Neutral Citation: [2013] IEHC 400

THE HIGH COURT

[2013 No. 408 P]

IN THE MATTER OF THE PARTNERSHIP ACT 1890

AND

IN THE MATTER OF A PARTNERSHIP KNOWN AS THE RENMORE PARTNERSHIP

BETWEEN

PAUL CULLINAN AND JOHN CULLINAN

PLAINTIFFS

AND

BRENDAN KEOGH

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 6th day of September, 2013.

Background to the proceedings and the application

1. The plaintiffs in these proceedings and their sister, Geraldine (commonly known as Ger) Cullinan (the Deceased), from 1973 onwards had a family business which was conducted through a company, Mycold Limited, of which they were directors and shareholders. The business in which Mycold Limited has been, and still is, involved is industrial refrigeration. Since 1991 that business had been conducted from premises situate at Kilcoole, County Wicklow. In 1998, the plaintiffs and the Deceased formed a partnership, which is known as the Renmore Partnership, the object of which was to carry on the business of investment and dealing in buildings and other property. The partnership owns the industrial site at Kilcoole, which it rents back to Mycold Limited. It has also acquired other property.

2. The Deceased died on 9th October, 2011. She died testate and was survived by her husband, the defendant, and one child. On 2nd May, 2012 the probate of her will was granted to the defendant. The defendant is sued in these proceedings in his capacity as personal representative of the Deceased. The defendant has acknowledged on affidavit that he is the sole beneficiary of the estate of the Deceased.

3. These proceedings were initiated by a plenary summons which issued on 15th January, 2013. Having regard to the general endorsement of claim on the plenary summons, it appears that the only property or asset to which these proceedings relate is the proceeds of a policy of insurance issued by Irish Life Assurance Plc (Irish Life) under policy number 11074428 (the Deceased's Irish Life Policy). The reliefs claimed at A, B and C of the general endorsement of claim seek declarations as to the ownership of the proceeds of the Deceased's Irish Life Policy, claiming a declaration that the Renmore Partnership is entitled to the proceeds, that they are held in trust by the defendant for the Renmore Partnership, and that they are to be utilised to purchase the shares of the Deceased in the Renmore Partnership by the plaintiffs. The reliefs claimed at paragraphs D, E and F are injunctive reliefs, which are replicated in the notice of motion which initiated the application to which this judgment relates.

4. That notice of motion was also issued on 15th January, 2013 and the reliefs claimed in it are the following:

> (a) an injunction restraining the defendant from in any way dissipating the proceeds of the Deceased's Irish Life Policy;
>
> (b) an injunction preventing the defendant from in any way dealing with the proceeds of the Deceased's Irish Life Policy until further directed or ordered by the Court; and
>
> (c) in the alternative, an order directing the proceeds of the Deceased's Irish Life Policy to be lodged in court.

5. The affidavits filed on the application disclose a wide range of controversies between the plaintiffs, on the one hand, and the defendant, as personal representative of the Deceased, on the other hand, in relation to the joint involvement of the plaintiffs and the Deceased in Mycold Limited and in the Renmore Partnership. However, these proceedings, as presently constituted, concern only the beneficial ownership of the proceeds of the Deceased's Irish Life Policy. In a nutshell, the plaintiffs contend that the proceeds are beneficially owned by the Renmore Partnership, with the added complication at paragraph C in the general endorsement of claim that it is claimed that they are to be utilised to purchase the Deceased's share in the Renmore Partnership by the plaintiffs. Unfortunately, the Court cannot ignore the other factual controversies, having regard to the lines of defence to the application taken by the defendant.

The factual controversies

6. The first partnership agreement establishing the Renmore Partnership, which was entered into on 1st December, 1998 between the Deceased, the first plaintiff and the second plaintiff, was replaced by a second partnership agreement dated 25th June, 2002 (the 2002 Agreement) made between the same parties. After the Deceased's Irish Life Policy was put in place, the partnership agreement was varied. Although the final partnership agreement (the 2006 Agreement) is not dated, it is common case that it was concluded and executed some time in 2006. Augustus Cullen Law acted for the partners in connection with the 2006 Agreement and they had also acted for the partners four years earlier in relation to the 2002 Agreement, which it replaced. It is clear that the three partners were equal partners in the Renmore Partnership.

7. The clauses of the 2002 Agreement and the 2006 Agreement to which the Court's attention has been drawn by the plaintiffs are the following:

(a) Clause 13, which dealt with "Life Cover Obligations". The first three sub-clauses of this clause were in the 2002 Agreement and, essentially, each of the partners covenanted with the other "to maintain the policy on his life in full force by payment of premiums". The relevant policy is not identified, but it is reasonable to assume that the reference was to each of the policies referred to in the Appendix thereto, being the Hibernian Life Assurance policies referred to later. Clause 13 also provided that, in the event of default, there was provision for payment of the premium out of the defaulting partner's share of the partnership profits. There was an agreement not to mortgage, charge or assign the policy without the consent of all the parties. Sub-clause 4 was introduced in the 2006 Agreement and provided:

> "This has been established *inter alia* for the payment of Capital Acquisitions Tax when in the event of the death of a Partner the share is transferred to the ownership of the remaining partners."

The words "*inter alia*" were inserted in manuscript and initialled by the partners.

(b) Clause 15(2) was headed "Death". Clause 15(2)(a) provided, in essence, that on the death of any of the partners the partnership would not be automatically dissolved. Significantly for present purposes, under Clause 15(2)(b) the surviving partners would have the option of purchasing the Deceased's partner's share in the partnership on the terms set out in the Schedule thereto. There was a time limit in respect of the exercise of the option. If the option was not exercised, the affairs of the partnership would be "wound up in accordance with the provisions of the Partnership Act (as amended or extended)".

(c) Insofar as is relevant for present purposes, the Schedule referred to in Clause 15(2), contained the following provisions:

(i) Paragraph 2(a) provided that the life cover set out in the Appendix thereto, the premiums of which were to be paid by the partners, would be kept in place during the partnership term. There was added to paragraph 2(a) in the 2006 Agreement a provision which was a verbatim replication of Clause 13(4) of the 2006 Agreement, which I have quoted, which provision had not been in the 2002 Agreement.

(ii) Paragraph 2(b) in the 2006 Agreement provided that the life cover would be reviewed every two years (which was an alteration of the corresponding provision in the 2002 Agreement which referred to every three years) "to ensure that the same corresponds with the market value of the Partnership".

(iii) The purchase price on the death of one of the partners was to be based on the "bricks and mortar" value of the share in sale rather than being "based on rent roll", as set out in paragraph 2(c), which provided:

> "The Purchase price shall be a sum equal to the saleable value . . . of the vendor's share in the partnership after repayment of the life cover (details of which are set out in the Appendix hereto)."

(iv) Paragraph 5 dealt with the payment of the "Purchase price" and sub-paragraph (a) provided:

> "In the event of the death of a Partner, the life assurance shall be paid to the Estate of the Deceased Partner/Vendor or the Solicitor acting in the Estate of the Deceased, within one year from the death of death or once the life assurance proceeds are released."

That provision, when read in conjunction with paragraph 2(c), seems to indicate that the proceeds of the relevant policies mentioned in the Appendix would be under the control of all of the partners rather than an individual partner and that the proceeds would be used wholly or partly by the surviving partners to acquire the deceased partner's share. To what extent that represents what the parties intended and agreed to in relation to the Irish Life policies taken out in 2005 is very unclear.

(d) There were three policies itemised in the Appendix, one in the name of each partner. All three were described as being with Hibernian Life Assurance in both the 2002 Agreement and the 2006 Agreement.

8. As regards the policies with Hibernian Life Assurance, they were in place when the 2002 Agreement was executed. However, they had been cancelled by the time the 2006 Agreement was executed. There is evidence before the Court that each of the partners wrote to Hibernian Life Assurance by letter dated 17th August, 2005 cancelling the policy relevant to her or him with effect from 1st September, 2005. The significance of that date is that 1st September, 2005 was the date from which the Deceased's Irish Life Policy and similar policies on the life of each of the plaintiffs became effective.

9. When the Deceased's Irish Life Policy was taken out in 2005, Augustus Cullen Law was acting for the Renmore Partnership. The affidavit evidence before the Court bears out a statement in a letter from Augustus Cullen Law dated 13th December, 2011 to the plaintiffs' agent, James Fitzsimons & Company, after her death, that "Ger was running the show" during her lifetime.

10. From March 2005 the Deceased was availing of the services of Liberty Asset Management Limited (Liberty) to put in place life assurance on the life of each partner. There have been exhibited e-mails which passed between Liberty and the Deceased and between Irish Life and Liberty. Liberty was clearly aware of the provisions of the 2002 Agreement and, in particular, Clause 15(2)(b), having actually quoted it in an e-mail of 14th March, 2005 to the Deceased, and was concerned and was querying whether, in the light of what it was proposing, that clause needed to be amended. Subsequently, an online application for cover was sent by Liberty to Irish Life. By separate letters dated 24th May, 2005 to the Renmore Partnership, Irish Life furnished details of the cover which had been applied for in relation to each of the partners on the "online application form questions and [the partners'] answers". Those documents were exhibited in the grounding affidavit of the first plaintiff. By way of example, in relation to the Deceased, the cover was described as "Life Cash Cover", the proposed Plan number was the eventual number of the Policy (11074428) and the life covered was the Deceased. Under "Plan ownership" it was stated in this document that the Plan would be owned by the Renmore Partnership. The amount of life cover was stated to be €1,300,000.00.

11. The Life Cash Cover Plans, as arranged by Liberty, were subsequently put in place and each of the partners was notified of the cover by letter dated 24th August, 2005, which letter contained, inter alia, a copy of the Plan schedule dated 24th August, 2005, the original having been sent to Liberty. By way of example, the Deceased's Plan schedule maintained the proposed Plan Number (11074428), the start date was given as 1st September, 2005 and the cover was stated to be life cover in the sum of €1,300,000. The payment (i.e. the premium) was expressed to be €152.59 per month and the payment method stipulated was direct debit. It is clear from the covering letter that the direct debit was already in place. In fact, it is clear on the evidence before the Court that the monthly payments on each of the three policies were paid by a single direct debit from the account of the Renmore Partnership at Bank of Ireland, Merrion Road, Dublin 4. I understand it to be accepted by the defendant that up to the death of the Deceased the payments on her policy were made monthly out of the partnership's current account. Unlike the schedule in the online application, the Plan schedule did not state that the Plan would be owned by the Renmore Partnership.

12. In the period from March to August 2005, when the Deceased's Irish Life Policy and the other two policies were put in place, the Deceased was dealing with Irish Life *via* Liberty and there may have been some contact with Augustus Cullen Law. Just less than five months before her death, the Deceased appointed her brother-in-law, Colin Meagher, as her attorney to act on her behalf in relation to matters in connection with, *inter alia*, the Renmore Partnership. Mr. Meagher, in that capacity, was in correspondence with Liberty and with Augustus Cullen Law prior to her death. From the correspondence which has been exhibited, it would appear that the Deceased was somewhat confused at the time as to the effect of the Deceased's Irish Life Policy.

13. After the death of the Deceased, the plaintiffs, apparently, sought information from Liberty in relation to the policies. The information was furnished by an e-mail from Liberty to the first named plaintiff sent on 17th November, 2011. In the e-mail, Clause 5(a) of the Schedule to the 2006 Agreement, which has been quoted earlier, was quoted. It was stated that the original life insurance policies with Hibernian Life Assurance had noted the "Renmore Partnership as grantee". However, Liberty had received instructions to cancel those policies and the "cover was replaced with Irish Life policies written on an Own Life Basis whereby the benefit would become payable to the estate in the event of a claim". That e-mail also explained that, the partners having been advised that the surviving partners might have a future exposure to Capital Acquisitions Tax (CAT) on the death of a deceased partner, three CAT policies were established with Eagle Star for the overall exposure and were accompanied by a General Trust form identifying the surviving partners as equal beneficiaries.

14. Subsequently, in their dealings with the estate of the Deceased and before the solicitors acting for them in these proceedings, Mangan O'Beirne, became involved, the plaintiffs were represented by James Fitzsimons of J. Fitzsimons & Co., Chartered Accountants. As early as November 2011, Mr. Fitzsimons was in correspondence with Augustus Cullen Law. A controversy emerged in that, in the early correspondence, Augustus Cullen Law took the view that the proceeds of the policy (which, although the policy is not identified by reference to the insurer or the policy number, I am assuming meant to the Deceased's Irish Life Policy) would go to the defendant as personal representative of the Deceased. Mr. Fitzsimons took issue with that. As early as 13th December, 2011, Augustus Cullen Law, prudently, identified that the difference between the plaintiffs and the defendant might come to a stage where the issue had to be judicially decided and, in such circumstances, a conflict of interest would arise because Augustus Cullen Law had been adviser both to the partnership and to the Deceased. However, Augustus Cullen Law continued to deal with queries from the parties' representatives.

15. From January 2012 the estate of the Deceased was represented by Michael Kelly of M.K. Business Advisers Limited, who commenced engagement with Mr. Fitzsimons on behalf of the plaintiffs. The defendant's evidence on affidavit was that, as a result of a letter dated 3rd July, 2012 from Mr. Fitzsimons to Mr. Kelly, he instructed Mr. Kelly to take legal advice from William Fry, the Solicitors who are on record for the defendant in these proceedings, on his behalf. In the letter of 3rd July, 2012, Mr. Fitzsimons had stated that, based on the available information, the balance outstanding on mortgages given by the Renmore Partnership was €2,446,877, of which the Deceased's share was €815,625. It was stated that the Deceased's share "should be settled together with outstanding interest at the earliest possible date". There was no mention of the Deceased's Irish Life Policy in that letter. The position of the defendant is that the estate does not have liability to the Renmore Partnership for that sum. That matter is adverted to here because Mr. Kelly informed Mr. Fitzsimons by e-mail dated 20th August, 2012 that he did not accept the position as outlined by Mr. Fitzsimons but, in order to move matters on, he had instructed William Fry to review the situation. He sought copies of the various loan agreements with the relevant banks, but the relevant documentation was never furnished. The defendant relies on those facts in support of his contention that he is not in a position to fully ascertain the extent of the assets and liabilities of the estate of the Deceased and, in those circumstances, he cannot distribute the estate, which, he asserts, includes the proceeds of the Deceased's Irish Life Policy. On that basis, it was contended on behalf of the defendant that these proceedings are entirely misconceived.

16. A broad range of issues has arisen between the defendant, as personal representative of the Deceased, and the plaintiffs, which have been pursued by Mr. Kelly with Mr. Fitzsimons initially and more recently by William Fry with Mr. Fitzsimons and subsequently with Mangan O'Beirne. The issues relate to the entitlement of the estate of the Deceased to payments under various pension schemes operated by Mycold Limited, in respect of which the defendant contends that the benefits due to the estate of the Deceased have not been paid. While the details of the defendant's complaints are not relevant for present purposes, what is relevant is the defendant's contention that the plaintiffs, in concentrating on these proceedings, are attempting to deflect the defendant from pursuing his other entitlements, so that the plaintiffs can avoid dealing with those other issues. The defendant has drawn those factual matters and other factual matters, such as the defendant's shareholding in Mycold Limited, as successor to the Deceased, into the picture with a view to demonstrating his assertion that, in the context of the broader issues, the plaintiffs' concentration on the Deceased's Irish Life Policy is an abuse of process.

17. Returning to the Deceased's Irish Life Policy, after the defendant obtained the grant of probate on 2nd May, 2012, Irish Life made a payment of €1,300,000 by cheque in favour of the defendant, as executor of the estate of the Deceased, "in settlement of the Death Claim on this Plan in respect of the late Mrs. Ger Cullinan". Accordingly, the defendant obtained the proceeds approximately eight months before these proceedings and this application were initiated. However, it is not clear when the plaintiffs became aware that the payment had been made.

18. The communications between the parties in early December 2012 indicate that there was some prospect of mediation to resolve issues between the plaintiffs and the defendant. However, the defendant, as personal representative of the Deceased, was not prepared to give an undertaking to the plaintiffs not to dissipate the assets of the estate of the Deceased. By letter dated 13th December, 2012, Mangan O'Beirne, on behalf of the plaintiffs, wrote to the defendant reiterating the request for such an undertaking "until all issues surrounding the Renmore Partnership are resolved". An injunctive application in the High Court was threatened if the undertaking was not forthcoming.

19. The response of William Fry on behalf of the defendant was dated 18th December, 2012. At the commencement of that letter it was stated that there was no basis for arguing that the plaintiffs have an interest of any kind in the Deceased's Irish Life Policy and it was stated that the request for an undertaking not to dissipate the proceeds of the Policy was inappropriate and unwarranted and would not be provided. The letter then went on to deal with the other issues which have been alluded to briefly above: the fact that the obligations of Mycold Limited to the Deceased's estate in respect of "Death in Service" and pension benefits had not been fulfilled; that the defendant remained a partner in the Renmore Partnership, but was being kept out of the picture; that the estate of the Deceased held 22.5% of the share capital of Mycold Limited and there were serious concerns about the manner in which that company was being managed; and that the estate of the Deceased had a 20% shareholding in another company, Mycold (U.K) Limited, and there were serious concerns about how that company was being managed. It was denied that the defendant was prepared to engage in mediation in respect of the dispute involving the Renmore Partnership. However, it was made clear that the defendant was prepared to engage in discussions with the plaintiffs on issues in dispute between them relating to the Renmore Partnership and Mycold Limited.

20. The response of the plaintiffs' solicitors was a letter of 20th December, 2012. The message conveyed was that, in the absence of the undertaking sought, proceedings would be issued for injunctive relief.

21. Having outlined the multiplicity of factual controversies between the parties, it is necessary to analyse the plaintiffs' claim in the proceedings and the plaintiffs' claim on the application against that background.

Analysis of plaintiffs' claims in proceedings and defendant's response

22. The reason I have found it necessary to embark on this analysis is that, having carefully considered the affidavits and, in particular, the documents exhibited in the affidavits, which relate to very complex matters in which neither of the deponents was directly concerned (*i.e.* the first plaintiff on the plaintiffs' side and the defendant), it is very difficult, as the saying goes, "to see the wood for the trees". There is also a large degree of confusion and, although, perhaps, not deliberate, obfuscation in the affidavits and exhibits produced by both sides. Therefore, I find it necessary to try and get to the kernel of the matter through the following observations.

23. First, it is appropriate to reiterate that the plaintiffs' claim as set out in the general endorsement of claim on the plenary summons is that the Renmore Partnership (by whomever that is constituted now) is the beneficial owner of the proceeds of the Deceased's Irish Life Policy (*i.e.* €1.3m) with the additional claim that the €1.3m is to be used for the purchase of the share of the Deceased in the Renmore Partnership by the plaintiffs. That seems to mean that the defendant, as personal representative of the Deceased, as vendor of the share is entitled to receive all or some of the €1.3m on leaving the partnership. The plaintiffs' claim, as framed, relates to the ownership and use of the €1.3m. There is no claim by the plaintiffs for damages.

24. Secondly, the defendant's response is that the €1.3m is part of the estate of the Deceased and that neither the Renmore Partnership nor the plaintiffs have any entitlement to it. Therefore, what is in issue between the parties is the beneficial ownership of the €1.3m. That being the case, the line of defence advanced on behalf of the defendant asserting misconception on the part of the plaintiffs in bringing this application, is itself misconceived. The plaintiffs are not alleging that the defendant will not administer the estate of the Deceased (including the €1.3m) properly, nor are they alleging that any liability (which is emphatically denied by the defendant) of the estate of the Deceased to the partnership will not be discharged. The plaintiffs' case is that the €1.3m paid out by Irish Life to the defendant, as personal representative of the Deceased, should be paid over to the plaintiffs, because the Renmore Partnership is the beneficial owner of the proceeds of the policy which it represents. Therefore, there is a contest as to the ownership of the €1.3m between the plaintiffs, who assert it is beneficially owned by the Renmore Partnership, on the one hand, and the defendant, who asserts that it is beneficially owned by the estate of the Deceased, on the other hand. The plaintiffs may or may not be correct in their assertion. The important point is that their claim is not a claim against the estate of the Deceased; it is a contest with the estate of the Deceased for beneficial ownership of the €1.3m. That, in my view, disposes of the argument that the plaintiffs' application is misconceived.

25. Thirdly, there is a fundamental question as to who are the partners in the Renmore Partnership now. The defendant has asserted that he remains a partner, as personal representative of the Deceased. Whether he does, and how he may cease to be a partner, falls to be determined in accordance with the 2006 Agreement. That is an issue which it seems to me will have to be resolved in these proceedings, given the basis of the plaintiffs' claim in relation to the proceeds of the Deceased's Irish Life Policy, as outlined earlier.

26. Fourthly, despite the defendant's contention to the contrary, the 2006 Agreement is relevant to the determination of the issues raised on the plaintiffs' claim. Emphasising here, lest the impression is given that the Court is trying to resolve issues of fact, given that it is well settled that it is no function of the Court on an interlocutory application such as this to resolve conflicts of fact (*per* Lord Diplock in *American Cyanamid v. Ethicon* [1975] 1 All ER 504 at p. 510), that it is not, nonetheless, it is appropriate to observe that as regards the intention of, and the terms agreed between, the partners in 2005 in relation to the Irish Life policies, the affidavit evidence is wholly inadequate. If the issues between the parties cannot be resolved, the terms of the agreement reached between the three partners in relation to the Life Cash Cover policies taken out in 2005, in the context of the 2002 Agreement and the variations thereof agreed by the partners, will require to be determined on oral evidence. The intention of the parties to the Renmore Partnership, even if it was permissible to attempt to ascertain it, cannot be ascertained from the documentation exhibited.

27. Fifthly, following from those observations, it is clear on the evidence that the Deceased was a very sensible, conscientious and cautious businesswoman, whose objective in 2005 was to protect the Renmore Partnership and all of its partners and their respective families. It may be that the partnership agreement, as amended in the 2006 Agreement does not accurately reflect what was the intention of, and agreed by, the partners. That is for another day. However, it is appropriate to comment on some observations of the defendant on affidavit. The defendant has characterised as "extraordinary" that the plaintiffs have brought this application, given the averment of the first named plaintiff in the following terms in his second affidavit:

"On discovering after [the Deceased's] death in October 2011 that the Irish Life policies may not have correctly reflected the intent of the Partnership, my brother and I arranged to re-direct the monies due on the Irish Life policies back to the Partnership in the event of one or either of our deaths. Our spouses are aware of this and have concurred with same."

The defendant in his next affidavit averred that this constituted an acknowledgement by the plaintiffs that "the Life Policy proceeds were correctly paid to the benefit of the estate". I consider that it would be inappropriate for the Court to draw any inference from that averment. The defendant further averred that "the paperwork surrounding the Life Policy supports the position" he has taken in the proceedings. On the contrary, in my view, the "paperwork" before the Court, including the 2006 Agreement, raises many questions, including a question as to the understanding of even the Deceased in July 2011 as to what had been intended and agreed by the partners in 2005.

28. Sixthly, each side has added to the confusion and to the lack of clarity as to what the agreement between the partners was. For example, it is difficult to understand the demand made by Mr. Fitzsimons in the letter of 3rd July, 2012 for €815,625 from the estate of the Deceased, in the overall context of the plaintiffs' case as set out in the documents before the Court. On the other hand, while the defendant has concerns, which may be well-founded, in relation to pension and other benefits to which the Estate of the Deceased appears to be entitled arising from the Deceased's position as an officer of Mycold Limited, the plaintiffs have decided to limit these proceedings and this application to the alleged beneficial ownership of the Renmore Partnership of the €1.3m, as they are entitled to do. In due course, if the proceedings are prosecuted, the defendant will be in a position to counterclaim in the proceedings with a view to recovering any loss sustained by the estate of the Deceased by reason of the alleged wrongdoing of the plaintiffs, if he so wishes. However, at this juncture, the matters in question have been raised by the defendant with a view to trying to establish some ulterior motive, namely, an attempt to gain tactical advantage, on the part of the plaintiffs in bringing these proceedings. I am satisfied that, as a matter of fact, no such ulterior motive or abuse of process has been established against the plaintiffs. That disposes of that line of defence raised on behalf of the defendant.

29. Finally, on the affidavits, there are a lot of assertions on each side in relation to the so-called CAT or s. 60 policies which were taken out in 2005 with Eagle Star (now Zurich). For present purposes, I am prepared to assume that what was stated in the e-mail of 17th November, 2011 from Liberty to the first named plaintiff represents the true position. There is no doubt that the rationale behind the taking out of those policies should assist in ascertaining the intention of the partners in relation to the Life Cash Cover policies taken out by the partners with Irish Life in 2005 and as to what was to happen in relation to the partnership on the death of a partner. Aside from noting that, the Court is not concerned with the s. 60 policies and, in particular, with the question of who is at fault in the surviving partners not having received the monies paid out by Zurich on foot of those policies. Obviously, in due course, if the proceedings are prosecuted to an oral hearing that issue may go to credibility. However, it is not a matter for the Court on this application.

30. The affidavit evidence before the Court discloses that there are really difficult issues of fact and law to be resolved between the surviving partners, on the one hand, and the defendant, as personal representative of the Deceased, on the other hand. On the basis of the case as presented by the plaintiffs and addressed in response by the defendant, it seems to me that neither side has adopted a realistic approach to those difficult issues.

Analysis of the application for injunctive relief

31. Turning to the application for interlocutory injunctive relief, it is quite clear what the plaintiffs' objective is: it is to safeguard the €1.3m and, at its height, to "ring-fence it" by having it lodged in a separate account or lodged into court. Counsel for the plaintiffs submitted that the plaintiffs are not seeking *Mareva* type relief. In this context he cited the following passage from Hamilton C.J. in *O'Mahony v. Horgan* [1995] 2 I.R. 411 (at p. 418):

> "Injunctions of this type became known as *Mareva* injunctions. A Mareva injunction is an *ad personam* order, restraining the defendant from dealing with assets in which the plaintiff claims no right whatsoever. A Mareva order does not give the plaintiff any precedence over other creditors with respect to the frozen assets."

It is true that, on the facts, this case differs from a case in which a *Mareva* injunction is sought. In this case, the kernel of the plaintiffs' claim is that, through the Renmore Partnership, they are the beneficial owners of the €1.3m.

32. The passage quoted from the judgment delivered in the Supreme Court in *O'Mahony v. Horgan* is just part of the analysis by Hamilton C.J. of principles underlying the grant of *Mareva* injunctions. Earlier, in the same context, Hamilton C.J. stated (at p. 417):

> "The common law, traditionally, expressed the principle that the plaintiff is not entitled to require from the defendant, in advance of judgment, security to guarantee satisfaction of a judgment that the plaintiff may eventually obtain."

As the plaintiffs' claim here relates to money, which was paid out by Irish Life to the defendant, what the plaintiffs are seeking here is security to guarantee payment to the Renmore Partnership on foot of declarations they seek in relation to the proceeds of the Deceased's Irish Life Policy, which in substance is no different from a guarantee of satisfaction of a judgment. Therefore, it seems to me, that in considering the plaintiffs' application for interlocutory relief, the fourth test applied by Hamilton C.J. in *O'Mahony v. Horgan* (at p. 416), that –

> "[t]he plaintiff should give some grounds for believing that there is a risk of the assets being removed or dissipated"

is relevant and should be factored in by the Court in determining whether to grant the reliefs sought by the plaintiffs.

Criteria for granting interlocutory relief and their application to the facts

33. The relevant criteria for determining whether an interlocutory injunction should be granted have been well settled since the decision of the Supreme Court in *Campus Oil v. Minister for Energy (No. 2)* [1983] I.R. 88. In the application of those criteria, in conjunction with the relevant factor derived from the decision of the Supreme Court in *O'Mahony v. Horgan*, the following questions arise and the answers thereto are as follows:

(a) Have the plaintiffs shown that there is a fair or bona fide or serious question to be tried?

> I am satisfied that they have. As the analysis conducted earlier indicates, the issue is whether the Renmore Partnership is, as contended by the plaintiffs, the beneficial owner of the €1.3m representing the proceeds of the Deceased's Irish Life Policy, rather than the estate of the Deceased. On the basis of that analysis, I am satisfied that there is a fair issue to be tried.

(b) The second criterion is whether, if the Court does not grant an injunction at this stage, and the plaintiffs succeed at the trial of the substantive action, the plaintiffs will be adequately compensated by an award of damages and, if so, does it appear likely that the defendant would be able to meet the award?

> Despite the fact that the reliefs sought by the plaintiffs in the substantive action are framed in terms of declaratory and injunctive relief, the reality is that what the plaintiffs are looking for is money and, as counsel for the defendant submitted, it is an amount of money which would be clearly and readily quantifiable. Therefore, an award of damages would be an adequate remedy. The question which remains is whether, if and by the time it is quantified, there is a risk that the defendant would not be a mark for an award of damages. On the basis of what is stated at (c) below, I find that there is no such risk.

(c) By reference to the fourth test posited by Hamilton C.J. in *O'Mahony v. Horgan*, are there grounds for believing that the proceeds of the Deceased's Irish Life Policy will be removed or dissipated?

> It is clear on the evidence that the defendant received the sum of €1.3m. His position on affidavit is that that money is held by him as a trustee for the estate of the Deceased and for the benefit of any creditors of the estate and thereafter for himself as beneficiary, so that he is not in a position to use those funds for his own benefit as beneficiary until he has fully ascertained the extent of the assets and liabilities of the estate. There is no evidence in this case which could give rise to a suspicion that the defendant would not abide by the assurance embodied in the relevant averment, although it is not in the form of an undertaking to the Court. In short, there is no evidence whatsoever that there is a risk of the €1.3m being removed or dissipated by the defendant. Therefore, the only conclusion open is that the defendant is a good mark for any money award which the plaintiffs obtain on the determination of the substantive proceedings.

34. Having reached the conclusions set out at (b) and (c), the Court must refuse to grant the interlocutory relief sought by the plaintiffs. In the circumstances, it is not necessary to consider the application of the remainder of the criteria derived from the *Campus Oil* decision.

35. A point which I think it is worth emphasising, however, is that the interlocutory injunctions sought by the plaintiffs are limited to the €1.3m. The undertaking which the plaintiffs had sought before the proceedings were initiated was variously formulated as "not to distribute the estate" and "not to dissipate the assets of the estate". The undertaking sought was not limited to the €1.3m. In the circumstances, it is understandable that the defendant was not prepared to give the undertaking sought, even on a "without prejudice" basis to his contention that the estate of the Deceased is the beneficial owner of the €1.3m. While the proceedings are against the defendant, as personal representative of the Deceased, as was acknowledged by counsel for the defendant, if the defendant were to effect any unlawful dissipation or distribution of the proceeds of the Deceased's Irish Life Policy, he could be made personally liable for such dissipation or distribution and, if they could establish an entitlement to the proceeds, the plaintiffs would have a right of recourse against him personally. Of course, when the court, at an interlocutory stage, is addressing whether there is a need to injunct a defendant from dealing with assets, whether the assets are held in a fiduciary capacity or in a personal capacity, the issue is the same. In a case such as this, where the defendant is sued in a fiduciary capacity and has statutory obligations, the Court cannot assume that those statutory obligations will be fulfilled. However, in this case, as I have found, there are no grounds for believing that if, on the hearing of the substantive proceedings the Court were to decide that the estate of the Deceased is not the beneficial owner of the €1.3m, those monies would not be available to meet whatever order the Court saw fit to make in respect of them.

36. Finally, it is not necessary to make a determination on the submission made on behalf of the defendant that the alleged delay on the part of the plaintiffs in initiating these proceedings and, in particular, in initiating the application for interlocutory relief should preclude the plaintiffs from being granted such relief.

Order
37. There will be an order dismissing the plaintiffs' application for interlocutory injunctive relief.

General observation
38. The parties would be well advised to re-assess whether any alternative dispute resolution mechanism could be usefully resorted to to resolve their multifarious disputes so as to avoid expensive litigation.