Neutral Citation No. [2013] NIQB 146 | *Ref:* **WEA9169**

Judgment: approved by the Court for handing down | *Delivered:* **19/12/13**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN

DANIEL McATEER

Plaintiff

V

SEAN DEVINE

MARY DEVINE

BRENDAN FOX p/a CLEAVER, FULTON RANKIN, Solicitors

JOHN LOVE p/a MOORE STEPHENS BRADLEY McDAID, Chartered Accountants

Defendants

WEATHERUP J

[1] On 20 September 2012 the proceedings against Sean and Mary Devine were stayed upon their undertakings that they would not at any time engage in any conspiracy, combination or agreement with any person having as its purpose or object to do harm or damage to plaintiff in connection with the plaintiff's business interests or accountancy practice; not to communicate with the plaintiff's business associates about the plaintiff directly or indirectly or communicate information to

the plaintiff's opponents in litigation or to provide information about the plaintiff's legal disputes to anyone.

[2] On the same date an Order was made adjourning the proceedings against the third defendant pending the submission and determination of the plaintiff's complaint about the third defendant to the Law Society and upon the third defendant giving similar undertakings.

[3] In relation to the Devines, on the application by the plaintiff for the removal of the stay by reason of breach of the undertakings and upon the non-appearance of the Devines, by Order of 24 June 2013, supplemented by Order of 14 August 2013, it was found that the Devines were in breach of the undertakings.

[4] The Devines applied to set aside the Orders that they had been in breach of the undertakings on the basis that they were not on notice of the plaintiff's application. Upon being satisfied that the Devines were not on notice of the plaintiff's application, they having changed their solicitors to whom notice had been sent, an Order of 30 September 2013 set aside the earlier finding. Thus the plaintiff's application for removal of the stay on the basis that the Devines were in breach of undertakings remained to be determined.

[5] In relation to the third defendant the plaintiff applied for declarations that the third defendant was in breach of the Order of 27 September 2012 and of an Order of McLaughlin J of 24 September 2009.

[6] The substance of the plaintiff's complaints of breach of undertakings by the Devines eventually involved five complaints. It was concluded that only two matters required further investigation, namely proof that alleged disclosures concerning the plaintiff had been made by the Devines and proof that two accountancy reports had been used by the Devines contrary to court orders.

[7] The grounding affidavit of the plaintiff referred, first of all, to the 'EIS case' in which Mr Devine had obtained judgment against the plaintiff and further to an unsuccessful appeal the matter was finally disposed of on 7 May 2013. The plaintiff reported that he had received a telephone call from a business associate in Dublin who had been told by an opponent of the plaintiff in other litigation that this judgment had been finally confirmed and Mr Devine was now going to pursue the plaintiff and to 'bury' him. The plaintiff claimed that this report indicated that the Devines had been in communication with his opponent in other litigation. I shall return to the EIS case below as it is relevant to the complaint about the Devines disclosing information to others.

[8] The second complaint concerned an IVA entered into by Mr Devine, in respect of which the plaintiff, as a creditor, had not been put on notice. The plaintiff eventually obtained an order from Burgess J that had the effect of securing his involvement in the IVA. Any issues concerning the IVA should be dealt with in the IVA and not in these proceedings.

[9] The third complaint concerned taxation of costs arising out of proceedings between N & R Devine Ltd and the plaintiff. Judgment had been obtained by the present plaintiff with costs in December 2008. A dispute arose about the plaintiff's Bill of Costs. Initially the plaintiff's complaint was that the Devines were continuing to contest the costs issue. Eventually the plaintiff obtained an Order on 11 October 2013 from Gillen J affirming the order of the Taxing master for recovery of his costs. The plaintiff complained that he had received a phone call from an associate reporting that the outcome of the case and stating that Mr Devine was going to destroy the plaintiff. I shall return to this case below as it is relevant to the complaint about the Devines disclosing information to others.

[10] A further affidavit by the plaintiff dated 4 September 2013 raised a fourth complaint related to reports prepared by accountants KPMG and AMS Howarth. These reports had been prepared on behalf of others involved in the litigation

against the plaintiff and may be said to be unflattering of the plaintiff. The plaintiff has been concerned since 2009 about the use made of these reports. The reports have featured large in this application and in an earlier application that came before McLaughlin J. In March 2009, at a meeting of former business associates of the plaintiff, there was circulated a compilation of papers prepared by the third defendant's office that included the reports from KPMG and ASMH. In 2009 the plaintiff made an application to restrain the use of those reports by the Devines and the third defendant. The application came before McLaughlin J in September 2009. The events that occurred at that time have been a matter of much debate.

[11] The plaintiff asserts that in November 2009 Savanne Limited and one of its directors, Michael Desmond, commenced proceedings in the High Court in Dublin against the plaintiff. In January 2010, the Devines forwarded the two reports to Mr Desmond who then made use of them in the Dublin proceedings to obtain an interim injunction against the plaintiff. Most recently in July 2013, further injunctive relief was granted to Mr Desmond in the Dublin proceedings. I shall return to the issue about the use of the reports.

[12] The plaintiff raised a fifth complaint against the Devines concerning non-party discovery in relation to proceedings in the Republic. Any issues about breach of discovery Orders in the proceedings in the Republic should be dealt with in those proceedings and not in these proceedings.

[13] This leaves the two matters that were considered to require further examination. One was proof that the Devines had made contact with other persons in breach of the undertakings. The second matter concerned the reports of KPMG and ASMH and whether they had been used improperly by the Devines. In relation to the two issues further affidavits were filed, notes were filed, written and oral submissions were made. Had the plaintiff not been a personal litigant I would never have agreed to the matter developing through the almost endless exchanges that occurred.

[14] In relation to whether the Devines are responsible for disclosing information about the plaintiff, by affidavit dated 22 October 2013 the plaintiff referred to the costs proceedings in N & R Devine Ltd. The appeal on the taxation of the plaintiff's costs came before Gillen J who gave judgment in favour of the plaintiff on 11 October 2013 affirming the Order of the Taxing Master that the plaintiff was entitled to some £18,000 in respect of costs. Following that judgment the plaintiff received a telephone call from a business associate, Jim McCartan. Mr McCartan told him that he had received a telephone call from Patrick Pearce outlining what had occurred in the Court before Gillen J. The plaintiff relies on that as indicating that the Devines' either directly or indirectly, were communicating about on-going litigation in breach of the undertakings.

[15] An affidavit filed by Mr McCartan stated that on Friday 18 October 2013, in a telephone call with the plaintiff, Mr McCartan disclosed that he had earlier received a call from Mr Pearce who had told him about what had been happening in the Court on the previous Friday. Mr McCartan attended the hearing of the present application at the request of Counsel on behalf of the Devines but his affidavit was accepted and he was not called for cross examination.

[16] An affidavit from Maria O'Donovan, a solicitor in Caldwell and Robinson, stated that she had received an email from Patrick Pearce, which she exhibited, which stated that he had not spoken to or contacted Mr Devine since early 2009; confirmed that the plaintiff had made numerous phone calls to Jim McCartan regarding his various actions against the Devines and others and that this information was then relayed to Mr Pearce; stated that the plaintiff was aware that the information regarding the Devines was being relayed to Mr Pearce and that he had been given many details by Mr McCartan.

[17] However it is obvious from the unchallenged evidence of Mr McCartan that the information of October 2013 was not coming from Mr McCartan but from Mr

Pearce. Some other source had passed that information to Mr Pearce on that occasion.

[18] By affidavit from the plaintiff of 19 November 2013 he sought to demonstrate how information was being disseminated indirectly by the Devines by referring to an e-mail chain in January 2012, therefore preceding the undertakings to this Court, but demonstrating connections that led information from the Commercial Office through Cleaver, Fulton and Rankin to a former defendant in these proceedings, Mr Love, through the son of the Devines and another litigation opponent of the plaintiff, ultimately to Mr Pearce.

[19] Affidavits from the Devines stated that they did not disclose any information or act in breach of the undertakings.

[20] The second issue to be investigated concerned the use of the reports. This issue began as a claim that the defendants were in breach of an Order of McLaughlin J of 24 September 2009 and moved on to become a breach of a direction of McLaughlin J and then moved to a breach of undertakings between the parties given outside Court at the time of the application before McLaughlin J. I have excused the plaintiff as a personal litigant from the piecemeal manner in which he has presented the various forms of the complaint and I have sought to uncover and consider the substance of the matter. The earlier papers in relation to the 2009 application to restrain the use of these reports were provided to the Court.

[21] An affidavit sworn by the first defendant in that earlier application on 1 September 2009 stated at paragraph 4 that "It might be that to maintain the status quo prior to ultimate determination by the court if proceedings follow, that consideration be given to giving an undertaking that I would not, in the words of the Plaintiff make 'available to third parties expert accounting reports relating to litigation involving the parties'." A guarded statement, particularly bearing in mind what precedes and follows the passage quoted.

[22] The plaintiff quoted from the comments made by McLaughlin J on 24 September 2009 in effect suggesting that an undertaking be given to the Court to resolve the plaintiff's application. The plaintiff states that there was then a discussion between the parties and that in short he agreed with the other parties that he would adjourn his injunction application on the clear understanding that there would be no further use of the documents by anyone.

[23] The Judge returned to Court and in his concluding remarks he stated that the parties should not use the documents without some clear understanding of the position of the Court on the use of the documents. The application was adjourned generally.

[24] By affidavit sworn on 9 December 2013 Mr Devine states that he was not present at the hearing in 2009, refers to the affidavit sworn at the time and that he indicated that he would give consideration to offering an undertaking that he would not make the reports available to third parties, continues that at no time during the hearing did Mr Conwell contact him to obtain my instructions or give any undertaking to the plaintiff nor did he contact him after the hearing to advise that he had given any undertaking on his behalf.

[25] By affidavit sworn on 10 December 2013 Killian Conwell, the solicitor who had represented the Devines before McLaughlin J, states that he had no recollection of ever giving such an undertaking on behalf of Mr Devine and his notes stated that the case was resolved as it was not to proceed without further notice to the parties and to the Court and was adjourned generally. He concludes that he would not have given an undertaking for Mr Devine or indeed any client without first taking express instructions and without recording that he had done so and that did not happen.

[26] The third defendant also contested that any undertakings had been given on 24 September 2009. A letter from Carson McDowell, Solicitors, of 11 December 2013

on behalf of the third defendant states that the plaintiff's assertions in relation to any undertaking were hopelessly inadequate and scant and that the solicitors had taken a firm stance that no undertaking would be given and that no undertaking was given on behalf of the third defendant, nor was there any agreement or understanding reached about the reports.

[27] The plaintiff disagreed with the denials on the part of the Devines and the third defendant. In his background paper of 13 December 2013 the plaintiff stated his recollection that Mr Dunlop (Counsel for the third defendant) clearly indicated that his position was that, notwithstanding the fact that his client hadn't done anything wrong, that the plaintiff would be given assurance that the third defendant would not engage in any similar conduct again in relation to the documents and confidential information.

[28] The tortuous course of development of the argument continued. In a further submission of 13 December 2013 the plaintiff quoted from the transcript of the proceedings before McLaughlin J in 2009 where Mr Conwell referred to the affidavit of Mr Devine of 1 September 2009 at paragraph 4 where he would consider giving an undertaking not to use the material. Mr Conwell stated "Mr Devine's affidavit, paragraph 4 of that affidavit served some three weeks ago approximately, fairly sets out and touches upon and very fairly on the matters that your Lordship has raised". The Judge stated "…. if you have a proposal in terms of paragraph 4 that you should put in formal correspondence…." The plaintiff contends that this was what Mr Conwell agreed with the plaintiff in discussions during the break in the proceedings in 2009.

[29] The Devines sought to suggest in the 2009 affidavit that they would not use the reports against the plaintiff, as appears from paragraph 4 of the affidavit. Their solicitor quoted the terms of the affidavit to the Judge. It seems to me that it is special pleading to suggest other than that the Court and the plaintiff were being given the impression that the reports would not be used, which after all was the

object of the plaintiff's application. The plaintiff was concerned that the reports were being used against him when he considered that they unfairly represented his position. He brought the matter to Court to obtain an Order restraining further use of the reports. Affidavits were filed. Some discussions took place. Mr Devine implied in his affidavit and his solicitor implied in submissions to the Court, that the Devines would not make any more use of the reports.

[30] No order was made by McLaughlin J restraining the use of the reports. No undertaking given to the Court by the Devines or the third defendant. It seems to me to be perfectly clear what was to happen and the Devines knew what was to happen, whether they were present in Court or not. There was understood to be no further use of the reports pending some further arrangement. However the Devines provided the reports to Mr Desmond in 2010 so that he could use them in proceedings in Dublin. It was not a breach of any Order of the Court. It was not a breach of any undertaking given by the Devines. However in light of proceedings before McLaughlin J I am satisfied that it was action taken by the Devines in bad faith.

[31] The Devines agreed the terms of the Order of 20 September 2012, which was not to communicate with the plaintiff's business associates or to provide information about the plaintiff's legal disputes. The reports were sent to Mr Desmond before September 2012. The reports were reused in the Dublin proceedings in 2013. It has not been established that the reports were reused because of any action of the Devines that post-dated the Order of September 2012. The reports had already been furnished in January 2010. In respect of the use of the reports I am not satisfied that the Devines acted in breach of the undertakings.

[32] Information about the plaintiff's involvement in various pieces of litigation is being circulated. In relation to the EIS proceedings of May 2013, information has been passed to Mr Pearce. I have no evidence as to the identity of those responsible for the dissemination of information about the case.

[33] The N & R Devine costs have been the subject of proceedings on 11 October 2013. Mr McCartan reported to Mr Pearce about some matters concerning the plaintiff. In this instance it was Mr Pearce who reported the proceedings to Mr McCartan. There is no evidence of the Devines being responsible for the dissemination of information in relation to the EIS case or the taxation case but I am satisfied that someone on their side of these disputes contacted Mr Pearce to inform him about the on-going litigation.

[34] Has a breach of the Order of 20 September 2012 been established? I am satisfied that information about the plaintiff is still being circulated by those opposed to him. I have not been satisfied that the either Mr or Mrs Devines is responsible, although I consider it to be likely that someone who believes he or she is acting in their interests is responsible. I have been satisfied that the Devines acted in bad faith after the 2009 application. The Devines should recall the reports and should withdraw their consent to their use. They are acquiescing in their continuing use. I consider it would be contrary to the terms of the Order of 20 September 2012 if they were to continue to acquiesce in their use.

[35] The result is that I do not find a breach of the terms of the Order but the Devines are to pay the costs of this exercise. They have been less than frank about the history of the matter.

[36] As far as the third defendant is concerned, that case was adjourned for the plaintiff to refer his complaint to the Law Society. The Law Society eventually ruled that there was no case to answer. There is to be a resumed hearing of the proceedings on a date that has been fixed. The plaintiff applied for an Order that the third defendant was in breach of the undertakings under the Order of 20 September 2012 and of McLaughlin J's Order of 24 September 2009. By his affidavit of 31 October 2013 the plaintiff introduced a new complaint relating to the third defendant's solicitors communication with the Solicitors' Disciplinary Tribunal.

[37] Carson, McDowell, solicitors for the third defendant, wrote a letter to the Secretary of the Solicitors' Disciplinary Tribunal on 17 September 2013 in which they made representations on behalf of the third defendant in relation to plaintiff's complaint.

[38] The plaintiff objects to the solicitors intervention in that the rules do not allow for such representations at that stage. In addition the letter refers to the reports about which the plaintiff has been so exercised. In an earlier affidavit of 10 September 2013, the plaintiff contended for the third defendant had breached the 2012 Order in a number of ways. First of all, by the nature of his conduct in relation to the IVA, secondly, by communicating with the plaintiff's business associates about legal disputes and thirdly, by communicating with the plaintiff's opponents in litigation.

[39] The plaintiff's affidavit made the complaint that the third defendant knew perfectly well that the plaintiff was a creditor of the Devines yet he voted for the voluntary arrangement from which the plaintiff had been excluded. Secondly, the plaintiff referred to the bundle of documents which the third defendant and his assistant had prepared in 2009 that contained the reports that led to the application before McLaughlin J in September 2009 for an injunction restraining the use of the reports. The plaintiff also referred to other contacts with Mr Pearce, or that he had heard about Mr Pearce and the EIS case and he referred to the string of email to which I have previously referred.

[40] The plaintiff stated that Mr Dunlop, Counsel on behalf of the third defendant, had agreed with the plaintiff about the restraint on the use of the reports. I did not receive a response to that allegation. I made it clear earlier that I would not adjourn this application any further and that all further materials had to be in before the Court by the date of the hearing.

[41] What I propose to do in relation to the third defendant is to adjourn all matters into the hearing of the proceedings against the third defendant. I do not direct any further pleadings; the affidavits filed will all stand as pleadings and evidence; any further response by or on behalf of the third defendant should be by affidavit; any further affidavits should be filed in advance of the hearing.

[42] The involvement of the Devines has already taken up an inordinate amount of time. I do not want to hear any more about this matter as far as the Devines are concerned. I have Ordered that the Devines to pay the costs of the application.

COUNSEL: My Lord, I hear what Your Lordship says. I do feel that I am bound to my clients to say that Your Lordship has made an Order for costs without hearing submissions on the question of the costs. Mr McAteer has brought an application to the court which has taken up a good deal of court time which ultimately has been unsuccessful for him. Your Lordship has not found any wrong doing in the legal sense of the word against my clients. The height of Your Lordship's finding is a finding of bad faith against them. I appreciate that Your Lordship having made that finding, that is a factor which Your Lordship is entitled to take into account in Your Lordship's discretion on costs. We say that the appropriate exercise of that would be to deprive the Devine's of their costs, rather than to award them the costs of the plaintiff on top of that. If Your Lordship is not with me on the point, we would remind Your Lordship that Mr McAteer brought to court 6 issues, Your Lordship has rejected 4 of his issues as misconceived and gone on to consider 2 of the issues in details. If the Devines are to pay costs, we say that those costs should be limited to the costs of the issues which Your Lordship has considered worthy of attention. Unless there is anything further I can add My Lord.

JUDGE: Yes Mr O'Rourke thank you. Well I think that I should limit this to the costs concerning, if it is possible to distinguish them, all the issues about the reports and the 2009 proceedings, which is what has been the focus since the November hearing. I had reached a little broader than that because there were other issues

about the defendants' contacts that needed to be investigated. I did drop a number of the other issues to which I have referred. I will limit the costs against the Devines to the examination of the issues on the reports and the 2009 proceedings.