Neutral Citation: [2014] IEHC 36

THE HIGH COURT

[2012 695 COS]

IN THE MATTER OF THE BELOHN LTD (IN RECEIVERSHIP AND IN LIQUIDATION) AND IN THE MATTER OF AN APPLICATION PURSUANT TO S. 316 OF THE COMPANIES ACTS 1963 AND IN THE MATTER OF AN APPLICATION PURSUANT TO S. 3 OF THE LEGAL PRACTITIONERS (IRELAND) ACT 1876

BETWEEN

THE MERROW LTD (IN LIQUIDATION)

APPLICANT

AND

BANK OF SCOTLAND PLC AND DAVID O'CONNOR

RESPONDENTS

JUDGMENT of Mr Justice Ryan delivered the 31st January 2014

This case concerns a public house and restaurant premises and business located at the corner of Merrion Row and Upper Merrion Street, Dublin 2 and known as Foleys Bar/O'Reillys. The company that owned and operated the business is The Belohn Ltd. Merrow owns all the shares in The Belohn Ltd. The shareholders of Merrow Ltd are Sean Foley, the applicant on this motion, and his wife.

The business premises comprise two separate buildings and titles and the Belohn entered into separate mortgages for these premises. A mortgage dated the 7th August, 1981 exists over 1 Merrion Row and there is a mortgage debenture of the 3rd April, 2008, over 17 Upper Merrion Street. The first respondent bank is now the holder of those mortgages and its predecessor in title, Bank of Scotland (Ireland) Ltd, also provided a facility of €3.75m on the 12th May, 2006. Merrow borrowed from BOSI to purchase the shares in The Belohn and there is a debenture/floating charge dated the 12th November 2007. In the result, the premises comprising two buildings are mortgaged and the business is also charged with the monies that were owed.

On the 10th October, 2012, the bank appointed the second named respondent David O'Connor to be the receiver and manager. On the 20th December, 2012, the company namely Merrow Ltd brought proceedings under s. 316 of the Companies Act challenging the appointment of the receiver on a number of grounds. One of the challenges succeeded. In one of the mortgages there was a requirement that a receiver be appointed by a formal document under the seal of the company. By an order of this Court (Gilligan J) of the 22nd March, 2013, the court declared that the appointment of Mr. O'Connor was invalid, void and of no effect. Although the frailty in the appointment of the receiver applied only to one of the mortgages and therefore only one of the premises, the court decided that it was impossible in the circumstances of the business being operated as a unit to make separate orders and to unscramble the tile and the appointment of the receiver and it declared the appointment under each of the mortgages to be void.

Following the court's decision, the bank made new demands on the two companies in respect of the monies owed and they successfully applied to the court for examinership but that process collapsed and on the 17th July, 2013 Finlay Geoghegan J made an order winding up the two companies.

In the proceedings to unseat the receiver, Gilligan J made an order for costs in favour of Merrow Ltd but they have not yet been taxed or ascertained. By letter of the 15th June, 2013, Mr. Sean Foley, solicitor, the applicant, sent a letter headed "*Re: Merrow Ltd v. Bank of Scotland and David O'Connor* (2012 No. 695 COS)" to himself and his wife at 1 Merrion Row, in which he enclosed a schedule of costs and outlay in regard to the s. 316 proceedings amounting to €223,921.50.

The solicitors acting against the bank in the court action were originally Sean Costello & Co but in early 2013, prior to the hearing date, Mr Foley replaced that firm and took over as solicitor for the applicant. He had not been working as a solicitor for a number of years but shortly before taking over the case he obtained a practising certificate from the Law Society and came on record for Merrow Ltd on 28th January 2013.

On the 22nd June, 2013, Mr. Foley wrote to Mr Gavin Simons of AMOSS, Solicitors for the bank. Mr. Foley deposes that he sent a second letter on the same day to the same recipient, but Mr. Simons denies having received that second letter. Each of the letters has an endorsement saying that it was hand delivered at 11.45 am on Saturday the 22nd June, 2013.

The matter now comes before the court by way of notice of motion dated the 15th August, 2013, seeking:

> 1. An order pursuant to s. 3 of the Legal Practitioners (Ireland) Act 1876 to charge premises at No. 1 Merrion Row and No. 17 Upper Merrion Street;
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> 2. Alternatively an order under the same section charging the proceeds of sale of the said two premises;
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> 3. Alternatively an order pursuant to the inherent jurisdiction of the court preserving the proceeds of sale of the said two premises;
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> 4. In the further alternative and if necessary an order restraining the receiver David O'Connor from distributing or dissipating any proceeds of the sale of lands comprised in a mortgaged debenture dated the 7th august, 1981, between The Belohn Ltd and the Industrial Credit Corporation and in a mortgaged debenture dated the 3rd April, 2008, between The Belohn Ltd and Bank of Scotland (Ireland) Ltd.

Mr Foley's case on the motion is as follows. He was the solicitor acting for Merrow Ltd, the sole member of The Belohn Ltd, (which owns the properties at No. 1 Merrion Row and No. 17 Upper Merrion Street) in the s.316 proceedings, which were successful. (It may

have some relevance that the decision of this court is under appeal to the Supreme Court.) The applicant in that case was Merrow Ltd and it was awarded costs on a party and party basis in the normal way of litigation. Independently, Mr Foley is entitled to bill his own client or clients for his fees and he has done so. The bill may or may not be referred to taxation but that is not a matter for today or this court. By his efforts in the action, he has affected the retention or preservation of valuable property for his client or clients. Even if the actual owner of the property whose retention or preservation he has secured is not his client, his right to charge it with his costs still subsists because the Act does not restrict his entitlement to a client. He has, in a word, fulfilled all the requirements of section 3.

In opposition to the application, the bank's solicitor Mr Simons in his affidavit accepts that he did receive one hand delivered letter dated 22nd June 2013, which related to the proceedings issued in the name of The Belohn, but says that he did not receive any letter from Mr Foley referring to the initiation of the section 3 of the Legal Practitioners Act 1876 action. Further, the copy of the letter from Mr. Foley delivered by hand on 22nd June 2013 that he did receive differs from the copy exhibited by Mr. Foley to the court. Mr. Simons' copy states "By Hand Delivery Only" whereas the exhibited copy reads "By Recorded Post Only".

Mr. Simons deposes that the fees owed to Mr. Foley relate to Merrow Ltd but the property over which he is seeking the charge is owned by The Belohn Ltd. While Mr. Foley, as solicitor for Merrow Ltd, was successful in securing a declaration that the receiver and manager were not validly appointed, that does not mean that Merrow Ltd recovered property for which Mr. Foley can now secure a charge. At most, Merrow Ltd only recovered a shareholding in The Belohn and the associated rights that accompany such a shareholding.

Mr. Simons queries the level of fees claimed by Mr. Foley. Between January and March 2013 Mr. Foley swore two affidavits totalling 21 pages and received five replying affidavits totalling twelve pages. Counsel for Morrow Ltd prepared the legal submissions which were 21 pages long. The case was heard on the 1st March 2013 and judgment was delivered on 22nd March 2013. For this work Mr. Foley claimed a net professional fee of €128,750 and outlays of €2,214 and has failed to justify this figure, either by way of detailed narrative or letter from a cost accountant. It is unclear whether the legal fees for Sean Costello Solicitors or counsel for Merrow Ltd are included in that estimate. It may also be the case that some of the fees relate to the examinership of Merrow Ltd and, in those circumstances, should not form any part of this application.

Mr. Simons avers that as of the 25th June 2013, the premises had cash on hand in the amount of €32,110, according to the examiner. Subsequent to the liquidator's appointment, a sum of only €955.01 was recovered. There has been no explanation given by Mr. Foley as to where the money has gone.

The Bank is owed in excess of €5,260,000 and the property is currently worth less than €3,000,000. The Bank will not recover all of the debts owing to it and, regardless of Mr. Foley's application, any charge he may acquire will still rank below that of the Bank's priority.

Mr Declan McGrath SC, for the applicant, argues that the authorities show that the right in question is said to derive from a concept analogous to salvage, whereby the salvor becomes entitled to reward by the act done rather than by reason of the contractual relationship. Nothing turns on the theory of the relief in this application because it is not challenged but it does appear to the modern eye to be a remarkable Victorian privilege accorded to a fortunate profession.

Counsel insists that the only issue for this court on Mr Foley's motion is his entitlement to the order. There is no question of the court being asked to sanction a particular fee as appropriate or reasonable; that is for another occasion. Neither, according to Mr McGrath, is the matter of priority up for decision. Nevertheless, I think it is obvious that it is the applicant's contention that he enjoys primacy over the bank; otherwise the matter is moot, as indeed Mr Andrew Walker, Counsel for the bank, submits because of his point that the bank's legal mortgages rank supreme.

Under s.3 of the Legal Practitioners Act, 1876, the court may declare a solicitor employed in a case to be entitled to a charge on property of whatever nature recovered or preserved through the instrumentality of the solicitor for the taxed costs, charges, and expenses of the case and the court [may make] orders for taxation of such costs charges and expenses out of the said property as to such court or judge shall appear just and proper. The section is as follows:

> "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit matter or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit matter or proceeding has been heard or shall be depending to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit matter or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs charges and expenses out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat or which shall operate to defeat such charge or right shall, unless made to a *bona fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right: Provided always, that no such order shall be made by any such court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations."

It is agreed that the court exercises a discretion whether or not to make the declaration in the particular circumstances of the case.

The issues for decision are:

> (a) Did Mr Foley by his efforts recover or preserve property?
>
> (b) If he is in compliance with s.3 should the court in its discretion make a declaration and order charging the mortgaged property in favour of the applicant?

The applicant submits that the court that hears the matter in which the solicitor was acting may grant him a charge over property recovered or preserved through his instrumentality. The court may also make orders for taxation and other provisions as appears to be just, citing *Lismore Buildings Ltd v. Bank of Ireland Finance Ltd (No. 2)* [2000] 2 I.R. 316 at 319 per Barrington J, speaking for the Supreme Court, when he said that there "is no doubt that a solicitor, whose fees and outlay have not been paid by his client, will normally have a lien on a property or fund recovered by his efforts to secure professional costs and outlay incurred by him." He went on to say that, for that reason, "it is proper for a Court to protect the solicitor's position by granting him a charge on property or

costs recovered or preserved as a result of his efforts."

A solicitor also has at common law a particular lien on property recovered or preserved by him at litigation but that does not extend to real property, by contrast with section 3. An order for the winding up of a company does not affect a solicitor's lien for costs.

The purpose of the s. 316 proceedings was to restore the property to The Belohn Ltd. The property does not have to belong to the person who instructed the solicitor: *Scholey v. Peck* [1893] 1 Ch. 709 - a judgment which emphasised that "it must be by reason of the employment that the property is preserved."

Questions of the amount of fees arise at a later stage. The costs charged in the amount of €223,921.50 relate solely to the s. 316 proceedings, and not in any way to the subsequent examinership. Questions of priority also are for another day.

The factual position altered by reason of the Court decision on the s. 316 application. Prior to the overturning of the appointment of the receiver, he could exclude other parties including the applicant and his wife but following the decision, Belohn recovered possession. There is a difference between a company with a receiver and one without.

Mr Andrew Walker, Counsel for the respondent, submits that Mr. Foley did not act for The Belohn Ltd; Merrow was the only party or client named as applicant; Mr. Foley's invoice was directed solely to Merrow. The receiver is the agent of the company; the company recovered nothing and neither was any property recovered or preserved in the s.316 proceedings. The result was a change of management and control but not of the assets or liabilities of the company. The properties were not recovered or preserved. The only relevant property consisted of the shares in The Belohn Ltd owned by Merrow Ltd. The property in question at all times remained charged to the Bank.

Any charge that the applicant might have ranks lower and subject to the existing charges in favour of the Bank and he cannot leapfrog his claim over the superior and prior interest. Mr. Foley's rights as solicitor cannot be greater than the rights of his client so any sum that he is entitled to is liable to be set off.

Mr. Foley's invoice, dated 15 June 2013, references matters prior to the date of his practising certificate and costs that do not relate to the s.316 case, e.g.

> "..... all discussions, discussions with experts financial witnesses in the independent accountant's report and preparation and presentation of same, receipt of instructions and advices provided as reasonable in this respect."

The s. 316 proceedings did not require or involve any financial witness and it follows that the applicant's invoice covers matters other than those arising in the Merrow proceedings. The applicant has not answered queries raised in correspondence from Mr Simons about payments to the previous solicitors, Sean Costello and Co and financial information concerning the period of examinership. The solicitors may be entitled to fees or they may have been paid fees. The Court's discretion should not be exercised in favour of the applicant in light of his failure to reply to the respondent's solicitor's letter of 18th October 2013 seeking relevant information.

The first question for this court is whether any property was recovered or preserved through Mr Foley's instrumentality. On this point I accept the respondent's submissions. The plaintiff in the proceedings sought to free itself from its bank appointed receiver and succeeded in doing so. But what property was recovered or preserved? The answer is none; the alteration that took place temporarily was in the control of the company but all of its assets and liabilities remained unchanged. Its interest in The Belohn did not alter; that company's property was still mortgaged to the bank, just as it was before the case.

There was of course a change in the position of the directors of Merrow Ltd in that they were temporarily, as it turned out, back in business. But the result of the case did not effect an alteration by way of recovery or preservation of property.

The receiver is the agent of the company. There are of course many practical implications and consequences of an appointment ant the management of a business will be very pleased to have a receiver removed but that does not change the legal status of the imposed controller. The company's assets do not change on an appointment or on a removal, such as happened in this case. A receiver and manager take over the company, supplanting the existing directors and management, but not extinguishing the company. Therefore, the company's property does not change. It may be sold and the mortgagee or debenture holder may receive the money. But the position is as if the company sold its own property and paid off the debt. Instead of the company doing that through its management, the creditor puts in its own nominee to do just that in place of the previous management.

It is of course true, as Mr McGrath SC submits that Mr and Mrs Foley as directors of Merrow Ltd won their case against the bank. There is a practical sense in which the business changed; the old management was back. But is a big step from there-too big in my view-to overturn a well-established, clear legal principle.

Overall, it would be unconscionable for the applicant to be able to trump the interest of the mortgagee and leapfrog into a position in regard to the property that was superior to any interest or claim that his client, however defined, might have been in a position to assert. Mr. McGrath highlighted *Scholey v. Peck* [1893] 1 Ch. 709 where the mortgagee had to take subsequent to the solicitor but the facts and circumstances are wholly incomparable and no principle relevant to this application can be derived. In the *Scholey* case, the mortgagee was going to lose her mortgagee interest and it was held inequitable for the solicitor to lose out because Ms Kirdale had a mortgage. In this case the property was never lost by the company.

Let me now look at the question of discretion that would arise for consideration if Mr Foley had satisfied the essential requirement of s.3 of the 1876 Act. I do this for completeness, because the submissions addressed it expressly or impliedly and in case the matter is considered on appeal.

In relation to discretionary considerations, it seems to me that matters involving dispute or implying disreputable behaviour should not be taken into account because they have not been the subject of full hearing, evidence or debate, even if they might give rise to some unease. An example is failing to reply to the issues raised by Mr Simons in his letter.

The position is different, however, in regard to other points such as the entitlement, potentially at least, of the previous solicitors Messrs Costello and Co to be paid their fees and perhaps themselves to claim under s.3 that by initiating the proceedings the property was preserved or recovered through their instrumentality; uncertainty as to how and by whom the quantum of fees sought by Mr Foley is to be determined; similarly as to priority and also set-off. If they do not arise now for decision, when and before whom and how are relevant questions. This category of concerns does not involve any decision as to turpitude or even criticism of the applicant but they are relevant in my view to the exercise of discretion.

Another important element is the close connection of the applicant to the client company or companies. In *Mount Kennett Investment Co & Anor. v. Patrick O'Meara & Others* [2012] IEHC 167, Clarke J. said that it "would be unreal to disregard the fact that the relationship between the client and the solicitor in this case was less than at arms length. As pointed out, Mr. O'Brien was the beneficial owner of the client and one of the only two equity partners in the firm of solicitors. This is not a case where there was an entirely independent relationship between a firm of solicitors and a client with whom that firm had no direct connection." [at para. 5.1- 5.2]

I also hold that if the applicant were to be able to claim that he had by his efforts recovered or preserved property, it would be subject to the mortgagee's prior interest and liable to be set off.

My conclusions accordingly are that the application fails because the solicitor has not satisfied the requirement of the statute and that, if he had done so, it would be proper in the exercise of the court's discretion to refuse a declaration.