Neutral Citation No. [2005] IEHC 43

THE HIGH COURT

[2004 No. 7164 P]

BETWEEN

MICHAEL BAMBRICK

PLAINTIFF

AND
JOHANNA COBLEY

DEFENDANT

Judgment of Mr. Justice Clarke delivered 25th February, 2005.

1. These proceedings arise out of a contract entered into between the defendant as vendor and the plaintiff as purchaser in respect of the sale of certain lands at Kilbline in the County of Kilkenny which contract was in writing and dated 11th day of June, 2004. In circumstances which I will outline more fully later in the course of this judgment the contract has now been completed. However a dispute exists between the parties as to the attribution of fault in relation to the fact that the contract did not close in the time contemplated and in those circumstances the plaintiff continues to maintain a claim in respect of damages for loss which he alleges flows from a breach of contract on the part of the defendant which, he alleges, stems from her delay in so closing. In this application he seeks a Mareva type order freezing part of the proceeds of sale.

2. The plaintiff issued proceedings on 16th May, 2004 in which he claimed specific performance of the above contract (which at that time had not been completed) and in the alternative damages in lieu thereof. For reasons set out in the respective affidavits of Jeremy Chugg (dated 25th June, 2004) and Michael F. Cornwall (dated 6th July, 2004) difficulty was encountered in effecting service of those proceedings. Those difficulties gave rise to an *ex parte* application on behalf of the plaintiff to this court on 5th July, 2004 as a result of which McKechnie J. refused an application which sought to deem good the purported service of the plenary summons in the circumstances set out in Mr. Chugg's affidavit or in the alternative seeking substituted service. McKechnie J. observed that another attempt should be made to serve the proceedings directly. That attempt was made in the manner set out in Mr. Cornwall's affidavit.

3. Parallel with those events on 28th May, 2004 the defendant's solicitors served a 28 day notice to complete on the plaintiff.

4. At all material times the plaintiff was represented by the firm of solicitors Peter G. Crean and Company of which he was a member. The purchaser was represented by Messrs. Thomas A. Walsh and Company in relation to the conveyancing matters but the said firm indicated that they did not have authority to accept service of any proceedings. Lengthy correspondence has been exhibited in the affidavits before me passing between the two firms of solicitors. Suffice it to say that insofar as it relates to the substantive issues which will ultimately have to be resolved in these proceedings it is accepted by both sides that there are fair issues to be tried as to whether the defendant was in breach of contract in relation to the delay in closing and as to whether, as a result of same if it be established, the plaintiff can be said to have suffered loss and damage. However insofar as it is relevant to this application it is important to note that as the conveyancing aspect of the matter neared completion the plaintiff's solicitors wrote to the defendant's solicitors on 2nd August and having made general complaints about the conduct of the conveyancing transaction went on to state as follows:-

> "could you also please confirm that your client is agreeable to leave a sufficient sum of money on joint deposit between our respective firms pending the outcome of High Court proceedings in this matter. We await hearing from you by immediate return".

5. By reply dated the following day (August 3rd) the defendant's solicitors stated as follows:-

> "Further to our telephone conversation this morning I note you confirmed that you would lodge the balance purchase monies into our Anglo Irish Bank account upon receipt of an undertaking from this office to retain the sum of €50,000 until close of business on Thursday August 12th. I confirm that I called you back before lunch, as you requested, to ask where I was to fax this undertaking to, and I left a detailed message on your voicemail which you say you did not receive".

6. There was also faxed on the same date an undertaking in the following terms:-

> "We, M/S Thomas A. Walsh and Company solicitors for the vendor in the above matter, hereby undertake to retain a sum of €50,000 from the nett sale proceeds of the above mentioned property, until close of business on August 12th next unless otherwise instructed by the purchaser in the meantime.
>
> This undertaking is furnished on the basis that the vendor has not authorised this office, to date, to put this money on joint deposit between the offices of the agents acting for the vendor and the purchaser herein.
>
> We trust this is in order."

7. On the 4th August a letter was written by the defendants solicitors to the plaintiffs solicitors concerning an ordinance survey map which is not material to the issues which I have to decide. On the 6th August a letter was written by the plaintiffs solicitors to the defendants solicitors which in material part states as follows:-

> "Transfer of funds is authorised on the strict understanding that you will hold same in trust until at least close of business on the 12th day of August 2004, or if there be no sitting of the High Court on that date or there be a sitting and it be adjourned, then and in those circumstances to hold the said funds until the next sitting of the High Court and in the case of adjournment thereof to the adjourned date".

8. This was in turn replied to on the 10th August by solicitors for the defendant in the following terms:-

> "Further to yours of the 6th inst. we write to confirm in relation to the second paragraph of your letter that we are not, nor have we undertaken to hold the balance of the sale proceeds on trust for you. We have agreed and have furnished an undertaking to you to hold the sum of €50,000 only on trust as per our undertaking to you of August 3rd 2004.
>
> With regard to the specific date until which we will hold this sum on trust we are writing to reaffirm our initial undertaking to retain this sum on trust for you until close of business on August 12th next, or in the alternative, until such time as agreement is reached between the parties as to whether this sum is to be placed on joint deposit between the two firms

or alternatively, until such time as any order which is made in relation to this matter shall provide otherwise."

9. The following day (11th August 2004) the plaintiff applied ex parte to the High Court for an order restraining the defendant from reducing her assets within the jurisdiction below €100,000 and further seeking an order that the said amount be deducted from the proceeds of sale/purchase between the parties and placed on joint deposit between the respective firms of solicitors. That application was grounded upon the affidavit of the plaintiff. The application was granted by Kelly J. and included, inter alia, liberty to the defendant to apply to discharge the order on 24 hours notice to the plaintiff and to the Court. That interim order was specified as being, in the absence of an order in the meantime, to continue until the 11th October 2004 when, it was contemplated, an application for an interlocutory order in the same terms would be moved.

10. It would appear that no copy of the aforementioned order was sent to the defendant prior to the 11th October 2004 nor was the affidavit grounding the injunction application received by that date. It would appear that on the 11th October Kelly J. indicated that he wished to hear from the solicitor dealing with the matter on behalf of the plaintiff on the following day (Tuesday 12th October) and upon that day the plaintiff himself appeared as solicitor and indicated that owing to the fact that he had been on holiday and as a result of a family bereavement he had been unable to transmit to the defendant and her legal advisers the appropriate paperwork. This explanation was accepted by the Court. Subsequently the interlocutory injunction application was adjourned from time to time and ultimately came before me on the 21st February.

11. In answer to the plaintiff's application for an interlocutory injunction) in the same terms as the interim order already made the defendant in substance relies upon two matters:-

1. Lack of candour:
12. It is said that the plaintiff inappropriately failed to disclose in the grounding affidavit (upon which the court was moved to grant the interim injunction) the fact that there had been detailed discussions (as evidenced in the correspondence referred to earlier in the course of this judgment) concerning the terms upon which monies might be retained to meet the possible claim.

No real risk
2. It is also asserted that the plaintiff has failed to establish that there was a real risk that the assets of the defendant would either be dissipated or removed from the jurisdiction of the court with the view to evading their obligations to plaintiff in the event that the plaintiff should succeed.

The Law.
13. In *Re: John Horgan Livestock Limited* [1995] 2 I.R. 411 at 416 and 418 Hamilton C.J. in the Supreme Court approved of the criteria adopted by Murphy J. in the High Court in that case which in turn were derived from the criteria set out by Lord Denning in *Third Chandris Shipping Corporation -v -Unimarine SA* [1979] 2 All ER 972 at 984. The relevant criteria are as follows:-

> "i. The plaintiff should make full and frank disclosure of all material matters in his knowledge which are material for the judge to know.
>
> ii The plaintiff should give particulars of his claim against the defendant stating the grounds of his claim and the amount thereof and fairly stating the points to be made against it by the defendant.
>
> iii The plaintiff should give some grounds for believing that the defendant had assets within the jurisdiction. The existence of a bank account is normally sufficient.
>
> iv The plaintiff should give some grounds for believing that there is a risk of the assets being removed or dissipated.
>
> v The plaintiff must give an undertaking in damages in case he fails".

14. Insofar as this application is concerned items (i) and (iv) would appear to be the relevant matters in that it is accepted by the defendant that the plaintiff has established an arguable case, has given an undertaking as to damages, and has clearly established that there are relevant assets within the jurisdiction being the portion of the proceeds which already stands frozen by the interim order.

Lack of Candour
15. In *Tate Access Floors Inc. - v- Boswell* [1990] 3 All ER 303 Sir. Nicholas Brown-Wilkinson V-C identified full and frank disclosure as being "the golden rule" when he said:-

> "No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the ex parte order and may, to mark its displeasure, refuse the plaintiff further inter partes relief even though the circumstances would otherwise justify the grant of such relief".

16. In *Production Association Minsk Tractor Works and Belarus Equipment (Ireland) Limited – v – Saenko* (High Court unreported 25th February 1998) McCracken J. refused an application for an interlocutory injunction on a number of grounds including the fact that, as he found:-

> "The amounts concerned are very large, almost £300,000 according to the grounding affidavit of this motion. It is a matter of some concern to me that after the interim order was granted, it was conceded in a replying affidavit that over £95,000 of this was in fact paid into an account of the first name plaintiff. This must have been known to the plaintiffs when the original affidavit was sworn."

17. It therefore seems clear that there is a clear obligation on a plaintiff moving for a mareva type injunction to make full disclosure to the court of all matters relevant to the exercise of the courts discretion. Two questions therefore arise:-

> (a) Did the plaintiff in this case fail to make appropriate disclosure; and
>
> (b) If he did so fail what consequences should flow.

18. It seems to me to be clear that the plaintiff failed in his obligation to the court to, in the words of Brown-Wilkinson V.C., "disclose

to the court all matters relevant to the exercise of the courts discretion". In coming to that view I am mindful of the fact that, as Lord O'Hagan L.C. put it in *Atkin-v-Moran* [1871] I.R. 6 E.Q. 79

> "The party applying is not to make himself the judge of whether a particular fact is material or not. If it is such as might in any way affect the mind of the court it is its duty to bring it forward."

19. I am also mindful of the fact that the courts have noted (for example in *Brink's-Matt Limited –v- Elcom* [1988] 3 ALL E.R. 188) that in particular in heavy commercial cases the borderline between material facts and non-material facts can be a somewhat uncertain one and that, without discounting the heavy duty of candour and care which falls upon persons making ex parte applications, the application of the principle of disclosure should not be carried to extreme lengths.

20. Taking those authorities it would seem that the test by reference to which materiality should be judged is one of whether objectively speaking the facts could reasonably be regarded as material wit materiality to be construed in a reasonable and not excessive manner.

21. The explanation given on behalf of the plaintiff for the non-disclosure of the correspondence and discussions concerning a possible agreement to lodge monies on joint deposit was that the undertaking given on behalf of the defendant was to last only till close of business on August 12th which, in the events that happened, was the day after the application for an ex parte order was made. While this is true it should also be noted that the undertaking when originally given was to last for a period of nine days and, perhaps more importantly, the sum which appears to have been agreed to be retained, insofar as one may infer an agreement from the correspondence, was a sum of €50,000 rather than the sum of €100,000 in respect of which an application to freeze was made. It is difficult to see how the fact that the parties had been discussing a retention of €50,000 would not have been a material factor in the exercise of the courts discretion as to the amount in respect of which the mareva injunction might have been granted. Whether an interim injunction would have been granted at all could also have been affected, if the court had know this, by the fact that the plaintiff had an adequate opportunity to seek to move the court on notice for an interlocutory order had he moved with expedition following the receipt of the undertaking of the 3rd August. While the relevant period was during the long vacation there is a duty judge sitting on each day during that period. It would at least have been possible to seek a short service of a motion returnable for any day prior to the 12th August so that an interlocutory application rather than an interim application could have been made. It is at least possible that a court might, in those circumstances, have been reluctant to make an *ex parte* order where the plaintiff had the benefit of a solicitors undertaking and thus was in no immediate danger of the assets being removed upon notice being given of an intention to apply for an interlocutory order.

22. For all of those reasons I am satisfied that there was a significant and material failure to disclose matters which should have been disclosed on the interim application. This leads to a consideration of the consequences.

The consequences of non-disclosure

23. In the ordinary way the rights of a defendant in respect of whom an adverse order has been made *ex parte* in circumstances where full disclosure has not been made it to apply to the court to have the order discharged. However for the reasons set out above the defendant was not aware of the contents of the grounding affidavit until the matter came back before the court by way of an interlocutory application order some two months later. In those circumstances the defendant, in her affidavit of the 30th November 2004, invites the court to discharge the interim order and also invites the court to decline to make an interlocutory order. That the consequences of non-disclosure are not automatic can be seen from Lloyds *Bowmaker Limited –v- Britannia Arrow Holdings Limited* (1988) 3 All ER 178 where Gildewell L.J. said:-

> "Certainly on the more recent authorities it is my view that the High Court would have a discretion to grant a second mareva injunction, and it may well be that this court would have a discretion to preserve the status quo in the meantime pending such an application, or a discretion itself to grant a second mareva injunction".

24. In the same case Dillon L.J. stated:-

> "I find it a cumbersome procedure that the court should be bound, instead itself granting a fresh injunction, to discharge the existing injunction and stay the discharge until a fresh application is made, possibly in another court, and the court which is asked to discharge the injunction should not simply, as a mater of discretion in an appropriate case, refuse to discharge it if it feels that it would be appropriate to grant a fresh injunction. That leaves me to think that there is a discretion in the court on an application for discharge".

25. In practice it is likely that an application for discharge will come on for hearing at the same time as an application for an interlocutory injunction. In the circumstances it seems to me that the approach of Dillon L.J. is to be preferred. Therefore it seems to me that the court has a discretion, in cases where failure to disclose has been established to refuse to grant the interlocutory injunction and to discharge the already granted interim injunction but is not necessarily obliged to do so.

26. It is therefore necessary to consider, in general terms, the criteria which the court should apply in the exercise of such discretion. Clearly the court should have regard to all the circumstances of the case. However the following factors appear to me to be the ones most likely to weigh heavily with the court in such circumstances:-

> 1. The materiality of the facts not disclosed.
>
> 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.

27. Applying those criteria to the facts of this case it does seem to me that the non-disclosed facts were of significant materiality. For the reasons set out above there is a very real possibility that the court would either have made no order or potentially required short service and considered an order only in respect of a significantly lesser sum had it been apprised of the full facts.

28. While I am not prepared to hold on the evidence that the plaintiff deliberately mislead the court I am constrained to the view that as a solicitor the plaintiff, in particular, ought to have been aware to his duty to disclose all material facts and must be regarded as

significantly culpable in failing to bring to the attention of the court matters which on any objective view would have had the potential to influence the courts determination.

29. Insofar as there as there are other factors surrounding the case which might legitimately be taking into account it seems to me that they cut both ways. It is undoubtedly a legitimate criticism of the defendant that she seems to have placed significant barriers in the way of service being effected. It is equally true to state that the plaintiff was guilty of a significant failure in relation to his bringing the attention of the defendant to the existence of the interim order and the service of the relevant documentation. While it would be inappropriate for me to go behind the acceptance by Kelly J. of his explanation in that regard it should, nonetheless, be noted that a party who obtains an onerous order (and in particular a party obtains such an order *ex parte*) has a clear obligation to act with appropriate expedition.

30. In all the circumstances it seems to me that I should exercise my discretion in favour of the application by the defendant to discharge the interim order and against any consideration of the merits of granting a further order.

31. In case I should be found to be wrong in that view I should express an opinion as to whether, in the ordinary way, it would be appropriate to grant an interlocutory order. In this regard the only real issue is as to whether it has been established that the plaintiff has, in the words of O'Sullivan J. in *Bennett Enterprises Inc. & Ors. –v- Lipton & Ors* [1999] 2 I.R. 221, established that there was "a real risk that the assets of the defendants would either be dissipated or removed from the jurisdiction of the courts with a view to evading their obligations to the plaintiffs in the event that the plaintiffs should succeed".

32. In this case there is no evidence of an intention to dissipate but there is clear evidence of an intention to remove certain assets from the jurisdiction being the balance of the nett proceeds of the sale of the property the subject of these proceedings. However the real question is as to whether it has been established that there is a real risk that such removal is "with a view to evading their obligations to the plaintiff in the event that the plaintiff should succeed". In that regard the defendant draws attention to the fact that she retains in the jurisdiction a property which appears to be valued at €30,000. She further draws attention to the fact that the sum being discussed for retention prior to the institution of proceedings was only €50,000. Furthermore she draws attention to the fact that the balance of her assets will be available within the United Kingdom which is, of course, a country in respect of which the judgement convention operates so that any order of the court in this jurisdiction will be enforceable under the provisions of the convention in the United Kingdom. As this latter point raises a matter of principle I should express my views upon it.

33. It is trite to say that a plaintiff is not entitled to security for every claimed liability. The 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 arguebility 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.

34. In answer to this latter point counsel for the plaintiff makes the undoubtedly correct assertion that notwithstanding the existence of the judgments convention it might prove difficult, in practice, to collect on foot a judgment of the court. Of course it should be pointed out that such a situation is not confined to persons outside the jurisdiction or whose assets are predominately outside the jurisdiction. Many plaintiffs experience difficulty in securing practical recovery on foot of court orders. However it seems to me that where a defendant has readily identifiable assets which are held in a convention country that is a factor which the court can properly take into account in assessing whether there is a real risk that the removal of further assets from this jurisdiction to another convention country can be said to be "with a view to evading obligations". While the removal simplicitor of assets from this jurisdiction to another jurisdiction can, of itself, be such as to give rise to an inference of a reasonable risk of evasion of obligation that inference will weigh less strongly in a case where the second country is a convention country and where therefore, in the ordinary course, the judgment of this court will be as enforceable as within this jurisdiction.

35. Having regard to the weight which should, therefore, be properly attached to the removal of assets to the United Kingdom and the other factors identified above I am not satisfied that the plaintiff has discharged the onus of establishing that the removal of any further assets to the United Kingdom would be "with a view to evading obligations". In the circumstances even if I did not consider it appropriate to exercise my discretion against considering the merits of the interlocutory application currently before me I would have refused same.