

THE HIGH COURT

**[2021] IEHC 245
[2020 NO. 3876 P]**

BETWEEN

UNIFORMAL LIMITED

PLAINTIFF

AND

TAURUS GEMINI REAL ESTATE B.V. TRADING AS GEMINI GROUP OF COMPANIES, NIEK TERSTEEG, SCORPION ENERGY SOLUTIONS B.V., SCORPION TRADING A.G., JJOE & MI CONSULTANCY B.V. AND MONIQUE SCHAGER

DEFENDANTS

Judgment of Humphreys J. delivered on Monday the 12th day of April, 2021

1. The Covid-19 emergency has given rise to a combination of urgent requirements for personal protective equipment and, initially at least, a loosening of procurement procedures. That combination has unfortunately given rise to difficulties such as those in this case, where the Netherlands-based defendants, or at least some of them, obtained significant monies following an agreement by the first defendant to supply masks on the basis of having made certain representations which, on the evidence, were not factual. Following non-delivery of the masks, further representations and explanations were offered, which, on the evidence, were also evasive and non-factual. If the Irish and European legal order is to be credible, there must be an effective remedy for such a situation.
2. The plaintiff company is in the business of supply and sale of clothing. The first defendant is a Dutch company registered in Bergen in North Holland. During the Covid-19 pandemic the plaintiff was engaged in the supply of personal protective equipment and in particular face masks. In order to source face masks, the plaintiff had entered into arrangements with various wholesale suppliers. The principal of the plaintiff, Mr. McCabe, came into contact with the principal of the first defendant, a Mr. Niek Tersteeg, on a "friend of a friend" basis - Mr. Tersteeg was suggested by a Mr. Kew who was the son-in-law of a client of Mr. McCabe's brother. Following this contact, Mr. Tersteeg offered to supply one million face masks which he claimed to carry in stock in the Netherlands. While the expertise of Mr. Tersteeg and his partner Mr. Kew was primarily in oil, he held himself out as also engaging in supply of masks. In an email dated 30th April, 2020 he stated that "Oil men are not known for their diplomacy but are known for their eternal friendship and will stay shoulder to shoulder beside you till the gates of hell and further if needed." These assurances would be somewhat tested by what happened subsequently.
3. On 24th April, 2020, Mr. Tersteeg on behalf of the first defendant offered to supply one million face masks for consideration of €500,000, with 50% payable in advance and the balance on arrival. Representations were made initially that the masks would be delivered within 72 hours and that the masks were in Europe. These matters were expressly confirmed by Mr. Tersteeg on 24th April, 2020.
4. The initial payment of €250,000 was paid on 27th April, 2020 and then detailed logistical information was sought from Mr. Tersteeg on 29th April, 2020. At this point problems began to emerge and Mr. Tersteeg replied on 30th April, 2020 that "[w]e are facing a few

days delay. Yesterday we inspected the 3-Ply masks at the warehouse and found out that the masks were rubbish, old and not what the supplier told and guaranteed us". It was then stated that new masks would be flown in from China.

5. On 1st May, 2020, the plaintiff replied that it could not accept the proposed new offer and requested the return of the deposit payment. On the same date Mr. Tersteeg replied "Dear Sir, we will ignore this [e]mail and deliver the masks coming Tuesday". There were then further alleged delays due to the Chinese national holiday and customs clearance in China. By 10th May, 2020 no masks had arrived and the deposit was again requested.
6. On 11th May, 2020, Mr. Tersteeg stated "[t]here will be no refund" and that the masks would be delivered on 22nd May, 2020.
7. Mr. McCabe notified Bank of Ireland of the matter on 12th May, 2020 and was subsequently advised that the bank had sought a recall of the money remitted to ING Bank on a "best endeavours" basis with the stated reason as being fraud. The Garda National Economic Crime Bureau was also contacted on 12th May, 2020.
8. On 19th May, 2020, Mr. Tersteeg claimed that he was "more than happy to cancel your order and return your payment of €250,000, - at a time chosen by us." Various flight reservations were referred to, but it was later discovered that such flight bookings were cancelled. Documents were also provided by Mr. Tersteeg which falsely purported to be proof of customs clearance. The present proceedings issued on 28th May, 2020.
9. In the end, the proceedings involved nine substantive court listings, during which I was greatly assisted by Arthur Cunningham B.L. for the plaintiff. The defendants did not appear at any stage. Despite or maybe because of this, a considerable number of practical questions of law and procedure arose, and I now take the opportunity to set out the position in relation to these matters and the reasons for the orders made.

Listing of 5th June, 2020

10. The plaintiff first moved the court for relief on foot of an *ex parte* docket dated 5th June, 2020. I was satisfied that the court had jurisdiction under Brussels I Regulation Recast, 1215/2012/EU. The place of performance was to be the State (see art. 7(1) of the regulation). On the plaintiff's application, I added Mr. Tersteeg as a proposed second defendant under O. 15, r. 13 RSC.
11. Given that a post-judgment *Mareva* injunction (*Mareva Compania Naviera S.A. v International Bulkcarriers S.A.* [1980] 1 All ER 213) can be extended under O. 15, r. 13 RSC to cover additional parties and to restrain them from dealing with assets (see the order made by the High Court and referred to in para. 4 of *Allied Irish Bank Plc. v. McQuaid* [2018] IESCDT 86 (Unreported, Supreme Court, Clarke C.J., MacMenamin J., O'Malley J., 29th June, 2018)), then to make such an order at the outset in the context of a pre-judgment *Mareva* must be equally acceptable in principle. Such an order is necessary in order to enable the court effectually and completely to adjudicate upon and

settle all the questions involved, so I was satisfied that such an order should be made here.

12. The Supreme Court determination in *McQuaid* notes at para. 9 that the High Court took the view that “[w]here there were reasonable grounds for believing that such an injunction against the defendant (in this case Mr. McQuaid) might or would be frustrated by the actions of other persons, there was an inherent jurisdiction to join those other persons so that they could be brought within the ambit of the *Mareva* order. The inherent jurisdiction enabled the court to protect its own processes and orders.” While the Supreme Court does not expressly state who made the order in question, it seems to have been McGovern J. (see para. 9 of the judgment of Haughton J. in *Allied Irish Bank Plc. v. McQuaid* [2018] IEHC 516, [2018] 3 I.R. 778). While a Supreme Court determination is not formally precedential, it does record what McGovern J. decided by way of a formal order, and it is the latter that is for these purposes precedential. I respectfully consider that to be the correct approach and I follow that here in the pre-judgment *Mareva* context.
13. The *ex parte* docket also sought a worldwide *Mareva* injunction restraining the defendants from reducing their assets below €250,000. The criteria were helpfully summarised by Barniville J. in *Trafalgar Developments Ltd. v. Mazepin* [2019] IEHC 7 (Unreported, High Court, 17th January, 2019), at para. 105: a substantive cause of action, a good arguable case, existence of assets, evidence of a risk of dissipation by the defendants of the assets, that the balance of convenience favours an injunction and that consideration is given to the conduct of the defendant. The only one of those criteria that calls for comment here is the question of establishing a risk of dissipation. As O’Sullivan J. noted in *Bennett Enterprises Inc. v. Lipton* [1999] 2 I.R. 221 at 228, “direct evidence of an intention to evade will rarely be available”. Such an intention can, however, be inferred from a defendant’s conduct. In *Bennett* at pp. 228 to 230, O’Sullivan J. sets out a list of factors from which the intention to dissipate could be inferred. The first one of which was failure to repay the monies. That certainly applies here. Factors such as failure to reply to queries or giving ambiguous or unsatisfactory or inconsistent answers also amounted to such evidence from which an intention to dissipate can be inferred. A similar position applies here. The criteria for a *Mareva* injunction were, therefore, satisfied so I granted that relief.
14. Ancillary orders were also sought requiring disclosure of the bank account into which the money was paid and dealings with the money as well as the overall assets and liabilities of the company. As Kelly J. put it in *Irish Bank Resolution Corporation Ltd. v. Quinn* [2013] IEHC 388 (Unreported, High Court, 10th July, 2013), at para. 29, cited by Barniville J. in *Trafalgar* at para. 129, “the court has inherent jurisdiction to ensure that injunctions granted by it are effective. In the case of the *Mareva* type injunction this may involve orders of discovery, disclosure, the answering of interrogatories or the production of a deponent for cross examination.”

15. In a separate judgment in *Irish Bank Resolution Corporation Ltd. v. Quinn* [2012] IEHC 510, [2012] 4 I.R. 381, Kelly J. at 393, referred to the decision of the Court of Appeal of England and Wales in *House of Spring Gardens Ltd. v. Waite* [1985] FSR 173, at para. 44, as follows. "That case involved proceedings for copyright infringement and breach of confidence. The plaintiffs obtained a *Mareva* injunction against the defendants. Vinelott J. made a subsequent order for disclosure by the defendants by affidavits of their assets. The plaintiffs, believing that there were serious inaccuracies or omissions in certain of those affidavits, moved to cross-examine the defendants on the affidavits. Nourse J. granted the order by consent. At the hearing of the cross-examination, Scott J. held that the application for cross-examination was misconceived in that the plaintiffs did not seek to ascertain or clarify any specific issue but sought to police the court's order. Holding that the court's function was instead to decide issues between the parties, Scott J. dismissed the order as being a nullity. The plaintiffs appealed to the Court of Appeal. Scott J. was reversed". He summarised the appeal judgment by saying that "[t]he Court of Appeal held that the court should be able to grant any ancillary order that appears just and convenient for the purpose of ensuring that a *Mareva* injunction is effective."
16. The fundamental principle is that the court must have such jurisdiction as to make its remedies effective ones. That principle is a mainspring of the inventiveness and adaptability of the courts generally and the Chancery jurisdiction in particular, but it is also reflected in the right to an effective remedy under art. 13 of the ECHR, a point I sought to make in *Walsh v. Walsh (No. 2)* [2017] IEHC 177, [2017] 2 JIC 1307 (Unreported, High Court, 13th February, 2017). In the light of such considerations, the orders for disclosure were necessary here. I also considered that the order sought permitting service by email on the defendants was also necessary in order to make the *Mareva* injunction effective and I granted that order on the basis that it would apply to service of all documents and proceedings on the defendants and each of them until further order. I directed that a motion for interlocutory relief was to be issued returnable for 10th June, 2020.

Listing of 10th June, 2020

17. The plaintiff then sought the joinder of two additional defendants. I was satisfied that there was evidence that the other two companies might obstruct the enforcement of the court's order and that those companies were part of the group under which the first defendant is trading, so I extended the *Mareva* injunction to cover the two additional corporate entities, Scorpion Energy Solutions B.V. and Scorpion Trading A.G.
18. Order 15, r. 15 RSC provides for service of an amended summons. In all the circumstances it was appropriate to give liberty to serve an amended plenary summons and any future documents on the third and fourth defendants both by registered post to the addresses provided and by email to the addresses provided as I was satisfied that the proceedings would be likely to come to the attention of the companies in that manner.
19. The plaintiff also sought an extension of the *Mareva* injunction to cover costs. I made a similar order in *Walsh (No. 2)* at paras. 8 to 18, on the grounds that the court had to provide an effective remedy and that to fail to make provision for costs would mean that

the plaintiff could be out of pocket in having to pay costs out of the sum that was meant to be allocated for damages. Accordingly, I extended the *Mareva* injunction to cover the plaintiff's reasonable estimate for existing costs which was €20,000 plus VAT.

20. The question then arose as to whether the *Mareva* should include provision for prospective costs. Following *Walsh (No. 2)*, the Court of Appeal in an *ex tempore* unpublished ruling left in place the provision for costs in the High Court, but not for 50% of the prospective Court of Appeal costs. While no particular reasons were given for that variation, I think it is best explained by the view that providing for the costs of a potential appeal to be put aside could be a disincentive to such an appeal, so that it would be more appropriate for the appellate court to make such an order. I certainly do not read that as precluding the inclusion of a reasonable estimate of prospective costs to be incurred in the High Court itself. Not doing so would deprive the plaintiff of an effective remedy because by the time the proceedings were finalised the sum recovered under the *Mareva* would be inadequate to ensure full damages for the plaintiff factoring in the costs incurred between the grant of the *Mareva* injunction and the final order. So on the basis of the affidavit evidence of a reasonable estimate of future costs at that particular point in time, I included provision for a further €20,000 plus VAT. In total then the amount of the *Mareva* injunction was increased to €299,200.
21. Two further types of orders were sought at paras. 10 and 11 of the affidavit on behalf of the plaintiff against financial institutions. First, an order requiring the disclosure of accounts and balances; and secondly, an order restraining the dissipation of sums standing to the credit of each of the defendants. These orders were sought both in respect of ING Bank which was where the money was first lodged and also of the other main bank in the Netherlands and Credit Suisse. It is clear that the court has jurisdiction to grant an *ex parte* disclosure order even against non-parties and here it is both appropriate and I think essential to do so. I also gave liberty to notify the banks of the order by way of the emails provided.
22. Finally, at this juncture the plaintiff sought an "unless order". As part of the important jurisdiction to make a *Mareva* disclosure requirement effective as set out in the judgment of Clarke J. in *JSC BTA Bank v. Ablyazov* [2010] EWHC 2219 (QB), the court can make an unless order to allow a party to enter final judgment unless the other party rectifies non-disclosure within a specific time. The logic for such an order is set out in an impregnable manner at paras. 38 to 39 of the judgment of Clarke J. The fundamental point is that "[t]he court expects its orders to be obeyed by those who are subject to them" and "if the court makes an order for disclosure for information or documents it is entitled, in the event of non-compliance, to order that if such non-compliance is persisted in the claimant will be at liberty to enter judgment. Were it otherwise, in many cases the order would be without effect."
23. In reliance on that principle, which I respectfully adopt and apply here, I made an order that the first defendant was to be debarred from making an appearance or defence and the plaintiff was to be at liberty to enter final judgment unless the first defendant

complied with the order of 5th June, 2020 and provided the information specified in that order within 48 hours of service of the present order. I made a similar order against the second defendant on the plaintiff's undertaking to serve an amended summons on the second defendant in advance.

24. I should note here procedurally that the orders made on 10th June, 2020 were made by way of two separate orders - one order against the defendants and one in respect of the financial institutions. The reason the order relating to financial institutions was made in a separate perfected order, not to be served on the defendants, was that it was not the sort of order that should be notified to a defendant because to do so could engender frustration of the *Mareva* injunction.

Listing of 19th June, 2020

25. When the adjourned motion resumed, I was informed that six banks had replied to the service of papers by the plaintiff and one had raised the issue of a certificate from the court under the Brussels I regulation Recast. ING Bank had given information of the two entities that had received payment from the monies paid by the plaintiff. I also extended the unless order so as to apply against all of the defendants.

Listing of 23rd June, 2020

26. On foot of a further application from the plaintiff, I added two further defendants being the entities that had received monies paid by the plaintiff. Firstly, JJOE and MI Consultancy B.V.; and secondly, Ms. Monique Schager. I extended the *Mareva* injunction to the two new defendants and also required disclosure of all assets and bank accounts by those defendants. In a separate order, for the reasons set out above, I directed the financial institutions to make disclosure regarding the accounts of the two additional defendants and also applied the *Mareva* injunction to their assets.
27. The final point at this stage was that the plaintiff's affidavit indicated that the plaintiff understood that the Central Office had declined to issue a certificate under art. 53 of regulation 1215/2015/EU until final judgment. That wouldn't have been a valid basis to decline to issue a certificate, because the definition of "judgment" in art. 2(a) "includes provisional, including protective, measures", but in fact further inquiries were later to make clear that this was not in fact the reason why a certificate was not issued at that particular point in time.

Listing of 6th July, 2020

28. Given the ongoing non-compliance with the orders for a disclosure and the unless orders already made, I gave the plaintiff liberty to deliver a statement of claim against all defendants pursuant to O. 13A, r. 3(1) RSC by filing the statement of claim in the Central Office on or after 9th July, 2020 subject to service of the order and continued failure to enter an appearance. I also extended the unless order to the fifth and sixth defendants.

Listing of 14th July, 2020

29. On the plaintiff's application I made an order giving it liberty to enter final judgment against all defendants. Having made enquiries of the Central Office as to why a certificate had not been issued under Brussels I, it seems that there was a need for the plaintiff to

have clarification about the papers required for that purpose. Essentially what is required is:

- (a). a covering letter to the Central Office stating exactly what is sought;
- (b). a core book containing the affidavit required by O. 42A, r. 21(1) with the supporting material referred to at r. 21(2), particularly the originating summons referred to at para. (2)(f) and affidavits of service;
- (c). a separate book containing all the pleadings as required by O. 42A, r. 21(2)(f); and
- (d). a fully completed draft certificate which needs only a Registrar's signature in order to be finalised.

Listing of 22nd July, 2020

30. At this listing I reviewed the ongoing difficulties with the issue of a certificate under Brussels I. The Central Office had written to the plaintiff on 16th July, 2020 helpfully drawing attention to a number of shortcomings in the papers. Firstly, O. 42A, r. 21(2)(d) requires the affidavit to state whether a notice to set aside judgment has been entered; and, in that regard, a supplemental affidavit was required here to rectify the omission of that information. Secondly, the affidavit of service was not in the standard format. The appropriate precedent for the affidavit of service is set out at p. 29 of the Courts Service publication, *Information Booklet for High Court Judgment Sets and Orders of Fieri Facias*. There was a further problem with service in that the envelopes containing papers served on the third and fourth defendants by registered post were returned. The affidavit of service overlooked addressing that and the plaintiff thereby overlooked the need to apply to deem service good, so I adjourned the matter to allow that application to be made.
31. Finally, an issue was raised by the Central Office about a difference in the wording of the order of 5th June, 2020 which refers to service by email and 10th June, 2020 which refers to service by email and registered post. I determined that the best way to give effect to the intention of the order of 5th June, 2020 was to deem service of the plenary summons on the first defendant and the other documents served insofar as service was actually effected to be good and sufficient service, and to direct that any further future documents would be served on the first defendant by way of email and registered post.

Listing of 24th July, 2020

32. The affidavit of service on the fourth defendant indicated that there had been a number of attempts to serve the fourth defendant by registered post, the last of which was refused. In the light of that I made an order for substituted service so that any service of future documents on the fourth defendant could be by email in the addresses already specified by order and by ordinary post. I also gave directions as to service on the third defendant. A further problem then arose because no separate affidavit was sworn specifically grounding the plaintiff's motion for a post-judgment *Mareva*, so I adjourned the matter further for that purpose.

Listing of 31st July, 2020

33. On this further listing another issue arose about the affidavit of service on the third defendant. Because there were a number of different amended versions of the summons it was essential to specify which version of the summons was served on the third defendant. Paragraph 10 of the affidavit of service did not adequately identify which version of the summons was served. It refers to the summons dated 28th May, 2020 as amended on 12th June, 2020 but without reference to the amendment on 25th June, 2020 under the order of 23rd June, 2020. That needed to be corrected in order to obtain the art. 53 certificate. Secondly, the summons was served at what now seems to be an incorrect address because following that service the Dutch court, de Rechtspraak, Rechtbank, Noord-Holland, Handel Alkmaar, wrote back on 23rd June, 2020, received on 2nd July, 2020, indicating the correct address for the third defendant and saying that correspondence had been forwarded. However, it was clear that this particular issue did not make any difference because the third defendant was clearly aware of the proceedings through email service. Mr. Tersteeg emailed on 7th July, 2020 in effect on behalf of the third and fourth defendants claiming that they did not exist and were bankrupt and confoundingly claiming non-performance by the plaintiff. He claimed that he bought the masks and was at the loss of €100,000 and he alleged that his partner Mr. Kew was aware of matters and that he would refund the €250,000.
34. Despite some shortcomings in the precise compliance with the initial directions, I deemed service on the third defendant good on the basis that I was satisfied that it was aware of the proceedings. Correspondence to the fourth defendant, which is the Swiss company with an address in Switzerland, was refused on 13th July, 2020. However, that correspondence was also sent by email and followed up with ordinary post so I deemed service good on the fourth defendant as well.
35. On the plaintiff's application I measured the costs in accordance with the affidavit of the plaintiff's solicitor in the amount of €68,487 and granted a post-judgment *Mareva* in the terms sought in the notice of motion with liberty to apply as to the execution of that order.
36. I have been informed that a sum of money was recently identified and frozen pursuant to the *Mareva* injunction as of March 2021. Accordingly it is now appropriate to publish a judgment setting out the reasons for the orders made. Publication prior to such a development might not have been appropriate because the orders against third party financial institutions are the type of orders that should not come to the attention of a defendant as to do so would frustrate and undermine the purpose of the order itself.

Summary of main conclusions on law and procedure arising

37. To conclude, it may be helpful if I endeavour to summarise the main conclusions on the points of law and procedure which these proceedings have involved:
- (i). the criteria for a *Mareva* injunction involve showing a substantive cause of action, a good arguable case, existence of assets, evidence of a risk of dissipation by the defendants of the assets, that the balance of convenience favours an injunction and that consideration is given to the conduct of the defendant (*per* Barniville J. in

Trafalgar Developments Ltd. v. Mazepin [2019] IEHC 7 (Unreported, High Court, 17th January, 2019), at para. 105);

- (ii). a *Mareva* injunction whether pre-judgment or post-judgment can be extended under O. 15, r. 13 RSC to cover additional parties with access to the assets frozen or to be frozen, and to restrain them from dealing with such assets (applying the logic of the order made by McGovern J. at an earlier stage of the *Allied Irish Bank Plc. v. McQuaid* [2018] IEHC 516, [2018] 3 I.R. 778 proceedings) and generally can be extended to bind any party who may frustrate the enforcement of the order;
- (iii). a risk of dissipation so as to warrant a *Mareva* injunction can be inferred from all the circumstances including failure to repay the money and failure to respond satisfactorily to inquiries (*Bennett Enterprises Inc. v. Lipton* [1999] 2 I.R. 221 at 228 *per* O'Sullivan J.);
- (iv). the court must have whatever jurisdiction is required to make its remedies effective ones, and in the case of the *Mareva* type injunction this may involve orders of discovery, disclosure, the answering of interrogatories or the production of a deponent for cross-examination (*per* Kelly J. in *Irish Bank Resolution Corporation Ltd. v. Quinn* [2013] IEHC 388 (Unreported, High Court, 10th July, 2013), at para. 29, cited by Barniville J. in *Trafalgar* at para. 129);
- (v). a *Mareva* injunction may make provision for the freezing of monies to cover prospective costs in the trial court as well as costs already incurred in that court, in order to ensure that the plaintiff is not deprived of an effective remedy or of full recovery (applying the logic of *Walsh v. Walsh (No. 2)*);
- (vi). if a defendant fails to comply with an order for disclosure, the court can make an "unless order" precluding that party from defending the proceedings and giving the plaintiff liberty to enter final judgment if the breach is not rectified (applying *JSC BTA Bank v. Ablyazov* [2010] EWHC 2219 (QB));
- (vii). where a court grants a *Mareva* injunction or similar order and also directs disclosure of information (for example financial information), or freezing of assets held, by third parties, such orders to third parties should procedurally be made by way of a separate perfected order from any order made against a defendant, so that the order against the third-party would not be served on or come to the attention of the defendant; to do so could engender frustration of the *Mareva* injunction, a principle that also would require non-publication of any judgment in respect of such third-party applications until such time as recovery has been achieved or sufficiently progressed;
- (viii). the procedure for seeking a certificate under art. 53 of the Brussels I Regulation Recast (Regulation (EU) No. 1215/2012) applies to both final and interim orders (see the definition of "judgment" in art. 2(a) which "includes provisional, including protective, measures");

- (ix). to obtain a certificate under art. 53 of the Brussels I Regulation Recast, the plaintiff should provide the Central Office with the following:
- (a). a covering letter to the Central Office stating what is sought;
 - (b). a core book containing the affidavit required by O. 42A, r. 21(1) with the supporting material referred to at r. 21(2), particularly the originating summons referred to at para. (2)(f) and affidavits of service;
 - (c). a separate book containing all the pleadings as required by O. 42A, r. 21(2)(f); and
 - (d). a fully completed draft certificate which needs only a Registrar's signature in order to be finalised; and
- (x). the preferred format of an affidavit of service is as set out at p. 29 of the Courts Service publication, *Information Booklet for High Court Judgment Sets and Orders of Fieri Facias*.