Neutral Citation Number: [2013] IEHC 188

THE HIGH COURT

Commercial

[2013 No. 122 COS]

IN RE MUCKROSS PARK HOTEL LIMITED, AND IN RE BOISDALE HOLDINGS LIMITED, AND

IN RE SILVERMIRE PROPERTIES LIMITED, AND

IN THE MATTER OF THE COMPANIES ACT 1990, AS AMENDED

JUDGMENT OF Mr. Justice Charleton delivered ex tempore on 12th April. 2013

1. This opposed application concerns the Muckross Park Hotel which is now in examinership pursuant to an order of this Court of 15th March of this year. The hotel is a very beautiful one and is situated in the vicinity of the National Park in Killarney, and from everything that I can see in relation to the workings of the hotel over the last year or so, it has a very good prospect of survival. The hotel is essentially run by three companies and, without going into the particulars of it, they are Muckross Park Hotel Limited, Boisdale Holdings Limited and Silvermire Properties Limited. Silvermire, as I understand it, owns 24 apartments on the grounds. Muckross Park Hotel Limited owns the hotel and that company itself is owned as to its shares by Boisdale Holdings Limited. That, in any event, was the situation as I understood it at the time when I granted the protection of the court to these three companies on 15th March. Since then a complicating factor has come to light and, as with many of these instances, one finds a situation where the parties cannot agree on even the simplest of facts and so the job of the court is to do its best.

2. The hotel premises is an old one dating from the time when people would visit Killarney by coach and horses. It was extended by the addition of a new wing some time as and from 2005. The indications are that the new wing was up and running in 2006 or 2007. One party, namely the applicants in this case for the extension of the court protection, say that the new wing accounts for about 32% or thereabouts of the business, lets say a third, whereas ACC Bank, who, are the mortgagees of both the old and the new part of the hotel say that it accounts for more than that. It is suggested by ACC Bank that the new part encompasses somewhere in the region of 40 to 45 bedrooms out of 65, contains the wedding reception area, the hotel spa which is called 'The Cloisters' and other necessary attributes of a hotel, and accounts for about 60% of the business. I am prepared to consider matters on the basis that I now know that about 50% of the actual hotel premises is not in the ownership of the three companies that are in examinership but is in the ownership of Mr. William Cullen, a well respected businessman who is also a director of these three companies.

3. Upon this application being made for the continuation of the appointment of the interim examiner ACC Bank has objected on three grounds which are as follows. Firstly, that there has been material non-disclosure by the three companies through their director, Mr. Cullen, of the fact that about half of the hotel is not, in fact, owned by the three companies but is owned or controlled by him personally. Secondly, that the test set out in s. 2 of the Companies Act 1990, as amended, which allows the intervention of the court where there is a reasonable prospect for the survival of the company, or in this case three companies, or the whole of any part of its undertaking as a going concern, is not met by virtue of the fact that the company does not own a substantial part of the premises and has no legal interest. Thirdly, as a matter of discretion as to the appointment or continuation of an examiner, that the balance of the evidence shows that on receivership, the hotel will do as well as, would be the case had the examinership been allowed to continue and the companies were allowed to be restructured in terms of a write down of its debts following as. 18 report under the Companies (Amendment) Act 1990. Further, under a receiver, ACC Bank argue the hotel will be sold at an appropriat1e time in relation to the market thereby saving it as a going concern as well as would an examinership.

4. I want to briefly refer first of all to some matters of chronology and then to refer to the central issue in this case, which is the holding in terms of legal right between the new wing of the hotel and the old wing of the hotel, taking these as I do to be 50/50 or thereabouts in relation to the business. It seems that the immediate circumstances leading to this application were precipitated by a demand of Mr. Cullen and of the three companies for the repayment of substantial sums of money. One demand was in relation to €4.655 million and there was also a demand in relation to Mr. Cullen and his borrowings personally. As I understand the position concerning the debt, what I have been told is that there is a debt of about €4.6 million to ACC by the three companies and that Mr. Cullen has a similar debt. I do not know whether that is correct in terms of exact figures or not, but that is the figure that I have been op{:rating on. If one of them is less, it does not make a difference to the decision.

5. On the 13th March, the three companies had receivers appointed to them under the relevant mortgage deeds held by ACC Bank and there was one receiver, Mr. Declan Tuite. In addition, a receiver was also appointed in relation to the personal borrowings of Mr. Cullen. On the 15th March, that is to say within the very short time span available, which is three days under the, Act, an application was made for examinership to this Court. The matter proceeded as would usually be the case, with the preparation of an analysis of the companies and their trading situation and prospects, until ACC Bank pointed out in correspondence to the companies and to Mr. Cullen that there had been a error in the basis upon which the application had been made to the court; the error being that it was not disclosed to the court that about half of the hotel was not within the ownership of the three companies and thereupon correspondence and affidavits have been exchanged. I am now asked, first of all, to make a finding of fact that Mr. Cullen has been guilty of material non disclosure.

6. In analysing the relevant facts in that regard, I am not prepared to come to the conclusion that Mr. Cullen has been deceitful with the court. Nor am I prepared to come to the conclusion that an application that is put forward in circumstances of extreme urgency and some confusion, precipitated in a situation of stress, has resulted not in a mistake but in people telling lies. I do not reach that conclusion and I will not reach that conclusion.

7. Of much more importance to this case, however, is the question of the interest of the hotel companies in the new wing. As I understand it, the borrowing in respect of this new wing was entered into on the 24th May, 2005, and that happened pursuant to a facility letter issued to Mr Cullen which, as in many fac ility letters, contains a large number of conditions. It is clear from that letter dated the 24th May, 2005, that the purpose of what is called facility 2, a bridging loan ofEn.85 million including interest rolled up and allowance of €400,000 was, as stated, to finance Mr. Cullen's working capital requirements in respect of the development of Muckross Park Hotel, Killarney, Co. Kerry. It is equally clear that as part of the conditions for that personal loan, the bank required the title to the site adjacent to Muckross Park Hotel, in which there was full planning permission for a 42 bed hotel extension, and all works completed thereon to be transferred to Mr. Cullen and a first legal charge to be created in favour of the bank. Special conditions in

the facility letter included that there would be no lettings or renewal of lettings in or on the secured property which can only refer, it seems to me, to this piece of land and what was to be built on it, without the bank's prior consent in writing providing that short term wholly residential lettings may be created, where the terms of such lettings are not greater than month to month and the tenants do not acquire any rights of renewal pursuant to statute; i e under the Landlord and Tenant (Amendment) Act 1980.

8. In addition to that, there was a mortgage deed which came later in relation to this new wing in the ownership of Mr. Cullen, and not in the ownership of the three companies, which contains at paragraph 6.1 a negative pledge in a form that is familiar to all conveyancing professionals or indeed anyone practicing banking law at the current time. It states that the borrower, namely Mr. Cullen, shall not, without the prior written consent of the bank create, extend or permit to subsist any encumbrance over the secured assets, which is the new wing of the hotel, or to part with, sell, convey, assign, transfer, lend, lease or otherwise dispose of the secured asset. That is referable to the new wing and what it plainly states is the same as what is stated in the facility letter on which the borrowing was made, simply - you cannot let the new wing of the hotel, you cannot let the land, you cannot alienate it without the consent in writing of the bank and that is backed up by the mortgage deed. Therefore, to my mind the matter could not be clearer, although I can appreciate that in circumstances where there are a lot of business dealings that mistakes can easily be made.

9. The next issue is that if the three companies are to be saved, it has to be on the basis that Muckross Park Hotel, as a hotel and not a complicated arrangement whereby a piece of the hotel is effectively cut off and sent elsewhere, is sold on. The object of the examinership was to see if the Muckross Park Hotel as an entity, as opposed to one half of Muckross Park Hotel as run by the three companies, could be saved and whereas there was reference to a technical ownership issue in the application before the court to appoint an examiner, the situation has now become a great deal clearer. Half of the hotel is physically owned by Mr. Cullen. The Companies Amendment Act 1990, is in relation to the saving as a going concern of companies or part of their enterprise and the case law of the High Court and the Supreme Court, is to the same effect. The purpose of the legislation is to save jobs and the purpose of an examinership is to see whether or not there is a reasonable prospect of the survival of a concern with a write down on a fair and equitable basis of some of the debts.

10. Having said that, based on the case law there is no doubt that even as regards a mortgagee, there can be a write down of a secured debt and that has happened in the past and has been approved by this Court. However, it is not within the remit of the Companies Act 1990 to in effect secure a write down or a restructuring of personal debt and the legislation in relation to that referable to this situation does not at the moment exist. The High Court exercising this jurisdiction and the servant of the law, can do as much and no more than the law entitles the Court to do. Therefore any question of my personal preference, which I am loathe to express, does not come into this matter. Central, therefore, is the issue as to whether Muckross Park Hotel as such, namely the three companies, Muckross, Boisdale and Silvermire, have an interest in the new wing. Here, in terms of an answer, once this rather startling piece of news was put before the court, three different ideas as to what any interest of Muckross Park Hotel Limited is in the new wing are put forward, remembering that Mr. Cullen is the person who is in legal ownership of that; albeit encumbered by a mortgage with an equity of redemption. Firstly, it said that there was a one year lease from January 2011, which has now expired. It is difficult to know whether that lease was executed or not, but it must be taken at face value. Secondly, it is said in contradiction of that, and it does contradict simply because the dates overlap, that there was a seven year arrangement for a lease pursuant to a draft lease of 2007 which would bring us up to 2014. Had that lease been entered into it would have rendered unnecessary any one year lease for 2011 for the obvious reason that I have stated. Thirdly, it is said that there were oral arrangements prior to 2007 whereby there is some kind of tenancy in favour of one or other of the companies now under examinership.

11. What is urged upon me is that the Circuit Court in Tralee should determine whether there is an implied tenancy and should determine in the circumstances whether Muckross Park Hotel as against Mr. Cullen is entitled to a new tenancy. It is also urged upon the court that there is now a valuation arrived at by CBR Richard Ellis which indicates that about €104,000 is a fair lease value on long terms basis for the new wing of the hotel. The question therefore is said to be whether it is arguable as to whether there is a lease at all. But there is a second and more important question as to whether any such lease could ever possibly bind the mortgagee, namely ACC Bank, which is the mortgagee of the old part of the hotel owned and controlled by the three companies and the new wing of the hotel which is owned and controlled by Mr.. Cullen personally. Let us deal with the first issue as to whether there is any possibility of a tenancy. In that regard, s.5 of the Landlord and Tenant (Amendment) Act 1980, provides that a tenancy can be express or implied or can arise out of statute. It also provides that where a tenant has been in a business occupation of a premises for five years that in those circumstances the tenant has an entitlement to a new tenancy which is to be granted by the Circuit Court under s.l6 of the Act. A tenant is defined by the s.3 of the Act, which states *"tenant means the person for the time being entitled to the occupation of premises and, where the context so admits, includes a person who has ceased to be entitled to that occupation by reason of the termination of his tenancy"*, which simply means that where your tenancy is terminated, you can apply for a new tenancy, but the core of that definition is an entitlement to be in possession of a premises.

12. The law that as has been argued very powerfully on behalf of the companies, and I presume on behalf of Mr. Cullen as well, is that a person being in possession can create a tenancy which he or she or the company is not entitled to deny. But it is also the case that what is crucial in such a situation is whether even if you can have an implied tenancy, and I am not ruling on that, it is binding on the mortgagee. The nature of a mortgage is that it is an instrument whereby an estate in real property is vested as to its legal interest in a lending institution subject to the equity of redemption. The entire legal interest in both the old, namely the companies' part of Muckross Park Hotel, and the new wing, Mr. Cullen's part of Muckross Park Hotel, is vested in ACC Bank. That bank holds as mortgagee for all parts of the hotel. Under the terms of the mortgage deed made by Mr. Cullen, the basis upon which Mr. Cullen continues to hold that new part, he is controlled by the terms thereof. As is stated in Lyall *Land Law in Ireland* (2nd Ed) Dublin 2000 (p.822) "many mortgages prohibit the mortgagor from letting the premises without the consent of the mortgagee" and it is also enabled under the Conveyancing Act 1881 that a mortgagor can let premises; but that is provided they comply with the provisions of the mortgage deed. In three case, *Irontrade Employers Insurance Association v Union Land and House Investors* [1937] 1 Ch. 313 which is an English case, and more importantly from my point of view, the decision of Mr Justice Lynch. in *ICC Bank plc v. Verling & Ors* [1995] 1 I.L.R.M. 123. and *Wyse Finance Company v. O'Regan* High Court, unreported, 26th June 1998 which is the decision of the highest authority, namely, Ms. Justice Laffoy, it is clear that where there is a mortgage deed which forbids leasing in circumstances of a lease being made in defiance of a mortgage deed, a lease is void visa-vis the mortgagee, namely the bank, unless it is done with the written permission, and in accordance with mortgage deed, of the bank. There is no such permission here. There is an eloquent attempt made to say that in the circumstances where the bank must have known what was going on, there must in those circumstances be acquiescence by the bank.

13. For me to make that finding would be to fly in the face of decided case law, particularly the decision of Laffoy J. and would be for me to contradict my own decision in *Cussens & Ors v. Brosnan* [2008] IEHC 169. The bank legally owns the property, subject to the equities of redemption under the relevant mortgage deeds. There is an equity of redemption subject to repayment of debt in Muckross Park Hotel, by which I mean the three companies as regards the old part, and as regards the 50% new wing in Mr. Cullen, provided that payments are made. When they are not made and a receiver is appointed the legal estate passes, upon certain legal formalities

both in equity and law as to well charging the mortgage deed, back to the mortgagee.

14. Why does it not matter therefore, that the bank was not involved and did not consent to any lease? First of all as stated in the letter dated 24th May, whereby the loan was made to Mr. Cullen, the bank made it perfectly explicit that they did not want any interest created apart from short term month to month lettings where no legal rights such as rights under the Landlord and Tenant Act 1980 were created. Secondly, in terms of the amount to be paid by any prospective tenant, the mortgagee, namely the bank, is entitled to be consulted and is entitled to consent or not to consent. Thirdly, as regards the term, whether it be a year or whether it be five years, thus passing the threshold of rights to a new tenancy due to business user under the Landlord and Tenant Act, the bank is entitled to be consulted. Fourthly, and something that is extremely important as regards the holding of land, is the repairs and insurance covenant. If there is a full repairing and insurance covenant in the tenant, it may mean, depending on the wording, that even in circumstances where the building might collapse, the person to whom it is leased is obliged to reinstate it, but if that is not present, then the obligation to repair is on the person giving the lease, namely Mr. Cullen, or in the case of the old part of the hotel, the three companies and there is where the obligation is to repair and to reinstate currently resides under the mortgage deeds. Therefore, consent to any lease of a mortgaged property it is not merely a formality. No court would be entitled to ignore it and that is what the decided cases demonstrate. It is a fact standing between the jurisdiction which the court might otherwise be enabled to exercise and the reality that is now starkly apparent in relation to how the legal affairs of this hotel are organised.

15. Even if that were not the case, I want to add two other matters. As I have said, I cannot possibly hold in the rushed circumstances of this case, that Mr. Cullen had any intention to be deceitful to the court, but the obligation to make full disclosure extends to an obligation to make reasonable inquiries and to put the result of those inquiries before the court. That was not done and there is therefore a breach of the duty of putting all relevant matters before the court where the protection of the court through examinership is applied for. Secondly, in terms of the discretion which the court has, even were it the case that the court could come to the view, which it cannot, that the whole or part of the enterprise of the three companies could be saved as a going concern for the benefit of the community and for the benefit of jobs, I am satisfied on the information that is put before me that the receiver wishes to continue with the business of this hotel and continue it as a going concern. Furthermore, the very good work done on behalf of the examiner indicates to me that there are enormous recent increases in relation to the revenue of this hotel, the occupancy of this hotel and the room occupancy sale rate of this hotel, the food sales of this hotel and in addition to that, wedding takings, public house takings and spa takings are all up. This desire to continue with the running of the hotel by the receiver under the mortgage deeds is therefore not simply, as perhaps it might be in other circumstances, a panacea put before the court. A receivership would achieve the same ends, in other words, as an examinership. In any event, fundamental to this is the fact that the only party which actively owns the entirety of this hotel premises is ACC Bank because that is the party that all of the hotel, old and new, is mortgaged to and as regards a substantial portion of it, the legal position in Mr. Cullen's wing is not only uncertain, but it establishes that there is no possible right to a legal interest through an implied tenancy by the three companies in respect thereof and I do not have jurisdiction to restructure the debts of an individual in the context of this application. Accordingly, I must refuse the application.