

THE HIGH COURT ON APPEAL

2009 1374

SOUTH EASTERN CIRCUIT COUNTY OF WATERFORD

BETWEEN:

QUIGLEY MEATS LIMITED

PLAINTIFF/RESPONDENT

AND

JOHN HURLEY AND MARGARET HURLEY

DEFENDANTS/APPELLANTS

Judgment of Mr Justice Michael Peart delivered on the 10th day of May 2011:

This matter comes before the Court on foot of a Notice of Appeal filed on the 2nd February 2011 against the order of His Honour Judge Teehan dated the 2nd February 2011 whereby it was ordered that the plaintiffs do recover from the defendants, jointly and severally, the sum of €28,675.86 for goods sold and delivered. It is an Appeal by way of re-hearing.

The plaintiff company operates a butcher business, and in the main supplies meat product to the hotel and restaurant trade, and has done so for many years.

The defendants are husband and wife, who at all material times ran a pub and restaurant in premises known as An Seanachie Bar and Restaurant at Ring, Dungarvan, Co. Waterford ("the premises"). Whether they did so on their own account or through the vehicle of a limited liability company called The Seanachie Cottages Limited ("the company") is an issue which arises for decision in this case.

Another issue is whether, if that be so, the plaintiffs ought to have known and must be taken to have known that they were supplying meat product to that company and not to the defendants. The defendants do not dispute that the sum claimed by the plaintiffs is due, but plead that it is owed by the company and not by them personally. The company has gone into liquidation. However, the bar and restaurant business and premises are not within that liquidation. The defendants continue to run the business personally.

The premises had been operated as a pub and restaurant by the previous owner of the premises. In about 2004 the premises and other land was acquired from that person by the first named defendant and his brother Michael Hurley, together with the ordinary seven day licence attaching to the premises. But the evidence of the second named defendant has been that the bar and restaurant had not been operated by the previous owner for about six years prior to this purchase.

I have not seen the purchase deed, but according to the Register of Licences produced in evidence by the plaintiff an application for the Confirmation of Transfer of the licence attaching to the premises was granted to John Hurley in the District Court on the 5th November 2004. He is shown as the licence holder, and the Register records that John Hurley and Michael Hurley are the owners of the premises. It would appear therefore that the purchase from the previous owner was completed in their favour and not to the company which had been incorporated on the 5th June 2003.

Further evidence that the land and the premises was not purchased by the company but by John Hurley and Michael Hurley is that on the 3rd May 2005 John Hurley executed a Short Term Business Letting Agreement in favour of the company. The term of that "Lease" is stated as 3 years and 11 months commencing on the 3rd May 2005 at a weekly rent of €800 payable to John Hurley, who is described as the landlord. However, the company is not the licence holder, and the Register of Licences to which I have referred records no transfer of the licence to the company, but rather refers only to annual renewals of the licence. As I have said, the licence holder is named as John Hurley, and there is no reference to his holding the licence as nominee of the company, as would be the case if the company was the owner of the licence.

The evidence before me is to the effect that after the land and premises were purchased by John Hurley and Michael Hurley, the latter ceased to have any interest in pursuing the intention of the purchase which was apparently to develop the land attached to the premises and to refurbish the premises. While I have no evidence that Michael Hurley transferred his joint interest to John Hurley, it at least explains why the Short Term Business Letting Agreement was executed in favour of the company by John Hurley alone.

The second named defendant has stated in her evidence that the company undertook the refurbishment of the licensed premises and has run the restaurant business there. However, the plaintiff has produced in evidence a copy extract from the Companies Registration Office in relation to the company which shows the principal objects of the company to be "development and selling of real estate". The defendants have not produced a copy of the Memorandum of Association but I am told that the objects do not include the operation of a licensed premises or restaurant.

Her evidence has also been that she and her husband incorporated three separate companies in relation to their proposed enterprises. She has stated that the purpose of The Seanachie Cottages Limited was to develop the land by the construction of townhouses or suchlike. Another company was called Seanachie Management Limited, and then a third company namely Pulla Enterprises Limited was formed as a building company.

Evidence was adduced in this case that the website for this bar and restaurant states that in 2006 it was reopened by its present owners "Johnnie and Mugs Hurley". I have also been informed that the company is now in liquidation, and that the premises are not within that liquidation. I do not know what assets/business are within the liquidation, but presume that it relates to whatever business was carried out by the company in relation to the cottages which may have been built. I am not too concerned with the minutiae of that. But the court has been told that following the appointment of the liquidator the bar and restaurant business is being

continued by the defendants themselves, and it is unaffected by the liquidation. The Short Term Business Letting has now expired, and I have no evidence as to who are the owners of the premises i.e. whether John Hurley and Michael Hurley continue to be the registered owners of the premises, whether they are owned now only by John Hurley, or whether John Hurley and Margaret Hurley are the owners. What is clear is that whether or not the company operated the premises, it was Margaret Hurley who was in charge of that business on a day to day business, and seems to have run it single-handedly, and was the person with whom the plaintiff company dealt at a personal level in relation to the running account for the supply of meat to the business.

James Quigley for the plaintiff has described the plaintiff's business as a family meat business in Cork, and that his three sons work with him in it. He has stated that often when seeking out business it is the chef with whom they speak, and in this case they first spoke to the defendant's chef 'Nigel' and the arrangement was that meat products would be delivered three times per week. At the beginning of each month a Statement of Account would be given in respect of goods supplied in the previous month, and the amount payable was to be paid by the end of that month. He has stated that at first payments were made by the defendants as due but gradually the situation deteriorated and the defendants began to fall behind with their payments, leading to an arrears situation building up. Eventually Mr Quigley became involved in discussions on a regular basis with Margaret Hurley in order to put arrangements in place for the discharge of the arrears, and for ongoing business. It was agreed apparently that each month a payment would be made in relation to arrears, and ongoing supplies would be on a cash-only basis. It had been hoped obviously that this methodology would result in a continuation of the business relationship while at the same time addressing the arrears so that they would over time be discharged. Clearly such an arrangement was in the interests of both parties.

He visited the premises on many occasions and on all occasions, bar a couple, dealt with Margaret Hurley. He encountered difficulties in getting payment off the arrears, and according to him would be given various excuses by her for this. She would sometimes pay something off the arrears but less than the agreed amount. At all times he believed that he was dealing with the defendants personally and not with any limited liability company. He says that the first time he became aware of any possible company situation was when a notice in Stubbs Gazette was brought to his attention which announced that a Petition had been presented to the High Court for the winding up of The Seannachie Cottages Limited. This occurred in January 2010. But as far as he was concerned the plaintiff company was at all times dealing with Margaret Hurley personally.

The customer account kept by the plaintiff named the customer as "Seanachie Bar & Restaurant, and not either of the defendants or both of them personally.

Payments from time to time on this account were made by Margaret Hurley for the most part by providing a cheque to the plaintiff, all of which were drawn on an Ulster Bank account in the name of The Seannachie Cottages Limited, and not either of the defendants personally. While these cheques were signed by Margaret Hurley, her signature appears beneath the name "The Seannachie Cottages Limited", and does not indicate that she does so as a director of that company.

This is said by the defendants to be a clear indication to the plaintiff at all times that it was that company which was operating the business and which was liable to the plaintiff company in respect of meat product supplied from time to time.

It is also the case that by September 2008 the plaintiff company had instructed their solicitors to write to the defendants seeking payment of the arrears due. Their solicitor carried out a search at that time and following thereon he wrote to the company seeking payment and threatening proceedings, and that letter concluded by stating that he would be advising his clients in relation to the possibility of petitioning to wind up the company. However, Mr Niall Quigley, one of James Quigley's sons who was in charge of accounts, has stated that when he gave instructions to their solicitor he made no reference to a company and that it was his intention that the amount due was owed by John Hurley and Margaret Hurley as he believed that it was they with whom the plaintiff was at all times supplying meat products. I am satisfied that this was the intention of Niall Quigley when instructing solicitors to recover the debt, and I am satisfied, having heard evidence from that solicitor in this regard, that their solicitor, having found that a company existed, decided that this was the legal entity that should be pursued for the debt rather than the Hurley's personally. I am not satisfied that the mere fact that the solicitor instituted proceedings against that company is of itself an acknowledgement by the plaintiffs that the debt was one due by the company rather than the present defendants personally.

But that is not an end to the question whether this debt is owed by the company rather than the defendants personally.

There is little doubt but that the defendants operated the bar and restaurant business through the company, and discharged amounts due to the plaintiff company from time to time by means of cheques drawn on that company's bank account. That however is the only fact which could have brought it to the attention of the plaintiff that this was the case.

The public documents in the Companies Registration Office, if consulted by the plaintiff company, would have revealed that this company was in the business of land development only, and not the operation of a bar and restaurant business. Similarly, the License Records would have shown that John Hurley personally was the licence holder, and not as nominee of any limited liability company.

Another piece of evidence which was given was that in February 2009, the plaintiff company sent a document headed "Personal Guarantee" to Margaret Hurley for her signature. This document, while so described, is not worded in a way which indicated that she was to personally guarantee the liability of any limited company. It describes Margaret Hurley as "part owner of the Seannachie Bar & Restaurant", and refers to the amount due being in respect of "goods sold and delivered to you the debtor" i.e. Margaret Hurley, and simply goes on to state, *inter alia*:

"1. The debtor, namely Margaret Hurley, hereby personally guarantees that she will within a time period of three months from the date of this Agreement pay to the said Creditor, Mr Niall Quigley of Quigley Meats Ltd, the sum of €26, 719.92 ".

Niall Quigley has stated that this document was never intended by him to be a form of guarantee by Margaret Hurley in respect of an amount owing by the company, and, although headed 'Personal Guarantee', was in fact simply a payment arrangement whereby the debtor, Margaret Hurley, guaranteed to discharge the sum then due within a period of three months. He states that it cannot be an acknowledgement by him that the debt was owed by the company, rather than by Margaret Hurley and her husband personally.

The document contains a further clause which indicates that if that payment period was not observed, judgment would be sought on foot of a Civil Bill which had by this time been issued against "Seanachie Bar & Restaurant".

On this point I am satisfied that this form of guarantee furnished by the plaintiff to Margaret Hurley for her signature is not determinative or even particularly relevant to the question of whether the debt is one owed by the company, or by the defendants personally or either of them. It is certainly not in the standard form one is familiar with when an individual guarantees a debt due by a limited liability company. The document contains nothing to indicate that the plaintiff regarded this debt as a sum due by the

company. In fact, to the contrary, the form describes Margaret Hurley as "the debtor" and makes no reference at all to the company.

Judgment was in fact obtained by the plaintiff against "Seanachie Bar & Restaurant ", but not being a legal entity as such, that judgment was unenforceable, resulting in the issue of the present proceedings against the present defendants/appellants.

Neither am I satisfied that the information contained in the public documents disclosing that the main objects of the company were for "the development and selling of real estate" is sufficient for a conclusion that the plaintiffs were entitled to assume that they were dealing with the defendants personally. I have no evidence to indicate whether or not the Memorandum of Association of the company contained the usual general objects clause which would allow the company to do all sorts of other things ancillary to the main objects. In any event these public documents were not consulted until well after this debt was incurred and so were not, as a matter of fact in this case, in any way relied upon by the plaintiff in this regard.

As a matter of clearly evidenced fact the premises out of which this bar and restaurant was operated was the subject of a short-term letting agreement between John Hurley and the company. I accept that the plaintiff would not have been aware of this but it is nevertheless a fact, and consistent with what the defendants say is the position, namely that the business of the bar and restaurant was the business of the company and not of them as individuals. I do not believe that the manner in which the website for the business stated that it had been re-opened by "Johnny and Mags Hurley" itself is sufficient to dislodge the fact that it was operated by a limited liability company.

Also clearly established is the fact that on a regular basis amounts paid to the plaintiff on account of outstanding balances from time to time were paid in the form of a cheque drawn on the company's bank account, those cheques clearly indicating the name of the company above the space for signature by the appropriate officer of the company. The fact that Margaret Hurley actually placed her signature below the company's name on these cheques would not have made her personally liable on foot of the cheque should any one of them have been dishonoured. She signed the cheques qua officer of the company, or at least an authorized signatory on the company's bank account. The fact that there was nothing adjacent to her signature to indicate whether she was a director of the company does not in my view displace the clear indication that this was a company cheque. The name of the company appears above her signature and any person must be taken as recognising that this was a company cheque and not a cheque for which the person signing had any personal liability, either for the cheque itself or for the debt in respect of which it was a payment.

The receipt of such cheques was sufficient in my view to fix the plaintiff with knowledge that the restaurant was being operated through a limited liability company, and to alert it to that fact so that if it wished it could secure its position either by insisting on a personal guarantee by either or both of John Hurley and Margaret Hurley of the company's liability to the plaintiff for product supplied, or indeed to decide that it would not supply product at all to the company.

For these reasons I am satisfied that, while I have every sympathy for the position in which the plaintiff now finds itself, the amount due to the plaintiff company is an amount due by the company and that neither of the defendants has any personal liability for that amount.

I therefore allow the appeal and set aside the order of the learned Circuit Court Judge made on the 2nd February 2011.