THE HIGH COURT

[2023] IEHC 442

2022 No. 5297P

BETWEEN

KIERNAN MILLING UNLIMITED COMPANY

PLAINTIFF

AND

PADRAIG KIERNAN trading as P.KIERNAN FARMS also trading as KIERNAN FARMS (AHERLOW) also trading as KIERNAN FARMS (GRANARD)

DEFENDANT

JUDGMENT of Ms. Justice Eileen Roberts delivered on 21 July 2023

Introduction

1. This judgment deals with two separate motions.

2. The first motion is the plaintiff's motion seeking summary judgment against the defendant in respect of part of a sum claimed in plenary proceedings which issued on 18 October 2022. This motion is described in this judgment as the "**Summary Judgment Motion**".

3. The second motion dealt with in this judgment is the plaintiff's motion for an interlocutory Mareva injunction against the defendant in respect of the proceeds of sale of properties marketed for sale by the defendant. This motion is described in this judgment as the "**Mareva Motion**".

4. The plaintiff is an unlimited company having its registered address at Granard, Co. Longford. It carries on the business of the supply of animal feed.

5. The defendant is a pig farmer who trades under the various names of P. Kiernan Farms, Kiernan Farms (Aherlow) and Kiernan Farms (Granard).

6. The parties have been engaged in a commercial relationship for many years whereby the plaintiff has supplied animal feeds and grain and associated agricultural product to the defendant for use in his business. The defendant was at one time the vice chairman of the plaintiff company, which is a family business, but he is no longer involved with the plaintiff company in any way.

The Summary Judgment Motion

Background

7. On 18 October 2022 the plaintiff issued these plenary proceedings against the defendant seeking, inter alia, judgment in the sum of €3.4 million against the defendant. This sum is sought on foot of the alleged default on the defendant's part of a settlement agreement entered into between the parties on 27 July 2018 relating to proceedings bearing High Court record numbers 2014/2851S, 2014/2852S, 2014/2853S and 2014/2854S (the "**Settlement Agreement**").

8. The plenary proceedings also seek judgment in the sum of €4 million against the defendant for the supply of animal feed to him by the plaintiff. In the alternative, damages are sought for breach of contract. The plenary proceedings also seek an injunction restraining the defendant from dealing with certain identified properties. This latter relief is considered under the Mareva Motion below.

9. The plaintiff now seeks, by notice of motion dated 3 November 2022, to recover the sum of €3.4 million arising from the Settlement Agreement by way of the summary judgment, thereby carving out that aspect of the claim from the plenary proceedings. It is accepted by the plaintiff that the balance of the monies sought, which relate to the supply of product to the defendant, must properly be determined by way of plenary hearing.

10. In 2014 the plaintiff issued four sets of summary proceedings (the "**2014 Proceedings**") seeking to recover monies from the defendant relating to the supply of animal feed and assorted agricultural input goods, loan facilities and other commercial matters related to the defendant's business. The combined total of the sum sought in the 2014 Proceedings was in the region of €15.5 million. The 2014 proceedings were compromised by way of the Settlement Agreement.

11. Given the importance of the Settlement Agreement to the Summary Judgment Motion, I propose to set out the material terms in full:

> "4. *The Defendants, and each of them will consent to a Judgment in the sum of €5.4 million with a stay on entry and execution provided the under noted terms are complied with in full;*
>
> *(a) the Defendants to pay the sum of €500,000 from the proceeds of the sale of Corbally Farms, Downpatrick County Down within 7 days of the date of closing and in any event to be no later than 30th September 2018.*
>
> *(b) €3 million to be paid by quarterly instalments of €125,000 commencing on the 1st October 2018 and continuing thereafter quarterly until the sum of €3 million is discharged in full.*

(c) *Should the defendants fail or default in the payment of any one quarterly payment in the sum of €125,000 the Plaintiffs shall be entitled to enter and execute the Judgement in the sum of €5.4 million less any quarterly payments already made.*

(d) *Upon full compliance with the payment schedule set out in B above, the Plaintiff confirms that the Defendants are released from their obligations under this agreement and the entire debt is deemed to be fully discharged*."

12. Clause 8 of the Settlement Agreement confirmed that it embodied the entirety of the agreement and understanding as between the parties. Specifically, the clause provided that *"[A]ny variation in the Terms of Settlement shall be in writing and be signed by or on behalf of each party*".

13. The parties to the Settlement Agreement agreed that the terms of settlement would be made a rule of court. By Order of the High Court dated 10 October 2018, by consent, it was ordered that the Settlement Agreement annexed to the Order as a schedule "*be received and filed and made a rule of Court*". The Order did not however state that judgment was entered against the defendant, even though the Settlement Agreement itself provided that the defendant "…*will consent to a Judgment in the sum of €5.4 million...*". The plaintiff accepts therefore that it cannot rely on the Order dated 10 October 2018 to enforce judgment against the defendant.

Events post the Settlement Agreement

14. In accordance with the Settlement Agreement, the defendant made the initial payment of €500,000 on time on 8 October 2018. Furthermore, the defendant commenced the quarterly payments of €125,000 and maintained these payments up until and including

30 June 2021. Therefore, by 30 June 2021, total payments of €2million had been made by the defendant on foot of the Settlement Agreement.

15. The defendant failed to make the payments due in September 2021, December 2021, March 2022, June 2022 and September 2022. In those circumstances the plaintiff claims that in accordance with clause 4 (c) of the Settlement Agreement (quoted above), it is entitled to enter and execute judgment against the defendant for the entire balance due on foot of the Settlement Agreement in the amount of €3.4 million – being the total settlement of €5,400,000 less €2 million already paid by the plaintiff. The plenary proceedings which issued on 18 October 2022 included a claim in these terms and it is that aspect of the plenary proceedings in respect of which judgment is now sought in a summary manner.

16. In its defence and counterclaim dated 10 May 2023, the defendant alleges that the Settlement Agreement was varied by the parties in or about August 2021. It is expressly pleaded at para 25 of the defendant's counterclaim that in 2021, the parties agreed to vary and did in fact vary the Settlement Agreement so as:

> *"(a) to suspend the Quarterly Payments; and*
>
> *(b) to make any suspended Quarterly Payments payable in quarterly instalments at the end of the term of the agreement (i.e., post October 2024) unless previously discharged by the defendant*".

17. It is pleaded that the said variation was evidenced in writing and that it represented to the defendant (a representation the defendant relied on) that the plaintiff would not seek to rely on the suspension of Quarterly Payments to seek immediate payment of €3.4 million under the Settlement Agreement (para 29(b) and para 30 of Counterclaim).

The alleged variation of the Settlement Agreement

18. Mr Mark Kiernan on behalf of the plaintiff avers in his affidavit sworn 2 November 2022 at para 10 that the defendant indicated to the plaintiff that

> "*as a result of him trying to "build up" his farms that he would not be in a position to make the quarterly payments due under the settlement agreement until such time as his pigs were suitably fattened and ready for the abattoir. This can take some time to come to pass. It was made clear by Kiernan Milling that any accommodation would not be an acquiescence of its position under the settlement agreement and that when Padraig Kiernan's business was fully progressed that he was to make good the deficient payments and recommence the discharge of the obligations under the settlement agreement. That was accepted by Padraig Kiernan who indicated on several occasions to his contact in Kiernan Milling, Sean McGlynn that he would catch up on the terms and regularise the repayment schedule*".

19. The payments did not recommence. A letter was issued by the plaintiff's solicitors to the defendant on 15 July 2022 and a formal letter of demand issued on 10 October 2022.

20. In his affidavit sworn 14 February 2023 the defendant, Padraig Kiernan, avers at para 9 that "…*in the summer of 2021, it was agreed by the parties that the payments due under the Settlement Agreement would be suspended*". He said that the context was the Covid -19 pandemic. He further avers at para 10 that *"[I]nstead of being paid on the dates provided for under the Settlement Agreements, the suspended quarterly payments were to be paid on the same quarterly basis at the end of the period provided for in the Settlement Agreement i.e. October 2024*."

21. His affidavit confirms that a draft agreement was prepared, and this is exhibited at exhibit PK2 to his affidavit. He says at paragraph 11 that "[*W]hen the draft was prepared, it was thought that two quarterly payments would be the ones not paid as it seemed in the summer of 2021 that the impact of COVID -19 would recede"*.

22. It is common case that the draft agreement (which appears to have been prepared by the defendant's solicitors in August 2021) was never signed. That draft recites the provisions of the Settlement Agreement and reflects that "*the parties hereto have agreed to amend the Settlement Agreement as hereinafter set out*". The draft then confirms that:

> "*A. The payment of the 2 instalments due to be paid by the Defendants to the Plaintiff on the 01/10/2021 and the 01/01/2022 are hereby waived by the Plaintiff on the condition that same shall in lieu be paid by the Defendants to the Plaintiff on the 01/10 /2024 and on the 01/01/2025.*
>
> *B. In all other respects the parties hereto confirm the term (sic) of the Settlement Agreement dated the 27/07/2018*."

23. The defendant says that the draft was "*overtaken by events*" and that "*the agreed suspension of quarterly payments continued, with no indication from the plaintiff that this was unacceptable*" (Para 12). The defendant exhibited some text messages and emails he had exchanged with the plaintiff at exhibit PK3. He says the effect of those messages was that there was no question of the plaintiff pressing for payment or otherwise suggesting that the suspension of payments was at an end. The key text message in that exchange appears to be one from the Plaintiff's Sean McGlynn to the defendant in the following terms :"*Evening. Missing Quarterly payment came up… Could I get an email off you next week about it. Something to acknowledge that it is due*

but delayed for x reason. That should be ok. I'm away from Tuesday till following Thursday. Thanks"

24. An email was then sent by the defendant to Sean McGlynn on 24 May 2022 in the following terms: –

"*Sean,*

Further to our conversation the 125K due to Kiernan Milling on April first is temporary (sic) delayed due to a unforeseen delay in the sale of property.

I expect to be back on track shortly.

Thanking you for your patience.

Kind Regards

Padraig"

25. Sean McGlynn acknowledged the email within 30 minutes simply stating "*Padraig Thanks for the update Regards Sean*."

26. The defendant says that it was both parties' understanding that any missed payments would simply be made at the end of the period provided for by the Settlement Agreement, by way of quarterly payment and that no question of their immediate payment arose. He admits at para 16 of his affidavit that he proposed to resume the quarterly payments falling due from January 2023 pending any adjudication of the circumstances surrounding the deferral of payments. However, he says he was unable to do this in circumstances where *lis pendens* proceedings were, he says wrongly, brought by the plaintiff, (although never served) which prevented him from selling properties. The losses he claims he has suffered as a result of the registration of the *lites* (since vacated) form part of his counterclaim and are also alleged to form part of the background to the non-resumption of the quarterly payments under the Settlement Agreement.

27. Sean McGlynn swore an affidavit on behalf of the plaintiff on 12 April 2023. At para 11 of this affidavit Mr Glynn states that

> "*Mr Kiernan was express in his commitment that the other payments, bar the two deferred payments, were to be paid in the normal course. This was the subject of much discussion back and forth between us. Indeed, in around 13 September 2021, Padraig Kiernan sent me a draft agreement to reflect this request. It was drafted by his solicitors*…".

28. Mr McGlynn states at para 12 that the parties conducted their affairs on the basis of the said draft agreement and that it referred only to the suspension of two payments. He says there was no forbearance on the entire quarterly payments due under the Settlement Agreement or any other accommodation beyond December 2021 akin to what is argued by the defendant.

29. Mr McGlynn says that he "*continually sought*" the defendant's position on the further payments due under the Settlement Agreement. He refers to further correspondence he received from the defendant on 7 July 2022 but that appears to this court to refer to missed monthly payments in respect of the trade account rather than to the quarterly payments under the Settlement Agreement.

30. It is clear from the affidavits of Mr McGlynn and Mr Mark Kiernan that there have been no further payments received by the plaintiff since 30 June 2021. That remained the position at the hearing of this application.

<u>The submissions of the parties</u>

31. The plaintiff says that any agreement reached related only to the identified two missed quarterly payments and that thereafter the plaintiff was to be entitled to rely on the enforcement provisions contained in the Settlement Agreement to sue for the entire

outstanding balance – although the plaintiff did not address what impact the two deferred payments would have had on that entitlement (the €3.4 balance would cover all amounts due, including the deferred payments). The plaintiff submits that the question of whether or not the defendant was obliged to make up the two missed payments during the currency of the Settlement Agreement (i.e. in conjunction with the remaining scheduled payments) or whether they were to be added on to the end of the period specified in the Settlement Agreement is not relevant as the defendant has failed to make any payments since June 2021.

32. The defendant says that Mr Mark Kiernan's grounding affidavit referred to the suspension of the quarterly payments under the Settlement Agreement but made *no* reference to the suspension being limited to two quarterly payments. Furthermore, the defendant says that had the "*accommodation*" which the plaintiff admits was in place only been in respect of two payments (i.e. the quarterly payment due in September 2021 and December 2021) there would have been no question of Mr McGlynn writing to the plaintiff (after the quarterly payment for March 2022 and two weeks before the quarterly payment in June 2022) in the terms set out in the text messages outlined earlier in this judgment. The defendant has acknowledged that unpaid quarterly payments will be payable at the end of the period provided for by the Settlement Agreement, if not already discharged by him. He does not therefore dispute the debt. However, he disputes that the amount claimed is due and owing at this time.

33. The defendant also refers to an averment by Mr McGlynn at para 14 of his affidavit where he described the plaintiff as being "…*betwixt between enforcing the terms of the settlement agreement and maintaining a relationship to protect repayment of the animal feed account*". The defendant submits that this supports his version of events,

namely that the suspension was not limited to two payments and that there clearly was a variation of it by the plaintiff.

34. The defendant also argues that it is the actions of the plaintiff that has prevented the quarterly payments being recommenced and that this action was itself a breach of the Settlement Agreement by the plaintiff.

The applicable legal principles

35. The parties are agreed that, pursuant to this court's inherent jurisdiction, it may determine proceedings commenced by way of plenary summons on a summary basis. This jurisdiction is clear from the decision of *Abbey International Finance Limited v Point Ireland Helicopters Limited* [2012] IR 694 where Kelly J stated at para 24:

> "*If the defence offered is alleged to be lacking any reasonable prospect of success, then the plaintiff should have the ability to seek to recover judgment regardless of the type of proceedings. I believe that there is no good reason why such an application cannot be brought and considered by the court*".

In *Inland Fisheries Ireland v O'Baoill* [2022] IECA 266, the Court of Appeal agreed that the same jurisdiction arose for all cases and was not limited to those in the Commercial List.

36. In his judgment in *McAteer v Fried* [2021] IEHC 249, Sanfey J observed at para 83 that

> *"There will be situations where it would be unjust to deny a plaintiff who has commenced his or her action by plenary summons a right to summary judgment, and subject them to the long delays to which plenary proceedings can be prone, rather than to grant judgment where it is clearly appropriate to do so*."

He went on to state at para 111 that

"*...a plaintiff who chooses to ignore the O. 37 procedure in a case clearly suited to it, but seeks summary judgment only after making very substantial engagement with the plenary process, should only be entitled under the inherent jurisdiction of the court to an order for judgment in the clearest of cases and where it would be unjust to refuse summary relief*".

37. In cases which are commenced by way of summary summons, the defendant must establish on affidavit either facts which give rise to an arguable defence or a credible basis for believing that facts to ground an asserted defence exist. A bald assertion of a defence, without more, is insufficient. In *Inland Fisheries* in the Court of Appeal (*Inland Fisheries v O'Baoill* [2022] IECA 266), Whelan J noted at para 146 that ".. *a conservative approach must be adopted to an application to the disposition of the plenary suit summarily*". The onus of establishing an entitlement to summary judgment rests on the applicant.

38. In that judgment Whelan J set out a useful list of factors likely to be of assistance in determining whether summary judgment should be granted. The power to grant summary judgment should be exercised with discernible caution, because a party against whom final judgment is entered summarily loses his opportunity to cross examine, to seek discovery or to avail of other litigation options available to parties in plenary proceedings. The court should assess the cogency of the evidence adduced on behalf of all parties, mindful of the unavoidable limitations which are inherent on any conflicting affidavit evidence. The test to be applied in granting summary judgment is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence. This is not the same as and should not be elevated into a threshold of the defendant having to prove that his defence will probably succeed

or that success is not improbable – it is sufficient if there is an arguable defence. The interests of justice remain the determinative factor overall.

Applying the relevant principle to the facts of this case.

39. The defendant has raised an issue regarding a variation of the Settlement Agreement. This is more than a mere assertion. He has provided some documentary evidence to support his version of the amendment in the form of a draft agreement, emails and text messages. The plaintiff agrees that there was an "*accommodation*", although it disagrees with the defendant's interpretation of that accommodation.

40. The defendant has also raised an issue regarding the manner in which the plaintiff's alleged wrongful registration of a *lis pendens* resulted in an inability on the part of the defendant to sell property and thus resume quarterly payments. In addition to the defence, the defendant makes a counterclaim, or, as contended by the defendant's counsel, a "cross-claim", although this is disputed by the plaintiff's counsel.

41. This court does not need to be satisfied that the defendant's defence will probably succeed at trial, or even that it is likely to succeed. If there is any arguable defence, summary judgment should not be granted. I do not believe on the facts of the present matter that this is one of those clearest of cases where it would be unjust to refuse summary relief.

Decision of the court on the Summary Judgment Motion

42. The defendant has, in my view, raised sufficient doubt as to the variation of the Settlement Agreement and the entitlement of the plaintiff at this time to recover the full amount due under it, such that it would be unjust to deny the defendant the opportunity

to have that defence tested by way of plenary hearing. I therefore refuse the relief sought by the plaintiff in the Summary Judgment Motion.

The Mareva Motion

43. The plenary proceedings issued by the plaintiff on 18 October 2022 sought an injunction restraining the defendant from marketing, selling, dealing with, disposing of, negotiating, transferring or otherwise divesting himself of the ownership of the lands contained in the folios scheduled at schedule A to the proceedings. Twenty-three properties were identified by reference only to Folio numbers.

44. By order dated 21 December 2022, the plaintiff was granted liberty to issue and serve a notice of motion for an interlocutory injunction returnable to 16 January 2023.

45. The relief sought in the notice of motion is Mareva relief limited to the net proceeds of the sale of three identified properties namely those situated at Folio OY5792F (Ballyfore Farm); Folio WH11534F (Hodgestown Farm) and folios TY1155F, TY14354, TY1154F and TY37735F (Aherlow Farm). The Mareva Motion is grounded on the affidavit of Mark Kiernan sworn 21 December 2022 and the affidavit of David Curran sworn 19 December 2022.

46. Mr Mark Kiernan in his affidavit outlines how the plaintiff became aware that the defendant was proposing to sell certain properties. He avers at paragraph 13 that " *[I]t was clearly represented to Kiernan Milling that the sale proceeds of this farm would be used to regularise the indebtedness of the defendants.*" The affidavit then confirms that the plaintiff became aware the defendant was indebted to other entities for significant sums and that charges were registered against the property. The plaintiff became aware that the defendant was proposing to sell other farms also. Mr Kiernan says at para 15 that

"*...these developments came as a surprise… given the large amount of monies owed by the defendants and each of them to the company. I say that of significant alarm was the fact that despite being the largest creditor of the Defendants and their action of default under settlement agreement from the 2014 proceedings, were we (sic) not informed of the sale of other farms and were not advised that the full net proceeds of those farms would be mandated to Kiernan Milling*".

47. The defendant, through his solicitors, confirmed the intended sale of the lands and confirmed that upon sale he would look to discharge monies due to Kiernan Milling. However, it is clear from the affidavit of Mr David Curran that the respective solicitors were unable to agree the terms of an undertaking in this regard acceptable to the plaintiff's solicitors. However, it was agreed, pending delivery of this judgment, that the defendant's solicitors would hold the net proceeds of any sales which were secured in the interim period.

48. At paragraph 21 of his affidavit, Mark Kiernan confirms that

"*Kiernan Milling is very fearful that given the history as between them and the Defendants that there is a real possibility that in the absence of an order of the court freezing the net proceeds of sale of the various farms of the defendants to allow the indebtedness to be reduced or entirely discharged that the Defendants or each of them will simply not pay that which is undeniably due and owing to the Plaintiff*".

49. The replying affidavit of Padraig Kiernan sworn 14 February 2023 states that he had agreed to apply certain sums from the net proceeds of sale of the identified properties "*to reduce any balance on the plaintiff's feed account*" (para 19). He avers that he holds seventeen other holdings and that *"[T]he approximate value of these remaining*

holdings, net of any indebtedness, is approximately €10,000,000 (ten million euro)" (para 20). No valuations or other material was exhibited to support this averment.

50. Most of the defendant's affidavit is taken up with averments regarding the *lis pendens* proceedings previously issued by the plaintiff (although these proceedings remain unserved and the various registered *lites* have been discharged on consent).

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51. At para 26 of his affidavit the defendant seeks to address the adequacy of damages, although he does not do so in any specific terms. He says : "*I have devoted my life and overcome (sic) many difficulties to retain and build up a thriving business and an award of money damages will scarcely remedy the damage being done or that will be done*".

The submissions of the parties

52. The defendant's counsel points to what he describes as inaccuracies in the plaintiff's affidavits grounding the Mareva Motion and in particular the suggestion that the defendant has sought to conceal the sale of the properties. He says that the defendant did no such thing. He states that this matter as well as the plaintiff's decision to use *lites pendentes* to prevent the sale of the properties, rather than applying for an injunction, are factors which should weigh against granting the equitable relief sought.

53. The defendant says that there is no evidence that there would be no assets available to satisfy any judgment which the plaintiff may ultimately obtain. The defendant also says there is no evidence of dissipation of assets in this case which could frustrate any decision of this court. The sale of the farms has been openly disclosed and they will be sold for full market value. Counsel for the defendant also referred to the defendant's averment on affidavit that there remains property with a net value of more than €10

million excluding the properties in question, and that this should be more than enough to satisfy any judgment that could be given in favour of the plaintiff.

54. The plaintiff submits that the orders sought are specific and are designed to cause no disruption to the sales of the defendant's farms whilst endeavouring to secure the plaintiff's position. It says the orders merely seek the retention of the net proceeds of sales which would permit payment out in respect of the costs of the sales and permit the discharge of any encumbrances on the farms. The plaintiff says that it issued this motion in circumstances where no satisfactory undertaking has been offered. The plaintiff says that significant monies are owed to it which, it appears, cannot be paid without the sale of the properties by the defendant.

Relevant legal principles applicable to Mareva injunctions

55. In the ordinary course, a plaintiff is not entitled to require from a defendant, in advance of judgment, security to guarantee satisfaction of any judgment that the plaintiff may eventually obtain.

56. Kirwan (Injunctions, Law and Practice 3rd ed at 8.04) notes that a useful summary of the principles are those set out by Chadwick P in *Algosaibi v Saad Investments Company Ltd* 2011 (1) CILR 194 at para 42 where he identified the basis on which a court exercises the Mareva jurisdiction as follows

> "*It is to ensure that the effective enforcement of its judgment (when obtained) is not frustrated by the dissipation of assets which would be available to the claimant in satisfaction of that judgment. …the jurisdiction is not exercised in order to provide the claimant with the security for his claim which he may otherwise have. But…it is equally plain…that the jurisdiction is not exercised in order to give the claimant recourse to assets which would not otherwise be*

available to satisfy the judgment which he may obtain. The court needs to be satisfied of two matters before granting Mareva relief. First, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and, second, that there is good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the claimant".

57. Given the nature of the relief sought, in which the defendant is restrained from dealing with assets in which the plaintiff claims no right whatsoever, it is accepted that there must be a good arguable case before a Mareva injunction would be granted.

58. The status quo to be preserved by a Mareva injunction is the existence of assets which could be realised to pay the prospective judgment debt. A Mareva order does not give the plaintiff any precedence over other creditors with respect to the assets which are made subject to the order.

59. The necessary criteria to satisfy the test for the granting of a Mareva injunction were set out by Barniville J (as he then was) in *Trafalgar Developments Ltd v Mazepin* [2019] IEHC 7 at para 105 where he stated that the criteria which must be satisfied include

"*the requirement by the applicant to demonstrate a substantive cause of action and a good arguable case, the existence of assets, evidence of a risk of dissipation by the defendants of assets for the purpose of preventing the plaintiff from recovering damages, demonstration that the balance of convenience favours the granting of such relief and, depending on the facts, that the behaviour of the defendant should be considered as a relevant factor by the court*".

60. Insofar as a risk of dissipation by the defendant of the sales proceeds is concerned, it is instructive to consider the Supreme Court judgement in *O' Mahony v Horgan* [1995] IESC 6, [1995] 2 IR 411 where the court held that the plaintiff should give some grounds for believing that there is a risk of the assets being removed or dissipated. Hamilton CJ stated at page 418 of his judgment that

> "*a Mareva injunction will only be granted if there is a combination of two circumstances established by the plaintiff i.e. (i) that he has an arguable case that he will succeed in the action, and (ii) the anticipated disposal of a defendant's assets is for the purpose of preventing a plaintiff from recovering damages and not merely for the purpose of carrying on a business or discharging lawful debts*".

He approved the decision in *Polly Peck International plc v Nadir* [1992] 4 All E.R.769 where the court stressed that Mareva relief is not intended to give security in advance of judgment but merely to prevent the defendant from defeating the plaintiff's chances of recovery by dissipation of assets.

61. The relief sought in the present case does not seek to prevent the sales of the various properties but simply requires that the balance of the proceeds of the sales after discharge of all fees and expenses and charges thereon would be held pending the determination of these proceedings. The plaintiffs have a concern that assets will be sold and the net proceeds dissipated or otherwise utilised to the detriment of the plaintiff and the significant debt it claims (at least part of which is admitted, if not accepted to be yet due and owing).

62. In the present case there are substantive proceedings in being and the plaintiff therefore has a substantive cause of action. I am also satisfied that the plaintiff has met the test of

establishing a good arguable case in circumstances where there are admittedly monies payable (albeit not admitted to be yet due) under the Settlement Agreement and where, separately, the plaintiff has supplied goods to the defendant which the defendant does not deny receiving. The plaintiff has shown that the defendant has assets within the jurisdiction in that three properties have been specifically identified in the Mareva Motion.

63. No direct evidence has been given that the net sales proceeds would be dissipated but, in the context of the large sums involved and the history of dealing between the parties, the concern of the plaintiff may not be entirely misplaced. However, the question arises as to whether in this case the plaintiff has established the necessary requirement of evidence of an intention by the defendant to dissipate the proceeds of sale for the purposes of frustrating any court order which may be made. It is permissible to take into account all the circumstances in establishing this intention. In *Aerospares Limited v Thompson* [1999] IEHC 76 Kearns J found (at p. 9 of his judgment) that the defendants in that case "*acted dishonestly in breach of contract and in breach of fiduciary duty in relation to this particular payment, and that they diverted monies wrongfully from the Plaintiff"* and that they chose *"very underhand means"* of dealing and that certain correspondence was "*blatantly dishonest*".

64. In *Tracey v Bowen* [2005] IEHC 138, [2005] 2 IR 528, Clarke J (as he then was) considered whether the plaintiff in that case had produced sufficient evidence that there were grounds for believing there was a risk that the defendant's assets might be removed from the jurisdiction or dissipated. Clarke J noted at p. 534 that a number of arguments advanced by the plaintiff were "*not inherently suggestive of fraud or unconscionable activity*". He was not satisfied that the identified factors, whether taken alone or collectively, were sufficient to create a reasonable apprehension that the

defendant would dissipate his assets in an inappropriate fashion and he refused Mareva relief.

65. The plaintiff's counsel placed significant emphasis in this case on the fact that the defendant has not instructed his solicitor to offer a clear and unequivocal undertaking despite several requests in order to provide adequate comfort to the plaintiff that the monies due to the plaintiff would be repaid to it. This complaint does not however reflect the level of dishonesty or unconscionability identified in the caselaw. While I note that the respective solicitors have not agreed the precise wording of an acceptable undertaking, there is some relevance in my view in the averment of the defendant at para 25 of his affidavit sworn 14 February 2023 as follows:

> "N*ow that an order to vacate the lites pendentes has been obtained by me from this Honourable Court, my solicitor is endeavouring to resuscitate the sales of Hodgestown and Ballyfore which sales were in place last year and about to be completed. The parcel of land at Aherlow will be marketed. As before, if they can be resuscitated, any sales will be at the market price. Given what has transpired and since the damages suffered by my business will have to be considered, it is more appropriate that the amounts which I had instructed my solicitor to pay to the plaintiff company from the sales to be held pending any final determination of the disputes between parties being determined by this Honourable Court. I have given an irrevocable instruction to my solicitor to do this, if this Honourable Court is minded not to grant the reliefs sought*".

66. This wording is somewhat confusing, but it appears to indicate that the defendant is not intending to dissipate the net sales proceeds but is willing to provide an irrevocable instruction to his solicitor to hold the amounts set out earlier in the affidavit (approximating to €2.625m) from the sales proceeds pending determination of these

proceedings. There is no evidence before the court as to how much more net proceeds would be available from the three sales if all net proceeds were to be frozen. But the evidence is that the defendant does not intend to entirely dissipate the assets so as to avoid any judgment that may be awarded against him. The further uncontradicted evidence of the defendant is that he has additional assets in the State worth in the region of €10 million net. This statement was neither expanded on by the defendant nor interrogated by the plaintiff, so the court has little to go on to confirm its veracity. It is clear however from the plenary summons that the defendant owns a considerable number of other properties in the State and there is no evidence of any plans to dispose of those properties or anything to suggest that they would not be otherwise available for the plaintiff in satisfaction of any judgment ultimately obtained by it.

Decision of this Court on the Mareva Motion

67. In all the circumstances I do not propose to grant the plaintiff the order sought at para 1 of its notice of motion restraining the defendant or any person acting on his behalf until further order from in any way dissipating, disposing of, reducing, transferring, charging, diminishing and/or divesting or distributing the value thereof or otherwise dealing with the net proceeds of the properties identified at sub-paras a, b and c.

68. I will however direct that the defendant should confirm to this court an undertaking in the terms of paras 19 and 25 of his affidavits sworn 14 February 2023 such that the said sums will be held by the defendant's solicitors pending the determination of these proceedings. I believe such an undertaking will properly address the balance of convenience in this case.

69. I was not addressed on paragraphs 2 or 3 of the plaintiff's notice of motion at the hearing of this application. Given my refusal of the Mareva relief sought, I will not make an order in these terms.

Next steps

70. The parties should now endeavour to agree a timetable to take this matter to trial. In the event that the parties are unable to agree on this, the court will direct a timetable.

71. I will list this matter for mention before me on Friday 28 July at 10.15am to agree the final Orders on both motions, to confirm the defendant's undertaking and to deal with costs, a timetable to trial and any other issues arising on this judgment.