APPROVED **[2024] IEHC 286**

THE HIGH COURT

Record No: 2024/11 IA

Between:

SIDNEY SUTTON

Applicant

-AND-

SALUMI GRAZING LIMITED T/A SALUMI GRAZING, MARK LEAVEY, KAREN LEAVEY, COHESION INFHEISTÍOCHTAÍ LIMITED, EOIN GOULDING, JAMES MICHAEL McQUAID T/A McQUAID ACCOUNTANTS, MICHAEL PERKINS and THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

Respondents

EX TEMPORE JUDGMENT of Mr Justice Rory Mulcahy delivered on 16 February 2024

Introduction

1. This ruling concerns an application for an injunction in a proposed derivative action by the applicant. The proposed derivative action would appear to be at least the third set of proceedings arising out of a striking set of circumstances which occurred in 2021.

2. In brief, the applicant was a director and 50% shareholder in Salumi Grazing Ltd ("**the Company**"). One of the proposed respondents to the derivative action, Mark Leavey, was the other director and 50% shareholder. The Company had the benefit of a three-year licence (which the applicant alleges was, in fact, a lease) to occupy Unit Two, Terenure Place, Terenure, Dublin 6W, where it operated a restaurant business. The

licensor (or landlord) was Cohesion Infheistíochtaí ("**Cohesion**"), of whom Eoin Goulding is a director, both proposed respondents to the derivative action.

3. In 2021, Mr Leavey took steps to remove the applicant as director of the Company, including by filing documentation with the CRO. Those steps are the subject of the first proceedings which the applicant took (2021/5206P) against the parties to the intended derivative action. Those proceedings concerned an application for injunctive relief, which was the subject of an *ex tempore* judgment of Stack J of 22 June 2022, which I've had the benefit of reviewing. As appears therefrom, Stack J granted the applicant mandatory injunctive relief, requiring that the documentation lodged with the CRO be amended and that the applicant be reinstated as a director of the Company.

4. The application before Stack J also included an application for an injunction with respect to the Company's occupation of the Terenure premises.

5. As mentioned above, the Company had the benefit of a three-year licence to occupy the Terenure premises from September 2020 to September 2023. However, in May 2021, Cohesion cancelled the licence and immediately granted a new licence to a company, Karmar Limited, which commenced trading from the premises. The new licence was on the same terms as the cancelled licence. The directors of Karmar were Mark Leavey and his wife, Karen Leavey.

6. Stack J had significant concerns about this transaction, as evidenced by her judgment:

> *I have very serious concerns about the actions of the second and third defendants [Mark and Karen Leavy]. However, I also have very serious concerns as to how, within 24 hours of the plaintiff attending on-premises, the fourth defendant [Cohesion] acted to terminate the licence on a completely unclear legal basis and immediately granted to another company, owned, managed and controlled by the second defendants a similar licence.*

7. She added that she had concerns about the affidavit sworn by the fifth defendant, Eoin Goulding, in relation to the application to restore the Company's occupation of the Terenure premises and had significant concerns about the lawfulness of the termination.

8. Notwithstanding these concerns, Stack J did not grant an injunction restoring the Company to the premises for two reasons. First, insofar as there was a right to be restored, it was a right enjoyed by the Company, not the applicant in person, and could, therefore, not be granted in proceedings brought by the applicant. Second, there was now a new company operating from the premises whose employees might be adversely affected by any such injunction.

9. It appears from judgement of Stack J that she was of the view, at least on an interlocutory application, that the Company had a stateable cause of action regarding the termination of the licence/lease.

10. The applicant says that any such view would be reinforced by the evidence given by Karen Leavy at the hearing into a complaint by her to the Institute of Certified Public Accountants in Ireland about the applicant. On page 20 of the transcript of her evidence, she describes the circumstances leading to the termination of the lease.

> "*We had to tell the landlord what was happening, and he was very supportive and everything; he said, I will do you another lease, do you another lease without his name on it, get it signed and everything, try to get him out of the business that way".*
>
> *"Rightly or wrongly, that is what he did anyway. He got a solicitor, wrote the new lease that evening, and came early on Saturday morning to sign a new lease without Mr Sutton's name on it, and it will just be myself and Mark's name*."

11. These are the events which are at the heart of the proposed derivative action. Mr Sutton claims that as a result of the Leaveys', Cohesion's and Mr Goulding's wrongful actions, the Company lost the benefit of a valuable lease/licence and, as a consequence, lost the benefit of significant profits which the Company would have been able to earn over the remaining period of the lease/licence.

12. For the purpose of this application, it is necessary merely to observe that based on the evidence to date, I share Stack J's concerns about the lawfulness of the termination of

the licence and that I agree with the applicant that those concerns are reinforced by the evidence of what Mrs Leavey said at the disciplinary hearing. Put otherwise, there is a good arguable case that the Company was wrongfully deprived of the benefit of the licence.

13. Stack J, in refusing the applicant an injunction *inter alia* on the basis that the cause of action was the cause of action of the Company, expressly stated in her judgment that if Mr Sutton wanted to bring a claim on behalf of the Company, he would have to do so by way of derivative action.

14. On 19 January 2024, Mr Sutton filed an application for leave to bring a derivative action, including a claim arising from the alleged wrongful termination of the lease. That application is listed before this court on Monday next. The applicant seeks an injunction in advance of the grant of leave to bring the derivative action in the following circumstances.

15. The applicant has quantified the Company's claim for loss of profits and unpaid debts in the region of €2.5 million. The basis for this calculation is set out on pages 25 and 26 of his Statement of Claim. This Statement of Claim was delivered on 22 January 2024. He has provided supporting documentation with this application, to which I have had regard.

16. As noted above, this is the third set of proceedings concerning the dispute between the parties. The second in time involved an action by Cohesion against the applicant and the Company seeking to restrain them from presenting a winding-up petition. This application was prompted by the applicant's delivery of 21-day warning letters to Cohesion regarding payment of the sums claimed in these proceedings. That application is listed for hearing on 19 February 2024.

17. The applicant claims that Cohesion is seeking to dissipate its assets with a view to avoiding judgment in favour of the Company. He seeks, in effect, a Mareva injunction to prevent such dissipation.

18. It is not disputed that Cohesion is selling its property assets. In particular, it is selling the block of buildings of which the premises the subject matter of the lease/licence form part. The buildings were first placed for sale in or about April 2023, seeking offers in excess of €3.4 million. Cohesion explains, in an affidavit sworn by Mr Goulding, that it has a purchaser in place, and the property is marked "sale agreed" though contracts have not been signed.

19. This application seeks an order granting a hold on the sale of Unit 2, which forms part of the property being sold by Cohesion.

Issues for the Mareva

20. The principles for the grant of an injunction are well settled and have recently been stated and clarified in **Merck Shark & Dohme v Clonmel Healthcare [2019] IESC 65**, being whether there is a serious issue to be tried, the balance of justice or convenience and, as a significant aspect of the balance of convenience, the adequacy of damages as a remedy.

21. In the case of a Mareva injunction, additional requirements have to be satisfied. The principles are also well established and are stated in **O'Mahony v Horgan [1995] 2 IR 411**. In particular, it is necessary to give some grounds for believing there is a risk of removal or dissipation of assets. As made clear by Hamilton CJ:

> *"Consequently, the cases established that there must be an intention on the part of the defendant to dispose of his assets with a view to evading his obligation to the plaintiff and to frustrate the anticipated order of the court. It is insufficient to establish that the assets are likely dissipated in the ordinary course of business and the payment of lawful debts."*

22. The applicant asserts that direct evidence of dissipation will rarely be available, and therefore, the risk of dissipation can be inferred from other factors. He refers to **Bonice**

Corporation v Oakes [2016] IEHC 461 in which Keane J quoted from the judgment of Kearns J (as he then was) in **Aerospares v Thompson [1999] IEHC 76**:

> *'Good grounds for alleging that the defendant has been dishonest is relevant. Dishonesty is not essential to the exercise of the jurisdiction, and there is no need to show an intention to dissipate assets. But if there is a good arguable case in support of an allegation that the defendant has acted fraudulently or dishonestly ... e.g., being implicated in an ingenious scheme for the misappropriation of funds belonging to the plaintiff, or has acted unconscionably, then it is unnecessary for there to be any further specific evidence on risk of dissipation for the court to be entitled to take the view that there is a sufficient risk to justify granting Mareva relief. Once this is shown, the limit of the Mareva relief will take into account claims for which the plaintiff has a good arguable case, including those which do not involve such an allegation.'*

23. In addition to meeting the threshold for a Mareva injunction, the applicant faces the further hurdle in this application that he seeks an injunction in proceedings in which he has not yet been given leave to bring.

24. Insofar as the applicant was concerned about the rule in **Battle v Irish Art Promotion Centre [1968] 1 IR 252**, now confirmed in **Allied Irish Bank v Aqua Fresh Fish Ltd [2018] IESC 49**, I do not, for present purposes, consider that an obstacle. The issue wasn't fully debated before me, but for the purpose of this application, I am prepared to accept that an individual who seeks to bring a derivative action on behalf of a company is not bound by the requirement that a company cannot be represented by a director in proceedings. That is not to suggest, however, that an individual could use the mechanism of a derivative action in order to 'get around' the rule in Battle.

Discussion

25. Therefore, the first issue to consider is whether the applicant can obtain injunctive relief before being given leave to bring a derivative action. Neither party was able to point to any authority directly on point. The Rules of Court provide for the bringing of an application for leave to bring a derivative action. It expressly provides that that application can include an application for interim relief of an urgent nature. As a matter of principle, it seems to me that where it could be shown that the application for leave to bring derivative relief would be frustrated if interim relief were not granted, then it should be available in advance of the hearing of the application to bring the derivative action. (See, by analogy, the law in relation to injunctions in advance of leave to bring judicial review, **Okunade v Minister for Justice [2012] 3 IR 152**).

26. I think it would be necessary to show that there is some prospect of leave being granted to entertain an application for interim relief. I want to be careful not to pre-empt that pending application. However, for the purpose of this application, it appears to me that the Company has a *prima facie* cause of action regarding the termination of the lease/licence. I make no comment on the quantum claimed. I am therefore prepared to accept, for present purposes, that it is, in principle, open to the court to grant relief in advance of leave being granted. Whether it is appropriate to do so is another matter.

27. Although I am prepared to accept that relief is, in principle, available in the circumstances presented, I am not prepared to grant the relief sought at this time for the following reasons.

28. As discussed, in order to obtain Mareva-type relief, it is necessary to show an intention to dissipate assets for the purpose of evading an anticipated judgment. I agree with the applicant that the court can infer such an intention from the surrounding circumstances.

29. The necessity to meet this threshold is obvious. Mareva-type relief would, absent such intention, inevitably be refused on the basis that damages are an adequate remedy. A plaintiff is not entitled, by way of injunction, to restrain a defendant from dealing with assets in which that plaintiff has no proprietary interest pending the determination of

proceedings. As stated in **O'Mahony v Horgan**, a plaintiff cannot, by injunction, obtain security for a potential judgment.

30. The Mareva jurisdiction thus represents an exceptional jurisdiction that can be invoked where the evidence suggests that the way in which a defendant is dealing with their assets is intended, in effect, to defeat justice. In my view, the applicant hasn't come close to adducing evidence from which the court could infer that that was Cohesion's intent in selling its Terenure property.

31. First, there is the question of timing. The properties were placed on the market in April 2023. The applicant first invoiced Cohesion in June 2023 (although Cohesion claims that it did not receive any invoice until receipt of the 21-day notice in November 2023). True, Unit 2 was initially offered for rent rather than for sale as part of the wider landholding, but it is very clear that the proposed sale was not in response to any demand made.

32. Even if, as suggested by the applicant, it was clear from the 2021 proceedings that the Company, through a derivative action or otherwise, might pursue a substantial claim against Cohesion, it is not reasonable to draw an inference that a proposed sale in 2023 was initiated in an effort to evade proceedings commenced in 2021, in which an injunction application was determined in June 2022, and which do not appear to have been progressed thereafter. Indeed, insofar as there was a claim against Cohesion, Stack J made it clear that this was the Company's claim that needed to be pursued by derivative action. At the time that the proposed sale commenced, there were no such proceedings in being, nor had any such proceedings been threatened.

33. Second, there is the nature of Cohesion's dealings with its assets. As pointed out by counsel for Cohesion, there was nothing surreptitious about the sale of the properties. They were marketed publicly through a well-known estate agent. There is no suggestion that the price sought was anything other than a fair market price or that Cohesion, if it concludes the sale of the property, will not get full value for its assets.

34. The most that the applicant can assert is that the transaction which gives rise to the cause of action against Cohesion – the cancellation of the licence/lease – was a

fraudulent transaction. Therefore, he argues, it is to be inferred that Cohesion's actions in selling the property are also intended to disadvantage the Company by putting Cohesion's assets beyond the reach of a judgment in favour of the Company. The applicant asks the court to infer too much.

35. In this regard, it is of significance that, on the basis of the evidence before the court, the case against Cohesion is that it facilitated the Leaveys in taking possession of the premises and getting the benefit of the licence and, on the applicant's case, the business of the Company. Cohesion's evidence is that it obtained no benefit from this and simply received the same licence fee from Karmar as it had from the Company. Insofar as its conduct is capable of being characterised as fraudulent, it is simply not the type of conduct contemplated by Kearns J in **Aerospares**, which could, without more, justify an inference that there is a risk of dissipation. What Kearns J was addressing, in my view, was a circumstance where a prior attempt to misappropriate funds might lead to an inference that there was a risk of dissipation. In that case, notably, Kearns J expressed his belief that the defendants had acted dishonestly in appropriating monies due to the plaintiff to their own account. The applicant, by contrast, has not asserted any basis for contending that Cohesion has misappropriated the Company's funds, only that it has facilitated the Leaveys in so doing. That is not changed if, as suggested by the evidence of Karen Leavy to the accountant's body, it was Cohesion's or Mr Goulding's idea to cancel the Company's licence.

36. In refusing relief, I must also have regard to two further factors that are apparent from the foregoing discussion. Firstly, the applicant has clearly delayed in bringing this application. In Stack J's judgment of 22 June 2022, he was told that the claim he now maintains could only be pursued by the Company and could only be brought by way of derivative action. As a lay litigant, he may not have known what a derivative action was – very few lay persons and possibly many lawyers would not – but that can't justify a failure to bring the derivative action for more than 18 months. The only other explanation for the delay was that he was waiting for the second and third respondents to comply with the order of Stack J in relation to filings with the CRO. I fail to see why it was necessary to await those steps being taken.

37. The applicant delayed further in seeking injunctive relief. The properties went on sale in April 2023. The applicant hasn't suggested that there was any delay in this coming to his attention. Yet he took no action, not even calling on Cohesion not to sell the properties pending the determination of contemplated proceedings. It appears that Cohesion first became aware that he had an issue with the sale of the properties in late December 2023 in the context of Cohesion's injunction proceedings. Mareva-type relief is almost invariably sought on an urgent or emergency basis triggered by a fear of dissipation requiring an immediate response. The absence of any urgency here undermines the suggestion both that there was an intention to dissipate or that there was a well-founded fear of a risk of dissipation.

38. The other factor to which I have regard is the fact that it is not clear to me at this stage that the relief sought will do anything other than potentially damage Cohesion – if it undermines a potential sale – without providing any corresponding benefit to the applicant. If the Company is ultimately successful in a claim, the most it could possibly obtain from Cohesion is an award of damages; it could never have an interest in the properties being sold. The mere fact that Cohesion is – at the moment – simply seeking to convert its assets from one form to another does not, by itself, prejudice the applicant or the Company's position. In any event, as stated above, the Company is not entitled to security for any potential award of damages.

39. That, in any event, is very much a secondary consideration. For the sale to be regarded as an attempt to dissipate the assets to evade judgment, it must necessarily be done in response to the prospect of such judgment. Based on the evidence before me, I am not satisfied that this was so. In the circumstances, I do not need to address the difficult question of the adequacy of the undertaking as to damages proffered. I accordingly refuse the relief sought.