

BETWEEN

SETANTA VEHICLE SALES LTD

PLAINTIFF

AND

TOM KANE MOTORS LTD AND FRANCIS [OTHERWISE FRAN] MCGUINNESS

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered 6th day of June, 2019

1. This application concerns two vehicles, identified for reference as VF630S160HD001965 and VF630S160JD002698 (*"the vehicles"*), which the plaintiff owns without contradiction from the defendants now. In fact, the first defendant does not resist the application because it does not take any part in the proceedings.
2. Interestingly, the second named defendant (*"Mr. McGuinness"*) was appointed director and secretary of that company on 23rd April, 2018, and on 18th February, 2019, notice was filed in the Companies Registration Office about the removal of Mr. McGuinness as a director.
3. The plenary summons and the notice of motion herein were issued on 12th February, 2019, and were served on 15th February, 2019. The plaintiff seeks, *inter alia*, an injunction requiring the defendants to deliver up or to procure the return of the vehicles.
4. The order of Reynolds J. of Tuesday 12th March, 2019, recites an undertaking, given by counsel for Mr. McGuinness, not to part with, sell or mortgage the vehicles. There is now some dispute about whether Mr. McGuinness undertook to identify the locations of the vehicles, the manner in which the vehicles have been dealt with and the persons who got possession of the vehicles. I will revert to this contention later.
5. When all is said and done, the factual issue arising from the two last sentences of Mr. McGuinness's replying affidavit, sworn on 29th March, 2019, is at the core of the dispute which this Court has to resolve, (see p. 178 of the motion booklet):-

"I repeat that I never had the vehicles nor were they in my yard but this is not to say that the works had not been carried out on them therefore and appropriately invoices properly arose. As a matter of interest and which the plaintiff himself has knowledge, whilst the gate to my premises may appear to be locked it is not in fact locked which would have given anyone the opportunity to remove therefrom any vehicle they wished. I say again for complete, [sic] I have no knowledge of where the plaintiffs [sic] supposed vehicle is or may be nor can I say and/or act for Mr. Donnelly in that capacity. The Plaintiff, with advice, deliberately and consciously decided to exclude him from inclusion in the proceedings and with respect whilst he may be my friend, I am not his keeper."
6. This averment was made despite some compelling evidence put forward on behalf of the plaintiff. Paragraph 3 of Mr. Andrew Freeney's affidavit sworn on 2nd April, 2019, at the request of the plaintiff, averred:-

"3. ... I say that Vehicle 1965 was collected by [Mr. McGuinness] from the Plaintiff's premises on the Longmile Road on 11 August 2017. With regard to Vehicle 2698, the vehicle was delivered by Renault Trucks SAS from the factory in Lyon directly to VDL in the Netherlands. Then in accordance with an agreement reached with [Mr. McGuinness], he collected the vehicle in VDL and brought it to Ireland."
7. Paragraph 8 of Mr. Freeney's affidavit averred:-

8. ... in or about mid November 2018 I attended at [Mr. McGuinness's] yard at Hillcrest, Cloughran, Co. Dublin, but [Mr. McGuinness] was not there. His yard gates were shut but I could see into the yard and saw Vehicle 1965 with the VDL body built on it"
8. Paragraph 10 of Mr. Freeney's affidavit details an exchange between a Tom in Bennett Crane & Truck Bodies, and Mr. Freeney. That exchange reveals confirmation that Mr. McGuinness called to collect vehicle 1965 which had NSAI vehicle approved certificate from October 2018. At the hearing this morning, Mr. McGuinness clarified that it was a person who he nominated who actually collected that vehicle.
9. Mr. McGuinness seeks, in his incoherent affidavit sworn on 29th March, 2019, to confuse and conflate issues involving a subcontractor of his, named Kevin Donnelly. Great play was made earlier on in this application and in the exchanges before about some grievances which Mr. Donnelly and Mr. McGuinness have had with the plaintiff about ten Dennis refuse trucks.
10. The Court has already ruled that the serious allegations which Mr. McGuinness made in his incoherent affidavit about a third party, who is not before the Court to vindicate his name and reputation, were inappropriate and add nothing to the facts with which this Court has been tasked to deal.
11. Senior counsel for Mr. McGuinness, informed the Court that he was instructed to raise these issues in order to show that the principal deponent, Mr. Harry Nash for the plaintiff, lacked good faith and comes to court with "unclean hands" and is therefore devoid of merit when seeking equitable relief for the plaintiff, which this Court could grant.
12. Given the acknowledgment by Mr. McGuinness in his correcting evidence, his cross-examination in this Court and the replies to the questions of this Court this morning, I am satisfied that the rambling averments of Mr. McGuinness in his affidavit about issues which are irrelevant to the right to possess and control the vehicles, were unnecessary.
13. Mr. McGuinness told the Court this morning that he did not even read the long affidavit before he swore same. He said that he was in a rush and the town agent for his solicitor was in a rush. The Court is minded to refer the conduct which occurred in preparing that affidavit for investigation by the Law Society and the supervising authority for counsel who drafted the affidavit but the Court will

refrain from doing so in view of the candour displayed by Mr. McGuinness today, albeit belatedly. However, that does not mean that it cannot be the subject of a complaint by the plaintiff to a responsible and governing authority.

14. It behoves Mr. McGuinness, with his solicitors and counsel, to formulate whatever claim that he may have in a coherent manner. He cannot claim relief on behalf of Mr. Kevin Donnelly, as he purported to do at least until this morning.

15. Mr. Donnelly is a friend of Mr. McGuinness who appears to operate a truck business in Northern Ireland and Britain. According to Mr. McGuinness this morning, Mr. Donnelly routinely stores vehicles in Newry for him. Mr. McGuinness has indicated that now, at long last, he consents to the release of those vehicles to the plaintiff by Mr. Donnelly.

16. Counsel for the plaintiff usefully submitted a chronology of events from 30th August, 2016, to 18th February, 2019, based on facts referred to in the affidavits and exhibits exchanged. Furthermore, the plaintiff offered to pay the amount which Mr. Donnelly claims to be due by the plaintiff to him pending the determination of these proceedings. The amount seems quite low now according to the evidence given this morning by Mr. McGuinness.

17. Mr. McGuinness on the one hand alleges that the plaintiff owes him money and asserted, until recently, a lien over the vehicles while he disavowed any knowledge of the current whereabouts of the vehicles.

18. This Court has to comment on the inconsistent stances taken by Mr. McGuinness, at least up until today and the utterly ill-founded claim that he seems to put forward for a third party (i.e. Mr. Donnelly), without showing how he can claim those amounts on behalf of Mr. Donnelly.

19. The confused thinking of Mr McGuinness may have been borne out of a misunderstanding of what may be claimed by him. Was the thinking a deliberate attempt at obfuscation for ulterior motives or pure malice? This Court is not asked, and could not determine, the true motives of Mr. McGuinness in resisting this application up until this morning.

20. All this Court can do is find whether there is a basis for making the disputed undertakings at paras. 1(i)-(iii) of the order of Reynolds J. part of the interlocutory injunction order to be granted by this Court.

21. The Court will give an opportunity to Mr. McGuinness and his solicitors to put forward their version of events, if it has to be put forward, in order to progress these proceedings. The Court understands that there is no objection to restraining the defendant, its servants or agents and all persons acting in concert with them, from parting with possession or control of the vehicles, or either of them to selling, transferring or assigning ownership of any interest in the vehicles and mortgaging, pledging or granting any lien in respect of the vehicles because (a) the first named defendant is not now resisting the application; and (b) Mr. McGuinness disavows knowledge of the exact whereabouts of the vehicles. He now consents to the release of those vehicles by Mr. Donnelly to the plaintiff if Mr. Donnelly possesses them.

22. The real issue is whether the plaintiff at an interlocutory stage can obtain a mandatory injunction in the terms of the disputed part of the order of Reynolds J.

23. The Court is sympathetic to the history of personal events and errors which arose involving Mr. Geary, solicitor for Mr. McGuinness, and his assistant as outlined without an affidavit in support, by Senior counsel.

24. On its face, Mr. McGuinness has breached those undertakings but I am not going to determine that matter now. These proceedings should progress to a plenary hearing, with directions to be given today. It is in the interests of all parties to save costs, and in pursuit of the fair administration of justice, for Mr. McGuinness to list and copy all invoices and receipts for the vehicles, his VAT returns for the Collector General (incorporating those amounts referred to in the said invoices and receipts), together with the written or electronic communications which he has had with Mr. Kevin Donnelly concerning the vehicles from 1st May, 2018, being the date of the invoice to the plaintiff from the first named defendant, to 5th June, 2019.

25. Mr. McGuinness, or the person who drafted his affidavits was rather coy, when preparing the replying affidavit of 29th March, by not commenting on the whereabouts of the vehicles. That is a matter which the plaintiff may or may not pursue if prosecuting the claim to a plenary hearing.

26. As sympathetic as the Court may be to the request of counsel for the plaintiff, for a mandatory order directing Mr. McGuinness to recover the vehicles from Mr. Donnelly in Newry, the Court is constrained by the law which pertains to the granting of interlocutory mandatory orders. Here damages could be an adequate remedy and whatever claim for damages which the plaintiff has against the defendants can be pursued at a plenary hearing.

27. Furthermore, requiring Mr. McGuinness to issue proceedings in Newry, if proceedings are required to recover the vehicles, is rather futile. Demanding that Mr. McGuinness deny any interest in the vehicles while requiring him to act on behalf of the owner creates a potential dilemma. I cannot decide what a court in Northern Ireland would actually do if Mr. McGuinness sought an order for the release of the vehicles. This court can only surmise what an Irish court would do.

28. Such loss as the plaintiff can establish deriving from the alleged illegal conduct of Mr. McGuinness is compensatable in damages. The first named defendant may not be trading but Mr. McGuinness has indicated to this Court that he is now trading five hundred vehicles per annum. That is a modest figure compared to previous trading, according to Mr. McGuinness. There is no evidence before this Court that he is incapable of paying an award for damages which this Court could give at the ultimate plenary hearing of this case.

29. The transcript this morning will help the parties to get advice on what can be sought, recovered or lost by pursuing these proceedings to a plenary hearing.

30. Given the urgency expressed on behalf of the plaintiff, which is not disputed by Mr. McGuinness, relating to the necessity for the registration of the vehicle before 15th June, it does behove the parties to pursue whatever reliefs they have against Mr. Donnelly. The Court directs Mr. McGuinness to furnish copies of the invoices, receipts and returns to the Collector General and the communications which he has had with Mr. Donnelly by 2pm next Thursday, 13th June. Same should be verified under oath. Therefore, all records and communications which fit within that description and which are in his possession or procurement should be disclosed and copied to the Plaintiff's solicitors.

31. Further discovery between the parties may be ordered once pleadings are closed. Such discovery could relate to what may or

may not have been in the possession or power or procurement of Mr. McGuinness or the other parties. The Court requires the parties to cooperate in realising the whereabouts and the value of the vehicles.

32. The Court further directs the plaintiff to deliver a statement of claim in these proceedings by 4pm on Friday, 21st June, 2019. Liberty is given to Mr. McGuinness and his legal representatives to file affidavits explaining their version of events concerning the disputed undertakings in the amended order of Reynolds J. on 12th March, 2019, by 14th June, 2019.

33. The purpose of that direction is to allow Mr. McGuinness address the alleged unlawful acts on his part which may merit the award of damages or exemplary damages. That aspect, subject to further submission, can be dealt with by affidavit.

34. In view of the desirability, if not the necessity, to move these proceedings to a conclusion where the parties can have their legitimate grievances aired, the balance of this application for interlocutory relief will be heard in the week of 1st July, 2019. I will facilitate counsel in that regard. To be clear, the order today is an order in the terms of para. 4 of the notice of motion of 12th February, 2019, and the order requiring Mr. McGuinness to make disclosure of invoices, receipts, VAT returns and communications with Mr. Donnelly.