

THE HIGH COURT

2011 404 COS

IN THE MATTER OF HSS (IN RECEIVERSHIP)

AND

IN THE MATTER OF SECTION 316 OF THE COMPANIES ACT 1963

JUDGMENT of Mr. Justice Clarke delivered on the 28th day of October, 2011

1. Introduction

1.1 The receiver of the company named in the title to these proceedings ("HSS") brings an application before the Court under s. 316 of the Companies Act 1963, for directions. The directions are sought in relation to the status of the receiver in relation to two properties owned by HSS and in particular whether the receiver is entitled to possession of those properties. It will be necessary to set out the circumstances in which the receiver felt it necessary to seek the Court's directions in early course. However, it should, at this early stage, be noted that two respondents have been put on notice of this motion but that only one appeared and made submissions at the hearing.

1.2 The first respondent to the receiver's application, Mr. Patrick O'Connor of Swift Concepts Ltd., who was the relevant party in the case of one of the properties concerned, did not participate in the proceedings. The respondent relevant to the other property (namely Unit 4a The Shopping Village, Citywest, Co. Dublin (otherwise the "Property")) was Mr. Graham Mason who trades as Oxford Property Group and also operates through his company Oxford Property Lettings Ltd. (collectively "Mr. Mason"). Mr. Mason did appear and put forward, through counsel, argument as to why the Court should not direct that the receiver was entitled to possession of the Property. That argument raises one general question about the proper approach of the Court in an application under s. 316. However, to understand the point it is necessary to turn, first, to the circumstances which led to the receiver's application insofar as it is material to Mr. Mason.

2. The Receiver's Application

2.1 HSS was associated with the Mansfield family. The Mansfield family, in addition to their interests in HSS, had other interests in Citywest and the surrounding areas (collectively the "Mansfield interests"). HSS had very substantial borrowings from a number of financial institutions including Bank of Scotland Ireland Ltd. which has now merged into Bank of Scotland Plc. (collectively "Bank of Scotland"). Those borrowings were secured through a debenture which included a first legal charge over certain specified lands. It is common case that the forms part of those lands. The land concerned is registered land. It is also common case, therefore, that Bank of Scotland holds a registered legal charge over the Property. In addition, no question was raised as to the validity of the appointment of the receiver. Furthermore, the terms of the debenture are clear.

2.2 There was again no dispute raised on behalf of Mr. Mason to the contention put forward on behalf of the receiver that the debenture contained covenants which would be broken in the event of HSS giving any interest in the lands in question to any third party. The relevant terms of the debenture are the following:

"7.1 The Company hereby irrevocably covenants and undertakes with the Bank that, during the continuance of this security, it:-

[...]

(u) shall not, without the prior consent in writing of the Bank exercise any of the powers of leasing or agreeing to lease vested in, or conferred on, mortgagors by common law or by statute or create or suffer to be created a tenancy of any description of the whole or any part of any of its properties or confer upon any person any contractual licence, right or interest to occupy the whole or any part of the paid property or accept or agree to accept a surrender of any lease, underlease, tenancy, licence or agreement;

[...]"

2.3 While not formally conceding the point, counsel on behalf of Mr. Mason, quite correctly, in my view, did not dispute the receiver's underlying contention which was to the effect that, *prima facie*, the interests of the Bank of Scotland (and through Bank of Scotland, the receiver) have priority over any interest which Mr. Mason might have in the Property for any interest which Mr. Mason obtained, it was common case, significantly post-dated the existence of the debenture.

2.4 On that basis, the case made by counsel on behalf of the receiver was straightforward. It was said that the receiver, who obtains his entitlements through Bank of Scotland, has priority over any interest which Mr. Mason might assert, and that in those circumstances, the matters put forward by Mr. Mason in opposition to the receiver's application are not relevant. In that context, it is appropriate to turn to Mr. Mason's case.

3. Mr. Mason's Case

3.1 The background to Mr. Mason's case stems from the contention which he makes that he provided significant services to HSS and, indeed, perhaps, to other interests of the Mansfield family, in relation to property management and the like, for a number of years. It is said that a point was reached where the Mansfield interests appeared to be having difficulty in meeting his reasonable invoices. It is said that it was, in that context, that he was allowed into possession of the Property, in other words, that it was in partial recognition of the fact that HSS and other Mansfield interests owed him money which they were unable to pay. This was achieved through a lease dated 7th December, 2009. The receiver, quite properly, took the position that he was unable to comment on the veracity of those allegations one way or the other. For the purposes of this application, I will, therefore, assume that the contention made by Mr. Mason is factually correct.

3.2 There is a dispute as to the amount that is properly owing by HSS to Mr. Mason. From an examination of the books and records of HSS, it is suggested on behalf of the receiver that the sum owed is of the order of €15,000. Mr. Mason suggests that it is very

considerably more, being of the order of €174,335.52. Either way, that dispute is not something which should ordinarily be resolved on an application such as this.

3.3 While the lease over the Property was expressly described as a “residential lease agreement” there was no dispute but that it was used by Mr. Mason for business purposes. Although in the circumstances it is not an issue now faced by the court, had the situation been one in which a truly residential lease was asserted, then it is likely that the provisions of the Residential Tenancies Act 2004 would apply.

3.4 In any event, counsel for Mr. Mason instead relies on three matters which, he argues, can and should properly be taken into account by the Court in deciding whether to make the order sought by the receiver. Those matters are as follows:-

(a) The fact that Mr. Mason is a significant creditor of HSS and was given occupation of the Property in recognition of the difficulty which HSS was facing in paying its liabilities and in circumstances where Mr. Mason continued, on that basis, to provide further services to HSS.

(b) It is said that, in the immediate aftermath of the appointment of the receiver, an agreement was reached between Mr. Mason and the receiver whereby it is said that Mr. Mason was to provide continuing property management services. The existence of any such contract is disputed by the receiver. More fundamentally, however, the receiver argues that, even if such a contract were found to exist, same would simply entitle Mr. Mason to recover whatever sum might be due and would not give Mr. Mason any additional entitlement to occupy HSS’s property.

(c) Third, Mr. Mason refers to the difficulties which he has encountered in carrying on his business at the Property by reason of actions taken by the receiver who has gone into occupation of much of the surrounding property and has put in place security and other measures which, it is said, have impacted on the ability of Mr. Mason to carry on his business from the Property. I do not doubt that the measures taken by the receiver may have had an effect on Mr. Mason’s business. However, it did not seem to me that any argument was, in truth, put forward which suggested that there was anything wrongful in the actions taken by the receiver.

3.5 It needs to be recalled that this is an application brought by the receiver seeking directions as to the priority of his position, claiming, as he does, through the earlier Bank of Scotland debenture, and his consequential entitlement, it is said, to possession. The real issue of principle which arose between counsel is as to whether any of the matters raised by Mr. Mason are matters which a Court could legitimately take into account in deciding whether to make an order under s. 316. I therefore turn to that general question.

4. The Scope of Section 316

4.1 Section 316(1) allows, amongst others, a receiver to apply to the Court:

“for directions in relation to any matter in connection with the performance or otherwise by the receiver of his functions”.

The section goes on to say that as a result of such an application:

“the Court may give such directions, or make such order declaring the rights of persons before the Court or otherwise, as the Court thinks just”.

4.2 The starting point has to be the recognition of the fact that the receiver was appointed by a debenture holder who holds a first legal charge over the Property and who had the benefit of covenants which would have precluded HSS from, without Bank of Scotland’s permission, giving any interest in the Property to Mr. Mason. To the extent, therefore, that HSS purported to create any interest in the Property in favour of Mr. Mason, HSS was acting in breach of covenant and thus unlawfully. It may well be that Mr. Mason was wholly unaware of that situation. However, it was a matter of public record. The existence of the charge in favour of Bank of Scotland was registered in the Land Registry and was available to be checked by any person who wished. There can be no doubt but that, in those circumstances, whatever might have been the position as and between HSS and Mr. Mason, Mr. Mason had no entitlement to assert any right against Bank of Scotland for any right which he had created in breach of HSS’s obligations to Bank of Scotland.

4.3 Insofar as Mr. Mason’s claim can be characterised as one in which he is asserting some form of lien or security over the Property in consideration of monies outstanding: his position vis-à-vis Bank of Scotland is clear. As a creditor, Mr. Mason could not be given any security by HSS in priority to that previously given to Bank of Scotland without its consent.

4.4 The real question is whether any or all of the three matters raised by counsel on behalf of Mr. Mason can displace that basic position. It seems to me that they cannot.

4.5 It is not possible for me to determine the level of indebtedness which HSS has to Mr. Mason. However, even on the basis of Mr. Mason’s case, he is no more than an unsecured creditor for a significant sum. While I have very considerable sympathy with someone in the position of Mr. Mason, he is, in reality, in no worse position than any other unsecured creditor of HSS, or indeed, the many unsecured creditors of various companies which have gone to the wall in recent years who have received little or nothing from receiverships or liquidations.

4.6 Likewise, there is nothing in the evidence to suggest that any possible arrangement that might have been entered into between the receiver and Mr. Mason gave Mr. Mason an entitlement to remain on in the Property. The height of Mr. Mason’s case (and I again express no view on the merits) is that he is entitled to be paid by the receiver as a result of a contract entered into by the receiver which, arguably, if it exists, might leave the receiver directly liable to Mr. Mason under s. 316(2).

4.7 Finally, so far as the complaints which Mr. Mason makes concerning the difficulty which he had in carrying on his business, I again have considerable sympathy with his position, but if, as the receiver has properly argued, Mr. Mason was not entitled to occupy the premises in priority to Bank of Scotland in the first place then it is hard to see how he has any legal complaint arising out of those circumstances. If he was not entitled to be in the premises in the first place, then any difficulty in carrying on his business from the time the receivership commenced needs to be seen in that light.

4.8 All of those points need to be seen in the context of the argument put forward by counsel on behalf of Mr. Mason which suggests that the Court enjoys a wide discretion under s. 316. It is true that the Court is entitled to give directions or make orders declaring the rights of persons, as the Court thinks just. However, it does not seem to me that that section confers on the Court any

entitlement to change the proper implementation of the regime for dealing with the assets of insolvent companies as set out in the Companies Acts. The reason why the Court has been given a wide discretion is that the types of directions or orders that might be required may vary enormously depending on the facts with which the Court is faced. The Court is, therefore, given a very wide discretion as to the type of intervention which may be appropriate.

4.9 However, it does not seem to me that s. 316 confers on the Court any discretion to alter the legal rights of parties as determined by corporate insolvency law. The Companies Acts contain very many measures designed to determine who gets what out of the assets of insolvent companies. The Court can, in an application under s. 316, decide issues that arise as to who is to get what and make whatever directions or orders are appropriate to ensure that parties get what they are entitled to. The section does not, however, give the Court carte blanche to reassess whether the carefully crafted provisions of corporate insolvency law are to apply.

4.10 Counsel for Mr. Mason also placed emphasis on the reference to unfair prejudice in s. 316(1A), which section requires a creditor who seeks to apply under s. 316 to put forward evidence of unfair prejudice. However, it seems to me that the prejudice that is spoken of in s. 316(1A) is prejudice to the actual rights of individuals. In other words, a creditor applying under s. 316 needs to show that that creditor's rights might be unfairly prejudiced by an action (or, indeed, inaction) of a receiver. It does not give the Court some general jurisdiction to consider whether things are fair or unfair.

4.11 It seems to me, therefore, that s. 316 is concerned with determining the rights of parties in the context of corporate insolvency law and making whatever orders or giving whatever directions are necessary to ensure that parties, having regard to those rights, are not dealt with in an unfair way. The starting point has to be, however, a determination of the party's legal rights. What legal right does Mr. Mason have?

5. What are Mr. Mason's Legal Rights?

5.1 In that context, his right, in respect of his pre-receivership liabilities from HSS, is no more and no less than to take his place among the unsecured creditors and hope for whatever payment may be forthcoming. He can have no right to the added comfort which he got by being given occupation of the Property because HSS was unable to pay his debts, for the giving of occupation of that Property in any circumstances which conferred any long-term entitlement on Mr. Mason was a breach of covenant on the part of HSS and could not confer any rights on Mr. Mason.

5.2 If, contrary to the submission of the receiver, there is a binding contract for post receivership services in place between Mr. Mason and the receiver, then Mr. Mason is entitled to recover whatever might be due under that contract. It seems highly unlikely that any amounts that could be claimed under that heading would come within the jurisdiction of this Court. It seems to me to be much more appropriate for any issues which arise under that heading to be dealt with in ordinary proceedings in whichever of the District or Circuit Court might have jurisdiction. It certainly is not an issue that is relevant to the question of whether Mr. Mason has any entitlement to remain in the Property, for even if he is owed money by the receiver, his legal entitlement is to get that money and not to occupy the Property.

5.3 Finally, it is hard to see how, based on the facts raised under the third issue and for the reasons already analysed, Mr. Mason had any right to be in the Property after the receivership in the first place. Any difficulties which he suffered cannot have breached his legal rights, for he did not have them in the first place.

6. Conclusions

6.1 In all those circumstances, it does not seem to me that Mr. Mason has made out any legal right to the Property which could justify the Court in departing from the *prima facie* position which is to the effect that the receiver is entitled to possession. The receiver's entitlement to possession is, of course, in turn, precisely because of the priority of the Bank of Scotland debenture to which I have already referred.

6.2 It follows that the receiver is entitled to the direction which he seeks so far as Mr. Mason is concerned. While the other respondent did not, as I have already indicated, appear, and while it seemed to follow that the same analysis would apply in that case also I was informed by counsel, as I was about to give judgment, that the receiver had concerns as to whether the application, insofar as it related to the other respondent, was properly constituted. In those circumstances I will adjourn that aspect of the application.