Neutral Citation: [2013] IEHC 478

THE HIGH COURT

[2013 No. 10255 P.]

BETWEEN

CAMDEN STREET INVESTMENTS LIMITED, CAMDEN STREET TAVERNS LIMITED AND CAMDEN STREET PROPERTIES LIMITED
PLAINTIFFS

AND

VANGUARD PROPERTY FINANCE LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Kevin Cross delivered on the 5th day of November, 2013

1. By plenary summons dated 26th September, 2013, the plaintiffs sought a number of declaratory and injunctive reliefs seeking, *inter alia*, to restrain the defendant from appointing a receiver over the premises located at 7, 8 and 8A Camden Street, Dublin 2.

2. On 26th September, 2013, upon application *ex parte* an interim injunction was granted restraining the defendant:-

> "(i) Appointing a receiver over the licensed premises located at 6 Camden Street, Dublin 2, trading as 'Flannery's Public House' pursuant to a debenture granted by the second named plaintiff to Bank of Scotland (Ireland) Limited that was purportedly transferred to the defendants; and
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> (ii) Appointing a receiver over the premises located at 7, 8 and 8A Camden Street, Dublin 2, pursuant to a debenture granted by the third named plaintiff to Bank of Scotland (Ireland) Limited that was purportedly transferred to the defendants."

3. The interlocutory application came for hearing in this Court and was on 7th October, 2013 and was heard on the said date and the following date.

Background

4. The second named plaintiff owns and operates Flannery's a well known licensed premises at 6 Camden Street. The third named plaintiff is the owner of premises located at 7, 8 and 8A Camden Street which is part of the Flannery's premises. By a letter dated 15th October, 2008, Bank of Scotland (Ireland) offered the first named plaintiff a loan facility of over €13m to fund the purchase of Flannery's and the adjoining premises by the second and third named plaintiffs. This facility comprised a twenty year term loan and also a second five year term loan. Monies were drawn down under the offer and security of the loan was, *inter alia*, a first specific charge granted by the second named plaintiff over 6 Camden Street, Dublin and a first specific charge granted by the third named plaintiff over 7, 8 and 8A Camden Street.

5. The Bank of Scotland (Ireland's) interest in the loan facility was first transferred to Bank of Scotland Plc and then subsequently sold to the defendants.

6. There is no doubt but that the loan facility was in arrears at the date of transfer to the defendant and on many other occasions and is still in arrears.

7. The licensed business was not trading very successfully and the plaintiffs contend that the defendant agreed to accept monthly payments of between €75,000 and €100,000 (providing that the annual average was €100,000 per month) and would not take any steps to enforce their right assuming that sum was paid.

8. The plaintiffs do not dispute that they were unable to make the average payments of €100,000 on an annual basis.

9. The plaintiffs contend that at a meeting on 20th September, 2013, the defendant's representatives confirmed that if all arrears were discharged and that all future payments were made that the loan facility would then be in compliance. This is disputed by the defendant.

10. The defendant maintains that the plaintiffs were well aware and indeed were cooperating with attempts by the defendant to sell the property. The plaintiffs contend that this cooperation was limited to ascertaining the open market price of the property so that arrangements could be made between the defendant and certain financial investors in the plaintiffs' companies.

11. It is further contended on behalf of the plaintiff that at a subsequent meeting of 23rd September, 2013, the defendant again agreed that they would not regard the first named plaintiff as being in default if the arrears that had accrued were discharged and the original monthly payments were met subject to a proviso that the "loan to value ratio" would have to be complied with. It is contended on behalf of the plaintiff there is no "loan to value ratio" in the facility and accordingly it was contended that the plaintiffs had entered into a new contract with the defendant or that the defendant was estopped from taking any actions in respect of the facility.

12. It was further contended on behalf of the plaintiffs that at 6.30pm on 24th September, at a time when the plaintiffs had not been furnished with any statement of arrears, which by then they would have been in a position to pay, that a formal demand was served by the defendant demanding payment of the loan facility and demanding payments of guarantees and indemnities entered into by and on behalf of the second and third named plaintiffs on or before 5pm on 26th September, 2013. These demands were predicated on the occurrence of what the defendant alleges to be an "event of default".

13. It is contended on behalf of the plaintiff that there is no "event of default" as the letter did not identify the quantum of the arrears or the nature of the default.

14. The defendant contends:-

> (a) That there is no arguable case to determine that there was clear default under the facility and estoppel cannot arise and neither could any agreement made on behalf of the defendant to accept a lesser sum be regarded as anything other than forbearance and cannot bind the defendant or prevent the defendant from demanding full payment.
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> (b) It is contended that the balance of convenience lies in favour of not granting injunctive relief.
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> (c) It is contended by the defendant that in any event damages would be an adequate remedy, should the plaintiff succeed, and an award of damages against the plaintiffs would be unlikely to be met.
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> (d) That there was significant nondisclosure of information to the High Court when the interim injunction was applied for and granted and that accordingly the orders should be set aside.

Legal Principles

15. It is common case between the parties that the principles in respect of interlocutory injunctions and reliefs set out by the Supreme Court in *Campus Oil Limited & Ors v. Minister for Industry & Ors (No. 2)* [1983] I.R. 88, apply in that an applicant for an interlocutory injunction to be successful must establish first that there is a fair question to be determined at the trial of the action concerning the existence of the right which he seeks to protect or enforce by the injunction and secondly that the circumstances are such that the balance of convenience lies on the side of granting the injunction.

16. It is also not disputed that if damages were an adequate remedy for the plaintiff that an injunction may not be granted. It is also agreed that a litigant applying *ex parte* for an injunction is obliged to make full and frank disclosure of all material matters in his knowledge which are relevant to the exercise by the judge of his discretion. If the duty of disclosure is not observed by a plaintiff a court may discharge the *ex parte* order and may refuse the plaintiff any further *inter partes* reliefs even though the circumstances would justify the grant of such relief, had full disclosure in fact been made – see *Tate Access Floor Inc. v. Boswell* [1991] 1 Ch. 512.

17. I propose to deal with each of the aforementioned matters in turn.

A Fair Question to be Determined

18. The plaintiff argues that there was no "event of default" entitling the defendant to appoint the receiver, as the parties had, by agreement, altered their contractual obligations so that the defendant agreed not to take any steps against the plaintiff and to regard the plaintiffs as being in full compliance should they pay at least €75,000 per month and an average of €100,000 over a twelve month period and that further the defendant later agreed in September 2013 that they would not regard the plaintiffs as being in default if the plaintiffs discharged the arrears, that had accumulated and met the ongoing payments. It is argued that the demand for payment was undertaken by the defendant at a time when the plaintiffs could not honour the altered agreement as no statement of arrears had been furnished to them. The plaintiffs further maintain that the defendants are estopped by their agreement and conduct from enforcing any rights over the plaintiffs and accordingly, that the appointment of the receiver was invalid and wrong.

19. Subject to the issue of any alteration of contract or any question of estoppel, it is clear that if the plaintiffs were in default then that it is not arguable, to maintain that in some way the defendants are prevented from taking the steps that they have done.

20. I accept the statement of the law as outline by Laffoy J. in *Crossplan Investments Limited v. McCann & Ors* [2013] IEHC 205, when she stated that "[it] is generally recognised that the threshold for compliance with the 'fair bona fide question' test is a low threshold."

21. By letter dated 15th October, 2008, the predecessors of the defendant (Bank of Scotland (Ireland) Limited) agreed to provide a loan to the plaintiff of just more than €13m. The form of two loans, one €11,103,000 and the other for €1,972,000 was subject to terms and conditions in particular subject to the Bank's general conditions which were attached thereto.

22. It was further agreed that if there was any conflict between the general conditions and the facility letter, the terms of the facility letter would prevail.

23. Loan A was offered for twenty years including a 36 month deferment of principle repayments and interest to be paid monthly by direct debits with repayments of the principle commencing not later than 36 months following the disbursement of the first tranche of the loan. Loan B was offered for five years with interest accruing on a day to day basis with repayment of the principle interest payable monthly over 60 monthly payments by direct debit.

24. Pursuant to the agreements as security for the facilities, the predecessors of the defendant obtained, *inter alia*:-

> (i) a specific charge over the freehold land and premises to be acquired consisting of Flannery's Public House at 6 Camden Street, Dublin 2; and
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> (ii) a specific charge over the freehold land and premises of properties consisting No. 7, 8 and 8A Camden Street, Dublin 2.

They also agreed on other securities which are not particularly relevant to these proceedings.

25. Condition No. 9 of the Bank's general conditions identified a number of "events of default" on the happening of which at "any time thereafter" the Bank might in its absolute discretion "by written notice to the borrow declare the loan to be due and payable on demand in which case the borrower shall make payment thereof on demand by the Bank at anytime thereafter".

26. Among the events of default specified in general condition No. 9 are the following:-

> "(i) if the borrower fails to pay on the due date any monies payable or due by it from time to time to the Bank…or fails to discharge or perform any obligation or liability to the Bank…
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> (xi) if the borrower or any guarantor or third party fails to observe and perform any of their respective obligations under any of the finance documents…

(xv) if there occurs any change in the business or undertaking operations, assets or financial conditions of the borrower… which in the Bank's opinion could have a material or adverse effect on the ability of the borrower…to comply with any of their obligations under the finance documents or which could place their security in jeopardy…"

27. Furthermore it was provided by general condition No. 25.4 that "no failure to exercise and no delay in exercising on the part of the Bank any right, power or privilege under any of the finance documents shall operate as a waiver thereof nor shall any single or partial exercise of any right, power or privilege preclude any further exercise thereof with the exercise of any other right, power or privilege. The rights and remedies therein provided are accumulative and not exclusive of any rights or remedies provided by law".

28. It is clear and I find as proved that the plaintiffs were and continue to be in arrears. It is also clear and I find as proved that representatives of the plaintiffs, in this case, Mr. Ormond were advised of the arrears position by letters on a number of dates throughout 2012.

29. It is further clear that whatever the status of the arrangement to pay on average of €100,000 per month that this amended payment was not met and I find that that subject to the issue of the status of any amendment to the agreement or issue of estoppel that they were clear "events of default" allowing the defendants to exercise their right under general condition No. 9(i) and (xi) (breach of obligations to the Bank) and I do not make any judgment as to whether there had been a breach of condition No. 9(xv) in relation to any possible change or control of the plaintiffs.

30. It is contended by the defendant and I accept that the fact that they chose not to make immediate demand for repayment from the plaintiffs at an earlier point of time has no bearing upon the defendant's entitlement to make demand on 24th September.

31. Even if the plaintiffs are correct that the plaintiffs were not contemporaneously provided as stated by Mr. Dolan on behalf of the plaintiff with the precise quantum of arrears, these arrears were set out in the demand letter though incorrectly described as "accrued interest". In any event, I find that the defendants are correct that the default in the case did not arise after the involvement of Mr. A. in the case on behalf of the plaintiff in September 2013 but had occurred long before that and had persisted over a considerable period of time.

32. I accept and adopt as a correct statement of the law the decision in *Bank of Baroda v. Panesar & Ors* [1986] All E.R. 751 and the decision of the High Court of Australia in *Bunbury Foods Pty Limited v. National Bank of Australasia* [1984] 51 ALR 609. I find that in the circumstances of the various obligations of the plaintiffs to the defendant a precise statement of account at the time that demand for payment was made to is not in the circumstances necessary.

33. The defendants further relied upon the well known decision of In *Re Pinnels case* [1602] 5 Co. Rep 117A in which the acceptance by a plaintiff of a lesser sum in full satisfaction of a debt of itself cannot be satisfaction or deprive the plaintiff of his entitlement to sue for the balance. This case is trite law and has been followed on numerous occasions since 1602. In *Re Pimmels* case, however, should not and cannot be expanded to have any greater implication than what it states. On its own terms the acceptance of different consideration, though of lesser value, is good consideration and, of course, circumstances of estoppel can arise.

34. It was contended on behalf of the plaintiff that what the plaintiff and defendants agreed (when an alternative method of payment was allegedly agreed) was not to accept a lesser sum but to accept the same sum over a longer period and that with the term being over a more lengthy period that greater interest repayments would have fallen on the plaintiff. Further it is contended that the defendant is estopped by its conduct from now seeking to rely upon the earlier document.

35. The defendant contended that there can be no issue of estoppel because it has not been established that the plaintiff in any way altered its conduct by reason of any supposed agreement or license given by the defendant or that there has been any question of any loss suffered or sustained by the plaintiffs as a result of relying upon the word of the defendants. It is not the function of this court to decide on the strength or otherwise of whether or not the license or further contract was granted or not, all these matters are matters of dispute.

36. In my judgment, the case of the defendant is a strong one but the issue is whether the plaintiff has met the low threshold identified by Laffoy J. (above) in establishing that there is a fair issue to be tried and I hold that there is indeed a fair issue to be tried as to whether or not the defendants agreed to, in effect, extend the loan period for a longer period of time with the defendant obtaining the repayment of the same principal sum together with interest repayments over a longer period of time which would perforce involve the plaintiffs' paying a greater sum in total for the interest and further and in the alternative whether as a result of that supposed agreement and the plaintiffs abiding by it they altered their position in a way to raise an issue of estoppel.

37. Accordingly, I hold that the plaintiffs have satisfied the first test of the *Campus Oil* principle.

The Balance of Convenience

38. I have heard and read the submissions of both parties in relation to the balance of convenience.

39. I will deal with the issues of damages being an adequate remedy under a separate heading even though usually the issue of damages might be more conveniently decided first.

40. I note that the plaintiffs have offered to discharge all arrears that have accrued under the loan facility. I accept that given the recent financial backing given to the plaintiffs by Mr. A., the plaintiffs will probably be able to discharge these arrears. This will put the defendant in the position that they are without any loss. I note also the contention on behalf of the plaintiff that the defendants are a party which it could be argued has no interest in the property other than obtaining possession to resell at a profit and that the property market in Dublin is rising which would result the plaintiffs being likely to meet or equal a price that would be received for the property.

41. It is contended on behalf of the defendant that the plaintiffs were aware for a considerable time that the property was to be sold to a third party and had prevailed upon the defendants to delay this so that it could pay down its trade creditors. For the purposes of my decision under the heading of the balance of convenience, I accept that submission.

42. In this case apart from the issue of the adequacy of damages, the balance of convenience would lie in me granting the injunction as the disruption to the plaintiffs should the receiver be appointed and the defendants gain control of the property and sell it would probably mean an end to the particular business involved and the balance of convenience would favour maintaining the *status quo*.

The Adequacy of Damages

43. If damages are an adequate remedy, the injunction will not lie – see *Kinsella v. Wallace* [2013] IEHC 112. In this case, should the injunction not be granted and the matter proceeds to trial and should the plaintiff succeed, I believe the defendants would be able to meet an award of damages. I am not confident should an award of damages be made against the plaintiffs that the plaintiff would be able to, or be inclined to, meet same but that of course another issue.

44. In *Curust Financial Services v. Loewe-Lack-Werk* [1994]1 I.R. 451, Finlay C.J., in deciding whether damages were an adequate remedy, considered whether the defendants would be in a position to pay the amount of damages that might be awarded to the plaintiff whether it was possible to quantify the damages and whether the threat of insolvency existed for the plaintiff if the injunction was not granted.

45. In this case, it is contended by the plaintiff that damages would be difficult if not impossible to calculate. I accept that it may be difficult for the damages to be calculated but I do not believe that it would be in any sense impossible. The loss of a business is always a matter of some conjecture but is capable of adjudication after hearing accountancy or other evidence. Indeed, the courts frequently enter into such valuations. While the plaintiffs raise the possibility of their own insolvency should the injunction not be granted (while at the same time making the possibly contradictory point that should the injunction be granted and should they fail in their action that they would be able to compensate the defendants). I find that the plaintiffs had not proved the case that they would become insolvent if the injunction was refused if they wished to maintain this action against the defendants. The plaintiffs clearly now have a new source of finance available to them in Mr. A.

46. I have come to the conclusion that damages are indeed an adequate remedy for the plaintiffs in this matter. I do not believe that the plaintiffs' business is such that either the plaintiffs, who are all corporate beings, or their principals who are all businessmen have in any real sense any emotional stake in maintaining the particular business of Flannery's license premise.

The Issue of Non-Disclosure

47. There has been significant and admitted non-disclosure by the plaintiffs in their original application *ex parte*. The plaintiffs accept non-disclosure of material fact but contend that the initial affidavit seeking the interim relief of Mr. Colin Dolan was sworn by him *bona fide* and that Mr. Dolan is not to be criticised because when he swore his affidavit, he was not aware of certain facts and the affidavit had to be sworn in some haste.

48. I accept the affidavit had to be sworn in some haste but, of course, it is not Mr. Dolan's non-disclosure that is relevant but the non-disclosure of the plaintiffs on whose behalf the affidavit was sworn. I have come to the conclusion that there were a number of significant facts that were clearly within the knowledge of the plaintiffs and which were not disclosed to the court and which might significantly have altered the decision of the learned judge when initially granting the interim relief. In *Bambrick v. Johanne Cobley* [2005] IEHC 43, Clarke J. considered the obligations of disclosure and holding that the plaintiff in that case failed in an obligation to disclose all matters and that the test by reference to non-disclosure is one as to whether objectively speaking the facts could reasonably regard his material i.e. material to be considered in a reasonable and non-excessive manner. The consequences of non-disclosure are not automatic and involve a discretion of the court. In *Bambrick* (above), Clarke J. identified a number of factors being likely to weight heavily upon the court in the exercise of its discretion:-

> "1. The materiality of the facts not disclosed.
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> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
>
> 3. The overall circumstances of the case which lead to the application in the first place."

I accept that these factors are material to the exercise of my discretion in this case.

49. The impression given to the judge at the interim stage by Mr. Dolan's affidavit was that the plaintiffs had been attempting for a considerable period to ascertain the precise level of arrears on its loan account so that it could bring itself into compliance with same and these requests were not met by the defendants.

50. It was further argued by Mr. Dolan that in effect the defendant either engineered "an event of default" or that there was no event of default due to the failure of the defendants to provide precise figures but that it had, instead issued demand letters for the full amount outstanding on the loan. Had the full correspondence between the parties been exhibited, I find that a different picture would or at least might well have itself presented to the learned judge.

51. I further find that it is significant whereas the loan facility was exhibited by Mr. Dolan and whereas the loan facility refers to the Bank's general conditions, these conditions were not exhibited or it seems made available to the court. Had the general conditions been available to the court, the judge would have been able to question the contention by the plaintiffs that "no event of default" had taken place.

52. I also note that Mr. Dolan failed to advise the court of the full background of the dealings between the parties, in particular that a sale of the public house had been negotiated on behalf of the defendants in July/August 2013, with a planned completion in the beginning of September but that this was rescheduled. The parties dispute the reasons for this rescheduling but the court ought to have been advised that there had been extensive discussions between the parties on the sale of the license premises by the defendant and in fact that the plaintiffs for one reason or another cooperated with a number of inspections of the license premises by proposed purchasers in July or August 2013.

53. In an affidavit Mr. Dolan made in response to affidavit on behalf of the defendant, Mr. Dolan stated that the plaintiffs had gone along with the defendant in relation to the inspection of the licensed premises by interested parties in order to maintain their relationship with the defendants and in effect to test the market to see what a third party might offer for the business so that persons on behalf of the plaintiffs might purchase the premises in cooperation with the plaintiffs. At the very least, I believe that the court ought to have been told about these negotiations so that they could have formed a closer and better understanding of what had happened between the parties.

54. There is further lack of disclosure in that I hold that the plaintiffs were indeed advised from time to time in 2013 as to the extent of their arrears and that they did not pay the average sum of €100,000 per month which they had agreed to pay from February 2013.

At the very least, the *ex parte* application was silent as to these matters and the impression seems to have been created that the plaintiffs were at all stages kept in the dark as to the fact and extent of their indebtedness.

55. I am prepared to exonerate Mr. Dolan of any attempted deliberate deception but the application was made on behalf of the plaintiffs. Mr. Ormond is the person on behalf of the plaintiffs who would have been directly aware of the various headings and arrangements with the defendants and the matter could have been sworn by him at the making of the original application, or Mr. Dolan could have been made aware of these matters by Mr. Ormond prior to him swearing his affidavit. The fact that Mr. Dolan is subjectively not guilty of any deliberate non-disclosure does not alter the fact that the plaintiffs were guilty at least of actions which are significantly culpable in a sense identified by Clarke J. in *Bambrick* (above) of not deliberately misleading but of failing to disclose.

56. In these circumstances and in particular due to the matters as outlined above, I am of the view that there was significant failure to disclose material facts to the judge at the interim stage to such a degree as would justify the refusal of relief even were I satisfied that the plaintiffs had met all the *Campus Oil* tests, which of course I am not.

Conclusion
57. Due to the failure of the plaintiffs to satisfy me that damages would not be an adequate remedy and due to their culpable lack of disclosure, I must refuse the plaintiff the reliefs sought.