THE HIGH COURT

[2024] IEHC 81

[Record No. 2023/3658P]

BETWEEN

BARRY BROPHY

PLAINTIFF

AND

TCFG NAAS L T/A THE CULINARY FOOD GROUP

DEFENDANT

JUDGMENT of Mr Justice Kennedy delivered on the 21st day of February 2024

1. The plaintiff seeks an order for costs for an interlocutory injunction application rendered moot by a proposal by the defendant. The application had sought, *inter alia*, to restrain the defendant from holding a disciplinary inquiry and/or dismissing the plaintiff on foot of a recent investigation and to require an independent investigation. The proceedings were issued on 25 July 2023. Five affidavits were exchanged, as were written submissions. The Statement of Claim was delivered, and the injunction was scheduled for a two-day hearing commencing 7 February 2024. However, at the start of the hearing, the defendant made a proposal which would avoid the need for the injunction hearing. While maintaining that its original investigation had been fair and robust and that the plaintiff was not entitled to interlocutory

relief, it committed to undertaking an independent investigation without prejudice to that position. The parties were agreeing terms of reference and arrangements.

2. This welcome development obviated the need for injunctive relief, and the parties instead sought directions by consent. The plaintiff sought costs on the basis that he had effectively achieved the principal reliefs sought. The defendant opposed the application for costs on the basis that the offer of an independent investigation was without prejudice. The merits of the application had not been resolved. It believed that the plaintiff's application for injunctive relief had been misconceived. While it was prepared to offer an independent investigation to address the concerns raised, the Court had not determined the merits of the application, let alone the proceedings as a whole. No defence had been delivered. The defendant submitted that the costs of the injunction application could not and should not be determined at this juncture. The plaintiff responded that even if the defendant's offer was without prejudice to its position, the offer effectively ended the original process and conceded another key relief, an independent investigation. The plaintiff submitted that the costs of the application (at least) should be determined now and in his favour.

Background to the investigation

3. In the light of the arrangements agreed by the parties, it is neither necessary nor appropriate for me to adjudicate upon the injunction application, let alone the substantive merits of the plaintiff's objections to the adequacy of the defendant's earlier investigation. A high-level summary will suffice to set out the context for the costs application.

4. The alleged issues for investigation are as follows:

a. The plaintiff is one of the defendant's senior employees and has been employed by it or by other companies within the Queally Group ("the Group") since 2000. Since

2018 he has been its Procurement, Projects and Continuous Improvement Manager. His contract of employment provided that:

> *"You shall under no circumstances, either directly or indirectly, receive or accept for your own benefit any commission, rebate, discount, gratuity or profit from any person, firm or company having or seeking to have business transactions with the company or any of its subsidiaries or fellow subsidiaries. You shall immediately notify and report any offer, or such inducement made to you*".

b. The defendant is investigating financial arrangements between one of its suppliers ("the Supplier") and Brolen Trading Ltd ("Brolen"), a company jointly owned and controlled by the plaintiff and a former colleague, Derek Lennon (who was, at the time, the CFO of the Group company which also employed the plaintiff and who was, like the plaintiff, transferred to the defendant's employment). It appears that from 2015 to date, Brolen charged the Supplier significant fees or commission in respect of its business with the defendant and the Supplier recouped these payments by passing them on to the defendant in its own invoices to the defendant. Correspondence between the supplier and Brolen obtained in the course of the investigation does suggest that the Supplier's payments to Brolen were characterised as "rebates", which begs the question as to why the Supplier paid them to Brolen rather than to the defendant. In any event, the monies were ultimately paid by the defendant for the benefit of Brolen (and the plaintiff and Mr Lennon). There is a dispute as to whether the two executives' financial interest was disclosed to the defendant.

c. The defendant also alleges that the plaintiff wrongfully shared confidential commercial information with the Supplier (such as prices charged by its competitors) when it was negotiating for the defendant's business.

d. The primary use of Brolen and the Supplier in the relevant period was in the context of the transport of product in special trailers (some of which were been provided by

Brolen at different times, which is relied upon by the plaintiff to justify the arrangement). There was a further arrangement from 2020 described as "*the dolav washing deal*" which the plaintiff references rather cryptically:

"the dolav washing deal followed on as a natural progression to the trailer one."

f. It appears to be accepted that Brolen (and, ultimately, the plaintiff and Mr Lennon) benefitted from the Supplier's payment of rebates and commission on all its business with the defendant. However, the plaintiff denies that these arrangements were undisclosed or fraudulent. He says that the arrangements were entered into with the defendant's knowledge and consent and for its benefit, saving it money and were approved by the defendant's then Group Chairman (who is now unfortunately deceased).

g. The plaintiff argues that Brolen was originally incorporated (he says at the Chairman's suggestion and with the knowledge of the defendant's current CFO) to allow the plaintiff and Mr Lennon to receive agreed benefits from the defendant by way of bonus or reward for their efforts as employees of (at that stage) one of the defendant's associated companies. The defendant maintains that the earlier arrangements are irrelevant because they related only to the 2006 - 2008 period and ended at that point, and that the plaintiff's remuneration/bonus arrangements were subsequently resolved by negotiation (in the context of threatened litigation and the intra-group TUPE of the plaintiff's employment to the defendant) and put on a more conventional footing. Even on the plaintiff's account, it appears that Brolen was dormant until 2015 and that it had only been used on two occasions prior to 2008 to:

> "*formally receive the bonus payments that myself and Derek were entitled to for those year* [*sic*] *for working in* [*the defendant's sister company*]. *We realised, however, that receiving bonus payments through Brolen was not as tax efficient as we had thought, so it was no longer used for that purpose after 2008. After*

> *that, however, Brolen lay dormant from 2008 to 2015. Despite being dormant, myself and Derek kept it on the company register in case any further business opportunities arose with the Queally Group.*"

The defendant also essentially maintains that the arrangements in issue in these proceedings, which relate to the period from 2015, were quantitatively and qualitatively different to the 2006 – 2008 arrangements. It says that any rationale for using Brolen ended in 2008 when remuneration arrangements were restructured and put on a more conventional footing in the ensuing years. It says that the recent, much larger transactions cannot be justified by reference to the earlier, different, arrangements (which had been superseded and replaced in any event). The defendant's CFO says that he had no knowledge of the post-2015 arrangements or of Brolen's (and the plaintiff's) financial interest in the defendant's ongoing business with the Supplier.

h. The defendant insists that any approval for Brolen's involvement ended in 2008 and that the post-2015 transactions in issue in these proceedings are not comparable. Its HR manager stated at para. 20 of her first affidavit that the group's current CFO:

> "*was a party to the output of the discussions between the plaintiff and* [*the then group chairman*] *around the establishment of Brolen and he is clear that the company was set up to facilitate the Plaintiff and Mr Lennon receiving a 'reward' (akin to a bonus payment) upon presentation of an invoice for services rendered to (the group company which then employed them) and that this 'reward' was not to exceed €10,000 per annum for each of the plaintiff and Derek Lennon. I am informed that the intention was never for the Plaintiff to set up a 'side business' as is referenced by him. Indeed, such a business is not permitted by the Plaintiff's contract of employment.*"

i. Whereas the pre-2008 transactions involving Brolen appear to have been relatively confined, the income derived by Brolen based on the defendant's business with the Supplier was very substantial. Although the plaintiff described Brolen as a "*micro business*", it apparently received revenues of the order of €735,033 from the

Supplier after 2015 in payments related to its business with the defendant. However, the plaintiff notes that the actual profit was lower, as Brolen incurred costs (including in relation to the purchase of trailers for use by the Supplier) as part of the arrangements (and the plaintiff would justify the payments to Brolen on that basis).

j. The plaintiff insists that the transactions were not fraudulent because they were approved by the Group Chairman and saved the defendant money, and that:

> "[*d*]*ue to the fact that he acted with permission, the Plaintiff cannot have been acting fraudulently*".

k. The plaintiff also referenced other alleged examples of "*unorthodox arrangements and cash payments*" by the Defendant and its associated companies to their employees and officers (and their families) "*as an insight into* [*the Group's*] *corporate governance*", claiming that he could furnish "*countless more examples*", while stating that:

> "*While I have no doubt that from a modern corporate governance perspective some of these arrangements might be deemed inappropriate. Instead I have been accused of fraud which is a qualitatively different accusation. The failure on the part of the investigators to even consider the culture of the Queally group and the likelihood that Peter Queally did authorise the arrangements with Brolen is a substantial failure on their part. In particular, there is an irony to Pat O'Brien failing to do so when he is personally and directly aware of many of these historic arrangements*". [*sic*]

5. It appears that significant legal issues could arise even if, as the plaintiff claims, the defendant's chairman was aware of the extent of the post-2015 payments, payments which the plaintiff acknowledges could be seen as inappropriate or unorthodox. He invoked examples of other alleged unorthodox arrangements to demonstrate the plausibility of his claim that the Group had approved his arrangements, which he equated with those allegedly entered into with other executives. The defendant vigorously disputes these claims.

The Investigation

6. The plaintiff acknowledged the defendant's entitlement to investigate the issues and his own obligation to participate in any fair investigation but maintained that the defendant must conduct any such investigation or disciplinary process fairly and in accordance with its contractual obligations. The plaintiff's contract of employment incorporates the defendant's disciplinary policy which stipulates that the defendant would undertake a full and proper investigation of all relevant facts relating to any alleged wrongdoing and that no disciplinary action would be taken until:

> "*all the relevant facts have been fully investigated and carefully considered, including talking to any witnesses if necessary*".

7. He maintained that the originally proposed disciplinary process would have been prejudicial because of the flawed investigation. He argued that: (a) he was "*ambushed*" at a meeting called to discuss his health while he was on extended sick leave and subjected to unfair questions which suggested predetermination; (b) despite repeated requests, he was not given full details of all evidence against him, and it was unfair to expect him to participate in the investigation without such information. He was willing to participate once all such information was forthcoming. The defendant maintained that he had received the information he was entitled to and completed the investigation report; (c) the "*findings*" were profoundly adverse, suggesting that he had engaged in fraudulent activity in relation to Brolen; (d) without the injunction application, the report would have constituted the entire factual matrix in which the disciplinary hearing would have been determined, with almost no attempt to uncover exculpatory evidence or to probe his claim to have been acting with the then Group chairman's express approval; (e) in terms of additional exculpatory evidence, the defendant and its related companies knew of the establishment of Brolen in 2006 and its operation until 2008 as a vehicle to enable the plaintiff and his former colleague to receive part of their bonus. The investigators should have probed the defendant's awareness of the ongoing use of Brolen; (f) on 12 June

2023, the plaintiff was formally suspended pending investigation into an allegation of gross misconduct for defrauding the defendant from July 2015; (g) the defendant concluded the investigation without the plaintiff's participation. The report made serious "*findings*" of fraudulent activity on the plaintiff's part in relation to Brolen and the following day the defendant confirmed its intention to proceed with a disciplinary hearing on 26 July 2023 on foot of the report; (h) on 25 July 2023, these proceedings were issued and the plaintiff obtained interim *ex parte* relief; (i) the defendant's actions in relation to the conduct of the investigation contravened the employment contract, the disciplinary policy and the plaintiff's fair procedure rights. The defendant had failed to ensure a proper and impartial investigation which interviewed all relevant witnesses and sought out both inculpatory and exculpatory evidence; and (j) the plaintiff's written submissions in support of the injunction application noted that the interlocutory relief sought would have required the defendant to start again with an impartial investigation in which the plaintiff:

> "*will be listened to and* [in which] *his factual assertions will be properly examined and not simply dismissed.*"

8. The defendant denied that the investigation was unfair or flawed. It accepted that there were direct questions at the 30 May 2023 meeting but denies any "*ambush*" or predetermination, noting alleged inconsistencies and contradictions in the plaintiff's position. It maintained that the plaintiff was repeatedly invited to participate in the ongoing investigation and that his demands for all evidence available to the investigators exceeded his entitlements. It said that he had not been prejudiced by withheld evidence because he was uniquely familiar with the details of the impugned arrangements. It also claimed that the investigation did seek exculpatory evidence and, if the plaintiff had participated, additional lines of enquiry could have been pursued. The defendant argued that fair procedures/natural justice rights would apply at the disciplinary process stage and such rights would be respected. The disciplinary process would be conducted by individuals who had not been involved in the investigation.

Costs

9. In terms of the costs of the application, my approach is determined by sections 168 and 169 of the Legal Services Regulation Act 2015 which (in the relevant part) provide that:

"*168. (1)… a court may… at any stage in, and from time to time during, those proceedings—*

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings…

(2) Without prejudice to subsection (1), the order may include an order that a party shall pay—

(a) a portion of another party's costs,

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e) interest on costs from or until a specified date, including a date before the judgment.

169. (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases…

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and …

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."

Conclusion

10. While the ongoing need for the litigation is not obvious to me in the light of developments, it would be premature to deal with the costs of the proceedings generally at this point.

11. The position with regard to the costs of the injunction is more straightforward. While the defendant's proposal was sensible and appropriate, it does mean, in my view, that the plaintiff has substantially succeeded in his application and that the starting point in principle is that he is presumed to be entitled to his costs on the application.

12. However, I note that concerns arose in respect of aspects of the evidence furnished by each side, giving rise to a possible need for directions pursuant to Order 40, rule 16 of the Rules of the Superior Courts. I propose to deal with that issue before finalising my decision on costs of the application, in case it impacts my discretion under sections 168 & 169. Furthermore, the parties may have submissions as to whether there should be either a stay or an interim payment.

13. Finally, for completeness, I presume that all parties to the various transactions referenced in these proceedings will carefully reflect on *all* issues credibly raised in the proceedings (and not solely issues pertaining to the plaintiff's relationship with the defendant) and will give due consideration to identifying what, if any, issues may arise in terms of compliance with tax or other compliance obligations. For example, I expect the directors of the corporate entities (including the defendant, its parent company, Brolen and the Supplier) to consider whether any issues arose in respect of their respective corporate governance, tax, accounting, financial reporting and other statutory requirements, including, without limitation, the directors' respective statutory and fiduciary duties to: (a) maintain proper books and records; (b) prepare proper financial statements; and (c) make full disclosure to the respective companies' auditors. For example, I was puzzled by the fact that, although there appears to have been a degree of consensus in the affidavits that the rationale for the small number of

Brolen transactions prior to 2008 was that they were a "*reward*" for the two executives in 2007 and 2008, that understanding did not seem to have been reflected in the contemporaneous document drawn up by the two parties. The apparent discrepancy was not explained in the affidavits nor were the tax or accounting implications of such an arrangement (for any of the parties involved) explained. Clearly the facts would need to be ascertained before any conclusions could be reached. No doubt the parties and, where applicable, their directors will be carefully examining and appropriately investigating all such issues which have emerged in these proceedings to determine what, if any, action may be required. It would be premature for me to reach any conclusion and I do not purport to do so, simply noting that it is incumbent upon the parties - especially those responsible for the governance of the various corporate entities - to appropriately address all applicable legal and governance requirements, not simply the employment issues arising between the parties to these proceedings.