

THE HIGH COURT

[2020] IEHC 96
2020/1019 P

BETWEEN

THISTLE BLOODSTOCK LIMITED

PLAINTIFF

AND

IRISH HORSERACING REGULATORY BOARD
PHILIP FENTON AND JIM DERWIN

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 28th day of February 2020

1. The plaintiff in this action, and the moving party on this application, carries on the business of a stud farm at a property at Grangecuffe, County Kilkenny. The plaintiff had in its stable until July 2019 a stallion called The Tartan Spartan. In December 2017 in Dubai the Tartan Spartan suffered a tendon injury or, in the argot of the business, "*broke down*". The horse was repatriated and rested for a year but in February 2019 broke down again in the same leg. The plaintiff's assessment was that he was unlikely to recover, and it was decided that he should be euthanized.
2. In July 2019 the Tartan Spartan left the plaintiff's yard with two or three other horses. There is some uncertainty as to the precise circumstances in which that came about. In the affidavit of Andrew Hughes, sworn on the 7th February, 2020, to ground this application, it was said that he, Mr. Hughes instructed Mr. Jim Derwin to undertake to euthanize the horse. In a second supplemental affidavit, sworn on the 26th February, 2020, Mr. Hughes says that it was a man called Declan Glynn who set up the arrangement with Mr. Derwin. Mr. Derwin in an affidavit sworn on the 18th February, 2020, deposes that he had never spoken to Mr. Hughes: and that now appears to be common case.
3. Mr. Derwin is a horse dealer. He describes himself as an international horse dealer and equine agent who buys and sells horses all over Ireland on a daily basis at fairs, sales and from private yards. He deposes that in June 2019 he had a telephone call from Declan Glynn who said that the plaintiff had three or four horses for sale and asked whether Mr. Derwin would be interested. By his account, Mr. Derwin agreed over the telephone to buy the horses and agree the price.
4. Mr. Derwin says that he had previously dealt with Mr. Glynn and paid for all his purchases by cheque and he exhibits a bundle of cheques all but one of which can have had nothing to do with the transaction in July 2019, but he says that he cannot remember the price he agreed to pay for those horses.
5. In any event, on the 5th or perhaps the 8th July, 2019 Mr. Derwin sent a lorry to the plaintiff's yard. The driver of the lorry was Mark Doolin. On Mr. Derwin's account, Mr. Doolin, having loaded the horses, telephoned Mr. Derwin and suggested that one of the horses, The Tartan Spartan, might be of interest to Mr. Philip Fenton who is a trainer and who carries on business from Glenbower Stables, Carrick-on-Suir, County Tipperary.

6. Mr. Derwin deposed that he immediately telephoned Mr. Fenton and, sight unseen by either, an agreement was made for the sale and purchase of the horse to Mr. Fenton for €2,000. Mr. Derwin says that he then phoned Mr. Doolin and diverted the lorry to Tipperary where the horse was delivered to Mr. Fenton, who gave Mr. Doolin a cheque for €2,000 made out to Mr. Derwin.
7. Mr. Derwin's account of events is not precisely matched by that of Mr. Fenton. In an affidavit sworn on the 20th February, 2020, Mr. Fenton recalls that it was Mr. Doolin rather than Mr. Derwin who telephoned him on behalf of Mr. Derwin.
8. According to Mr. Fenton he did not agree to buy the horse sight unseen but rather agreed to meet Mr. Doolin in Kilkenny where, having in the meantime checked out The Tartan Spartan's form, he took a look at the horse. Mr. Fenton recalls that having decided that he might take a chance on the horse rang Mr. Derwin and he says that the bargain was then struck over the phone. When the horse arrived at Glenbower Stables, Mr. Fenton had it examined by an equine veterinarian, who reported it to be a fit candidate for athletic function.
9. The outcome of all of this from The Tartan Spartan's point of view was rather mixed. On the one hand, rather than being fed to hounds, he went back into training in Mr. Fenton's stable. On the other hand, he was gelded.
10. Over the following months the horse was trained up and in January, 2020 was entered for the 3.22 p.m. handicap hurdle at Naas Racecourse for Saturday 8th February, 2020 under the colours of Mr. Fenton's wife, Ms. Patricia Hogan.
11. On the morning of Friday, 7th February, 2020 it came to the attention of Mr. Hughes that The Tartan Spartan was due to run on the following day and that afternoon an *ex parte* application was made to Mr. Justice Heslin for an interim injunction restraining Mr. Derwin and Mr. Fenton from running him. Late that morning letters had been sent calling for undertakings by noon, but those letters were sent by e-mail at about 11.40 a.m. or 11.50 a.m. and it is accepted that there was no opportunity for a reply, even if the e-mails had been opened immediately: which Mr. Derwin and Mr. Fenton say they were not.
12. The affidavit of Andrew Hughes, sworn on 7th February, 2020 was drafted in haste. As I have said, Mr. Hughes deposed that it was he who instructed Mr. Derwin to euthanize the horse. It was also said that the plaintiff had never signed a change of ownership form and had never transferred the horse's passport to any other party. Mr. Hughes exhibited a copy of the passport which he said showed the ownership of the horse to the plaintiff.
13. Mr. Cahill, counsel for Mr. Fenton, protests that this was misleading. In the first place, it is said, the reference to a change of ownership form conveys that there was a system or practice of such forms - which there was not. Mr. Hughes does not in his later affidavit contest this but neither does he offer any explanation for the reference in his grounding affidavit to such a form.

14. Secondly, it is said, the averment that the passport was not transferred was false. It is now accepted that this averment was false. It was corrected in a supplemental affidavit of Andrew Hughes, sworn on 10th February, 2020, but that of course was after Mr. Justice Heslin had given the interim injunction.
15. In my view, there is substance to the complaint of lack of candour. There appears to be an issue now as to whether the horse's passport is evidence of ownership but the premise of the application to Mr. Justice Heslin was that it was, and that the plaintiff had it. It is now accepted that the horse needed to be accompanied by its passport wherever it might go, specifically to the abattoir where its value would depend upon whether or not it had been stamped out of the human food chain.
16. In *Bambrick v. Cobley* [2005] IEHC 43, Clarke J. (as he then was) approved a statement by Browne-Wilkinson V-C in *Tate Access Floors Inc. v. Boswell* [1993] All E.R. 303, as the golden rule of full and frank disclosure. Browne-Wilkinson V-C. said: -

"No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant the relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the ex parte order and may, to mark its displeasure, refuse the plaintiff further inter partes relief even though the circumstances would otherwise justify the grant of such relief."

17. The misstatement in the first affidavit of Mr. Hughes was corrected in the supplemental affidavit but to my mind has not been explained. What is said by Mr. Hughes in his affidavit of the 10th of February, 2020 is: -

"I wish to clarify that I did not transfer the passport of the horse to any other party other than the third named defendant for the purposes of slaughtering the horse."

I say that I am aware of my legal obligation that a passport must at all times accompany a horse and my obligation to transfer the passport with the horse to the slaughtering facility and the slaughtering facility in turn to hand the passport to the Turf Club or other regulatory authority once the horse was put down."

18. It seems to me that if Mr. Hughes was aware of the requirement that the passport should go to the slaughtering facility with the horse and would be transferred by the facility to the Turf Club the averment otherwise in his first affidavit was grossly careless.
19. The affidavits which have been exchanged on this application canvass a number of issues as to Turf Club and equine veterinary practice and animal welfare, but I am not persuaded of the relevance of much of this to the issue which I now have to decide.
20. The plaintiff's case is that the horse belongs to it; that it is entitled to its return; and that The Tartan Spartan is not to be run against its wishes. Incidentally, the suggestion is

that the horse will, if returned to the plaintiff, be put out to grass rather than destroyed but if the horse belongs to the plaintiff, the plaintiff is free to decide its fate.

21. Mr. Fenton's case on the other hand is that the horse belongs to him; that he bought and paid for it in good faith; that he spent money and time training it up; and that he is entitled to and wishes to run it.
22. The plaintiff challenges Mr. Fenton's averment that he bought the horse in good faith. It is suggested that he bought a racehorse in unusual circumstances and at a gross undervalue and it is suggested that he has behaved secretly.
23. I am not on this application to finally decide any contested issue of fact, but I am bound to say that the argument that Mr. Fenton bought a racehorse at gross undervalue is wholly consistent with the plaintiff's case that The Tartan Spartan was broken down and fit only for dog food. The proposition that Mr. Fenton behaved in a clandestine manner is to my mind utterly inconsistent with the fact that Mr. Fenton entered the horse in the 3.22 p.m. handicap hurdles in Naas.
24. This is an application for an interlocutory injunction. The court cannot on such an application finally decide any contested issue of fact or resolve any seriously argued issue of law.
25. The principles to be applied on an application for an interlocutory injunction restraining trespass are set out in a decision of Keane J. (as he then was) in *Keating & Company Limited v. Jervis Shopping Centre Limited* [1997] 1 I.R. 512. That was a case in which the claim related to real property, but it seems to me the principles apply equally to personal property. Mr. Justice Keane said this:-

"It is clear that a landowner, whose title is not in issue, is prima facie entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only. However, that principle is subject to the following qualification explained by Balcombe L.J. in the English Court of Appeal in Patel v. W.H. Smith (Eziot) Limited and Another [1987] 1 W.L.R. 853 at p. 859: -

'However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. Then the court must consider the application of the principles set out in American Cyanamid Co v. Ethicon Ltd. [1975] 1 A.C. 396 in relation to the grant or refusal of an interlocutory injunction.'

26. On the evidence now before the court I am not satisfied that there is a *bona fide* issue to be tried as to whether Mr. Fenton acted in good faith. He agreed to buy and paid by cheque for a horse which the plaintiff no longer wanted and which was accompanied by its passport. He later dealt openly with the Turf Club and Naas Racecourse. He dealt with a horse dealer who had possession of the horse and the passport with the permission of the breeder.

27. Section 21 of the Sale of Goods Act 1893 provides:

"21. (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the seller of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) *Provided also that nothing in this Act shall affect –*

(a) *the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.; ..."*

28. Section 2 of the Factors Act 1889 provides that:-

"2.- (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition noticed that the person making the disposition has not authority to make the same."

(2) *Where a mercantile agent has, with the consent of the owner, been in possession of goods or the documents of title to goods, any sale, pledge, or other disposition which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition had not at the time thereof notice that the consent had been determined."*

29. It is now accepted that Mr. Hughes did not deal directly with Mr. Derwin but that the arrangements were made by Mr. Glynn. Mr. Glynn was employed by the plaintiff between 2013 and September 2017 and since then, in the words of Mr. Hughes, "*helps out from time to time*".

30. On the plaintiff's case, Mr. Glynn was entrusted with The Tartan Spartan and his passport to bring him to slaughter. Mr. Glynn's reward was to have been whatever he could persuade the slaughterman to pay for the horse.

31. In my view, there is a *bona fide* issue to be tried as to whether Mr. Glynn, on collecting the horse and passport, became the owner of the horse. Mr. Glynn in an affidavit sworn on 27th February, 2020, denies that he ever had title or ownership of the horse: but that is a question of law.

32. Alternatively, there is a *bona fide* issue to be tried as to whether Mr. Glynn or Mr. Derwin was or were mercantile agents of the plaintiff. On the plaintiff's case, Mr. Glynn and Mr.

Derwin were authorised to sell the horse to a slaughterman. In my view, there is a *bona fide* issue to be tried as to whether he had the plaintiff's ostensible or apparent authority to sell it otherwise than for slaughter.

33. These are issues of law, or combined issues of fact of law, which the court is not in a position to finally decide on this interlocutory application.
34. The case now made on behalf of the plaintiff is that if the order now sought is refused and he ultimately wins the case, his property rights in The Tartan Spartan will have been infringed in the meantime. I accept that argument.
35. On the other hand, if the order now sought is made and Mr. Fenton ultimately wins, his property rights will have been infringed. If as Mr. Lanigan O'Keeffe argues on behalf of the plaintiff, damages would not be an adequate remedy for the plaintiff, it seems to me to follow that damages would not be an adequate remedy for Mr. Fenton either.
36. The notice of motion seeks an interlocutory mandatory order for the interim return of the horse but Mr. Lanigan O'Keeffe did not press that. What is proposed is that The Tartan Spartan will remain in the possession of Mr. Fenton and will remain in training but should not be allowed to run. If the horse is not allowed to run, the plaintiff will not suffer any pecuniary loss. Mr. Fenton however, will be deprived of the opportunity to run the horse which seems to me is a matter of sport as well as the possibility that he may win prize money.
37. The plaintiff accepts that Mr. Fenton is a reputable and experienced trainer and that he has and will continue to care for the animal properly.
38. Mr. Hughes expresses an apprehension that the horse if run may break down catastrophically, but that apprehension is not supported by veterinary evidence and the case is not made that Mr. Fenton's plan to race the horse is reckless. I must balance the risk of potential injustice to both parties.
39. The Tartan Spartan left the plaintiff's yard on the way to slaughter but is now fit to run. Objectively, Mr. Fenton's assessment of the condition of the horse in July, 2019 appears to have been more accurate than that of Mr. Hughes. I am not persuaded that there is a risk that the horse will catastrophically breakdown or that Mr. Fenton intends to deal with him otherwise than entirely correctly and in accordance with the best veterinary advice. Insofar as the plaintiff relies upon considerations of animal welfare, I am not satisfied that the running of The Tartan Spartan would be inconsistent with animal welfare.
40. I find that the balance of convenience is against the making of the interlocutory order sought and I will decline to make the order. I will, however, give directions to ensure an early trial of the action.