THE HIGH COURT

[2019 No. 3514 P.]

BETWEEN

DAVID HODGINS

PLAINTIFF

AND

DUNCAN HODGINS AND ELIZABETH MCKEEVER

DEFENDANTS

***EX TEMPORE* JUDGMENT of Mr. Justice Tony O'Connor delivered 23rd of July, 2019**

Notice of Dissolution
1. The plaintiff was given a notice of dissolution dated 28th February, 2019, ("notice of dissolution") of his partnership with the defendants, with effect from 31st May, 2019. The notice of dissolution was signed by the first named defendant (brother of the plaintiff) and the first named defendant's wife, the second named defendant.

2. The parties had executed a partnership agreement on 1st January, 2006, with an addendum dated 11th July, 2012, ("the partnership agreement") and are the only partners in the firm of solicitors at 11 Summerhill, Nenagh, Co. Tipperary ("the offices").

Relief Sought
3. This judgment now only concerns the first relief sought in the notice of motion dated 2nd May, 2019:-

> *"An injunction preventing the Defendants or either of them from taking any steps whatsoever to bring about the dissolution of the partnership known as "David Hodgins & Co. Solicitors" save for where such course of action is expressly permitted by the Partnership Agreement …."*

pending the determination of the plenary hearing of this action.

4. The further relief seeking an injunction preventing the defendants "*from informing any third party of the purported dissolution*" was not pursued. Previous applications to Reynolds J. during the month of May 2019, for interim and procedural orders, effectively disclosed to the public that the defendants had given notice of the dissolution.

Affidavits
5. The plaintiff and the first named defendant swore two affidavits each ending with the first named defendant's affidavit sworn on 4th June, 2019. The second named defendant had authorised and approved the first named defendant's averments in his affidavit.

Mediation
6. The action was adjourned to allow the parties attend a mediation on 11th June, 2019, that proved unsuccessful. On the date of the mediation, the defendants instituted proceedings against the plaintiff, having record number [2019 No. 4583 P.], in which they sought various orders under the Partnership Act 1890 ("1890 Act"), which will be referred to later.

Hearing of this Application
7. Counsel for the plaintiff opened the application late last Wednesday, 17th July, and following various interchanges with counsel on Thursday, 18th July, I directed:-

> (i) The plaintiff to deliver a statement of claim in these proceedings by today along with his defence to the statement of claim in the proceedings having record number [2019 No. 4583 P.] seeking, *inter alia*, orders pursuant to ss. 32, 35 and 39 of the 1890 Act.
>
> (ii) The defendants to furnish four specific details of files and eight specific proposals and lists of existing and potential clients of the firm from specified dates.

8. The plaintiff has yet to particularise his claim for the damages sought in these proceedings and directions in that regard can be given next Tuesday, 30th July, 2019, following the plaintiff's review of the details given by the defendants today along with a request for particulars from the defendants that I direct the defendants to serve by 5pm on Thursday, 25th July, 2019. The defendants now must deliver their defence in these proceedings and I will hear counsel about how best to accelerate the prosecution of these proceedings to a plenary trial. The Court will also facilitate applications on the 12th September, 2019, if requested, in relation to further directions.

Continuing Obligations
9. Irrespective of whether the notice of dissolution is valid, the effect of s. 38 of the 1890 Act is a factor to be considered in the analysis of the "*least risk of injustice*" criterion to be applied in this application:-

> *"After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise."*

Issues for Plenary Trial
10. The plaintiff claims in these proceedings that the notice of dissolution is invalid because there is no general right in the partnership agreement to cause a dissolution by a simple notice. The plaintiff's argument is to the effect that any steps taken by the defendants purportedly on foot of the notice of dissolution "*are unlawful and are likely to cause* [him] *to suffer loss and damage".*

11. The defendants, however, argue that Clause 2.1 specifically refers to dissolution. It provides:-

> *"Subject to the provisions for retirement, expulsion and* dissolution *hereinafter contained the Firm shall continue during*

the joints lives of the Partners and the survivors of them." (emphasis added).

12. The defendants further submit that the notice of dissolution accords with the 1890 Act. Section 26(1) of the 1890 Act allows for determination at any time on giving notice. Section 32(c) of the 1890 Act provides that notice to dissolve may be served in a partnership that is entered into for an unidentified *time* "*subject to any agreement between the partners*". The defendants contend that the partnership agreement does not contain a term which precludes dissolution by notice.

13. This Court on an interlocutory application, and particularly in an application where the affidavit evidence contains averments for both sides that are not always reconcilable without cross-examination, cannot determine definitively the central issue about the right to dissolve the partnership practising as David Hodgins & Co Solicitors. Although the submissions of counsel for the plaintiff are rather cogent and persuasive, there are questions which can only be determined following a full plenary hearing of both actions.

14. The provision for voluntary retirement upon giving 90 days' notice has not escaped the attention of this Court and that the defendants have not availed of this provision. Clause 26.3(d) of the partnership agreement envisages, *inter alia*, a retiring partner having only 70% of his/her percentage interest in accounts receivable paid out plus unpaid loans and any relevant capital account surplus less any obligations owed to the partnership.

Defendants do not operate Clause 26

15. Counsel for the plaintiff rhetorically asked why the defendants did not act upon the right to withdraw from the firm under Clause 26 when pressing the strength of the plaintiff's claim that the partnership agreement precludes a notice of dissolution in circumstances created solely by the defendants according to the plaintiff. Counsel submitted that it is not for the plaintiff to accept the incorrect procedure used by the defendants.

16. The defendants on the other hand insist that they have the right to dissolve because "*…dissolution is explicitly stated in the partnership agreement, and the right to dissolve is implicitly included*." They further claim that the notice of dissolution is valid because the 1890 Act provides them with the right to dissolve. Counsel for the plaintiff in his final reply today cited *Lindley & Banks on Partnership* (20th ed. Sweet & Maxwell, 2018): "*… there will be no prospect of implying a term which permits the parties to terminate the Partnership on reasonable notice* ...". (para. 9-05, footnote 20).

17. The plaintiff certainly has a point but the defendants have demonstrated their resolve to defend with some logic and reason while risking a final judgment contrary to their position with monetary effects.

Defendants' Proceedings

18. As already mentioned, the defendants also commenced proceedings, having record number [2019 No. 4583 P.], against the plaintiff. They quickly delivered a statement of claim on 13th June, 2019, seeking, *inter alia*:-

> (i) a declaration pursuant to s. 32 of the 1890 Act that the notice of dissolution is valid;
>
> (ii) an order pursuant to s. 35 of the 1890 Act for a decree of dissolution on the non-exclusive basis that it is just and inequitable to do so; and
>
> (iii) an order pursuant to s. 39 of the 1890 Act on the dissolution of the partnership concerning the application of partnership property.

19. There are issues therefore of fact and law to be tried in both sets of proceedings. It would be invidious for this Court to comment further on the merits of the arguments other than to say that it is open to the defendants to withdraw from the partnership in accordance with Clause 26 if they fail in their defence to the claim in these proceedings or in their claim for a decree of dissolution under the 1890 Act.

The offices

20. The offices were left to the plaintiff (one third) and the first named defendant (two thirds) by their mother who died in January 2018. The loan for renovating these offices in 2008 continues to be repaid from partnership income even though there is no lease between the owners and the partnership. This aspect has not been dwelt upon by the parties to any extent in this application.

Damages: An Adequate Remedy?

21. If the plaintiff succeeds in his claim that the partnership was not dissolved on 31st May, 2019, are damages an adequate remedy for the defendants having taken wrongful steps in the dissolution of the partnership?

22. Counsel for the plaintiff iterated today that "*once dissolved, the partnership cannot be undissolved*". He stressed that the firm continues and that there will be a terminal prejudice caused to the plaintiff by the Court's refusal of the interlocutory relief sought.

23. Counsel for the plaintiff today also cited the judgment of Barrett J. in *Báinne Aláinn Ltd and Hayden v. Glanbia Plc* [2014] IEHC 482 (unreported, High Court, 24th October, 2014) ("*Báinne Aláinn*"), and para. 38 in support of his submission that the Court should not refuse the interlocutory injunction on the basis that the damage which will arise relating to the plaintiff's business more than his personal reputation. This Court inclines towards the view that the authorities such as *Fitzpatrick v. Commissioner of An Garda Síochána* [1996] IEHC 24 (unreported, High Court, Kelly J., 16th October, 1996), are more apposite to the plaintiff's claim for loss of professional reputation than the milk rounds and business of Mr. Hayden in *Báinne Aláinn*. In any event, the plaintiff has not satisfied the Court on the balance of probabilities that any loss of reputation which he can ascribe to the alleged unlawful notice of dissolution cannot be compensated in damages. As this point had not been canvassed last week, the Court heard Ms. Ní Mhurchú, counsel for the defendants on this point today. She submitted that neither this distinction nor particulars of this loss have been pleaded or mentioned in the affidavits filed.

24. In *Haughey (Lawline) Solicitors v. Synnott* [2011] IEHC 467 (unreported, High Court, 12th December, 2011) ("*Haughey*"), the defendant maintained that the partnership was governed by a written agreement and that the notice of dissolution was of no effect. The plaintiff disputed the existence of any written agreement. It appeared to Laffoy J. that the defendant had misconceived "*the role of a receiver and manager appointed by the Court in a partnership context.*" (para. 2.10). Laffoy J., after receiving advice from an officer of the Law Society, stated that:-

> "*…all the Court is concerned with for present purposes is the fact that the clients have been informed and they have made their choice as to who will act for them in the future.*" (para. 3.4).

25. At para. 4.1, Laffoy J. explained:-

> "*I think it is important to record accurately the premise on which the defendant brought this application* [to, *inter alia*, appoint a receiver and manager – para. 2.1 recites the specific reliefs sought]. *He did so on the basis that, having regard to what has occurred since 30th September, 2011, he must accept that the Lawline partnership is at an end. He also accepts that, in the event that the Court should find that there was a written partnership agreement which bound the defendant in the manner he contends, that his remedy against the plaintiff sounds in damages only. To put it another way, the defendant accepts that the Lawline partnership had been dissolved, subject to his right to argue at the trial of the action that the plaintiff ought to have adhered to what he contends were the terms of the written partnership agreement, which he contends was in place, and that he is entitled to damages for the loss he has suffered as a result of her failure to do so."*

26. The plaintiff, in this case, emphasises that the notice of dissolution is invalid. In *Haughey*, the defendant also did not concede that the notice of dissolution was valid. These are common features. However, the plaintiff, in these proceedings, does not accept that damages will be an adequate remedy.

Decision on Adequacy of Damages
27. Neither of the parties have explained adequately how damages will be assessed if the plaintiff succeeds in these proceedings at plenary trial. Notwithstanding, the onus is on the plaintiff to satisfy the Court that damages will not be an adequate remedy. It has not been established on the balance of probabilities that damages cannot be ascertained for the period beginning with the date of the purported dissolution without any restraining undertaking or order to the date of the plenary hearing. It also remains to be determined when and whether the firm is actually dissolved by the acts or future actions of the defendants. This Court is not asked today by the defendants to grant a declaration that they are right in taking their positions to date or in the future.

28. The height of the plaintiff's submissions, in this regard, is that the firm will be unable to recover its business if the interlocutory order sought is not granted. Neither of the defendants wish to practise as solicitors in partnership with the plaintiff save as to comply with their obligations under the 1890 Act. The Court cannot make an interlocutory mandatory order which will effectively compel two solicitors to work with another solicitor; the remedy for breach of contract and more specifically of the partnership agreement lies in damages.

Assessment of Damages
29. Despite the request of the Court, the plaintiff was unable to recast or refine the specific relief claimed in the notice of motion to address any specific concern of the plaintiff relating to what will happen between now and the plenary hearing of the actions that have been commenced. The plaintiff merely asserts that the purported notice of dissolution cannot be acted upon in any shape or form.

30. Although it may be difficult and time-consuming to ascertain the actual monetary loss which the plaintiff will be able to recover if he succeeds in his action, it will still be possible for the plaintiff to establish a claim in what is ultimately a commercial law claim. The following para. of Finlay C.J. in *Curust Financial Services Limited v. Lowe-Lack-Werk* [1994] 1 I.R. 450 at pp. 468-469, resonates loudly in this regard:-

> *"The loss to be incurred by Curust if it succeeds in the action and no interlocutory injunction is granted to them, is clearly and exclusively a commercial loss, in what had been, apparently, a stable and well-established market. In those circumstances, prima facie it is a loss which should be capable of being assessed in damages both under the heading of loss actually suffered up to the date when such damages would fall to be assessed and also under the heading of probable future loss. Difficulty, as distinct from complete impossibility, in the assessment of such damages should not, in my view, be a ground for characterising the awarding of damages as an inadequate remedy."*

31. The Court notes and will record in the order the offer by the defendants to undertake to pay damages to the plaintiff if they are found to be liable for same. The Court further quotes from submissions filed on behalf of the defendants: *"…the defendants maintain that the partnership assets would not be sufficient to discharge an award of damages in favour of the plaintiff, if the interlocutory injunction he is seeking is granted and the partnership is forced to continue pending full hearing".*

Status Quo
32. The Court listened carefully to the submissions for the plaintiff that the defendants have contrived a set of circumstances to breach their contractual obligations under the partnership agreement. It is worth repeating that the Court cannot make any finding as to this claim giving the differing stories described at some length in the affidavits which have been exchanged. As much as the plaintiff may wish the *status quo* to remain until the determination of the plenary hearing, the situation is that the defendants will not continue to practice with the plaintiff, save as to comply with their obligations under s. 38 of the 1890 Act. By reason of this application at the very least, they know of their potential exposure to an award of damages in favour of the plaintiff.

33. Paragraph 34 of the plaintiff's grounding affidavit sworn on 2nd May, 2019, follows a series of concerns expressed about the lack of regard to the effect of an invalid dissolution on the part of the defendants. In summary, the plaintiff averred that no prejudice will be visited upon the defendants between now and the trial, if the firm remains in existence.

34. Similarly, the first named defendant's replying affidavit sworn on 14th May, 2019, denies acting in bad faith and lists criticisms of the plaintiff's handling of matters at partnership level, which are denied by the plaintiff. Paragraphs 37-44 of that affidavit refers to the "*Solicitors Ceasing Practice*" publication of the Guidance and Ethics Committee of the Law Society and the repeated insistence by the plaintiff that the substantive issue for an arbitrator under Article 28 of the partnership agreement concerns the validity of the notice of dissolution.

35. Crucially for this Court, are the increasing if not irreconcilable differences between the plaintiff and the defendants which will impact upon the client base of the firm. Competitors and, more particularly, staff are now aware of the dispute and nothing which has been said by, or submitted for, the plaintiff has satisfied this Court that the balance of convenience favours a prolonging of an inevitable breakup whether by court declaration, remedying of the defendants' position by invoking the provisions of Article 26 of the partnership agreement or otherwise.

Features of this Partnership
36. The three-partnership firm in a provincial town, which had one particularly good year recently, depends on a working relationship between the parties. The intransigence since the commencement of this litigation does not augur well for the confidence of employees or clients in the firm. Therefore, the balance of convenience also favours a refusal of the specific application in the notice

of motion.

Least Risk of Injustice
37. Since *Okunade v. Minister for Justice* [2012] 3 I.R. 152; [2012] IESC 49, the courts in a mandatory interlocutory injunction application look to see whether there is a strong case and will seek to "*lower the risk of injustice*" that may arise by the grant of an interlocutory mandatory order. For all the reasons already outlined, this Court finds that the least risk of injustice favours the refusal of the application by the plaintiff and the Court will hear counsel in relation to directions mentioned earlier in this judgment in order to bring all of this litigation to an early conclusion so that the parties can concentrate on serving clients and securing the employment of the firm's staff.