THE HIGH COURT

2009 523 COS

IN THE MATTER OF LINEN SUPPLY OF IRELAND LIMITED (FORMERLY KNOWN AS CWS-BOCO IRELAND LIMITED)

AND

IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990

(AS AMENDED)

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 3rd day of February, 2010

1. This matter comes before the court, pursuant to s. 24 of the Companies (Amendment) Act 1990 ("the Act"), for the consideration by the court of the report of the Examiner under s. 18 of the Act. The court is asked by the Examiner to approve a Scheme of Arrangement. While most of the creditors of the companies support the Scheme, it is opposed by a number of landlord creditors from whom the company had leased premises. Their objections to the Scheme are twofold. In the first place, they claim that the debts due to them are not subject to impairment under the Act, and that the court has no jurisdiction to confirm a Scheme which makes provision for impairment of the sums due by way of future rent. Secondly, they claim that the proposals are unfair and inequitable and that they are unfairly prejudiced.

2. The company was incorporated on 8th October, 1997. It is the leading supplier of linen products to the hospitality and health sectors in Ireland, particularly hotels and restaurants. It provides work uniforms and other garments to companies operating in manufacturing, retail, hospitality and healthcare services. It is also the leading supplier of what are known as "clean room services". This is the supply, decontamination, delivery and collection of a range of specialised clothing to companies working in a clean room environment such as pharmaceutical companies, hospitals and companies in the food industry. The company also supplies sterile surgical procedure packs, surgical gowns, sterile gloves and other materials used by hospitals and pharmaceutical companies. It supplies, maintains and cleans dust control mats used at entrances to buildings, and it rents or supplies washing hygiene products such as paper or cotton towel dispensers, foam dispensers, toilet roll holders and other related matters to companies throughout Ireland.

3. On 30th October, 2009, the company transferred its clean room business to a wholly owned subsidiary, Micron Clean (Ireland) Limited.

4. The downturn in the hospitality sector in the current difficult economic conditions had a negative impact on the company. The decline in hotel occupancy rates depressed the demand for the company's linen sales and further pressure was put on the company's business by the demands of customers in the hotel and restaurant sector for lower prices. The downturn in the economy also led to similar decreases in the company's work wear sales and sterile and surgical supplies, floor care and washroom sales. There were also demands in all these areas for goods and services to be supplied at lower prices. All of these factors led to a sharp decrease in the company's turnover for the first eight months of 2009, with no corresponding decrease in the company's outlays or overheads.

5. The company incurred losses in the years ended 31st December, 2007, and 31st December, 2008, and at 30th August, 2009, the company had net estimated liabilities of €700,000 and was trading at a loss. By the time of the presentation of the petition, the company was operating with the financial support of CWS-Boco International GmbH, the company's parent. The petition was presented by the company on 18th September, 2009, and an interim Examiner was appointed on that date. The appointment of the Examiner was confirmed at the hearing of the petition on 30th September, 2009. The Examiner has submitted a report, pursuant to s. 18 of the Act, and presented proposals for a scheme of arrangement between the company and its members and creditors. The court is asked to confirm the proposals. As I have indicated earlier in this judgment, a number of landlords, who are creditors of the company, object to the confirmation of the proposals.

Has the court power to approve the scheme?

6. The landlords argue that at the date of presentation of the petition, there were no arrears of rent due to them. In his affidavit sworn in support of the petition, the Examiner described the claims of the landlords as, ". . . a contingent liability at the date of the presentation of the petition".

7. The company carried on business in various parts of the State, and had rented premises for this purpose. In some cases, these premises were significantly adapted to the needs of the company, and in one particular case, the premises were purpose built to the specifications set out by the company. In the course of this examinership, the company applied to have the leases repudiated and brought a motion, pursuant to s. 20 of the Act. At the same time, the Examiner brought a motion under section 9. This court held that it had no jurisdiction to make the order sought by the company and the Examiner. The Supreme Court allowed an appeal against this decision, ruling that there was a statutory basis under s. 20 of the Act, to repudiate a lease, and remitted the matter back to this court to exercise its discretion on the s. 24 application.

8. At the hearing of this application, written submissions were presented to the court by the DOC Partnership which is the landlord of premises at Rahoon, County Galway, and E.P. Mooney & Company Limited, the landlord of a property at Unit C, Concorde Industrial Estate, Naas Road, County Dublin. The other landlords supported the submissions and adopted them. In considering the submissions, I am doing so on the basis that they have been presented by all the objecting landlords and I do not propose to differentiate between them for the purpose of my decision, as it is not necessary to do so.

9. When the matter was referred back to me, I ruled on 16th December, 2009, that the company should be permitted to repudiate the leases. Section 20(5) of the Act, states:

> *"Where the court approves the affirmation or repudiation of a contract under this section, it may, in giving such approval, make such orders as it thinks fit for the purpose of giving full effect to its approval, including orders as to notice to, or declaring the rights of, any party affected by such affirmation or repudiation."*

The parties had agreed the sums due in respect of loss of rent and/or dilapidations that arise in the event of the court making an order, pursuant to s. 20 of the Act, permitting repudiation. These sums are as follows:-

Bluebell lease: €662,000

Fonthill lease: €502,759 (together with a payment of €200,000 to be paid in full in order to allow the break option to be exercised)

Naas Road lease : €1,089,370

Galway lease: €4,000,000

Parkwest lease: €783,000

These figures do not include loss of rent during the course of the examinership which I have already directed shall be treated as expenses properly incurred by the Examiner, pursuant to s. 29(1) of the Act. In Appendix F - Part 5 of the proposed Scheme of Arrangement, the Examiner has set out the list of landlord creditors and the sums set out are stated to be "agreed in quantum and liability". There are some minor variations between these figures and those furnished to the court at an earlier date. For example, in the case of the Galway lease, the figure is €4,056,410.56, and the figure for the Fonthill lease is stated to be €503,000. As no point was taken in relation to these figures during the course of the s. 24 hearing, I will assume those to be the precise figures which now apply in respect of the landlord creditors. These figures represent damages arising from the post-petition repudiation of leases of premises occupied by the company. Taken as a group, the landlords represent, in value, a significant group of creditors, and one of the landlords is by far the largest unconnected creditor of the company.

10. The Scheme of Arrangement states at clause 12.8:

"Each of the Landlord Creditors shall, within 7 days of the Effective Date, be paid in full for rent falling due during the Protection Period by the Company, and shall receive 30% of their agreed debt (together with 30% of any VAT thereon, if applicable) within 7 days of the Effective Date."

11. The landlords complain that under the Scheme, they will only receive 30% of the figure agreed as the damages that follow the repudiation of the leases. The landlords argue that these damages are a post-petition liability. Until such time as the court made an order permitting repudiation, the leases continued in force and the only liability that the company had in relation to these leases was for unpaid rent on each gale day as it fell due. The landlords argue that the damages that flow from repudiation can only arise as a matter of law at the effective date of repudiation and not before, and can only be treated as a post-petition liability and therefore must be paid in full. They argue that s. 22(5) of the Act, makes it clear that a Scheme is only intended to apply to debts due at the date of presentation of the petition, because it refers to a creditor's claim being impaired if he receives less under the proposals than the full amount due "at the date of presentation of the petition". In the case of the landlords, it is argued that there were no amounts due at that time.

12. The landlords contend that post-petition liabilities (including a judgment debt against the company following its repudiation of a lease) can only be written down if there is express statutory authority to this effect. They say that none is to be found in the 1990 Act.

13. Another argument made on behalf of the landlord creditors is that a repudiation payment is not a contingent liability at the date of presentation of the petition. In an affidavit sworn by the Examiner on 15th January, 2010, he states that the company's liability with regard to the landlords' claims ". . .was a contingent liability at the date of the presentation of the petition." This is challenged by the landlords who say that the approach is wrong in principle and misconceived as a matter of law.

What is the nature of the landlords' claim for future rent?
14. Section 3 of the Act sets out a list of bodies or persons who may present a petition under section 2. Among those who can present a petition are:

"(c) A creditor, or contingent or prospective creditor (including an employee) of the company. ."

While petitions by creditors are somewhat unusual in the examinership process, it is clear that the Act had regard to different types of creditors who might make such application. Such creditors are entitled to be heard by virtue of s. 3(b) of the Act.

15. In this case, the claim by the landlords is a claim for agreed damages based on the loss of rent in the future, and taking into account dilapidations and the possibility of the landlords re-letting the properties during the currency of the term of the repudiated leases. In Re Park Air Services Services plc. [1999] 2 W.L.R. 396, the court considered the implications of a disclaimer of a lease in a winding up under the Companies Acts. The court held that the statutory right to compensation was a right which comes into existence at the moment of the disclaimer. It is not a right to the performance of the contract disclaimed and it is not a right to the payment of future debts. It is a right to the payment of compensation coming into existence at the date of the disclaimer. While the word "creditor" does not ordinarily include a person who has a contingent or future claim against the debtor, it has to be given a certain flexibility of meaning according to the context in which it is used. It cannot be said that the claims of the landlords make them contingent creditors. In Stonegate Securities Limited v. Gregory [1980] Ch. 576, Buckley L.J. said at p. 579:

"In that context, in my opinion, the expression 'contingent creditor' means a creditor in respect of a debt which will only become due in an event which may or may not occur; and a 'prospective creditor' is a creditor in respect of a debt which will certainly become due in the future, either on some date which has already been determined, or on some date determinable by reference to future events."

I have been referred to the 2nd Edition of 'Applications to Wind Up Companies' by Derek French, in which the author says, at page 461:

"It is clear, though, that there are prospective debts which are not contingent debts. For example, the liability of a lessee under an existing lease to pay rent for the remaining term of the lease was described as 'a perfectly certain debt, a future debt, but not a contingent debt' by Lord President Dunedin in Palace Billiard Rooms Limited and Reduced [1911] 2 S.L.T. 324 at page 326."

16. In Oppenheimer v. British and Foreign Exchange and Investment Bank [1877] 6 Ch.D. 744, Hall V.C. said, at p. 746:

"Now, rent which will accrue under covenants which have been entered into by the company, though payable at future times, is a claim of a certain ascertained amount."

He went on to say at p. 747:

"Rent is not payable as a debt or a claim subject to a contingency; and because there is another remedy for payment viz., by distress, its value is not made less certain."

17. The position of the landlords at the presentation of the petition seems to me quite clear. They were prospective creditors. While the landlords argue that their claim was not a claim for unpaid rent but for damages arising on the repudiation of their leases, pursuant to s. 20 of the Act, this does not alter their status as prospective creditors. That prospective creditors are entitled to present a petition is clear (s. 3 of the Act).

18. The bankruptcy code and Companies Acts recognise the rights of creditors with debts payable in the future as well as those payable at present. In Re Cancol Limited [1996] 1 All. E.R. 37, Knox J. held that a narrow construction of "creditor" which would include only those with a present right to payment would produce anomalous results. In the that case, the issue arose as to whether a company voluntary arrangement could, as a matter of law, bind persons entitled to future contingency payable debts, or whether it could only bind persons entitled to the benefit of presently enforceable claims. The company's landlord was listed in the Schedule of Unsecured Creditors, and applied for an order declaring that all money falling due under the lease after the creditors meeting, was payable in full, and was not affected by the voluntary arrangements. Knox J. did not accept that a liability to future rent is incapable of inclusion as a matter of law in a company voluntary arrangement. At p. 43, he stated:

"Moreover, the power of a company with the approval of a court to enter into schemes of arrangement under s. 425 of the Companies Act 1985, in my judgment, extends to schemes of arrangement which affect the rights of creditors with debts payable in the future as well as those payable at present. This was decided in relation to s. 2 of the Joint Stock Companies Arrangement Act 1870, in Re Midland Coal, Coke and Iron Company, Craig's Claim [1895] 1 Ch. 267."

He went on to refer to the judgment of Lindley L.J. giving the judgment of the Court of Appeal at p. 277, where he said:

"Whether the court is bound to give effect to his [that is, Mr. Craig, the original lessee] opposition is a different question, and depends on the meaning of the word 'creditor' in the Joint Stock Companies Arrangement Act 1870. Considering that that Act was passed in order to enlarge the powers conferred by s. 159 of the Companies Act 1862, we agree with Mr. Justice Wright in thinking that the word 'creditor' is used in the Act of 1870, in the widest sense, and that it includes all persons having any pecuniary claims against the company. Any other construction would render the Act practically useless."

19. At p. 45 of the Cancol judgment, Knox J. said:

"If Mr. Schaw-Miller is right in his submission regarding the meaning of the word 'creditor', the directors would appear to have to exclude secured creditors on a contingency such as a debt made payable on demand, a very common case, which would be outside the scheme of the voluntary arrangement because 'creditors' on this hypothesis only includes those with a present right to payment and that does seem very anomalous."

At p. 46, he stated:

"Either the word 'creditors' in s. 425(1) includes creditors who have claims which are not presently enforceable, such as a landlord with a right to future rent, or it does not. If it does, it goes a long way towards destroying Mr. Schaw-Miller's thesis regarding the natural or ordinary meaning of the word 'creditors' because there is no relevant statutory enlargement of the term. If it does not, and the Midland Coal case, contrary to the views expressed in Buckley , is no longer good law in relation to s. 425 of the 1985 Act, Parliament has radically restricted the power of compromise with creditors in a way which would deprive it of a great deal of its usefulness. The only other possibility that I can see would be that the word 'creditor' would have a variable meaning according to whether or not the company in question was in liquidation, with a wider construction applicable to those that were in liquidation and a narrower for those that were not in liquidation. That is also a profoundly unsatisfactory construction, giving a single word different meanings in the same sentence in relation to different situations."

It seems to me that the reasoning of Knox J. is equally applicable to our company law as it applies in winding up and examinerships.

20. I have been referred to the Interpretation Act 2005. Section 5 of the Act applies to the construction of ambiguous or obscure provisions. The section provides that if a provision of any Act is obscure or ambiguous or would, on literal interpretation, be absurd or fail to reflect the plain intention of the Oireachtas:

". . . the provision shall be given a construction that reflects the plain intention of the Oireachtas . . . where that intention can be ascertained from the Act as a whole."

The landlords rely on the decision of the Supreme Court in Albatross Feeds Limited v. Minister for Agriculture [2007] 1 I.R. 221, which held that the exercise of a power depriving a citizen of his property rights would require to be justified by clear legal authority. At p. 245, Fennelly J. stated:

> *"However, clear words are necessary where fundamental rights are at issue. I do not accept that our courts are obliged to interpret our laws so as to confer drastic powers by vague or indirect words, or, indeed, by none. In the present case, such a result cannot be achieved by any normal process of legal reasoning."*

21. Undoubtedly, the property rights of the landlords in this case are being impaired or interfered with (see Blake v. A.G. [1982] 1 I.R. 117 and In the Matter of Art. 26 of the Constitution and In the Matter of the Housing (Private Rented Dwellings) Bill 1981 [1983] 1 I.R. 181). It seems to me, however, that the plain intention of the Oireachtas, in enacting the Companies (Amendment) Act 1990, was to provide for the repudiation of certain contracts (including leases) and that the court could appoint an Examiner who may present a scheme of arrangement that impairs the rights of a creditor, including a prospective creditor. In those circumstances, I hold that the agreed debts due to the landlord creditors is subject to impairment under the Act, and the court does have jurisdiction to confirm a scheme which makes provision for such impairment. I am satisfied that the proposals are fair and equitable in relation to the landlord creditors.

Are the proposals unfair and inequitable and are the landlord creditors unfairly prejudiced?

22. Having heard the submissions of counsel and considered the evidence in this matter and the proposals for a scheme of arrangement, I cannot find evidence that the proposals are unfair or inequitable. The 30% dividend being offered to the landlord creditors under the scheme is similar to the offer made to many other creditors who are supporting the scheme. The landlords have not been treated differently to other creditors. While it is true that the sums agreed in quantum and liability amount to damages for the repudiation of the lease and take into account dilapidations, the sums also have regard to the fact that the landlords will be able to offer the premises to other tenants, although it make some time for them to conclude firm agreements.

23. The objecting landlords, in common with the company's creditors (other than preferential creditors) are being asked to accept a 70% write-down of their claims. The proposals do not involve any impairment of the interest of the company's shareholder. The issued share capital of the company is €5,503,683 ordinary shares which are held by CWS-Boco International GmbH. This is the company's parent and the investor which will invest sufficient funds into the company to make the payments to the creditors under the scheme of arrangement and to pay for the restructuring costs associated with the business, including redundancy and relocation costs, and to discharge the costs of the examninership. It is clear, therefore, that the company's shareholder is obliged, under the terms of the scheme of arrangement, to put up substantial sums of money which it would otherwise not be obliged to do.

Should the scheme of arrangement be amended in any way?

24. The objecting landlords claim that the proposals provide that the investor/member will provide a non-interest bearing loan of up to €17,800,000 and that, "The Loan shall be immediately repayable on demand at any time after the day upon which all payments to Creditors are to be paid pursuant to the Approved Scheme". Thus, they argue, as soon as the creditors of the company are cleared away (at 30 cent in the Euro, save for the preferential creditors), the investor will be free to demand repayment of the loan and the company would be immediately insolvent. Alternatively, the member might resolve that the company sell all or part of its business. The member would be in the greatly enhanced position of being able to benefit from the sale of the company's business, unencumbered by its leases and free of debt. The court was referred to the decisions in Re Wogans (Drogheda) Limited (Unreported, High Court, Costello J., 7th May, 1992), and in Re Sisti Gugan Barra Teoranta (in Examinership) [2008] 1 IEHC 251, which held that proposals for a scheme of arrangement must involve a legally binding obligation to invest sufficient monies to enable the survival of the company and its undertaking as a going concern.

25. It seems to me that this is a valid complaint. Counsel for the company seemed to acknowledge this by informing the court that the scheme could be amended so there would be no withdrawal for a year after the effective date.

26. It is useful, I think, to look at the independent accountant's report furnished on 18th September, 2009, in support of the application for court protection. At para. 6.23, he states:

> *"CWS-Boco International GmbH, the company's parent, is the largest creditor of the company since it has historically provided all of the company's financial support through Haniel Finance B.V., a financing company of the Haniel Group. This financial support is critical to the company's survival. CWS-Boco International GmbH has agreed that, to the extent any working capital is required by the company during the protection period to facilitate the continuance of its business, they shall provide the company with such working capital upon receipt of any reasonable request from the company. In addition, they have confirmed that they are interested in investing in the company to facilitate the terms of an appropriate scheme of arrangement formulated by the Examiner, in the event that such a scheme is approved by the court."*

In para. 6.24 of his report, the independent accountant said that, in his opinion, the company, and the whole or any part of its undertaking, would have a reasonable prospect of survival as a going concern subject to a number of conditions, among which was, "the continued provision of funding by companies within the Haniel Group to support management's proposals for the future of the business". (Highlighting added).

27. The actual scheme of arrangement seems to fall short of this requirement and in my view, will have to be amended. I am prepared to approve the scheme of arrangement if a provision is made for ongoing funding by the investor. I will adjourn my final decision on the matter for one week to enable the Examiner and the company to enter into discussions with the investor to ascertain whether it is willing to make this investment.