Neutral Citation Number: [2005] IEHC 189

**THE HIGH COURT**

**2002 No. 139 COS**

**IN THE MATTER OF**
**WORLDPORT IRELAND LIMITED (IN LIQUIDATION)**
**AND IN THE MATTER OF SECTION 218 OF THE COMPANIES ACTS,**
**1963-2001.**
**AND IN THE MATTER OF AN APPLICATION BY THE OFFICIAL LIQUIDATOR.**

**Judgment of Mr. Justice Clarke delivered 16th June, 2005.**

1. In this application the liquidator of Worldport Ireland Limited ("the Company") seeks a declaration that a certain payment of €256,044.44 ("the Sum") is a void disposition by the Company by virtue of s. 218 of the Companies Act, 1963 (as amended).

2. Initially the liquidator sought such a declaration as against the first named respondent, Worldport Communications Inc. ("Inc."). As a result of the position then adopted by Inc. it became necessary for the liquidator to join the second named respondent, ABN Amro Bank N.V. ("the Bank").

**The Facts**

3. An official liquidator was appointed to the Company by order of the court on 13th May, 2002. A change in the identity of the liquidator has occurred though that is not material to the issues which I have to decide in this case. It is, however, relevant to note that the petition on foot of which the winding-up order was made was presented in the Central Office of the court on 15th April, 2002. It is common case that by virtue of the operation of s. 220(2) of the Companies Act, 1963 (as Amended) this date (i.e. the date of presentation) is the date upon which the winding-up of the Company is deemed to commence.

4. It is again common case that the books and records of the Company demonstrate that on 22nd April, 2002 (i.e. on a date which post-dated the presentation of the petition and therefore post-dated the commencement of the winding-up for the purposes of the Companies Acts) a transfer was made of funds from the Company's account with the Bank in favour of Inc. Inc. is the parent company of the Company. The amount involved was the Sum. It is accepted by Inc. that it received the Sum on 22nd April, 2002. It is also accepted that at all material times the relevant account of the Company with the Bank was in credit sufficient to meet the Sum with a balance over.

**The Issues**

5. The issues for consideration by the court are, therefore, as to whether the payment of the Sum is in breach of s. 28 of the Companies Acts, 1963 to 2001 and if so, to whom was the disposition for the purposes of that section made. On the facts it is contended by Inc. that if a disposition was made same was in favour of the Bank. Equally the submission of the Bank is that any disposition made was made in favour of Inc. The liquidator, while primarily asserting that there was a disposition within the meaning of the section and that it was in favour of Inc., also contends as a fall-back position that there was a disposition either in favour of the Bank or, alternatively, that on a proper construction of the transactions involved, it may be said that a disposition in favour of both Inc. and the Bank in fact occurred.

**The Section**

6. Section 218 of the Companies Act, 1963 provides that:

> "In a winding-up by the court, any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the court otherwise orders, be void."

7. It is not really in contention that there was in fact a disposition of the Company's assets and that such disposition occurred subsequent to the commencement of the winding-up. The only real issue is as to the proper analysis of that disposition for the purposes of determining what it is precisely that is liable to be rendered void. Finally, it should be noted that the parties have reserved their position in respect of the extent to which it is open for either or both of the respondents to argue and, if they are entitled so to argue, whether they are entitled to succeed, in an application to the effect that (to the extent that the transaction may be taken to be a disposition in favour of either or both of them) the court should "otherwise order" so as to validate the transaction. It has been agreed that all questions concerning that issue should be left stand pending a determination as to the proper identity of the party or parties whom, it may be said, were the disponees of any disposition which is to be rendered *prima facie* void.

**Analysis of Transaction**

8. There can be little doubt that a strict analysis of a transaction whereby a party who has an account with a bank which account is, as here, in credit sufficient to make a payment in favour of a third party and who gives instructions to its bank to make such a payment, is that the bank, on foot of its contract with that customer, and on the basis of receiving an appropriate instruction from that customer in accordance with the terms of its contract, reduces the balance standing to the credit of the customer and transmits by some appropriate banking means the relevant sum to the credit of the third party nominated by its customer. It is, undoubtedly, the case that the bank uses its own money to actually effect a transfer to the nominated third party. However, it is equally true that it can do so, properly, and thus reduce the credit balance standing in favour of its customer, only upon receiving proper instructions in accordance with mandate from the customer concerned. Thus the net effect of the receipt of such proper instructions and same being properly carried out by the bank concerned is that:-

> a) at the request of the customer the bank's liability to that customer (on foot of the credit account) is reduced by the sum concerned;
>
> b) the third party receives that sum out of monies held by the bank and, in the event that the sum is paid on foot of an obligation by the customer to that third party, that obligation is, to the extent of the sum involved, reduced or extinguished;
>
> c) the bank has less cash available to it as a result of the transaction (having transferred some of its monies to the third party) but equally has a correspondingly reduced set of obligations being the reduction in the amount which it owes to the customer.

9. Thus each of the three parties involved has two separate effects on its financial position which are equal and opposite. The customer has reduced the value of its asset in the form of the debt which the Bank owed to it by virtue of it having a credit account but also has reduced its indebtedness to the third party by the same amount. The Bank has reduced its obligation to the customer but also is out an equivalent amount of cash by virtue of having transferred that sum to the third party. The third party has received

the relevant sum in cash from the Bank but has correspondingly reduced its entitlement to recover that sum (either in part or in its entirety) from the customer.

10. It is necessary to consider that series of interlocking relationships in order to ascertain whom it might be said can properly be regarded as a disponee for the purposes of a disposition which is caught by s. 218.

**Inc.'s Case**
11. Inc. places significant reliance on the decision of Kearns J. in this court in *Re Industrial Services Limited* [2001] 2 I.R. 118. It would appear from the judgment in that case that the court was referred to all relevant recent authority both in this jurisdiction, in the United Kingdom, and by reference to the United Kingdom authorities, in Australia. Having reviewed those authorities, Kearns J. came to the view that a payment made in circumstances similar to those which pertain in this case amounted to a disposition in favour of the bank concerned. In so doing Kearns J. would appear to have declined to make a distinction between that category of cases where, it would appear, it would necessarily have to be accepted on the part of a bank that it was a disponee (for example where there is a lodgement into an account which is in debit, where there is security over an overdraft or where the bank has a right of set-off) and other cases where the bank concerned retained no commercial advantage. In each of the former cases it is clear that the bank concerned would receive a commercial benefit by virtue of the transaction which could have the effect of improving the Bank's situation upon the proper application of the rules for the distribution of assets in respect of an insolvent company. What was in contention in Industrial Services and what is in contention here is as to whether a bank may nonetheless be regarded as a disponee in a case where the bank could not be said to have obtained any commercial advantage from the transaction involved. In addressing that situation, and having referred to the relevant passages in Breslin's Banking Law in the Republic of Ireland (1998) ed. at p. 386 which put forward the contrary view, Kearns J. stated as follows:-

> "I feel that, notwithstanding the passage just referred to, something more than a commercial *desideratum* as considered from the bank's viewpoint would be required to persuade me to take a different view from that expressed by Costello J. in *Re Pat Ruth Limited* [1981] I.L.R.M. 51. I am not convinced that the reasoning by the Court of Appeal in *Hollicourt (Contracts) Limited –v- Bank of Ireland* [2001] 2 W.L.R. 290 is preferable to the different view taken by the same court in *Re Gray's Inn Construction Limited* [1980] 1 W.L.R. 711. I do not see that some commercial interpretation advantageous to the bank must be given to s. 218 when its meaning, on the face of it, is plain and straightforward. Had the legislature intended that some sort of derogation or qualification would apply in the case of banks, it would have been easy to frame this section appropriately."

12. It is clear from the judgment that, at least in significant part, the payments under contest in that case included payments out of an account in credit which were, therefore, similar to the payments in question in these proceedings. While it is true to state, as has been noted by counsel for the liquidator and counsel for the Bank, that many of the other judgments referred to by Kearns J. do not relate to payments out of an account in credit, having regard to the clear findings contained in *Industrial Services* it does not seem to me that it is possible to distinguish the facts of this case to any sufficient material extent.

13. In those circumstances, as a fall-back argument, both counsel for the liquidator and counsel for the Bank urged that I should reconsider the position as set out *in Industrial Services.* As was noted by Kearns J., the arguments for and against the proposition that the Bank should be regarded as a disponee in circumstances such as this are finely balanced. The argument in favour of that proposition stems from the fact that as a result of a transaction of the type given effect to here, one of the Company's assets (*viz*. its entitlement as a matter of contract to receive the sum held on credit for it by the Bank) is reduced in value so that the Bank's liability is, as a necessary consequence, reduced. The counter-argument is to the effect that the Bank is, in substance, whatever about form, merely an agent for giving effect to a payment by the Company to the third party concerned. That was the view taken by the Court of Appeal in England in *Hollicourt*.

14. I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in Industrial Services. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority –v- Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the *ratio* in *Industrial Services* and decline to take the view, as urged by counsel for the Bank, that that case was wrongly decided.

15. It is conceded on behalf of the Bank (at para. 4.1 of the written submissions filed on its behalf) that "on the law as stated by Kearns J. in *Industrial Services* the Bank would appear to be within the ambit of s. 218". For the reasons indicated above I would propose following *Industrial Services* and it therefore follows that I must determine that the Bank in this case is within the ambit of s. 218.

**The Bank's Case**
16. Both the Bank and the liquidator have argued that Inc. is within the ambit of the section. Counsel for Inc. resists such a claim and places reliance on *Industrial Services*. However, it is clear that Kearns J. did not exclude the possibility of the ultimate recipient also being liable. At p. 130 he said as follows:

> "It does not necessarily follow from the conclusions I have reached that there is any justification for arguing that a liquidator can set his sights against the bank only, ignoring the ultimate recipients of payments made."

17. No other authority was cited on behalf of Inc. which suggested that the ultimate recipient would not be regarded as a disponee. The argument put forward is that on a proper analysis of the transaction the disposition of the Company's property is in favour of the Bank because of the reduction in the amount of the liability of the Bank to repay what the Company would previously have been entitled to demand. That may well be a correct analysis. But it is also clear that on the basis of a direction from the Company the net effect of the transaction is not only to ensure that the Company has a reduced entitlement to receive money from the Bank but also

has discharged its obligation to Inc. In those circumstances it does not seem to me that there is any real basis upon which Inc. should not also be regarded as a disponee.

18. In the course of his judgment in *Industrial Services* Kearns J. noted with approval the submission of counsel for the applicant in that case to the effect that:-

> "Banks discharge a dual function in their relationship with their customer. In one sense they act as agents, but, given that property and money passes to them, the true relationship is that of borrower and lender. Thus the bank can be both agent, creditor and debtor. They thus have a very special role of responsibility in winding-up situations."

19. The very fact that the Bank has a dual role and that a transaction of the type which occurred in this case cannot be readily severed into its constituent parts leads to the inescapable conclusion that the entirety of the transaction needs to be looked at as a whole. It would not be possible for the Bank to make the payment of funds properly to the third party without the instruction from its client customer. It is not possible to look at one part of such a transaction without the other. Taking the transaction as a whole it is manifestly clear that the Company has caused money to be paid to its parent out of its bank account. As a result of the transaction which was, after all, carried out on the instructions of the Company, the Company had its assets in the form of its entitlement to receive money from the Bank reduced by the Sum and also had its obligations to its parent reduced by an equivalent amount. To say in those circumstances that the parent was not a disponee would, in my view, be to give a wholly unreal and unrealistic meaning to the transaction. If, as Kearns J. pointed out, the Bank has a dual role, then, following *Industrial Services*, it seems to me that I must regard this case as being one where there are dual disponees. In those circumstances it seems to me that I should also regard Inc. as a disponee.

20. Counsel for Inc. asserted that to treat the relevant disposition as being in favour of Inc. would involve something akin to tracing. Where would it end, he rhetorically asked. If Inc. paid the money to a third party would that third party be a disponee. The answer lies in the fact that there is no separate independent action required to cause the funds to move to Inc. The tripartite transaction here involves the Company, the Bank and Inc. in a single set of arrangements that is indivisible. A recipient of the funds from Inc. as a result of an independent and unconnected arrangement between Inc. and that recipient would be in an entirely different position.

21. I should not complete this judgment without making two further points.

22. Firstly, I have not touched upon the extent to which it may be appropriate in all the circumstances of this case, to ameliorate the strict application of the section by virtue of the undoubted jurisdiction of the court to validate. The reason I have not touched upon this issue is that further debate is anticipated in respect of this matter and it would, therefore, in all the circumstances, be inappropriate for me to touch on this issue, even in part, at this stage.

23. Secondly, in deference to the fact that a significant portion of the argument at the hearing centred around the issue as to the purpose of the section and the extent to which it might be contended (as the liquidator and the Bank suggested) that Kearns J. went too far in emphasising the purpose of the section as imposing obligations on financial institutions, I should only add the following.

24. It seems to me that the primary purpose of the section is to ensure, insofar as it may be possible, that the Company is "frozen" as of the date of the presentation of the winding-up petition. Where it is sought to wind-up a company on the basis of insolvency it will, save in the most exceptional cases, be the case that the company will end up being unable to pay all of its debts. There may be unusual circumstances where either the amounts which the company ultimately has to pay out in the liquidation or the amounts which are recovered by the liquidator are significantly different from those anticipated in advance to the extent that they render the company able to meet all its debts (including the cost of the liquidation). There may also be rare cases where a company, though unable to meet its debts as they fall due, has an excess of assets over liabilities. Such cases are rare. It is, therefore, inevitable that, in virtually all cases where a company is liquidated on the basis of insolvency, some creditors will not be paid in full. The Companies Acts provide an elaborate code for determining where the burden of not being paid should lie. The primary purpose of the section, it seems to me, is to ensure that the court has ample power to prevent any adjustment occurring subsequent to the presentation of the petition, which would disturb that elaborate balance. In seeking to achieve that end there can, of course, be a series of subsidiary rights and obligations which necessarily arise. However, the precise extent to which any such principle might affect the ultimate distribution of the assets of the Company is, of course, dependent, at least in part, on any view the court might take as to validation. For that reason it does not appear to me to be appropriate to go into this matter in any greater detail at this stage.