Neutral Citation Number: 2006 IEHC 285

THE HIGH COURT

[2004 No. 18785 P]

BETWEEN

PORTERRIDGE TRADING LIMITED

PLAINTIFF

AND
FIRST ACTIVE PLC

DEFENDANT

Judgment of Mr. Justice Clarke delivered 4th October, 2006.

1. Introduction

1.1 These proceedings are one of a series of cases involving disputes between companies controlled, or formally controlled, by Mr. Brian Cunningham ("Mr. Cunningham") on the one hand and the defendant ("First Active") together with Mr. Ray Jackson (who has been appointed by First Active as receiver to many of the companies concerned) on the other hand. For a general overview of the totality of the proceedings reference should be made to an earlier judgment delivered by me which related to each of the relevant proceedings (High Court, Unreported, Clarke J., 20th October, 2005). These proceedings are referred to in that judgment as the "second related proceedings" and are outlined at paragraph 1.4 of that judgment. In this application First Active contends that these proceedings should be stayed as bound to fail.

1.2 These proceedings relate to three leases and/or agreements which would appear to have been executed by Salthill Properties Limited ("Salthill") on 22nd December, 1999 in favour of the plaintiff ("Porterridge"). It would appear that on 20th August, 2004 First Active went into possession of the premises the subject matter of these leases. It is the lawfulness of that action and the subsequent attempts by First Active to sell the property concerned that is the subject of these proceedings. The substance of the defence put forward by First Active is that, prior to the execution of the relevant leases, Salthill had entered into a mortgage debenture which, amongst other things, created a first charge in favour of First Active in respect of the premises the subject of the leases. In addition it is contended that the debenture created a first floating charge on all of the assets of Salthill, which included the relevant premises. It would appear that the relevant debenture agreement provided that Salthill should not, amongst other things, lease the property without the written consent of First Active. On that basis First Active contends that the leases were, at least insofar as the interests of First Active are concerned, ineffective. On that basis First Active contends that it was lawfully entitled to enter into possession of the premises.

1.3 In its reply delivered on the 21st June, 2005 Porterridge denies or puts in issue most of the matters raised by way of defence but goes further in paragraph 7 in alleging that First Active:-

> "Was at all material times aware of the execution and/or existence of the leases dated 22nd December, 1999 and is thereby estopped from now relying on any clause which it is alleged required the giving of prior written consent to the making of such leases."

In similar vein paragraph 8 contends that the receiver/manager:-

> "Accepted that the leases dated 22nd December, 1999 were valid and accordingly the defendant is estopped from alleging that the said leases are invalid".

1.4 While these proceedings were pending the receiver brought an application pursuant to s. 316 of the Companies Act 1963 for directions relating to his entitlements in respect of the property ("the directions application"). That application was the subject of a judgment in this court in *Re Salthill Properties Limited* (High Court, Unreported, Laffoy J., 30th July, 2004) and in the Supreme Court (Supreme Court, Unreported, McCracken J. 29th May, 2006).

1.5 On the basis of the determination of the directions application, First Active now contends that this court should stay or dismiss these proceedings either under Order 19 Rule 28 of the Rules of the Superior Courts or alternatively under the inherent jurisdiction of this court. In substance it is contended that as a result of the decision of this court and of the Supreme Court in the directions application these proceedings are bound to fail.

1.6 In that context it is necessary to look at the issues which were before this court and the Supreme Court in the directions application and the manner in which that application was determined. I now turn to that issue.

2. The Directions Application

2.1 As appears from the judgment of Laffoy J. the specific issues on which directions were sought were the following:-

> "1. Whether the leases, which in the notice of motion are referred to as "purported" leases, are valid?
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> 2. Whether the leases contravene the negative pledge clause contained in certain mortgages between the company and First Active plc (the Bank)?
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> 3. Whether the leases were determined by reason of forfeiture notices served by the company on the lessees dated 20th December, 2001?
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> 4. Whether the leases were surrendered by the lessee in January 2002?
>
> 5. Whether the lessee currently has any valid or enforceable leasehold or other interest in the lands thereby demised?"

The judgment also notes that at the hearing the receiver did not pursue the question of the validity of the leases as referred to at 1. It should also be noted that Porterridge was a party to the application.

2.2 As is clear from p. 10 of the judgment of Laffoy J., amongst the matters raised by Porterridge in its submissions was the suggestion that the issues raised by the receiver should more properly be dealt with in these proceedings and that an application under s. 316 of the Companies Act 1963 was inappropriate for the resolution of contested facts.

In relation to that argument Laffoy J. concluded, at p. 13, as follows:-

> "While it is probable that, when the issues are joined in the plenary proceedings, there will be a certain similitude between those issues and the issues which arise in this application, in my view, that is not a basis for the court refusing to exercise its jurisdiction under s. 316(1).
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> *Prima facie*, the receiver was entitled to bring this application. Whether it would be just for the court to declare rights as between the company (in receivership) and the lessee on this application on the basis of the current state of the evidence remains to be considered having regard to the admissible evidence considered in the context of the issues which arise".

2.3 Having reviewed the evidence Laffoy J., at p. 15, indicated that the issues which remained for determination were the following:-

> "1. Whether, as between the company and the lessee, the leases have terminated by -
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> (a). forfeiture; or
>
> (b). surrender
>
> 2. What impact the existence of the mortgage debentures had on the leases".

2.4 Laffoy J. was not satisfied that there was evidence to justify a conclusion that the leases had been terminated either by forfeiture or surrender.

Having reviewed the evidence in relation to bank consent Laffoy J. concluded, at p. 21, as follows:-

> "On the basis of evidence adduced by the lessee, I am satisfied that the creation of the leases contravened clause 6 in that they were granted without the written consent of the bank".

As if further clear from a passage at pp. 21 and 22 of the judgment, Laffoy J. went on to consider whether the bank might have given retrospective consent. Laffoy J. reached the conclusion that the bank had indicated that it would give such consent on condition which condition was not fulfilled. On that basis the court concluded that there was no retrospective consent.

Laffoy J., for reasons set out in the following paragraphs of her judgment, further concluded that the lessee had failed to establish that it did not have actual notice of the existence of clause 6.

On that basis, insofar as material to the issue which I have to decide, Laffoy J. concluded that the leases contravened clause 6.

2.5 As noted above, the judgment of the Supreme Court was delivered by McCracken J.. In dealing with the question of the appropriateness of the procedure adopted, McCracken J. stated the following, at p. 6:-

> "I am quite satisfied that the directions sought by the receiver in this case clearly come within the provision of s. 316. The primary issue is the priority of charges on the assets of the company. If a receiver is to perform his functions properly, and in particular if he were to wish to sell the relevant assets, it is, of course, essential for him to know and identify such priorities. Furthermore the section specifically empowers the court to make orders declaring the rights of the persons before the court, in this case the rights of Porterridge as a lessee."

On that basis McCracken J. (speaking for the court) was satisfied that the procedure was appropriate.

The balance of the judgment was concerned with the appeal brought in respect of the decision of Laffoy J. concerning actual notice. For the reasons set out the decision of Laffoy J. was upheld.

2.6 Porterridge was, of course, a party to the directions application. It is, therefore, bound by the determination in those proceedings. It is not, therefore, of course, open to Porterridge to seek to go behind any of the determinations of the courts in the directions application for the purposes of establishing its case in these proceedings.

2.7 The net question which therefore arises on this application is as to whether there is any basis upon which Porterridge could succeed in these proceedings having regard to the findings in the directions application. If there is not, then these proceedings are bound to fail and should be stayed under the court's inherent jurisdiction as identified by Costello J. in *Barry v. Buckley* [1981] I.R. 306.

2.8 In that context it is necessary to refer to the extent to which the issues in these proceedings are determined by the findings in the directions application.

3. The Issues (directions application)

3.1 As was pointed out by McCracken J., in the passage from his judgment which I have quoted above, the primary issue in the directions application was the priority of charges on the assets of the company. The reason why those priorities were, as was noted, important, was that it was essential for the receiver to know and identify such priorities if he was to perform his functions properly and required, in so doing, to sell the relevant assets.

3.2 It is clear, therefore, that the overall issue between the receiver and Porterridge was the priority between the debenture (through which the receiver had his entitlements) and the leases (through which Porterridge had its entitlements).

It is also clear that the specific issues of detail which the court had to consider in reaching conclusions as to those priorities were, in the main, issues raised on behalf of Porterridge. Thus, for example, Laffoy J. determined against Porterridge a contention made on its behalf that there had been a retrospective consent. Furthermore it was determined that Porterridge had, contrary to its argument, actual notice of the existence of the relevant clause in the debenture.

3.3 It is, therefore, clear that it was open to Porterridge to raise any additional questions which could have had an effect on the issue as to the priorities as and between Porterridge and the receiver and that such issues would have been determined by the court

on the s. 316 application if the court felt that it was appropriate so to do. As is clear from the judgment of McCracken J., this could have been so even if it was necessary to direct a plenary hearing in respect of any issues of fact which could only be determined by the resolution of contradictory evidence.

3.4 It is in that context that First Active places reliance on the jurisprudence which has been referred to as the principle in Henderson v. Henderson (1843) 3 Hare 100.

This principle was most recently applied by the Supreme Court in *A.A. v. The Medical Council* [2003] 4 I.R. 302 where Hardiman J. (speaking for the court) quoted the famous passage from *Henderson* delivered by Wigram V.C. at p. 115 to the following effect:-

> "I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

3.5 Having reviewed further authority Hardiman J. noted. at p. 317 that:-

> "Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the courts for the determination of his civil rights or liabilities. This point has a particular resonance in terms of article 6 of the European Convention on Human Rights and Fundamental Freedoms 1950. In *Ashingdane v. United Kingdom* (1985) 7 E.H.R.R. 528 at p. 546, the European Court of Human Rights said:-
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> > "the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access, by its very nature calls for regulation by the State, regulation which may vary in time and place according to the ends and resources of the community and of individuals."
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> Considering the nature of permitted limitations, the same court in *Tinneally & Sons Ltd. v. United Kingdom* (1999) 27 E.H.R.R. 249 at p. 271 quoting from *Ashingdane v. United Kingdom* (1985) 7 E.H.R.R. 528:-
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> > "a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be achieved."

3.6 It is, therefore, clear that a party will not, ordinarily, be permitted to raise an issue which could have been raised in previous proceedings, but which was not. The court does, however, retain a discretion to permit such a matter to be raised where so to do would not, in all the circumstances of the case, amount to an abuse of process.

3.7 In the light of that jurisprudence it is necessary to consider the matters that might be said to arise in these proceedings but which were not determined by the judgments in the directions application. Obviously matters expressly determined against Porterridge cannot be raised again. Equally matters caught by the principle *in Henderson v. Henderson* cannot now be litigated.

3.8 In general terms two matters are put forward on behalf of Porterridge which, it is said, are not excluded by either of the above principles and which, it is also said, are capable of establishing Porterridge's claim in the proceedings. They are:-

> 1. The estoppel issues raised on the pleadings (and in particular paragraph 7 and 8 of the reply to which I have referred in detail earlier); and
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> 2. Issues concerning the possession of First Active which derive from contentions that First Active did not enter into possession of the property in accordance with the provisions of the relevant debenture.

I propose dealing with each in turn.

4. The Estoppel Issues

4.1 Under these issues it is contended that First Active is estopped from relying on clause 6 by virtue of the fact that it was aware of the execution and/or existence of the leases or, alternatively, as a result of an acceptance by the receiver as to the validity of the leases.

4.2 While it is clear that a specific issue of estoppel was not raised in the directions application it seems to me that it would have been open for Porterridge to have raised such an issue. As was pointed out by McCracken J. the overall issue was as to the priorities between the position of Porterridge as lessee and the receiver who derived his entitlements from the debenture. If First Active were estopped from relying on the debenture, then the receiver, who was appointed by First Active on foot of that debenture, would equally have been estopped. The legal entitlement of First Active (through the receiver) to priority over the interests of Porterridge as a lessee would have been displaced by any estoppel which could have been established. It seems to me, therefore, that any issue of estoppel which would have precluded the receiver and First Active from asserting the priority of entitlements deriving from the debenture over the interest of the lessee ought to have been raised in the directions application and, not having been raised, is now caught by the principle in Henderson v. Henderson. I can see no basis for exercising the discretion spoken of by Hardiman J. in *A.A.* to permit the issue to be raised in these proceedings when it was not raised in the directions application.

4.3 Indeed, before leaving this issue, it is worthy of note that Porterridge raised (and had determined against it) a not dissimilar issue which amounted to a contention that a retrospective consent had being given by First Active. The factual basis for the contention that there was a retrospective consent would, at least in significant part, have overlapped with the factual basis for the estoppel case now sought to be made.

4.4 I am therefore satisfied that it is not open to Porterridge to seek to rely on the estoppel issues identified in paragraphs 7 and 8 of its reply by virtue of the fact that those issues must be taken to have been determined against its interests in the direction application under the principle in *Henderson v. Henderson.*

5. The Possession Issue
5.1 Under this heading it is contended, on behalf of Porterridge, that there is what is described as a "striking incongruity" between Mr. Jackson continuing to have possession of the units as receiver and agent of Salthill (i.e. in his capacity as receiver appointed to Salthill by First Active) and at the same time purportedly being agent for First Active as mortgagee seeking to sell as a mortgagee in possession. On that basis the legality of the possession of First Active is challenged.

5.2 Having considered this aspect of the case I am not satisfied that this is an issue which was either expressly dealt with by this court or the Supreme Court in the course of the directions application or must necessarily be taken to be excluded under the principle *in Henderson v. Henderson.* In coming to that conclusion I express no view as to the merits of the argument put forward on behalf of Porterridge under this heading. Indeed given that it is an issue which I may have to decide, it would be most inappropriate for me to express any view until after the matter has been argued. However it seems to me that it is at least possible that Porterridge may be able to formulate an argument in favour of the relief claimed in these proceedings based upon its contentions relating to the manner in which possession was obtained, which would, in theory, allow it to succeed on a basis that was not inconsistent with the determination of the courts in the directions application. In those circumstances it would not, it seems to me, be appropriate for the court to exercise its inherent jurisdiction to stay the claim in its entirety. It is well settled that the court should be slow to exercise that jurisdiction. *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425; *LAC Minerals v. Chevron Corporation* [1995] ILRM 161. However it seems to me that each of the other matters contended for on behalf of Porterridge as providing a basis for its claim (with the exception of the possession issues) are either inconsistent with the findings of the court in the directions applications or seek to raise issues which should have been raised on the directions application.

6. Conclusions
6.1 For the reasons which I have set out above I have, therefore, come to the conclusion that the only basis upon which it is open to Porterridge to now argue that it can succeed in these proceedings on a basis which would not amount to an abuse of the process of the court as being an attempt to re-litigate issues which either were or should have been determined in the directions application, is the contention that, irrespective of the priorities as and between the debenture and interest derived from it (such as the receiver's entitlements) on the one hand, and the interest of the lessee on the other hand, the nature of the possession exercised by First Active is wrongful.

6.2 I will therefore direct that Porterridge file an amended statement of claim which confines itself to that issue and will give such further consequentional directions as appear appropriate when counsel have had an opportunity to consider the matter in the light of this judgment.