Neutral Citation: [2016] NICh 18 | *Ref:* **McB10117**

Judgment: approved by the Court for handing down | *Delivered:* **23/11/2016**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

PETER AND YVONNE MacMAHON

Plaintiffs;

-v-

BANK OF NEW ZEALAND

Defendant.

_____

McBRIDE J

Application

[1] This is an ex parte application whereby the plaintiffs seek leave to serve a writ out of the jurisdiction pursuant to Order 11 Rule 1 of the Rules of the Court of Judicature (Northern Ireland) 1980.

Pleadings

[2] The plaintiffs issued a writ in the Chancery Division of the High Court of Justice in Northern Ireland, claiming the following relief against the defendant, which is a bank domiciled in New Zealand:-

(a) An injunction preventing the defendant from seeking in this jurisdiction the assistance of the court pursuant to the Cross Border Insolvency Regulations (Northern Ireland) 2007 ("The regulations injunction"); and

(b) An anti-suit injunction restraining the defendant from pursuing bankruptcy proceedings in New Zealand.

[3] No Statement of Claim has been filed. During the course of this application the court requested that the plaintiffs, in accordance with the recommendations made by Horner J in Galloway and Fraser and Others [2016] NIQB 7, submit a draft Statement of Claim which:

> "Is focused and highlights both the relevant cause of action and the material facts relied on".

The plaintiffs then submitted a draft Statement of Claim. As appears from this the plaintiffs now seek to amend the relief claimed. The plaintiffs now seek to claim injunctive relief restraining the defendant from:

(a) continuing with the New Zealand bankruptcy proceedings, and

(b) serving the second-named plaintiff with the New Zealand bankruptcy petition in this jurisdiction, and

(c) exercising any rights as a creditor pursuant to the Cross-Border Insolvency (Northern Ireland) Regulations 2007 in the event the defendant succeeds in bankrupting the plaintiffs in New Zealand.

As a result of submitting a draft Statement of Claim, the plaintiffs have been much more focused in the case they wish to make, and many of the submissions made in the original skeleton argument, filed on their behalf, have now fallen by the wayside.

[4] Pursuant to an order of Horner J dated 8 November 2016 the defendant has been provided with all the relevant applications and supporting applications. By letter dated 26 August 2016 Sanderson Weir, solicitors acting on behalf of the defendant stated:

> "We wish to be unequivocally clear that this response is not intended to operate as a submission to your jurisdiction or participation in the application brought by Mr and Mrs MacMahon and at this stage our client does not intend to instruct legal representation in Northern Ireland".

They further stated that they were not intending to be involved in the proceedings at this stage but requested to be kept abreast of developments and provided with any related documentation. In view of this request this court directed that the plaintiffs' solicitors provide to the defendant's solicitors a copy of the draft Statement of Claim and that they be informed of the date this Court intended to rule on this ex parte application.

[5] The plaintiffs initially acted as litigants in person. They now have the benefit of pro bono representation from the Pro Bono Committee of the Bar Council of

Northern Ireland together with McIldowie, solicitors who have agreed to act on a pro bono basis. I am grateful to Mrs Danes QC who appeared with Mr Fletcher on behalf of the plaintiffs for their well-marshalled and researched written skeleton arguments which were ably augmented by oral submissions.

Factual Background

[6] The factual background is set out in four affidavits filed by Peter MacMahon. He avers that in or around April 2009 the plaintiffs obtained a loan facility from the defendant. This loan was secured against property owned by the plaintiffs in New Zealand. The loan account fell into arrears. The defendant then sold the property at auction. Monies remained due under the loan facility. The defendant then brought proceedings against the plaintiffs and obtained a judgment in default on 1 September 2015 in the High Court of New Zealand. The default judgment has not been satisfied. The defendants have now sought to enforce that judgment by commencing bankruptcy proceedings in New Zealand against the plaintiffs.

[7] On 17 June 2016 Peter MacMahon was served with bankruptcy proceedings in Dublin. On 10 June 2016 the New Zealand Court granted the bank leave to serve bankruptcy proceedings on Yvonne MacMahon. On 26 August 2016 Eamon Gavin purported to serve the bankruptcy notice on Yvonne MacMahon by giving the papers to her husband Peter MacMahon. On 26 August 2016 Mrs MacMahon filed, by e-mail, in New Zealand Notice of Appearance and Objection to the jurisdiction in relation to the bankruptcy notice. On 17 November 2016 the plaintiffs couriered to New Zealand Notice of Objection and objection to jurisdiction in relation to Mrs MacMahon's Notice of Bankruptcy and Mr MacMahon's bankruptcy petition.

Test for Leave to serve Proceedings out of the Jurisdiction

[8] As appears from A K Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKC 7 and Galloway v Fraser an applicant seeking leave to serve proceedings out the jurisdiction must satisfy four grounds:

(a) There is a good arguable case that the case falls within one or more of the classes of case in which permission to serve out of the jurisdiction may be given, ("Gateway Provisions"). In this context a good arguable case connotes that one side has a much better argument than the other.

(b) That in relation to the foreign defendant there is a serious issue to be tried on the merits, that is, a substantial question of fact or law or both. This is the same test as for summary judgment, namely whether there is a real as opposed to a fanciful prospect of success. ("Serious issue to be tried").

(c) Northern Ireland is clearly and distinctly the appropriate forum for the trial of the dispute.

(d) In all the circumstances the court ought to exercise its discretion to permit service out of the jurisdiction.

Gateway Provisions

Plaintiffs' Submissions

[9] Mrs Danes QC on behalf of the plaintiffs relied on the gateway provision set out in Order 11 Rule 1 (1) (b) of the Rules of the Court of Judicature (NI) 1980 which provides:

> "Provided that the writ is not a writ to which paragraph (2) of this Rule applies service of the writ out of the jurisdiction is permissible with the leave of the court if in the action begun by the writ -
>
> (b) An injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction."

[10] She submitted that the relief sought by the plaintiffs in the writ passed through this gateway as the writ claimed injunctive relief seeking to restrain the defendant from carrying out certain acts in this jurisdiction. In particular the writ sought an injunction to restrain the defendant from serving New Zealand bankruptcy proceedings on the second named plaintiff in this jurisdiction and an injunction restraining the defendant from exercising its rights as a creditor in this jurisdiction under the Cross Border Insurance (NI) Regulations 2007.

[11] Although the writ also seeks relief by way of an anti-suit injunction, which seeks to restrain the defendant doing something outside this jurisdiction, Mrs Danes submitted that it passed through the gateway provided in rule 1 (1) (b), on the basis the Court can make ancillary orders. Although a free standing anti-suit injunction would not pass through this gateway, she submitted that this Court when granting other injunctions which restrained things from being done in this jurisdiction would have power to make an order restraining the defendant from commencing or continuing proceedings in another jurisdiction, as this would be an ancillary order. On this basis the provisions of rule 1 (1) (b) are satisfied. She relied on dicta in Amoco (UK) Exploration Co v British American Offshore Ltd [1999] 2 All ER 201 and Masri v Consolidated Contractors International Co [2008] EWCA Civ 625 in support of this proposition.

Relevant Legal Principles on Gateway Provisions

[12] The equivalent English Provision to Order 11 rule 1 (1) (b) was considered by the Privy Council in Mercedes Benz v Leiduck [1995] 3 All ER 929. Lord Mustill at page 940 paragraph (f) – Page 941 (a) made the following observations:-

> "It is not enough simply to say that since a Mareva injunction is an injunction, it automatically falls within Order 11 Rule 1(1)(b). At the centre of the powers conferred by Order 11 is a proposed action or matter which will decide upon and give effect to rights. When ruled upon (a Mareva injunction) decides no rights and calls into exercise no process by which rights will be decided".

He further stated at page 941 paragraphs (c) – (d),

> "This opinion that Order 11 is confined to originating documents which set in motion proceedings designed to ascertain substantive rights is borne out by its language…..Looking at Order 11 Rule 1(1) in the round it seems to their Lordships plain, that this expression refers to a claim for substantive relief which will be the subject of adjudication in the action initiated by the writ and not to proceedings which are merely peripheral."

[13] Thus, it is not sufficient to say that since the plaintiffs are seeking an injunction restraining the defendant from doing something within this jurisdiction, the case automatically falls within the gateway provided by Rule 1(1)(b). To come within this gateway the writ must claim substantive rights which will be the subject of adjudication in the action initiated by the writ. Therefore, the applicant must establish that the proceedings in this jurisdiction, place before the court, substantive rights of the parties, which require adjudication.

[14] The applicant must also establish, when seeking to rely on rule 1 (1) (b) that there is a good arguable case that the case falls within the gateway provisions. This requires a consideration of, whether the Court can and whether it would, grant the injunction sought.

[15] The general jurisdiction of the court to grant injunctions was considered by the House of Lords in South Carolina Insurance Co –v- Al Ahlia Insurance Co [1987] 1 AC 24 , Lord Brandon after summarising the authorities said at page 40 paragraphs (b)–(d):

> "The power of the High Court to grant injunctions is …. limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former, for the enforcement of which, the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable."

Therefore the burden lies on the plaintiff to establish that the Court has general jurisdiction to grant the injunction sought.

[16] The jurisdiction of the court to grant an anti-suit injunction was considered in Amoco. The relief sought by the plaintiff in the originating summons was to restrain the second named defendant from pursuing proceedings in Texas. In addition to the anti-suit injunction, the proceedings also sought relief by way of an injunction restraining the service of any documents in England in connection with the Texan proceedings. Langley J held "None of these claims can be brought within the Rule. Indeed they are the antithesis of it." Therefore a free-standing anti suit injunction does not satisfy Order 11 rule 1 (1) (b) as it seeks to restrain actions outside the court's jurisdiction.

[17] Amoco also considered whether such an anti-suit injunction could pass through the gateway provisions on the basis it was ancillary to an injunction seeking to restrain service of proceedings within the jurisdiction. Mr Tomlinson on behalf of the plaintiff submitted that as the relief sought also included an order to restrain the service of any documents in England in connection with the Texan proceedings that was a sufficient basis on which to grant leave. Langley J held,

> "to permit service out on this limited basis would be to ignore the reality of the claim the claimant seeks to make and the spirit of the rule. The tail would indeed be wagging the dog".

The plaintiffs were held not to be entitled to leave under rule 1 (1) (b).

[18] As is clear from Amoco, the fact a writ seeks, in addition to an anti-suit injunction, an injunction to restrain the service of documents within this jurisdiction in respect of the foreign proceedings is not in of itself a sufficient basis to satisfy the gateway provisions of Order 11 Rule 1(1)(b).

[19] Further in Galloway v Frazer Horner J held at paragraphs [54]- [57] that unless there was a realistic prospect the court would grant the injunction sought the gateway would also not be satisfied. A plaintiff must therefore establish that he has a

good arguable case the court would grant the injunction sought in the writ, before he can satisfy the gateway provision of Rule 1(1)(b).

Consideration of Gateway Provisions

[20] As appears from the writ and draft Statement of Claim, and as was conceded by Mrs Danes, the only substantive claim made by the plaintiffs is for injunctive relief. They are asking the Court to grant injunctions to restrain the defendant commencing or continuing proceedings in New Zealand, serving such proceedings in this jurisdiction and preventing the defendant participating in future proceedings in this jurisdiction which may be brought by a third party. The plaintiffs' writ does not require this court to determine any substantive rights as between the parties. It simply asks this Court to prevent the defendant from continuing with bankruptcy proceedings in New Zealand and or enforcing such proceedings in this jurisdiction. The plaintiffs are not asking this court to adjudicate upon the merits of the bankruptcy proceedings. The plaintiff's writ action therefore does not place any claim before this court which requires adjudication upon the substantive rights of the parties. Accordingly and in line with the decision of Mercedes Benz, it is my judgment that the gateway provision of Rule 1(1)(b) is not met in respect of any of the claims made by the plaintiffs. Accordingly the plaintiffs are not entitled to leave under rule 1 (1) (b).

[21] The claims sought by the plaintiffs also fail to satisfy the gateway provision of rule 1 (1) (b) in a number of other respects.

[22] In my judgment, it has not been shown on behalf of the plaintiffs that the defendant's proceedings in New Zealand amount to an invasion of a legal or equitable right of the plaintiffs. It is difficult to see on what basis what rights of the plaintiffs has been invaded by such proceedings. I am therefore not satisfied that situation (1) as described by Lord Brandon is satisfied. In respect of situation (2) the question is whether the behaviour of the defendants is unconscionable. As Lord Brandon stated in South Carolina at page 41 paragraph (e) unconscionable can refer to the need for the court to control its own process in circumstances where the actions of the party bringing foreign proceedings is an interference with such control and therefore an interference with the due process of the Court. In my judgment it has not been established in this case that the proceedings in New Zealand are interfering with the due process of this court.

[23] Mrs Danes on behalf of the plaintiffs was unable to point to any authority where the court granted such an injunction. It is the judgment of this court that the reason no such authority exists is that the injunction sought does not come within the general jurisdiction of the Court. Accordingly there is not a good arguable case that the case comes within the gateway provision of rule 1 (1) (b).

[24] Peter MacMahon seeks an injunction restraining the defendant from continuing with the New Zealand bankruptcy proceedings. This is an anti-suit

injunction. As appear from a literal reading of rule 1 (1) (b) and the cases of Amoco and South Carolina such a free standing injunction, which is to take effect outside the jurisdiction, does not satisfy the gateway provision of rule 1 (1) (b).

[25] Peter MacMahon also seeks, in the event the defendants succeed in bankrupting him in New Zealand, an injunction restraining the defendant from exercising any rights as a creditor pursuant to the Cross-Border Insolvency (Northern Ireland) Regulations 2007. In my judgment the plaintiff has failed to establish that there is a good arguable case that this injunctive claim falls within Rule 1(1)(b). The injunction sought in the writ is to restrain the defendant exercising rights granted to it under the Cross-Border Regulations to participate in proceedings which may in the future be brought by the trustee in bankruptcy in New Zealand to enforce a New Zealand bankruptcy order in this jurisdiction.

[26] I am satisfied that the granting of such an injunction in the circumstances of this case, would be a breach of the defendant's Article 6 rights. Such an injunction would have the effect of preventing the defendant participating in proceedings brought by a third party, which is contrary to rights granted to the defendant by legislation. Therefore, I consider there is no realistic prospect any court would grant such an injunction. Accordingly the gateway provision is not met.

[27] Yvonne MacMahon claims an injunction restraining the defendant serving her with a New Zealand bankruptcy petition in this jurisdiction. Whilst this injunction seeks to restrain the defendant doing something within this jurisdiction I find that this alone is not sufficient to satisfy the Gateway of Rule 1(1)(b). As Langley J held in Amoco, to permit service of the writ out, on the basis it includes an order to restrain service of documents in England in accordance with foreign proceedings, is to ignore the reality of the plaintiff's claim. The second named plaintiff is, in reality seeking to restrain the defendant from continuing with the New Zealand bankruptcy proceedings. To permit service out of the jurisdiction on the basis she is also seeking to injunct the defendant serving her with bankruptcy proceedings in this jurisdiction would in my view be allowing the tail to wag the dog. I am therefore not satisfied the claim for an injunction to restrain service of proceedings allows the main anti-suit injunction to satisfy the gateway provision on the basis the anti-suit injunction would amount to an ancillary order. I therefore find that this claim also fails to satisfy the gateway provision in rule 1 (1) (b).

[28] In view of my findings on the gateway provisions, it is unnecessary to consider whether the other limbs of the test for leave to serve out of the jurisdiction are met.

[29] I therefore refuse leave to serve proceedings out of the jurisdiction.

[30] I direct that all documents filed in this case and this judgment be forwarded to the defendant's solicitors in New Zealand.