THE HIGH COURT

[2023] IEHC 659

[Record No. 2022/106SP]

BETWEEN

THOMAS MANNING

PLAINTIFF

AND

JOHN MANNING

DEFENDANT

JUDGMENT of Mr Justice Brian O'Moore delivered on the 28th day of November 2023

1. This is a dispute between two brothers. The plaintiff, Thomas Manning, seeks an order for the sale of premises at 85 Ballyfermot Crescent, Dublin 10. The premises were bequeathed to John Manning by the father of the two men.

2. The dispute between the brothers involves a failed business venture in which both men were involved. The business was operated by a company, the debts of which were guaranteed by Thomas and by John. The guarantee, in favour of Ulster Bank Ireland Limited, is dated 08 August 2008. On 22 July 2010 John provided Thomas with an indemnity in the following terms: -

> "John Manning hereby full [sic] indemnifies Thomas Manning in respect to any liability which might arise connected with, or arising from any personal guarantee

given by Thomas Manning in respect of monies advanced to a A Cashcard Systems Limited by way of loan or overdraft or howsoever arising and that it is expressly agreed by the parties that on execution of this agreement Thomas Manning should have no personal or financial responsibility for any debt or debts of A Cashcard Systems Limited".

3. In 2013, Thomas commenced summary proceedings against John on foot of the indemnity of 2010. These proceedings, bearing the record number 2013/1076S, sought a total sum of €156,956.53. That included the amount of €117,185.67 "owing at that time arising from the Ulster Bank loan to A Cashcard Systems Limited": see the first affidavit of John Manning in the current proceedings.

4. By order of 10 February 2014, White J directed:

"By consent it is ordered and adjudged the plaintiff do recover against the defendant the sum of €117,185.67 with no order as to costs

'and it is ordered that the balance of this Motion (the sum of €39,770,86) be transferred to the non-jury list on Wednesday 12th day of February 2014 for mention to this date for hearing'".

5. On the evidence available to me, John Manning agreed to have marked against him a sum in respect of the entirety of the amount due at that point in time to Ulster Bank. It is conceded by John's counsel, at the hearing of this application, that John Manning was fully legally represented at the time this consent order was made, but that notwithstanding this no provision was made for revisiting or reducing the amount of the consent order in the event that any of the Ulster Bank debt was paid by John Manning, or indeed, from any other source apart from the resources of Thomas Manning. It may well be, of course, that John Manning was advised not to enter into this arrangement but nonetheless chose to do so. Whatever the dynamics of the situation in February 2014, this was a seemingly ill-advised court order to

which John Manning consented. It meant that Thomas Manning had an unappealable order in his favour against John in respect of the entirety of the Ulster Bank debt. However, it also meant that Ulster Bank was free to pursue John for the totality of the debt which the brothers had guaranteed, as the guarantee appears to have been a joint and several one. It left Thomas free to execute against John the full value of the Ulster Bank debt at the time, but (as already noted) provided no mechanism by which the judgment in favour of Thomas could be varied in any way in the event that John paid some or all of the guaranteed debt to the bank. It also allowed Ulster Bank to pursue John for all of the sums guaranteed by him.

6. On 04 June 2014, Thomas registered the judgment of 10 February 2014 against three properties: -

(a) a property owned jointly by the two brothers Mullaghboy, County Meath;

(b) John's family home at Clonoo, Gainstown, County Meath; and

(c) the house at 85 Ballyfermot Crescent, County Dublin.

7. In fact, in order to pay off Ulster Bank John had placed his family home (at Gainstown) on the market. The house went sale agreed, but the sale could not close because of the registration of the judgment mortgage against the property.

8. In 2017, the jointly owned property at Mullaghboy was sold. While the affidavits could be clearer (to put it mildly) on what was involved in this, it was accepted by counsel during the course of the hearing that the sale of the Mullaghboy property went close to clearing the entire debt due to Ulster Bank, but there was no direct return to either brother from the sale of this property which they jointly owned.

9. At para. 15 of his first affidavit, John Manning set out a position which very much reflected the attitude taken by counsel at the hearing of the current application. Mr Manning said:

> "The paying off of the original Ulster Bank debt, which gave rise to the said High Court judgment, on consent, on 10 February 2014 means that the plaintiff who is not at any loss arising from that Ulster Bank and therefore is released from his Ulster Bank indebtedness."

10. This is incorrect. The individual loss to Thomas Manning and to John Manning arising from the fact that Ulster Bank were paid out of the proceeds of Mullaghboy constitutes one half of the net proceeds of sale. In other words, if John Manning had arranged the payment of the Ulster Bank debt without recourse to an asset held with Thomas Manning then Thomas would have received half of the net value of Mullaghboy when it was sold.

11. Much of the opposition to the making of the order for sale founders when one considers this basic commercial fact. In addition, the actual loss to Thomas is difficult to define. In his second affidavit, Thomas states that the property was sold for €150,000, and the net proceeds of sale from Mullaghboy were approximately €119,000. All of those monies were paid to Ulster Bank, and there is a rump of debt (approximately €8,000) owed to Ulster Bank as of April 2021. However, Thomas also complains that the property was sold at an undervalue – though he does not specify what the property should have realised in his view. An indication to the extent of the undervalue is, however, a valuation from REA Potterton Auctioneers which states that the Mullaghboy property was worth €300,000 as of July 2017. This valuation was relied upon by John Manning during the course of yet other proceedings, bearing the record number 2017/213SP, in which Thomas sought an order for the sale of the lands at Mullaghboy. An order for the sale of those lands was made by Coffey J. on the 18th December 2017, with a stay of three months on John's undertaking: -

> "To facilitate the sale of the property.
>
> To pay the plaintiff from the proceeds of his interest in the property and allow it not to exceed €145,721.17.

To take all steps necessary to facilitate the sale of the property."

12. The first and third of these appear to be something of a duplication. The second undertaking reflects the liability on the part of John to Thomas at the time. This liability was made up of the sum of €117,185.67 (contained in the consent order of February 2014), a sum of €4,378.80 (ordered by Keane J. in the same proceedings) interest and costs.

13. It would be remiss of me to ignore the fact that, as mentioned by John in his evidence, Thomas has brought proceedings pursuant to s. 117 of the Succession Act, 1965 in respect of the provisions of the Will of the late father of the two brothers. The Will, as I commented to counsel during the hearing, makes uncomfortable reading. The relevant portion reads: -

> "Unfortunately my son Thomas Manning and his family have become estranged from his mother and me. He rarely visited us until my dear wife became terminally ill and deprived us the pleasure of getting to know and enjoy the company of his children, *i.e.* our grandchildren. Thomas borrowed large sums of money from his mother on two occasions but never repaid these loans. He often pressurised his mother for money but never showed any love or generosity towards her. In these circumstances, while I wish him and his family well, I leave him the sum of €1,000…"

14. It is very difficult to know where responsibility lies for a dispute between two brothers which has been as elongated as it is bitter. At the end of the hearing I urged the brothers to resolve their dispute, preferably by the use of a mediator. That suggestion was not taken up, and for that reason this judgment is required.

15. There was no great dispute about the legal position. In *Quinns of Baltinglass Limited v Smith* [2017] IEHC 461, Keane J. reviewed the relevant authorities, including the judgment of Dunne J. in *Drillfix Limited v Savage* [2009] IEHC 546 and Laffoy J. in *Irwin v Deasy* [2006] IEHC 25.

16. Keane J. concluded that the *"essential question"* is whether the defendant has satisfied the court that *"a good reason exists for not ordering a sale"* where the proofs are otherwise in order. The example given by Laffoy J. in *Irwin v Deasy*, namely the land at issue might be a family home, do not arise here. The example does, however, give some guidance as to what sort of considerations may be taken into account by the court or, to put it another way, what might constitute a *"good reason"* not to order a sale.

17. For the sake of completeness, I should note that a similar approach is taken by Twomey J. in a very helpful judgment of *D&D v S&S* [2017] IEHC 584.

18. There is no dispute, and I so find, that the required proofs have been made out by Thomas Manning. The issue therefore resolves down to whether there is a good reason not to order a sale.

19. A number of submissions were made by counsel for John Manning as to why a sale should not be ordered.

20. The first of these is the one to be found in John Manning's affidavits, namely that Ulster Bank debts which were designed to be addressed by the consent order of 2010 had been met without any cost to Thomas. For the reasons I have already given, this is simply incorrect.

21. The second reason is a related one and, in truth, encompasses the main reason why the court would consider not ordering a sale. It is this. John Manning, in settlement of yet another set of proceedings (the original Company Law proceedings bearing the record no. 414 COS/290) agreed to indemnify Thomas and hold him harmless in respect of any of the debts to the company. The end result, if the Ballyfermot property is sold and the monies due to Thomas are paid out of it, is that Thomas will have made a profit out of the collapse of the business and the repayment of the relevant creditors of that business (including Ulster Bank). As counsel for John put it on a number of occasions, circumstances have changed since the

original consent order of 2010 and any order for sale, in the sum sought by Thomas, will unjustly enrich Thomas Manning.

22. There are several problems with this *"good reason"*. Firstly, and ignoring interest calculations, the amount that John owed to Thomas on foot of the consent order of White J. in 2014 was about €117,000. This is the capital sum which Thomas now seeks to recover against John. The cost to Thomas of the payment to Ulster Bank could be anything between around €60,000 (namely half of the net value of Mullaghboy when it was sold) or a sum in excess of twice that amount (if the Potterton valuation of 2017, relied upon by John Manning in earlier litigation) is correct. While the actual sale price would suggest that the Potterton valuation was over optimistic, I am not given any relevant evidence about the circumstances of the sale which explain why (according to at least one of the parties) Mullaghboy was sold at an undervalue.

23. What is undoubted is that the gross sale price was €150,000, and the net receipts amounted to just shy of €120,000. A similar reduction of gross to net receipts for the sale of the property would yield a figure of €270,000 (if the Potterton valuation was accurate). That would mean that the value of the loss of Thomas Manning's half interest in Mullaghboy was in the region of €135,000 - a figure very close to the capital sum that he now seeks to have paid out of the proceeds of sale of Ballyfermot.

24. The evidence before me is not as complete as one would like. However, given that counsel for John Manning accepted (quite correctly) that the onus is on him to show that there is a good reason why the sale should not proceed, any gaps in the evidence cannot really accrue to his benefit. In any event, it is possible to decide whether or not this second reason is a good one by reference to principle as opposed to by reference to financial calculations. All of the monies which Thomas Manning claims to be owed to him by John constitute court awards in his favour. The lion's share of the debt for which Thomas has a court order against

John is the figure of some €141,000 which John, through his lawyers, agreed in February 2014 should be paid to Thomas. The bargain which John made with Thomas at the time appears to be a poor one, at least on the face of it, and certainly did not contain appropriate legal provisions to accommodate any change in circumstances. However, to say that this is a good reason for refusing an order for the sale of the property would be effectively to rewrite the arrangements between the two men which have been in place for the last nine years and which have over that time been embodied in a court order. To do this would appear to be wrong in principle, and without any direct authority.

25. Finally, it is suggested both in the submissions to me on behalf of John, and in John's own affidavit, that account should be taken of the fact that John was prepared to sell his family home to meet the Ulster Bank debt. That may well have been the case. However, that proposed course of action did not proceed. It is difficult to see how the intended sale of John's family home to meet the liabilities of the business constitutes a good reason as to why Thomas should not be able to obtain an order for sale against the Ballyfermot property in order to satisfy the established liabilities of his brother John.

26. I would therefore grant Thomas Manning the reliefs sought by him in the special summons of the 23rd June, 2022. In essence, the order will direct the sale of the Ballyfermot property together with all necessary ancillary orders. I will list the matter for mention on the 11th of December 2023 with a view to either receiving an agreed order from the parties or alternately hearing the parties on any disputes on its precise form, in light of the contents of this judgment.