Neutral Citation Number: [2009] IEHC 544

THE HIGH COURT

2009 523 COS

IN THE MATTER OF LINEN SUPPLY OF IRELAND LIMITED

(FORMERLY KNOWN AS CWS BOCO IRELAND LIMTIED)

AND

IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990 (AS AMENDED)

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 4th day of December, 2009

1. The company is the leading vendor in Ireland of washroom hygiene products, textile services and mats. The company operates from a number of different locations throughout Ireland. On 18th September, 2009, Mr. Kieran Wallace of KPMG (the "Examiner") was appointed Examiner to the company on an interim basis and his appointment was confirmed by the High Court on 30th September, 2009.

2. The company has operated out of a number of premises in which it holds a leasehold interest. These properties can, for the purpose of this judgment, be loosely described as follows:-

(i) Premises at Bluebell Industrial Estate (hereinafter referred to as "the Bluebell lease");

(ii) premises at Unit 34, Fonthill Industrial Park, Dublin 22 (hereinafter referred to as "the Fonthill lease");

(iii) premises at Unit C, Concorde Industrial Estate, Naas Road, in the City of Dublin (hereinafter referred to as "the Naas Road lease");

(iv) premises forming part of GalwayWest Business and Retail Park, Rahoon, County Galway (hereinafter referred to as "the Galway lease");

(v) premises at Unit 3A and Unit 3F, Block 71, the Plaza, Parkwest Business Park, Dublin 12 (hereinafter referred to as "the Parkwest lease").

3. Two applications are before the court. The first is an application on behalf of the company for an order pursuant to s. 20(1) of the Companies (Amendment) Act 1990 (as amended), approving the repudiation of the above leases and an order pursuant to s. 20(3) of the Companies (Amendment) Act 1990 (as amended), determining the amount of the loss or damage (if any) to be suffered by the landlord in each of the premises in respect of which the landlord is to rank as an unsecured creditor of the company and in which amount the landlord in each case is to be admitted in the Examiner's Scheme of Arrangement as a result of the repudiation of the lease.

4. The second application is one made by the Examiner for an order pursuant to s. 9(1) of the Companies (Amendment) Act 1990 (as amended), transferring the functions and powers of the directors of the company which are vested in or exercisable by the directors to the Examiner. An order pursuant to s. 9(4) of the Companies (Amendment) Act 1990 (as amended), providing that the Examiner shall have the powers conferred upon a liquidator by s. 290 of the Companies Act 1963 (as amended), an order granting the Examiner leave to disclaim the leases referred to above and an order pursuant to s. 290(4) imposing such terms as a condition of granting leave to disclaim the leases as the court thinks just.

5. The application of the Examiner is made as an alternative to the application by the company and on the basis that the application by the company does not succeed.

6. The hearing took place on Wednesday 2nd and Thursday 3rd December, 2009, and counsel informed the court that the decision would have to be given today (4th December, 2009) because a meeting has been called for Monday 7th December, 2009, with a view to preparing a Scheme of Arrangement. These time constraints obviously have some impact on the details which were exchanged between the parties in advance of the application and also, necessarily, impose limitations on the extent to which the court can set out its reasons for the decision given herein.

7. The arguments raised by counsel for the landlords involve the court considering some novel points of law in the examinership process.

8. The landlords in each of the premises oppose the application by the company and the Examiner. In the case of the application by the company, a united front has been taken by the landlords who argue that s. 20(1) of the Companies (Amendment) Act 1990 (as amended) ("the Act"), does not apply and is not intended to apply to the repudiation of a lease. I have been informed by counsel that for some time past, the *de facto* position has been that the courts have permitted the disclaimer or repudiation of leases by companies in examinership or by the examiner, and that is undoubtedly so. Counsel also informed the court, however, that the objection raised by them in this application has not been subject of any definitive ruling, although it has been referred to in the decision of Ryan J. in the matter of *O'Brien's Irish Sandwich Bars Limited* (Unreported, 16th October, 2009).

9. Section 20(1) of the Act reads:

"Where proposals for a compromise or scheme or arrangement are to be formulated in relation to a company, the company may, subject to the approval of the court, affirm or repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and other contracting party of parties."

In this case, the court is invited to consider what is meant by the words ". . . any contract under which some element of performance other than payment remains to be rendered, both by the company and the other contracting party or parties".

10. Counsel for the landlords argue that this does not refer to leases. In the present case, the company seeks to repudiate the leases because they are (a) surplus to the requirements of the company, and (b) too great a financial burden because of the level of rent payable under the terms of the leases. So far as the leases are concerned, the company, as tenant, says it simply cannot afford to pay the rents and the Examiner, for his part, says that it will not be possible to put forward a Scheme of Arrangement if the company's liability to pay these rents remains. The company argues that the only element of performance remaining to be rendered is a payment, and on that basis, it does not come within the ambit of s. 20(10 of the Act. Counsel for the company argues that leases do come within the ambit of the section because they involve duties and obligations on the parties to the lease going beyond payment.

11. In his judgment in the *O'Brien's Irish Sandwich Bars Limited* case, Ryan J. contrasted the terms of s. 20 with those of s. 290(8) of the 1963 Act, which dealt specifically with leases, and he noted the absence of any such provisions in section 20. He did express the view that this did not exclude the application of s. 20 to a lease, but he regarded it as a significant omission. In dealing with the question as to whether s. 20 of the Act permitted repudiation of the leases in that case, he said:

> "As to the first question, although, as I have mentioned above, the section does not make any particular provision for a lease, nor even mention such a contract, neither does it exclude a lease. Subsection (1) is a relevant provision. It seems to me that the primary purpose of this is to deal with the situation the company in protection and another contracting party have contractual obligations that do not involve the payment of money. The company may repudiate a contract where 'some element of performance other than payment remains to be rendered, both by the company and the other contracting party or parties'. The primary purpose of the section is to deal with those obligations that are due by and to the company in protection, and the words 'other than payment' are key to the understanding of the statutory purpose. If the matter is one of payment, a sum that is owed by the company is dealt with in the normal way, with the creditor receiving such payment as may result from the scheme that is formulated. But, where a person is contractually engaged with an insolvent company, and there are residual performance obligations, other than money payments, the section provides a mechanism whereby the person is, in effect, put in the same position as a money creditor, if the balance of the obligations is in the creditor's favour . . . ."

12. Counsel for the landlords in the Fonthill lease referred the court to s. 25B of the Act, which was inserted by s. 26 of the Companies (Amendment) (No. 2) Act 1999.

13. Section 25B states:

> "1. Subject to subsection (3), proposals for a compromise or scheme of arrangement shall not contain, nor shall any modification by the court under section 24 of such proposals, result in their containing a provision providing for either or both -
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> (a) a reduction in the amount of any rent or other periodical payment reserved under a lease of land that falls to be paid after the compromise or scheme of arrangement would take effect under section 24(9) or the complete extinguishment of the right of the lessor to any such payments,
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> (b) as regards a failure -
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> (i) to pay an amount of rent or make any periodical payment reserved under a lease of land, or
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> (ii) to comply with any other covenant or obligation of such a lease,
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> that falls to be paid or complied with after the date referred to in paragraph (a), a requirement that the lessor under such a lease shall not exercise, or shall only exercise in specified circumstances, any right, whether under the lease or otherwise, to recover possession of the land concerned, effect a forfeiture of the lease or otherwise enter on the land or recover the amount of such rent or other payment or to claim damages or other relief in respect of the failure to comply with such a covenant or obligation.
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> 2. Subject to subsection (3), proposals for a compromise or scheme of arrangement in relation to a company shall not be held by the court to satisfy the conditions specified in paragraph (c)(ii) of section 24(4) if the proposals contain a provision relating to a lease of, or any hiring agreement in relation to property other than land and, in the opinion of the court -
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> (a) the value of that property is substantial, and
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> (b) the said provisions of like effect to a provision referred to in paragraph (a) or (b) of subsection (1).
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> 3. Subsection (1) or (2) shall not apply if the lessor or owner of the property concerned has consented in writing to the inclusion of the provision referred to in subsection (1) or (2) in the proposals for the compromise or scheme of arrangement.
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> 4. In deciding, for the purpose of subsection (2), whether the value of the property concerned is substantial, the matters to which the court shall have regard shall include the length of the unexpired form of the lease or hiring agreement concerned."

14. It is argued that s. 25B is a self-contained provision dealing with proposals or a compromise for a Scheme of Arrangement related to leases and that if s. 20 of the Act permitted a company to repudiate the lease, it would set at

nought the provisions in section 25B. Counsel also argued that the rule of statutory interpretation *expressio uniuest exclusio alterius* applied.

15. It seems to me that the thrust of s. 25B of the Act is to the effect that a Scheme of Arrangement cannot provide for a reduction in rent or an extinguishment of the right of the lessor to the payment of rent that falls to be paid after the compromise or Scheme of Arrangement would take effect, unless the lessor or owner of the property concerned has consented in writing to the inclusion of such a provision in the proposals for the compromise or Scheme of Arrangement. If s. 20 of the Act was to permit the repudiation of a lease, it would be completely at variance with s. 25B. Since s. 25B specifically refers to leases, as does s. 290 of the Principal Act, I have come to the conclusion that s. 20 of the Act does not permit the court to make an order entitling the company to repudiate the leases in this case.

16. I now consider the application of the Examiner. His application is made pursuant to s. 9(1) of the Act. Section 9(2) of the Act states:

> "The matters to which the court is to have regard for the purpose of subsection (1) are-
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> (a) that the affairs of the company are being conducted, or are likely to be conducted, in a manner which is calculated or likely to prejudice the interests of the company or of its employees or of its creditors as a whole, or
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> (b) that it is expedient, for the purpose of preserving the assets of the company or of safeguarding the interests of the company or of its employees or of its creditors as a whole, that the carrying on of the business of the company by, or the exercise of the powers of, its directors or management should be curtailed or regulated in any particular respect, or
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> (c) the company or its directors have resolved that such an order should be sought, or
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> (d) any other matter in relation to the company the court thinks relevant."

17. Counsel for the landlords argue that the rationale behind s. 9 is to take the administration of the company away from the directors in circumstances where there is a danger of mismanagement or otherwise a threat to the interests or creditors of the company. While such a purpose can undoubtedly be achieved by invoking s. 9, it is clear that the court can have regard to any of the matters referred to in subsection (2) and is not obliged to have regard to all of them. Clearly, s. 9(2)(c) has been complied with as the company or its directors have resolved that such an order should be sought. It appears from the wording of the section that the court can have regard to any of the matters referred to in subsection (2). Having considered these matters, the court has to consider whether it is just and equitable to make the order sought. There is no evidence in the application before me that there was any mismanagement of the company or that it is expedient, for the purpose of preserving the assets of the company while safeguarding the interests of the company or its employees, that the powers of its directors or management should be curtailed or regulated.

18. The Examiner has expressed the view that he cannot put together a Scheme of Arrangement if the leases are not disclaimed. The proposed investor in the company is a parent company which has supported the company in recent times and is not willing to put further money into the company and continue its support as long as the company is tied into the leases.

19. On the face of it, therefore, it would seem that the court should consider making the order that the Examiner seeks. But it seems to me that since the order sought by the Examiner is one which he intends to use to disclaim the leases, this causes a problem by virtue of s. 25B of the Act. Section 25B of the Companies (Amendment) Act 1990, specifically relates to Examinerships. This section provides that unless the landlord consents in writing, the proposals put forward by the Examiner in a Scheme of Arrangement cannot reduce the quantum of any rental or other payments falling due after that date, nor can they provide for the cancellation of the landlord's right to receive such payments. Section 25 does not permit the proposals to contain any provision which would curtail or extinguish the landlord's rights and remedies in respect of breaches of the lease which occur after the coming into effect of the Scheme of Arrangement. Therefore, it seems to me that while an Examiner might be given all or any of the powers that he would have if he were a liquidator appointed by the court, those powers could not include the power to disclaim a lease for the purpose of preparing a Scheme of Arrangement if this is prohibited by s. 25B of the Act, in the absence of the landlord's consent.

20. In the circumstances, and having regard to the objections of the landlords to the disclaimer of the leases, I refuse the application of the Examiner.

21. Since I have already concluded that s. 20 of the Act does not apply to the repudiation of a lease, I refuse the company's application.