[2020] IEHC 684

THE HIGH COURT

[2020 No. 1299 P]

BETWEEN

THOMAS MCALISTER

PLAINTIFF

AND

CHURCHES ESTATE AGENTS LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 21st day of December, 2020

SUMMARY

1. Is a plaintiff entitled to a Mareva injunction (a freezing order) against the assets of a defendant where there is no evidence of an intention on the part of the defendant to dissipate his assets to defeat the plaintiff's claim, but there is evidence of alleged past dishonesty on the part of the defendant?

   That is the issue for consideration in this case.

2. The plaintiff ("Mr. McAlister") claims that he paid €150,000 to the defendant auctioneers ("Churches Estates") in connection with the purchase of two Dublin pubs which purchase never completed. The first one is the Dark Horse Pub (and adjoining property) on Carysfort Avenue in Blackrock with a proposed price of €2.6 million. The second pub is the Kestrel Pub (and adjoining property) in Walkinstown with a proposed price of €1.95 million. He has instituted proceedings against Churches Estates for the return of the money but is concerned that Churches Estates might dissipate its assets before he obtains the judgment to which he believes he is entitled.

3. The question for this Court is whether Mr. McAlister is entitled to a Mareva injunction restraining Churches Estates from reducing its cash assets below the sum of €150,000, in advance of the hearing of the action, in light of the actions of Churches Estates, which Mr. McAlister alleges amount to dishonesty.

4. For the reasons set out below, this Court concludes that the law does permit the granting of a Mareva injunction, even where an intention on the part of the defendant to dissipate his assets has not been established. However, while this Court concludes that it is unclear why certain monies have not been returned by Churches Estates to Mr. McAlister or to Carysfort Avenue Limited (the alleged corporate vehicle for the purchase of the pubs, in which he is a 50% owner), this case does not involve acts or omissions, on the part of Churches Estates, of sufficient concern to amount to *prima facie* evidence of dishonesty so as to justify the granting of a Mareva injunction.

BACKGROUND

5. Mr. McAlister is a builder, albeit that for a couple of weeks in 2018 he had been involved in the running of the Dark Horse Pub with the consent of the receiver of that pub, as he had hoped to either lease or buy that pub. Churches Estates is a firm of auctioneers with 15 employees and has six branches throughout Dublin, including one beside the Dark Horse Pub on Carysfort Avenue in Blackrock.

6. The Statement of Claim was served by Mr. McAlister on the 21st February, 2020 claiming the return of €150,000 which had been paid by him to Churches Estates in relation to the purchase of the Dark Horse Pub and the Kestrel Pub. No defence has been filed by Churches Estates despite demands for same by Mr. McAlister. Accordingly, on the 11th August, 2020, Mr. McAlister issued a motion for judgment in default of defence, which motion is due to be heard on the 18th January, 2021.

7. These proceedings for the grant of a Mareva injunction were issued on the 12th November, 2020.

LAW RELATING TO MAREVA INJUNCTIONS

8. The law relating to Mareva injunctions was set out by Hamilton C.J. in the Supreme Court case of *O'Mahony v. Horgan* [1995] 2 I.R. 411 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."

9. It is clear from the reference by Hamilton C.J. to the '*purpose'* of the disposal, that the disposal must be with *the intention* of preventing the plaintiff from recovering on any future judgment. This is clear from pp. 419 and 420 of Hamilton C.J.'s judgment:

> "Consequently, the cases establish that there must be an intention on the part of the defendant to dispose of his assets with a view to evading his obligation to the plaintiff and to frustrate the anticipated order of the court. It is not sufficient to establish that the assets are likely to be dissipated in the ordinary course of business or in the payment of lawful debts.
>
> […]
>
> Before being entitled to the relief sought by him, [the plaintiff] must establish that there was a likelihood that the assets would be dissipated with the intention that they would not be available to meet any decree or part of a decree ultimately made against the [defendant] in the proceedings." (Emphasis added)

10. However, Mr. McAlister also relies on the High Court judgment of Kearns J. in *Aerospares Limited v. Thompson & Ors*. [1999] IEHC 76 which considers the possibility of a Mareva injunction being granted even where an intention to dissipate assets on the part of the defendant has not been established.

If evidence of past dishonesty, no need to show intention to dissipate assets to get Mareva?

11. In that case, Kearns J. expressed himself open to renewing a Mareva injunction (which had previously been granted) without the necessity for any further specific evidence on the risk of dissipation of the assets, since in that case there had been evidence of past

dishonesty. At page 5 of his judgment, he quoted with approval an extract from Gee, *Mareva Injunctions and Anton Piller Relief* (4th Ed., p. 198) that:

> "[I]f there is a good arguable case in support of an allegation that the Defendant has acted fraudulently or dishonestly (e.g., being implicated in an ingenious scheme for the misappropriation of funds belonging to the Plaintiff), or has acted unconscionably, then it is unnecessary for there to be any further specific evidence on risk of dissipation for the Court to be entitled to take the view that there is a sufficient risk to justify granting Mareva relief."

12. Kearns J. does not appear to have renewed the injunction in that case, as his judgment concludes with the statement that he was willing to discharge the previously granted Mareva injunction on receipt of satisfactory undertakings from the defendants. Nonetheless, this Court agrees with the approach adopted by Kearns J. This is because the whole purpose of a Mareva injunction is to ensure that a plaintiff is not left in a situation where, after proceedings have issued but before judgment is given, a defendant deprives the plaintiff of the opportunity to recover on that judgment by dissipating his assets. Accordingly, it seems to this Court that it is irrelevant whether the risk of this dissipation is established by showing an intention on the part of the defendant to dissipate the assets or by past dishonesty on the part of the defendant (which gives rise to the same risk).

13. On this basis, it seems to this Court that, in addition to the grounds for a Mareva injunction set out by Hamilton C.J. in *O'Mahony*, a Mareva injunction will also be granted where a plaintiff has

- an arguable case that he will succeed in the action, and,

- evidence has been produced of dishonesty on the part of the defendant, such as to justify the granting of a Mareva injunction, even though there is no specific evidence of an intention on the part of the defendant to dispose of his assets for the purpose of preventing the plaintiff from recovering damages,

- provided that the evidence of dishonesty is such as to lead a court to conclude that there is a risk that the defendant will dissipate the assets so as to frustrate a future court order.

This then raises the next question.

What evidence of past dishonesty is sufficient to justify the grant of a Mareva injunction?

14. The Aerospares case involved three former employees of the plaintiff, Aerospares Limited, who left that company to compete in the same business of their former employer - the purchase and sale of aircraft parts. The case involved a claim that the former employees had perpetrated a fraud on their former employer, Aerospares Limited, by causing monies due from customers to Aerospares Limited to be channelled to a company owned by them (Aviation Display Limited).

15. Kearns J. was open to granting a Mareva injunction based on the evidence of dishonesty before him and in the context of the current case, it is relevant to note what evidence of dishonesty was sufficient to justify the grant of a Mareva injunction in that case.

16. First, the defendants had done something which immediately raised considerable suspicion, namely they had incorporated a company in the Seychelles with exactly the same name (i.e. Aerospares Limited) as their former employer. They were involved in transferring funds (allegedly intended for the plaintiff from its customers) through an account in Barclays Bank in London in the name of that newly incorporated company. Kearns J. noted that he was:

> "not given any good reason why it was necessary for an identically named company to be set up in the Seychelles involving Hungarian trading contacts for the purposes of receiving in London payments destined either for Aviation Displays or persons connected with it. Equally, no explanation has been given as to why Aviation Display Limited could not itself have opened its own London account. As far as any overseas customer was concerned, it could still reasonably believe it was dealing with the Plaintiff through its Barclays' account in London."

In particular he concluded that it was:

> "equally extraordinary that such circuitous steps required to be taken by the Defendants to receive these monies if they were acting *bona fide."* (*Emphasis* in original)

17. Secondly, Kearns J. concluded that there was a good arguable case that the defendants had "*acted dishonestly in breach of contract and in breach of fiduciary duty*". He also concluded that they had "*diverted monies wrongfully from the Plaintiff*".

18. Thirdly, there was evidence of a fax sent from Aviation Display's premises to a customer of the plaintiff stating that the plaintiff could not meet further orders and that the plaintiff should be replaced with Aviation Display. This fax was sent on the plaintiff's headed notepaper and this was stated by Kearns J. to be "*a forgery*".

19. Fourthly, there was evidence of another fax sent by one of the defendants to a customer of the plaintiff in which it was represented that Aviation Display was part of the plaintiff group of companies, which Kearns J. noted was "*blatantly dishonest*".

20. This therefore was the very significant extent of the evidence of dishonesty on the part of the defendants, which, not surprisingly, Kearns J. concluded was sufficient for him to grant a Mareva injunction, without his requiring, in addition, evidence of an intention on the part of the defendants to dissipate their assets.

21. Having considered the law, this Court will next consider the details of the present case.

MR. MCALISTER'S CONCERNS ABOUT CHURCHES ESTATES

22. In November 2020, Mr. McAlister discovered that Churches Estates was in arrears of rent, in the sum of €56,000, in respect of one of its leased premises (the one on Carysfort Avenue), which raised concerns for him regarding the return of his money alleged to be due from Churches Estates. However, Churches Estates avers that this premises on Carysfort Avenue in Blackrock is only one of six premises leased by it and that it is the only one of the six which is in arrears of rent. In any case it says that there is a good explanation for the arrears, i.e. that there is a dispute regarding rent and that it relates to a failure to reach agreement on a reduced rent, with the receiver managing the property, arising from the Covid-19 pandemic.

23. Mr. McAlister also became concerned about the return of his money when he discovered from the accounts of Churches Estates filed in the Companies Office for the years ending 31st March, 2018 and 31st March, 2019 that it had, what he describes as "*significant liabilities*". In reply to this claim, Mr. John Bayle ("Mr. Bayle"), the secretary of Churches Estates, avers that Churches Estates is fully tax compliant and has a 2020 Tax Clearance Certificate.

24. Mr. McAlister is also concerned by two statements (which are considered in detail below) made by Mr. Bayle. The first statement was that some of Mr. McAlister's money "*was just not there*" when Mr. McAlister sought its return. The second statement by Mr. Bayle was that some of Mr. McAlister's money had been used as a deposit for the purchase of the Kestrel Pub, which money had been forfeited by the vendor of the pub, when the sale did not complete.

25. On the basis of the foregoing evidence, Mr. McAlister avers that he believes that there is:

> "a real danger that any money currently held by [Churches Estates] could be misappropriated in order to avoid paying [Mr. McAlister] on foot of any Judgment arising out of these proceedings when they are ultimately determined."

26. Crucially, no evidence has been produced to this Court of an *intention* by Churches Estates to dissipate its assets in order to deprive Mr. McAlister of the ability to recover judgment. Indeed, this appears to have been accepted by counsel for Mr. McAlister as she placed particular reliance upon the *Aerospares* case in her legal submissions, which concentrates on the alleged dishonesty of the defendant, in the absence of evidence of any intention to dissipate assets.

27. It follows that for Mr. McAlister to be successful in his application for a Mareva injunction, he must show that there is evidence of dishonesty on the part of Churches Estates sufficient for this Court to dispense with the usual need to establish an intention to dissipate assets.

28. Against this background, this Court will consider the evidence and in particular the evidence of alleged dishonesty.

THE EVIDENCE

29. Based on the controverted and uncontroverted averments in the affidavits filed by Mr. McAlister and Mr. Bayle, this Court can make some *prima facie* conclusions regarding the evidence, pending a full hearing.

Proposed purchase of Dark Horse Pub

30. Mr. McAlister and Mr. Bayle discussed organising a group of investors to purchase the Dark Horse Pub. Mr. McAlister directly paid Churches Estates, between August 2018 and February 2019, the sum of €54,000 to enable the purchase of the Dark Horse Pub proceed. Mr. McAlister claims that this sum was paid to cover the fees of the finance company which was to provide the loan. However, Mr. Bayle does not accept that the money was provided for this purpose, but rather to fund the purchase of the property. In any case, no contract for the purchase of the Dark Horse Pub was ever signed by Mr. McAlister (or any corporate vehicle) and no funding was ever provided for its purchase and the sale never proceeded. More importantly, this sum of €54,000 has not been returned to Mr. McAllister, even though it is clear from the correspondence (referenced below) that Mr. McAlister did not want to progress with the sale and the pub went sale agreed to a third party in November 2020.

31. While Mr. Bayle expressly avers that Carysfort Lounge Limited (a company which by 18th June, 2019 was jointly owned by Mr. Bayle and Mr. McAlister) was the proposed purchaser of the Kestrel Pub, he appears to imply on affidavit that this company was also intended to be the purchaser of the Dark Horse Pub (since at para. 28 of Mr. Bayle's first affidavit, he states that the delay in the purchase of the Dark Horse Pub was "*due to queries that had been raised by Carysfort Lounge Limited regarding serious title defects").* On this basis it seems that Mr. Bayle is suggesting that if money is due to be repaid to someone in relation to the failed purchase of the Dark Horse Pub, it is due to Carysfort Lounge Limited.

Proposed purchase of Kestrel Pub

32. Between March 2019 and April 2019, Mr. McAlister paid directly to Churches Estates the sum of €96,000 in relation to a similar agreement with Mr. Bayle to organise a group of investors to buy the Kestrel Pub. Again, Mr. McAlister claims that this sum was paid to cover the fees of the finance company which was to provide the loan, but this is not accepted by Churches Estates. As noted hereunder, Churches Estates claims that funds provided by Mr. McAlister were used as the deposit for the purchase of the Kestrel Pub (and a deposit of €100,000 was provided for the purchase of that pub).

33. On 18th June, 2019 Mr. Bayle and Mr. McAlister became joint directors and 50:50 shareholders in Carysfort Lounge Limited, which had been set up by Mr. McAlister in relation to a previous project which had not proceeded. Mr. Bayle avers that this company was to be used for the purchase of the Kestrel Pub. This is not accepted by Mr. McAlister.

34. On or about the 30th July, 2019, Mr. McAlister claims that Mr. Bayle sought further funds for stamp duty and solicitor's fees in connection with the purchase of the Kestrel Pub. However, given that the purchase of the Dark Horse Pub had not gone through at that stage, Mr. McAlister requested that Mr. Bayle use the €54,000, that he had provided for

the purchase of the Dark Horse Pub, for the purpose of the stamp duty/solicitor's fees for the Kestrel Pub. Mr. McAlister claims that in reply to this request, Mr. Bayle told him at this time that this money "*is just not there*" and when pressed that Mr. Bayle stated "*it is just not there at the moment*".

35. Mr. McAlister states that when he heard these comments on the 30th July, 2019, he "*lost faith and trust*" in Mr. Bayle and Churches Estates.

36. It may seem curious that Mr. McAlister would nonetheless continue with Mr. Bayle in progressing the purchase of the Kestrel Pub, and in fact pay a further sum of €45,000 to progress that purchase, after learning that his €54,000 in respect of the Dark Horse Pub was "*just not there*". However, he says that he did so as Mr. Bayle informed him that they were "*so far down the line*" with the purchase of the Kestrel Pub and that the last sum of €45,000 would get them "*over the line*". To support this version of events, Mr. McAlister points out that he paid this sum, not to Churches Estates this time, but to the solicitor acting for Carysfort Lounge Limited in the purchase of the Kestrel Pub (Ben O'Rafferty Solicitors). He therefore paid, between 22nd July, 2019 and 9th October, 2019, a further sum of €45,000 in relation to this purchase.

37. A day later, on the 31st July, 2019, a contract was signed, by Mr. McAlister and Mr. Bayle as directors of Carysfort Lounge Limited, for the purchase of the Kestrel Pub. This provides for a purchase price of €1.95 million and a deposit of €195,000 to be paid by the purchaser.

38. The funding for the Kestrel Pub was never provided by the finance company and the sale never proceeded. Mr. McAlister has averred that the Kestrel Pub is back on the market for sale by Lisney and that he has not received the €96,000 back from Churches Estates (nor the €45,000 from Ben O'Rafferty Solicitors).

39. On the 18th October, 2019, Mr. McAlister received a forfeiture notice in relation to the deposit paid for the purchase of the Kestrel Pub which had not completed.

Summary of amounts paid by Mr. McAlister

40. To summarise the financial evidence, the total sum paid by Mr. McAlister in respect of the two pubs is €195,000 (i.e. €54,000 in relation to the Dark Horse Pub, €96,000, in relation to the Kestrel Pub, and €45,000 to Ben O'Rafferty Solicitors in relation to stamp duty/solicitor's fees for the Kestrel Pub). However, these proceedings concern Mr. McAlister's claim for the return of the sum of €150,000 (i.e. the €54,000 paid in respect of the Dark Horse Pub and the €96,000 paid in respect of the Kestrel Pub. These proceedings do not concern the return of the €45,000 in respect of the Kestrel Pub which was paid to Ben O'Rafferty Solicitors by Mr. McAlister. However, it was made clear by counsel for Mr. McAlister that a claim for the return of this €45,000 may become a part of these proceedings, in which case it will be necessary to amend the pleadings.

Some curiosities/inconsistencies in the evidence

41. There are certain inconsistencies in the evidence which will have to be resolved at the hearing of this action.

The emails

42. The first relevant email put into evidence by Mr. McAlister relating to this issue is some two months after he avers that he "*lost faith and trust*" in Mr. Bayle and is dated 30th September, 2019 and is from Mr. McAlister to Mr. Bayle and states:

> "Further to our telephone conversation a today could you please return monies transferred to you for the purchase of the Black Horse in Blackrock. I am no longer interested in entering into another deal.
>
> I have waited long enough for promises to materialise and I have honoured my part of the deal without question.
>
> I have no option but to wait to see how the Kestrel purchase plays out but I am now requesting the following from you;
>
> 1) Proof of funds transfer to Ian Manson of €46,000 for advance payment of fees (Kestrel).
> 2) Proof of all other monies transferred to you for purchase of the Kestrel (the transfers should still be in the Churches Client Holding Account as no money has been transferred from Ian Manson to complete sale).
> 3) FULL refund of funds provided for The Black Horse."

43. This email does refer to the payment of €46,000 being for "*advance payment of fees*", rather than a deposit, but it is to be noted that it does not make any reference to the incident which caused Mr. McAlister to lose faith in Mr. Bayle, i.e. the statement that the €54,000 was "*just not there*" and simply states "*could you please return*" those monies.

44. By email dated 5th October, 2019, Mr. McAlister stated to Mr. Bayle:

> "I have already requested that the money which was transferred to your client account to show that we had fees money on account to furnish dark horse purchase 31-33 carysfort ave be returned but you have not even replied formally to my email so I need that transfer or proof that my money is still in your client account as we have never had an offer accepted on the carysfort Avenue purchase."

45. Again, it is relevant to note that there is no reference to the fact or possibility of the €54,000 not being available for payment to Mr. McAlister.

46. Then on the 2nd December, 2019 he emailed Mr. Bayle to say:

> "Following our telephone conversation earlier today I have decided I am no longer interested in the purchase of the Dark Horse in Blackrock.
>
> This is my 4th & final email requesting return of €55,000.00 that was transferred to your Client account for the purchase of the Dark Horse pub & surrounding property."

47. The reference to €55,000 in this email appears to be a reference to the €54,000 paid in respect of the Dark Horse pub. However, there is no reference in this email to that sum not being available nor is there any reference to what Mr. McAlister has averred to as the "*shocking*" news that Mr. McAlister's money had been used as a deposit and forfeited (which he would have received on the 18th October, 2019).

The claim that Mr. McAlister believed his money was for bank fees and not a deposit

48. Mr. McAlister claims that he paid €54,000 (in relation to the Black Horse Pub) and €96,000 (in relation to the Kestrel Pub) as payment for the fees of the finance companies and not as a deposit, yet there are certain matters which are *prima facie* inconsistent with this claim (although these inconsistencies may of course be clarified at the trial).

49. First there is the fact that one of the proposed finance companies (FMS Partners) provided in its Offer Letter that the arrangement fee for the loan of €2 million in relation to the Kestrel Pub was 2% of that loan amount, i.e. a sum of €40,000 (and not €96,000, which is the amount that Mr. McAlister transferred). It is also to be noted that this letter provides that the arrangement fee was to be "*deducted*" from the drawdown, rather than paid by the borrower to the finance company.

50. In addition, when FMS Partners was replaced as the proposed finance company by Autonomous, its offer letter also provided for an arrangement fee of 2% of a €2 million loan in relation to the Kestrel Pub, i.e. €40,000 rather than €96,000. However, it provided that 50% of this fee was deductible from the drawdown, with the balance (i.e. €20,000) to be received no later than 30th November, 2019. Again this amount is considerably less than the €96,000 paid by Mr. McAlister.

51. In the context of the claim by Mr. McAlister that he paid the money over as bank fees, it is also relevant to note that, contrary to this assertion, he categorises the payment as a "*deposit*" in a Complaint Form dated 17th December, 2019 signed by Mr. McAlister to the Property Services Regulatory Authority ("PSRA") concerning this dispute. In that Complaint Form it is stated that:

> "A total of €55,000 was transferred to Churches Estate Agents Holding Account by request of John Bayle as a deposit for the purchase of Black Horse and associated buildings/offices.
>
> […]
>
> €96,000 was transferred to Churches Estate Agents Client Account *as a deposit* for the purchase of the Kestrel public house."
>
> A further €45,000 was transferred to Ben O'Rafferty Solicitors *as a deposit* for the Kestrel" (*Emphasis* added)

52. Mr. McAlister seeks to explain this inconsistency by averring that it was "*a mistake that this terminology was used*" by his solicitor in completing this documentation. In this regard in an email dated 20th November, 2020 to the PSRA, Mr. McAlister's solicitor

describes as a "*clerical error*" the description of the monies paid as a "*deposit*" rather than as "*banks fees*".

53. However, Mr. McAlister also states in an email dated 18th October, 2019 to Ian Manson of Autonomous - the proposed finance company for the purchase of the Kestrel Pub that:

> "I have stayed out of all communication with autonomous to date but *as the money used for deposit was funded by myself* I feel I now need to know why this sale got to this point? [....] As you are aware we are at the 11 hour I need to know if you are going to transfer funds to get the Kestrel over the line." (*Emphasis* added)

54. He seeks to explain this inconsistency by averring that this email was sent on the same day that he received the forfeiture notice regarding the deposit and he was "*so shocked*" to hear that the sale was not going through that he rang Mr. Bayle, who told him that he had used some of Mr. McAlister's money for a deposit for the purchase of the Kestrel. He explains that he then knew for the first time that his money was at risk and that it had been used as a deposit and it was for this reason, he says, that he used the term "*deposit*" in his email to Mr. Manson, rather than referring to bank fees.

55. In addition, there is an email dated 29th August, 2018 from Churches Estates to a Ms. Sandra Burke, a business associate of Mr. McAlister, immediately prior to the first tranche of the lodgements of an aggregate of €54,000 by Mr. McAlister to Churches Estates. In this email there is again a reference to "*deposit*" as it states:

> "Please find attached our client account details for lodgement of booking deposit."

The claim that purchase was not to be made by Carysfort Lounge

56. It is also the case that Mr. McAlister claims that the proposed purchases of the two pubs were not to be made by Carysfort Lounge Limited, which he says is evidenced by the fact he made all payments personally (and not through this company which has only ever had €50 in its bank account). However, it is to be noted that a copy of a ledger from Ben O'Rafferty Solicitors was produced in evidence and it states that the client for the purchase of the Kestrel Pub was Carysfort Lounge Limited. In addition of course, as previously noted, the contract for the purchase of the Kestrel Pub was signed by Mr. McAlister in his capacity as a director of Carysfort Lounge Limited.

The response of Churches Estates to these claims

57. While no defence has been lodged to the main proceedings, it is clear from the affidavit evidence of Mr. Bayle that as regards €100,000 of the €150,000 paid by Mr. McAlister, Churches Estates' position is that this €100,000 was not payment in respect of the fees for the finance company providing the loan to finance the purchase of the Kestrel Pub (although it should be noted that Mr. McAlister's claim is that he paid €96,000, rather than €100,000, in respect of the Kestrel Pub, excluding the €46,000 paid in respect of stamp duty/solicitor's fees). Instead, Churches Estates claim that this €100,000 was the deposit for the purchase of the Kestrel Pub. Furthermore, and most significantly, Mr. Bayle claims that this sum of €100,000 was forfeited by the vendor of the Kestrel Pub

when the sale did not close as a result of the finance not having been obtained for the purchase.

58. On this basis it seems, Churches Estates claims that as regards €100,000 of the €150,000 it has no liability to Mr. McAlister or indeed Carysfort Lounge Limited.

59. However, even if Churches Estates' claim is correct that €100,000 of the €150,000 provided by Mr. McAlister was validly used as a deposit which was forfeited, there is a discrepancy between the €96,000 paid by Mr. McAlister to Churches Estates (allegedly as the fee to the finance company for the loan to purchase the Kestrel Pub) and the €100,000 forwarded by Churches Estates to the vendor's agent (allegedly as the deposit for the purchase of the Kestrel Pub).

60. In addition, it may well be that even if €100,000 was lost as a deposit, there may need to be clarification as to how this loss was to be apportioned between the investors/partners in the project or whether there has to be an indemnification between them. However, this is a matter for the trial in view of the very limited detail before this Court regarding the terms of the proposed purchase amongst the investors.

61. Furthermore, even if €100,000 (or €96,000) of Mr. McAlister's money was lost as part of the forfeited deposit, this still leaves €50,000 (or perhaps €54,000), which was paid in respect of the Dark Horse Pub but which was not forfeited, which should, it seems, be in the client account of Churches Estates.

62. Yet, this is where the response of Churches Estates is not very satisfactory. This is because in relation to this €50,000 which is prima facie due to Mr. McAlister or Carysfort Lounge Limited, the most that Mr. Bayle will state at para. 14 of his affidavit sworn on 19th November, 2020 (seeking to defend the application by Mr. McAlister for an order preventing Churches Estates from reducing its cash assets below €150,000) is that:

> "As the office account statements show, there is never €150,000 in that account. The other account is the company's client account and I wonder is [Mr. McAlister] suggesting €150,000 should be ring fenced in that account. *Save the monies that are retained in [Churches Estates'] client account belonging to Carysfort Lounge Limited*, the other monies in that account belong to other people and other companies". (*Emphasis* added)

63. As a response to Mr. McAlister's claim that Churches Estates should return to him the sum of €150,000 (or even based on Churches Estates' case, the sum of €50,000), this is not satisfactory.

64. This is because this averment raises more questions than it answers, particularly where no defence has been filed. It is far from clear how much, if any amount, Churches Estates accepts is held in its client account for the benefit of Carysfort Lounge Limited or indeed for Mr. McAlister. This reference to "*monies that are retained in*" the client account could be a reference to €100 or €150,000 and this vagueness cannot but have been a concern

for Mr. McAlister as he seeks the return of the money he paid for the purchase of pubs that did not proceed.

Why has Churches Estates not paid money out of its client account to Carysfort?

65. There appears to be no good reason why Churches Estates did not, in this affidavit, state precisely how much it holds in its client account for Mr. McAlister/Carysfort Lounge. No doubt this vague averment, along with the unexplained failure by Churches Estates to file a defence to Mr. McAlister's claims for the return of his money, contributed to Mr. McAlister's understandable concerns, which resulted in his application for a Mareva injunction.

66. Even if this money, however much it is, is due to Carysfort Lounge Limited, rather than Mr. McAlister, it is not clear why it has not been returned to Carysfort Lounge Limited, since Mr. Bayle confirms that the Dark Horse Pub went sale agreed in November 2020 and equally he does not controvert Mr. McAlister's averment that the Kestrel Pub is back on the market.

67. Based on the limited evidence before it therefore, this Court can see no reason why this sum (however much it is, in the client account of Churches Estates) has not been returned to Mr. McAlister or Carysfort Lounge Limited.

Money held in the client account of Churches Estates' solicitor

68. Of similar concern to this Court is the fact that in a letter dated 11th February, 2020, the solicitor for Churches Estates states to the solicitor for Mr. McAlister that:

> "Your Client: Thomas McAlister
>
> Our Client: John Bayle & Churches Estate Agents
>
> Property: The Dark Horse Public House
>
> Dear Sirs,
>
> We refer to the above matter and to previous correspondence herein.
>
> We can confirm that *we are now in receipt of deposit monies in the amount of €54,000.00*.
>
> We can confirm that these monies held by us to the order of our respective clients company, Carysfort Lounge Ltd and we await further instructions with regard to the payment of same in due course.
>
> We note that you have entered into direct correspondence with Messrs Ben O'Rafferty Solicitors and can we suggest that the writer is copied on all future correspondence in this regard. […]" (*Emphasis* added)

69. Again, like the averment of Mr. Bayle, this statement of Churches Estates' solicitor is vague and it raises more questions than it answers, i.e. it does not clarify the following:

- how Churches Estates’ solicitor came to receive this sum of €54,000, since on Mr. McAlister’s version of events, he only paid money to Churches Estates and Ben O’Rafferty Solicitors and he never paid any money to Churches Estates’ solicitor, and,

- whether it is the money paid by Mr. McAlister in respect of the Dark Horse Pub (which is possible as it is the exact same amount - €54,000 - that was paid by Mr. McAlister in respect of that pub and also since the letter references the Dark Horse Pub, rather than the Kestrel Pub), or,

- whether it is made up, in part, of the €45,000 paid by Mr. McAlister to Ben O’Rafferty Solicitors in respect of the Kestrel Pub, and,

    - if so, it is not clear if and whether it was received from the client account of Ben O’Rafferty Solicitors (as might be implied by the reference in the letter to Ben O’Rafferty Solicitors), and,
    - if this sum of €54,000 is made up of the €45,000 that Mr. McAlister paid to Ben O’Rafferty Solicitors in relation to the purchase of the Kestrel Pub (plus €9,000), why did Churches Estates’ solicitor receive €45,000 from the solicitor who was to purchase the Kestrel Pub for Carysfort Lounge Limited?

70. In this regard, the copy of the client ledger from Ben O’Rafferty Solicitors produced in evidence references the payment out of €45,000 (the same amount paid in by Mr. McAlister for stamp duty/solicitor’s fees) from the client account of *Carysfort Lounge Re Purchase of Kestrel Pub* on the 27th January, 2020 with a narrative of ‘Pay/Doyle So Deposit’. Mr. McAlister avers that Churches Estates’ Solicitors took over a firm called Doyle Solicitors and on this basis, he avers that this may be evidence that this €45,000, that he paid to Ben O’Rafferty Solicitors, is currently held by Churches Estates’ solicitor in its client account.

71. It is important to emphasise that there is no suggestion of any wrongdoing by any of the solicitors involved in this case, since they are acting on instructions of their respective clients and secondly this Court is required, at an interlocutory stage, to reach *prima facie* conclusions only, which are tentative in nature as they are based on limited affidavit evidence, no discovery and no oral evidence/cross examination.

Why has Churches Estates’ solicitor not paid money out of its client account to Carysfort?

72. Although one is dealing with matters at an interlocutory stage and so the conclusions are reached on a *prima facie* basis, nonetheless just as this Court can see no reason why Churches Estates has not returned to Carysfort Lounge Limited/Mr. McAlister the amount of money in its client account (referenced at para. 14 of Mr. Bayle’s replying affidavit), so too this Court can see no reason why, in relation to this sum of €54,000 held in the client account of Churches Estates’ solicitor, Churches Estates has not instructed that solicitor to return it to Carysfort Lounge Limited/Mr. McAlister.

73. More generally, it is concerning that Churches Estates has had an opportunity to provide bank statements and ledgers of client accounts (whether held by Churches Estates or by its solicitor) to clarify the sums paid into those accounts by, or for the credit of, Mr. McAlister and paid out of those accounts and to clarify the sums currently held in those accounts, yet no such statements or accounts have been exhibited by Mr. Bayle in order to clarify precisely the current position regarding not just the €100,000 (the alleged forfeited deposit) but also the €95,000 also paid by Mr. McAlister to Churches Estates/Ben O'Rafferty Solicitors.

Is there evidence of dishonesty in this case so as to justify a Mareva injunction?

74. This is a case in which, based on the foregoing evidence, Mr. McAlister has raised an arguable case that he (or perhaps a company he jointly owns) is owed at least €54,000, perhaps €95,000 and possibly up to €195,000 by Churches Estates.

75. In the absence of evidence showing an intention on the part of Churches Estates' to dissipate its assets, in order for Mr. McAlister to be entitled to a Mareva injunction, he must establish that there is evidence of dishonesty on the part of Churches Estates which is sufficient for this Court to conclude that there is a risk of the dissipation by Churches Estates of its assets so as to defeat any judgment that he might obtain.

76. In *Aerospares*, there was an intricate cross-border scheme which was sufficient evidence for Kearns J. to conclude that certain acts of the defendants were forgeries and blatantly dishonest. This evidence was also sufficient for him to conclude that there was a good arguable case that the defendants had acted dishonestly in breach of contract and in breach of fiduciary duty and that they had diverted monies from the plaintiff.

77. In contrast, the foregoing concerns, regarding the treatment of Mr. McAlister's payments and concerns as to why money has not been paid out of Churches Estates' client account and out of the client account of Churches Estates' solicitor to the rightful person (whether Mr. McAlister or Carysfort Lounge Limited), do not amount to evidence of dishonesty (so as to obviate the need for evidence of an intention to dissipate assets), such as to justify a Mareva injunction. Similarly the concerns of Mr. McAlister regarding some arrears of rent by Churches Estates and liabilities on its filed company accounts do not amount to evidence of dishonesty.

78. In addition however, Mr. McAlister, in claiming that Churches Estates is guilty of dishonesty, places particular reliance on two statements made to him by Mr. Bayle.

The statement that the €54,000 was 'just not there'

79. Mr. McAlister claims that the statement by Mr. Bayle on the 30th July, 2019 that the €54,000 was "*just not there at the moment*" suggests some dishonesty on the part of Churches Estates. It is relevant to note that Mr. Bayle has not denied making this statement in his replying affidavit. However, it is also relevant to note that, whatever Mr. McAlister understood by this comment, it was not sufficient for him to take immediate action, and so it is not clear to this Court that Mr. McAlister regarded that statement at that time as evidence of dishonesty. This is because he proceeded with the proposed

purchase of the Kestrel Pub with Mr. Bayle, even though he claims now that Mr. Bayle was a person in whom he had "*lost faith and trust*" at the moment of that statement.

80. Furthermore, between September and December of 2019 he sent emails to Mr. Bayle regarding the return of that €54,000 from Churches Estates' client account, but somewhat curiously there is absolutely no reference to this statement that the money was "*just not there*", a statement to which he attaches such significance now.

81. For these reasons, this Court does not believe that this statement could be said to be clear evidence of dishonesty on the part of Churches Estates, *akin* to forgeries or setting up bank accounts in identically named companies as occurred in the *Aerospares* case, such as to justify this Court in concluding that there is a risk that Churches Estates will dissipate its assets.

The statement that Mr. McAlister's money was used as a deposit

82. Mr. McAllister also relies on the statement by Mr. Bayle on the 18th October, 2019 that his money had been used as the deposit for the purchase of the Kestrel Pub even though Mr. McAlister claims that he had only ever agreed for his money to be used to pay bank fees. He suggests that this is also evidence of dishonesty by Churches Estates.

83. However, as noted earlier, there is a considerable amount of evidence which appears to be inconsistent with Mr. McAlister's claim that his money was used as a deposit without his consent or knowledge (e.g. the PSRA form and the email to Mr. Manson referencing his money being used as a deposit and not as bank fees). Similarly, although he avers that he was "*shocked*" at this news of his money being used as a deposit, in his email of 2nd December, 2019 to Mr. Bayle (set out above) seeking the return of his money, there is no mention of his shock at the use of his funds as a deposit (in contravention of the alleged agreement he had with Mr. Bayle). Indeed, there is no reference in any of the emails around that time to this news, yet now the fact that his money was used as a deposit by Churches Estates is said to be sufficient to ground the claim that Churches Estates is guilty of dishonesty.

84. In this Court's view, this statement by Mr. Bayle that the monies were used as a deposit could not be said to be evidence of dishonesty on the part of Churches Estates, *akin* to forgeries etc in the *Aerospares* case, such as to justify this Court in concluding that there is a risk that Churches Estates will dissipate its assets.

85. While the evidence in this case is not sufficient for this Court to conclude that there is evidence of dishonesty (and so the application for the Mareva injunction is refused), this Court has expressed concerned about the manner in which Churches Estates have dealt in these proceedings with accounting for monies paid by Mr. McAlister to Churches Estates and why monies paid by Mr. McAlister have not been returned to him or Carysfort Lounge Limited. It is this Court's view therefore that the sooner these matters are progressed the better, and in this regard, it is noted that there is a motion seeking judgment in default of defence to be heard on the 18th January, 2021.

Conclusion

86. For the foregoing reasons, there is insufficient evidence of past dishonesty to justify the granting of a Mareva injunction. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding any outstanding matters so as to reduce the amount of court time required on Tuesday 12th January, 2021 at 10.30, when the matter will be put in for mention.