

THE HIGH COURT

CHANCERY

[2017 No. 1230P]

BETWEEN:

MINIHANE

PLAINTIFF

-AND-

SKELLIG FISH LIMITED

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 27th day of February, 2017**Application for an interlocutory injunction**

1. The plaintiff has issued a plenary summons on the 9th February, 2017, against the defendant Company for the specific performance of a Capacity Sale Agreement which is dated the 4th March, 2016. This Capacity Sale Agreement provides for the purchase of fishing capacity of 324 gross tonnes and 709 kilowatts. The plaintiff is seeking, in these interlocutory proceedings, an injunction restraining the Company from alienating the fishing capacity before the hearing of the action. On the 9th February, 2017, Gilligan J. granted the plaintiff an *ex parte* injunction in similar terms to which he is now seeking an injunction in this interlocutory hearing.

2. The original Capacity Sale Agreement was produced to the Court and it appears to have been signed by the plaintiff, who is defined as the 'Buyer' in the Agreement. The Company is defined as the 'Seller' in the Agreement and the Capacity Sale Agreement appears to have been signed by a director of the Company, Mr. Liam Quinlan, and by the secretary of the Company, Mr. Fintan Quinlan. It is also relevant to note that the Agreement has the Company seal affixed to it.

3. The Agreement provides for a purchase price of €900,000 for the fishing capacity and the payment of a deposit of €90,000. In addition, Clause 5 of the Agreement contains a specific right on the part of the plaintiff to specific performance in event of non-performance by the Company, since it states:-

"In the event the closing is not consummated due to non-performance of Seller regarding any of the covenants in this Offer, all money paid and deposit pursuant to this contract by Buyer shall be returned to the Buyer upon demand, less all expenses incurred against the Vessel on behalf of Buyer; Or the Buyer shall have the right of specific performance."

4. Evidence was produced that the deposit was paid by the plaintiff to the Company's former solicitors, Harrison O'Dwyer, and that Harrison O'Dwyer by letter dated 18th April, 2016, sought permission to release this deposit to the Company, but this was refused by the plaintiff's solicitor pending the actual transfer of the fishing capacity.

5. Sworn evidence was provided by the plaintiff to the effect that on foot of the execution of the said Capacity Sale Agreement whereby he was to acquire fishing capacity, he took steps to have a fishing vessel constructed for a sum of €6 million, which vessel is to be called the Allanah Riley. For this purpose the plaintiff received funding from Allied Irish Bank, €4,925,000 of which has been drawn down by him so far and the Allanah Riley is due to be completed at the end of April of 2017. The plaintiff also averred that the Bank require the Capacity Sale Agreement and the right to the fishing capacity as security for these borrowings. The plaintiff claims that he would not have proceeded with the construction of the Allanah Riley were it not for the existence of the Capacity Sale Agreement.

6. It is against this background that the plaintiff's solicitor, by email dated 9th January, 2017, called on Harrison O'Dwyer to complete the sale of the Capacity Sale Agreement. She was advised by letter dated 11th January, 2017, from Harrison O'Dwyer that their client was on holiday. Then by letter dated 23rd January, 2017, Harrison O'Dwyer advised the plaintiff's solicitor that a meeting had been arranged with the client for Wednesday 25th January, 2017, on his return from holidays. However, on the 26th January, 2017, Harrison O'Dwyer wrote to the plaintiff's solicitor to advise that it had received, on the 25th January, 2017, a letter of authority dated 4th January, 2017, appointing Conway Solicitors.

7. In these circumstances, the plaintiff's solicitor wrote to Conway Solicitors on the 31st January, 2017, seeking an undertaking that the Company would not alienate the fishing capacity and confirmation that the Company would take steps to assign the fishing capacity to the plaintiff.

8. By reply dated the 2nd February, 2017, Conway Solicitors stated that:-

"Harrison O'Dwyer were dealing with the matter on behalf of Liam Quinlan. Not the Company itself."

9. While Conway Solicitors had sufficient knowledge and instructions from the Company to be able to make this statement, it did not have sufficient knowledge or instructions to give the undertaking sought as it stated that it did not have the file, which was still with Harrison O'Dwyer. Indeed, at the hearing before this Court on Thursday 23rd February, 2017, this Court was advised that while the outstanding fees due to Harrison O'Dwyer were discharged on Friday 17th February, the file was still not in the possession of Conway Solicitors. On this basis, counsel for the Company argued that Mr. Dermot Conway, of Conway Solicitors, was still not in a position to give an undertaking along the lines suggested.

10. It is also relevant to note that apart from Mr. Quinlan, the other directors of the Company are Mr. Domonguez and Mr. Quintas and both appear to be resident in Spain. Neither of them has sworn the affidavit filed in this proceedings on behalf of the Company. Rather, this affidavit, which is dated the 21st February, 2017, was sworn by the Company's solicitor, Mr. Conway. In this affidavit Mr. Conway avers that when speaking to the plaintiff's solicitor he did 'express the view that the agreement presented difficulties'. He goes on to aver that:

"Quite aside from the issues between the Plaintiff and the Defendant, I say that the Defendant has been advised to reserve its rights as against the Director, Mr Liam Quinlan, as well as the solicitors acting on his instructions in respect of

their conduct with regard to the transaction relied on by the Plaintiff.”

11. In light of :

- the reference in Mr. Conway’s letter of 2nd February, 2017, to the fact that Harrison O’Dwyer were not acting for the Company in its execution of the Agreement;
- Mr. Conway’s failure, at that time or since, to give the undertaking that the Company would comply with the Agreement;
- the reference in Mr. Conway’s affidavit to the Agreement presenting difficulties, and;
- the express reservation in that affidavit of the Company’s rights against Mr. Quinlan and Harrison O’Dwyer,

it appears to this Court that, in the context of there being in existence a signed and sealed agreement by the Company, a copy of which was provided to Conway Solicitors on the 7th February, 2017, that on the balance of probabilities the primary purpose in obtaining the file is not to challenge the binding nature of the Agreement, but rather to consider whether any action is available to the Company against Mr. Quinlan or Harrison O’Dwyer in relation to the execution of the Capacity Sale Agreement.

12. It is also relevant that in his affidavit, Mr. Conway avers that he is:-

“instructed that the Defendant did not have any intention to sell, charge, dispose or alienate itself of the capacity”.

13. Bearing in mind that this is an affidavit to contest the plaintiff’s claim for specific performance of an Agreement that is signed and sealed by the Company for the sale of the fishing capacity, and in particular to contest the granting of an interlocutory injunction preventing the alienation of that fishing capacity, it is striking that now that Mr. Conway clearly has instructions from the Company to make this averment, that he did not have instructions to give an undertaking not to alienate the fishing capacity pending the trial. Nor indeed did he even have instructions that it was not the Company’s intention to alienate the fishing capacity. Rather the extent of his instructions were that sometime in the past the Company did not have an intention to alienate the fishing capacity.

14. Against this background is the fact that evidence was produced to the Court of emails between the Department of Agriculture, Food and the Marine on the one hand and representatives of the Company on the other hand regarding the possibility of the transfer of the fishing capacity internally between ships owned by the Company. The plaintiff avers that this has led him to be concerned that the Company intends to swap or otherwise deal with the fishing capacity in a manner which would lead to the contamination of the fishing capacity and render it of no use to the plaintiff. As no evidence was produced to the Court of how this ‘contamination’ would occur however, this averment, while it cannot be ignored, must be treated with caution.

15. A letter dated 7th February, 2017, was also produced to the Court by the plaintiff from Mr. Art Kavanagh, who appears to be an independent marine finance consultant. This letter states in relation to the fishing capacity market, that:-

“as things currently stand there is no Capacity readily available even in modest amounts as I and a number of my clients are discovering with the result that projects are unable to proceed”.

16. For its part, the Defendant produced an email from Mr. Gonzalez-Rae dated 21st February, 2017, albeit that Mr. Gonzalez-Rae does not appear to be a broker or financial consultant nor is he independent, since he is a financial manager in a company (Rampesca S.A) that is a shareholder in the defendant Company. This email states, *inter alia*, that:-

“I have been told that there might be some capacity available to purchase in Ireland currently belonging to a shipowner named Mark Amy, who apparently sold his boat to Norway and kept the capacity. There is also a broker named Stephen McCahil who apparently could be in touch with more shipowners with capacity available as well”.

17. The plaintiff has averred that it would be impossible to replace the fishing capacity if the Company were not in a position to comply with the terms of the Capacity Sale Agreement. This Court concludes on the basis of this correspondence that, while it may be overstating the situation to say that it would be impossible to replace the fishing capacity, at a minimum, fishing capacity is scarce.

Application of the law regarding interlocutory injunctions

18. The Company has argued that the Capacity Sale Agreement does not have a closing date for completion of the transfer of the fishing capacity and so there must be some question over its enforceability. However, it seems to this Court that the terms of the Agreement, though brief, are clear and that the plaintiff has, at the very least, an arguable case that the Company is legally bound to sell it the fishing capacity.

19. In considering whether damages would be an adequate remedy for the plaintiff, the Court is influenced by the fact that the Capacity Sale Agreement itself specifically provides for specific performance of that Agreement, rather than damages, in the event of non-performance by the Company. This supports the view that the parties’ own opinion was that damages would not be an adequate remedy in view of the scarcity of the asset being sold.

20. For this reason, and in the light of the amount of money expended by the plaintiff on the Allanah Riley, which he did on the express understanding that he would be acquiring the fishing capacity, this Court concludes that damages would not be an adequate remedy for the plaintiff since he has sworn that if the Company were to alienate the fishing capacity before the trial, he could be left with a €6 million vessel without fishing capacity and in breach of his obligations to Allied Irish Bank and in all likelihood unable to honour his financial obligations to the ship builders.

21. This Court is also of the view that if the interlocutory injunction is granted pending the trial of the action, yet it turns out at the trial that the Company is not in fact bound by the Capacity Sale Agreement, the plaintiff’s undertaking as to damages will adequately compensate the Company for the loss suffered by it, in not being able to alienate the fishing capacity in the months between today’s date and the trial of the action. In this regard, it is relevant to note that the plaintiff has sought a trial of the action within two months of today’s date, as the boat is due to be completed by the end of April 2017.

22. As regards the balance of convenience, it is this Court’s view that granting the injunction would carry a lesser risk of injustice than refusing to grant the injunction, since the injustice of granting the injunction (if the Company wins at the trial), is that it will

lead to a delay in the Company being able to sell the fishing capacity to any other party and also a delay in it swapping the fishing capacity internally between vessels owned by the Company. Yet, it is common case that fishing capacity is a relatively scarce commodity so that if the Company were to win at the trial, it seems likely that it would have no difficulty in selling the fishing capacity to some other party and hence a delay of a few months is not likely to prejudice the Company. Equally, the Court has not been advised that there is any particular prejudice in the Company not being able to swap the fishing capacity internally in the months between now and the trial of the action.

23. On the other hand, if the plaintiff wins at the trial but it is not granted the injunction and the Company was free to, and did sell the fishing capacity to a third party, there is a risk, because of the scarcity of fishing capacity, that the plaintiff might not be able to source fishing capacity from elsewhere. Similarly the plaintiff has raised the risk of the fishing capacity being contaminated if it is transferred internally as appears to be the intention of the Company. While no evidence was produced to the Court of how this would occur, and therefore this Court treats this averment with caution, this Court cannot completely eliminate this possibility when considering where the risk of greater injustice lies.

24. The plaintiff has entered into an agreement for the construction of a fishing vessel which is due for delivery in only two months, at the very significant cost of €6 million, which the plaintiff avers was purchased only because the plaintiff had contracted for the fishing capacity. Thus, it seems that the least risk of injustice lies in seeking to ensure that, when the trial judge determines whether specific performance should be granted of the Capacity Sale Agreement, the status quo is maintained and the Company is prevented from alienating the fishing capacity during what should be a short few months between now and the trial of the action.