

Neutral Citation No: [2017] NIQB 23

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Judgment: approved by the Court for handing down  
(subject to editorial corrections)\*

Delivered: 01/02/2017

IN THE HIGH COURT IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

COLM HURL

Plaintiff;

-and-

EMMANUEL LUPARI

First Defendant;

JAMES B KENNEDY

Trustee in Bankruptcy of Emmanuel Lupari

Second Defendant.

**McBRIDE J**

**Application**

[1] The plaintiff seeks an order for committal of first-named defendant pursuant to Order 52(1)(3) of The Rules of the Supreme Court (Northern Ireland) 1980 by reason of the refusal of the first-named defendant to comply with an order of this Honourable Court dated 9 June 2016 (hereinafter referred to as "the injunction"), which ordered that-

"Pending the trial of this action in Northern Ireland, the first-named defendant, Emmanuel Lupari be and is restrained from representing, whether by himself or by his servants, agents, attorneys or otherwise, that he is entitled as of now to the beneficial ownership of shares held in Bodrum Ege Gayrimenkul Pazarlarna Insaat Ticaret ve Sanayi Ltd. Sirketi Reg. No. 178 055 4306, as the beneficial ownership of any shares found to be the name of Emmanuel Lupari continues to be vested in this trustee and bankruptcy

James G Kennedy".

[2] The plaintiff was represented by Mr Keith Gibson and the first-named defendant was represented by Mr Joseph Kennedy. I am grateful to both counsel for their well-researched submissions ably augmented by oral submissions.

### **Background**

[3] The circumstances which gave rise to the granting of the injunction are set out in the judgment of Deeny J entitled Hurl v Lupari & Kennedy (unreported) DEE9999 dated 9 June 2016.

[4] As appears from that judgment, the plaintiff and the first-named defendant (hereinafter referred to as the 'defendant') worked together with a view to developing a housing project in Turkey. Both had shares in Bodrum Ege Gayrimenkul Pazarlama Insaat Ticaret ve Sanayi Ltd. Sirketi Reg. No. 178 055 4306 (hereinafter referred to as "the company"). The company is registered in Turkey. The Defendant issued proceedings in Turkey seeking a declaration as to his shareholding in the company. The Plaintiff also issued commercial proceedings in this jurisdiction in respect of the company which bear reference No 2011/11444. The injunction was granted as interim relief in respect of these commercial proceedings.

[5] On 14 March 2011, the defendant was made bankrupt. The second-named defendant, James B Kennedy, was appointed trustee in bankruptcy of the defendant on 24 March 2011. The defendant was released from his bankruptcy on 21 January 2013.

[6] As a result of divergent views taken by the parties as to the present ownership of shares held in the company by the defendant, as of the date of the bankruptcy, the plaintiffs sought and obtained a declaration from this Honourable Court on 10 December 2015, whereby the Court declared that:-

“... all assets (including any share in any company) held by the first named defendant, Emmanuel Lupari, prior to his bankruptcy on 14 March 2011 are vested in the second named defendant as trustee in bankruptcy namely James B Kennedy”.

[7] It subsequently came to the plaintiff's knowledge that the defendant had represented through his Turkish lawyer, in the Turkish court, that he was presently entitled to a shareholding in the company.

[8] Upon receipt of this information, the plaintiff sought and obtained the

injunction. The injunction is endorsed with a penal notice on its face. Deeny J in the course of his judgment granting the injunction stated at paragraph [8] that the injunction:-

“... was effective on Mr Lupari and he will be subject to penal sanctions if he breaches it”.

### **The plaintiff's application**

[9] By notice dated 11 August 2016, the plaintiff seeks committal of the defendant by reason of his refusal to comply with the injunction. The Notice is accompanied by an affidavit by Brian Speers, Solicitor, sworn on 10 August 2016.

[10] Details of the alleged breach or breaches are not set out on the face of the Notice of Motion.

[11] Mr Speers avers that he was informed by Cern Tuncbilek, the lawyer representing the company in the Turkish proceedings, that the defendant's Turkish lawyer "submitted a new petition to the Turkish court on 29 June 2016 seeking two heads of relief: demanding (a) what is termed "the acceptance of the case" and (b) asking a decision to be given in their favour." He then refers to the said written petition and an English translation thereof which is marked Exhibit 'C'. Exhibit C is a petition dated 28 June 2016.

[12] Mr Speers further avers that the defendant's Turkish lawyer appeared at the Turkish court on 30 June 2016 "when the petition filed by him on behalf the first-named defendant dated 29 June 2016, was considered by the court". Exhibit D is the English translation of the hearing record of the Turkish Court proceedings on 30 June 2016. It states:-

"The petition of the attorney of the defendant, Bodrum Ege dated 29/06/2016 and the petition of the plaintiff's attorney dated 29/06/2016 were read."

[13] As a result of a query raised by this Court a further affidavit was sworn by Cern Tunbilek on 12th December 2016. The originals of the exhibits to that affidavit were then filed with the court on 5 January 2017. His affidavit exhibits a 'statement of clarification' from the Turkish Court dated 29 November 2016, which states:

"At the hearing of our Court on 30/06/2016, the petitions of the plaintiff's attorney sent as certified and dated 28/06/2016 and 29/06/2016 were read".

This document then exhibits two petitions, one dated 28 June 2016 and one dated 29 June 2016.

[14] The Court directed that the Defendant be given a period of 7 days in which to respond to this new evidence filed by the Plaintiff. No response has been filed by the Defendant.

[15] The petition dated 29 June 2016 is difficult to decipher. It appears to make the case that, because of the Company's failure to comply with an Order of the Turkish Court to file certain documentation within a time frame, the defendant's case is now proven.

[16] The petition dated 28 June 2016, is again difficult to decipher especially as much of its meaning is 'lost in translation'. It appears to be something akin to a skeleton argument or legal submission. In particular it states the following:

"By failing to submit to court the minute book ... per section 2 of the interim decision ... the defendant ... accepted that the signatures of Emmanuel Lupari ... regarding ... decrease a 50% share of Emmanuel Lupari to 2.5% ... are forged thus our action has been proven".

Later in the document a submission is made that the alleged transfer was invalid as:-

"... the plaintiff client who owns 50% of the shares ... and therefore transfer could not take place without his approval ... having accepted the fact that their signatures under these minutes are forged, thus a vested right have originated in favour of the plaintiff, Emmanuel Lupari."

### **The plaintiff's submissions**

[17] The plaintiff's case, as set out in the supporting affidavit, is that the Defendant has committed a willful and serious breach of the injunction as:

- (i) His lawyer filed a petition in the Turkish Court dated 29 June 2016, seeking relief on the basis of the Defendant's purported shareholding in the company, and
- (ii) His Turkish lawyer attended the Turkish Court on 30 June 2016 and on behalf of the defendant, presented this petition (that is the petition dated 29 June 2016) to the Court.

[18] At no stage during oral or written submissions did the plaintiff's counsel make the case that the lodging of a petition dated 29 June 2016, and the reading of such a document to the Turkish Court constituted breaches of the injunction.

Rather, the plaintiff's counsel submitted that the Defendant was in breach of the injunction as his Turkish lawyer filed a petition dated 28 June 2016 in the Turkish Court and read this document to the Turkish Court on the 30 June 2016. He submitted that this petition contained representations that the defendant was the beneficial owner of shares in the company and such representations constituted a breach of the injunction, as the injunction restrained the defendant, whether by himself or his attorneys from making such representations. The only reference to a document dated 28 June 2016 was an exhibit attached to the grounding affidavit sworn by Mr Speers.

### **The defendant's submissions**

[19] The defendant filed an affidavit dated 26 September 2016 in response to the application. By reason of matters which arose at the hearing of the summons, the defendant was granted leave to file supplemental affidavits. The defendant filed a second affidavit dated 11 October 2016 and his solicitor, John Doran, filed an affidavit dated 11 October 2016.

[20] In his first affidavit, the defendant avers that he spoke to his lawyer on several occasions between 16 June 2016 and 30 June 2016 confirming the existence of the injunction and instructed him not to take any further steps in relation to the Turkish proceedings until the issue of the injunction was resolved in this jurisdiction. In his second affidavit, he states that he sent his Turkish lawyer a copy of the injunction on 17 June 2016 at 09.21 and exhibits an email which was sent to his lawyer. This email is a forwarding email of an email which had the injunction as an attachment and which was sent from the defendant's solicitors in Northern Ireland to him.

[21] The defendant further avers that his solicitors in Northern Ireland emailed his Turkish lawyer informing him of the terms of the injunction. This email was sent on 29 June 2016 at 14.56. The email is exhibited and it sets out the terms of the injunction and explains "neither Emmanuel or any lawyers acting on his behalf are allowed to say that Emmanuel owns the shares in Bodrum Ege".

[22] Mr Doran in his affidavit, states that the defendant attended a consultation with counsel on 24 June 2016. The terms of the injunction were explained and the defendant confirmed he had informed his Turkish lawyer about the injunction and had instructed him not to take any further steps in relation to the Turkish proceedings until the injunction proceedings in Northern Ireland were resolved.

[23] On 30 June 2016 at 07.52, the defendant's Turkish lawyer emailed the solicitors in Northern Ireland attaching a letter. In this letter he confirms he had a telephone conversation with the defendant on 29 June 2016 who informed him that his Northern Ireland solicitors had sent an email explaining the situation. The Turkish lawyer states that he did not receive this email. His letter then goes on to essentially state that Deeny J had made a "judicial mistake" in granting the injunction and he indicates that he is ready to give "judicial help and solidarity to Mr Justice Deeny and

Belfast courts". He then notes he has great difficulty in understanding the injunction and he wants to come to Belfast as "all I want is justice".

[24] The defendant denies that he is in breach of the injunction. He submits that he informed his Turkish lawyer of the injunction in Northern Ireland in early June 2016 and provided a copy injunction to him on 17 June 2016. This was followed up by an email from his solicitors in Northern Ireland dated 29 June at 14.56, which attached the injunction and explained its import. The defendant submits that he advised his Turkish lawyer not to take any further steps in the Turkish proceedings until the injunction was resolved in Northern Ireland. He therefore submits that he is not vicariously liable for the acts of his lawyer in submitting petitions to the Court in Turkey dated 28 and 29 June and reading these petitions to the Turkish Court on the 30 June 2016 as his Turkish lawyer was acting outside his authority in doing these acts.

### **Relevant legal principles**

[25] The procedural rules governing committal applications are set out in Order 52, Rules of the Supreme Court (Northern Ireland) 1980. From these and the jurisprudence on committal a number of principles emerge:-

A. Under Order 52 rule 1(3) where civil contempt of Court is committed in connection with any proceedings in the High Court, an order of committal may be made by a single Judge. A civil contempt includes disobedience of a court order.

B. Under Order 52, rule 4(1) an application for committal must be made by motion and be supported by an affidavit.

C. In accordance with Order 52 Rule 4(2), "the notice of motion, ... accompanied by a copy of the affidavit in support of the application, must be served personally on the person sought to be committed." Thus the Notice and a copy of the supporting affidavit must be served personally unless the Court orders otherwise.

D. Order 52 Rule 4 (2) further provides, "the notice of motion, stating the grounds of the application.." The importance of this provision was outlined by Cross J in Re B (IA) (an infant) (1965) Ch. 112 at 117 when he said:

"Committal is a very serious matter. The court must proceed very carefully before they make an order to commit to prison; the rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations".

In Harmsworth v Harmsworth [1987] 1 WLR 1676, the County Court judge held that, although the application notice did not contain sufficient particularity, that defect was cured by the supporting affidavit. The Court of Appeal rejected this view and held that the allegations must be set out with sufficient particularity in the application notice itself and could not be supplemented by reference to some other document such as a supporting affidavit. Nichols LJ stated at page 1683:

"So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge? ... From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged ...".

Further Woolf LJ in Attorney General for Tuvalu v Philatelic Distribution Corporation Limited [1990] 1 WLR 926 at 924-935 stated:

"The essential point which the cases establish is that an alleged contemnor should be told, with sufficient particularity to enable him to defend himself, what exactly he is said to have done or omitted to do which constitutes contempt of court. The cases make clear that compliance with this rule will be strictly insisted upon since the liberty of the subject is at stake".

Males J in The Lord Mayor and the Citizens of the City of Westminster v Addbins Limited [2012] EWHC 3716 summarised the principles at paragraph 43 when he said:

"In summary, therefore, the application notice must contain sufficient detail of what is alleged to enable the alleged contemnor to meet the case against him, but that requirement must be applied sensibly and the level of detail required to be included in order to satisfy this test will depend on the circumstances of the particular case, including the nature of the acts or omissions alleged."

E. The power to commit for contempt must be exercised only where the court is sure, to the criminal standard of proof that the alleged contemnor is in breach of an unambiguous order. The burden of proof is upon the applicant.

F. To establish that someone is in contempt, it is necessary to prove the three elements set out in Masri v Consolidated Contractors International [2011] EWHC 2579, namely:

- "(i) he knew the terms of the order,
- (ii) he acted (or failed to act) in a manner which involved a breach of the order, and
- (iii) he knew of the facts which made his conduct a breach."

G. Liability for contempt does not require any direct intention on the part of the alleged contemnor. This was clearly set out in the decision of the House of Lords in Re Supply of Ready Mix Concrete (No. 2) [1995] 1 AC 456.

H. An alleged contemnor is only required to meet the specified allegations of contempt made against him, which must be determined as at the date of the application notice. This appears from Tankaria v Morgan [2005] EWHC 3282 at paragraph 27 when Laddie J said:

"... Perhaps of greatest significance in this case is the importance of the date and content of the application notice. The respondent's only obliged to meet the 'charges' set out in the application notice. In other words, the charges are those specified in the application notice. The question of whether there has been contempt has to be determined as of the date of the application notice ...".

I. The liability of a principal in relation to the acts of his agents is set out in Arlidge, Eady and Smith [4th Edition] On Contempt, which states at paragraph 12 – 102 as follows:

"Where judgment or order is binding upon an employer or principal, and a servant or agent fails to comply with the judgment or breaches the order this may lead to a find of liability on the basis of vicarious liability....

The agent in an ordinary case is engaged to perform a particular task on a particular occasion and only has authority to do whatever is required for that purpose. If the authority of the servant or agent has been revoked before the act is done, this would in principle have the consequence of the relevant would not be attributable on a vicarious basis".

This test was confirmed in Heatons Transport (St Helens) Limited v Transport and General Workers Union [1973] AC 15 when the court held:

"No new development is involved in the law relating to the responsibility of a master or principal



for the act of a servant or agent in the present appeal. In each case the test to be applied is the same: was the servant or agent acting on behalf of, and within the scope of the authority conferred by, the master or principal?"

## **Consideration**

### **Procedural requirements**

[26] This is an application for committal of the defendant on the basis he has committed a civil contempt, in that he refused to comply with the injunction. The application was made by Notice dated 11 August 2016 and was supported by an affidavit sworn by Mr Speers, solicitor. The Notice and a copy of the affidavit were served personally on the defendant.

### **Were sufficient particulars given?**

[27] As noted in Tankaria v Morgan the defendant is only obliged to meet the charges specified in the application notice. The Plaintiff's Notice of Motion seeks committal of the defendant on the basis of his "refusal to comply" with the injunction. No particulars of the alleged breach or breaches of the injunction are set out in the Notice of Motion. The jurisprudence makes clear that compliance with this rule is strictly insisted upon since the liberty of the subject is at stake. The requirement, however, must be applied sensibly and the level of detail required in the Notice of Motion will depend on all the circumstances. The Notice of Motion must be read as a whole in light of the background as known to the parties. Reading it in this way, the question arises whether the Notice of Motion gave the defendant enough information to meet the charge against him. That is, did he know precisely what acts he had done which the plaintiff is now complaining about?

[28] As the Notice of Motion contains no particulars of the alleged breaches the Defendant could not know exactly what it was alleged he had done or omitted to have done which constituted a contempt of court. He therefore did not know the case being made against him and was not therefore in a position to meet it.

[29] As Hannsworth makes clear such a defect in the Notice of Motion is not cured by particulars being set out in the supporting affidavit of Mr Speers. I therefore find that the Plaintiff's application, which fails to particularise the alleged breaches in the Notice, is fatally flawed.

[30] If, contrary to my view, the Notice is not considered to be fatally flawed, because the Defendant was aware of the case being made against him, because the affidavit of Mr Speers particularised the breaches, I will now consider the merits of the application on this basis.

[31] In Mr Speer's affidavit, two particulars of breach are alleged, namely (1) the filing of the petition dated 29 June 2016 by the defendant's Turkish lawyers in Turkish court, and (2) the reading of this petition to the Turkish court on 30 June 2016. When the contempt summons was served, the petition dated 29 June 2016 was not exhibited to the affidavit. The petition exhibited was dated 28 June 2016. It is now clear from the affidavit of Cern Tuncbilek, sworn on 12 December 2016, that a petition dated 29 June 2016 was actually lodged with the Turkish court.

[32] The plaintiff failed to provide any particulars of the petition dated 29 June 2016 at the time of the original contempt application. Therefore, I find that the plaintiff has failed to provide the defendant with any or adequate particulars of this alleged breach as of the time of the contempt application. As a result the defendant did not and could not know the case being made against him in relation to the lodging and reading of the petition dated 29 June 2016. For this reason I find that the supporting affidavit also failed to provide the Defendant with sufficient particulars of the alleged breach of the injunction to enable him to know the case being made against him. For this reason I further find the application is fatally flawed.

### **Substantive application**

[33] If, contrary to my findings the application is not fatally flawed due to procedural irregularities, I will now consider whether the Plaintiff has proved, to the requisite standard, that the Defendant was in breach of the injunction.

[34] As has already been noted, the affidavit of Brian Speers refers to two alleged breaches of the injunction, namely (a) the filing of the petition dated 29 June 2016 by the defendant's Turkish lawyers in the Turkish Court and (b) the reading of this petition to the Turkish court on 30 June 2016.

[35] As Masri notes, the burden of proof is on the plaintiff to establish to the criminal standard, that the defendant acted in a manner which involve a breach of the order and he knew of the facts which made his conduct a breach.

[36] I have considered the contents of the petition dated 29 June 2016. It is very difficult to decipher and, in particular, to determine whether its contents amount to a breach of the injunction. In my view, in the absence of proof that this petition was translated and its contents brought to the defendant's attention by a legal expert so that its contents could be explained, I find that the defendant did not know that the lodging of this document amounted to a breach of the injunction.

[37] If, contrary to my finding, the lodging of this petition constitutes a breach of the injunction, I find that the defendant is not vicariously liable for the acts of his Turkish lawyer in filing the document. I have considered the affidavit evidence and I find that the defendant forwarded a copy of the injunction to his Turkish

lawyer by email dated 17 June 2016 at 09.21 hours. Further, the defendant spoke to his Turkish lawyer on 29 June 2016 and made clear to him the contents of the injunction and asked him not to take any steps which would breach the injunction. It is clear that such a conversation did take place because the Turkish lawyer confirms that this conversation took place in his letter which is attached to an email dated 30 June 2016 at 07:52 from him to the defendant's solicitors. In this letter the Turkish lawyer makes clear that he was aware of the content of Deeny J's judgment although he thinks it was a "judicial mistake". I find that the Turkish lawyer, by lodging the petition dated 29 June 2016, was acting without instructions from the defendant and therefore the defendant is not vicariously liable for his acts. Hence I do not find that the lodging of the petition dated 29 June by the defendant's Turkish lawyer amounts to a breach of the injunction by the defendant.

[38] The second alleged breach relates to reading this petition to the Turkish court on 30 June 2016. I find that the reading of this petition, by the defendant's Turkish lawyer to the Turkish Court on 30 June 2016 does not amount to a breach of the injunction by the defendant. As already indicated, I have made a finding that the Turkish lawyer was aware of the injunction on 17 June 2016. It is further clear from all the email correspondence and in particular the Turkish lawyer's email dated 30 June at 07.52, that he was aware of the injunction and its import and the defendant's instructions before the hearing on 30 June 2016. Therefore, when the Turkish lawyer read the petition dated 29 June 2016, he was acting without authority. Therefore I do not find that the defendant was vicariously liable for his acts. In view of this, I find that the defendant is not in breach of the injunction when his Turkish lawyer read this petition to the Turkish court on 30 June 2016.

[39] Counsel for the Plaintiff submitted to the Court that the Defendant was in breach of the injunction because his Turkish lawyers submitted a petition dated 28 June 2016 to the Turkish Court and he committed a further breach of the injunction when his Turkish lawyer read this petition to the Turkish Court on 30 June 2016. As Tankaria v Morgan makes clear, the defendant is only obliged to meet the charges set out in the application notice. Neither the Notice of Motion nor the grounding affidavit of Brian Speers referred to a charge that a petition dated 28 June 2016 was lodged in the Turkish court and then read to the Court on 30 June 2016. For this reason it is unnecessary to consider whether the lodging of this document amounted to a breach of the injunction.

[40] In the event the Court was to find that the petition dated 28 June 2016 was lodged and read to the Turkish Court on 30 June 2016, and that the contents of that document were such as to amount to a breach of the injunction, for the reasons already set out I find that the Turkish lawyer in filing and reading a petition dated 28 June 2016 was acting without authority, and therefore the defendant is not

vicariously liable for his actions. Therefore the Defendant is not in breach of the injunction.

## **Conclusion**

[41] I find that the defendant is not in breach of the injunction on the basis the Notice is fatally flawed as it failed to set out with sufficient particularity the alleged breaches of the injunction. Such a defect is not normally cured by a supporting affidavit. Even if the defect could be cured in this way, the supporting affidavit in this case also failed to provide sufficient particulars of the alleged breaches. I find that the Plaintiff has not proved, to the requisite standard that the filing of a petition on 29 June 2016 in the Turkish Court by the defendant's Turkish lawyer is a breach of the injunction as there is no evidence to establish that the Defendant knew of the facts which made the lodging of this petition a breach of the injunction. In addition, I find, on the basis of the affidavits lodged, that the Turkish lawyer in filing this petition was acting without authority and the Defendant is not therefore vicariously liable for his acts. I further find that the Defendant is not in breach of the injunction on the grounds his Turkish lawyer read petitions dated 28 and 29 June 2016 to the Turkish Court on 30 June 2016. The Turkish lawyer was acting outside the scope of his authority when he read these petitions and therefore the defendant is not vicariously liable for his acts. The Plaintiff has not therefore proved the alleged breaches to the requisite standard.

[42] This case is a salutary reminder to that those who seek to commit a person for contempt, that they must exercise great care in drafting notices. They must ensure matters are pleaded with extreme accuracy, and evidence is provided which proves the breach or breaches to the criminal standard. As contempt involves the liberty of the individual the Courts will construe all procedural and substantive requirements strictly.

[43] I therefore dismiss the application. I will hear counsel in respect of costs.