

THE HIGH COURT

[2024] IEHC 230

[Record No. 2023/6003 P]

BETWEEN

COHESION INFHEISTÍOCHTAÍ LIMITED

PLAINTIFF

AND

SALUMI GRAZING LIMITED AND SIDNEY JOHN SUTTON

DEFENDANTS

EX TEMPORE JUDGMENT of Mr Justice Mark Sanfey delivered on the 20th day of February 2024.

1. By a notice of motion of 12 December 2023, the plaintiff, to whom I shall refer as “Cohesion”, sought an interlocutory injunction restraining the defendants from issuing a petition to wind up the plaintiff company.
2. In an interim application heard by this Court on 11 December 2023, an order was granted on an *ex parte* basis restraining the defendants from issuing a petition to wind up the company. The interlocutory injunction application has been the subject of numerous affidavits which set out the facts of the matter exhaustively. There is indeed a complex background to the facts at issue.

3. The facts immediately relevant to the present application are as follows:
 - (1) A purported 21 day demand letter of 22 November 2023 was served on the plaintiff, purportedly by Salumi Grazing Limited, which called on the plaintiff to discharge the sums of €51,462.95 and €2m in respect of two invoices in those sums;
 - (2) the payments were demanded on foot of the alleged breach by the plaintiff of a licence between the plaintiff and Salumi Grazing Limited which was allegedly “unilaterally terminated” by the plaintiff on 15 May 2021;
 - (3) invoices on notepaper of Salumi Grazing Limited were attached to the letter. The first invoice for €51,462.96 contained numerous items which it was alleged were paid for by Salumi Grazing Limited, the value of which was lost to that company by the alleged unlawful termination of the licence. The second invoice simply stated “16/06/23 licence agreement contract breach no notice given, loss of earnings due to breach of capital/licence agreement €2m”.
4. The final paragraph of the letter made it clear that the writer’s intention, if the sums were not discharged within 21 days, would be to petition the High Court for the winding up of the plaintiff. The letter was signed “Sid Sutton, Director and Secretary, Salumi Grazing Limited”.
5. For the purpose of the hearing of the interlocutory injunction, Mr Sutton represented Salumi Grazing Limited and made oral and written submissions in that regard. The plaintiff was at all times represented by counsel.
6. The background to the matter involves a three-year licence granted to Salumi Grazing Limited on 15 September 2000 in relation to a premises at Unit 2, 8-12 Terenure, Dublin 6W. Salumi Grazing Limited was a company with two members, each of whom was a director *i.e.*, Mr Sutton and Mr Mark Leavy. The licence was terminated by Cohesion on 15 May 2021 when there was still some 28 months left to run.

7. Mr Sutton, on 27 August 2021, brought proceedings in his own name against a number of parties including Salumi Grazing Limited, Mr Leavy, his wife Karen Leavy, Cohesion and its main shareholder and managing director Mr Eoin Goulding, the former accountant of Salumi Grazing Limited and Bank of Ireland. He then issued a notice of motion returnable for 02 September 2021 seeking a number of reliefs.

8. The motion was ultimately heard by Ms Justice Stack and the judge sets out the background to the dispute comprehensively in her *ex tempore* judgment of 22 June 2022. At para. 2 of her judgment, Ms Justice Stack states as follows:

“As against the first, second and third defendants, the plaintiff seeks relief on the basis of complaints relating to

(a) the plaintiff’s removal as director and secretary of the first defendant, the company;

(b) the removal of any reference to the plaintiff’s shareholding in various documents presented to the Companies Registration Office (the CRO);

(c) the *de facto* transfer of the business of the first defendant to Karmar Foods Limited and the alleged breach by the second defendant of his fiduciary duty to the company as director;

(d) the alleged breach of intellectual property rights relevant to the business originally run by the company and now run by Karmar Foods Limited.”

9. These matters are alleged to have taken place while Mr Sutton was in prison for what Stack J characterised at para. 10 of her judgment as “a series of assaults on his former partner”. It is important to state that Mr Sutton’s conviction was subsequently quashed by the Court of Appeal.

10. Ms Justice Stack points out at para. 15 that

“It turns out that while the plaintiff was in prison Mr Leavy took various steps to take sole control of the company and its business and to transfer the business to his sole control and benefit.”

11. In the application before Ms Justice Stack, Mr Sutton sought a range of orders. At para. 3 of her judgment, Stack J records that “as against the fourth and fifth defendants, the plaintiff seeks relief arising out of the determination of a licence which I think is in reality a lease which was held by the company in relation to premises in Terenure Place and the immediate grant of a similar licence to Karmar Foods Limited which is now trading from those premises”.

12. At paras. 52 to 56 of her judgment Stack J deals with the claim against Cohesion and Mr Goulding, its managing director. At para. 55 and 56 she says as follows:

“55. I have very serious concerns about the actions of the second and third defendants. However, I also have very serious concerns as to how within 24 hours of the plaintiff attending on the premises, the fourth defendant acted to terminate the licence on a completely unclear legal basis and immediately granted to another company, owned, managed and controlled by the second defendants a similar licence.

56. I am also concerned about the affidavit sworn by the fifth defendant in these proceedings relating to the application to restore the company to the occupation of its business premises”.

13. Stack J went on to say as follows:

“57. I am somewhat underwhelmed by the submission made on behalf of the fourth and fifth defendants which appeared to suggest that the licence had been lawfully determined by reason of a discrepancy of something over €900 in relation to the December licence fee. The notice terminating the licence purported to be based on the right to terminate for breach of a condition other than the payment of the licence

fee/rent. Counsel for the fourth and fifth defendant very properly admitted that there was no such breach, though he had identified a shortfall of over €900 in the payment of the licence fee/rent for December 2020, a time at which the second defendant controlled the company's bank accounts and should have seen that this was paid.

58. However, no notice was served in relation to the non-payment of the licence fee/rent, the notice served referred to a non-existent breach of a condition in the licence and I think a non-existent agreement as to when it would be remedied. It was not served by recorded delivery as required by the licence and there is no proof of its receipt although I think that is very much a secondary issue in my concerns. I therefore have significant concerns about the lawfulness of the termination of the lease”.

14. Stack J goes on to say as follows:

“59. However, the injunctions sought for restoration to the premises cannot be granted for two reasons. First, that is a right enjoyed by the company which has not, for reasons which I think must be obvious, sought to regain possession in these or any other proceedings. The rule in *Foss v Harbottle* means that the plaintiff cannot personally sue for this relief. He must regain, if he can do so lawfully, control of the company in order to procure to seek it, or he must bring a derivative action in accordance with the rules of court and the relevant legal principles”.

15. In the course of Mr Sutton's representation of Salumi Grazing Limited for the purpose of the present injunction, he stands over the right of Salumi Grazing Limited to issue a 21 day letter. He maintains that the company has continued to trade although he has no contact with Mr Leavy, the other 50% shareholder and director, and does not suggest that there have been directors' meetings or resolutions which have led to the sending of the 21-day letter. It is clear that this is an initiative of Mr Sutton alone.

16. The plaintiff lays much emphasis on this. At para. 4 of his second affidavit, Mr Goulding says as follows: -

“In my affidavit of 05 December 2023, I expressed my concern that these ‘invoices’ were not issued by any properly constituted meeting of Salumi Grazing Limited but were a ‘solo run’ of Mr Sutton. Mr Sutton now confirms that to be the position. He does not refer to any meeting of Salumi Grazing Limited and states that Mr Leavy is ‘not acting as a director’ but in fact does not suggest that the company is currently trading or carrying on any business or that there have been any meetings of either the directors or the members. He does not suggest he has ever called a meeting”.

17. Later on in that affidavit, which was sworn on 09 January 2024, he swears as follows at para. 26:

“I accept that Judge Stack expressed concerns about the lawfulness of the termination of the licence and the grant of a new licence to Karmar Foods Limited. However, she also made clear that any dispute about that could only be litigated by Salumi Grazing Limited and not Mr Sutton personally. At best this gave Salumi Grazing Limited a cause of action against the plaintiff, something that it has not done through any decision of Salumi Grazing Limited. Instead Mr Sutton has taken it upon himself to issue the purported invoices and to issue a 21 day statutory demand without (a) any input from his co-shareholder and director and (b) without any honest belief that those invoices constituted a liquidated money demand”.

At para. 29 Mr Goulding avers as follows:

“Paragraph 30 demonstrates the fundamental problem with Mr Sutton’s position. He has never advanced his claim against the plaintiff. He has never sought to bring a derivative action as he correctly notes at paragraph 33 was an option referred to by Ms Justice Stack. I note that in paragraph 33 there is no suggestion that he has ever

tried to call a meeting either of the directors or members of the first named defendant”.

18. Subsequently on 18 January 2024, Mr Sutton brought an application under O.15, r.39 of the Rules of the Superior Courts seeking liberty to conduct a derivative action on behalf of the company against the defendants to the original 2021 proceedings, including Mr Goulding and the plaintiff.

19. The company’s former bank and accountants are proposed to be sued as are Mark Leavy and his wife Karen. That application is winding its way through the court process at the moment. Mr Sutton relies on s.569(1)(d) as entitling Salumi Grazing Limited to issue a 21-day letter. He submitted before the court that it was clear that a debt of €10,000 or more was due and owing to the company by the plaintiff. Mr Sutton correctly submits that a debt of at least this much must be established in order for the company to rely on s.569 and that debt must be a liquidated debt.

20. The plaintiff’s position is that any claim vested in Salumi Grazing Limited is a claim for unliquidated damages for an alleged breach of the licence agreement. It is submitted that no proceedings have been brought by Salumi Grazing Limited to establish its entitlement in that regard.

Legal principles

21. The legal principles governing this application are very clear. The court has power to restrain proceedings which are an abuse of process, and a plaintiff company may establish such an abuse on a *prima facie* basis.

22. The law was definitively established by the Supreme Court in the case of *Meridian Communications Limited & Anor. v Eircell Limited (Unreported, 10 May 2001 McGuinness J)*. In that judgment, the court quoted from the headnote in the earlier case of *Truck &*

Machinery Sales Limited v Marubeni Komatsu Limited, a decision of Keane J (as he then was), as follows:

“(a) Since a winding up petition was not a legitimate means of enforcing payment of a debt which was *bona fide* disputed, the presentation of a petition would, in normal circumstances be restrained if the company, in good faith and on substantial grounds disputed all liability in respect of the debt claimed;

(b) Where a company admitted its indebtedness to the creditor in the sum exceeding £1,000 [now €10,000] but disputed the balance, even on substantial grounds, the creditor should not normally be restrained from presenting a winding up petition;

(c) Even where the company appeared to be insolvent, the court, might in the exercise of its equitable jurisdiction, restrain the presentation of the petition where it was satisfied that the petition was being presented for an ulterior or collateral purpose and not in good faith; but that the court must approach the position of such a company with the interests of the creditors particularly in mind;

(d) The jurisdiction to restrain the presentation of the petition should be exercised only with great caution;

(e) Since an application to restrain the presentation of a winding up petition involved not the restraint of an alleged violation of a plaintiff’s rights but of the exercise by a creditor of his right of access to the courts, the normal considerations of a fair question to be tried, the adequacy of damages as a remedy and the balance of convenience did not arise; instead it was for the plaintiff to establish at least a *prima facie* case which would in many instances be established by evidence that the petition is bound to fail or, at the least, that there was a suitable alternative remedy”.

23. In the present case, Mr Sutton sought to establish that a sum of just over €11,000 of the total of €51,000 in the first invoice undoubtedly represented liquidated damages which

were due by the plaintiff to the company. He relied on the non-return of a security deposit by the plaintiff of €2,917. Counsel for the plaintiff accepted that €2,000 of this amount, after deduction of what the plaintiff says is non-payment of €900 rent by the company, a claim which is being disputed by Mr Sutton, could be liquidated, but submitted that all other items were effectively claims for unliquidated damages for breach of the licence which were utterly disputed and would have to be litigated.

24. Mr Sutton referred in his submissions to the decision of the Court of Appeal in *Motsumi v Fitzpatrick* [2015] IECA 70 in relation to the question of what constituted a liquidated debt. This case concerned an issue of whether students in a failed educational establishment had a liquidated claim so as to be able to vote at a creditors' meeting in a winding up.

25. In that context, at paras. 54 to 55 of the judgment, Hogan J on behalf of the court stated as follows:

“54. The distinction between liquidated and unliquidated damages was exhaustively analysed by Peart J in *Motor Insurers Bureau of Ireland v. Hanley* [2006] IEHC 405, [2007] 2 IR 591. In that case Peart J. approved ([2007] 2 IR 591, 601) the definition of liquidated demand contained in the following extract from Bullen and Leake on Precedents of Pleading (8th. ed., 1924):

‘The words 'debt or liquidated demand' in Order III, Rule 6 are not restricted to cases in which a fixed amount was expressly agreed to by the parties when they entered into the contract; they include cases in which the plaintiff is entitled to be paid according to prices current in the trade or to the scale of charges recognised in his profession.....Whenever the amount which the plaintiff may recover depends upon all the circumstances of the case and on the conduct of

the parties, so that it can only be fixed by a judge and jury, the damages are unliquidated and the case is not within the rule.’

55. In the present case the amount of the claims of the 190 students whose studies were interrupted will depend on the circumstances of the case and the conduct of the parties. These are claims for damages for breach of contract, the entitlement to which can ultimately be determined only by a judge alone. In these circumstances, based on the test articulated with approval by Peart J in *Hanley*, these claims cannot properly be regarded as liquidated claims”.

26. The claim must therefore be either undisputed or not capable of being disputed in the sense that the amount is referable to a scale or agreed level of payment or remuneration. As *Meridian Communications* makes clear, the debt must not be “*bona fide* disputed”.

27. In the present case Mr Sutton claims that monies are due in respect of expenses incurred by the company as a result of what he says is the unlawful termination of the licence. It is absolutely clear that whether such a claim could succeed will depend on “the circumstances of the case and the conduct of the parties”. If these claims are made in litigation, and they have not been to date, the plaintiff has made it clear that those claims will be utterly disputed.

28. The €51,000 claim and the €2m claim are estimates of loss by Mr Sutton which he says result from the wrongs of the plaintiff. They may or may not stand up in the heat of litigation, but it is absolutely clear that they are not liquidated sums. Salumi Grazing Limited would have to establish its entitlement to those sums in litigation and it is by no means certain that they would succeed in this regard notwithstanding the encouragement which Mr Sutton has clearly derived from the comprehensive judgment, on an interlocutory basis, of Stack J.

29. There is no evidence which convinces me that the dispute of these debts by the plaintiff is not *bona fide*. While the judgment of Stack J suggests strongly that it may have some uncomfortable questions to answer in relation to the termination of the licence, the plaintiff has to some extent got caught in the middle of a row between Mr Sutton and Mr Leavy. It appears to have charged Mr Leavy's company the same rent as charged to Salumi Grazing Limited and in that sense did not exploit the differences between the two gentlemen to extract an increased rent or other advantage for itself. I accept that it is likely to strenuously contest any proceedings seeking damages served on it by or on behalf of Salumi Grazing Limited.

30. In these circumstances, it seems to me that any petition to wind up the company would be bound to fail, is an abuse of process and the presentation of which should be restrained by this Court.

31. While that conclusion is sufficient to warrant the grant of an interlocutory injunction, I do not accept in any event that Mr Sutton was entitled to present a 21-day letter on behalf of Salumi Grazing Limited. It is clear that he has not played any substantive part in that company's affairs for almost three years. He has no dealings with Mr Leavy and cannot locate him to serve him with the derivative action application. He is a 50% shareholder and director of the company but, as Stack J pointed out at para. 59 of her judgment, he has to gain control of the company or get this Court's permission to sue on its behalf in order to represent the company in litigation, or I should say, for the purpose of the service of the 21-day letter under s.569 of the Companies Act.

32. Mr Sutton has clearly, and somewhat belatedly, recognised this by commencing an application for leave to bring a derivative action. However, this cannot retrospectively validate his threat to initiate winding up proceedings at a time when he was not entitled to represent the company. Mr Sutton's subjective view that he has been defrauded does not

entitle him to disregard the provisions of O.15, r.39 and threaten winding up proceedings in circumstances where he does not control the company or have the authority of the court to sue on the company's behalf.