THE COURT OF APPEAL

Record Number: 2021/97
High Court Record Number: 2021/849P

Whelan J.

Neutral Citation Number [2022] IECA 9

Noonan J.
Haughton J.

BETWEEN/

PHILIP WARD

PLAINTIFF/APPELLANT

-AND-

TOWER TRADE FINANCE (IRELAND) LIMITED
& AENGUS BURNS

DEFENDANTS/RESPONDENTS

JUDGMENT (*Ex Tempore*) of Mr. Justice Noonan delivered on the 13th day of January, 2022

1. The appeal before the court today is brought from the judgment and order of the High Court (Allen J.) of the 12th March, 2021 whereby he refused the plaintiff's application for an interlocutory injunction restraining the sale of certain lands.

2. I propose to adopt the statement of the facts, which are not in dispute, set out in the judgment of the High Court and a brief summary of the relevant matters will suffice.

3. The plaintiff is the father of Michael Ward who appears to be the beneficial owner of a company called Michael Ward Engineering Limited ("the Company"). The plaintiff and his son are both directors of the Company. On the 8th December, 2014, the first defendant ("Tower") entered into a contract with the Company described as a Trading Agreement. This agreement was in effect a form of loan arrangement whereby Tower agreed to discharge debts to the Company's trade creditors as they fell due in consideration of

specified commission and charges levied by Tower. The agreement was executed on behalf of the Company by the plaintiff and his son. Clause 24 of the agreement provided as follows: -

> "The terms and conditions of this agreement shall be construed in accordance with the laws of South Africa. The supplier and buyer submit to the non-exclusive jurisdiction of the High Court of South Africa, South Gauteng Local Division."

4. On the same date as the Company entered into the Trading Agreement, Michael Ward entered into a guarantee and indemnity with Tower whereby he agreed to guarantee, as principal obligor, all sums due by the Company to Tower. Clause 25 of the guarantee provided as follows: -

> "25.1 This guarantee and indemnity is governed by and shall be construed in accordance with the laws of Ireland and the guarantor hereby irrevocably submits to the jurisdiction of the Irish courts."

5. Pursuant to the terms of the Trading Agreement, by a further agreement of the 11th February, 2015 Tower made available to the Company a trading facility of €100,000. On foot of that facility, Tower paid various suppliers of the Company the sum of €100,125.74. The Company defaulted in repaying this sum to Tower and this eventually led to the Company being wound up on the 16th October, 2015. Arising from the Company's default, demands for payment of the sums due by the Company were made of Michael Ward pursuant to his guarantee in the total amount of €132,032.40. This comprised the principal sum together with accrued contractual interest.

6. On the 20th November, 2015, Tower issued a summary summons against Michael Ward seeking judgment for the amount claimed. No proceedings issued against the Company.

7. It would appear that the summary proceedings came before the High Court on a number of occasions and ultimately were compromised. The terms were reduced to writing in a document entitled "Settlement Agreement". There is no dispute about the terms of this agreement. The parties to the agreement are Tower, Michael Ward and the plaintiff. It provided that Michael Ward consented to judgment for the full sum claimed of €132,032.40. However, there would be a stay for 12 months on entry and execution of judgment on condition that the sum of €100,000 was paid by Michael Ward to Tower within that period whereupon the stay would become permanent.

8. In addition, the plaintiff consented to provide security for his son's obligations under the settlement agreement in the form of a charge over lands owned by the plaintiff and comprised in Folio 12329F, County Monaghan, being a little over 12 acres of agricultural land. The plaintiff further agreed to execute a suite of documents including a guarantee, a family home declaration and a deed of charge. Clause 10 of the settlement agreement provided that it was to be governed by Irish law and the parties submitted to the exclusive jurisdiction of the Irish courts.

9. In the summary proceedings against Michael Ward, he was represented by Mr. Matthew Wales, solicitor, and counsel at all material times. The terms of relevant correspondence concerning the settlement agreement between Mr. Wales and the plaintiff are set out in full in the High Court judgment herein. Essentially, Mr. Wales advised the plaintiff that he should seek independent legal advice before executing the settlement agreement.

10. The plaintiff did so and was provided with such advice by Ms. Anne Skinnader of McEntee and O'Doherty Solicitors. The fact that he was provided with such independent advice by Ms. Skinnader is demonstrated by a memorandum to that effect signed by her and attached to the settlement agreement. Although the agreement is undated, it appears to have been received and filed by the High Court on the 27th February, 2018.

11. The deed of charge was duly executed by the plaintiff and registered as a burden on the Folio on the 12th April, 2018. The second named defendant herein was appointed receiver over the plaintiff's lands in October, 2019. The receiver then put in train arrangements to have the land sold by online public auction on the 17th December, 2020. As recorded by the trial judge, the plaintiff attempted to prevent that auction taking place with the assistance of a man described as a "family friend".

12. This gentleman, who is not a qualified lawyer, apparently drafted a plenary summons on behalf of the plaintiff in which he named not just Tower and the receiver but also the receiver's employer, solicitors and auctioneers. The summons alleges that all of the defendants conspired and colluded to sell his lands unlawfully on foot of fraudulent documents. The summons went on to allege that these matters had caused the plaintiff high blood pressure, respiratory illness, lower self-esteem and life satisfaction, psychological distress, depression and anxiety, suicidal tendencies, stress and anger, psychosis and more work limiting long term illness and disability. It goes on to allege defamation of the plaintiff's name and professional reputation and claimed damages of €500,000.

13. This scurrilous and scandalous document, while never issued as a summons, was circulated to all relevant parties. Despite this entirely improper attempt by the plaintiff to scupper the auction, it went ahead but failed for lack of interest. Of note, however, earlier in December and prior to the date of the auction, the plaintiff consulted his current solicitors who, despite making phone calls to the receiver's solicitors on his behalf, claim not to have been formally instructed until some months later.

14. Following the failure of the first auction, a second auction was arranged for the 25th February, 2021.

15. The plenary summons herein, although it is unsigned and undated, appears to have been issued on the 10th February, 2021, that being the date stamp of the Central Office thereon. The first four paragraphs of the summons allege various breaches but make no claim for relief. It may be that these are intended to ground a claim for damages. The summons goes on to allege that the plaintiff's consent to the charge on his lands was procured through misrepresentation and breach of contract. It cites s. 31 of the Registration of Title Act,

1964 in support of a claim seeking removal of the charge on the grounds of fraud or mistake.

16. The plaintiff also seeks a declaration that the appointment of the receiver is null and void due to misrepresentation by Tower. Paragraph 8, relevant to this interlocutory application, seeks a permanent injunction restraining both defendants from offering the lands for sale or trespassing upon them. There is a further claim for damages for defamation, misrepresentation, breach of contract, trespass and attempted unlawful disposition of the property.

17. It would appear that simultaneously with this, an *ex parte* docket was issued seeking an interlocutory injunction preventing the sale, and rather bizarrely, an order compelling Tower to provide a copy of the summary summons in the earlier proceedings against Michael Ward. The plaintiff's grounding affidavit was also sworn on the same date. He sets out the facts as I have described them. He avers that he signed the guarantee and indemnity (and I assume by extension the settlement agreement) in the belief of a summary judgment having been obtained, suggesting that there is no record of such judgment. He then goes on to say (at para. 9): -

> "I say, for clarity, I would not have consented to the charge if I had the benefit of disclosure from Tower. I am now aware that candour was entirely absent when my 'consent' was obtained under bogus circumstances."

18. Far from bringing clarity to the matter, it is entirely unclear what the plaintiff is referring to when he speaks of disclosure or indeed, bogus circumstances. He refers to difficulties with the original agreement between Tower and the Company. Again this averment is entirely opaque but appears to relate to clause 24 of the trading agreement to which I have already referred.

19. Having set it out, he goes on to say (at para. 12) that on the basis of clause 24, Tower was not entitled to seek summary reliefs in this jurisdiction. He extrapolates from this that Tower was not entitled to threaten him with the consequences of a summary judgment in breach of the Trading Agreement. At para. 14, the plaintiff says his consent to the charge was obtained by non-disclosure on the part of Tower and yet again, fails to identify what the non-disclosure is. Insofar as this might be construed as a reference to clause 24, the allegation of non-disclosure by Tower is somewhat extraordinary when the agreement which contains the clause that was allegedly not disclosed to the plaintiff was signed by him.

20. Accordingly, as articulated in the grounding affidavit, the entire basis for this application rests upon the contention that clause 24 of the trading agreement has the effect, of itself, of rendering the deed of charge over the plaintiff's lands invalid, and for the additional reason that Tower had a duty to disclose the clause to him and failed to comply with that duty.

21. Based on this affidavit and the *ex parte* docket, the plaintiff made an application to the High Court on the 19th February, 2021. It appears that an interim injunction was sought from the court on that date but that was refused and instead, the court granted liberty to serve short notice of a motion seeking interlocutory relief on the following Wednesday the 24th February, 2021, the day before the auction. As the trial judge pointed out, it is not without significance that the affidavit on foot of which the plaintiff moved the High Court *ex parte*, apparently seeking an interim injunction against the defendants, is entirely silent about the earlier auction on the 17th December and the plaintiff's attempts to prevent it proceeding.

22. That seems to me to be a very serious omission and a matter of considerable concern, notwithstanding that the trial judge apparently was prepared to take a benign view of this given the lack of objection by the defendants. Shortly after the making of the *ex parte* application, it seems that the plaintiff and his solicitor, Mr. Nwadike, became alive to the potential difficulty thus arising because on the following Monday, the 22nd February, 2021, both swore affidavits. The plaintiff, in his second affidavit, refers for the first time to the auction of the 17th December, 2020 and the assistance he obtained in relation thereto from a family friend. He says that acting as a litigant in person he was "ill advised in the matter".

23. In his affidavit, Mr. Nwadike avers, at para. 2, that he was instructed by the plaintiff to act on his behalf in these proceedings on the 9th February, 2021. I have to say that I find that averment somewhat surprising in view of the fact that it is absolutely clear that Mr. Nwadike received instructions from the plaintiff, at the latest by the 14th December, 2020, and his office acted on foot of those instructions in contacting the receiver's solicitors. Mr. Nwadike goes on to exhibit in his affidavit a letter of the 19th February, 2021, emailed to the receiver's solicitors after close of business on Friday the 19th February, 2021, following the application to Reynolds J. in which he says: -

> "As you are aware, my application for injunctive relief before Justice Reynolds was heard this afternoon. The said application has now been adjourned in the circumstances that she deems it fit to make an order for short service returnable for Wednesday the 24th February, 2021."

24. A replying affidavit was sworn by Joe Diggins, a director of Tower. He notes that the proceedings were served after close of business on Friday 19th February, 2021 and in consequence were only received the following Monday. He avers, at para. 8, that the summary proceedings brought against the plaintiff's son, Michael Ward, were not challenged by him on any basis in the course of those proceedings. He makes complaint of the fact that despite the plaintiff being aware for some considerable time of the date of the second auction, he had waited until the last moment to apply for injunctive relief.

25. A further affidavit was sworn on behalf of the defendants by their solicitor, Mr. Thomas Dowling, who expresses surprise at Mr. Nwadike's averment that he was only instructed on the 9th February 2021 and refers to the earlier phone call with his office on the 14th December, 2020 by Mr. Nwadike's assistant, "William". He avers that the plaintiff and his solicitors were aware of the intention to sell the property at the latest since the 14th December, 2020 and yet waited until the 19th February, 2021 to move the court.

26. Mr. Dowling's affidavit was replied to by a further affidavit from Mr. Nwadike. He avers that an individual in his office, whom he describes as his assistant and identifies only as "William", met with the plaintiff on the 14th December, 2020 when Mr. Nwadike was not present. For some unexplained reason, and quite unusually, Mr. Nwadike refers to this unidentified person throughout as only "William" without giving his surname. This gentleman did indeed speak to Mr. Dowling on the 14th December on the plaintiff's instructions when Mr. Dowling appears to have informed him that he had received the plaintiff's summons drafted by the family friend. In response to questions from the court this morning, counsel for the appellant, Ms. Sallar, informed the court that she was being attended by Mr. William Murphy and confirmed that he has previously acted as a McKenzie friend in many cases but is now employed by Mr. Nwadike. Regarding the first draft summons, Mr. Nwadike says he refused to act "whilst it was being applied in any way to this case." What this means is unclear and there is certainly no suggestion that this document or any of the accompanying correspondence was withdrawn at any particular time, or at all, by the plaintiff.

27. Mr. Nwadike then says that he was not "formally instructed by the plaintiff until the 9th February, 2021" nor had he agreed terms with him until that date. I have difficulty in understanding the concept of a solicitor being formally, as opposed to informally, instructed by a client. A solicitor is either professionally engaged by a client or he is not. Of course being instructed by a client is quite different from being on record for a party to proceedings. It is of course perfectly permissible for a solicitor to advise and represent a client in relation to proceedings without entering an appearance to those proceedings.

28. While Mr. Nwadike suggests that his office initially represented the plaintiff at latest on the 14th December, he decided thereafter to withdraw because of the summons being "applied" to the case. He does not however explain what happened that changed this position between the 14th December and the 9th February, 2021. In particular, he avers in the final sentence of his affidavit that he refused to act until the plaintiff "disengaged" from the summons.

29. I am afraid this really smacks of doublespeak. I cannot conceive what Mr. Nwadike has in mind when he speaks of the plaintiff disengaging from the summons. If he means writing to all those to whom it was sent expressly withdrawing it and apologising, that certainly did not happen. This Court, like the High Court, has been left entirely in the dark as to what happened to change Mr. Nwadike's attitude, beyond the fact that he had "agreed terms" with the plaintiff.

30. As I have already noted, it is of very serious concern that none of these matters were disclosed to Reynolds J. when an application was made to her for an injunction restraining the defendants from attempting to sell this property for a second time. While the High Court judge was inclined to a charitable view of this on the basis that express objection was not taken by the defendants, and he proposed to say no more than it ought to have been disclosed, I would be inclined to take a slightly different view on this issue, irrespective of whether the defendants take a point about it or not.

31. Every party moving the court on an *ex parte* basis has a duty of candour towards the court to disclose all material facts, whether they favour the party's case or not. This is nothing new and is a principle which is, or ought to be, well known to all lawyers. It is a duty owed to the court, and not to the defendant, and the court can and should have regard to it independently of any position agitated by the parties themselves. I have little doubt but that the facts which were not disclosed to Reynolds J. were highly material to the application that was before her.

32. Certainly, had she been minded to grant the injunction, she would have done so without knowledge of the full facts and, at a minimum, facts which might well have led to an entirely different outcome. In a serious case, this is not only an abuse of process but a contempt of court. However, given that the plaintiff and Mr. Nwadike sought, shortly after the event and before the return date, to correct the position leads me to conclude, as did the trial judge, that no further action should be taken beyond stating that this highly unsatisfactory state of affairs should not have happened.

33. Unlike the trial judge, I also take the view that the failure to move the court over a period of months until the 11th hour, irrespective of whether Mr. Nwadike was involved or not, is a matter to be weighed heavily in the balance against the plaintiff. In the context of both delay and non-disclosure the equitable maxims of delay defeats equity and he who seeks equity must come with clean hands fall to be considered. Both are of relevance to the court's approach in this case. These two matters taken in tandem would, irrespective of the merits, have entitled the High Court in my view to refuse discretionary interlocutory relief.

34. In the event however, the High Court considered the matter on the merits, if they can be described as such. With regard to the first point concerning the jurisdiction clause in the trading agreement, which was described by the trial judge as unstateable, if anything, this is an understatement of the position. Even if the trading agreement with the company were of any relevance to the issues that arise here, which it is plainly not, clause 24 would have no application for the reasons, as explained by the trial judge, that no issue of construction of the contract arose, and consequently neither did any issue of South African law, but more importantly the jurisdiction of the South African Court is expressly stated to be "non-exclusive".

35. As I have said however, this is of absolutely no moment in circumstances where the litigation pursued against Michael Ward, and not the company, was pursued on foot of Mr. Ward's guarantee which is in the clearest terms governed by the laws of Ireland and subject to the, exclusive in this case, jurisdiction of the Irish courts. That is the beginning and end of the matter and the argument that South African law applies and the South African courts have jurisdiction is simply absurd.

36. Even all of that is *nihil ad rem* in circumstances where the receiver's rights in this case to sell the property derive not from the Trade Agreement and not from Michael Ward's guarantee but from the terms of the settlement agreement entered into by the parties and received by the High Court. That agreement, as is abundantly clear, was entered into by

the plaintiff with the benefit, not only of advice from his son's solicitor, Mr. Wales, but also from an independent solicitor retained expressly to independently advise the plaintiff who evidently did so.

37. Even if it could be said, despite all the circumstances, that Mr. Michael Ward had somehow some right to challenge the jurisdiction of the Irish Court in the summary proceedings, which incidentally he did not exercise, then the fact that this may have afforded him a defence is wholly and entirely immaterial to the terms of the settlement agreement, which binds the parties. It would make a nonsense of any settlement if it could be discarded by one party, who comes along after the event and says, I did not realise I had a defence. In this case the plaintiff is not even saying that but rather that his son did have a defence, but chose not to raise it, despite the fact that he had the benefit of full advice from solicitor and counsel. This is to heap absurdity upon absurdity.

38. Falling into the same category is the contention that Tower somehow concealed or failed to disclose to the plaintiff the jurisdiction clause in the Trading Agreement. As the judge said, this does not get out of the starting blocks by reason of the simple fact, if for no other, that the plaintiff himself signed this agreement in order to bind the company of which he was a director.

39. The other issue raised in the notice of appeal concerns the suggestion that the trial judge failed to have adequate regard to the fact that these were family lands in the possession of the plaintiff for a long number of years and he failed to follow his own judgment in *Sammon v Tyrell* [2021] IEHC 6. Here again, I have struggled to understand the relevance of this argument and endorse entirely the views expressed by the trial judge concerning *Sammon* to the effect that it has absolutely no bearing on this case.

40. Today for the first time, Ms. Sallar raised a new point. She suggests that the effect of s. 108 of the Land and Conveyancing Law Reform Act 2009 was to deprive the receiver of the power of sale and this somehow amounted to a misrepresentation by Tower. This argument was not raised in the High Court, in the grounds of appeal or the written submissions before this court and it is impermissible to do so now. In any event, it is entirely wrong. The guarantee signed by the plaintiff contains a clear power on the part of the receiver to sell the lands at clause 10 which is stated to be in addition to the powers in s. 108 of the LCLRA.

41. I am also satisfied that the trial judge applied the correct test in applications for interlocutory injunctions by reference to long established and well settled case law. Quite simply, the plaintiff has not raised any issue in these proceedings which would remotely qualify as a fair issue to be tried and it seems to me that that must be the end of the enquiry. This being a discretionary interlocutory application, it is by now well settled that this court would be very slow to interfere with the exercise of that discretion by the High Court unless a clear error of law has been made or an injustice arises. There is nothing here to suggest either of those things.

42. In conclusion, I note that although the auction on the 25th February, 2021 was unsuccessful, subsequent to the judgment of the High Court, the receiver entered into a

contract for the sale of the lands with a third party on the 29th April, 2021 which remains to be closed but is the subject matter of a completion notice. I note also that a second application for an interlocutory injunction was made to this court (Costello J.) on the 30th April, 2021 and although no written judgment was delivered, it would appear from what the court has been told by the parties that Costello J. refused the order on broadly the same basis as the High Court.

43. Finally, it only remains for me to say that it is a matter of regret and concern that such patently untenable and misconceived arguments as have been advanced in this case, now for the third time, and possibly a fourth if the Supreme Court grants leave to appeal, have allowed the accumulation of enormous costs, almost certainly well in excess of the value of the property concerned, and thus at an entirely disproportionate level, which all ultimately fall for the account of the plaintiff.

44. Perhaps the plaintiff will reflect on the true benefit of the assistance he received originally in this matter from his family friend. It is clear from the content of the summons drafted by this individual and the accompanying correspondence that the language used therein is well familiar to the courts, being a vernacular espoused by individuals and groups with no legal qualification who purport to give assistance for reward in land disputes involving financial institutions.

45. The courts have on numerous occasions drawn attention to the damage wrought by such persons not only on the hapless individuals they purport to advise but on our courts system in terms of the enormous waste of resources to the detriment of legitimate court users. The warning, given in previous cases such as *Start Mortgages v Kavanagh* [2017] IEHC 433 bears repeating that unqualified persons who purport to draft documents for use in legal proceedings for reward commit a criminal offence under s. 58 of the Solicitors Act, 1954.

46. I would dismiss this appeal.