

**Neutral Citation No. [2011] NIQB 24**

Ref: **WEA8082**

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

Delivered: **26/1/2011**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (COMMERCIAL)**

**2007 No 14748**

**THE OUTLET RECORDING COMPANY**

**Plaintiff;**

**-and-**

**BARRY F THOMPSON & OTHS p/a ELLIOTT DUFFY GARRETT (a firm)**

**Defendants;**

**-and-**

**HENRY TONER and RACHEL HUTTON**

**Third Parties.**

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**2007 No 14726**

**THE OUTLET RECORDING COMPANY**

**Plaintiff;**

**-and-**

**BARRY F THOMPSON & OTHS p/a ELLIOTT DUFFY GARRETT (a firm)**

**and HENRY TONER and RACHEL HUTTON**

**Defendants.**

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**2008 No 114908**

**THE OUTLET RECORDING COMPANY**

**Plaintiff;**

**-and-**

**HENRY TONER and RACHEL HUTTON**  
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## ABUSE OF PROCESS AND SECURITY FOR COSTS

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### WEATHERUP J

[1] The defendants in each of the three actions apply, first of all, to strike out the plaintiff's pleadings as an abuse of process under Order 18 rule 19(1)(d) and the inherent jurisdiction of the Court and secondly, if the plaintiff's pleadings are not struck out, that the plaintiff provide security for costs of the defendants under Order 23 rule 1(e). Mr Hanna QC and Mr Coyle appeared for the Plaintiff, Mr Horner QC and Mr Millar for Elliott Duffy Garrett, Mr Simpson QC and Mr Good for Mr Toner and Mr Lockhart QC and Mr McMahon for Ms Hutton.

[2] The plaintiff claims damages for loss and damage occasioned by the negligence and breach of contract of the defendants in the provision of legal services as solicitors and Counsel representing the plaintiff in the defence of two sets of proceedings against the plaintiff by in the first place John Sheahan and others ("the Dubliners action") and secondly by Margo O'Donnell ("the Margo action") in the Chancery Division of the High Court of Justice in Northern Ireland. The Dubliners action was settled on the advice of the defendants on 13 November 2002. The Margo action was settled on the advice of the defendants on 2 December 2002.

[3] The Dubliners action and the Margo action were concerned with copyright in relation to sound recordings. There is distinction between the copyright for musical works and the separate copyright for sound recordings of musical works. The dispute in the Dubliners action and the Margo action concerned copyright of sound recordings and in the settlement of the actions and negligently according to the plaintiff the copyright of the sound recordings was conceded to the artists in the Dubliners action and not contested in the Margo action. On the plaintiff's case the negligent advice of the defendants led to overpayments by the plaintiff on the settlements of the actions and therefore occasioned loss and damage to the plaintiff.

[4] The first action claims against the Solicitors in respect of the Dubliners action, with Counsel being joined as third parties. The second action claims against the Solicitors and Counsel in respect of the Margo action. The third action claims against Counsel in the Dubliners action, the separate action against Counsel arising because of concerns about time limits in relation to the joining of Counsel as defendants in the first action.

### Abuse of Process.

[5] In relation to the abuse of process applications the grounding affidavits of Brian Turtle, solicitor for Elliott Duffy Garrett, state as follows. The Dubliners were advised by a Shay Hennessey and Fiadhra Sheahan. Fiadhra Sheahan is the son of John Sheahan the lead plaintiff in the Dubliners action. Both Mr Hennessey and Mr Sheahan are said to have played leading roles for and on behalf of the Dubliners. Mr Hennessey was an expert witness who was going to be called on their behalf. Mr Sheahan was closely involved in negotiations of settlement terms at a joint consultation which took place at the Hilton Hotel, Belfast on 17 January 2002. They were also involved in the Margo action.

[6] Further to the settlement of the Dubliners action and the Margo action the shares in the plaintiff, the value of which has been affected by the settlement of the actions, were acquired by Mr Hennessey and Mr Sheahan, both of whom also became directors of the plaintiff. The result is said to be that those persons who were intimately involved in directing and prosecuting the original actions are now directing and prosecuting the present action which is concerned with the settlement of the original actions. Accordingly it is said that Mr Hennessey and Mr Sheahan appear to have purchased the plaintiff company so that they could prosecute the causes of action which it is said they were instrumental in creating.

[7] A grounding affidavit sworn by Alexandra Crawford, solicitor for Mr Toner, states that Mr Hennessey and Mr Sheahan played a prominent role on behalf of the Dubliners. Ms Crawford believes that Mr Hennessey actively participated in the negotiations in the Dubliners action and he signed, on behalf of the Dubliners, amendments of 11 March 2003 and 14 October 2002 of a licence agreement of 13 November 2002 between the Dubliners and the plaintiff. It is said that Mr Sheahan was an active participant in the proceedings on the Dubliners' behalf and furnished his database to the forensic accountants retained on behalf of the plaintiff.

[8] A grounding affidavit by Henry McGrattan, solicitor for Ms Hutton, also outlines the roles of Mr Hennessey and Mr Sheahan who are said to have been instrumental in advancing the case that the plaintiff did not own the copyright and in securing the settlements in the original actions. It is then noted that Mr Hennessey and Mr Sheahan gained control of the plaintiff and retained the services of the solicitor and junior Counsel who had carriage of the Dubliners action and who now advance arguments that are the antithesis of those they advanced in the proceedings against the plaintiff.

[9] The defendants' contention therefore is that the persons now controlling the plaintiff acquired that control shortly after the settlement of the Dubliners action and the Margo action, they having been active

participants in and supporters of the Dubliners and Margo. At the time of acquiring such control the resources of the plaintiff had been diminished by payments of settlement monies to the Dubliners and Margo and others. Thus it is said that Mr Hennessey and Mr Sheahan have in essence bought a right of action through a company that is otherwise defunct.

[10] Mr Hennessey filed a replying affidavit in which he states that he was acting as consultant to the Dubliners, having previously been the manager of Horslips since 1984 and involved in previous successful litigation brought by that group against the plaintiff. He had been asked by John Sheahan to provide general advice as a music business manager and if the Dubliners action had proceeded to trial he might have been required to give evidence to provide background information in relation to the music business in Ireland. He describes Fiadhra Sheahan as an accountant by occupation with no personal or financial interest in the Dubliners or in their business, property or copyrights who, because of his relationship with John Sheahan and his financial expertise, assisted informally in relation to the litigation. He was not an expert witness. The Dubliners had retained a forensic accountant to give expert evidence on their behalf.

[11] Mr Hennessey states that he had no reason to think that at the time when the Dubliners brought the original action they did not believe in good faith that they were the owners or co-owners of the copyright in the sound recording. He states his understanding that in the course of the preparations for the trial of the Dubliners action it had become apparent that it might have been difficult to obtain enough evidence to prove that the Dubliners were the owners or co-owners of the copyrights. It was understood that the issue turned on events that had happened in Dublin in the 1970s and 1980s and accordingly those advising the Dubliners were said to be very relieved when a formal concession was made on behalf of the plaintiff that the chain of title in relation to the ownership of the copyrights which were the subject of the action began with the Dubliners. Mr Hennessey is now privy to information held by the plaintiff about the settlement of the Dubliners action and states that he now knows that the concession was made in a document drafted by Ms Hutton of Counsel.

[12] As a result it was not necessary for the Dubliners and those advising them to seek further evidence with a view to establishing the original copyright and the concession played a significant part in enabling the Dubliners to secure what is said for them with the benefit of hindsight to have been an unduly favourable settlement of the action. It is said that a similar situation existed in relation to the Margo action. Although there was no formal concession made about the root of the copyright of the sound recordings in that case nevertheless, as in the Dubliners action, a settlement was achieved in the Margo action which, with the benefit of hindsight is said to have been unduly favourable to Margo.

[13] The terms of settlement in the Dubliners action included a declaration that the copyright to the recordings that were in dispute reposed entirely with the Dubliners and also a declaration that the Dubliners were at all times the owners of the copyrights. In addition a payment of £900,000 was to be made in instalments. The plaintiff subsequently entered into further court settlements including the Margo action, where a payment of £320,000 was to be made.

[14] Mr Hennessey's explanation for his and Mr Sheahan's subsequent involvement with the plaintiff is as follows. In early 2004 it was apparent that the plaintiff was unable to pay its creditors and was at risk of going into liquidation. A meeting took place in Dublin on 24 March 2004 attended by the Dubliners together with Mr Hennessey and Fiadhra Sheahan and Robert Martin the Dubliners solicitor and his assistant. Various options were considered as to the way forward and the option which was adopted was to agree to allow Mr Hennessey and Mr Sheahan to take control of the shareholding and the debts of the plaintiff and that is what happened.

[15] Mr Hennessey states that they had in effect acquired a company owing debts at the time of transfer amounting to just over £1 million. They proceeded to run the plaintiff business which was said to be limited to the exploitation of music publishing and sound recording rights. They continued trading and successfully managed their way through what he describes as difficult times and settled the outstanding litigation debts which included the payments due to Margo in 2006 and the payments to the Dubliners in 2008.

[16] It is against that background that the defendants claim that the present proceedings amount to an abuse of process. The abuse is put in terms that the prior involvement of Mr Hennessey and Mr Sheahan amount to a breach of confidentiality on their part in that they had knowledge of how the settlement arrangements had been reached as they were parties to the settlement negotiations without being parties to the actions. Thus it is said that to permit Mr Hennessey and Mr Sheahan, through the vehicle of the plaintiff company, to continue these proceedings to set aside the settlements is contrary to public policy. Further they are said to have bought the right to the action and the use of information gleaned in the earlier proceedings is being used for a collateral purpose that is said to be contrary to public policy.

[17] The defendants make the additional point that those supporting the Dubliners action and the Margo action are now controllers of the plaintiff and now undertake proceedings through the former solicitor, Mr Martin, and junior Counsel, Mr Coyle, who acted for the Dubliners and Margo. In so doing they advanced the case in the original actions that the plaintiff was not the owner of the copyright. In the present actions the case is advanced that the plaintiff was the owner of the copyrights until the defendants negligently

advised that they be given up to the artists. The contentions are said to be entirely contrary to those made in the original proceedings and the plaintiff is said to be but an empty vessel being used for a contrived purpose.

[18] What is the information that is said to have been misused in this case? It is said that the plaintiff, through the present directors and shareholders, has now obtained the files from the original proceedings and have noted the absence of adequate inquiry in the files on the basic point about the history of the sound recordings. This is said to be information that would not have been available to the plaintiff during the original actions because the then directors and shareholders were not to know what steps had or had not been taken.

[19] It is well established that re-litigation is an abuse of process and contrary to justice and public policy. Such abuse of process may include litigation of an issue tried in another jurisdiction, a matter that is not strictly *res judicata*, a determination in criminal proceedings that is sought to be re-tried in a civil action, an action for negligence that seeks to challenge the correctness of a final decision of a Court of competent jurisdiction and matters being raised in subsequent proceedings that could and should have been raised in earlier proceedings. The categories of abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material. See the discussion of abuse of process in the White Book (1999) from paragraph 18/19/18 and Valentine's Civil Proceedings - The Supreme Court paragraph 11.181.

[20] While the present claims involve further litigation on the copyright issue they do not involve a challenge to a previous decision of the Court but to the terms of the agreement between the former parties on the advice of the defendants. If Solicitors and Counsel were negligent in advising the settlement of proceedings it would not be any abuse of process if the client subsequently brought proceedings on the basis that they had been negligently advised, subject to such legal immunities as may exist. If the client in such circumstances was a limited liability company it could equally take proceedings alleging negligent advice and that would not amount to an abuse of process. Equally so if, when the proceedings alleging negligent advice were commenced, the corporate client had different directors and shareholders from those who received the advice. Any client who accepted legal advice in relation to the settlement of legal proceedings may subsequently discover that the advice has been negligently given.

[21] I am satisfied that there is a bona fide issue as to the settlement terms in the original actions and as to whether the defendants, as the Solicitors and Counsel advising on the settlement of the original actions, were negligent or in breach of contract in relation to the advice that they furnished. The new directors and shareholders of the plaintiff were not parties to the original

actions, although it is correct that they were aligned with opposing parties in the original actions. They probably had access to information in the course of the settlement of the original actions that was not available to others less closely connected to the Dubliners and Margo. They probably now have access to information in the possession of the plaintiff that has not been available to those outside the plaintiff. However I am satisfied that the actions of Mr Hennessy and Mr Sheahan do not establish any impropriety on their part nor provide any basis for concluding that the public interest or the interests of justice would require that they should be prevented from continuing with these proceedings.

[22] Further, the defendants say that the present directors and shareholders of the plaintiff must always have believed that the settlements were wrong and that they took over the plaintiff to pursue the present actions. I am not satisfied that was the case. Mr Hennessy and Mr Sheahan may or may not have had their own views about the settlements of the original actions. They may have considered that the settlements should or should not have been agreed. They may have considered that they would or would not have settled on the same terms.

[23] Accordingly I am satisfied that the defendants have not established any grounds that could constitute abuse of process.

[24] While I am not satisfied that there are any grounds that could constitute abuse of process I do raise a query about the involvement of the Solicitor and the junior Counsel on one side of the original proceedings and on behalf of the plaintiff in the present proceedings. This is not an issue of abuse of process issue but rather a professional issue in relation to conflict of interest.

### **Security for Costs.**

[25] Secondly there is an application by the defendants for security for costs which arises on the basis that I am not acceding to the application to strike out the pleadings as an abuse of process. This application is now made under Order 23 rule 11(e) which provides that where a plaintiff is a company and there is reason to believe that the company will be unable to pay the defendants costs the Court may order the plaintiff to give such security for the defendants costs as it thinks just.

[26] I had occasion to consider the issue of security for costs in GWM Developments Limited v. Lambert Smith Hampton Group Limited [2010] NIQB 33 in relation to the statutory predecessor of the present rule. I stated that the application involved three steps. First of all there must be reason to believe that the plaintiff will be unable to pay the defendant's costs. Secondly

in those circumstances the Court has a discretion as to whether to require security for costs. Thirdly the Court has a discretion as to the amount of the security for costs. I consider that the same three steps would be equally applicable under the present rule.

[27] In relation to the first matter, the plaintiff's ability to pay the costs, I have affidavit evidence on the financial position of the plaintiff and draft Bills of Costs in the three actions. The parties have debated both the value of the plaintiff's assets and the defendants' Bills of Costs. In relation to the assets Mr Turtle referred to the plaintiff's accounts which he said set out substantial trading losses for the years 2005 to 2008. He also refers to a draft Bill of Costs of some £300,000 including a fee for a copyright expert of £25,000. There are three sets of proceedings and the costs are replicated in each case so all in all the costs are put in the region of £1 million.

[28] Mr Martin responded that Mr Turtle has made an error in relation to the accounts and that for the years 2005 to 2008 the plaintiff was not trading at a loss but was trading at a profit, which in the most recent accounts available was stated to be some £88,000.

[29] The dispute over the interpretation of the accounts led on to valuations of the plaintiff. The plaintiff's report examined the assets and concluded that if the plaintiff were to be sold it would not be unreasonable for the sellers to indicate they required an opening sale price of around £1 million to be set for the assets. The defendants' report carried out a valuation based on the present value of the expected future cash flows and concluded that on the basis of the information provided and various assumptions which are set out in the report, the net present value was some £644,000.

[30] The defendants then obtained a report on the solvency of the plaintiff from Mr Bull, an accountant with McClure Watters. He reported that the value of the intellectual property owned by the plaintiff may be significantly lower than the full value of £644,000 in what would be a distressed sale situation. The proceeds would be subject to corporation tax and if an order for costs were made in favour of the defendants such an order would be likely to produce an overall net deficit in which the proceeds from liquidation of the assets would be insufficient to discharge the liabilities.

[31] Mr Sheehan junior is an accountant and stated in an affidavit that took issue with a number of matters raised by the defendants that in his view, taking into account the current retained earnings of the plaintiff and the valuation of the projected income, the plaintiff was likely to be worth in excess of £1.2 million.

[32] Mr Hanna QC on behalf of the plaintiff raised issues about the costs that have been claimed. For example the copyright expert's costs of £25,000



have been replicated in all three actions. It is hardly appropriate that three different copyright experts should be engaged and in any event it is open to question whether any copyright expert is required as the issue is a legal question of copyright law for the Court to determine. Further the plaintiff questions the extent of the dispute that there is in relation to the plaintiff's claim. This is said not to have been disclosed by the defendants and therefore there is a query about whether all issues are actually in dispute and whether the supposed defences of the defendants will materialise.

[33] It is quite clear that the plaintiff has significant worth. I am satisfied that the plaintiff is trading at a profit and would have a significant capital value if sold as a going concern. It is equally clear that the defendants claim very substantial costs and if even one half of the totals set out in the Bills of Costs were payable by the plaintiff I am satisfied that it would require the sale of the plaintiff to realise assets to discharge the liabilities. Further I am satisfied that a forced sale in such circumstances would reduce the realisable value of the plaintiff.

[34] I have reason to believe that the plaintiff will be unable to pay the defendants' costs if the plaintiff loses the actions against the defendants despite what I consider to be significant assets which would have to be sold to meet very substantial costs.

[35] The second question is whether I should exercise the discretion to require security for costs. The discretion must be exercised on judicial lines, taking into account all the relevant circumstances. Relevant circumstances will include whether the claim is bona fide, whether the plaintiff has a reasonably good prospect of success, whether there is any admission, whether the application for security is being used oppressively so as to stifle a genuine claim and whether the plaintiff's want means had been brought about by any conduct on the part of the defendant.

[36] I consider whether the claims are bona fide, which I am satisfied is the case. I have rejected the claim for abuse of process which questions the bona fides of the promoters of the claim, in effect Mr Hennessey and Mr Sheehan. Further, whether the plaintiff has a reasonably good prospect of success and at the moment I have no reason to consider that they have less than a reasonable prospect of success. Further, whether there is any admission, which is not the present case. Further, whether the application for security is being used oppressively so as to stifle a genuine claim, which I do not consider to be the case. Further, whether the plaintiff's limited means has been brought about by any conduct on the part of the defendants. The payments made on foot of the settlements in the original actions, alleged to have been occasioned by the negligence and breach of contract of the defendants, have brought about a diminution in the assets of the plaintiff. Payments of £1M have been made by the plaintiff, a substantial portion of

which the plaintiff claims should not have been paid had the claims been valued properly. The plaintiff's assets have been reduced by the alleged conduct on the part of the defendants.

[37] Weighing up the circumstances I am satisfied that I should exercise my discretion to require the plaintiff to make a payment of security for the defendants' costs.

[38] In relation to the third matter, the amount of security, that amount should be proportionate and should not be such as to destroy the essence of the right of access to the Court. The overall balance is to avoid injustice to the plaintiff if prevented from continuing with the actions by an order for security and also avoiding injustice to the defendants if unable to recover the costs if successful. The plaintiff's principal assets are the value of the rights that are generating future revenue. An amount of security for costs that could only be realised by the disposal of any such assets raises the question whether that would be proportionate. Any substantial amount that would be ordered to be paid as security for costs that could not be raised from income and as a charge on the value of future income would probably suppress the claim. An amount of security for costs that would probably have the effect of compelling the abandonment of the actions that presented as prima facie cases may be considered to be disproportionate. The plaintiff may raise a reasonable amount from current income and against the value of the assets without having to dispose of a part of the assets, a realisable amount that would not impact upon the continued viability of the plaintiff. Of course if the claims are eventually unsuccessful and the costs do have to be met by the plaintiff then the assets remain as a target for the recovery of costs in any event. In measuring what the appropriate amount is in the circumstances I propose to require payment for security of the defendants' costs in the sum of £50,000.

[39] I dismiss the defendants' abuse of process applications. I grant the defendants' security for costs applications and the proceedings will be stayed pending the payment of the sum of £50,000 as security for the defendants' costs.