



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 254

**Ryan P.
Finlay Geoghegan J.
Whelan J.**

Appeal Number: 2016 123

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2012

AND

IN THE MATTER OF SECTION 316 OF THE COMPANIES ACT 1963

AND

IN THE MATTER OF KEELGROVE PROPERTIES LIMITED (IN RECEIVERSHIP)

BETWEEN

BRIAN CUNNINGHAM AND KEELGROVE PROPERTIES LIMITED

APPLICANTS/APELLANTS

AND

BANK OF SCOTLAND PLC, TOM KAVANAGH

AND KENDLEBELL MID-WEST LIMITED

RESPONDENTS

JUDGMENT (ex tempore) delivered on the 4th day of October, 2017

by Ms. Justice Finlay Geoghegan

1. This is an appeal brought by Mr Brian Cunningham and Keelgrove Properties Limited against an order made by the High Court (Murphy J.) on 8th February, 2016 in which she refused an application which had been brought on a notice of motion dated 21st August, 2014 seeking certain directions pursuant to s. 316 of the Companies Act 1963. I emphasise that the application was brought pursuant to s. 316 of the Companies Act 1963 and the issues which have arisen on appeal relate to the nature of the application that was brought under this statutory provision. That provision has of course been repealed and replaced by s. 438 of the Companies Act 2014 Act but this appeal relates to an application which was brought under s. 316 and therefore the Court is considering, and the entire appeal was premised on it considering, s. 316 of the 1963 Act as amended by ss. 171 and 172 of the Companies Act 1990.

2. The reasons for which the trial judge refused the application are set out in a written judgment which she delivered on 1st February, 2016 [2016] IEHC 65. The directions which were sought on the notice of motion are essentially capable of being divided into three categories: first those relating to the validity of a mortgage granted, or a purported legal mortgage granted by Keelgrove Properties Limited (to which I will refer as "the Company" henceforth) on 31st July, 1997 to the predecessor of Bank of Scotland plc in these matters; the second relate to the validity of the appointment of a receiver on 14th December, 2012 over certain properties of the Company; and then, third those relating to a purported sale by the receiver acting as agent for the Company or, perhaps more accurately, the Company acting through its receiver, to the second named respondent, Kendlebell Mid-West Limited and subsequent actions taken by Kendlebell to enter into possession of certain of the properties.

3. As I have indicated, the application was brought pursuant to s. 316 and the terms of that section are central to the issues on appeal. Section 316(1) provides:

"(1) Where a receiver of the property of a company is appointed under the powers contained in any instrument, any of the following persons may apply to the court for directions in relation to any matter in connection with the performance or otherwise by the receiver of his functions, that is to say—

- (a) (i) the receiver;
(ii) an officer of the company;

- (iii) a member of the company;

- (iv) employees of the company, comprising at least half in number of the persons employed in a full-time capacity by the company;

- (v) a creditor of the company, and

- (b) (i) a liquidator;

- (ii) a contributory;

and on any such 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. As appears, a company itself, in relation to which, or in relation to property of which, a receiver is appointed is not one of the listed applicants who may exercise this statutory right, and the trial judge dismissed the application of the Company on that basis, amongst others, and in my view she was correct in dismissing the application of the Company. It is not open to the Company itself to bring an application under s. 316 in respect of a receiver appointed either to it or to its property.

5. The second applicant is Mr Cunningham, and Mr Cunningham in the five affidavits he swore in the notice of motion in the High Court identifies and puts before the Court evidence which indicates that arguably he is, and was at the time of the application:

- (i.) an officer of the Company in the sense of being a director of the Company;
- (ii.) a member of the Company; and
- (iii.) a creditor of the Company.

And therefore, on the face of the section, he is entitled to bring the application. However, his entitlement to pursue an application is subject to s. 316(1A), and that provides:

"(1A) An application to the court under subsection (1), except an application under paragraph (a)(i) of that subsection, shall be supported by such evidence that the applicant is being unfairly prejudiced by any actual or proposed action or omission of the receiver as the court may require."

6. Now, the exception in paragraph (a)(i) does not apply, that is the application by the receiver. Therefore the statutory requirement is that the application of Mr Cunningham be supported by such evidence that he as the applicant is being unfairly prejudiced by any actual or proposed action or omission of the receiver as the Court may require.

7. The background facts, which are not in dispute, are fully set out in the trial judge's judgment and I do not propose repeating them in this short *ex tempore* judgment. There are certain of the facts which become relevant to a consideration of the position of Mr Cunningham as a member, creditor and director, and whether or not he has put before the Court evidence that he is being unfairly prejudiced by the actual action of the receiver in selling the property as he did, or certain omissions which are complained of in relation to how he sold the property, and in relation to the furnishing of information.

8. Prior to turning to a consideration of the facts, I just want to refer to two authorities which Mr Conlon SC has helpfully drawn the Court's attention to where the requirements of s. 316(1A) were considered in the High Court. Firstly Clarke J. in *Re H.S.S.* [2011] IEHC 497 stated of the requirement to show unfair prejudice:-

"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."

9. Subsequently in *Moran v. Hughes* [2013] 11 JIC 1902, [2013] IEHC 522 Laffoy J. having referred to the quotation I have just quoted from Clarke J. in *Re H.S.S.*, and an earlier quotation by Budd J. in *Kinsella v. Somers*, to which the Court's attention was drawn stated at para. 29 of her judgment:

"It was not disputed, nor could it be, that the applicant being an officer, which term is defined as a director or secretary, of each of the respondent companies has standing to bring an application under s. 316 in relation to the receivership of each of the respondent companies. However, on the basis of subs. (1A) of s. 316 and having regard to the authorities just referred to, the Court must be satisfied that in his capacity as an officer of each of the respondent companies the applicant is being unfairly prejudiced by the action or inaction of the Receivers."

She then goes on to deal with particular issues in that case which I think do not greatly assist the Court on the facts of this case.

10. I now turn to applying those principles to the position of Mr Cunningham, and in relation to the evidence which he had put before the High Court as to whether his rights as a creditor, a member or a director might be or are being unfairly prejudiced by the actions and omissions in relation to which he seeks to make complaint. There are certain undisputed facts which are relevant to that. In relation to his position as a creditor, the evidence given in the High Court on behalf of the Bank was that at the time a letter of demand was served in November, 2012 the Company was indebted to the Bank in the sum of €852,238.33. That amount is not disputed and it is not in dispute that that amount was secured at that time by, at minimum, an equitable mortgage over the properties at issue in these proceedings, which are in Moore Lane in Dublin. What is in dispute is whether the purported deed of mortgage of 31st July, 1997 created a legal mortgage. However, it is not in dispute that Mr Cunningham signed that document and that there is an equitable mortgage in existence.

11. The next facts which are not in dispute are that the properties were sold by the receiver for an aggregate of €600,000. One set of properties were sold for €550,000 on a conveyance dated 17th December, 2013 to the second named respondent and there was a further plot sold for €50,000. That, on the face of the agreed facts, means that the deficit owing to the Bank by the Company after the sale of the properties over which the receiver was appointed is just in excess of €250,000, and that is before receivership costs and interest from 2012 are factored into the final sum.

12. It is against those facts that the Court must consider the application made by Mr Cunningham, firstly as a creditor of the Company under s. 316, having regard to the requirement of subs.(1A) that there be evidence that he may be unfairly prejudiced by the action of the receiver. The relevant action is the sale of the property. The contention of Mr Cunningham undoubtedly is that the receiver, by certain omissions in the manner in which he sought to market and sell the property, did not obtain the best price available. Mr Cunningham further seeks to make certain contentions in relation to the fact that the property was not expressly sold with vacant possession, and that in fact he was a person in occupation of at least a portion of the property at the time of sale. However, and in my judgment, crucially, the evidence put by Mr Cunningham before the High Court does not include any evidence from which the Court should infer that the properties when sold in 2013 could have or should have achieved a price which would exceed even the amount of the debt agreed to have been owing in 2012, the sum of just over €850,000. Mr Cunningham did not put before the Court any evidence of the probable price, or the possible price, achievable by the properties if they had been marketed in the manner in which he contends they ought to have been at the time they were sold by the receiver.

13. It follows from that that there is no evidence before the Court, having regard to the acceptance that there is an equitable mortgage in favour of the Bank over the properties, that the Company had any equity of redemption in the property with a value in 2013. It may have had a legal equity of redemption, but no equity of redemption which had any value to it.. In my view, Mr Cunningham, as a creditor of the Company, was dependent on there being a probable equity of redemption with a value in order that he could potentially recover any sum, from the Company,. He has not put any evidence before the Court of that, and in my judgment he has not put evidence before the Court from which the Court could conclude that there is evidence that he is being unfairly

prejudiced by any of the actual actions or omissions of the receiver of which he complains.

14. My analysis in relation to Mr Cunningham's position as a member of the Company is identical. Again, central to certain of the misapprehensions of Mr Cunningham as to his position is the failure to recognise the separate identities of him as a natural person and the Company as a legal person. But as a member of the Company, his only interest as a shareholder of the Company - and his only beneficial interest - could be if he had demonstrated that there was a potential equity of redemption for the Company in the properties if the actions and omissions of which he complains had not occurred.

15. I now turn to the question of his position as a director of the Company, as an officer of the Company. And again it must be recalled that there is a distinction between Mr Cunningham as a director and the Company itself, and as set out by Laffoy J. in *Moran v. Hughes* the Court must be satisfied that it is in his capacity as a director of the Company that the applicant Mr Cunningham is being unfairly prejudiced by the alleged actions or omissions of which he seeks to make complaint and seek directions. The submissions advanced on his behalf, contend that as there is an invalid appointment of a receiver over an asset of the Company, that he is being unfairly prejudiced. Submissions have also been made that the failure to furnish information to and notify Mr Cunningham, as a director, of an intention to sell the property is capable of being regarded as an unfair prejudice to him in his capacity as a director. I do not accept the first submission that the allegedly invalid appointment over an asset of the Company is potentially an unfair prejudice to Mr Cunningham in his capacity as a director. If there is unfair prejudice to anyone, it is the Company and it is a complaint which may be made by the Company. As I have already indicated in this judgment, the Company may not be an applicant under s. 316 and nothing in this judgment is intended to determine in any way any complaint which the Company may have or any challenge it is making against the receiver in any other proceeding. I am only concerned with the application under s.316 and Mr Cunningham's position as a director.

16. Insofar as Mr Cunningham is seeking to make complaints in relation to alleged breaches by the receiver of obligations to furnish information to him as a director of the Company, or unfair prejudice to him by omissions of the receiver in the manner in which he marketed the property, on the facts of this application I am satisfied that Mr Cunningham has not put before the Court evidence of potential unfair prejudice to him as a director of the Company by any alleged act or omission of the receiver. I have reached that conclusion principally by reason of the fact that the receiver, shortly after his appointment, wrote to Mr Cunningham by letter dated 11th January, 2013 informing him that he had been appointed over the specified assets of the Company, both at Moore Lane and Moore Street. The receiver sought certain information from Mr Cunningham and also sought to have keys which were in his possession passed over. The receiver then informed Mr Cunningham of persons assisting him and expressly stated: "Should you have any queries, please contact either of these on the details above or by specified e-mails." And finally the receiver said to Mr Cunningham in the letter:

"If you would like to arrange a meeting to discuss the above and any other issues that you may have in relation to the receivership, please contact my above colleagues who will arrange this."

17. Mr Cunningham, in fairness to him, in his first grounding affidavit in this application, drew the Court's attention to that letter which he had received, and to which he acknowledged that he had not responded. At para. 21 of his grounding affidavit he exhibited the letter and stated: "I did not respond to that letter and did not acknowledge or communicate with the Receiver in any way."

18. After that period and before the sale of the property, which was contracted in November, 2013, and completed in December, 2013, there was no further communication between Mr Cunningham and the receiver. Whilst counsel on his behalf sought to make submissions alleging a failure by the receiver to furnish information, there was no request made by Mr Cunningham to the receiver in advance of the issue of the notice of motion seeking any information, and accordingly I am not satisfied that Mr Cunningham has put before the Court evidence that he, in his capacity as a director of the Company, is being unfairly prejudiced by the alleged actions or inactions of the receiver.

19. The final matter, then, is the position of Mr Cunningham as a tenant of the properties which the receiver has sold to the second named respondent. Certain directions were sought, essentially by Mr Cunningham in his capacity as a tenant of that property, in relation to actions taken by the second named respondent. The trial judge considered those to be outside of the ambit of s. 316 as they were essentially of a landlord and tenant nature and in my view she was correct in that it is not a matter which comes within the ambit of s. 316 as it is not a matter in connection with the performance or otherwise by the receiver of his functions, and accordingly that aspect of the application should be dismissed on that basis also.

20. In conclusion I therefore am of the view that the trial judge was correct in refusing the application of both Mr Cunningham and the Company under s. 316 of the Companies Act 1963 (as amended).

21. The final comment I wish to make is that by reason of that conclusion for the reasons I have set out, it appears to me unnecessary for the Court to consider on this appeal the correctness or otherwise of the determination made by the trial judge at para. 32 of her judgment in the High Court that the issue of the validity of a receiver's appointment appears to be outside the scope of s. 316. That is an issue which should be left over for an appropriate case.

President Ryan

I also agree.

Ms. Justice Whelan

I agree with the judgment delivered by Ms Justice Finlay Geoghegan for the reasons that she has set out.