THE HIGH COURT

CIRCUIT APPEAL

2018 No. 195 CA

BETWEEN

P & B SECURITY SERVICES LIMITED (IN LIQUIDATION)

PLAINTIFF

AND

TRIGLEN HOLDINGS LIMITED

(TRADING AS RUSSELL COURT HOTEL)

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 12 March 2019

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The proceedings are, in effect, debt collection proceedings. The Plaintiff is a company, now in liquidation, which previously provided security services to bars and night clubs. The Defendant is a company which operates a hotel and night club in Dublin, and had availed of the Plaintiff's security services prior to the latter company entering into liquidation.

2. The Defendant accepts, in principle, that it owes monies to the Plaintiff. However, the Defendant maintains that it is entitled to set-off this debt against monies which it holds pursuant to an indemnity given by the Plaintiff. The indemnity is in respect of personal injury claims brought against the Defendant wherein it is claimed that the personal injuries arise from acts, negligence and/or failures on the part of the Plaintiff arising from the provision of security services at the Defendant's hotel.

3. The dispute between the parties centres on whether a right of set-off exists. The Plaintiff contends that the requirement for "mutuality" is not satisfied on the facts. If a right of set-off does not exist, then the Defendant must pay the debt to the Plaintiff in full. Insofar as the Defendant's right to an indemnity against the Plaintiff is concerned, the Defendant would simply rank as an unsecured creditor in the winding up.

4. For the reasons set out herein, I am satisfied that the Defendant is entitled to a right of set-off. In circumstances where the liability under the indemnity is contingent only, the Liquidator must make a "just estimate" of what that liability will be. The uncontested evidence indicates that the liability will exceed the debt otherwise owing to the Plaintiff.

FACTUAL BACKGROUND

5. The Plaintiff is a limited liability company which had been in the business of providing security services to customers in the licensing trade, and, in particular, to the operators of public houses and nightclubs. The Plaintiff went into liquidation on 23 March 2015. Mr. Angus Donohoe has been appointed liquidator ("*the Liquidator*").

6. The within proceedings were instituted before the Circuit Court in or about 14 October 2015, and seek to recover a sum of €51,435.78 which it is said the Defendant is indebted to the Plaintiff for in respect of the provision of security services. The Defendant operates a hotel and nightclub. The letter of demand seeking the payment of the €51,435.78 was sent on 1 September 2015.

7. Following the service of various motions, a Defence was ultimately delivered on 1 November 2017. The Defence consists, in effect, of a traverse of the Plaintiff's claim. However, the following pleas are made in the alternative, at paragraphs 6 to 8 (inclusive).

> "6. Without prejudice to the foregoing if the Defendant is indebted to the Plaintiff in the amount claimed or any amount, which is denied, then the Defendant will assert and claim that it is entitled to set off any amounts due and owing by it to the Plaintiff in respect of monies due by way of indemnity and/or agreement and/or representation by the Plaintiff, its servants and/or agents in respect of claims and/or legal proceedings instituted by third parties against the Plaintiff and/or Defendant in respect of which liability for same rests with the Plaintiff.
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> 7. At all material times the Plaintiff, its servants and/or agents had furnished indemnity and/or agreed to indemnify the Defendant in respect of such claims but has failed and neglected to do so.
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> 8. In the premises the Defendant denies that it is indebted to the Plaintiff in the amount claimed or any amount."

8. The matter was heard before the Circuit Court, and an appeal brought to the High Court.

9. The appeal came on for hearing before me on 21 February 2019. Both counsel, very helpfully, agreed that the sole issue for determination was as to whether the Defendant was entitled to withhold money on the basis of the asserted indemnity.

10. In order to understand the arguments of the parties, it is necessary, first, to set out in full the terms of the indemnity asserted by the Defendant.

11. The indemnity is recorded in a letter dated 1 May 2010. This letter is signed by a director of the Plaintiff company, Mr. Victor Ellis. Mr. Ellis gave evidence before me, which I will summarise presently.

> "Re: Indemnity and Undertaking
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> We refer to the various claims against The Russell Court Hotel/Triglen Holdings Limited seeking damages for personal injuries sustained at the Russell Court Hotel, wherein it is claimed that the personal injuries arise from acts, negligence and/or failures on the part of the P & B Security Services Limited arising from the provision of security services at the

Hotel, and we hereby indemnify the Russell Court Hotel/Triglen Holdings Limited in respect of those claims.

P & B Security Services Limited undertake that it will have in place a Policy of Insurance to cover Public Liability and Employee Liability and in the event that for some reason that the Insurers fail or refuse to indemnify the Russell Court Hotel/Triglen Holdings Limited in respect of any such claim, P & B Security Services Limited will make good the undertaking.

It is hereby accepted and agreed that by way of security for such indemnity and undertaking that the Russell Court Hotel/Triglen Holdings Limited can withhold payment due to P & B Security Services Limited in respect of the security services provided, and set off such monies paid to claimants in respect of the claims referred to above against monies due to P & B Security Services Limited for security services provided."

12. Explaining the background to the letter of 1 May 2010, Mr Ellis in his direct evidence stated that representatives of the Defendant had requested the indemnity in circumstances where a number of security service providers had previously gone into liquidation. Mr Ellis stated that the Russel Hotel was the Plaintiff's largest customer, and that the company wished to retain the contract.

13. Mr Ellis described the security industry in general as being transient, with a high turnover of employees. This could make it difficult to defend claims for alleged assault in that it might be difficult to trace the relevant staff members to appear as witnesses. This was especially so in the case non-national employees. Mr Ellis also explained that there was often a significant "excess" payable under insurance policies issued to security service providers. Currently, the excess might be as much as €35,000 in respect of any individual claim.

14. In the course of his cross-examination of Mr Ellis, counsel on behalf of the Liquidator sought to suggest that the indemnity was unusual and that it left the company open to an open-ended liability. However, counsel confirmed that the Liquidator was not seeking to challenge the authenticity or validity of the letter of 1 May 2010.

15. Evidence was given on behalf of the Defendant by Mr Rangan Arulchelvan. Mr Arulchelvan explained he had been advised by his broker to obtain an indemnity from the hotel's security service provider. The witness confirmed that there are at least four personal injury claims pending against the Defendant which allege acts of negligence and assault on the part of the Plaintiff's employees. The pleadings in these proceedings were provided to the court. The witness suggested in evidence that he had very recently settled a case for personal injury in the sum of €25,000 for which no contribution was received from the hotel's insurers. The witness suggested that each of the four claims might have a similar value, which could result in a liability of €100,000 in respect of the four claims.

DISCUSSION

16. The starting point for consideration of this case must be the provisions of the Companies Act 2014. Section 619 provides that the bankruptcy rules apply in the winding up of an insolvent company.

"619. (1) In the winding up of an insolvent company the same rules shall prevail and be observed relating to—

(a) the respective rights of secured and unsecured creditors,

(b) debts provable, and

(c) the valuation of annuities and future and contingent liabilities,

as are in force for the time being under the law of bankruptcy relating to the estates of persons adjudicated bankrupt."

17. This, in turn, necessitates a cross-reference to the Bankruptcy Act 1998 (as amended). The rules in relation to set-off are to be found in the First Schedule, paragraph 17 to 19 as follows.

"17.(1) Where there are mutual credits or debts as between a bankrupt and any person claiming as a creditor, one debt or demand may be set off against the other and only the balance found owing shall be recoverable on one side or the other.

(2) Section 36 of the Civil Liability Act, 1961 (which provides for the set-off of claims), as amended by section 5 of the Civil Liability (Amendment) Act, 1964, shall apply with the substitution in section 36 (3) of a reference to subparagraph (1) for the reference to section 251 of the Irish Bankrupt and Insolvent Act, 1857.

18. This Schedule is without prejudice to section 61 of the Civil Liability Act, 1961 (which provides for proof of claims for damages or contribution in respect of a wrong) and section 62 of the said Act (which provides for the application of moneys payable under certain policies of insurance where the insured becomes a bankrupt).

19. A creditor shall, unless the Court otherwise orders, bear his own costs of proving a debt."

18. The position re: contingent liabilities is governed by section 620(2) of the Companies Act 2014, as follows.

"620.(1) Subject to the provisions of this section, in a winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of bankruptcy) the following shall be admissible to proof against the company:

(a) all debts payable on a contingency; and

(b) all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages;

a just estimate being made, so far as possible, of the value of such debts or claims which may be subject to any contingency or which sound only in damages, or for some other reason do not bear a certain value.

(2) The value of such debts and claims as are made admissible to proof by subsection (1) shall, as far as possible, be estimated according to the value thereof at the date on which the winding up shall be deemed to have commenced by virtue of section 589 or 590, as the case may be (referred to subsequently in this section as the 'commencement date')."

19. The practical operation of the equivalent provision under the then English legislation has been discussed in detail by the House of Lords in *Stein v. Blake* [1996] A.C. 243 (at 252/53), as follows.

> 6. Quantifying the cross-claims
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> How does the law deal with the conundrum of having to set off, as of the bankruptcy date, 'sums due' which may not yet be due or which may become owing upon contingencies which have not yet occurred? It employs two techniques. The first is to take into account everything which has actually happened between the bankruptcy date and the moment when it becomes necessary to ascertain what, on that date, was the state of account between the creditor and the bankrupt. If by that time the contingency has occurred and the claim has been quantified, then that is the amount which is treated as having been due at the bankruptcy date. An example is *Sovereign Life Assurance Co. v. Dodd* [1892] 2 Q.B. 573, in which the insurance company had lent Mr. Dodd £1,170 on the security of his policies. The company was wound up before the policies had matured but Mr. Dodd went on paying the premiums until they became payable. The Court of Appeal held that the account required by bankruptcy set-off should set off the full matured value of the policies against the loan.
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> But the winding up of the estate of a bankrupt or an insolvent company cannot always wait until all possible contingencies have happened and all the actual or potential liabilities which existed at the bankruptcy date have been quantified. Therefore the law adopts a second technique, which is to make an estimation of the value of the claim. Section 322(3) says:
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> > 'The trustee shall estimate the value of any bankruptcy debt which, by reason of its being subject to any contingency or contingencies or for any other reason, does not bear a certain value.'
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> This enables the trustee to quantify a creditor's contingent or unascertained claim, for the purposes of set-off or proof, in a way which will enable the trustee safely to distribute the estate, even if subsequent events show that the claim was worth more. There is no similar machinery for quantifying contingent or unascertained claims against the creditor, because it would be unfair upon him to have his liability to pay advanced merely because the trustee wants to wind up the bankrupt's estate."

20. Applying these principles to the facts of the present case, it is necessary to make a "just estimate" of the value of the Defendant's contingent claim. At the hearing before me, evidence was led on behalf of the Defendant to the effect that there are at least four significant personal injury claims outstanding. Copies of the pleadings in these proceedings were put to the witness on behalf the Defendant. Counsel on behalf of the Plaintiff did not challenge the evidence to the effect that the value of these claims could be greater than €100,000, i.e. a liability of €25,000 each.

21. It seems to me that in all the circumstances a "just estimate" of the contingencies would exceed the value of the debt as claimed against the Defendant (€51,435.78.)

22. As noted earlier, the principal argument advanced on behalf of the Plaintiff against the asserted set-off was that there was an absence of mutuality. In particular, it was submitted that the Plaintiff, in providing the indemnity, had assumed the role of an *insurer*. It was further submitted that whereas the debt to the Plaintiff had been incurred by the Defendant in its capacity as a customer or client availing of the security services, the indemnity provided by the Plaintiff had a different character. The Plaintiff had provided both security services and a form of insurance to the Defendant. In short, it was said that the Plaintiff was acting in two different capacities, and this destroyed any mutuality. Reliance was placed on Donnelly, *The Law of Credit and Security* (2nd edition, 2015), §23 22. Reliance was also placed on the judgment in *Dunnes Stores v. McCann* [2017] IEHC 700.

23. Donnelly states at §23–22 that mutuality requires that the right of set-off must arise from claims between the same persons in the same right. Donnelly then cites a number of cases where debts were held not to be mutual. By contrast to the present proceedings, these cases all involved parties acting in a specific role, e.g. persons acting *qua* trustees or agents, which affected their right to claim a beneficial interest in the debt. None of the examples cited suggest that a party in the role of insurer cannot rely on set-off.

24. Moreover, and in any event, I think the attempt to characterise the role of the Plaintiff under the letter of 1 May 2010 as one of an insurer goes too far. The indemnity was directly related to the provision of its security services. The Plaintiff was, in effect, agreeing to discharge any losses suffered by the Defendant as a result of the actions of the former's employees. Mr Ellis explained that the indemnity had been sought at a time, during the recession, when security service providers were regularly going in to liquidation, leaving their clients/customers exposed to liability for personal injury claims. I think that there is sufficient nexus between (i) the underlying contract for the provision of security services, and (ii) the indemnity, to conclude that the debts are mutual.

25. Finally, I note that at paragraph 18 of the First Schedule to the Bankruptcy Act 1988 (as amended), there is a cross-reference to section 62 of the Civil Liability Act 1961 (which provides for the application of moneys payable under certain policies of insurance where the insured becomes a bankrupt). This suggests that a policy of insurance is, in principle, amenable to set-off and is not excluded *a priori*. The exception under section 62 does not apply because it is referable to the bankruptcy (and by extension insolvency) of the insured, not the insurer.

26. Accordingly, I am satisfied that the Defendant is entitled to claim a set-off, and that a "just estimate" of same exceeds the value of the Plaintiff's claim (€51,435.78).

PROPOSED FORM OF ORDER

27. I will hear counsel as to the precise form of order, but my initial view is that the only order required is one dismissing the Plaintiff's application for liberty to enter final judgment, on the basis that the Plaintiff's claim is less than the amount which the Defendant is entitled to set-off.