Neutral Citation: [2014] IEHC 659

THE HIGH COURT

[2009 No. 2354S]

BETWEEN/

ADM LONDIS PLC

PLAINTIFF

AND

RANZETT LIMITED, RAY DOLAN AND ANNALIESE MCCONNELL (NO.2)

DEFENDANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered the 15th day of July 2014

1. Where a franchisor unlawfully terminates a contractual relationship with a franchisee, what is the measure of damages which flows from this breach? This is, in essence, the question which I am now required to determine in the wake of my earlier judgment in these proceedings delivered on 15th February 2013: see *ADM Londis plc v. Ranzett Ltd.* [2013] IEHC 63. This judgment may be regarded as supplementary to that earlier judgment and should be read in conjunction with it.

2. The present dispute concerns the termination of a franchise by the well known retail company, ADM Londis plc ("Londis") of a Londis franchise at a retail outlet at the Black Bull premises, Dublin Road, Drogheda, Co. Louth in December 2008. The franchisees were Ray Dolan and Annaliese McConnell, the second and third defendants. This couple married in June 2007. The first named defendant, Ranzett Ltd., was the corporate vehicle by which the retailing business was operated by them.

3. I do not propose to rehearse again at any length the complex set of circumstances which led to the termination of the franchise agreement, since these details are set out at considerable length in the first judgment. It suffices to say for present purposes that Mr. Dolan was an accomplished retailer who had been operating under the Londis franchise for some years. However, by November and December 2008, Mr. Dolan and his company, Ranzett Ltd., found themselves in a precarious position. Arrears on the trading account with Londis had grown to some €430,000 and the bank was refusing to honour direct debits.

4. At that hearing, evidence was given by Ms. O'Dea, the plaintiff's financial officer, to the effect that the total sum which ADM Londis was owed was €561,283.91 in respect of unpaid invoices (of course, this figure also includes the sum of €400,000 in respect of which I had already given judgment). The defendants did not seriously dispute this figure and I gave judgment against the second and third defendants qua guarantors (the first defendant having been dissolved) for the further sum of €161,283.91. I further ruled that ADM Londis was also entitled to Courts Act interest from the date on which payment was originally demanded, namely, 2nd June, 2009.

5. In my judgment, however, I also ruled that the plaintiff was in breach of contract with regarding to the giving of notice, the abrupt termination of the agreement and the closure of the trading account and the de-branding of the Black Bull premises on 4th December 2008: see paragraphs 131 et seq. of the first judgment. It was these breaches of contract which had brought about the total cessation of the defendant's business and the effective destruction of whatever value still remained in the business and (more especially, perhaps) its assets, especially by reason of the abrupt and immediate termination of the trading relationship between the parties. It was the very abrupt termination of the trading relationship which I found to be at the heart of the unlawful termination of the contract.

6. At this juncture I should pause to observe that while counsel for the plaintiff, Mr. Buttanshaw, urged that in assessing damages I should have regard to the fact that, insofar as there were losses, they were the loss of Ranzett Ltd. and not those of either Mr. Dolan and Ms. McConnell, it is not, I think, necessary for me to undertake any disquisition on the implications of *Saloman v. Saloman & Co.* for this purpose. It is sufficient to say that under the contractual relationship between the parties, Mr. Dolan and Ms. McConnell have primary obligations vis-à-vis the plaintiff in respect of these contractual obligations as principal obligors. In these circumstances, I propose to treat the fate of the three defendants as entirely intertwined for the purposes of this damages claim.

7. There are, accordingly, really three separate heads of losses which fall for consideration. First, there are the losses which resulted directly from the termination of the franchise and the inability of Ranzett Ltd. to trade during that critical period. Second, there are the losses which flowed from the subsequent forfeiture of the lease at the Black Bull premises. Third, there are the losses which arose following the separation out of the Londis goods from the non-Londis goods for the purposes of the performance of the retention of title exercise. I propose to consider each of these categories in turn, although they are to some degree interlinked. Before doing so, however, it may be convenient to make some general observations regarding the effect of these breaches of contract.

8. As I pointed out in my first judgment, there is no doubt but that Ranzett itself was heavily under-capitalised and it faced a difficult trading future. Yet the effect of these breaches was to bring about the forfeiture of the lease at the Black Bull premises, with disastrous consequences for the defendants. The other significant losses which these breaches brought about was that they deprived the defendants of the opportunity of securing an opportunity to trade during a critical period and to keep the retail premises open, in particular by securing an alternative source of supply.

9. Another way of looking at this issue is to consider what the position would have been had the contract not been unlawfully terminated by ADM Londis in the manner which I have described. I think that it is clear from the evidence that, had this happened, the defendants would have secured an alternative supplier and could probably have continued to trade. The plaintiff would have pursued them for the debts which the company run up. I think that it is unlikely that Mr. Dolan would have been able to meet these debts or secure alternative re-financing. All of this means that debt recovery by ADM Londis as against Ranzett would probably have resulted in the latter company going into liquidation at some stage within the following two years.

10. Critically, however, it was the failure of the plaintiff to allow the defendants the breathing space to enable them to secure an

alternative supplier in the manner which I have found the contractual relationship between the parties required which ultimately brought about a financial catastrophe. It was the very abrupt nature of the termination which led directly to what I described in the first judgment as a cascade of claims against the defendants. If, for example, the defendants had been given more time, then I believe that they would have found it be possible to sell or assign the leasehold in the Black Bull premises in an orderly fashion. While it is true that neither 2009 nor 2010 were auspicious years for the retail business, it could not be said that even in those years the lease had a nil value.

11. Here it must be recalled that the landlord of the premises managed to find a new tenant even after the forfeiture of the original lease with Ranzett Ltd. While the terms of that agreement are not known to the court – or, for that matter, to the parties – it shows that the lease had some residual value which, but for the breaches of contract, would have accrued to the defendants.

12. It is likewise clear that with even a little breathing space the defendants would have been able to sell or dispose of the specialist refrigeration, air-conditioning units and other equipment associated with the fit-out of the premises. This equipment had been leased by the defendants from Friends First. While it is true that this equipment would probably have depreciated significantly in value by reason of the fact that it would by this stage have been second-hand, the property might nonetheless have been sold or disposed of had but this opportunity been presented to the defendants. The evidence instead was that once the business ceased to trade, the defendants could not afford the leasing costs of the equipment. At that point the leasing company, Friends First, repossessed the equipment and according to Mr. Dolan sold it on a fire sale basis to a third party. Friends First have subsequently obtained judgment against Mr. Dolan for the balance of the sums due under the lease, namely, €155,000.

The valuation of the company
13. The defendants have claimed the sum of €900,000 in respect of the value of the company. Mr. Dolan explained in evidence that, traditionally, the sale of retail premises was based on a figure between 10 and 20 times the weekly turnover in the case of leasehold premises and a figure of 25 to 35 times turnover in the case of freehold property. There is no doubt but that even in December 2008 he was turning over a figure of €45,000 to €50,000 a week. There is also evidence that a sale of the company for €1.4m. was seriously contemplated by third party purchasers in September 2007. Unfortunately, however, that sale fell through in August 2008 because the purchasers could not obtain the appropriate finance, even though these purchasers purchased another company (Mattóg Ltd.) from him who was similarly involved in the retail business for €3.4m.: see paragraphs 18 and 19 of the first judgment.

14. Mr. Dolan also gave evidence that he was drawing an income from the company by way of salary in the sum of €900 per week, i.e., approximately €45,000 a year.

The forfeiture of the lease
15. Mr. Dolan gave evidence that he had paid €650,000 in respect of the lease of the premises and had obtained a bank loan from National Irish Bank for this purpose. There were no arrears of rent when the forfeiture notice was served, but the lease was subsequently forfeited when the defendants could not trade out of the premises following the termination of the contract. The plaintiff was fully aware of these arrangements prior to the termination of the contract.

Conclusions regarding the loss of the value of the company and the forfeiture of the lease
16. In the absence of any expert evidence, the valuation of the company in December 2008 is especially difficult. To this may be added the fact that this was just several months after the announcement of the bank guarantee in September 2008, so that the trading environment was particularly difficult. Property values were falling rapidly and retail sales were plummeting as consumers were faced with bleak and unforgiving economic news.

17. To my mind, by that stage the company had very little intrinsic value over and above the value of the lease, the fact that it occupied a good trading position just outside of Drogheda and its capacity to deliver an income from the retail business. Certainly, without these assets the company had a nil value. In addition, I think that had the defendants been given an opportunity to sell the company in 2009 or 2010 they would have struggled to do so. In these circumstances, I do not believe that the defendants can advance a claim in respect of the value of the company along with a claim for damages associated with the forfeiture of the lease. While I naturally have had regard to the proposed price of €1.4m. for Ranzett which was contemplated in September 2007, the economic conditions had changed radically for the worse in the intervening fifteen month period. Ranzett itself was also by this stage in a far more precarious position than had been the case at the time of the proposed sale.

18. In these circumstances, I propose to value these claims by reference to the lowest multiplier of 10 times weekly turnover, reflecting the bleak economic environment which then prevailed and the uncertainties which would then have attended the sale of the business. I also think that the weekly turnover of the business would have declined in 2009 to €42,000 in line with declining consumer spending.

19. On that basis, therefore, I propose to award the defendants the sum of €420,000 in respect of the damages arising from the effective destruction of the business and the forfeiture of the lease.

The re-possession of stock
20. It is clear from the terms of my first judgment (see paragraphs 74-85) that Londis were really only interested in retrieving only high value boxed stock. As I pointed out in the first judgment (at paragraphs 71 and 72) , the effect of the letter from Londis's solicitors of 4th December 2008 was that Mr. Dolan could not safely deal with the stock until Londis had exercised its reservation of title rights, there was a further delay until December 23rd, 2008. It was only then that Londis confirmed that it did not propose to exercise its retention of title rights any further. This left some €65,000 of stock which, by this stage, Mr. Dolan was not able to sell by reason of the closure of the store in the meantime.

21. In my view, the defendants can, in principle, properly make a claim in respect of these particular losses which flow directly from the termination of the contract and more specifically from the failure of the plaintiff to exercise its contractual powers of retention of title in a manner which was also consistent its fiduciary obligations under the trading terms agreement, so that these contractual entitlements were exercised in a manner which also took account of the defendants' interests: see paragraph 132 of the judgment.

22. In calculating these damages, however, I must also have regard to the fact that Mr. Dolan was objectively at fault in not immediately permitting Londis to repossess the stock on the morning of December 4th, 2008, as they were contractually entitled to do: see paragraph 134 of the judgment. In this regard, it is clear from the Supreme Court's decision in *McCord v. Electricity Supply Board* [1980] I.L.R.M. 153 that, having regard to the provisions of s. 34(1) of the Civil Liability Act 1961, damages for breach of contract may be reduced – or even entirely negatived – where the plaintiff has been guilty of fault or contributory negligence.

23. As Kenny J. stated in this context in *Carroll v. Clare County Council* [1975] I.R. 221, 227:

> "I think that 'fault' in s. 34 of the Act of 1961 means a departure from a norm by a person who, as a result of such departure, has been found to have been negligent and that degrees of 'fault' expresses the extent of his departure from the standard of behaviour to be expected from a reasonable man or woman in the circumstances. The extent of that departure is not be measured by moral consideration, for to so would introduce a subjective element while the true view is that the test is objective only. It is the blameworthiness, by reference to what a reasonable man or woman would have done in the circumstances, of the contribution of the plaintiff and the defendant [to the happening of the accident] which is to be the basis of the apportionment."

24. In my view, Mr. Dolan was objectively at fault in not permitting the Londis team to repossess the stock. This was a factor which led to a series of misunderstandings on all sides and a cascade of events which culminated in the closure of the store, with disastrous consequences for the defendants: see paragraphs 135-136 of the first judgment. It is appropriate, therefore, reflecting that degree of that fault, to reduce the damages in respect of the stock repossession only by approximately one third from €65,000 to €44,000.

The re-possession and sale of the specialist equipment

25. For the reasons I have already given in respect of the forfeiture of the lease, the re-possession of the specialist equipment by the leasing company was a natural and foreseeable consequence of the abrupt closure of the store in the manner which I have found to be unlawful and a breach of contract. The evidence of Mr. Dolan aside, I have no evidence on which I could have valued that equipment. The real loss here again stems from the fact that the defendants were deprived of the opportunity of selling this equipment at some stage in 2009 or 2010 in an orderly fashion and thus securing what Mr. Dolan contended was a more realistic price for that equipment than that obtained by the leasing company. In the absence of any specialist evidence on the point I cannot say what this additional value might have been or, indeed, if any higher price was obtainable.

26. I will, however, give the parties an opportunity to lead evidence on this point should they wish to do so, prior to the finalisation of any order.

Conclusions

27. In summary, therefore, I will award the defendants the sums of €420,000 in respect of the value of the company and the forfeiture of the lease, along with the sum of €44,000 in respect of the value of the goods which were not re-possessed following the retention of title exercise. This combined sum of €464,000 will be set off against the award of €561,283.91 which I have already awarded to the plaintiff.

28. In addition, I will give the parties an opportunity to adduce evidence regard the value of the re-possessed leasing equipment if it were to have been disposed of in an open market in 2009 or 2010. Insofar as this figure is higher than the sum actually obtained by the leasing company for the sale of such equipment in early 2009, then the defendants will be entitled to that figure by way of damages as well and that figure will also be set off as against the current balance of the award in favour of the plaintiff.