Neutral Citation Number: [2010] IEHC 412

THE HIGH COURT

2010 9417 P

BETWEEN

PHILIP BURKE

PLAINTIFF

AND

INDEPENDENT COLLEGES LIMITED TRADING AS INDEPENDENT COLLEGES

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 5th day of November, 2010.

1. The application

1.1 On this application the plaintiff, who has been an employee of the defendant since 2007, seeks reliefs in the form of interlocutory injunctions restraining the defendant pending the trial of the action from –

(a) terminating the plaintiff's employment by way of redundancy or otherwise,

(b) 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) Limited" or otherwise,

(c) directly, indirectly or howsoever representing that the plaintiff's employment has been terminated,

(d) directly, indirectly or howsoever publishing adverse statements to the effect that the plaintiff's employment has been terminated, and

(e) directly or indirectly placing the plaintiff on "garden leave".

1.2 The history of the proceedings is that the plaintiff issued a plenary summons on 13th October, 2010. On that afternoon, the plaintiff, on an *ex parte* application, got leave from the Court to issue a notice of motion seeking the reliefs outlined above returnable for 15th October, 2010. The application was grounded on the affidavit of the plaintiff sworn on 13th October, 2010. The defendant's replying affidavit was sworn by Garret Doyle (Mr. Doyle), the Chief Executive Officer of the defendant, on 18th October, 2010. The application was heard on 19th and 20th October, 2010. The Court gave the plaintiff leave to file a supplemental affidavit sworn by the plaintiff's solicitor, Tom Casey, on 20th October, 2010, which merely exhibited the memorandum and articles of association of the defendant, which is a public document.

1.3 The reliefs claimed by the plaintiff in the endorsement on the plenary summons are, in addition to permanent injunctions in the terms of paragraphs (a) to (e) inclusive at **1.1** above, declarations that the purported termination of the plaintiff's employment "confirmed by letter from Independent Newspapers (Ireland) Limited to the plaintiff dated 11th October, 2010" was –

(i) unlawful, invalid or void, and

(ii) was procured in breach of fair procedure including breach of the plaintiff's natural and/or constitutional rights.

The plaintiff also claims damages for breach of contract, negligence and breach of duty.

2. The defendant

2.1 The defendant is a limited liability company incorporated in the State. It operates a private third level college, Independent Colleges, which specialises in courses in law, both for entry into the professional course run by the Law Society and at undergraduate level, and in accountancy.

2.2 The largest shareholder in the defendant is Independent News & Media Holdings (Ireland) Limited (Holdings), which I understand is a company in the Independent News & Media Group (INM Group). Its precise shareholding is not averred to in the affidavits before the Court, but the Court was told that its shareholding is in the region of 70%. The plaintiff is a 17% shareholder in the defendant.

2.3 The plaintiff is one of the seven directors of the company. Mr. Doyle, who has averred that he was "Group Enterprise Director INM, Plc" before becoming Chief Executive Officer of the defendant, is also a director. Of the remaining five directors, four are employees or officers of companies within the INM Group.

2.4 The shareholding in the defendant is the subject of a shareholders' agreement dated 9th July, 2009 to which the defendant is a party, as are all the other shareholders, including the plaintiff. The Court was referred to Clause 6 of that agreement which deals with the conduct of the defendant's affairs and the obligations of the shareholders in respect thereof and, in particular, to Clause 6.1.9, which provides that, subject to the express provisions of the agreement, the board of directors of the defendant determines the general policy of the defendant, including the scope of its activities and operations and that the board reserves to itself all matters involving major or unusual decisions. Further, the Court was referred to Clause 9 thereof, which provides that, in relation to certain matters, including the appointment or removal or entering into any contract, whether of employment or otherwise with, or altering the terms of employment of, *inter alia*, the Chief Operations Officer and other senior executives, the prior written consent of Holdings is

required.

2.5 Amended articles of association of the defendant, which reflect the provisions of the shareholders' agreement, were filed in the Companies Registration Office on 21st July, 2009. Regulation 18 and Regulation 21.1 of the articles were obviously intended to reflect Clause 9 of the shareholders' agreement, save that they refer to the consent of the "Shareholder Majority", which, by reference to Regulation 15, appears to mean one or more shareholders who alone or between them hold 70% or more of the equity share capital of the defendant.

2.6 The position of the defendant, as set out in Mr. Doyle's affidavit, is that the plaintiff's status as a shareholder and as a director of the defendant is not affected by the recent events which the defendant contends have resulted in his ceasing to be an employee of the defendant.

3. The plaintiff's employment

3.1 There is a lot of background factual material in the plaintiff's affidavit in relation to the setting up of, and his involvement with, Independent Colleges, which I consider not to be material to the determination of the issues before the Court at this juncture. The crucial factual matters are the terms on which the plaintiff was employed by the defendant.

3.2 The plaintiff's contract of employment was executed in September 2007. His employer was named as the defendant (by its former corporate name) "trading as Independent Colleges", which is referred to thereafter as "the College". The contract provided that commencement of the plaintiff's employment would be 10th September, 2007 and that he would also be appointed "as a Director of the College and a member of its Management Board". His job title was "Chief Operating Officer and Head of the Law School". He was to report to the Management Board. Subject to the provisions of Clause 16, he was employed on a full time permanent basis.

3.3 Clause 16 dealt with notice and termination. Clause 16.1 provided that the plaintiff's employment might be terminated during its term by "either party giving to the other 16 week's notice in writing". There was also a provision for termination by the defendant with or without notice in the circumstances listed in Clause 16.2. That provision has not been invoked by the defendant and it has been made clear in Mr. Doyle's affidavit that the defendant has no complaint about the quality of the plaintiff's work and no issue of misconduct arises. Clause 16.4 provided:

> "In the event of termination by the College for reasons other than misconduct or poor performance, you will be entitled to compensation payment of an amount equivalent to three month's basic salary. This will be subject to you executing a waiver and release agreement in full and final settlement of all claims as you may have at such time against the College and any associated undertakings in a form reasonably satisfactory to the College. For the avoidance of doubt, in the event of such payment being made, you will not be entitled to the period of notice provided for in Clause 16.1."

Clause 16.5 provided that any notice to be given pursuant to Clause 16 should be given in writing. It further provided that the defendant reserved the right "to make payment of salary in lieu of such period of notice".

3.4 Clause 13, the application of which to the plaintiff has been the subject of controversy, provided:

> "During the continuance of your employment hereunder (including, but not limited to, any period after notice of termination has been served by either party) there shall be no obligation on the College to require you to work or perform any duties or services for the College or to provide you with any work and if the College gives written notice to you requiring you not to work or to perform any duties or services for any given period, then during such period you shall not be entitled to attend at or have access to the offices. You will however continue to be entitled to receive your full salary and other benefits hereunder."

4. The purported termination of the plaintiff's employment

4.1 While there is a conflict of evidence as to how the three main players in the events which led to these proceedings, the plaintiff, Mr. Doyle and Mr. Declan Carlyle (Mr. Carlyle), the Deputy Managing Director of Independent Newspapers (Ireland) Limited (IN Ireland), came together in a room in the defendant's premises in Baggot Street in Dublin on 6th October, 2010, it is common case that it was the first occasion on which the plaintiff became aware that his employment was about to be terminated. It is also common case that, when his telephone rang, the plaintiff took advantage of the situation and left the room and left the building. According to Mr. Doyle, and this has not been disputed by the plaintiff, the plaintiff telephoned Mr. Doyle later that day and stated that he was meeting a solicitor to discuss his situation on the assumption that he was going to be "fired". Mr. Doyle gave the telephone to Mr. Carlyle, who informed the plaintiff that he should come back to the meeting and have a discussion and make no assumptions, that a meeting at a venue of his choice on the following day could be arranged and he could bring a representative with him.

4.2 There followed a series of e-mails between the three main players. The first was from Mr. Carlyle to the plaintiff on 6th October (21.36), the purpose of which was stated to be to put in writing what Mr. Carlyle had said to the plaintiff during the telephone conversation. Mr. Carlyle stated that he was responsible for "Group Human Resources" matters and it was "in that regard" that he had been asked to speak to the plaintiff with Mr. Doyle. Mr. Carlyle recorded what happened in the course of the telephone conversation and reiterated the invitation to attend a meeting at a time and place of the plaintiff's choosing with a representative in attendance. The plaintiff's first response to Mr. Carlyle, by e-mail of 7th October, 2010 (07.29), was to record that during the conversation Mr. Carlyle directed the plaintiff to take "garden leave" with immediate effect and to express surprise that there was no reference to the direction in Mr. Carlyle's e-mail. Mr. Carlyle responded by e-mail later that morning (10.38) stating that he had omitted the reference to "garden leave" because it arose during their conversation, presumably on the telephone, in circumstances where he understood at that time that the plaintiff was refusing to meet Mr. Doyle and himself. As the plaintiff had clarified that such was not the case, he had withdrawn the instruction to take "garden leave". That is the position which has been adopted in Mr. Doyle's replying affidavit, namely, that the "garden leave" was "lifted" at that time. 4.3 On the afternoon of 7th October, 2010 the plaintiff initiated a series of e-mails between himself and Mr. Doyle, in the first of which he made the point that he considered that he had no reason to report to Mr. Carlyle, who was an employee of a shareholder of the defendant. I would observe at this juncture that Holdings and IN Ireland are two distinct companies and that the latter is not a shareholder of the defendant. The series culminated in an arrangement that Mr. Doyle would meet with the plaintiff on 11th October, 2010, that the plaintiff was welcome to bring a representative and that Mr. Doyle would ask Mr. Carlyle to join the meeting. In the last e-mail in the series from Mr. Doyle to the plaintiff, Mr. Doyle stated that at the meeting he would inform the plaintiff of how decisions he had arrived at, as Chief Executive Officer of the defendant, would impact directly on the plaintiff, following his review of the College's trading performance. A number of requests from the plaintiff for

particulars of the so-called "Talbot Street review" have not been acceded to by the defendant.

4.4 The meeting which had been arranged duly took place on 11th October, 2010. Present were the plaintiff and his solicitor, Mr. Casey, and Mr. Doyle and Mr. Carlyle. Mr. Casey's memorandum of the meeting has been put before the Court. The defendant did not take issue with that memorandum as representing an accurate account of what had occurred at the meeting.

4.5 The meeting was followed by a letter dated 11th October, 2010 to the plaintiff. It was from IN Ireland and was signed by Mr. Carlyle as deputy managing director of IN Ireland and as "Group Human Resources Director" and it was addressed to the plaintiff C/O his solicitor and copied to Mr. Doyle. This is the only communication in writing to the plaintiff in relation to the proposed termination of his employment with the defendant which exists. The letter opened by stating that it was written confirmation of what had been verbally conveyed to the plaintiff at the meeting earlier that day "with reference to the economically pressured requirement to embark upon a restructuring of the College's operations" that would affect the plaintiff personally. As regards the plaintiff's position, the letter stated:

> "As you were informed, as part of this restructuring it is proposed to make the position of Chief Operating Officer redundant from 25th October, 2010. To that effect, please accept this letter as two weeks notice of intention to terminate your employment for reasons of redundancy.
>
> As advised, this decision is subject to the outcome of an appeal, which may be made by you in writing within seven days of this letter. It should be addressed to Mr. Joe Webb, Chief Executive, IN (I) L (*sic)* Should you decide to appeal, a stay will be put on your termination of employment until the outcome of your appeal is known.
>
> In the event redundancy proceeds, you will have due the following entitlements:
>
> - Statutory Redundancy Lump Sum
> - Any outstanding holiday pay
>
> The first element above will be a tax-free lump sum. Receipt of this will require you to sign the RP50 form. Holiday pay will be processed through payroll and the terminating P45 document forwarded to your home address.
>
> Alternatively, and in addition, (whether you make an appeal or not) you may apply for the application of Clause 16.4 of your contract and receive the additional tax-free payment in return for a signed waiver."

While Mr. Webb is named as Managing Director on the letter heading of IN Ireland, Mr. Doyle has averred that Mr. Webb is "Chief Executive of Independent News & Media (Ireland) Ltd.". I assume that the averment is incorrect and that Mr. Webb is Chief Executive of IN Ireland.

4.6 In the letter of 11th October, 2010 Mr. Carlyle then went on to deal with the question of "Garden Leave, as per Clause 13 of your contract", stating:

> "At our meeting you were advised that you would be placed on Garden Leave with immediate effect as the company determined your ongoing presence during the restructuring, which may ultimately have an effect on you, would be counter to the best interest of the company and to everyone concerned."

There was then reference to a letter from the plaintiff to Mr. Doyle, which has not been exhibited on this application, the content of which was interpreted by Mr. Carlyle as an assumption on the part of the plaintiff that he could resume normal duties. Mr. Carlyle went on to state:

> "This is a misunderstanding on your part and, while you highlight important business related matters in your letter that you wish to attend to, they are now a matter of concern for the Company following its decision to place you on Garden Leave.
>
> …
>
> Garden Leave is a stated term of your contract and does not require cause before its application and its application and any consequential impacts, while regrettable, are simply unavoidable."

4.7 These proceedings were initiated without any preliminary letter from the plaintiff's solicitors to the defendant seeking redress and threatening proceedings, a point to which the defendant sought to attach weight. By way of general observation, if the letter of 11th October, 2010 was not effective to terminate the plaintiff's contract of employment in accordance with its terms, the plaintiff is not precluded from seeking relief from the Court to restrain reliance by the defendant on that letter as being ineffective, notwithstanding that he did not raise the arguments he advanced in support of that proposition either at the meeting on 11th October, 2010 or by letter to the defendant prior to the institution of these proceedings.

5. The legal basis of the plaintiff's claim to entitlement to relief and the defendant's answer to it

5.1 It is important to preface the outline of the plaintiff's claim and the defendant's answer to it by emphasising that the outline is, of necessity, based only on the endorsement on the plenary summons, the plaintiff's notice of motion, the affidavits filed by the parties and the arguments made on behalf of the parties at the hearing by the respective counsel. It is also important to emphasise that what I am endeavouring to do is to extrapolate the essential elements only of the plaintiff's claim and the defendant's answer to it from the comprehensive oral submissions made on behalf of the parties.

5.2 The nub of the plaintiff's claim is that his contract of employment with the defendant has not been properly terminated and that the actions and conduct of the defendant in giving effect to the purported termination communicated to him in the letter of 11th October, 2010 are unlawful and should be restrained pending the trial of the action. It was submitted on behalf of the plaintiff that the purported termination was ineffective on three bases. First, and as I understand it, this was the plaintiff's principal contention, it

was submitted that the decision to terminate the plaintiff's employment had not been made by his employer, the defendant, in the manner stipulated in its articles of association. The plaintiff's position is that any decision to terminate the contract of the Chief Operating Officer must be made by the board of directors. There was no such decision in this case and the communication of the purported termination by Mr. Carlyle was instigated by a shareholder of the defendant, namely, Holdings. Secondly, the decision communicated in that letter, as regards length of notice, did not comply with the requirements of Clause 16 of the plaintiff's contract of employment and, on that ground alone, was not effective to terminate the plaintiff's employment. Thirdly, the plaintiff should have been, but was not, afforded an opportunity to challenge the decision to make him redundant and, on that ground alone, the purported termination infringed the plaintiff's entitlement to fair procedures and was ineffective.

5.3 The defendant's answer to the principal argument made on behalf of the plaintiff was that a board decision was not required to terminate the plaintiff's employment. The decision to terminate was made by Mr. Doyle, the Chief Executive Officer of the defendant, and he had authority to make that decision. The only evidence in support of that contention is to be found in paragraph 17 of Mr. Doyle's affidavit in which he averred:

> "I say that I am the Chief Executive Officer of the [defendant] and I have been given responsibility to carry out all management functions by the INM Board from the outset. This includes decisions with regard to hiring and firing. The plaintiff himself is a member of the [defendant's] Board and it is ridiculous to suggest that the Board would meet to decide if one of its members would be made redundant from his employment."

It is difficult to determine from the documentation before the Court what corporate entity Mr. Doyle was referring to when he referred to "the INM Board". Earlier, in paragraph 5 of his affidavit, he had referred to "Independent News & Media" which was thereafter to be referred to as "INM", but, on its face, that is not a legal entity.

5.4 The plaintiff had supported its argument that a decision of the board was essential by reliance on the commentary in Courtney on the *Law of Private Companies* (2nd Ed.) at para. 8.004 *et seq*. Counsel for the plaintiff relied in particular on a passage from the speech of Lord Wilberforce in delivering a decision of the Judicial Committee of the Privy Council in *Howard Smith Ltd. v. Ampol Ltd*. [1974] A.C. 821, in which he stated (at p. 837):

> "The constitution of a limited company normally provides for directors, with powers of management, and shareholders with defined voting powers having power to appoint the directors, and to take, in general meeting, by majority vote, decisions on matters not reserved for management. Just as it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office, so it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist."

5.5 In response, counsel for the defendant relied on the decision of Costello J., as he then was, in *Thomas Williamson Ltd. v. Bailieborough Co-Operative Agricultural Society Ltd*. (Unreported, High Court, 31st July, 1986). The passage in the judgment upon which counsel for the defendant relied related to a question whether representations made when an individual was signing contracts to purchase property and to guarantee completion of the contracts estopped the defendant in that case from denying that the individual was its agent. In the passage relied on by counsel for the defendant, Costello J. stated:

> "Actual authority can be expressly conferred on a company's board of directors or it can be expressly conferred by the board of directors on an agent or it can impliedly be conferred by them on an agent. Thus when a board of directors appoints a "managing director" or a "secretary" it impliedly confers on the persons so appointed the powers usually associated with holders of such offices."

That passage is not authority for the proposition that Mr. Doyle had power, to use his own terminology, to "fire" the plaintiff, no more than the passage from the speech of Lord Wilberforce establishes that he had not. The crucial factor is what the shareholders' agreement and the articles of association of the defendant, which were amended to reflect the shareholders' agreement, provide.

5.6 In relation to the second argument advanced on behalf of the plaintiff, the position of the defendant was that no issue had been raised by the plaintiff in relation to the term of the notice of termination prior to the hearing. It was submitted that, even if the plaintiff had not been given the correct length of notice in accordance with his contract, that was only a technical breach and it was a breach which could be adequately remedied by an award of damages.

5.7 In relation to the plaintiff's third argument, the position of the defendant was that no issue could be taken by the plaintiff in these proceedings that the decision to make him redundant had not been made in accordance with fair procedures and that any challenge by the plaintiff to the decision to make him redundant in accordance with the relevant legislation had to be pursued in a different forum, namely, the Employment Appeals Tribunal.

6. The substantive law on the core issue and its relevance to the facts.

6.1 As frequently happens when dealing with applications for interlocutory injunction, I consider it appropriate to enter a *caveat* at this stage as to the function of the Court on this type of application and to quote the following passage from the speech of Lord Diplock in *American Cyanamid v. Ethicon Ltd*. [1975] A.C. 396, which was quoted by the Supreme Court with approval in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

6.2 I consider that it is important to emphasise that the Court is addressing the position of the plaintiff as an employee of the defendant, not as a shareholder or a director, on this application. There is no doubt that the defendant, if it went about it properly, could terminate the plaintiff's employment by giving him sixteen weeks notice in writing and that would be the end of the matter, following the decision of the Supreme Court in *Sheehy v. Ryan* [2008] 4 I.R. 258. The question which arises, insofar as it can be addressed on the material before the Court, but without giving any definitive answer to it, is whether the plaintiff is correct in contending that his employment has not been effectively terminated by notice by the defendant in accordance with his contract.

6.3 On the issue as to who has authority within the defendant to decide to terminate the employment of the Chief Operating Officer,

regard must be had to the articles of association of the defendant, as amended to reflect the shareholders' agreement. Having regard to Regulation 21, when read in conjunction with Regulation 18, of the amended articles, it would appear that the function is reposed in the directors of the company subject, however, to the requirement that they must not exercise it without the prior written consent of the "Shareholder Majority", which for present purposes I am assuming is Holdings. There is no evidence whatsoever that the board of directors of the defendant ever delegated that function to Mr. Doyle. Indeed, he has not averred that it was delegated to him by the directors of the defendant. Rather, the averment in his affidavit, which I have quoted earlier, suggests that he considered he was entitled to act on the basis of some arrangement put in place by another corporate entity at the outset, which I take to mean September 2007.

6.4 On the evidence presented on behalf of the defendant, I am not satisfied that Mr. Doyle made the decision to terminate the plaintiff's employment and, even if he did, I am not satisfied that he had authority to do so. That conclusion is informed by the apparent total disregard on the part of the persons or bodies from whom Mr. Doyle takes his instructions as to the proper corporate governance of the defendant and its relationship to the other companies in the INM Group. In the narrative in the first four sections of this judgment I have attempted to highlight the utter confusion which has been created by the involvement of Mr. Carlyle and Mr. Doyle in the events leading up to the initiation of these proceedings and in answering these proceedings. The defendant is the employer of the plaintiff. It is a legal entity separate and distinct from other companies in the INM Group. It is true that Holdings, which I understand to be a company in the INM Group, is a majority shareholder and, as such, has certain important powers under the articles of association. However, that does not mean that IN Ireland, assuming it is a company within the INM Group, has any authority to give the plaintiff notice either under his contract of employment or in accordance with the provisions of the Redundancy Payments Acts of termination of his employment. It is impossible to unravel the corporate confusion in the letter of 11th October, 2010 and in Mr. Doyle's replying affidavit, even when carefully considered in the light of the shareholders' agreement. However, I assume that "INM", referred to in paragraph 17 of Mr. Doyle's affidavit quoted above and in the second paragraph of the letter of 11th October, 2010, in which it was stated that Mr. Doyle was requested by "INM" to review all costs including staff costs associated with the sharp downturn, is Independent News and Media plc. Again, at the risk of unnecessary repetition, even if that company was the biggest investor in the defendant, through Holdings or otherwise, the fact is that the defendant is a separate and distinct legal entity from it and the defendant must be governed and managed in accordance with its own constitutional documents.

6.5 As regards the plaintiff's argument as to the inadequacy of the contents of the letter of 11th October, 2010 to terminate his contract of employment in accordance with the terms thereof, in my view, that argument is well founded and it is not merely technical. The impression I get from it is that the author of it did not understand the provisions of the plaintiff's contract of employment. Either party to that contract, either the employer or the employee, was entitled to terminate that contract on giving sixteen weeks notice in writing to the other. The object of Clause 16.4 was clearly to give the plaintiff, as employee, the option of three months basic salary (which would have equated with twelve or thirteen weeks basic salary), instead of working out his sixteen weeks notice, but the plaintiff's entitlement to invoke it would only be triggered on the employer giving sixteen weeks notice in writing. The fact that the letter of 11th October, 2010 recognises that the plaintiff would have had that option, if he had been served with notice of termination by the defendant, does not remedy the fundamental defect of failure on the part of the defendant to give the plaintiff sixteen weeks notice in writing in accordance with Clause 16.1. Therefore, apart from the lack of authority to terminate the plaintiff's employment on the part of the sender of the letter of 11th October, 2010 as he purported to do, the notice in that letter could not have terminated the plaintiff's contract in accordance with Clause 16.1. Therefore, the type of finality to which recognition was given by the Supreme Court in *Sheehy v. Ryan*, does not arise in this case at this juncture.

6.6 If the sender of the letter of 11th October, 2010 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 my view, the contention of the defendant that the plaintiff could not challenge the redundancy in these proceedings is correct, having regard to the decision of this Court in *Nolan v. Emo Oil Services* [2009] 20 ELR 122. In reaching that conclusion, it is necessary to comment on the submission made on behalf of the plaintiff that the facts of the plaintiff's case are more in line with the facts in *Shortt v. Data Packaging* [1994] ELR 251 than the facts in the *Nolan* case so that this case is distinguishable from the *Nolan* case, and to clarify the effect of the *Nolan* decision.

6.7 In my judgment in the *Nolan* case I did observe that there were two significant features which distinguished the *Shortt* case from the *Nolan* case, one being that Mr. Shortt's employment had not been terminated in accordance with his contract of employment. The other was that Mr. Shortt was an officeholder, as a director of the defendant company, as well as a contract employee. That second factor has given rise to understandable academic comment that it is not clear why the fact that someone is an officeholder should be relevant in the particular context (*cf.,* Cox, Corbett and Ryan on *Employment Law in Ireland* [Clarus Press, 2009] at footnote 18 on page 839). In the context of the effect of termination on notice or termination on redundancy of an employee's contract of employment with a corporate employer, it is not of significance that the employee was also a director or a shareholder of the corporate employer. The only significance of the duality of role is that it that it may assist the employee in discharging the evidential onus on him, if he contends that the corporate employee did not act properly in accordance with its constitutional documents or otherwise.

6.8 It is only fair to acknowledge that the decision in the *Nolan* case could be interpreted as being at variance with the decision of Keane J. in the *Shortt* case and the decision of Costello P. in *Phelan v. BIC* (Ireland) Ltd. [1997] ELR 208. According to the head note in the *Shortt* case it had been submitted to the Court that the defendant intended to honour its obligations to Mr. Shortt pursuant to the Redundancy Payments Acts. In his judgment, Keane J. stated that the statutory redundancy requirements were not observed by the defendants, but emphasised that that issue would have to await the hearing. He granted an interlocutory injunction. In the *BIC* case Costello P. addressed an issue raised by the plaintiff, which he described as "a serious issue", that the Redundancy Payment Act 1967 applied and there was a serious issue in that there had been a complete disregard and breach of the terms of the Redundancy Payments Acts. He stated that there had been no redundancy notice, or redundancy certificate, or offer of a lump sum as required by the legislation. The effect of the illegality was to be tried by the court. In relation to an argument on behalf of the defendant that the illegality did not invalidate the decision, Costello P. stated that was a matter for the trial Judge, but the plaintiff had raised a serious issue that the illegality of the termination meant that the decision was illegal and invalid and had no effect in law. In this case, in the letter of 11th October, 2010, Mr. Carlyle purported to terminate the plaintiff's employment by making him redundant in accordance with the provisions of the statutory redundancy code. 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, I consider 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 can rely on the argument that the letter of 11th October, 2010 was not effective to terminate his employment either on a contractual basis or on the basis of statutory redundancy, he is not so constrained as regards pursuing relief outside the statutory redundancy code.

7. Issues on the application for an interlocutory injunction

7.1 Counsel for the plaintiff accepted that, however formulated, if the relief sought by the plaintiff is a mandatory order requiring the employer to keep him in employment, the first issue on this application is whether the plaintiff has established that he has a strong case that he is likely to succeed at the hearing, following the decision of the Supreme Court in *Maha Lingam v. Health Service Executive* [2006] ELR 137 and the decision of this Court (Clarke J.) in *Bergin v. Galway Clinic Doughiska Ltd*. [2008] 2 I.R. 205. I am satisfied that the plaintiff has established a strong case that he is likely to succeed on his argument that the purported decision communicated in the letter of 11th October, 2010 was ineffective to terminate his employment. However, I propose addressing the various forms of relief sought by the plaintiffs separately later.

7.2 The second and third issues are:

> (a) the adequacy of damages, both as a remedy for the plaintiff if the injunction is refused and he is ultimately successful in his action, and as a remedy for the defendant if it is successful in the action and has to have recourse as to the plaintiff's undertaking as to damages; and
>
> (b) whether the balance of convenience lies in favour of granting or refusing the injunction.

7.3 The approach of counsel for the defendant was that, even if the plaintiff's employment has not been terminated, that situation can be readily remedied by the defendant properly serving sixteen weeks notice of termination on the plaintiff in accordance with Clause 16.1 of his contract of employment and on that basis the plaintiff would be adequately recompensed in damages. In relation to what the Court's attitude should be to the forms of relief claimed by the plaintiff and on the issue of the adequacy of damages and where the balance of convenience lies, counsel for the defendant relied on a passage from the judgment of Clarke J. in the *Bergin* case.

7.4 That case is instructive, in my view, as to the approach the Court should adopt in this case. There the plaintiff, who had been just over a year in his post as Chief Executive of the defendant, was seeking to restrain by injunction anticipated summary termination of his contract on the ground that he was guilty of serious misconduct, broadly speaking on the basis that the defendant was acting in breach of his right to fair procedures. He had sought orders compelling the defendant to re-engage him pending the trial of the action, restraining it from exercising its contractual right to terminate the contract on three months notice and restraining the defendant from appointing a replacement for him. Having found that the plaintiff had made out a strong case that he was likely to succeed, Clarke J. went on to consider the issues of the adequacy of damages and where the balance of convenience lay. He held that the balance of convenience favoured the refusal of the orders sought by the plaintiff requiring the defendant to re-engage him and restraining the defendant from appointing someone else to act as Chief Executive on an interim basis pending the trial of the matter. Potentially irreparable harm would be done to the defendant if such orders were made, which harm would significantly outweigh any harm done to the plaintiff by refusing such orders. The inconvenience to both sides could be minimised by restraining the defendant from appointing someone to the relevant post save on the terms which would enable a trial court, if it so decided, to direct that the plaintiff return to his post. Clarke J. then went on to consider whether there was a basis from restraining the defendant from purporting to exercise a contractual entitlement to terminate the plaintiff's employment on notice being given in the terms of the contract and, in the passage relied on by the defendant, he stated at para. 39:

> "In addition it does not seem to me to be appropriate to restrain the board, if it should be minded to so, from purporting to exercise an entitlement to terminate the plaintiff's contract of employment by giving notice in accordance with the terms of that contract. Whether or not such notice would be effective, in the light of the issues which have arisen in these proceedings, … there does not seem to me to be any basis from restraining the process from being started at this stage. If such notice is served then its validity can be considered at the trial of the action."

7.5 The adoption of a similar approach in this case, that is say, not precluding the defendant from properly invoking its right to terminate the plaintiff's contract in accordance with Clause 16.1 thereof, in my view, would maintain the proper equitable balance between the parties in this case. However, I cannot conclude, as the defendant's argument suggested, that the matter is so straightforward that the defendant may, if it wishes to do so, issue a notice of termination pursuant to Clause 16.1 tomorrow, with the result that the high point of the plaintiff's redress against the defendant would be the equivalent of his salary and emoluments until the expiry of the notice at the end of the sixteen weeks, so that the plaintiff would be adequately compensated in damages. The matter is complicated by the fact that the necessary decision is a decision of the board of the defendant, albeit a decision in respect of which the board has to have regard to the wishes of the "Shareholder Majority". On the basis of the very confused evidence before the Court, and having regard to the fact that the law imposes fiduciary duties on corporate directors, it is impossible to conclude that the defendant can easily correct the situation which has resulted in the plaintiff being able to establish a strong case that he is likely to succeed at the trial of the action on the substantive issue that his contract of employment has not been properly terminated. Given the impact that the loss of his employment will have on the personal, family and professional life of the plaintiff, as disposed to in his affidavit, I am of the view that the defendant has not established that the damages are an adequate remedy for the plaintiff. While the defendant contends that its finances are in a parlous state and points to the plaintiff's own evidence of his financial state, I am not satisfied that the plaintiff's undertaking as to damages would not provide adequate recompense to the defendant for any losses it might incur, if it ultimately transpires that the injunction which I propose granting should have been refused.

7.6 As regards the specific reliefs sought by the plaintiff I find as follows, by reference to paragraph **1.1** above:

> (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. In this case it seems to me that a slight departure from the approach adopted by Clarke J. in the *Bergin* case is justified, because this is not a case in which there is any issue of misconduct on the part of the plaintiff or of the summary termination of his contract. If the defendant is in a position to, and does, properly terminate the plaintiff's employment either in accordance with his contract of employment, or in accordance with the statutory redundancy code, there is no basis for precluding it from so doing.
>
> (b) For the reasons outlined earlier, which support the view that the plaintiff has made out a strong case that he is likely to succeed in establishing the ineffectiveness of the notice communicated in the letter of 11th October, 2010 to terminate his employment, I consider it appropriate to grant an order restraining the defendant from carrying out any steps for the purposes of effecting and/or implementing the purported termination of the plaintiff's employment as communicated by letter from IMN Ireland. However, it seems to me that, having regard to the finding at (a) above, the defendant must be given liberty to apply to discharge the order I propose making in the event of it being in a position to prove that it has properly terminated the plaintiff's employment prior to the trial of the action.

(c) & (d) The issues between the plaintiff and the defendant raised on this application have been fought in open court. This judgment will be given in open court and, in the circumstances, I see no basis for restraining the defendant from representing that the plaintiff's employment has been terminated or "publishing adverse statements" to the effect that it has been terminated.

(e) In relation to whether the defendant can place the plaintiff on "Garden Leave", that depends on the proper construction of Clause 13 of the plaintiff's contract of employment, which is quoted in full in paragraph 3.4 above. Clause 13, in my view, is clear and unambiguous. It does entitle the defendant, on giving written notice, to require the plaintiff not to work or to perform any duties or services for a given period, and the plaintiff is bound by such notice. It is expressly provides that such notice may apply to "any period after notice of termination has been served". On the basis of the finding that the plaintiff has made out a strong case as to the ineffectiveness of the notice of 11th October, 2010, I find that the plaintiff is entitled to an order restraining the defendant from treating him as having been placed on "Garden Leave". However, the defendant must be given liberty to apply to discharge the order in the event of it being in a position to prove that it has properly served notice on the plaintiff in accordance with Clause 13.

8. Form of order

8.1 The order of the Court will recite the plaintiff's undertaking as to damages and will restrain the defendant, whether by itself, its servants or agents or otherwise, from –

(a) carrying out any steps for the purpose of effecting and/or implementing the purported termination of the plaintiff's employment as communicated by letter dated 11th October, 2010 from IN Ireland, and

(b) treating the plaintiff as having been placed on "garden leave",

pending the trial of the action or until further order. The order will contain an express proviso that the defendant shall be at liberty to apply to Court to discharge –

(i) so much of the order as is referred to at (a) prior to the trial of the action on the ground that the employment of the plaintiff with the defendant has been terminated in accordance with the law, and

(ii) so much of the order as is referred to at (b) prior to the trial of the action on the ground that the defendant has served notice on the plaintiff in accordance with Clause 13 of the plaintiff's contract of employment,

such applications to be on notice to the plaintiff.

8.2 With the co-operation of the parties I will endeavour to case manage this case so that an expedited trial of the action may be achieved.