BANCO AMBROSIANO

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THE HIGH COURT

BEFORE HIS HONOUR MR. JUSTICE MURPHY
ON FRIDAY, 19TH JULY, 1985

1984 585P

BANCO AMBROSIANO S.P.A. (IN COMPULSORY VOLUNTARY LIQUIDATION)

FRANCO GERINI

FELICE MARTINELLI

FRANCO SPREAFICO / PLAINTIFFS

and

ANSBACHER & COMPANY LIMITED
BRUNO TASSAN DIN
ANTONIA CORI
ROBERT FRIEDMAN
ANDRE de PFYFFER
ARBORFIELD LIMITED / DEFENDANTS

1983 8987P

BANCO AMBROSIANO S.P.A. (IN COMPULSORY VOLUNTARY LIQUIDATION)

/ PLAINTIFFS

AND

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Certified true record of shorthand note:

B. Smiet

B. Smiet (Official Stenographer)

Affirmed

Frances Allitt

## APPEARANCES

1984 585P

(Solrs. for Defendant Bruno Tassan Din
Colum McKeown & Co.,
18 FItzwilliam Square, Dublin 2)

(Solrs. for Plaintiff:
Matheson Ormsby & Prentice
& Ors.)

1983 8987P

(Solrs. for Defendant Bruno Tassan Din
Colum McKeown & Co.
18 FItzwilliam Square, Dublin 2)

(Solrs. for Defendant:
A.L. Goodbody & Co.
31 Fitzwilliam Square, Dublin 2
and Ors. on record).

MR. BLAYNEY SC for Mr. Din

MR. P. KELLY BL for Andino

MR. RICHARD NESBITT BL for Baspa

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JUDGE: The documents relating to this matter are voluminous, the issue is complex and the sums involved astronomical. It was not surprising that the case is expected to be at hearing for three months. Fortunately the immediate issue with which I am at present concerned is less protracted, if somewhat more urgent. The fifth-named defendant, Mr. Bruno Tassan Din, whom I shall refer to as Mr. Din, is applying for an order that the plaintiffs, to whom I shall refer to as Andino, should be required to give security for Mr. Din's costs of the proceedings Andino is a corporate body incorporated in Peru in October 1979. On 24.3.1983 the domicile of Andino was transferred to Luxembour and it is now a body corporate registered there. It is conceded that Andino - and I quote from the affidavit sworn by Ms. Erwin ... "is now being administered by administrators who were appointed pursuant to an order made by the competent Court in Luxembourg." I infer that such proceedings are equivalent to a winding-up by the Court within this jurisdictio and that the existence of such a winding-up is prima facie evidence of the insolvency of Andino. Whilst it has been state and again I refer to the affidavit of Ms. Erwin, that Andino "has been denuded of its assets" by the actions of Mr. Din, I understand that Andino has not been deprived of all its resources. It is not clear whether Andino could provide security or whether an order to that effect would prevent the plaintiffs from maintaining these proceedings.

The application was based partly on Section 390 of the Companies Act 1963 and in part on Order 29 Rule 3 of the Rules of the Superior Courts. Section 390 of the Companies Act 1963 provides as follows: "Where a limited company ..... security is given." As a company is defined by Section 2 of th

1963 Act (quotes) it is clear that Section 390 has no direct application to the present case. Nevertheless the Section is helpful and relevant in as much as it was decided in Cohane an Cohane (1968 Irish Reports page 176) that the same considerations and principles established in relation to Section 278 of the Companies Consolidation Act 1908, (which is equivalent to Section 390 of the 1963 Act) are equally applicable to litigation between individuals. The Rules of the Superior Courts provid (quotes Order 29 Rule 3 ..."no defendant shall be ....."). The inclusion of the word "may" in Section 390 to which I have already drawn attention, and the decisions of the Courts in this jurisdiction, particularly in the cases of Peppard & Co. Ltd. and Bogoff (1962 Irish Reports page 180), Cohane and Coha e to which reference has already been made, and Collins and Doyle (1982 Irish Law Reports Monthly page 495), makes it clear the Court has a discretion to refuse application for security notwithstanding the fact that the plaintiff is resident out of the jurisdiction, or is insolvent, or both. In the present case the application for security is grounded in the affidavit of Colum McKeown, Solicitor, on behalf of Mr. Din. (Quotes paragraph 5 of affidavit sworn on 10.7.85).

The first observation to be made on that affidavit is that it is sworn by a Solicitor on behalf of the defendant concerne l and not by the defendant himself. It is well settled law in this jurisdiction that prima facie an affidavit of this nature should be sworn by the defendant himself, and that was decided in particular in the case of Gardiner and Harris (VIII L.R.Ir. page 352) and it is feasible to read the judgment of Chief Justice Morrison in full as it was expressed in the briefest possible terms. The defendant was seeking security on behalf of the plaintiff resident out of the jurisdiction and an affidavit was sworn by a solicitor on behalf of the defendant.

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The judgment was expressed in the following terms - "prima facie an affidavit should be made by the party - this is a more defective affidavit than that in Jones and Cullens". The failure to have the affidavit sworn by the defendant himself would have been sufficient grounds for refusing the order, although perhaps in other circumstances it might have been appropriate to stand over the matter to afford the defendant an opportunity of correcting the defect. It seems to me however that the affidavit in the present case is not a satisfactory affidavit and that its shortcomings are of a more fundamental nature. What is a satisfactory affidavit within the meaning of Order 29 Rule 3? This is a question which has been considered in many cases decided in this country. A number of those cases were reviewed in the decision of the then Chief Justice Mr. Justice O'Dalaigh in Power and the Irish Civil Service Building Society (1968 Irish Reports page 158); although Chief Justice O'Dalaigh was delivering a dissenting judgment there is no reason to doubt that his comments in relation to this aspect of the matter represented the views of the entire Court. Having referred to the decision of the Court of Appeal in Walker and Atkinson (1895 I.R. 246) Chief Justice O'Dalaigh at page 159 of the report of the judgment quoted Lord Justice Fitzgibbon (quotes).

In addition there are passages in the judgment of the late Mr. Justice Fitzgerald, as I see it, material to the present case (quotes page 164 ..."in my opinion the assessment ..... to be tried".

In the present case it appears from the pleadings that Andino is alleging that very substantial sums of money originated in a current account which they had with Banco Ambrosiano Overseas Lt. in Nassau. It is further alleged these

moneys were wrongly and unlawfully transferred from that account and that, through a series of further unlawful dealings, part of the moneys so originating and amounting to something in the order of $30m was lodged with the first-named defendants in Dublin in the name of the sixthly-named defendant Arborfield Ltd. It is the plaintiffs' contention that they were the owners of the moneys in the first instance and that the subsequent transactions, to which it is alleged Mr. Din was a party, did not in law deprive them of their beneficial ownership of the moneys in question. The defence filed on behalf of Mr. Din does contain a full traverse of these allegations but the affidavit sworn by Mr. McKeown in the terms I have already quoted, does little more than deny the ultimate claim of Andino. Not only may one describe the affidavit as containing hearsay evidence but it is to some extent hearsay upon hearsay. The Solicitor is apparently quoting or relying upon information given to him by Counsel. They in turn were presumably basing their advice and judgment on information supplied by Mr. Din; but even that is not clear because all that is said is that ... "his defence being that the moneys claimed are the property of Arborfield". No particular statement is attributed even by way of hearsay to Mr. Din. Apart from the shortcoming the affidavit does not challenge or deal with the allegation that the moneys originated from the account in Nassau or that they were dealt with in the manner alleged by the plaintiff. From the affidavit it would be impossible to know whether this defendant was going to make the case that the moneys in the account in the name of Arborfield with the first-named defendant had the origin claimed by the plaintiff or whether they had a totally different origin, or whether it is his contention that the intervening transactions affected the title of Andino to those moneys.

In these circumstances it seems to me that the affidavit

offers little evidence to satisfy the Court that there is a defence or that the defendant has a reasonable prospect of establishing a defence. Less still is there evidence indicatin what was described in the passage cited by Mr. Justice O'Dalaig and to which I have made reference, that there is any evidence to suggest a more or less specific or ascertainable defence. It is hardly necessary for me to emphasize that in no way am I casting doubt upon the fact that this defendant may have and has indeed pleaded a full and comprehensive defence. Defendants are under no obligation to put their defence on affidavit. It is only for the purpose of this application and for the purpose of obtaining an order for security for costs that a defendant must put in a satisfactory affidavit showing the defence he proposes to make. It seems to me, having regard to these facts the affidavit sworn is not a satisfactory affidavit, and that the application must be refused. In these circumstances I do not feel it is necessary to explore further the nature of the discretion which the Court possesses with regard to the granting or withholding of an order for security for costs.

My decision on this application in relation to the Andino case is equally applicable to the case described as the Baspa case.

Each of the plaintiffs is entitled to their costs against Mr. Din.

(Stay on costs agreed).

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