[2019] IEHC 941

THE HIGH COURT

[2018 No. 706 S]

BETWEEN

**INNOVATIVE HEALTH CARE DISTRIBUTION L.L.C.
AND ENVIROTEK WORLD WIDE L.L.C.**

PLAINTIFFS

AND

**SEAMUS KILGANNON, WORK LAB INNOVATION LIMITED AND
WORK LAB INVESTMENTS LIMITED**

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 19th day of December, 2019

Background

1. The first named plaintiff and the second named plaintiff are both companies incorporated in Charlotte, North Carolina, United States.

2. The first named defendant is a company director and is the Managing Director of the second and third named defendants.

3. The second named defendant is a private company limited by shares with its registered office at 24-26, IDA Industrial Estate, Cork Road, Waterford, and was formerly known as "*Schivo Precision Limited*".

4. The third named defendant is also a private company limited with shares and has the same registered office as the second named defendant. The third named defendant was formerly known as "*Schivo Group Limited*".

5. On 10 October 2017, a Court sitting in the County of Mecklenburg in the State of North Carolina, United States, ordered that the plaintiffs recover judgment against the defendants, for the amount demanded being $1,190,781.00 (the judgment).

6. Subsequently, it came to the plaintiffs' attention that there was a clerical error in the judgment as "*Schivo Group Limited*" was named twice in the final paragraph of the judgment in place of "*Schivo Precision Limited and Schivo Group Limited*". This error was corrected by a further Order of 6 February 2018.

7. On 6 February 2018, a motion to set aside the judgment was issued by the defendants. This motion was heard on 16 May 2018 and the reliefs sought were refused.

8. The plaintiffs have issued a summary summons seeking to enforce the judgment. In a notice of motion, dated 24 July 2018, the plaintiffs seek summary judgment against the defendants of the said sum of $1,190,781.00. The defendants, who entered a conditional appearance, are resisting the plaintiffs' applications, seek leave to defend the proceedings and have the matter remitted to plenary hearing.

"The Supply Agreement"

9. The plaintiffs were granted judgment on the basis that the defendants were in breach of the Supply Agreement. This Agreement was entered into by the second named plaintiff

and the second named defendant (then named "*Schivo Precision Limited*"). The following is stated in the Agreement: -

> "This ("Supply Agreement") is made as of the 30th day of June, 2016 (the "effective date"), by and between (1) Envirotek World Wide Co ("Envirotek"), located in Charlotte, N.C. and (2) Schivo Precision Limited ("Schivo") located in Waterford, Ireland. Envirotek and Schivo are individually referred to as "party" and collectively referred to as "parties", and their parents, subsidiaries, affiliates, and assigns."

10. Under the Supply Agreement, Schivo agreed to manufacture, assemble, and sell the products listed in Exhibit 1 to the Agreement. The Supply Agreement also contained the following jurisdiction clause: -

> "(b) GOVERNING LAW. This supply agreement shall be interpreted, construed, and enforced in accordance with the laws of North Carolina, U.S.A. This agreement shall be construed under North Carolina law. Any claims for breach of this Agreement or for any other reason are required to be brought in Mecklenburg County, North Carolina, or in the Federal District Court for the Western District of North Carolina, Charlotte Division. All parties consent to jurisdiction and venue as described."

The Agreement was signed by Richard F. Admani, CEO, on behalf of the second named plaintiff and by the first named defendant, CEO of the second named defendant.

Principles to be applied

11. As already stated, the defendants are seeking to have the plaintiffs' claim to enforce the judgment remitted to plenary hearing. The threshold which the defendants must reach was clearly set out in *Bussoleno Limited v. Kelly & Ors* [2011] IEHC 220. In this case the plaintiffs were seeking to enforce a judgment obtained in the State of Florida, United States against the defendants. The Floridian judgment was granted pursuant to a mediated settlement agreement and the second and third named defendants opposed the application for summary judgment and sought orders pursuant to O.37, r. 7 of the Rules of the Superior Courts, giving them leave to defend the proceedings and that the matter be remitted to plenary hearing. In the course of her judgment, Finlay Geoghegan J. set out the principles that a court should apply in such an application. She stated: -

> "8. There is no dispute between the parties as to the test to be applied by the Court in determining the application for summary judgment and Mr. McCabe and Mr. Walsh's applications for leave to defend. It is in accordance with the principles set out by the Supreme Court in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607, and *Danske Bank A/S trading as National Irish Bank v. Durkan New Homes* [2010] IESC 22, in reliance upon earlier decisions and as applied and expanded upon by the High Court in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1. In *Aer Rianta v. Ryanair,* Hardiman J., at p.623, summarised the test in the following terms:

> 'In my view, the fundamental questions to be posed on an application such as this remain: Is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?'

In *Danske Bank v. Durkan*, the defence contended for included a question of law being the construction of a document and Denham J., at p.8, in setting out the law and having referred to the above extract from the judgment of Hardiman J. in *Aer Rianta v. Ryanair*, also cited with approval the following statement by Clarke J. in *McGrath v. O'Driscoll* [2007] 1 ILRM 203, at p.210:

> 'So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment.'"

12. Having identified the threshold which must be reached by the defendants, the next matter that must be addressed is what defences are available to defendants on an application such as this. In considering this, the courts have adopted the rules as set out in *Dicey, Morris and Collins on the Conflict of Laws* (15th Edition, Sweet and Maxwell, 2012). It is clear from a number of authorities opened to the Court that these rules are applied almost as if they were statute law. There is no dispute between the parties as to what are the relevant rules. In order for the judgment to be recognised and enforced by this Court, it must be shown that the judgment is: -

    (i) Based on an action *in personam* for a liquidated sum;

    (ii) Handed down by a court of competent jurisdiction (competence to be determined by reference to domestic common law principles); and

    (iii) Final and conclusive.

13. If the defendants satisfy the Court that they have an arguable case on all or any of the following: -

    (i) The foreign court did not have jurisdiction to give the judgment;

    (ii) The judgment was obtained by fraud;

    (iii) Recognition of the judgment would be contrary to domestic public policy; and

    (iv) The foreign proceedings in some way breached the principles of natural or substantial justice.

    then the court must grant the defendants leave to defend the proceedings and remit the matter to plenary hearing.

14. It is not disputed that the plaintiffs' action was *in personam*, for a liquidated sum, and that the judgment of the Court in North Carolina was final and conclusive.

Jurisdiction of the Court in North Carolina

15. Two matters need to be considered. Firstly, the plaintiffs' reliance on the jurisdiction clause in the Supply Agreement, set out at para. 10 above, and, secondly, the defendants' application to set aside the judgment, which was heard on 16 May 2018.

16. As to the interpretation and application of the jurisdiction clause in the Supply Agreement, I am mindful of the passage of Clarke J. in *McGrath v. O'Driscoll* where he referred to a court considering questions on the construction of documents "*within the somewhat limited framework of a motion for summary judgment*". The defendants submit that the Supply Agreement is binding only on the second named plaintiff and the second named defendant but that the judgment is sought by the plaintiffs to be enforceable against the first named defendant and the third named defendant. The plaintiffs maintain that the wording of the agreement, referred to at para. 9, includes the first named defendant and the third named defendant.

17. The first named defendant, in his affidavit to set aside the judgment, states that the first named plaintiff is not a party to the Supply Agreement. Further, the defendants submit that the first named defendant signed the Agreement only in his capacity as CEO to the second named defendant. Thus, it is submitted, the plaintiffs were not entitled to judgment against these defendants and, more particularly, were not entitled to rely on the jurisdiction clause.

18. To my mind there is an issue as to who are the parties to the Supply Agreement. I do not think that this is a straightforward issue and attempting to resolve it in the course of a hearing for summary judgment does amount to a real risk of an injustice being done.

19. I do not accept that the motion to set aside the judgment, which expressly denies the jurisdiction of the Court in North Carolina, could be considered to be a submission to jurisdiction. Were this not the case it would, in effect, mean by contesting jurisdiction you were, in fact, submitting to jurisdiction. Such could be seen to be a variation of the classic "*catch 22*" situation. I believe that I am supported in this approach by the following passage from *Dicey, Morris & Collins on the Conflict of Laws*, relied upon by the defendants: -

> "where a litigant … pleads to the merits without contesting the jurisdiction there is clearly a voluntary submission … if the defendant takes no part in the proceedings and allows judgment to go against him in default of appearance, and later moves to set the default judgment aside, the application to set aside may be a voluntary appearance if it is based on non-jurisdictional grounds, even if the application is unsuccessful."

20. By reason of the foregoing, I am satisfied that the defendants have made out an arguable case that the Court in North Carolina did not have jurisdiction to give the judgment.

Fraud

21. The defendants submit that the judgment was obtained by fraud. There is an overlap between the issues of jurisdiction and fraud in that it is contended by the defendants that the plaintiffs misled the Court in North Carolina that all the defendants were parties to the Supply Agreement so as to rely on the jurisdiction clause.

22. The principal issues on fraud centre on the defendants' contention that the plaintiffs' claim, on foot of which the judgment was granted, was not based on the Supply Agreement at all. Reliance is placed on the terms of the "*complaint*" which set out the plaintiffs' claim in the North Carolina Court. The affidavit of the first named defendant takes serious issue with a number of the claims in the "*complaint*".

    (i) Paragraph 30 of the complaint states that the second named plaintiff paid the sum of $400,000 to Schivo (which is not defined in the complaint). Whereas the first named plaintiff states, that in fact, the payment was made personally by Mr. Richard F. Admani, who signed the Supply Agreement, to the second named defendant. Further, it is stated that this payment was made some eleven months prior to the parties entering into the Supply Agreement. Support for this is in a bank statement exhibited in the affidavit of the first named defendant.

    (ii) Paragraph 31 of the complaint makes reference to the second named plaintiff having paid the sum of $409,058.50 for the purchase of certain products. The first named defendant has exhibited documentation which indicates that this order was placed by another entity and not by either of the plaintiffs.

    (iii) Paragraph 38 of the complaint refers to a payment by the plaintiffs of a sum of $41,000 to Schivo in March, 2017 (equivalent to €37,654.44). This amount the defendants allege is claimed for a second time at para. 41 of the complaint. In his affidavit the first named defendant relies on what he characterises as "*false claims*".

23. The detail and supporting documentation exhibited by the defendants lead me to the conclusion that what is claimed by the defendants is more than mere assertions. I do not believe that these matters can be resolved on affidavit.

24. The next matter I must address is: do the issues raised by the defendants on the amounts claimed on foot of which the judgment was granted amount to fraud.

25. The issue of setting aside a prior judgment on grounds of fraud was considered by the Supreme Court in *Desmond v. Moriarty* [2018] IESC 34. In giving judgment McKechnie J. referred to a number of passages from the judgment in the *Ampthill Peerage Case* (1977) A.C. 547 where, at p. 591, Lord Simon stated: -

> "To impeach a judgment on the ground of fraud it must be proved that the court was deceived into giving the impugned judgment by means of a false case known to be false or not believed to be true or made recklessly without any knowledge on the subject. No doubt, suppression of the truth may sometimes amount to

suggestion of the false: the *Alfred Noble* (1918) P. 293. But, short of this, lack of frankness or an ulterior or oblique or indirect motive is insufficient."

26. At para. 84, in summarising the principles to be applied setting aside a judgment on grounds of fraud, McKechnie J. states: -

"(i) The power to set aside a final judgment on the ground of fraud is an exceptional one.

(ii) This jurisdiction must be seen against the backdrop of the important principle of *res judicata* and of the public policy which discourages endless litigation, which reflects the interest of all citizens who resort to litigation in obtaining a final and conclusive determination of their disputes.

(iii) There are three aspects of this important, though exceptional, power:

a) First, the quality or degree of fraud or dishonesty that must be alleged. In order to ground an action to set aside a judgment, the plaintiff must allege fraud in the true sense, that is, *deliberate and purposeful dishonesty,* knowing and intentional deceit of the court.

b) Second, the extent to which it must be shown that the alleged fraud affected the impugned judgment. In this respect, the fraud alleged must be such as to affect the impugned decision in a *fundamental way*. It will not suffice to allege that the new situation revealed by the uncovering of the fraud *might* have affected the judgment. The fraud must be such as to 'change the whole aspect of the case'. Put another way, the fraud must go to the root of the case.

. . .

c) Third, the particularity with which the fraud must be pleaded. The allegation of fraud said to have deceived the former court must be pleaded with particularity and exactness. The nature of the fraud, deceit or dishonesty must be clearly and unambiguously alleged."

27. The defendants' criticism of the matters alleged in the "*complaint*" is both comprehensive and detailed and clearly goes to the root of the case. What is alleged by the defendants' goes well beyond inaccuracy on the part of the plaintiffs in formulating the complaint and, arguably, amounts to fraud. I am satisfied that I should grant leave to the defendants to defend the matter on the issue of fraud and remit the action to plenary hearing.

Breach of natural justice

28. The defendants alleged that the hearing of the plaintiffs' claim in the North Carolina Court breached principles of natural justice. The judgment was said to be obtained on foot of a *"five-minute motion calendar*" or a so called "*fire cracker*" motion. This could indicate that the Court put speed ahead of justice. However, in my view this is only "*an assertion*" and, in the absence of more detail, does not reach the threshold of being an arguable ground. For the sake of completeness, though raised by the defendants, it does appear that no serious issue arises on the issue of service of the proceedings.

Conclusion

29. I am satisfied that the defendants be given leave to defend the proceedings and that the matter be remitted to plenary hearing on the following issues: -

    (i) The construction and interpretation of the Supply Agreement;

    (ii) Whether or not the Court in North Carolina, United States, had jurisdiction to give the judgment; and

    (iii) Whether or not the judgment was obtained by fraud.