Neutral Citation: [2013] IEHC 521

THE HIGH COURT

[2012 No. 600 COS]

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2012

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 316 OF THE COMPANIES ACT, 1963 (AS AMENDED)

AND

IN THE MATTERS OF JRM HOTELS LIMITED (IN RECEIVERSHIP) BCGM (IN RECEIVERSHIP) CITYWIDE LEISURE LIMITED (IN RECEIVERSHIP) BLARNEY INN LIMITED (IN RECEIVERSHIP) AND ASPERE PROPERTY INVESTMENTS LIMITED (IN RECEIVERSHIP)

BETWEEN

DAVID HUGHES AND LUKE CHARLETON

APPLICANTS

AND

JOHNNY MORAN AND SONJIA MAHER

RESPONDENTS

Judgment of Ms. Justice Laffoy delivered on 19th day of November, 2013.

The application

1. This application brought by the applicants (the Receivers) as receivers of the companies named in the title hereof (the Companies) under s. 316 of the Companies Act 1963 (the Act of 1963) against the respondents, who are the directors of the Companies, was heard following the hearing of an application by the first named respondent (Mr. Moran) against the Receivers (Record No. 2012/204 COS). The judgment on that application (the earlier judgment) delivered immediately before this judgment gives context to this judgment.

2. This application was initiated by the Receivers by an originating notice of motion dated 30th October, 2012 in which they sought the directions of the Court pursuant to s. 316 of the Act of 1963 (as amended) compelling the respondents to deliver to the Receivers "the books and records" of each of the Companies. The application was grounded on the affidavit of the second named applicant (Mr. Charleton) sworn on 26th October, 2012. The basis on which the Receivers' entitlement to the books and records in issue was asserted in that affidavit was that they are entitled thereto pursuant to the security documents under which they were appointed. The reason advanced for seeking the order was that, in the course of proceedings on petitions brought by them to wind up two companies controlled by Mr. Moran, Clapin Limited and Open Minds Centre Limited, on foot of debts which the Receivers considered to be owing to two of the Companies of which they are receivers, the petitions were defended "on the basis of documents purporting to be books and records of the [petitioning] Companies, which did not form part of the books and records of the [petitioning] Companies available to" the Receivers. As a result, the Receivers sought confirmation in correspondence with the respondents' solicitors, P. B. Cunningham & Co., that the respondents did not retain any books and records, indicating the intention to bring a motion to seek such confirmation. Not having obtained the confirmation sought, the application was brought. In his grounding affidavit Mr. Charleton averred that the position adopted by the respondents is wholly unsatisfactory and "amounts to an attempt to frustrate" the Receivers in their work.

3. Mr. Moran responded to the application in his first replying affidavit sworn on 12th December, 2012. This gave rise to Mr. Charleton's second affidavit sworn on 11th January, 2013 which, in turn, led to Mr. Moran's second affidavit of 4th February, 2013.

4. Unlike the earlier application, on the hearing of which Mr. Moran appeared in person, on this application both respondents were represented by counsel instructed by B. P. Cunningham & Co.

Grounds on which Receivers claim entitlement to books and records

5. The Receivers do not rely on any particular statutory provision other than s. 316. There was mention of s. 202 of the Companies Act 1990 (the Act of 1990) at the hearing. That reference arose from a letter dated 13th December, 2012 issued by the Receivers' solicitors, Arthur Cox, in response to a letter from the respondents' solicitors dated 5th December, 2012 asking the Receivers' solicitors to describe in either broad or specific terms the nature of the documentation required from the respondents. In that letter, the Receivers' solicitors confirmed, for the avoidance of doubt, that the books and records of the Companies that the Receivers require are "(per Section 202 of the Companies Act, 1963) any books and records within the below categories which have not already been provided to [the Receivers] or which are not in the books and records left at the hotel premises on Pearse Street when the Receivers took possession of the premises". That the reference in that letter should have been to s. 202 of the Act of 1990 is obvious because the categories of documents outlined in the letter effectively paraphrase subs. (1) and (3) of s. 202. In broad terms, that is the section which imposes on every company an obligation to keep proper books of account. Notwithstanding the obvious mistake in their solicitors' letter of 13th December, 2012, which was highlighted by Mr. Moran in his second affidavit, what is clear is that what the Receivers were and are seeking were and are documents which each of the Companies had a statutory obligation to generate, although, having regard to the basis on which the Receivers claim entitlement, what they require are the physical or electronic books and records.

6. In fact, the Receivers based their entitlement to the books and records, as Mr. Charleton outlined in his grounding affidavit, on the provisions of the security documents under which they were appointed. In particular, the Receivers are relying on the floating charges

in the security documents under which they were appointed. There were three security documents in all given by the Companies to Anglo Irish Bank Corporation plc (the Bank) which appointed the Receivers.

7. Two of the security documents are in the same format. Counsel for the Receivers referred to one of them and, in particular, to Clause 3.5 of the Composite Debenture dated 30th June, 2005 given by the first three named Companies to the Bank. As one would expect, the various provisions in the charging clause, Clause 3, were drafted with a view to capturing everything, to use a colloquialism, "including the kitchen sink". The provision which created the floating charge, however, was Clause 3.1(r) which charged by way of first floating charge in favour of the Bank the undertakings of the chargor companies and all their other property, assets and rights whatsoever and wheresoever both present and future including property not captured by the specific or fixed charges in Clauses 3.1(a) to (q). Clause 3.5 dealt with the crystallisation of the floating charge. I am satisfied that the books and records of the relevant chargor companies were captured by the provisions of Clause 3.1(r) and Clause 3.5.

8. I am also satisfied that the books and records of the relevant chargor company were captured by the charging provisions of the security document which was in a different format, namely, the Mortgage Debenture dated 16th June, 2008 made between the fifth Company of the one part and the Bank of the other part, the relevant clause being Clause 4.5.

9. As to the necessity for an order in the terms sought by the Receivers, Mr. Charleton, in his second affidavit, has exhibited letters dated 30th March, 2012 from Arthur Cox to the respondents' solicitors summarising the petition proceedings in relation to Clapin Limited and Open Minds Centre Limited and he has pointed to the fact that the defence advanced to those petitions was based on documents "which purported to form part of the books and records of the companies" but which were not furnished to the Receivers as part of the Companies' books and records following their appointment. I have considered the exhibits and I must profess to not fully understanding the nature of the defences advanced to the two petitions.

10. However, I note from the letter of 30th March, 2012 in relation to the petition to wind up Clapin Limited that the petition arose from the debt recorded in the books and records of Citywide Leisure Limited (Citywide) and that a statutory demand under s. 214(a) of the Act of 1963 had been served on Clapin Limited on 6th December, 2011. I also note that the letter states that the affidavit of Mr. Moran sworn on 2nd March, 2012 "exhibited a loan agreement which purports to defer repayment of the debt the subject of the petition to 2017" and that it was commented that this was the first reference to the loan agreement and that it was raised as a defence to the petition debt some ten months after the first demand for that debt was raised. I also note that it is recorded in the letter that, by a letter dated 9th March, 2012, Arthur Cox sought:

> (a) an inspection of the original purported loan agreement;
>
> (b) copies of the board minutes of Citywide and Clapin Limited in relation to the entry into the loan agreement; and
>
> (c) an explanation why the debt due by Clapin Limited to Citywide was included as a current asset of Citywide, if it was not repayable within twelve months.

No substantive response was received to those queries. Finally, the letter recorded that, following extensive searches, "it does not appear that the original of the purported loan agreement is held by [the Bank] nor does it appear that they would have had any cause to hold the same".

11. Mr. Moran in his second affidavit sworn on 4th February, 2013 did not explain why the loan agreement, a copy of which was exhibited by him in his affidavit sworn on 2nd March, 2012 in response to the petition to wind up Clapin Limited, had not been handed over to the Receivers as receivers of Citywide. No explanation was given at the hearing of the application either. Both in Mr. Moran's affidavits and in the submissions made by counsel on behalf of the respondents certain assertions were made in relation to the withdrawal of the petitions to wind up Clapin Limited and Open Minds Centre Limited. Those proceedings terminated by the withdrawal of the petitions and it would be entirely inappropriate for the Court to form or express any view on their outcome on this application.

12. However, on the evidence adduced by the Receivers, I am satisfied that, as regards the indebtedness of Clapin Limited and Open Minds Centre Limited to some of the Companies, a genuine question arises as to whether all of the books and records of those Companies to which the Receivers are entitled have been furnished to them.

The response of the respondents to the application

13. Counsel for the respondents asserted that the application was a "pincer movement" by the Bank against companies of limited resources and that it was an abuse of process. In this connection, he outlined other related proceedings which were pending. First, he referred to proceedings against Mr. Moran personally by the Bank on foot of a guarantee (Record No. 2011/3213S) to which a full defence and counterclaim had been delivered and which were pending in the Commercial Court. Secondly, he referred to proceedings by Mr. Moran against the Bank (Record No. 2011/7023P) in which Mr. Moran was challenging the validity of the appointment of the Receivers, which were also pending in the Commercial Court, although an order for security for costs made against Mr. Moran was the subject of an appeal to the Supreme Court. Thirdly, he referred to matters in relation to each of the respondents which were pending in the Employment Appeals Tribunal. Fourthly, he referred to the Mr. Moran's application under s. 316 (Record No. 2012/204 COS) referred to at the outset. Finally, he referred to proceedings by the Bank against the Companies seeking to vacate a *lis pendens*, also pending in the Commercial Court, of which this Court has no knowledge. While it was emphasised that the Receivers have all the relevant documents and that the respondents are not wilfully holding back any documents, it was submitted that to make the order sought it would be prejudicial to Mr. Moran and that this application should be stayed or adjourned generally pending the outcome of the related proceedings. It would be wholly inappropriate for this Court to form or express any view on the related proceedings. However, in my view, the existence of the related proceedings cannot be an answer to the Receivers' application.

14. It was also submitted that the Receivers had acted in an aggressive manner in taking possession of the premises and assets of the Companies. Reference was made to proceedings initiated by the Receivers against the respondents seeking injunctive relief (Record No. 2011/1285P). In his first replying affidavit Mr. Moran raises issues in relation to those proceedings. Again, those proceedings have terminated, as outlined in my earlier judgment on Mr. Moran's s. 316 application, and are of no relevance to the issue now before the Court.

15. It was contended by Mr. Moran on affidavit and reiterated by his counsel at the hearing that, if an order is granted in the terms sought, Mr. Moran would have to undertake "a significant trawl through extensive quantities" of the respondents' personal documentation, both electronic and hard copy, in order to determine whether any documentation relating to the Companies exists and, if such documentation exists, whether the same could be said to be "books and records" of the Companies. The respondents would also be required to carry out an extensive scheduling exercise. It would be necessary for Mr. Moran to contact all accountants, auditors and solicitors who previously represented the Companies. Further, if the documentation exists, it would be necessary to carry

out a comparative exercise with the documentation already in the Receivers' possession "in order to determine whether the documentation in question is an original or merely a copy of a book and/or record of the Companies which is already in the [Receivers' possession]". However, Mr. Moran does not have access to the documentation, books and records of the Companies of which the Receivers have taken control. It was submitted by counsel for the respondents that in the context where it is the respondents' belief that the Receivers have access to all original books and records of the Companies and are aware of all of the Companies' transactions and that any accounting documentation in respect of the Companies is within their power of possession or procurement from third parties or financial institutions, this application is tantamount to oppression.

16. Counsel for the respondents referred to two authorities in support of his argument that the application should be refused.

17. One was the decision of this Court in *Re Old Court Holiday Hostel Ltd.* [2006] IEHC 424, where it was suggested that, where a liquidator is applying to the Court for directions under s. 280 or, indeed, where a receiver is applying for directions under s. 316, of the Act of 1963, it would be helpful if the Court had some overview of the winding up from the liquidator or the receivership from the receiver. It was further suggested that the type of report furnished to the Court in compulsory winding up matters would be useful template. However, it was made clear in that judgment that the detail required in any case would depend on the case, on the stage which the winding up had reached and the issues which the Court had to address on the application for directions. As counsel for the Receivers stated in reply, this Court knows the state of the receivership of the Companies.

18. The other authority relied on by counsel for the respondents was a decision of the Chancery Division of the High Court of England and Wales in *Green v. BDO Stoy Hayward LLP* [2005] EWHC 2413. That case concerned an application by the liquidator of a company, which went into compulsory liquidation in 1998, for an order against the company's former auditors, BDO, for production of documents, the request for information having been made in 2005. The statutory provision in question was s. 236 of the Insolvency Act 1986, which is in similar terms to s. 245 of the Act of 1963, in that the context of such an order is a compulsory winding up, and the target is either an officer of the company, or a person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company, whom the Court may summon before it (subs. (1)) and examine on oath (subs. (2)). Further, in both jurisdictions under subs. (3) of both provisions the Court may require such a person to produce books, papers or records in his possession or under his control.

19. Counsel for the respondents referred the Court to the outline of the relevant legal principles set out in the judgment of Kitchin J. (at paras. 27 *et seq*.), where it is stated:

> "27. It is well established that the powers conferred by s.236 are powers directed to enabling the court to help a liquidator discover the truth of the circumstances connected with the affairs of the company in order that the liquidator may be able, as effectively and cheaply as possible, to complete his function and put the affairs of the company in order, including the getting in of any assets of the company available in the liquidation. When the liquidator thinks he may be under a duty to recover something from some person concerned with the affairs of the company then it is appropriate for the liquidator to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim. Normally the court should seek to assist the liquidator to carry out his duties in this way.
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> 28. The scope of s.236 has always been understood to extend to reconstituting the state of the company's knowledge, however it is now well recognised that the scope of the jurisdiction also extends to all documents which the liquidator may reasonably require to see to carry out his functions: *British and Commonwealth Holdings (No. 2)* [1992] AC 426.
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> 29. Nevertheless, it is for the liquidator to establish his case under s.236. He must show that he reasonably requires the documents sought. In this connection the view of the liquidator is normally entitled to a good deal of weight: *Sasea Finance Ltd (Joint Liquidators) v KPMG* [1998] BCC 216 at 220. It is also recognised that the liquidator is required to establish only a 'reasonable requirement' for information, not an absolute need and that he is under no duty to make out the requirement in detail. The court ultimately has an unfettered discretion which it will seek to exercise in the interests of the winding up without being oppressive to the party the subject of the application. As Lord Slynn explained in *British and Commonwealth Holdings* at 439, the proper case is one where the liquidator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the liquidator's requirements."

20. The commentary on s. 245 in MacCann & Courtney on *Companies Acts 1963 – 2012* is in similar terms and is instructive. On the discretion of the Court to make an order for examination under s. 245, the editors state (at p. 513):

> "The Court has an inherent discretion to grant or refuse an order for examination. The primary function of the section is to enable the Liquidator or the ODCE, as the case may be, to complete his functions as effectively as possible and with as little expense and as much expedition as possible. An application under this section is subject to the overriding requirement that the examination must be necessary in the interests of the winding up or of the performance of the ODCE's functions, as the case may be, and must not be oppressive, unfair or unjust to the respondent. If the object of the Liquidator is simply to obtain information, which will enable him to assist to decide whether or not the company has a valid claim against a third party, the Court will normally grant the application. However, if the evidence shows that the purpose of the Liquidator or the ODCE in seeking the examination is to achieve an advantage beyond the ordinary litigant in proceedings which he has already commenced or which he has definitely decided to commence, the pre-disposition of the Court will normally be to refuse the application as being tantamount to an abuse of process, unless of course the applicant can show special grounds to the contrary (as where the proposed line of questioning goes not to the merits of the case, but simply to understand the affairs of the company or to identify the whereabouts of assets owned by the company). The case for making an order against an officer or former officer of the company would usually be stronger than against a third party who has no duty to operate with the Liquidator and that oral examination is likely to be more oppressive than an order for production of documents. The order will be made even though its stated purpose is to gather information to be used against a director in restriction or disqualification proceedings. Nevertheless an order for the production of documents may be oppressive where the person against whom the order is directed is being required to produce documents which do not belong to him but which belong to some other party, such as his employer."

21. Counsel on behalf of the Receivers submitted that the decision in *Green v. BDO Stoy Hayward LLP* is not in point, on the basis that it was an application by a liquidator which was targeted at auditors. He also submitted that, in any event, the Receivers' case is that the books and records sought are assets of the Companies, which are captured by the security documents under which they were appointed. I do not accept those submissions as being determinative. I consider that the judicial decisions on provisions such as

s. 245 of the Act of 1963 should guide the Court when the Court is asked to make an order under s. 316 at the suit of a receiver seeking an order analogous to subs. (3) of s. 245. If anything, I think the Court should take a stricter line in adjudicating on such an application made by a receiver under s. 316, because the receiver, unlike a liquidator, is protecting the interests of the security holder which appointed him and his functions are largely regulated by the security documents.

22. It was submitted on behalf of the respondents that in this case the Receivers have failed to discharge the onus identified in *Green v. BDO Stoy Hayward LLP* and that what they are doing is embarking on a "fishing expedition" and that the oppressive nature of what the respondents are being asked to do in the search to find the documents outweighs the Receivers' requirements.

Conclusion

23. I do not think it would be a proper exercise of the Court's discretion under s. 316 to make an order against the respondents for blanket delivery of the books and records of the Companies for a number of reasons. First, while, as I have already found, the position in relation to the debt which the Receivers understood to be due by Clapin Limited to Citywide as outlined earlier does establish a necessity or a "reasonable requirement" on the part of the Receivers for information and documentation in relation to that matter, the evidence does not suggest a necessity for an all embracing order of the type sought. Secondly, it appears that the respondents have not complied with their statutory obligations under s. 319(1)(b) and s. 320 of the Act of 1963 in relation to the submission of a statement of affairs in relation to any of the Companies to the Receivers, a fact from which, wrongly and absurdly, Mr. Moran seems to profess an entitlement to merit in his second replying affidavit. I say wrongly because it is absolutely clear on the evidence that, in relation to each of the Companies, by letter dated 17th January, 2011 each of the respondents were notified that the Receivers had been appointed and of their obligations under ss. 319(1)(b) and 320 of the Act of 1963 and the fact that failure to comply with those requirements would render them liable to penalties. Having said that, it would make more sense for the Receivers to pursue compliance with ss. 319 and 320 than the approach adopted on this application, which seems to be focused on obtaining physical and electronic books and records. Thirdly, if the Court were to make an order in the terms sought and the respondents failed to comply with it, I have no doubt that enforcement would give rise to huge difficulties, if the Court was asked to enforce the order because of the wide scope of the order sought.

24. For all of the foregoing reasons I consider that the proper exercise of the Court's discretion is to make a limited order at this juncture, which will meet the Receivers' reasonable requirements, having regard to the evidence before the Court, but which will not be unduly oppressive to the respondents. The order I propose making is an order directing the respondents to deliver to the Receivers within six weeks of the date of this judgment all documents and records in their possession in relation to –

(a) any indebtedness by Clapin Limited to Citywide and

(b) any indebtedness of Open Minds Centre Limited to the fourth named company, Blarney Inn Limited,

in relation to a debt which existed at any time on or after 1st January, 2007.

25. I propose adjourning the application generally with liberty to the Receivers to re-enter it, if the Receivers consider it necessary to have further recourse to the Court.