

**THE HIGH COURT**

[2022] IEHC 213

[Record No. 2021/6178P]

**BETWEEN**

**PATRICK CONNOLLY**

**PLAINTIFF**

**AND**

**O'DWYER SOLICITORS LLP**

**DEFENDANT**

**JUDGMENT of Mr. Justice Mark Sanfey delivered on the 7th day of April, 2022**

1. In this matter, the plaintiff seeks interlocutory orders in the following terms: -
  - "2. An order for an injunction, including a permanent injunction, directing the Defendant to transfer all his files and papers to include in electronic and digital format or otherwise in connection with and arising from the purchase and mortgage of lands comprised in Folios MY 31763F, Folio MY 22335F, MY 47074F and Folio MY 46909F and house Number 14 Cornaroya Manor, Ballinrobe, Co. Mayo to his new solicitors, Swaine Solicitors at 14 Radharc Na Farrage, Ballymoneen Road, Galway.
  3. An Order preserving all files and papers to include in electronic and digital format or otherwise in connection with and arising from the purchase and mortgage of lands comprised in Folios MY 31763F, Folio MY 22335F, MY 47074F and Folio MY 46909F and house number 14 Cornaroya Manor, Ballinrobe, Co. Mayo, pending further order of this Court."
2. In his plenary summons issued on 8th November, 2021, the plaintiff seeks these reliefs against the defendant, a firm of solicitors practising in Ballyhaunis, Co. Mayo, together with "damages for negligence, breach of duty (including breach of statutory duty), detinue and breach of retainer". In the grounding affidavit of 9th November, 2021, the plaintiff sets out the basis for seeking the injunctive relief. He avers that the defendant firm was instructed to act for him and a Mr. Michael Finnegan in the purchase and mortgage of residential development lands in County Mayo, ('the Mayo lands') and the property at number 14 Cornaroya Manor ('the Cornaroya property') in Ballinrobe, County Mayo ('the properties').
3. It appears that Everyday Finance DAC, assignee of the original mortgagee of the properties, has appointed Ken Fennell and Mark Degnan ('the receivers') as receivers over the properties. Proceedings (referred to herein as 'the receiver proceedings') have been instituted against the receivers and Everyday Finance DAC as set out at para. 7 of the plaintiff's grounding affidavit in the present application: -

"In High Court proceedings issued in May 2021 under record number 2021/3756P Ms. Justice O'Hanlon on the 28th day of May, 2021, granted interim or interlocutory relief [sic] by injunction restraining the Defendants or anyone acting on their behalf or in concert with them from in any manner howsoever entering upon the said lands comprised in Folios MY47074F, Folio MY331763F [sic], Folio MY22335F and Folio MY46974F or attending at the said lands or premises or watching or besetting

the said lands or premises including restraining them from in any manner attempting to sell, advertise for sale (whether online or offline), survey or interfere in any manner howsoever, directly or indirectly, with the properties until further order and or pending trial, and interlocutory motions in that behalf remain pending before the High Court on Thursday 11 November 2021...".

4. Although the aforesaid order is exhibited to the plaintiff's affidavit, the pleadings and proceedings were not, and this Court was apprised only in very general terms as to the nature of those proceedings. It appears however that the plaintiff considers that he has "...great difficulty in prosecuting the above proceedings and swearing and filing the sort of detailed replying affidavit now urgently required in circumstances of a most material and continuing dearth of information due to the stonewalling point blank refusal of the Defendant over more than the last half year to release my files and papers..." [para. 8, grounding affidavit of the plaintiff in the present application].
5. In this regard, the plaintiff avers that he has, through his solicitors, corresponded with the defendant firm over a long period "seeking my files and papers". He says that he has attended physically at the defendant's office "on numerous occasions", and telephoned and sent texts to Mr. Evan O'Dwyer, a partner of the defendant firm, to no avail. It appears from the initial letter of 11th March, 2021 sent by the plaintiff's solicitors that what he seeks is "the original file" in relation to the purchase of the Mayo lands and the Cornaroya property. The plaintiff contends that the files are "the property of the client", and that the exercise of a solicitor's lien does not arise. He argues that he is "very specifically prejudiced in prosecuting the extant High Court proceedings [i.e. the receiver proceedings] without the benefit of my files and papers. A very specific issue which has arisen is the alteration of designated assets to be included in succession of different incidents over time. Detailed scrutiny of contemporaneous accreditation is, as I am advised, of paramount importance. I fear that this matter will be listed for hearing, and I will not be able to fully prosecute my case due to stonewalling dearth of detailed information and documentation" [para. 16, grounding affidavit in present application].
6. In its letter of 15th March, 2021, the defendant made the point that a written authority from the client would be needed in order to transfer the files, and that physical attendance at the office was not permissible without an appointment due to pandemic restrictions. The defendant however indicated that it was carrying out a search of files "held for the past 7 years in preparedness of the receipt of your written authority", and that any such file would be released on such receipt. There was further correspondence in March of 2021, but it appears that there was no further correspondence until the plaintiff's solicitor's letter of 2nd November, 2021, notwithstanding the plaintiff having procured an interim injunction in the proceedings against the receiver on 27th May, 2021. In its replying letter of 2nd November, 2021, the defendant stated that "...[w]e have no file. This transaction happened 13 years ago and files from that time are no longer retained by this office...".

7. There followed an exchange of affidavits between the parties. In his affidavit of 19th November, 2021, Mr. Evan O'Dwyer on behalf of the defendant set out the details of his firm's dealings with the plaintiff and Mr. Finnegan, stating that the firm had represented them in the sale of fifty or sixty houses which they had built. Mr. O'Dwyer averred that "...the defendants have found an undertaking and a letter of discharge in relation to the property known as 14 Cornaroya Manor, Ballinrobe in the County of Mayo, but we have no other files or documents in relation to those transactions at this remove..." [para 10]. This undertaking and letter of discharge related to the Cornaroya property, and the defendant's position was that they would be released "on receipt of a signed and witnessed authority" which as of that date had not been furnished.
8. Mr. O'Dwyer averred at para. 32 of his affidavit that "...[t]he files and papers relating to the properties mentioned in these proceedings were shredded several years ago, as those files related to property transactions which concluded on or about 2004. Those files were shredded in the ordinary course of the management of the records held by the firm. There was no reason for this firm to retain those files". Mr. O'Dwyer further indicated that he had not had sight of the pleadings in the action against the receivers on foot of which an interim injunction had been obtained, and that it was therefore "simply not possible to assess Mr. Connolly's asserted need for the documentation in question based on the evidence that he has put before this Honourable Court..." [para. 33].
9. In an affidavit sworn on 30th November, 2021, the plaintiff drew attention to what he considered to be a number of inconsistencies in the correspondence, and between the correspondence and the averments in Mr. Dwyer's affidavit. He did not accept the veracity of Mr. O'Dwyer's averment that the defendant had "long since destroyed the files in question". He pointed out that Mr. O'Dwyer had averred that the defendant retained funds on foot of an undertaking to Allied Irish Banks, and said that Mr. O'Dwyer "should be in a position at least to provide me with a copy of the ledger card..." [para. 16].
10. As regards destruction of the firm's records, the plaintiff averred that the Law Society "has prescribed mandatory periods for the retention of files and have [sic] mandated 13 years for Conveyancing files... [para. 26]". The plaintiff stated his belief that "the defendants have been stonewalling me since March of 2021...".
11. In a further affidavit of 8th December, 2021, Mr. O'Dwyer accepted that there had been inconsistencies in the correspondence, for which he apologised, but continued to assert the position in relation to the firm's possession of files in relation to the properties as follows: -
  - "23. It is...true that the files that I had in relation to the properties the subject matter of these proceedings have long since been destroyed. The transactions in question were completed several years ago. The transactions in relation to Cornaroya Manor, Ballinrobe in County Mayo were completed in 2004. The preponderance of the units in Hazel Lawns, Ballinrobe in County Mayo were sold between 2005 and 2008, though two were sold in 2012, at reduced prices. The fact is that the defendants do not have any documents in relation to those transactions save for the documents

that I have exhibited to my Replying affidavit. We continue to act for Mr. Finnegan. We hold funds in relation to the property known as 9 Hazel Lawns, Ballinrobe in the County of Mayo, but that property is owned by Mr. Finnegan and not by Mr. Connolly.”

12. The plaintiff then issued a motion on 10th December, 2021 for leave of the court to cross-examine Mr. O’Dwyer on his affidavit of 19th November, 2021. In a written judgment of 25th January, 2022, the court refused the application. In his judgment, Dignam J stated as follows: -

“16 It seems to me that part of the exercise that the Court will have to engage in when considering the interlocutory motion is whether the Plaintiff has established a *prima facie* case or fair question that the Defendant has relevant documents that the Plaintiff is entitled to, not whether as a matter of fact the Defendant does indeed possess such documents, and if he does, what documents he actually possesses...At the level of general principle the effect of the orders sought in the Plaintiff’s earlier motion, if they are made in the terms sought, would be to compel the Defendant to preserve and transfer such documents as the Defendant holds which fall within the categories in the Notice of Motion...[17] it is in fact not necessary to resolve that question of general principle in this case because the fact is that Mr. O’Dwyer has stated on affidavit that the Defendant has two relevant documents. It is therefore unnecessary for Mr. O’Dwyer to be cross-examined to establish whether the Defendant has any documents which would be caught by an order where one to be made because it is already admitted that the defendant has such documents. Thus, on the admitted facts there are at least two documents to which an order would apply. The Order would therefore not be in vain, if a Court decides to make an Order. It seems to me that this is fatal to the Plaintiff’s application given the stated basis for the application”.

13. Two further affidavits from the plaintiff and Mr. O’Dwyer were sworn. Mr. O’Dwyer in his affidavit accepted that he held funds in relation to a property on the Mayo lands, but averred that this property belonged to Mr. Finnegan, and not the plaintiff. He confirmed that he held no money belonging to the plaintiff.

#### **Submissions**

14. Counsel for the plaintiff submitted at the hearing that the plaintiff had established a fair question to be tried. The court suggested that, given the mandatory nature of the reliefs sought, the test of “a strong case likely to succeed at trial” was more appropriate. Counsel submitted that the plaintiff would in any event meet this standard, as the defendant had not challenged the plaintiff’s assertion that the appropriate period for which a solicitor’s firm should retain conveyancing files was thirteen years rather than six years, and that the failure of the defendant to retain the papers for the longer period would be likely to result ultimately in a finding of negligence and breach of retainer against the defendant.

15. Counsel referred to the order obtained in the receiver proceedings, and the averment by the plaintiff at para. 8 of his grounding affidavit referred to above that he had "great difficulty in prosecuting [the receiver proceedings] and swearing and filing the sort of detailed replying affidavit now urgently required...".
16. It was submitted on behalf of the plaintiff that the alleged difficulty of the plaintiff in prosecuting the proceedings against the receivers should be balanced against the position of the defendant, who it was suggested would suffer no prejudice at all from the making of the interlocutory order. It was put to counsel by the court that what he sought was effectively discovery in aid of the receiver proceedings by way of an injunction in the present proceedings, and was asked why this method of proceeding had been adopted. By way of reply, counsel referred to the delay involved in applying for discovery in the normal way, which would of necessity involve completing the exchange of pleadings and the making of formal discovery requests. The court was informed that the court dealing with the application for an interlocutory injunction in the receiver proceedings had been informed of the present application and had accepted that the former application should await the outcome of the latter. Counsel however expressed the concern that, if the plaintiff did not succeed in the present application, he would be forced to contest the application against the receivers without access to vital information and documentation.
17. Counsel for the defendant submitted that the application was effectively an attempt to obtain final orders, in that the reliefs sought were the very reliefs sought in the plenary summons and were not orders intended to keep the parties in *statu quo*. Reference was made to the comments of Clarke CJ in *Charleton v. Scriven* [2019] IESC 28 at para. 7.1 that "...interlocutory injunctions should not be treated as a means of attempting, in practice, to obtain a summary judgment. They are designed to do what they say, that is, to hold the situation until there can be a full trial...".
18. It was in any event submitted that the plaintiff had not shown that he had a strong arguable case that he would obtain a permanent injunction: as O'Donnell CJ pointed out in *Merck Sharp and Dohme Corporation v. Clonmel Health Care* [2020] 2 IR 1 at para. 64, the court in considering whether or not to grant an interlocutory injunction must first consider whether, if the plaintiff succeeded at trial, a permanent injunction might be granted: "...if not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted...".
19. It was submitted on behalf of the defendant that it cannot be said that the plaintiff has a strong arguable case. Firstly, the files which the plaintiff seeks, if they exist, are the property of both the plaintiff and Mr. Finnegan. There was no evidence before the court that Mr. Finnegan consented to the release of such documentation. The nub of the plaintiff's case was said to be that the documents were being wrongfully withheld by the defendant; this could not be the case where no authorisation from both clients had been received, as Law Society guidelines required the consent of both clients to be furnished.
20. It was submitted that, as Mr. Connolly and Mr. Finnegan were effectively a partnership for the purposes of the transactions in which the defendant was instructed, it was clear that it

was their partnership rather than either of the two individuals that was entitled to possession of the documents. In this regard, counsel cited the judgment of the Court of Appeal in England and Wales in *Ex Parte Cobeldick* [1883] 12 QBD 149, which was cited with approval by McCracken J in *Bayworld Investments v. McMahon* [2004] 2 IR 199. As McCracken J pointed out at para. 26 of the judgment "...the position of the plaintiff is undoubtedly that it must obey all lawful instructions from the partnerships, but I would emphasise the word "lawful". A trustee is not bound to comply with unlawful or fraudulent instructions".

21. It was asserted that, in any event, as the defendant had averred on affidavit that it had no files, it could not be said in such circumstances to be wrongfully withholding files; to the extent that there was controversy as to whether or not further documentation over and above the two acknowledged documents existed, this was a conflict of evidence which militated at this interlocutory stage against a finding that a strong arguable case was made out.
22. Counsel for the defendant advanced a number of reasons why the balance of justice favoured refusing the application. In reply, counsel for the plaintiff emphasised what he saw to be a lack of prejudice to the defendant, which he submitted suggested that the balance of justice favoured granting the reliefs sought.

#### **Discussion**

23. It has to be said at the outset that there is a number of odd features of this application. It appears from para. 2 of the judgment of the court of 25th January, 2022 that Dignam J was given very little information in relation to the receiver proceedings other than as to the fact that "...they concern certain lands owned in whole or in part by the Plaintiff and the appointment of a receiver over those lands and that O'Hanlon J made...orders in the proceedings on 28th May, 2021 on the application of the plaintiff, Mr. Connolly... [para. 2 of judgment]".
24. This court finds itself in the same position. No copies of the plenary summons or the notice of motion or affidavits in the application against the receivers have been made available to the court. In those circumstances, this Court is not in a position to assess what exactly the difficulties are which the plaintiff is experiencing in the prosecution of that application, or how they have been exacerbated by the absence of the files which the plaintiff maintains the defendant should have.
25. Although it was made clear on behalf of counsel that the action against the defendant is a substantive one – in that the alleged negligence and breach of contract on the part of the defendant may result in a claim in damages – the present application is, as counsel put it, "...more in the nature of an accelerated discovery request than a final order...". That discovery is sought, somewhat unusually, in aid of an application currently in train in other proceedings. It is not suggested that the injunctive relief is necessary for the prosecution of the present proceedings.

26. As to whether the plaintiff has a strong arguable case likely to succeed at trial, the plaintiff has not set out in any detail what his case against the defendant is. There is no statement of claim, despite the fact that the plenary summons issued almost five months ago. On being pressed as to what the plaintiff's case was, counsel for the plaintiff relied mainly on what he says was a failure on the part of the defendant to observe Law Society guidelines for retention of documents. Even if there was a failure in this regard, it is not clear what consequences flow from this; it was suggested in a vague way that it might lead to the plaintiff's inability to prosecute his application in the receiver proceedings. However, it seems that the present proceedings are primarily a vehicle for obtaining documentation with which to prosecute the application against the receivers, and it is difficult to assess, in circumstances where the present proceedings are not fleshed out or substantiated, and no meaningful information or documentation is furnished in relation to the application against the receivers, whether there is a strong arguable case or even a fair question to be tried. Even if the court were to accept that the plaintiff had met the appropriate standard in this regard, it is difficult to see what benefit would accrue to the plaintiff by making the order. The defendant has averred on affidavit as to what it has, and has exhibited those documents, which are now thereby available, in copy at least, to the plaintiff. In the absence of any meaningful information regarding the application against the receivers, it is impossible to say how that application will be affected by the documentation which the plaintiff has. As the defendant points out, the plaintiff has already obtained an interim injunction; whether or not he now has sufficient documentation to persuade the court to grant interlocutory relief is not a matter which concerns this Court, even if it were in a position to make any assessment in that regard.
27. In the circumstances, it does not seem to me, given the averments of the defendant, that the position of the plaintiff, either in the present proceedings or in the receiver proceedings, would be improved by the granting of the injunction. In the absence of cross-examination on the affidavits, I must – and do – take Mr. O'Dwyer, an officer of the court, at his word when he avers that his firm simply has no further relevant documentation. It seems to me that, even if the plaintiff had established a strong case likely to succeed at trial, there would be little point in doing so, given Mr. O'Dwyer's averments. It seems to me that it would be unjust to make the order against Mr. O'Dwyer in the circumstances.
28. I am also mindful that it is apparent from Mr. O'Dwyer's affidavits that his firm has at all times been amenable to releasing whatever documentation it has, subject to a suitable authorisation from the client, who he considers to be the plaintiff and Mr. Finnegan, effectively a partnership in the relevant transactions. I was informed at the hearing that Mr. Connolly may be unable to procure Mr. Finnegan's consent. However, that is no concern of the defendant which, as the plaintiff himself has repeatedly pointed out, is bound by Law Society strictures in the conduct of his business and in particular in relation to the release of documentation.
29. The plaintiff was aware of the defendant's position since at least receipt of the defendant's letter of 29th March, 2021, and yet did not initiate the present proceedings until over

seven months later; notwithstanding his knowledge of the defendant's position, he went ahead with the receiver proceedings and the application for an interim injunction in May 2021. No explanation has been given for the plaintiff's delay, nor has any rationale been given for the fact that the present application was not deemed necessary for the purpose of the interim injunction application in the receiver proceedings, but is now deemed essential in order to be able to prosecute the subsequent interlocutory application.

**Conclusion**

30. In all the circumstances, and for the reasons set out above, I do not consider it appropriate to grant the reliefs sought.
  
31. As regards costs, my preliminary view is that costs must follow the event, and be awarded to the defendant. If either party wishes to make submissions in this regard, I will grant liberty to the parties to do so in writing within seven days from delivery of this judgment. Such submissions should not exceed 750 words in length. On receipt of those submissions I will consider the matter and finalise the court's order without further reference to the parties.