THE HIGH COURT

[2024] IEHC 507

[Record No. 2023/5422P]

BETWEEN

ADRIAN FOX

PLAINTIFF

AND

DAVID WALSHE, CAROLINE O'GRADY, WATERFORD TRANSFREIGHT STORAGE & WAREHOUSING LIMITED

AND

OTHER PERSONS UNKNOWN IN OCCUPATION OF 2 MANOR WALK, ROSE HILL, KILKENNY

DEFENDANTS

JUDGMENT of Mr Justice Liam Kennedy delivered on the 5th day of September 2024[1]

Introduction

1. Several motions in these proceedings were listed for hearing on 30 July 2024. However, the First Defendant's motions were adjourned at his request, with directions providing for the subpoena and cross examination of witnesses. In addition, the Plaintiff invited the Court to

[1] As amended by order dated 12 November 2024 pursuant to Order 28 rule 11.

summarily strike out the First Defendant's various proceedings, but I determined that, in fairness to the (unrepresented) First Defendant, any such application should be grounded on a formal notice of motion and a comprehensive affidavit, setting out all facts and matters relied upon, to which the First Defendant would have the opportunity to respond. I gave directions to facilitate the issuance and listing of any such application, along with the other interlocutory matters. The parties also agreed that certain reliefs sought in the Plaintiff's Notice of Motion dated 28 May 2024 either: (a) had been overtaken by developments; or (b) could best be dealt with along with the First Defendant's adjourned motions. Accordingly, the Plaintiff only sought one relief from his Notice of Motion at the 30 July hearing, with the balance of the motion being adjourned. In consequence, this judgment deals with his application an order prohibiting the Third Defendant ("the Company"), its servants and/or agents from reducing its assets below €31,905 (as was reported at year end 30 September 2023) pending further order ("the Freezing Order").

The Background

2. In these proceedings, the Plaintiff, who is the registered owner of a property ("the Property") acquired at auction, seeks to restrain the First and Third Defendants from trespassing thereon. For a (disputed) number of years, the First Defendant has been residing at the Property, allegedly on an unlawful basis, resisting attempts by receivers to take possession, including legal proceedings apparently resulting in an order for possession (although the First Defendant disputes this). The First Defendant claims to have acquired an interest in the Property by virtue of adverse possession, a claim disputed by the Plaintiff. The First Defendant is also advancing other claims or counterclaims against the Plaintiff and related parties.

3. At the time of the injunction hearing, the Company was owned and controlled by the First Defendant, and it had been carrying on business from the Property, which was actually its registered address. There was no appearance on its behalf at that stage. At the end of the

hearing, I indicated my intention to grant injunctions to restrain the First Defendant and the Company from trespassing, but I delayed formalising my decision and the delivery of my written judgment as other motions were pending, and it was hoped that the matters would be addressed comprehensively at the same time. On 6 August 2024, following the 30 July hearing of the current applications (at which stage the Company had belatedly entered an appearance in these proceedings), I delivered judgment on the earlier application for interlocutory injunctive relief, granting such orders to require the First Defendant and the Company to vacate the Property pending trial (subject to a stay to 31 October 2024).

4. Following the institution of these proceedings, and also following my indication in open Court that I was minded to grant such injunctive relief, the First Defendant sold the Company to a Northern Ireland purchaser ("the Purchaser"). The Plaintiff does not suggest that the Purchaser has acted other than in good faith but does suggest that the transaction was an attempt by the First Defendant to prevent the enforcement of any damages or costs orders obtained by the Plaintiff against the Company.

5. The Plaintiff's grounding affidavit notes that:

a. the First Defendant changed the Company's registered office after the institution of these proceedings "*to take effect retrospectively*", which he believes to have been a deliberate attempt to frustrate these proceedings (although he does not explain the basis for his belief or how any such change of address, retrospective or otherwise, could have that effect). Notwithstanding the change of the Company's registered office (to a Tipperary address) the First Defendant continues to advertise haulage services in the Kilkenny area.

b. two weeks after the injunction hearing, the First Defendant resigned as secretary of the Company and was replaced by a Northern Ireland woman (who we now know as the Purchaser), and, earlier this year, the Plaintiff discovered that an asset of the

company, a Renault truck, was for sale in County Derry, although registered in the Republic of Ireland. The Company may have other assets, as its financial statements for the year ended 30 September 2023 suggested a net asset balance of €31,905.

c. there are multiple inconsistencies in the Company's filings as to the First Defendant's current shareholding and role in the Company. For example, contrary to other filings, he signed a form B1C declaration as its secretary on 7 May 2024, which appears inconsistent with his statement to the High Court the following day that he had "*sold the company*", and his mobile number remains the sole contact number on the Company's website (although the First Defendant denies any continuing involvement and says that the Company's new owners have simply not updated the website yet).

On the basis of the foregoing points, the Plaintiff assumed that the First Defendant remained a 51% shareholder and the person in effective control of the Company and was seeking to put assets out of reach in anticipation of adverse cost and damages awards. The Plaintiff's grounding affidavit also argued that the proceedings initiated by the First Defendant were frivolous and vexatious and/or an abuse of process. He estimates the cost of defending them as being in the region of €70,000 in addition to the estimated cost of these proceedings as being €50,000 to date (plus VAT in each case).

6. The First Defendant's replying affidavit dismissed the Plaintiff's averments in respect of the Company as an:

> "*irrelevant statement regarding a previous company which I no beneficial links or control, shares or an interest in the said company, but at the time I was within company rights/laws to change or alter details to suit the viability of the company as no order was in place to say otherwise*" [*sic*].

7. The First Defendant's affidavit also dismissed the Plaintiff's other averments in relation to filings and its assets as irrelevant, since the Company was sold and controlled by new owners – he claimed to have no assets in the Company, that it was no longer of interest to him and that

he was not an agent or shareholder. The First Defendant's affidavit also exhibits a copy of his affidavit sworn in support of his application pursuant to section 49 of the Registration of Title Act, 1964 (as amended), for registration of title to the Property based on his alleged possession. I had commented on the previous failure to exhibit that affidavit in my decision in respect of the injunction application. In fact, the section 49 affidavit does not advance matters in terms of the merits of the adverse possession claim. The First Defendant again asserts possession since 2011 and claims to have spent substantial sums on the Property but fails to substantiate either assertion with detailed particulars or documentation. Furthermore, while claiming that he was never asked to vacate the Property or pay rent over the years, he fails to refer to the possession proceedings initiated against him by the original mortgagee, which appear to have resulted in a previous order for possession (although he disputes this). Accordingly, having reviewed the affidavit, it does not cause me to reassess my previous conclusion that the First Defendant has failed to demonstrate an arguable case for interlocutory purposes.

8. On 24 July 2024, Counsel for the Company appeared before the Court, indicating their client's intention to come on record. I gave directions with regard to the entry of an appearance and the filing of a detailed affidavit concerning, *inter alia*, the Company's current ownership and management and the details of the sale of the Company. An affidavit was filed on the Company's behalf to the following effect:

a. It was sworn by the Purchaser, a Tyrone businesswoman, who is now a director of the Company and who has been involved in the haulage industry for more than twenty years. She explained that she explored the option of expanding her own business into the Republic of Ireland:

> "*primarily in order to comply with EU transport regulations but also as it made logistical and practical sense given the increasing demand for haulage services in the Republic of Ireland.*"

b. She became aware of the Company being sold via a popular website and contacted the advertiser, who, she discovered, was the First Defendant (who she appears to have already known). She met him and his accountant on 30 April 2024. She was satisfied that it was an attractive business opportunity. She discussed the proposal with her own accountant, and they undertook what appear to have been extremely rudimentary checks. She was not aware of any pending litigation, including these proceedings. She agreed to proceed with the purchase of the shareholding of the Company, with a view to taking over its executive control and directorship.

c. Remarkably, the purchase agreement was entirely oral. The Purchaser has not identified any representations or warranties in relation to or in advance of the sale. Given the low price and her perception that she was just buying the Company's goodwill, the Purchaser did not see any need to commit the terms to writing. A price of €9,000 was agreed. €5,000 was to be paid immediately and the balance on receipt of various documents. The €5,000 was transferred to the First Defendant on 1 May 2024, but the documents have not been received, and the Purchaser has withheld the balance.

d. At all times, it was agreed that the Company was being sold as "*a going concern*" and the Purchaser was not buying its physical property. The First Defendant offered to include a Renault Truck in the sale, and she initially took the vehicle on trial while she contemplated acquiring it. However, she concluded that the vehicle would not be suitable, and it was agreed that the vehicle would not form part of the sale. Because the vehicle was in Northern Ireland with the Purchaser and the First Named Defendant no longer wished to retain it, the parties agreed that, rather than returning the vehicle to Kilkenny, the Plaintiff would offer the vehicle for sale on the

open market for the First Named Defendant and the proceeds would be returned to him. It does not appear to have been sold yet.

e. It was never envisaged that the Purchaser or the business would occupy the Property and it has not done so since the sale of the Company - it was always her intention to trade in Monaghan, but her change of registered office was delayed as she finalised a lease.

f. She was not aware of these proceedings until she was served with motion papers, which she only saw on 11 June 2024. She immediately contacted the First Defendant. He assured her that the dispute did not concern her and would be taken care of and that she should not worry. She was misled by the First Defendant in that he misrepresented/failed to disclose the issue or the litigation (however, the 11 June 2024 communication appears to be the only "misrepresentation" specifically identified by the Purchaser, but it was made after the sale of the Company).

g. She and the Company had been innocently caught up in the proceedings due to the First Defendant's misrepresentations and misleading explanations and it would be unfair and disproportionate for the Company's assets to be used as security for costs, as the Company was an innocent party and a stranger to many facts alleged in the proceedings. She says that the Company does not operate a business from or occupy the Property and has not done so since its sale to her, and that therefore it is not necessary for the Court to put in place interlocutory orders restraining trespass on the Company's part.

9. No further affidavits were exchanged, and, for the purposes of the application, the Plaintiff did not take issue with the Purchaser's *bona fides* or the plausibility of her account, although he did continue to seek the two interlocutory reliefs and relied on the Purchaser's evidence in that regard and as casting further doubt on the First Defendant's *bona fides*.

The Law

10. Orders "freezing" assets pending trial are only granted in limited circumstances. In *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645 ("*Third Chandris*"), at pp. 668-669, Lord Denning M.R. listed relevant criteria, an analysis endorsed by the Supreme Court in the seminal Irish authority, *O'Mahony v Horgan* [1995] 2 IR 411 ("*Horgan*"). In brief, the plaintiff must: (i) disclose all material facts within his knowledge; (ii) particularise his claim, stating the grounds of claim and the amount, and fairly stating points made against the claim by the defendant; (iii) explain the basis for believing that there are assets in the jurisdiction; (iv) establish a risk of the assets being removed before the judgment is satisfied (the mere fact of a foreign defendant is not sufficient); and (v) give an undertaking as to damages. The Irish courts lay particular emphasis on the fourth criterion (likelihood of fraudulent dissipation). As Hamilton C.J. observed in *Horgan* (at p. 418):

> "*a Mareva injunction will only be granted if there is a combination of two circumstances established by the plaintiff i.e. (i) that he has an arguable case that he will succeed in the action, and (ii) the anticipated disposal of a defendant's assets is for the purpose of preventing a plaintiff from recovering damages and not merely for the purpose of carrying on a business or discharging lawful debts*".

11. The need for evidence of risk of dissipation was reiterated. in *Tracey v Bowen* [2005] 2 IR 528. Clarke J. (as he then was) cited the observation of O'Sullivan J., in *Bennett Enterprises Inc v Lipton* [1999] 2 IR 221, at p. 228, that the dissipation of assets in the ordinary course of business is not enough – the concern is to prevent the defendant seeking to evade his obligations. Authorities such as *Fleming v Ranks (Ireland) Limited* [1983] ILRM 541 and *Polly Peck International plc v Nadir* [1992] 4 All ER 769 also show that a Mareva injunction is not intended to provide pre-trial security but only to prevent reasonably anticipated dissipation.

The Plaintiff's Submissions

12. The Plaintiff emphasised the timing of the sale of the Company. Two weeks earlier, at the end of the interlocutory injunction hearing, I had indicated that I was disposed to granting interlocutory relief, meaning that the Company was liable for trespass and for some the Plaintiff's costs. Two weeks later, the First Defendant met the Purchaser, misled her, misrepresented the position, failed to disclose these proceedings and (in the words of Counsel for the Plaintiff) told her that "*It's okay. It's nothing -- you've nothing to worry about here.*" The intention to dissipate was also confirmed by the fact that the truck was for sale. Dissipation clearly took place, and the intention was apparent because the First Defendant knew the Company was liable for trespass and that the Company would be liable for a portion of the costs.

13. In response to my observation that, if the parties entered a business transaction for legitimate business reasons, then that would not be a basis for a freezing order, the Plaintiff submitted that for the transaction to be legitimate it would have to be on the basis of full disclosure. Because there was no disclosure, the transaction cannot be legitimate. He submitted that there is no innocent explanation for a misrepresentation or a failure to disclose. The Plaintiff submitted that the Court had already found the Company liable for trespass. That finding entitled the Plaintiff to seek costs from the Company. A dissipation of assets had clearly taken place (apparently by virtue of the sale of the Company and the attempted sale of the truck). While accepting that the party seeking a freezing order must establish a likelihood that the assets would be dissipated with the intention that they would not be available to meet a decree, he suggested that the Purchaser's own evidence showed that the First Defendant deliberately misled her, thus demonstrating an intention to dissipate assets, evidently with the intention of taking them out of reach of a decree.

14. In response to the Company's affidavit, the Plaintiff submitted that: (a) the affidavit provided no legal certainty about the Company's purported sale; and (b) it was clear that the First Defendant made misrepresentations to the purchaser. Accordingly, the sale could be voided for misrepresentation. The Plaintiff was concerned to proceed with the application for the Freezing Order against the Company to protect his position against that risk. In summary, the Plaintiff submitted that he had established dissipation and the First Defendant's intention to put assets out of reach. The Court could make a freezing order in respect of the Renault truck for €14,000, and the balance (€4,000) of the sale price of the Company which its Purchaser was withholding.

The Company's Submissions

15. The Company submitted that the key issue was whether the Court was satisfied that the sale was *bona fide*. It argued that the proposed sale of the truck and the issues with the Property had nothing to do with the Purchaser and were excluded from the sale of the Company. The Purchaser had bought "*the company asset as a going concern*" and was not availing of its property rights or assets nor trespassing on the Property.

The First Defendant's Submissions

16. The First Defendant confirmed in submissions that the truck which was to be sold was a Company asset and that he had no control over or interest in its assets since the Company was sold. His attempts to sell the Company commenced before and were unrelated to the litigation. He had decided to sell the Company entirely independently of the litigation because it was of no use to him. It hadn't been trading for some time. Accordingly, it was wrong to suggest that he was putting assets out of the reach of the creditors. As far as he was aware, the

truck had not yet been sold and was not in his possession and he had no intention of selling it. It belonged to the Company, rather than to him.

Discussion

17. A crucial feature of the current application is that the relief is sought against the Company alone, not against the First Defendant (against whom the Plaintiff's submissions were primarily directed). Notwithstanding the extraordinary circumstances surrounding the sale of the Company (by means of a popular website, without a share purchase agreement or any other meaningful documentation, disclosure or due diligence, and at a nominal price), the Plaintiff has not – at least for the purposes of the current application – sought to impugn the Purchaser's *bona fides* or the validity of the sale. He has solely sought to impugn the motivation of the Company's *former* owner and management and to raise the spectre that the transaction *could* ultimately be set aside, which *could* then lead to a risk of further dissipation.

18. A second preliminary point is that while it is not necessary or appropriate for me to comment on the *bona fides* of the transaction, it is relevant to note curious features of the transaction which are relevant to the submissions which I have heard. The position is greatly confused by the surprising absence of written purchase agreement documentation and by the ambiguous nomenclature in the Purchaser's affidavit, which highlights her naivety in entering into such an agreement without legal advice and due diligence. She evidently did not understand the potential legal ramifications depending on how the transaction was structured. She committed to a very modest price for the Company - €9,000, of which €4,000 is outstanding. According to the Company's counsel, her main concern was to buy:

> "*the going concern and to have an entity that she could use in terms of her British company that would complement the northern one*".

19. The Purchaser maintains that she has bought the Company, including its shares but not its assets, on the basis that she acquired it "*as a going concern*". However, she seems to be confused by the accounting concept of a going concern (relating to the preparation of corporate accounts on the assumption that a business will continue to trade, avoiding a fire sale which would reduce asset values). That concept has no relevance in a share sale context. Perhaps she envisaged the sale of the goodwill of the business rather than the share capital of Company itself. If that was the deal, then it would have had different consequences. However, that is not what she has said, and her inconsistent explanations of the basis for the transaction are flawed from accounting, company law and governance perspectives.

20. In particular, if, as she says, the Purchaser has acquired the Company's entire share capital, then all Company assets (including the Renault truck) and liabilities (including any liability to the Plaintiff in these proceedings) necessarily remain with the Company. There is no need for an assignment as such assets and liabilities remain vested in the Company, irrespective of any sale of shares in the Company itself.

21. I emphasise the Purchaser's evident confusion as to the basis for the sale because of the controversy about the proposed sale of the Company's Renault truck (which the Plaintiff relied upon as a perceived attempt by the First Defendant to dissipate assets).

22. The incongruity of the overall transaction is increased by the low sale price - €9,000 for the entire Company, which, in my view, would necessarily include the €14,000 truck as well as the rest of the business (and the First Defendant seems to appreciate this, even if the Purchaser does not). The price would appear even more surprising if the Company retains the net assets of circa €32,000 shown in its September 2023 financial statements and, although this must surely have been an issue in any arm's length sale negotiations, neither defendant has cast light on the current position in that regard and, in the event of any diminution in the net asset position, the explanation for any such diminution (conversely, if the Company retains the net

assets as per its last financial statements, it could suggest that the Purchaser may have received a better bargain than appreciated, apart from the litigation exposure).

23. In any event, the Purchaser does not seem to have appreciated that, from a governance perspective, parties to a share sale cannot simply agree that the vendor (even if it owns the Company) can appropriate assets owned by it, carving them out of the sale. Nor, in fairness, did the First Defendant suggest that that was his intention. Under Irish company law, company assets remain such (irrespective of changes in the ownership of shares in the company), unless the Company lawfully disposes of them, either by scrupulously following legal procedures, enabling the declaration of a dividend or the making of a distribution, or by a good faith asset disposal (in which case, corresponding value should presumably have been received by the Company), and potential tax implications would have needed to be addressed. Accordingly, the Purchaser's account of the undocumented transaction raises more questions than it answers, possibly due to unfamiliarity with basic legal, company law, tax, accounting and commercial requirements.

24. For the reasons I have outlined, I doubt the legal basis for the Purchaser's statement that the Renault truck owned by the Company (worth circa €14,000) was to be excluded from the sale and that the proceeds of its sale in Northern Ireland would be retained by or returned to the First Defendant. The Company retains its assets and liabilities irrespective of whether its own shares change hands. The sale of the entire share capital does not change that position. The Purchaser could have structured the deal differently. She could have bought the business or goodwill rather than the shares in the Company, excluding the corporate entity and its assets and liabilities. That might have been a better way of achieving her stated aims. However, that is not what she says she did. Her affidavit is contradictory because she claims to have bought the Company, but then claims to only be purchasing it as a going concern, a meaningless qualification. Her claim that she did not purchase the Company's physical property is

inconsistent with her having acquired all shares in the Company itself, which necessarily means that what is now "her" Company retains ownership of its assets (and liabilities) as at the time of sale. The Company could have lawfully divested itself of assets before the share sale. However, that did not occur.

25. The alternative (sale of goodwill) scenario was hinted at by the Purchaser's submissions, but it was still suggested that it was a share sale:

> "*MS. MURPHY: There's no written purchase agreement. That is what it is, Judge. I can't say that there is. There's a verbal agreement for the name and goodwill of the company in relation to its -- the entity being in the south, which was --*
> *JUDGE: When you say the name and goodwill, was she intended to become the hundred per cent shareholder?*
> *MS MURPHY: Absolutely.*"

26. In any event, the Purchaser's submissions were that the Purchaser's dealings, whether properly documented or not, were done in good faith, and the Purchaser resisted the application on that basis. She also submitted that she had not been on notice of these proceedings. However, there was no suggestion of any failure by the Plaintiff to serve the Company at its then registered office (the Property in issue in the proceedings). Accordingly, the party to the proceedings was duly served and was on notice. Even if there is substance in the Purchaser's complaint that she was not aware and may have been misinformed by the First Defendant, that would not undermine the validity of the service effected by the Plaintiff on the Company. It is the Company, not the Purchaser, which is the party to the litigation. The failure to inform its new owners is a purely internal communication issue for the Company, an issue between its past and current owners.

27. I should also deal with certain aspects of the Plaintiff's submissions which, in my view, overstate the factual or legal position as it currently stands:

a. Firstly, I have not given summary judgment against any defendant. My indication of my likely decision on the injunction (subsequently confirmed in my written judgment) confirmed my conclusion that the Plaintiff had demonstrated *a strong arguable* case of trespass by the First Defendant and the Company. That was a provisional finding for the purposes of the interlocutory injunction application. It does not prevent the defendants from litigating those issues at trial and it is possible that a different conclusion may be reached at trial with the benefit of more extensive evidence, cross examination and more detailed legal submissions. It is only correct to say that my interlocutory ruling concluded that the Plaintiff has established a strong case. The merits will be determined at trial. It remains open to the defendants to contest the trespass claim at the trial of the action. Even if the Plaintiff wins at trial, his damages will be limited to the period of trespass and to costs – there is no suggestion that the Company is continuing to trespass.

b. Although there are certainly reasons for suspicion, on the basis of the current evidence, and without the benefit of cross examination, I am not satisfied that the Plaintiff has discharged the onus of proving that the First Defendant's motivation in selling the Company was to prevent the enforcement of any damages or costs award in these proceedings. However, even if that had been the evidence, it could not logically justify a freezing order *against the Company*, now that the latter is under new ownership and management, whose integrity the Plaintiff has not sought to impugn in the proceedings to date.

c. The Plaintiff has not satisfied me that there is any reason to anticipate that the share purchase agreement was procured by misrepresentation or nondisclosure and that it is likely to be set aside. The only specific assurances or representations referenced in the Purchaser's affidavit seem to have been made *after* she was served with the legal

proceedings and *after* the sale of the Company. Accordingly, there is no evidence before the Court to suggest that the sale was procured on foot of a specific misrepresentation. Both the Purchaser and the Plaintiff referred to the First Defendant having failed to disclose the issue, but neither identified the legal basis on which any duty of disclosure arose. It is not obvious to me that this is one of the limited categories of "*uberrimae fidei*" contracts, where parties must disclose material circumstances to each other. Normally, a share purchase agreement will contain detailed warranties and will be accompanied by a due diligence process, including disclosure by the vendors in respect of the corresponding warranties. However, there was no written agreement, nor any meaningful due diligence or disclosure. Accordingly, unless something was expressly or implicitly represented or warranted in the pre-sale discussions which has not yet been put in evidence, it is not obvious to me that there is any basis to impugn the transaction on the basis of either misrepresentation or nondisclosure. The First Defendant may argue that the traditional common law rule of *caveat emptor* should apply. Even if there had been misrepresentation or disclosure, it is not obvious to me that this would mean that the transaction was likely to be voided. In any event, a disclosure issue on the sale would be a matter between the Purchaser and the vendor, not between the plaintiff and the parties to these proceedings. Accordingly, the Plaintiff's attempt to obtain relief against the Company on the basis of alleged misrepresentation and nondisclosure by its former owner to its current owners seems to me to be fraught with legal and factual difficulties. It does not help the Plaintiff establish a basis for relief against the Company on the basis of the likelihood that it will fraudulently dissipate its assets.

28. The Plaintiff has raised legitimate concerns about the timing of the sale of the Company. However, although his statements to the Court were not always set out on affidavit, the First Defendant maintained that he had been intending to sell the Company for some time, and that

it had no longer been trading. The evidence is inconclusive, and the issues would benefit from more detailed examination and cross examination. It is also important to acknowledge that the First Defendant openly referred in submissions at the injunction hearing to his intended disposal of the Company. That reference makes it harder to contend that the object of the transaction was to put his assets beyond the reach of creditors. The Plaintiff bears the onus of showing that the intention was to put assets out of reach, but he has not convinced me that it is implausible that the First Defendant may have sold the Company for genuine business reasons. As matters stand, I am not satisfied that the Plaintiff has discharged that onus of proving an intention to dissipate assets.

29. The sale of the shares in the Company was clearly a very informal casual transaction. That may or may not give the Purchaser recourse against the First Defendant in the absence of a written agreement containing detailed warranties. Without full particulars, I cannot assess the strength of any such claim. However, whether or not there is a misrepresentation or warranty claim is a matter between the parties to the sale. I do not see how that issue assists the Plaintiff, who is not a party to the transaction, in meeting his onus of showing that the First Defendant's motivation in selling the Company was to dissipate his assets. Even more fundamentally, if that were the case, at its height, it might suggest an intention to dissipate on the First Defendant's part. However, the Plaintiff is not seeking a freezing order against him. Such relief is only sought against the Company, but no intention on the part of the current owners or management of the Company has been demonstrated. The possibility that the sale could be rescinded, returning the Company to the First Defendant's ownership and control is, in my view, far too speculative to justify a freezing order against it.

30. I also consider that the application is flawed as the Plaintiff is seeking the order against the Company, whereas his allegations are largely aimed at the First Defendant, but no such relief was sought against him. Furthermore, to the extent the application for a freezing order is

based on the contention that the First Defendant cannot be trusted, the Company appears to be under new ownership and management due to the sale. There is no evidence that its current owners and management have demonstrated an intention to dissipate. At most, the Plaintiff was inviting the Court to infer such an intention on the part of the First Defendant. However, if the First Defendant is no longer an owner, manager or director of the Company, then his actions cannot entitle the Plaintiff to a freezing order.

31. I accept that the Plaintiff is also presumptively entitled to an award of costs against both defendants in respect of the costs of the interlocutory injunction application. However, the Company's liability is not affected by changes on its share register. The Plaintiff can still enforce any award against the Company, irrespective of such shareholder changes. The Purchaser's ignorance of the Company's exposure at the time of the share sale is a matter between her and the First Defendant as vendor. The sale of the Company does not change the position as between it and the Plaintiff.

32. Counsel for the Plaintiff acknowledged that he did not have any dispute with the Purchaser, and also proposed to refine the freezing order to limit it to the outstanding €4,000 balance still due to be paid by the Purchaser to the First Defendant or to the value of the Renault truck (although this position was at variance with the Notice of Motion, the factual position had changed with the disclosure of details of the sale). However, I do not see the basis for any such order since no freezing order has been sought or granted in respect of the First Defendant himself.

Conclusion

33. The position in terms of the five criteria outlined in *Third Chandris* is as follows:

(i) I am satisfied that the Plaintiff has disclosed all material facts within his knowledge.

(ii) I am not satisfied that the Plaintiff has sufficiently particularised his claim against the Company (as opposed to the First Defendant), stating the grounds of claim against the Company and the amount, and fairly stating the points made against the claim by the Company. Since it seems to be accepted that the Company is no longer trespassing at the Property, at the moment, the Plaintiff's sole claim against the Company appears to be a historic claim for trespass, which he had made no attempt to quantify, and a possible claim in respect of its share of the liability for the costs of the litigation to date.

(iii) while the infamous Renault truck appears to be in Northern Ireland and it was not entirely clear what other assets the Company retained or where they are located, in all the circumstances, I accept, on the balance of probabilities, that the Company has(or should) have assets within the jurisdiction.

(iv) It appears that the Renault truck has not been sold but, in any case, the Plaintiff has not satisfied me that any such sale would have been for the intention to dissipate assets. The Plaintiff doubts the veracity of the First Defendant's explanation for his sale of the Company, but his explanation is not completely implausible, and I would not disregard it on the basis of the current evidence without cross examination. More importantly, the Freezing Order is sought against the Company, not against the First Defendant. The Plaintiff has not put forward any grounds for suspecting that its current owners and directors intend to dissipate assets to prevent the enforcement of any award of damages or costs which might be made against it.

(v) The Plaintiff neglected to offer an undertaking as to damages in his grounding affidavit (but I do not anticipate that there would be any issue in

34. To say the same thing in terms of the criteria summarised in *Horgan*, the Plaintiff has established an arguable case that he will succeed, to some extent, in the action against both the Company and the First Defendant. However, he has not satisfied me that any currently

anticipated disposal of assets *by the Company* is for the purpose of preventing him from enforcing any judgment and not merely for the legitimate business purposes.

Conclusion

35. On the basis of the evidence as it stands, I will refuse the application for a freezing order. The Plaintiff may bring a new application for a freezing order against the Company (or against the First Defendant) if evidence emerges which would justify such an application.

Addendum

An earlier version of this judgment has been corrected pursuant to Order 28 Rule 11.