely the amplification of his claim as permitted under Order 20, rule 6 of the Rules. As Delany and McGrath *Civil Procedure in the Superior Courts* 3rd ed. (Dublin 2012) summarise the position (at para. 5-43):

> "Order 20, rule 6 provides that whenever a statement of claim is delivered the plaintiff may therein alter, modify or extend his claim without any amendment of the indorsement of the summons. However, it was held in Moore v. Alwill (1881) 8 LR Ir 245 that it is not possible to add, under the guise of amplification, a new and distinct cause of action not covered by the indorsement of the summons and such an amendment will be liable to be set aside. So, in Teevan v. Cavan Creameries Ltd (1903) 3 NIJR 306 it was held that it was not possible for the plaintiff to add in to his statement of claim, a claim for damages for libel which had not been made in his plenary summons. Where it becomes necessary to make an amendment of this nature, the plaintiff should first obtain leave to amend the plenary summons."

36. *A fortiori*, it seems to me clear that proceedings cannot be commenced by the issue of an originating summons that fails to identify any substantive cause of action whatsoever, on the basis that one can be introduced for the first time in the plaintiff's statement of claim in the guise of amplification of an existing claim through the invocation of Order 20, rule 6 of the Rules.

37. While the plaintiff has never formally sought leave to amend his plenary summons, it was suggested by Counsel for the plaintiff in the course of argument that the Court might consider granting such leave at this stage, in exercise of the jurisdiction to do so expressly recognised under Order 28, rule 1 of the Rules.

38. In the case of *Caulfield v. Bolger* [1927] 1 I.R 117, Hanna J. held that the failure of a solicitor to demonstrate compliance with the requirements of s. 2 of the 1849 Act rendered the summary summons, by which those proceedings had been commenced, defective. Hanna J. refused to allow the plaintiff to amend his summary summons on the basis inter alia "that the main features of his proceedings have been held to be radically defective …"

39. In this case, where there is established non-compliance with the requirements of s. 2 of the 1849 Act rather than a mere failure to demonstrate compliance with those requirements, it seems to me that, were the Court to ignore that clear breach of the law and to grant leave to amend the plenary summons in this case despite the radical defect in that pleading as it stands, it would drive a coach and four through the statutory code regulating the recovery of solicitors' fees and, in particular, would completely undermine the protection conferred on persons such as the defendant, as consumers of legal services, under s. 2 of the 1849 Act by entirely circumventing the safeguards governing the disapplication of that section provided in s. 2 of the 1876 Act.

40. Finally, confronted with certain of the difficulties that I have already described, the plaintiff resorted to the unedifying argument that, since his claim against the defendant is essentially one of fraud, any necessary amendment of his pleadings should be permitted and his action should be allowed to proceed on the basis that a statute may not be used as an engine of fraud.

41. There are two fundamental difficulties with that submission. First, although the plaintiff's statement of claim was delivered on the 19th July 2011, fraud is nowhere pleaded in it, much less properly particularised in accordance with the requirements of Order 19., rule 5(2) of the Rules.

42. Second, whether or not the plaintiff had pleaded - and was in a position to establish - fraud, there was at all times available to him a statutory mechanism for lawfully commencing proceedings otherwise prohibited under s. 2 of the 1849 Act by meeting a far less onerous requirement. All that was necessary for him to do was to establish probable cause to believe that the defendant was about to take a step or do an act that, in the opinion of the court, would tend to defeat or delay the plaintiff in obtaining payment, in order to obtain the leave of the Court under s. 2 of the 1876 Act to bring a claim for the recovery of his fees before the expiration of one month from the delivery of a bill of costs. He could then have sought, perfectly properly, any appropriate interlocutory relief in support of those proceedings comparable to that which is the subject of the consent order he did in fact obtain in the unusual and irregular circumstances already described.

43. Since the plaintiff in this case never sought to make an application for leave to commence these proceedings in accordance with the provisions of s. 2 of the 1876 Act, the Court was never asked to consider whether the required probable cause was established. The evidence that the plaintiff put on affidavit in seeking to meet the equivalent aspect of the separate test for the grant of a Mareva injunction is far from compelling.

44. An applicant for a *Mareva* injunction must demonstrate, inter alia, either an intention on the part of the defendant to dissipate assets in order to frustrate the plaintiff's claim or some unsconsionable conduct on the defendant's part from which such an intention might reasonably be inferred: *Aerospace Ltd v. Thomson*, Unreported, High Court, Kearns J., January 13, 1999. In purporting to meet that test, the plaintiff in this case merely averred that "at all material times the parties…had an agreement that [the plaintiff's] legal fees would be paid when [the defendant] came into funds" upon the sale of the property. No particulars were provided then or subsequently concerning when or where the relevant agreement is alleged to have been made or how it was evidenced. The unconscionable conduct from which the defendant's intention to dissipate her assets was to be inferred (and which, the plaintiff might now wish to argue, amounts to an act that would establish probable cause to believe that the defendant was about to take a step that would tend to defeat or delay the plaintiff in obtaining payment of the legal fees he now claims) was the defendant's decision to instruct other solicitors to represent her interests in respect of that transaction without first informing the plaintiff.

45. Whether that fact alone is sufficient to establish an intention to dissipate the funds derived from that transaction in order to frustrate the plaintiff's claim for the fees due to him is, to use a neutral expression, far from clear. To rely on that fact alone to allege fraud on the part of the plaintiff, which – to be fair to the plaintiff - he certainly has not done by way of any formal pleading, would be remarkable.

46. In this context it is important to remember that, in seeking a Mareva injunction, it is not sufficient to demonstrate that assets are likely to be depleted by a defendant in the ordinary course of business or of life; rather, it is necessary to demonstrate an intention to dispose of assets or place them beyond the jurisdiction of the court with the intention of frustrating a lawful claim. As Clarke J. put the matter in *Bambrick v. Cobley* [2006] ILRM 81 (at 90):

> "[A *Mareva* injunction] is not intended to provide plaintiffs with security in respect of all claims in relation to which they may be able to pass an arguability test. The true basis of the jurisdiction is the exercise by the court of its inherent power to prevent parties from placing their assets beyond the likely reach of the court in the event of a successful action."

Conclusion

47. Order 19, rule 28 of the Rules provides as follows:

> "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."

48. In so far as the plaintiff's claim for the recovery of stated legal fees bears the obvious characteristic of being the ultimate relief sought in these proceedings, the present action was commenced in clear breach of s. 2 of the 1849 Act. No application was brought by the plaintiff for leave to commence the proceedings in exercise of the jurisdiction to grant such leave, which has survived the repeal of section 2 of the 1876 Act. Insofar as the plenary summons does not identify a claim for the recovery of fees or for any other substantive relief, reciting instead only a free-standing claim for various interlocutory reliefs, it is entirely irregular on its face. The inclusion of a claim for the recovery of legal fees in the plaintiff's statement of claim was impermissible in the absence of an application to amend the plenary summons. No such application was made. Fraud has not been pleaded by the plaintiff in this case, nor is it immediately apparent how it might be on the evidence that he presented in seeking interlocutory relief.

49. For the foregoing reasons, I am satisfied that this is a case in which I should exercise my discretion to strike out the plenary summons and statement of claim and dismiss the action. It follows that the interlocutory injunction in the proceedings stands discharged.