Neutral Citation Number: [2006] IEHC 188

THE HIGH COURT

1997 23 COS

IN THE MATTER OF BELL LINES LIMITED (IN LIQUIDATION),
BELL FREIGHT TRANSPORT GROUP LIMITED (IN LIQUIDATION),
BELL (MERTENS TERMINAL) LIMITED (IN LIQUIDATION),
BELL VIEW SHIP AGENTS AND STEVEDORES LIMITED (IN LIQUIDATION)
WATERFORD MULTIPORT LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACT, 1963 - 2003

Judgment of Ms. Justice Dunne delivered on the 28th day of April, 2006

1. The above entitled companies (the companies) formed a substantial Irish owned shipping business based in Waterford. On 4th July, 1997, David Hughes (the liquidator) of Ernst and Young, Accountants, was appointed official liquidator of the companies. By an amended composite notice of motion dated 25th July, 2005, the liquidator has sought, *inter alia*, the following reliefs:

> c. An order confirming that French creditors of the French branch of Bell Lines Limited are permitted to claim in the Irish liquidation of Bell Lines Limited notwithstanding the appointment of a liquidator in France, and an order that the official liquidator deduct from dividends in respect of amounts due to French creditors in the liquidation of Bell Lines Limited (in liquidation) any payment which such creditors may have received from the French insolvency fund or from the French liquidator in respect of such amounts.
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> d. An order that the English Insolvency Service (DTI) be admitted subject to adjudication as a creditor in the liquidation of Bell Lines Limited in respect of payments lawfully made to employees of that company from the English equivalent of the Redundancy and Employers Insolvency Fund, as a preferential creditor insofar as such payments were in respect of Irish preferential debts due to employees of Bell Lines Limited and as an unsecured creditor insofar as such payments were in respect of Irish unsecured debts due to employees of Bell Lines Limited; and a similar order in favour of the Northern Ireland Department of Employment and learning in respect of payment of a debt due to a Northern Ireland employee of Bell Lines Limited.
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> h. An order that in principle the English Insolvency Service (DTI) and the Northern Ireland Department of Employment and Learning (DEL) have preferential claims to the extent to which payments made by them are preferential under Irish Law in respect of wages, holiday pay and pension but that their claims for payments relating to redundancy and minimum notice are not preferential.

2. Affidavits were sworn by the liquidator herein on 17th June, 2005, 11th July, 2005, 19th July, 2005, 28th September, 2005 and 18th November, 2005, relating to the issues referred to above. I propose to deal with the issues raised in respect of paras. (d) and (h) of the notice of motion. It was not necessary to deal with para. (c). Written submissions were furnished to me on behalf of the liquidator and on behalf of the notice party herein, the Port of Waterford (the notice party).

3. In his oral submission Mr. Shipsey, on behalf of the liquidator, indicated that at the time of the liquidation there were two hundred and nine employees of the companies based in the UK. Those employees made claims for sums due in respect of minimum notice, holiday pay, preferential wages, redundancy and pension to the relevant insolvency agency where they were based, namely the English Insolvency Service (DTI) in respect of UK employees based in England and Wales and to the Northern Ireland Department of Employment and Learning (DEL) in respect of payment of a debt due to a Northern Ireland Employee of Bell Lines Limited. Initially the DTI and DEL refused to pay the amounts due and following proceedings before an industrial tribunal in Bristol the matter was referred to the European Court of Justice. The European Court of Justice found that the UK employees were entitled to claim in the UK from DTI. The judgment of the European Court was delivered on 16th December, 1999, in a matter entitled *Everson and Barrass v. Secretary of State for Trade and Industry and Bell Lines Limited* [1999] EC C-198/98, in which it was held "where the employees adversely affected by the insolvency of their employer were employed in a Member State by the branch established in that State of a company incorporated under the laws of another Member State, where that company has its registered office and in which it was placed in liquidation, the competent institution, under Article 3 of Directive 80/987 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer for payment to those employees of outstanding claims is that of the State within whose territory they were employed." Accordingly on the basis of that decision the DTI and DEL made payments in respect of wages, holiday pay and pension together with redundancy and minimum notice to the relevant employees.

4. Mr. Shipsey submits that the monies paid by the DTI and DEL insofar as the monies concerned relate to categories of payment referred to in s. 285 of the Companies Act, 1963 should be treated as preferential claims arising under s. 285. He argues that this is so by virtue of the wording of s. 285 itself or alternatively, it arises out of the interpretation of s. 285 read together with EU Directive 80/987/EEC. It is also submitted that the payments should be treated as preferential claims by operation of law from a restitutionary right of subrogation to the position of the person whose debt has been discharged.

5. Section 285 of the Companies Act sets out the provisions in relation to preferential payments in a winding up.

6. Subs. 2 In a winding up there shall be paid in priority to all other debts

> (a) The following rates and taxes…
>
> (b) All wages or salary…
>
> (c) All accrued holiday remuneration…
>
> (i) Any payments due by the company… for the provision of superannuation benefits to or in respect of employees…

7. Subs. 3 provides for a monetary limit in respect of the amount to which priority is given in the case of any one claimant.

8. Subs 6, Where any payment has been made –

> (a) To any clerk, servant, workman or labourer in the employment of a company, on account of wages or salary; or

(b) To any such clerk, servant, workman or labourer or, in the case of his death to any other person in his right, on account of accrued holiday remuneration; or

(c) To any such clerk, servant, workman or labourer while he is absent from employment due to ill health or pursuant to any scheme or arrangement for the provision of superannuation benefit to or in respect of him;

out of money advanced by some person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid up to the amount by which the sum, in respect of which the clerk, servant, workman or labourer or other person in his right, would have been entitled to priority in the winding up have been diminished by reason of the payment having been made.

9. Subsection 7 is a *pari passu* provision.

10. Mr. Shipsey submits that on a construction of s. 285 there is nothing to prevent the DTI or the DEL from claiming preference in respect of the debts due to them. He emphasised that under s. 285 it is the debt which is given priority as opposed to the person per se who is preferential. In support of this contention he stated that this is shown by the fact that any further debt due to the individual employee will be unsecured. He also pointed out that under s. 285(6) it is clearly provided that claims may be brought other than by the employee and that accordingly monies may be paid to persons other than the employee concerned in respect of preferential debts. He accepted that this section is most often relied on by someone who advances monies such as a banker prior to a winding up to pay wages. He argued that on a proper construction of s. 285 there is nothing to prevent DTI or DEL claiming preference. He contended that it is the debt that gains the priority not the person to whom the debt is due. If the debt in this case is one which would be a preferential debt then DTI and DEL should be able to step into the shoes of the person to whom the debt was originally due.

11. Mr. Shipsey further submitted that if he was wrong on the construction to be placed on s. 285 then, he argued, EU Directive 80/987/EE7 provided some support for his contention and he referred to the preamble which states:

"Whereas it is necessary to provide for the protection of employees in the event of the insolvency of their employer, in particular in order to guarantee payment of their outstanding claims, while taking account of the need for balanced economic and social development in the community; whereas differences still remain between the Member States as regards the extent of the protection of employees in this respect; whereas efforts should be directed towards reducing these differences, which can have a direct effect on the funding of the common market.

Whereas the approximation of laws in this field should, therefore, be promoted while the improvement within the meaning of Article 117 of the Treaty is maintained;…"

12. He then referred to Article 2 and 3 of the Directive. He went on to refer to the judgment in the Everson decision and in particular paras. 20, 22 and 23 thereof. He pointed out that as can be seen from that judgment the result of the operation of the Directive makes clear that where a company incorporated in one Member State has a branch in another Member State the regulatory authority in that State has a duty to meet claims of employees in that State. This relieves other entities in the present situation, such as the Irish Guarantee Institution (Department of Enterprise, Trade and Employment) of meeting such a claim. He argued that in the absence of the Directive it would have been an obligation for the equivalent Irish body to discharge the payments due to the UK employees. Thus he contended that s. 285 on its own should be sufficient to enable the DTI and DEL to claim as preferential creditors and if not on its own, then s. 285 should be read in the light of the EU Directive. So doing would have the effect of ensuring that the foreign guarantee institution such as the DTI or DEL once it has paid in accordance with the EU Directive is then subrogated to the position of the employee in the Member State where the winding up is taking place in accordance with the ranking of those debts subject to the provisions of s. 285. In other words they would be in the same situation as would be the Irish guarantee institution in respect of debts paid by that guarantee institution, namely the Department of Enterprise Trade and Employment.

13. The next point raised by Mr. Shipsey related to the remedy of restitution. He argued that DTI and DEL should be entitled to make a claim in the same way (with preferential status) as the employee would be able to on the basis of restitutionary remedies or subrogation or the right of recoupment. He argued that the view of the notice party that subrogation is a concept which arises in the context of a principle/surety relationship only is incorrect. Subrogation can arise to prevent unjust enrichment in a variety of circumstances. In this instance someone benefits at the expense of another, that is to say other creditors benefit at the expense of the person who is obliged as a guarantee institution to make a payment. He referred to Goff and Jones on the Law of Restitution where it is stated in chapter 3:

"But as these examples show, it is in essence a remedy, fashioned to the particular facts, and designed to ensure 'a transfer of rights from one person to another…by operation of law' in order to deprive B of a benefit gained at A's expense."

14. He also referred to the judgment of Millett L.J. in *Boscawen v. Bajwa* [1995] 4 All ER 769, 777 where he stated:

"Subrogation…is a remedy, not a cause of action… it is available in a wide variety of different factual situations in which it is required in order to reverse the defendant's unjust enrichment. Equity lawyers speak of a right of subrogation or equity of subrogation, but this merely reflects the fact that it is not a remedy, which the court has a general discretion to impose whenever it thinks it just to do so. The equity arises from the conduct of the parties on well settled established principles and in defined circumstances which make it unconscionable for the defendant to deny the propriety interest claimed by the plaintiff. A constructive trust arises in the same way. Once the equity is established the court satisfies it by declaring the property in question is subject to a charge by way of subrogation in the one case or a constructive trust in the other."

15. He also referred to the decision of the Supreme Court in the case *Highland Finance (Ireland) Limited v. Sacred Heart College of Agriculture Limited & Others* [1998] 2 I.R. 180 in which both Murphy J. in the High Court and Blayney J. in the Supreme Court referred to the following passage by Lord Salmon's judgment in *Orakpo v. Manson Investments Limited* [1978] A.C. 95:

"The test as to whether the court will apply the doctrine of subrogation to the facts of any particular case is entirely empirical. It is I think impossible, to formulate any narrower principle than that the doctrine will be applied only when the courts are satisfied that reason and justice demands that it should be."

16. On the basis of those authorities Mr. Shipsey argued that the claim for debts due for wages, holiday pay, pension are an encumbrance on the assets of the company by virtue of s. 285 and where a person such as the DTI has paid off that encumbrance they are entitled to a charge by way of subrogation to the amount recoverable under s. 285. He argued that to hold otherwise would be to unjustly enrich the general body of creditors in circumstances where the intent of the legislation is that the general body of creditors stands behind the debts identified in s. 285. He contended that there is no circumstance which precludes the general application of the general right of subrogation. He pointed out that no issue is taken by the notice party to the position of the Irish equivalent of the DTI or DEL in respect of the Irish employees.

17. He also referred to the case of Re *Downer Enterprises Limited* [1974] 1 WLR 1460. In that case a lease was signed to D. Limited, which later collapsed with rent unpaid: a prior assignee was forced to pay the landlord. The right to rent had the status of a preferential debt in the insolvency. It was held that the prior assignee had a right obtained by subrogation to the landlord's preferential status and thus Mr. Shipsey argued that this was a similar analogy to the facts of the present case. In other words there is a primary liability on the company to pay certain debts of employment and a secondary liability, arising by virtue of statute in Britain and Northern Ireland and the operation of the EU Directive 80/987/EEC on the DTI in Britain and the DEL in Northern Ireland to pay the employee's wages, holiday pay and so on. He conceded that the existence of a statutory remedy may preclude a right of subrogation depending on the wording of the statute concerned but argued that the fact that legislative decisions relevant to English and Northern Ireland insolvency funds do not refer to preferential status in the insolvency proceedings of other jurisdictions it did not follow that this omission that no subrogation should arise. The omission is, he argued, more readily explained in terms of respect of the laws and sovereignty of other States. The question of whether and to what extent the doctrine of subrogation will arise in any jurisdiction is a question for the law of that jurisdiction allowing for rights which may be conferred on a claimant from another jurisdiction under their local law. He also referred to a decision of this court in which the DTI was allowed to be subrogated for unpaid wages and holiday pay on a preferential basis but he indicated that there was no objection made in that case by any creditor and accordingly this point was not argued in those proceedings.

18. Finally Mr. Shipsey dealt with an argument based on the right to recoupment. He pointed out that the payments made by the DTI and DEL were made under compulsion by virtue of statute having regard to the requirement on Member States to abide by the decision of the ECJ in *Everson and Barrass v. Bell Lines* in respect of the Directive 80/987. Thus he argued that as the payments were made under compulsion and resulted in the discharge of another's (the company in liquidation) liability the payments made by DTI and DEL should be regarded as payments within s. 285. He referred to Goff and Jones and quoted:

> "In general, any body that has under compulsion of law made a payment whereby he has discharged the primary liability of another is entitled to be reimbursed by that other."

19. Goff and Jones then quoted the common law principle stated in *Moule v. Garrett* [1872] LR 7 EX. 100:

> "Where the plaintiff has been compelled by law to pay, or being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liabilities; under such circumstances the defendant is held indebted to the plaintiff in the amount."

20. Based on those authorities Mr. Shipsey submitted that the DTI and DEL are compelled to pay and therefore the company in liquidation should have to answer for the benefit it received. If the manner in which that is done is simply to treat the debt discharged by the DTI and DEL as unsecured then the company in liquidation benefits unjustly. The only just way of dealing with the matter is to allow the DTI and DEL the status accorded to the debt which they were compelled to discharge.

21. Ms. Marshall on behalf of the notice party submitted that the principles of subrogation do not apply in the context of the claims of DTI and DEL. She pointed out that in Northern Ireland and in Britain there is a statutory scheme for the payment of employee entitlements as there is in this jurisdiction. Such schemes are not for the purpose of applying subrogation but rather excluding the concept of subrogation by creating a separate statutory scheme for the transfer of claims from the individual to the particular guarantee institution. In such circumstances it is unnecessary for the court to find that there is an equitable remedy open to a guarantee institution given that there is a statutory scheme. She pointed to similarities in relation to the statutory scheme in Northern Ireland, Britain and Ireland and contrasted the effect of subrogation with the effect of the statutory scheme. In the case of subrogation she stated that the party who has paid is "entitled to step into the shoes of the creditor" and is entitled to exercise all the creditor's rights and remedies. In the case of the statutory scheme the relevant guarantee institution does not seek to step into the shoes of the employee and exercise all the employee's right but rather has the benefit of a statutory transfer of rights from the employee to the relevant body. She argued that such a transfer operates to exclude equitable principles which might otherwise apply. Further she argued that it is for this reason that it was necessary in each jurisdiction to provide separate preferential status for the transferred claim.

22. Ms. Marshall also raised the issue of the rule against double proof. She pointed out that certain difficulties would be created under that rule in circumstances where the creditor had not been paid in full. She submitted that the purpose of the statutory scheme was to enable the guarantee institution to claim in competition with the employees and thus to avoid the effects of subrogation and the rule against double proof.

23. So far as preferential status is concerned she argued that under Irish law preferential status is exclusively a matter of statute by virtue of s. 285 of the Companies Act, 1963, as amended. There is no provision giving preferential status to debts due to the guarantee institutions save for that provided for in respect of the Irish guarantee institution. Further she submitted that a transfer of a preferential debt does not carry with it a right to preferential status. She referred to the provisions of s. 10(1) and (2) of the Protection of Employees (Employer's Insolvency) Act, 1984. It would be useful to look at the precise wording of the provision.

> "Section 10(1) Where, in pursuance of section 6 of this Act, the Minister makes any payment to an employee in respect of any debt to which that section applies, any rights and remedies of the employee in respect of that debt (or, if the Minister has paid only part of it, in respect of that part) shall, on the making of the payment, become rights and remedies of the Minister.
>
> (2) Without prejudice to the generality of subsection (1) of this section, where rights and remedies become, by virtue of subsection (1) of this section, rights and remedies of the Minister, there shall be included amongst them any right to be paid in priority to all other debts under –
>
> (a) section 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889; or

(b) section 285, as amended by section 10 of the Companies (Amendment) Act, 1982, of the Companies Act, 1963, and the Minister shall be entitled to be so paid in priority to any other unsatisfied claim of the employee concerned being a claim which, but for this subsection, would be payable to the employee in such priority; and in computing for the purposes of any of the provisions of the said section 4 or the said section 285, as so amended, any limit on the amount of sums to be paid, any sums paid to the Minister shall be treated as if they had been paid to the employee."

24. She argued that if the transfer of the claim at subs. 1 was sufficient to transfer the preferential status of the claim, the insertion of subs. 2 would be unnecessary. She referred to the fact that in Northern Ireland and in Britain similar provisions effect the transfer of rights and the granting of preferential status in respect of those transferred rights. On that basis she argued that the provisions of s. 285(6) of the Companies Act, 1963 as amended should not be construed as applying to monies advanced after the relevant date as defined in s. 285 subs. 1 because if that subsection applied it would have been unnecessary to include s. 10 in the Protection of Employees (Employers Insolvency) Act, 1984.

25. Ms. Marshall referred to the case of *Food Controller v. Cork* [1923] AC 648. In that case it was claimed that the Food Controller was entitled to be paid in priority to other creditors on the basis that the sum involved constituted a crown debt. It was held by the House of Lords that under the Companies (Consolidation) Act, 1908 the combination of s. 186 which contained the *pari passu* rule and s. 209 which provided for certain preferential debts govern the entire application of the assets of a company. Those provisions had the effect of abolishing the general crown priority in the case of liquidations of companies. Relying on that authority Ms. Marshall submitted that in the absence of express statutory authority there is no entitlement of a debt to preferential status.

26. It should be noted again that there is no dispute whatsoever that DTI and DEL are entitled to claim in the liquidation in respect of the sum paid by them to employees of the companies. The issue is whether or not DTI and DEL are entitled to claim as preferential creditors. It is interesting to note that in Northern Ireland and in Britain specific legislation similar to the provisions of s. 10 of the Protection of Employees (Employers Insolvency) Act, 1984 put the DTI and DEL in the same position as the Department of Enterprise Transport and Employment in this jurisdiction vis à vis preferential debts.

Decision

27. The argument made by Mr. Shipsey in regard to this particular case seems to me to be, at first sight, very attractive. In essence he submits that the wording of

28. s. 285 identifies the type of debt which is to have preference on the assets of the company. While this is an attractive proposition it seems to me to be a misinterpretation of s. 285. Without the benefit of s. 285 all unsecured creditors of the company would have to be paid on an equal basis among themselves. However, the legislature by s. 285 has given certain types of creditors priority over other unsecured creditors. A cursory examination of the list of debts referred to in s. 285 show that priority was given by the legislature firstly to rates, taxes and wages and salaries, holiday remuneration and pension contributions. Therefore in this context the identity of the person to whom the debt is due is clearly crucial. Mr. Shipsey and Ms. Marshall in the course of their submissions referred to the social aims of the legislation and the EU Directive. It is clear that the legislature in enacting s. 285 had regard to the importance of protecting employees of a company in priority to other unsecured creditors. Mr. Shipsey referred to the importance of s. 285(6) in that it provided a statutory form of subrogation to a lender who advanced money to the company for the purpose of paying wages or salary in priority to other creditors in respect of the money so advanced. It is significant to note that this right of subrogation is reinforcing the legislature's view of the importance of protecting the employees of the company.

29. A further example of statutory subrogation is provided for by s. 10 of the Protection of Employees (Employers Insolvency) Act, 1984. By virtue of that section the relevant Minister is empowered to make payments to employees out of the redundancy fund in respect of debts owed by an insolvent employer to his employees. The Minister is given by s. 10 the same right as the employee in respect of such debt. It is important to note that in each of these situations i.e. the provisions of s. 285(6) of the Companies Act as amended and s. 10 of the Protection of Employees (Employers Insolvency) Act, 1984, the legislature has chosen to apply a form of statutory subrogation to the class of those who were identified in s.285 as of such importance that special protection was required for them in priority to the remainder of the unsecured creditors.

30. Mr. Shipsey has said that if he is not entitled to treat the DTI and DEL as being entitled to similar subrogation in respect of the sums paid by those guarantee institutions to employees in their respective jurisdictions that that will amount to unjust enrichment of the body of unsecured creditors. I take the contrary view. Far from being unjust enrichment in the sense contended for by Mr. Shipsey, the body of unsecured creditors are not postponed to any creditor of the company other than those expressly provided for by statute. In the course of her submissions, Mrs. Marshall submitted that in the absence of express statutory authority there is no entitlement of a debt to preferential status. I agree with that submission. Notwithstanding the very careful arguments of Mr. Shipsey to the contrary, it does not seem to me to be possible to obtain on foot of subrogation preferential status. If that were possible, one would have to question the need for s. 285(6) of the Companies Act, 1963 and

31. s. 10 of the Protection of Employees (Employers Insolvency) Act, 1984. Further I do not see how s. 285(6) could be interpreted as in some way being capable of being interpreted as covering payments made by bodies such as the DTI and DEL. In essence it seems to me that the category of creditors entitled to priority has been carefully and narrowly drawn by the legislature.

32. There is no doubt in this case that DTI and DEL are entitled to claim as creditors in respect of the sums paid by them to the employees of the companies. That much is not in dispute. However I cannot conclude from any of the authorities cited by Mr. Shipsey that that right of subrogation extends to an entitlement not just to seek to have the debt repaid but also to step into the status that the employee would have had directly against the companies. Preference has been given to certain categories of creditors in respect of certain types of debt. That priority is delimited by reference to the statutory provisions. There is no provision within the legislation for guarantee institutions from outside the jurisdiction. In the absence of such legislation I have come to the conclusion that the DTI and DEL cannot have preferential status.

33. Mr. Shipsey also referred to the right to recoupment. He referred to a number of passages from Goff and Jones in that regard. Undoubtedly the DTI and DEL have been compelled by law to pay in their jurisdiction money which the companies were under a liability to pay; again it is difficult to see how the undoubted liability of the companies to DTI and DEL is advanced to preferential status as a result. I do not accept that the authority cited by him in support of his contention goes that far. I am of the view that in considering the applicable principles of law I must have regard to the manner in which the legislature has provided for the payment of debts in an insolvency. The body of unsecured creditors rank equally among themselves. A limited number of unsecured creditors in respect of certain types of debt have been given preferential status. In the absence of express statutory authority a debt does not acquire preferential status by reference to equitable principles of restitution, whether by way of subrogation or recoupment. If that were not so, there would have been no need to enact s.285 (6) or s. 10 of the Protection of Employees (Employers Insolvency) Act, 1984. In

the circumstances I cannot accept the arguments made by Mr. Shipsey in this regard.

34. I should add briefly that in the course of his submissions, Mr. Shipsey referred to the decision in the English case of Re Downer. I think that whilst he correctly identified in that case the right of a prior assignee to be entitled to the landlord's rights by way of subrogation, that right of subrogation in that case did not amount to the grant of a preferential status. On the facts of the case, it was held that the landlord would have been entitled to be paid as an expense of the liquidation, rent from the date when agents were instructed to find a purchaser to the date when the leasehold interest was sold. Thus, the prior assignee having paid the rent was entitled to be paid in full out of the assets of the company, as an expense in the liquidation. Accordingly, that decision was not of any assistance.

35. For the reasons outlined above I am refusing the relief claimed herein.