Neutral Citation: [2013] IEHC 495

THE HIGH COURT

RECORD NUMBER: 2012 NO. 411 COS

IN THE MATTER OF ELEKTRON HOLDINGS LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF CROSSPLAN INVESTMENTS LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 316(1) OF THE COMPANIES ACT 1963, AS AMENDED

BETWEEN:

PAUL McCANN

APPLICANT

AND

PATRICK HALPIN AND ANNE KEANE

RESPONDENT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 8TH DAY OF NOVEMBER 2013:

1. The applicant is the Receiver appointed by Irish Bank Resolution Corporation Limited in respect of Elektron Holdings Limited ('Elektron') and Crossplan Investments Limited ('Crossplan') under certain debentures entered into by Elektron and Crossplan by way of security for substantial loans from Irish Nationwide Building Society ('INBS') in 1998 and 2010 respectively. All the rights and entitlements of INBS in those loans transferred to IBRC pursuant to a Transfer Order dated 1st July 2011 made under the Credit Institutions (Stabilisation) Act, 2010.The validity of the Receiver's appointment is at issue on this application by the Receiver for directions.

2. The respondents are directors of each company.

3. Elektron is the owner of Aberdeen Lodge, a large Guest House/Small Hotel premises situated in Sandymount, Dublin 4.

4. Crossplan is the owner of another premises known as Merrion Hall, comprising a number of properties on Merrion Road, Dublin 2 which were purchased by Crossplan with a view to developing the entire as a Guest House/Small Hotel, similar to Aberdeen Lodge.

5. INBS sanctioned loans totalling €25 million. Most of those borrowings were made available to Crossplan for the purchase and redevelopment of Merrion Hall, with about €1 million being used by Elektron for the purpose of refinancing some existing borrowings with National Irish Bank. Elektron gave a guarantee to INBS in respect of the loan to Crossplan, and the first named respondent, Patrick Halpin in turn gave a personal guarantee in respect of the loans of each company.

6. There is no need to set forth an exhaustive recitation of events which preceded a letter of demand which was sent to the companies by IBRC on the 15th February 2012, save to say that it is clear that in due course the companies were not in a position to service its loans as required by the terms of the facilities, and that the usual meetings and correspondence took place between the companies and the Bank over a considerable period of time. However by February 2012 the IBRC was not prepared to forbear any longer in relation to the enforcement of the security over the assets of the companies, and a decision was made to appoint a Receiver.

7. The relevant debentures provide for the appointment of a Receiver at Clause 9A which provides:

> *"The Society may at any time after the monies hereby secured have become payable and the security hereby constituted has become enforceable appoint by writing ... … … any person or persons to be a receiver or Receivers …".*

8. Clause 8E thereof provides:

> *"Notwithstanding anything hereinbefore contained, all monies hereby secured shall become immediately payable or shall be deemed to become immediately payable as the case may be and the security shall become enforceable if the Society shall by Notice in writing make a demand on the Company for payment of the monies hereby secured or, whether or not the Society shall by notice in writing make such a demand, on the happening of any of the events set out in the following sub-paragraphs of this sub-clause E:*
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> > *(i) If the Company shall fail to repay any monies due to the Society on demand or on the date on which the same ought to be paid in accordance with the provisions of this Debenture or in accordance with the terms and conditions upon which same may have been advanced or be payable."*

The remaining sub-clauses (ii) to (xx) of paragraph 8E are not relevant for present purposes.

9. Letters of demand were sent by post to the companies on the 15th February 2012. It appears from what I have been told that they were brought to the post office at 6pm on that date, and therefore must be taken as having been posted at 6pm. The letters were received by Mr Halpin the following morning the 16th February 2012.

10. The issue for determination in these proceedings is whether the Receiver's appointment is valid, given the terms in which those letters of demand were written. It will be seen below that each letter stated that unless payment of the amounts owing were paid *"by close of business on the 17 February 2012"* steps to enforce the bank's security would be taken. It is a fact that a Receiver was appointed over each company at 4pm on the 17th February 2013. A very simple point is taken by the respondents, namely that 4pm is not the hour normally understood to be "close of business", and that the companies were therefore deprived of an opportunity to pay the amounts in question to the bank by, say 5pm or 5.30pm which it is submitted represents a normal meaning of "close of business". I will return to these submissions, and the bank's responses.

10. Under the terms of the loan facility letters the loans in question were repayable on demand. The letter of demand to each company was identically worded save that the amount claimed as due in respect of each company was different. The paragraphs relevant to the issue to be determined herein are set forth as follows in the letters of demand:

> *"We hereby demand payment forthwith of all amounts of principal, interest, costs and expenses outstanding under the Offer Letters, being the aggregate amount of € [amount inserted] as of the date of this letter. Payment can be effected by electronic transfer to account number 87180023, IBAN IE53 INBS 0000 0040 021086 sort code 93 20 86 SWIFT/BIC AIBKIE2D and account name IBRC held with AIB or by bank draft delivered to Irish Bank Resolution Corporation Limited at 2 Grand Parade Dublin 6.*
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> *We reserve the right to make further and other demands upon Elektron Holdings Limited in respect of any indebtedness or liability (now or hereafter due and whether actual or contingent) not incorporated in this demand.*
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> *In the event that payment is not received by close of business on 17 February 2012 we are entitled to and reserve the right to enforce any security given to us to secure the facilities made available under the Offer Letters, to take all such actions as are permitted under the said security (including, without limitation, the appointment of a receiver) and to take such steps, as we are lawfully entitled to, to recover all monies due by you to us.*
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> *Nothing in this letter constitutes, or should be deemed to constitute, a waiver of any rights or remedies of Irish Bank Resolution Corporation Limited under the Offer Letters or any security documents entered into or otherwise available as security for the facilities made available under the Offer Letters or otherwise." [emphasis added]*

11. It is clear that Mr Halpin received the letters of demand on the following day. A meeting took place between Mr Halpin, his accountant, Aiden Murphy and bank personnel at 8.30am on Friday 17th February 2012. According to the witness statement of Mary Kelly of the Bank, who attended that meeting, Mr Halpin stated his disappointment at having been served with letters of demand, and stated as he had done on previous occasions that the Aberdeen Lodge premises was his family home – a point no longer pursued by him, though until recent times it seems to have been his main objection to the Receiver's taking possession. Ms. Kelly's witness statement goes on to state that at this meeting it was made clear to Mr Halpin that a Receiver was one of the options, and Mr Halpin was informed that the bank could not confirm what the next step would be until after "close of business", but would telephone Mr Halpin at 4pm to advise him. Ms. Kelly telephoned him at 4.15pm that evening to inform him that a Receiver had been appointed at 4pm to each company. The Deed of Appointment of the Receiver to each company was signed at 4pm, and the acceptance of that appointment by the Receiver was signed by him at 4.15pm.

12. It is not being suggested by the respondents that either of the companies or Mr Halpin was in a position to discharge the amounts due either at any time on the 17th February 2012 or on any date thereafter. It is accepted that both companies were at that time and remain hopelessly insolvent.

13. Cian Ferriter SC for the applicant submits that in the light of the provisions of Clause 8E of the Debentures once the letters of demand were served on the 15th February 2012, it was entitled to immediately appoint a Receiver, and that the bank was not in fact required to await a default on foot of the demands made. The monies due on foot of the loans are repayable forthwith upon demand being made. While in some circumstances it may make sense to await the expiration of the deadline specified for payment in case payment might be forthcoming, the Bank submits that it is not necessary that it do so given the fact that the loans were repayable upon demand, and the letters of demand required that payment be made forthwith.

14. Mr Ferriter makes two points on the applicant's behalf. His first submission is that as a mater of fact the bank did wait until the specified deadline for payment had passed, since "close of business" for a bank is 4pm, as any payments received even electronically after that time cannot be processed, and not any later time at which offices in other walks of life might habitually close, such as 5pm or 5.30pm. That is the first point made. The second point is that in any event, as I have stated in paragraph 13 the bank was entitled to appoint the Receiver at any time after the demand for payment was issued, and that even though a deadline for payment was stated, it was not strictly speaking necessary that the bank await the expiration of that deadline before appointing the Receiver.

15. In circumstances where it is clear that one way or another the companies were unable to repay the monies on foot of the demand, no matter how long the deadline, Mr Ferriter has referred to a judgment of Goff J. (as he then was) in *Cripps (Pharmaceuticals) Ltd v. Wickenden and another* [1973] 2 All ER 606. In that case the plaintiff complained that the creditor had not allowed a reasonable period of time to make repayment between the issue of the demand and the appointment of the Receiver. That argument was rejected, it being held that the appointment could not be impugned on that ground where it was clear that the plaintiff would not be in a position to repay the sum demanded. In so holding, Goff J. stated:

> *"It was argued by the plaintiffs that even where money is payable on demand, still a reasonable time must be given to enable payment to be made: see Brighty v. Norton, Toms v. Wilson, and Upjohn J. in Lloyds Bank Limited v. Margolis … much was made of the speed with which Mr Stokoe acted, and it was said that he never really gave the company a chance to put proposals in answer to the letter of 6 August; but in my judgment that is not the point. The question is whether he gave such time as the law requires when money is payable on demand; and the cases show that all the creditor has to do is give the debtor time to get it from some convenient place, not to negotiate a deal which he hopes will produce the money. I quote from Blackburn J. in Brighty v. Norton:*
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> > *'I agree that a debtor who is required to pay money on demand, or at a stated time, must have it ready, and is not entitled to further time in order to look for it.'"*

Later at page 617, he continued:

> *"It is abundantly plain that Cripps had not got the money and had no convenient place to which they could go to get it … in my judgment, therefore, the plaintiffs cannot object on the ground that they were not given time to find the money*

or that the interval of time between 11.00am or shortly before, when the demands were made and midday, or later when the receiver was appointed was too short."

16. The applicant has referred also to passages in similar vein in *Sheppard & Cooper v. TSB Bank plc* [1996] 2 All ER 654 at page 657, and *Bank of Geroda v. Panessar* [1986] 3 All ER 751 at pages 759-760.

17. The respondents have rested their arguments firmly upon the contention that the Receiver was not appointed in conformity with the letters of demand, as he was appointed at 4pm, which they contend is not "close of business". Ross Maguire SC submits that there can be no question but that the doors of IBRC remain open beyond 4pm. They do not contend that if the bank had waited another hour or even an hour and a half the money could have been repaid. It is contended that since no event of default was committed by the respondents until after the expiration of the deadline, namely until after "close of business" the bank was not entitled to appoint the receiver and his appointment is therefore invalid. It is submitted in other words that the demand made is faulty and of no lawful effect because the bank failed to comply with the terms of the demand i.e. wait until close of business before taking any enforcement step.

18. Mr Maguire has submitted that given the serious consequences for any company by the appointment of a receiver the Court should be vigilant to ensure that there is scrupulous compliance with legal requirements for such appointment. He has referred to the judgment of Gilligan J. in *The Merrow Limited v. Bank of Scotland plc* [2013] IEHC 130, where the learned judge, having considered a wide range of foreign authority, held that strict compliance with the contractual terms contained in the debenture was necessary, and concluded that the receiver's appointment was invalid and of no legal effect in circumstances where the document appointing the receiver was required by the relevant debenture to be under seal, and in the event was not.

19. It is submitted by Mr Maguire that since it cannot be the case that 4pm is "close of business" the receiver's appointment was premature, not in strict compliance with the letter of demand, and therefore his appointment was invalid under the terms of the debenture.

20. Mr Maguire has also laid emphasis upon the fact that Mr Halpin and his partner, the second named respondent and family reside in part of Aberdeen Lodge. In such circumstances, he submits that this is a further reason why the Court should insist on strict compliance with the legal requirements for valid appointment, since the appointment permits the receiver to enter the respondent's home, and to achieve the respondents' removal from their home. He has referred to the judgment of the Chief Justice in *Damache v. DPP and others*, [2012] IESC 11, and the importance given to the inviolability of the home under the Constitution, and, as a consequence, to strict adherence to formal requirements in relation to a search warrant before a home can be searched.

21. Mr Ferriter in reply to this last point has submitted that cases such as *Damache*, and *DPP v. Kelly* to which Mr Maguire also referred were decided in a criminal context, and that reliance cannot be placed upon them in a case such as the present one where the right of the bank to appoint a receiver and recover possession of the premises arises under contract between the parties.

22. I agree that it is unnecessary to rely upon the constitutional protection to the inviolability of the home in this case. It is simply a matter of contract. Either the Receiver has been appointed in accordance with the contractual terms agreed between the parties in this regard or they have not, and the Court must construe the relevant terms by reference to the words used.

"Close of Business":
23. The phrase "close of business" is not a term of art, and is not defined in the debenture deed. Neither is it a phrase for which a definition is provided in the Schedule to the Interpretation Act, 2005, or even in any of the standard texts on statutory interpretation, or the meaning of words and phrases. It is simply a phrase commonly used in everyday language to describe a time at which a business might reasonably be expected to close its doors to the public or to clients. It does not mean that thereafter no personnel may remain on the premises. One could envisage a solicitor's office, for example, being closed for business at, say, 5pm or 5.30 in the sense that a courier or a client could not gain entrance except by special arrangement. But it would not exclude the possibility or even the probability these days that it might be some hours yet before the last person to leave would turn out the lights and lock the door.

24. The phrase covers a range of different contexts depending on the nature of the business in question. Close of business for a pub or a restaurant might be midnight or even later, just to take a very simple example. Nevertheless one thinks of so-called normal business hours as being 9am to 5pm, but businesses vary in nature, and for some businesses normal business hours are different, and therefore "close of business" will not necessarily be 5pm or 5.30pm. What is "close of business" in any particular case will depend upon the nature of the business in question. It is a flexible phrase to be seen in any particular context.

25. The context for the present case is a banking context where the relationship is that of bank and bank customer. Each party signed up to the terms of the debenture. Any letter of demand is in the context of monies owing to the bank and secured by the debenture on the companies' assets. Where a letter of demand requires repayment forthwith, and threatens that if the funds are not received on a particular day by "close of business", that must be interpreted as meaning the end of the banking business day. I do not require expert evidence to know that traditional banking hours have for many years been 10 am to 4pm. There have been instances where a particular bank might advertise itself as staying open until 5pm on a particular day of the week in order to convenience its customers, or be open at 9.30am instead of the normal 10am, or perhaps even open on Saturday mornings. But it is reasonable to interpret and understand the phrase "close of business" in the banking context as being the time at which banks have traditionally and normally closed their doors to customers. If money is to reach the bank by close of business, that can be fairly and reasonably interpreted as meaning by not later than 4pm, in the absence of any other specific arrangement made. It is not reasonable to interpret it as meaning 5pm or 5.30pm simply because there may be bank staff working away inside the bank up to either of those times or later, or because other types of business might regard "close of business" as meaning some time later than 4pm.

26. That is sufficient to determine the issue raised by the respondents on this application. It is not necessary to reach any conclusion as to whether the bank was entitled to appoint the Receiver at any time after demand was made and before 4pm on the 17th February 2012.

27. I myself raised the question with the parties as to whether Clause 28 of the debenture had a relevance to the issue for determination. That is a clause which defines a demand made under the debenture. Having heard submissions on the point I am satisfied that the clause is not relevant to the matter raised for determination.

28. In his Notice of Motion dated 13th July 2012, the applicant Receiver sought directions as to the entitlement of the respondents to withhold possession of the property known as Aberdeen Lodge from the applicant, including (a) whether the respondents were correct in contending that the applicant, as duly appointed Receiver over the property, was precluded from seeking to enforce security rights

over the property on the basis that the property comprises their family home; and (b) if the answer to (a) is 'yes', what powers can the applicant exercise over or in connection with the property. Other orders were sought which do not concern me at this point. But as the case evolved prior to hearing the basis of the respondents' objections to the Receiver have changed. They have abandoned their original contention that the property is a family home, and have relied on the point which I have addressed. I will therefore grant a Declaration that the Applicant has been validly appointed as receiver over both Crossplan Investments Limited and Elektron Holdings Limited, and is entitled by virtue of his appointment to take possession of the properties in the ownership of each said company. I will if necessary give further directions in relation to the reliefs sought in the Notice of Motion at paragraph 2, sub-paragraphs (a) to (h), and at paragraph 3, sub-paragraphs (a) to (h). However, in the light of my conclusion as to the validity of the applicant's appointment, I would expect that the latter reliefs may not be required. But I shall hear Counsel in relation to same.