Neutral Citation Number: [2011] IEHC 442

**THE HIGH COURT**

**2011 41 COS**

**IN THE MATTER OF GERRY BREDIN HARDWARE LIMITED (IN LIQUIDATION)**

**AND**

**IN THE MATTER OF THE COMPANIES ACTS 1963 - 2009**

**JUDGMENT of Mr. Justice Ryan delivered the 29th November 2011**

**Introduction**

1. The company the subject of this liquidation operated a hardware business in Ennis, Co. Clare in premises that it leased from its directors Gerry and Ailish Bredin. There was a fire in the premises in November 2007, when the building was severely damaged and the stock, fixtures and fittings were destroyed. The company claimed more than €3 million under its insurance policy and received an interim payment of approximately €1.3 million. The shortfall was pursued by negotiation to no avail and ultimately was referred to arbitration.

2. The dispute was settled. The insurers made two payments dated the 4th November, 2010, one by cheque for €700,000 payable to Gerry Bredin Hardware Ltd & AIB Bank and crossed "a/c payee only". The other was to the company's solicitors for €125,000 to cover their fees. By this time the company was insolvent but a liquidator had not been appointed nor had any application been made in that regard.

3. The solicitors negotiated the cheque drawn in favour of the company through their client account and, after withholding €40,000, disbursed the remaining €660,000 to the two directors of the company in their personal capacity. They did this on the basis that the money paid by the insurers was actually due and owing not to the company but to the directors personally. They relied on an analysis and apportionment made by the company's accountant at their request.

4. The liquidator who was appointed on the 21st February, 2011 looked askance at these transactions. He claimed that the payment of the insurance money to the two directors was invalid under s. 286 of the Companies Act 1963, as inserted by s. 135 of the Act of 1990. It was a payment made by a company that was unable to pay its debts as they became due, in favour of connected persons and within the relevant time. A section 286(1) transaction within two years before winding up is deemed to be a fraudulent preference unless the contrary is shown. Since the principal payment here was €660,000 to the directors, the onus is on them to show that it was not made with a view to giving them preference over the other creditors. But that would not apply if the money was the property of the directors and not of the company. The liquidator brought a series of motions and this Court made an order dated the 4th July, 2011, directing the discrete trial of the question whether the sum of €700,000 is the property of the company.

5. The liquidator seeks the return of the money. The directors rely on the accountant's computation. If this Court is satisfied that the directors were personally entitled to all of the insurance settlement money, the decision on the issue is obvious. In that event, whatever reservations might be entertained about the mode of distribution in light of the law relating to insolvent companies, the beneficial ownership of the entire sum would eliminate the question of actual injustice to the company and its creditors. The position is equally clear if the company is beneficially entitled to the whole €700,000. But the specified issue is not limited to beneficial ownership. Property in the money can exist in different legal manifestations. The insurance payment could be the property of the company although subject to claims by third parties. The matter of qualified ownership and property arises if anything other than 100% entitlement applies. In the event, that is the circumstance that has to be addressed.

**The Insurance Claim**

6. The claim by the company in November 2007 following the fire was for €3,037,519 and included the lessors' buildings loss claim as well as the business losses. In February 2008, the insurers made an interim payment of €1,393,856 based on calculations made by their loss adjusters, as follows:

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|---|---|
| Buildings | €973,350 |
| Fixtures and Fittings | €196,519 |
| Stock | €124,053 |
| Business Interruption | €100,184 |
| Total | €1,394,106 |
| Less Excess | €250 |
| Net Settlement | €1,393,856 |

7. This money was lodged to the company's account, out of which it made a payment to the directors of €973,350 and retained the balance of €420,506. This distribution reflected the apportionment between buildings and business losses adopted by the insurers. The interim payment made in February 2008 left a balance of €1,643,663, which was the subject of the arbitration.

**The Apportionment**

8. The settlement figure of €700,000 did not specify the headings under which it was paid, unlike the interim payment. The company's solicitors asked the company accountant Mr. Martin Lynch to determine the respective entitlements of the company and the Bredins to the money. He concluded that the whole €700,000 should be paid to Gerry and Ailish Bredin and nothing to the company.

9. In essence, what Mr Lynch did was first to deduce that the Bredins were entitled to 70% and the company to 30% of the aggregate sums recovered under the policy; then he estimated what each party had previously received; and finally he concluded that the company had benefited by some €118,000 over and above its proper 30% share.

10. The principal assumption underlying the respective percentages was that the Bredins were entitled to €1,500,000 for property damage to the building they owned in which the business had been carried on. In addition, Mr Lynch allocated half of the figure for fixtures and fittings (€196,000/2) to the Bredins personally. Similarly with business interruption, Mr. Lynch decided that it could be related to rent lost by the landlords. Having made these calculations, Mr. Lynch derived the proportions of 70/30, which he applied to the total amount of insurance payments received, comprising the interim payment of over €1.3 million and the subsequent payment of €700,000. Applying the 70/30 ratio gave a starting point at which the Bredins were entitled to €1,465,699 and the company €628,156. He then introduced notional prior allocations of €647,709 credited to the Bredins and €746,147 to the company. The result

was that, according to Mr Lynch, the company had benefited by some €118,000 more than it was entitled to.

**The Arguments**
11. The liquidator's case, argued by Mr Eugene Gleeson SC, is that the company effected the insurance and paid the premiums on the policy. The premium was not recorded as a benefit in kind for the directors, who did not pay tax on any such benefit. The solicitors negotiated the insurance settlement on the company's behalf and not the directors' personal behalf. The cheque for €700,000 was payable to the company and was crossed "a/c payee only". The company was insolvent at the time when this payment was made and it was accordingly a fraudulent preference under s.286 of the Companies Act, 1963 as amended. The law required that the cheque be lodged to the company's account. Taking the directors' case at its height, even if they had an insurable interest or if the directors were entitled to an apportionment, there is nothing to show that they were any more than unsecured creditors.

12. The directors' case, argued by Mr. Martin Hayden SC, is that

(1) The company never had an insurable interest in the property and therefore never had an entitlement to the proceeds of the insurance.

(2) The matter did not concern section 286: the court was charged with the decision of who owns the €700,000.

(3) The starting point for an analysis of the entitlements of the parties is the lease of the building and the provisions relating to the maintenance of insurance and payment. Counsel referred to clause 4.02 of the lease which stipulated that the obligation of the lessor (the directors) to maintain insurance of the premises was subject to the discharge by the lessee (the company) of the rents on demand by the lessor. Whereas the lessors were entitled to receipt of insurance monies paid in respect of loss of rent, insurance monies for damage to buildings would either be applied to the reinstatement of the premises or the lessors could opt to retain the insurance proceeds and accept a surrender of the lease. The option of allowing the tenant to reinstate the building was never exercised.

(4) Mr Hayden argued that the insurer accepted that losses were incurred without identifying which party suffered such losses. The company had taken out the policy in its name but the benefit was for the company and the directors as lessors. The intention was that the policy of insurance would protect the respective positions of the parties. He cited Beacon Carpets v. Kirby [1984] 2 All E.R. 726 where the benefits of an insurance policy were apportioned between a landlord and tenant in accordance with their respective interests. He argued that insurance should cover the respective interests of the lessor and lessee in accordance with their common intention as stipulated by the lease and as stated by the directors. In essence, the matter was one of apportionment.

(5) He submitted that there was no evidence led by the liquidator to show that the company had any insurable risk in the property. Counsel referred to Colinvaux's Law of Insurance (9th Ed.) on the subject of insurable interest in property as between landlord and tenant and quoted the following:-

> "Landlord and tenant: premises may be insured by the landlord on his own behalf, by the tenant on his own behalf, by either party on behalf of himself or the other, should be determined by the lease. The last mentioned arrangement is increasingly common: the insuring party will often be the landlord, particularly where the lease is long term…Where the landlord insures on behalf of himself and the tenant (or vice-versa) with the tenant's authority or with the subsequent ratification by the tenant then whether or not the tenant is named in the policy as insured, the policy is a composite one, and each party – as an independent assured – has independent rights against the insurer."

Counsel argued that that is what happened here. He asserted that a composite policy was taken out and ratified by both parties – the exercise by the company was ratified by the landlords. He quoted further from Colinvaux:-

> "The rules relating to insurable interest give rise to particular difficulties where insurance is affected by an agent, generally a broker, on behalf of the assured, where it was the agent's intention to have his principal to be a party to a contract. The basic rule here is that a person with an insurable interest may insure his own interest or he may insure the interests of others as well as his own. Thus, a joint tenant or tenant in common that has such an interest in the entirety as will enable him to insure the whole, including the interest of other joint tenants, are tenants in common. Equally, a person with no interest in the subject matter may insure on behalf of another person as agent or trustee."

Thus it was asserted that the policy was intended to cover both the interests of the company and the directors.

(6) The company was paid in full for all of its losses arising out of the fire insofar as they were actually covered by the policy. This is clear when one looks at the nature of the cover provided and also from the apportionment that was made in respect of the interim payment and the resulting disbursement of the proceeds between the company and the directors. In fact, the company received overpayment because it was paid €100,000 business interruption when that heading was not covered in the policy.

(7) The real dispute was about the buildings and they are the property of the directors personally.

(8) The accountant Mr. Lynch carried out a proper assessment which can be shown from an analysis of the insurance policy, the interim payment letter and relevant documents. The apportionment was legitimate because Mr. Lynch carried it out and has stood over it in evidence and has not been challenged in cross-examination on the basis that he did so dishonestly or in respect of any suggested errors.

(9) This Court's function pursuant to the order made by Finlay Geoghegan J. is limited. That is to decide whether the €700,000 is the property of the company.

(10) On the basis of Mr. Lynch's evidence, which is the only evidence, the money is not the property of the company. It has nothing to do with the liquidation because it is Mr. and Mrs. Bredins property which is the outcome of the claim made in the name of the company but on their behalf.

(11) This Court is obliged to accept Mr Lynch's apportionment showing that the directors are entitled to the full amount and the company to nothing. Moreover, it is possible to demonstrate the correctness of the apportionment by objective examination.

**Discussion**

13. The directors' claim to the €700,000 rests on Mr Lynch's reconciliation of their interests and those of the company. In my view, the exercise carried out by Mr. Lynch was flawed in principle as well as in practice. I do not think that this was a valid exercise in circumstances where he was dealing with an insolvent company, even though it was not actually in liquidation. In fact, the analysis that he made was faulty but the more fundamental objection is that he should not have been doing it at all. Mr Lynch was in effect being asked to act as arbitrator between the directors of an insolvent company and the company itself. He was in an impossible position and the outcome of his endeavour was doomed to failure. The Bredins and their advisors were insufficiently alert to the directors' duties to act bona fide in the interest of the company, to use their powers for proper purposes and not to place themselves in a position of conflict of interest. They did not take account of its insolvent condition and the conflict of interest that was inevitably present.

14. Mr. Lynch's work, despite the criticisms I have made of his function, might nevertheless have been useful as a precedent in revealing the ownership of the insurance money. However, I am afraid that the way he approached his task and the result he arrived at cannot be supported. It seems to me that this exercise was based on unwarranted assumptions, arbitrary attribution of benefits and losses and invalid preferences. In consequence, there is no reliable basis for determining the beneficial ownership, although it is illogical to suggest and most unlikely in fact that the company is not entitled to at least a substantial share.

15. First, it cannot be assumed that €1.5 million was the correct sum for the building in preference to the other elements of the claim. Second, I do not believe that there is any sound basis for the allocation of half of the fixtures and fittings (€196,000/2) to the Bredins personally. Mr. Lynch makes an argument that business interruption could be related to rent lost by the landlords but it was suffered by the business and not the landlord. A lessor can insure against loss of rent but that is not shown to have happened in this case.

16. The Bredins received nearly €1 million out of the interim payment, not €647,709. Taking into account €746,147 ascribed to the company as already allocated is also incorrect. As appears in a letter from Mr Lynch of the 23rd March, 2011 to the official liquidator, €325,391 of that sum had previously been expended by the Bredins in respect of company expenses and creditors or had been provided in the form of advances or loans to the company. Indeed, that is how they were described by Mr. Lynch himself in the company accounts. However, instead of ranking with other debts of the company this money is set off as a credit on the Bredins' side of Mr Lynch's balance. That is an invalid preference of one creditor or two creditors in this case over the other unsecured creditors.

17. It follows from these considerations that, if one were to assume the validity of the task undertaken by Mr Lynch and also accepting his methodology, it would even then be necessary to make substantial adjustments to his equation. First, €325,391 must come out of the calculation as being due to the Bredins personally because it is included in the accounts as directors' loans. Also due to come out, as I see it, is the €98,000 attributed to the Bredins in respect of half of the fixtures and fittings payment, plus the business interruption allowance to them of €84,000. This gives a total of €507,391 and if Mr. Lynch's figure of the alleged overpayment to the company – notionally – of €118,000 were to be deducted, the net result is €389,000 that is due to the company out of the €700,000. For the reasons given above, it is far from clear why €118,000 should be considered correct.

18. Is it possible to say how the money should be apportioned? The fact that the Bredins kept the business going for the purpose of the insurance arbitration, as Mr Bredin told the Court, is implicit evidence that the continuing existence of the company contributed to the outcome and that at least some of the final payment is due to the company beneficially. On a proper apportionment it is probable that some of it belongs to the company and some to the Bredins. There is, however, no evidential basis on which this Court could do so. The directors do not have an alternative proof in this hearing if Mr Lynch's analysis falls.

19. There are possible approaches that might be adopted by the parties if they were unable to establish their entitlements to exact shares but that is for them to decide. The basic point is that it cannot be said that the company has no entitlement to any of the money received from the insurance fund. The company made the claim on its own behalf and on behalf of the lessors/directors. It might be thought that the outlines of that claim are a reasonable indication of the company's thinking and that of the directors as lessors at the time when the claim was made and that these were genuine bases of claim. In the circumstances, one rational way to approach the question would be to apportion the money between the Bredins and the company in proportions corresponding to the amounts originally claimed, namely, €1.8/€1.2. But there may be evidence that points to a different mode of sharing the proceeds. Obviously, it is open to the liquidator and the Bredins to reach agreement on the directors' entitlement without further Court proceedings and these reflections may possibly be of some assistance but they are in no way binding.

**Conclusions**

20. My conclusions are:--

1. The company is the owner and was at all material times entitled to possession of the insurance money, subject to any legitimate claims in respect thereof.

2. This Court cannot sanction a cavalier approach to the legal regime that exists to protect assets of insolvent companies.

3. It was not permissible for directors or advisors to intercept and divert money en route to the insolvent company's account.

4. It was not competent or legitimate for the insolvent company's accountant to validate the claim by the directors to money destined for the company.

5. The Bredins' claim to the insurance settlement money should have been made in a proper and regular manner that recognised the insolvency. If no liquidator had been appointed when the cheque was received, application could have been made for that purpose.

6. It is still open to the directors to put forward their claim.