

## THE HIGH COURT

2010 117 COS

## IN THE MATTER OF BESTSELLER RETAIL IRELAND LIMITED

## AND

## IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

**JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 23rd day of April, 2010**

1. This is an application by Bestseller Retail Ltd. ("the Company") for orders, pursuant to s. 20(1) and s. 20(3) of the Companies (Amendment) Act 1990, in respect of a number of leases.

2. The Company has been trading in Ireland since 1991, and is a wholly owned subsidiary of Bestseller A/S, a company incorporated in Denmark. The Bestseller group of companies is a family owned company operating a clothing business and commenced trading in Denmark in 1975. The Group has operated in a number of countries and its typical operating model is the establishment of two subsidiaries, one operating as a distribution company, and one operating as a retail company. The distribution subsidiary supplies both the retail subsidiary and other third party retail entities in the country. In Ireland, it operates under four brands, namely: (i) Name It (formerly Exit), (ii) Vero Moda, (iii) Jack & Jones and (iv) Only. The Company operates from thirty-six stores in the Republic and under thirty leases. The Company is insolvent. On 26th February, 2010, Mr. Declan McDonald was appointed as Interim Examiner and his appointment was confirmed on 9th March, 2010.

3. On the application to appoint an examiner, an independent accountant's report was furnished which recommended that fourteen stores should be shut down. The independent accountant's report states, *inter alia*, in para. 5.2, that, in his opinion, it is essential to the survival of the Company that the fourteen underperforming stores be closed and that such other stores as may be identified as causing a deficit on the financial position of the Company will also have to be closed. Subsequently, the Examiner added a further three stores as being unprofitable and a financial drain on the Company. These include the premises in Clanbrassil Street in Dundalk.

4. The Company brings this application to repudiate a number of leases. While agreement has been reached with some landlords, there are others who are objecting to the repudiation of the leases. Written submissions have been received on behalf of Mr. Eamon Duignan and Mr. Cathal McCarthy, the owners of premises in Navan, County Meath, and also on behalf of the Seamus Duffy Retirement Scheme in respect of premises at 84, Clanbrassil Street, Dundalk, County Louth. Objections were also heard from the landlords of premises at 49 O'Connell Street, Sligo, and Unit 10, The Mall, in Tralee. These parties adopted the submissions made by the landlords of the Navan and Dundalk properties. Among the complaints made by the landlords are that the company failed to make full disclosure of all material facts relating to the decision to close the retail outlets and, in particular, to provide details of the criteria applied to determine which stores ought to be closed. It is also alleged that the Company failed to provide clarification and confirmation that the same criteria were applied consistently across all stores and that details of any financial analysis carried out in order to make the decision have not been furnished.

5. It is clear on the evidence that if the Company is allowed repudiate the leases, the landlords concerned will suffer significant loss. As this is a loss affecting a property right of a landlord, it is something which can only be done in exceptional circumstances and where permitted in law. The Supreme Court has held in *Re Linen Supply of Ireland Ltd.* (Unreported, 10th December, 2009) that the High Court has jurisdiction under s. 20 to decide whether it should approve, or otherwise, a repudiation of a contract which is a lease. In each case, the court has to exercise its discretion, depending on the particular circumstances that arise. One of the complaints raised by the landlords of the Navan premises is that the Grafton Street store is not included among those intended to be closed, notwithstanding its difficult trading record, as described in the Company's petition and the very high rents applicable to that tenancy. There are six premises in respect of which guarantees have been given for the rent by Bestseller Wholesale A/S, the holding company. These are:

- (i) Vero Moda, Patrick Street, Cork
- (ii) Jack & Jones, Patrick Street, Cork
- (iii) Vero Moda, The Square, Tallaght
- (iv) Only, Omnipark
- (v) Vero Moda, Grafton Street
- (vi) Vero Moda, Galway

The guarantor in Omnipark, Grafton Street and Galway is Bestseller A/S. In the case of Grafton Street, one of the guarantors is also Mr. Povlsen, one of the founders of the Company.

6. No repudiation of a lease has been sought where there is a guarantee by the parent company. Objectively, this appears to be unfair. No reasonable explanation has been given for this difference in treatment of those premises. Counsel for the Company accepts that the holding company, which is a shareholder, does have a benefit in the repudiation sought because of the guarantee, but he argues that this has to be balanced against the benefits of an examinership. He argues that the court should weigh and balance the rights of other creditors and the other landlords who have entered into agreements to compromise their leases and the court should also consider the possible loss of 150 jobs if the examinership does not proceed. The purpose of the 1990 Act is the survival of the enterprise. It is difficult to escape the conclusion that the company is seeking to repudiate these leases because a guarantee has been given by the holding company. In the case of *Re Traffic Group Ltd.* [2008] 3 I.R. 253 at 260, Clarke J. set out the principal focus of the legislation on examinership. He pointed out that, "*It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save enterprise and the jobs*". The owners of the Dundalk store complain that although Dundalk is not on a list of underperforming stores in the independent accountant's report, it is sought, by the company, to repudiate that lease. There appears to be no satisfactory explanation for this. They argue that it is difficult to understand how a financial burden arises to

the group if, in fact, the Dundalk store provides a net contribution. In any event, this situation would not warrant such a drastic step as a repudiation. The Company, for its part, argues that, in fact, the Examiner has carried out a review of the Dundalk lease and is satisfied that, having regard to the turnover of the unit and the rent, and forecasting further turnover, it is likely to reflect a loss.

7. No particular analysis in respect of the Sligo and Tralee properties was argued before the court by the landlords.

#### **Purpose of Examinership**

8. In enacting the Companies (Amendment) Act 1990, the legislature sought to provide a rescue mechanism for companies that were in trouble, but potentially viable. The jurisdiction to appoint an examiner has been described as ". . . *an exceptional jurisdiction . . . which negatively affects the rights of creditors*". See Denham J. in *Re Vantive Holdings Ltd.* (No.2) [2009] IESC 69, at paragraph 30.

9. In *Re Traffic Group Ltd.* [2008] 3 I.R. 253, Clarke J. stated:

*"It is clear that the principal focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed, greater importance, to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important, both for the court and, indeed, for examiners, to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs."*

It has been accepted by the courts that although the Act provides a breathing space for troubled companies, it does so at the expense of some creditor or creditors.

10. In an application such as this, the court has to exercise its discretion as to whether or not the repudiation of leases should be permitted. In the case of *Linen Supply of Ireland* [2010] IEHC 28, this Court allowed the company to repudiate leases, subject to certain conditions. That was a case where the scheme of arrangement involved an investment being made by the company's parent. However, that case can be distinguished from the matter before me. In the present case, the parent company is guarantor for the rent due under a number of the leases, and no application is made to repudiate the leases on foot of which there are guarantees.

11. In my view, this is a material consideration in exercising my discretion as to whether or not to permit repudiation of the leases. There is no doubt that all the Company's outlets in the State are running at a loss. But the criterion for picking out those leases which are to be repudiated seems to have been solely or predominantly on the basis of guarantees by the parent company. Indeed, in the Dundalk case, it was not even listed in the report of the independent accountant as requiring to be repudiated. The Examiner subsequently took a different view, but it appears to have been postulated on a number of assumptions connected with future turnover and planned renovation costs. The landlords complain that they have not been furnished with sufficient information and that they have been given information on a piecemeal basis and at the last minute. For example, in the case of the Navan property, a substantial figure is claimed by the Company as overheads, but no explanation is given concerning a breakdown of the figure, and the landlord says that the effect of the large amount claimed by way of "overheads" is to turn a profit of approximately €1m into a loss of €408,000. In my view, the landlord was entitled to this information.

12. The repudiation of a lease under s. 20 of the Act is a significant interference with the property rights of a landlord and it must not be exercised lightly. The court has a wide discretion. I must consider the overall purpose of the examinership legislation. But the court is also entitled to consider an application under s. 20 in the context that it is an interim application in the examinership process and does not necessarily determine whether or not a scheme of arrangement can be brought before the court. If this application is refused, it does not terminate the examiner's appointment and he would then have to go back and look at the situation afresh. I am aware that the landlords of many of the premises referred to in the independent accountant's report have reached a compromise with the Company and it is quite possible that a compromise could be reached with the objecting tenants in the event that I refuse the application of the Company.

13. Throughout the hearing of this motion, one fact stood out in stark contrast, namely, that the only leases in respect of which repudiation was not sought were those where the parent company had given guarantees. The evidence suggests to me that the dominant motive for excluding these properties from the ambit of the motion was to protect the interests of the holding company which is the shareholder in the Company. This, in turn, suggests that it is a process ". . . *designed to help shareholders whose investment has proved to be unsuccessful*" to use the words of Clarke J. in *Re Traffic Group Ltd.* and this is something which is outside the scope and purpose of the Act.

14. That is a shortcoming which affects all of the leases in which the landlords propose repudiation.

15. I therefore refuse the application of the Company in respect of the leases in Navan, Dundalk, Tralee and Sligo. I will hear counsel as to the effect of that order on the remaining leases.