Neutral Citation Number: [2011] IEHC 471

THE HIGH COURT

2011 502 COS

IN THE MATTER OF

BALLYMITTY SUPPLIES STORES LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

IN THE MATTER OF AN APPLICATION FOR AN ORDER PURSUANT TO SECTION 290(1) OF THE COMPANIES ACT 1963

SEEKING LEAVE TO DISCLAIM ONEROUS PROPERTY

IN THE MATTER OF AN APPLICATION BY MR. PHILIP TUBRITT, VOLUNTARY LIQUIDATOR

JUDGMENT of Ms. Justice Laffoy delivered on the 9th day of December, 2011

1. On this application, Philip Tubritt (the applicant), who is the liquidator of Ballymitty Supplies Stores Ltd. (the Company) in a creditors' voluntary winding up, seeks leave pursuant to s. 290(1) of the Companies Act 1963 to disclaim certain property owned by the Company, which it is contended is "onerous".

2. Sub-section (1) of s. 290 provides as follows:

> "Subject to sub-sections (2) and (5), where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or any other property which is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or the payment of any sum of money, the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto, may, with the leave of the court, and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the court, disclaim the property."

3. On 24th August, 2011, the applicant, by a document addressed to "To Whom It May Concern" and signed by him, sought to disclaim the property the subject of this application on the basis that the property is burdensome, onerous and a liability, and its continued presence within the liquidation will unnecessarily and "unfairly" impede the winding up process. This application for leave to disclaim was initiated by a notice of motion which, on foot of directions given by the Court (Hogan J.) on 29th August, 2011, was served on Bank of Ireland, Wexford County Council, Padraig Kelly, Bridie Kelly and Lena Kelly. None of the notice parties appeared on the hearing of the application.

4. The property the subject of this application comprises the following two properties held under separate titles:

> (a) The lands registered on Folio 11834F of the Register of Freeholders, County Wexford containing 0.202 hectares. At present, these lands consist of a secure concrete yard upon which stands a selection of sheds extending to 609 square metres. The yard is fenced and secure and its boundaries are clearly defined. The premises were formerly used as a builders' providers yard. The Company is registered as full owner of this land on Folio 11834F, subject a charge in favour of Bank of Ireland which is registered as a burden on the Folio. No other burden is registered on the Folio.
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> (b) Unregistered land the subject of a conveyance dated 17th December, 1981, made between John Bennett of the first part, John Bennett of the second part and Kelly & Hannon Supplies Ltd. (the former name of the Company) of the third part, which land was described as being part of the lands of Kilderry containing 0.070 hectares as described on a map annexed to a Land Commission consent to subdivision dated 9th November, 1981. That property, which is on the opposite side of a tertiary road to the property referred to at (a) above, now comprises a large retail and storage premises, which was formerly a convenience store, hardware shop and post office. By virtue of the conveyance dated 17th December, 1981, the Company acquired that property in fee simple free from encumbrances. It is subject to an equitable mortgage by deposit of title deeds in favour of Bank of Ireland, which was created in or about May 1983.

5. The position, accordingly, is that when the Company acquired each of the properties, it was not subject to any covenants of any nature whatsoever.

6. The Company was party to a Deed of Grant of Easement dated 6th June, 2006, with three adjoining owners, Lena Kelly, Padraig Kelly and Bridie Kelly. That deed discloses that the Company's property and the properties of two of the adjoining owners are serviced by a septic tank located on the property of the third adjoining owner and a percolation area located on the lands registered in Folio 11834F. The effect of that deed was to create reciprocal wayleaves and easements for the benefit of the Company's property and the property of the two adjoining owners in relation to the septic tank, the percolation area and the service pipes serving both. The Deed contained a covenant by the three parties who obtained the benefit of the easements and wayleaves, including the Company, wherein they covenanted with each other to bear the expense of the maintenance of the septic tank system and the percolation area and connecting pipes equally between them and to indemnify the third adjoining owner, on whose land the septic tank is located, against such costs and expenses. That Deed was well drafted and, in my view, there is nothing onerous or burdensome about the obligations thereby undertaken by the Company, such obligations being proportionate to the benefit the Company acquired under the Deed.

7. As of May 2011, the estimated market value of the properties was €180,000 according to a valuation carried out by Sherry Fitzgerald Haythornthwaite. The matters which are cited by the applicant as liabilities due on the properties referred to at para. 4

above, apart from the charge and the equitable mortgage in favour of the Bank of Ireland, on foot of which in excess of €183,000 was due on 16th September, 2010, are the following:-

> (a) sums aggregating in excess of €31,000 due to Wexford County Council in respect of outstanding financial conditions attached to a planning permission in relation to part of the property, unpaid commercial rates from 2009 to date, and unpaid water rates; and
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> (b) the costs which have been incurred by the applicant in maintaining and insuring the properties, which are covered up to the start of December 2011.

8. The applicant, in his grounding affidavit sworn on 24th August, 2011, has set out the difficulties he has encountered in endeavouring to sell the properties. He has elaborated on those difficulties in a supplemental affidavit sworn by him on 24th November, 2011. He has exhibited a report of a civil engineer, who was retained by prospective purchasers of the properties, which identified planning problems with the properties, the most significant problem relating to the septic tank system and the associated percolation area. The applicant has averred that these problems add to the difficulties in relation to selling the property. In addition, in the supplemental affidavit, the applicant has expressed concern in relation to the entitlement of the Company to access the yard on the land referred to at (a) in para. 4 above via a laneway, which is not in charge of the local authority and which is merely subject to consents in favour of the Company from five adjoining landowners, including the three parties to the Deed of Grant of Easement referred to at para. 6 above, which the applicant considers to be "quite limited".

9. The core issue on this application is whether the property referred to at para. 4 above constitutes onerous property which may be disclaimed pursuant to section 290(1). In my view, it does not, unless it "consists of land of any tenure burdened with onerous covenants". As a matter of construction, it does not come within "any other property which is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or the payment of any sum of money", which on a plain reading appears not to encompass land, shares or stock, or unprofitable contracts.

10. Having considered the title to both properties, I am of the view that neither property constitutes land which is "burdened with onerous covenants". As I have stated, the Company obtains a proportionate benefit for the obligation it undertook in the Deed of Grant of Easement to pay one third of the cost of the maintenance of the septic tank system, the percolation area and the connecting pipes, which, insofar as it is a burden on the land and not merely personal, is the only burden which affects the properties. The fact that the Company, and the liquidator standing in the shoes of the Company, has liability for payment to the local authority of rates and such like and considers it prudent to maintain and insure the properties does not mean that the property comes within section 290(1).

11. In reaching that conclusion, I have considered the two authorities to which the court was referred by counsel for the applicant. However, in my view, they do not assist the applicant.

12. The earliest in time is the decision of Jessel M.R. in *In re Mercer and Moore* [1880] 14 Ch. D 287. The property at issue in that case was held under a fee farm grant, which contained a covenant to erect buildings within a year, to maintain the buildings in good repair, not to allow trades to be carried on and so forth. As Jessel M.R. pointed out, there were "all sorts of provisions, the neglect of which would certainly subject the legal owner of the land to an injunction, whether it would subject him to an action for a breach of covenant or not". He held that the property was burdened with onerous covenants within the meaning of the section of the Bankruptcy Act 1869 similar to section 290(1).

13. The later authority was a decision of the Chancery Division of the English High Court in *In re the Nottingham General Cemetery Company* [1955] 1 Ch. 683. In that case, it was held that the court had jurisdiction to authorise the liquidator to disclaim a property which was used as a cemetery in Nottingham and which was subject to various restrictions created by a private Act of Parliament, which imposed restrictions on the manner in which grants could be made by the company of the right of burial or internment. Wynn-Parry J. rejected a submission that the obligation on the Company did not "touch or concern the land", stating (at p. 691):

> "Against this it was argued by [counsel for the liquidator]…that the restrictions are not personal but bind or touch and concern the land. The form of grant confers an exclusive right to burial in a specified part of the cemetery, a right which is evidenced by registration in the book kept for the purpose. It therefore necessarily follows that the land cannot be used for any purpose conflicting with that right. To adopt [counsel's] test, let it be visualized that the land is sold. In such an event the purchaser must take with notice of the restrictions: and I cannot see that there would be any defence to an action for specific performance by the grantee against the purchaser. Nor is it any objection that the company's obligations are negative in character: *In re Mercer & Moore*. I therefore hold that the land the subject of this summons is land burdened with onerous covenants within the meaning of section 323 of the Companies Act, 1948."

I note that the *Nottingham General Cemetery Company* case is referred to in Forde and Kennedy on *Company Law* (4th Ed.) at p. 807 as "one instance" in which a liquidator was permitted to disclaim freehold land. However, the freehold land in that case was, as the Court found, unquestionably burdened with onerous covenants.

14. On this application, in my view, the applicant has not identified any covenant of a burdensome nature relating to the properties referred to in para. 4 above which touch and concern the land, in the sense of binding the possessor thereof *qua* possessor, unlike the situation which might prevail if the Company held the lessee's interest under a lease or the interest of a grantee under a fee farm grant. Accordingly, in my view, the Court does not have jurisdiction to grant leave to the liquidator to disclaim the properties under s. 290(1) of the Act of 1963.

15. Although, having regard to the finding I have made, it is not necessary to consider the effect of a disclaimer on the notice parties, I consider it apt to make the following observations. If it were the case that I was satisfied that the properties do come within s. 290(1), the position of Bank of Ireland, which has chosen not to appear on the hearing of the application, would not militate against the making of the order sought, because disclaimer would not affect the securities held by Bank of Ireland (*Tempany v. Royal Liver Trustees Ltd.* [1984] ILRM 273). It appears that, prior to purporting to disclaim and prior to initiating these proceedings, the applicant requested Bank of Ireland to accept possession of the property. The response of Bank of Ireland was that it did not propose to accept possession of the property at that time, but that was without prejudice to its legal rights as mortgagee. It is clear from earlier correspondence exhibited by the liquidator that Bank of Ireland holds personal guarantees in relation to the indebtedness secured on the property. It was averred in the grounding affidavit of the liquidator that the guarantees were given by the directors of the Company, namely, Bridie Kelly and Padraig Kelly. While the directors as such guarantors would have a potential right of subrogation against the securities held by Bank of Ireland, they are on notice of this application and they have chosen not to appear.

16. The consequence of the finding that the property does not come within s. 290(1) is that it cannot be disclaimed so as to fall into what is referred as "the form of legal limbo" in the annotation on s. 290 contained in McCann and Courtney *Companies Acts 1963 – 2009* (2010 Ed.). The property remains vested in the liquidator until the Company is dissolved, whereupon it will vest in the Minister for Public Expenditure and Reform by virtue of the provisions of the State Property Act 1954.

17. Unfortunately the Court does not have jurisdiction to assist the applicant in his endeavours to expedite the completion of the creditors' voluntary winding up in the manner advocated. There will be an order dismissing the applicant's application.