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Judgment: approved by the Court for handing down | *Delivered:* **29/04/2014**
(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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COLIN SAMUEL MARSHALL

Plaintiff;

AND

SEAMUS KIERON VINCENT McGUIRE

Defendant.

_____

DEENY J

Introduction

[1] The court's decision on this matter arises out of relatively unusual facts. To some degree it raises a novel point of law but as it is being heard by me at an interlocutory stage I have concluded that I should not reserve other than over the luncheon interval in delivering judgment. The claim of the plaintiff here, Colin Samuel Marshall, against the defendant, Seamus Kieron Vincent McGuire, is for specific performance of an agreement of 19 February 2010 entitled a cross-option agreement made by the parties "upon which they received legal advice and which was witnessed by a solicitor that the defendant be ordered to comply with the said agreement and make the payments insuring his life as stipulated to the insurance company thereby maintaining the policy in place" as alleged in the writ. Further and other relief and costs are also sought.

[2] That writ was of 29 January 2014 and it followed a letter from the defendant to the plaintiff of 11 November 2013 purporting to terminate the cross option agreement by giving 3 months' notice of termination. Following the writ the plaintiff by notice of motion of 5 March 2014 sought from the court an order to require the defendant to continue to make the payments due to him and to indeed make up any payments not paid from November. It was clearly intended that this was on an interlocutory basis. The Writ of Summons was supported by an affidavit

to which I will turn in due course. This is an interlocutory hearing. The court has had the benefit of argument from Mr John Coyle of counsel for the plaintiff and Mr Richard Shields of counsel for the defendant.

[3] The appropriate test for the grant of an interlocutory injunction continues to be found in the magisterial judgment of Lord Diplock in the case of American Cyanamid and Ethicon Ltd [1975] A. C. 396 and particularly at pages 407g-409d. As I have had occasion to say in other judgments it is almost invariably preferable to go back to that judgment than to attempt to paraphrase it or enlarge upon it. There is certainly no argument between counsel here on the principal issues to be addressed by the court. As his Lordship put it at p.407g:

> "the court must be satisfied that the claim is not frivolous or vexatious; in other words, that there was a serious question to be tried."

That is the submission of plaintiff's counsel here and it is important that I bear in mind that it is the test, that there is a case to be argued, it is an arguable case to be tried and I do bear that in mind. The other principal tests or issues to be addressed begin with whether damages would in fact be an adequate remedy making an injunction unnecessary. If there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, then the question of balance of convenience arises. Where other factors appear to be evenly balanced, Lord Diplock said:

> "it is a counsel of prudence to take such measures as are calculated to preserve the status quo."

[4] I do not forget that the application here is of a mandatory nature and indeed counsel for the plaintiff faced up to that. But it is mandatory only to the extent of requiring the defendant to make a monthly payment until the trial of this action. I observe that for completeness it is probably wise that any order of the court that would issue should also require the defendant to inform the plaintiff forthwith if that was not being done or the policy was being endangered. The matter is helpfully dealt with at Bean on Injunctions and in particular I find the judgment of Chadwick J., as he then was, in Nottingham Building v Eurodynamics Plc Society [1993] F.S.R. 468 of assistance but I think I need not quote from it in extenso.

[5] The application brought at this interlocutory stage by Colin Samuel Marshall is supported by his affidavit. He worked in the communications field. The defendant was a colleague of his dating back to the last century. Later, when their employers withdrew from Northern Ireland, they participated in a management buy-out of that firm in Northern Ireland. Mr McGuire, the defendant, is apparently some 67 years of age whereas the plaintiff is some thirty years younger. Whether for that reason or other reasons Mr McGuire was to, and does, enjoy, a 70% shareholding in the

company that they set up with Mr Marshall having 15%. A third participant had 15% but I was informed by counsel that this was now owned by Mr McGuire also.

[6] The company they formed was called Fenix Solutions Ltd and Mr Marshall was the Technical Director and Mr McGuire was the Managing Director. The business prospered but accordingly to Mr Marshall there were some disagreements between the parties and some stresses and strains. In or about 2009 the defendant having consulted a financial advisor put forward to the plaintiff that some steps should be taken and an important aspect of the steps that were taken was that they entered into a cross option agreement, the subject of this dispute. This document states on the face of it that it was dated 19 February 2010. I have given its title and the parties. It bears the name of Messrs King & Gowdy, Solicitors, prominently on the first page and it is averred that they drafted it and were advising, certainly Mr McGuire, about the matter. The recital of the agreement begins as follows:

> "Whereas:
>
> (a) the parties hereto are shareholders and directors of the company.
>
> (b) The parties are the registered holders and beneficial owners of the ordinary shares at £1 each in the capital of the company shown opposite their names in the second schedule hereto.
>
> (c) The parties hereto wish to enter into arrangements as herein set out for the sale and purchase of their shares in the company in the event of death."

[7] Although it is not spelt out very clearly it would appear to be the intention of the parties that in the event of the death of either one of them an insurance policy would mature and the proceedings of that insurance policy would enable the surviving shareholder to purchase the shares of the deceased shareholder from his estate. It is that policy that the plaintiff wishes to preserve in existence and which the defendant no longer wishes to pay the premiums upon. I say policy, this is slightly unusual, as there is no replying affidavit by Mr McGuire here to the plaintiff's grounding affidavit. The plaintiff seems to have a relative paucity of documents and so there are some matters that are, as yet, not entirely clear. Before moving on from the recital I think I have to say one or two things or it is apt to say one or two things. First of all, most unusually, neither the solicitors for the plaintiff nor the solicitors for the defendant have the schedules to this agreement but the recital which I have just read refers to a second schedule and clause 2.1 of the agreement, which is of importance, refers to a first schedule.

[8] I have concluded that I should infer that such schedules do exist. It would be most surprising, given the nature of this agreement, if, having been referred to in

this legally drafted agreement they did not exist and it would be close to astonishing if a reputable firm like Messrs King & Gowdy had permitted a contract to go out over their name and to see it executed by the parties, as this is executed and witnessed by solicitors, with such a glaring error on the face of it, i.e. to refer to schedules which did not exist. So I shall infer that those schedules did exist, certainly at this stage and for the purposes of this interlocutory hearing. The second thing to say on looking at the recital is that Mr McGuire is no longer a director of the company. Following this agreement their relationship did continue for some time but in 2011 his employment was terminated as a director. He brought proceedings before an industrial tribunal; these were compromised. The terms of the compromise were confidential; the plaintiff was willing to disclose the terms but Mr Shields had no instructions to reciprocate. Mr Shields does, however point out that the plaintiff is no longer a director of the company and he says that is of significance and that really the intention of the parties was to cater for a situation where they were both still directors at the time of the death of one or another.

[9] To return to the agreement there is a definition clause at Clause 1 and then Clause 2 is headed 'Policies' and 2.1 says:

> "Each of the shareholders hereby agrees to effect and thereafter maintain the Policy with the sum assured shown opposite his name in the third column of the First Schedule for the purposes of this Agreement and periodically to review the sums assured against the value from time to time of the shares."

[10] Mr Coyle says that is, once one ignores this curious omission of the schedules, that is perfectly clear. Each of them is obliged to maintain the policy [for that person]. Not only that, they are to review the sums assured against the value from time to time of the shares, i.e. so that the policy will be enough to pay for each other's shares in the event of death. It is true to say that this might seem of particular interest to the plaintiff who is so much younger than the defendant, but where they were either the only two shareholders or only two of three shareholders at that time it is an agreement that could be intended to work for them merely as shareholders without being directors. In support of that interpretation which favours the plaintiff's case at this stage and later, the references in Clause 2, Clause 3 and indeed Clause 5 are repeatedly to shareholders and the same is true of Clause 7 to which I will turn in a moment. It does not say each of the directors hereby agrees to effect and thereafter maintain the policy.

[11] So it seems to me that Clause 2.1 is in favour of the plaintiff's interpretation that the defendant was, mutually with him, undertaking to effect and maintain the policy which he now does not want to do. That interpretation is supported by Clause 7 of the Agreement. Its rubric is 'Continuing Protection' and it continues:

> "Each of the shareholders undertakes:

7.1.1 To punctually pay all the premiums and other monies necessary for keeping the policy in force."

There are other sub-clauses I need not read. So again there is to be continuing protection requiring each of the shareholders to pay the premiums for "keeping the policy in force". Now it is apparently the case that in fact the company Fenix Solutions Ltd, even after Mr Marshall ceased to be a director there, continued to pay the premiums. The direct debit apparently, though in his name, came from the company and not from Mr Marshall himself. But it is not that he refused to pay them and, indeed, he has now taken to paying them. I could not help but comment on the remarkably modest nature of the premium disclosed in the letter from Aviva, the trading name of the well-known insurance company, of 7 March 2014 by which it appears that the monthly premium is only £5.96. It is presumed that the defendant's premium is a much larger one for two reasons. Mr Marshall's share is only valued at £75,000 while Mr McGuire's is valued at £500,000 and, secondly, Mr McGuire is some 30 years older than Mr Marshall. But, in any event, Mr Coyle's submission is that he has the strongly arguable case here that the intention of the parties is that these policies should be kept up and therefore he is entitled to an injunction at the very least to maintain that position until the trial of the action. That is his serious question to be tried and I do not think it can be doubted, subject to Mr Shields' submissions which I will turn to next, that that is well made out.

[12] Now as I indicated above there are issues as to damages. Would damages not be an adequate remedy? Mr McGuire is by definition the owner of the shares, 85% of the shares it now appears, in this successful trading company. He can pay damages if he is found to be wrong. But Mr Coyle made several points on that. First of all, of course, it may involve his client suing the estate of the deceased which is not ideal. Secondly, the policy, as I briefly indicated, appears to be rather good value at the present time. Would the estate of the deceased, if it comes to that, be of sufficient value? Even if it is not a question of suing the estate of the deceased i.e. that the court orders damages following a plenary trial of this matter I do observe that the calculation of those damages might not be straightforward. Furthermore, Mr Coyle states from the Bar but without dispute from the other side that the company has just lost its biggest client, not only lost it but is now engaged in litigation with them. So while the company was doing very well a few years ago, how well is it doing now? Is Mr McGuire still a mark for damages, asked Mr Coyle? It is conceded that he may own other properties but the plaintiff has no idea what the loans or obligations on those properties are. He simply does not know. Mr Coyle reiterates that the defendant has chosen <u>not</u> to put in a replying affidavit here asserting that he can comfortably meet any claim equivalent to a policy worth £500,000.

[13] It seems to me those were convincing arguments and have not been displaced by those of Mr Shields and I conclude that the plaintiff succeeds in surmounting that hurdle. Strictly speaking therefore I need not consider the balance of convenience

but clearly it and the idea of the status quo both fall in favour of the plaintiff. A payment of some kind but it cannot be of an enormous kind would be made by the defendant until the trial of this action in the autumn or at the latest early next year and that would maintain the status quo which existed at the time of the commencement of these proceedings i.e. that such a policy was in existence to enable Mr Marshall to buy out the shares of Mr McGuire if he so wished in the event of Mr McGuire's death.

[14] I then pass to the arguments of Mr Shields. I briefly indicated one or two of those in advance of this point in this ruling. His point about the plaintiff no longer being a director is a valid one but it does not seem to me to fatally weaken the plaintiff's case so that I could possibly conclude that there was no longer a serious issue to be tried. As I indicated the interpretation of the Agreement seems to me against the defendant on that point with its repeated reference to shareholders. He then makes a further, and, I accept, interesting point. He refers the court to Clause 8 of the Agreement which reads as follows in its entirety:

> "8. **General**
>
> 8.1 This Agreement will terminate automatically on the winding up of the company.
>
> 8.2 This Agreement will bind the personal representatives of the shareholders."

He laid stress on 8.1 and on the use of the word automatically there. He said, therefore, that one should infer that though the Agreement would terminate automatically on the winding up of the company there was nothing to stop it terminating prior to that. There was no prohibition on the Agreement terminating in the way that Mr McGuire now wishes i.e. on 3 months' notice.

[15] I have considered that argument. First of all I point out Clause 8.2 which was not read to the court i.e. that the Agreement expressly contemplates binding the personal representatives of the shareholders. That would be essential to make it work but it is a reminder that this was an Agreement between the parties contemplating that most final of all steps, the death of one of the two parties. There is nothing else in the Agreement to positively support the submission of Mr Shields in that regard. I consider the general approach to the interpretation of agreements. We have assistance from Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 Weekly Law Reports 896 at page 912g and perhaps those famous paragraphs will bear one further repetition:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which

would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact" but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear but this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of the words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see Mannai Investments Co Ltd v Eagle Star Life Insurance Ltd [1997] Appeal Cases 749)."

[16] I have to ask myself what meaning this document would convey against the background of two men who have been working together for some years and were shareholders in and working together as directors in a smallish company here. Was it the intention of the parties that either of them could on 3 months' notice walk away from this Agreement? Or was it not clearly intended to be something that bound them together long term even until after death? Mr Coyle relies on, I think properly, an alternative which he says favours him, which is that if Mr Shields is right there must be an implied term in the contract allowing Mr McGuire or either

party to unilaterally resale from the Agreement on 3 months' notice and he relied there on the opinion of Lord Hoffman in Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10. Inter alia, Lord Hoffman said at paragraph 17:

> "The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is done. If the parties had intended something to happen, the instrument would have said so. Otherwise the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls."

[17] It seems to me that this is of assistance to the plaintiff also. I only have to decide whether there is an arguable case here. Because the injunction is of a mandatory nature I would want to err on the side of finding that there was a clearly arguable case. It seems to me there is a clearly arguable case that these parties did not intend that one could resile unilaterally on 3 months' notice. It seems to me there is a clearly arguable case that such a right to resile would have to constitute an implied term that is not sufficiently implied here, neither the circumstances for resiling nor the period of notice that would be appropriate nor anything else.

[18] I accept Mr Coyle's submissions in that regard and I find in favour of the plaintiff.