Neutral Citation [2015] IEHC 312

THE HIGH COURT

2014 No. 390 COS

IN THE MATTER OF TUCON PROCESS INSTALLATIONS LIMITED (IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012

AND IN THE MATTER OF SECTION 280 OF THE COMPANIES ACTS 1963

AND IN THE MATTER OF SECTION 139 OF THE COMPANIES ACT 1990

Between/

Tucon Process Installations Ltd (In Voluntary Liquidation)

Applicant

-and-

The Governor and Company of the Bank of Ireland

Respondent

Judgment of Mr. Justice Tony Hunt, delivered on 1 May 2015.

Pleadings
The Notice of Motion in this case was issued in the name of the applicant company on 15 August 2014, seeking a declaration that three individual sums totalling €23,894.50 are the property of the creditors of the applicant.

Facts
The affidavit grounding the application was sworn by Anthony J. Fitzpatrick, Chartered Accountant and Insolvency Practitioner, who was appointed liquidator to the applicant at a creditors meeting held on 4 May 2012.

The applicant operated a current bank account at the branch of the respondent at O'Connell Street, Limerick, bearing the account number 76884770.

The special resolution leading to the creditors meeting and the appointment of Mr Fitzpatrick was passed at a meeting of the directors of the applicant on 20 April 2012. On this date, the applicant's current account was overdrawn in the sum of €40,400.78.

It is alleged that on 23 April 2012, the respondent was informed by a former director of the applicant, Mr James Duffy, of the intention to place the applicant into voluntary liquidation by the holding of a creditors meeting as aforesaid.

Between this date and the subsequent holding of a creditors meeting, various debtors of the applicant made electronic payments to the applicant's current account, comprised of €1,947 on 25 April 2012, €3,769 on 27 April 2012 and €18,178.50 on 30 April 2012.

After his appointment, Mr Fitzpatrick sought the return of any funds received by the respondent on behalf of the applicant after 23 April 2012, on the basis that such sums had been received by the respondent after the date of the resolution passed by the directors to wind up the company by means of a creditors voluntary liquidation.

The respondent replied by the affidavit of Nigel Larke, Business Manager at the material time at the Limerick branch. By this affidavit, the respondent challenged the right of the applicant to bring this application; on the basis that standing properly belongs only to the liquidator or a creditor or contributory of the applicant. The respondent also referred to Circuit Court proceedings issued by the applicant against the respondent in the Dublin Circuit Court seeking payment of the combined sum the subject matter of this application. A Notice of Discontinuance was served in these proceedings in September 2014.

Mr. Larke confirmed that Mr. Duffy had advised the respondent on 23 April 2012 that the applicant was to be placed in voluntary liquidation, and of the holding of the creditors meeting on 4 May 2012, as advertised in two newspapers on 21 April 2012.

He also confirmed that Mr Fitzpatrick requested the respondent by letter dated 4 May 2012 to rule off all accounts held by the applicant with the respondent, and by the said letter advised as follows:-

> *"Please note that with immediate effect any credit transfers received by the bank must be held in trust for the liquidator."*

Mr. Larke stated that the respondent complied with this direction after the date thereof. He asserted that the three sums lodged automatically by way of electronic funds transfer by third parties to the applicant's account prior to this date were made lawfully and in the normal course of business prior to the liquidation of the applicant. Consequently, the receipt of these payments did not have the effect of perpetrating a fraud on the applicant or its creditors or members.

The application was heard on the 20th and 21st of January and 10 February 2015. Mr. Ronnie Hudson appeared for the applicant. Mr. Denis McDonald SC appeared for the respondent (with Ms. Elizabeth Donovan).

Standing
The first issue to be determined is the capacity of the company to bring this application. The specific sections of the 1963 Act invoked by the heading of the Notice of Motion are sections 139 and 280. Each of these sections specifically refers to *"….the*

application of a liquidator, creditor or contributory of a company…."

Before deciding the issue, it must be noted that the applicant specifically declined a proposal by the respondent during the proceedings that the company should be substituted by the liquidator for the purposes of determining the merits of the application made herein.

In the case of an application brought pursuant to a statutory provision, regard must be had to the plain and ordinary meaning of the words of the statute in determining questions such as standing. The nomination of specific parties as potential applicants expressly precludes such statutory applications being brought by a party other than those specified by the legislature, otherwise the precise words used to legislate for classes of applicant would be deprived of ordinary meaning. As the company is not specified by either statutory provision as being an appropriate applicant, it has no standing to seek relief under either of the statutory provisions invoked in this application.

This interpretation of the sections in question also has the benefit of being in keeping with the general principle that in company law matters, where proceedings are being taken for the benefit of the company, rather than by an individual creditor or contributory, the liquidator should be named as the applicant rather than the company itself. In those circumstances, the liquidator will be entitled to an indemnity out of the assets in the winding up, unless he has acted improperly.

A somewhat similar situation arose on the facts of the case of ***Southern Mineral Oil Ltd. (in liquidation) v. Cooney [1997] 3 I.R. 549***. In that case, proceedings under s.297(1) of the 1963 Act were brought in the name of two companies which had no assets. Lynch J. reviewed various provisions of the Companies Acts with identical wording to those under consideration in this case, and noted as follows:-

> *"None of these statutes provide that the application may be brought by the company in receivership or examinership or liquidation. They provide that the application shall be brought by the receiver or examiner or a liquidator, as the case may be, and in all cases the application may also be brought by any creditor or contributory of the company in question. Nor do the provisions of O.74, r.49 of the Rules of the Superior Courts lend any support to bringing the application in the name of the company in receivership, examination or liquidation.*
>
> *The Revenue Commissioners are the real applicants in the proceedings brought against the respondents…. In these circumstances it seems to me that it is wrong that they should be enabled to shelter against liability for the respondents' costs if the respondents succeed in the substantive trial of the motion by bringing the proceedings in the name of two companies who have no assets. On my reading of ss. 297 and 298 of the Companies Act, 1963, under which these proceedings are brought, neither the Revenue Commissioners nor the liquidator is entitled to bring them in the name of the companies.*
>
> *I would therefore dismiss the appeal but I draw attention to the probable need to apply to the High Court for a ruling as to whether or not it is necessary to join or substitute the liquidator and/or the Revenue Commissioners as applicants and if so whether or not such an order should be made in this case."*

Keane J. agreed with the observations of Lynch J. Barron J. also agreed that the question as to whether the proceedings were properly constituted was one which would have to be determined by the High Court.

Although the observations of Lynch J. were *obiter dicta* in the sense that they were not essential to the resolution of the issue on the appeal, which was that of delay, they are of the highest persuasive authority. As they represent a correct and precise statement of the law on the legal issue arising in this case, the application herein should be dismissed on the basis that neither of the sections invoked by the applicant is available to it in circumstances where it is not within the category of applicant specified by either of the statutory provisions in question.

In the event that the decision on this point is not correct, the substantive issue of the legal status of the payments received by the respondent will also be addressed.

The substantive issue
The claim pursued by the applicant was first set out in a letter from the liquidator to the respondent dated 11 June 2012, which stated as follows:-

> *"The Company was insolvent and unable to pay its debts on 20th April 2012 and the Bank was on notice of this. In the circumstances, I believe the appropriate course of action for the Bank would have been to hold the lodgments made on or after 23rd April 2012 in trust for the Liquidator.*
>
> *As the company was insolvent on 20th April 2012, I believe that the lodgments made to the Company Bank account subsequent to that date constitute a fraudulent preference or fraudulent disposition within the meaning of the Companies Act, 1963, in favour of the bank…."*

Consequently, it appears that the substantive issue raised on the application is as to whether the payments received by the respondent prior to the holding of the creditors meeting on 4 May 2012 are captured by either of the statutory provisions invoked by the applicant. Presumably, the references therein to "fraudulent preference" and "fraudulent disposition" were intended to refer to the provisions of s.286 of the 1963 Act and s.139 of the 1990 Act respectively.

However, the Notice of Motion refers only to the latter section, and the claim can only be considered within that context. This is not surprising, in that it is difficult to see how the provisions of s.286 of the 1963 Act could apply to the circumstances of this claim, as they relate to dispositions made by a company with the intention of preferring a creditor. This claim concerns payments made by third parties to a company bank account, rather than intentional acts by a company performed for preferential purposes.

s.139 of the 1990 Act
This section provides an addition to the provisions of the 1963 Act. It is described as a power of the court to order the return of assets which have been improperly transferred. s.139 effectively provides that where the court is satisfied on the application of a liquidator, creditor or contributory that company property was disposed of with the effect that such disposal perpetrated a fraud on the company or its creditors or members, it may make various orders in respect thereof on a "just and equitable" basis. It also provides that s.139 does not apply to transactions to which s.286 of the 1963 Act applies.

Consequently, the availability of relief under this section requires proof of a disposal of property accompanied by the effect of the perpetration of a fraud on the company, or its creditors or members. It does not require proof of an intention to defraud, merely that the impugned transaction has that effect.

The important distinction between fraudulent preferences and fraudulent dispositions was noted by Warner J. in ***Clasper Group Services Ltd. [1989] BCLC 143***, when he said:-

> *"….There is a distinction between a payment to a creditor as such and a payment which, albeit made to a person who is a creditor, is the sheer misapplication of the company's money".*

The courts in Ireland have held that the following behaviour has had the effect of constituting a fraudulent disposition for the purposes of s.139:-

> 1. Entry on to company premises and the taking of possession of a cash sum and the entire stock of an insolvent company in lieu of rent owed: ***Le Chatelaine Thudichum Ltd. v. Conway [2010] 1 I.R. 529***.
>
> 2. Personal expenditure by company directors which had been recorded as business expenditure on behalf of the company: ***Devey Enterprises Ltd. v. Devey [2012] 1 I.R. 127***.
>
> 3. Payment of the proceeds of company sales at a restaurant to a related company: Kirby (as liquidator of ***Citywest Hire Limited v. Petrolo Limited and Stokes [2014] IEHC 279***.
>
> 4. The use of company funds to settle the private debts of a company director: ***Kirby (as official liquidator of MPS Global Limited) v. Muldowney [2014] IEHC 318.***

The courts have equally held that where the company has received a benefit from a disposition, such as where sums were used to discharge the liabilities of the company to employees or suppliers, such sums do not fall to be repaid under the section, on the basis of the "just and equitable" provision therein. In ***Petrolo Limited*** Finlay Geoghegan J. stated as follows:-

> *"On the evidence before the court, I find...that the sum of €29,334.92 was paid out of the Petrolo account to the employees of Citywest for the period up to and including 9 June 2013, in which they were employed by and worked for the benefit of Citywest. It appears just and equitable that such sum should be excluded from any order for payment now to be made.*
>
> *Similarly, on the facts before the court, I find, on the balance of probabilities that a sum of €12,664.31 was paid to suppliers of Citywest in the period up to 10 June 2013 for the purpose of the continued trading of Il Segreto restaurant. Again, it appears just and equitable that this sum be excluded from any order for payment against the respondents."*

The principles to be discerned in relation to s.139 from these cases are that improper dispositions or misapplications of company property will be caught by the section, but payments or dispositions in favour of creditors or employees for the benefit of the company concerned will not be included in an order made under the section. A simple payment made to an unsecured creditor when the company is insolvent will not, without more, trigger the operation of the section. It is not the case that every otherwise lawful payment made by an insolvent company to a legitimate unsecured creditor will automatically amount to a fraudulent disposition. The type of additional ingredient necessary to trigger the application of the section is illustrated by the features of the cases listed above. The additional ingredient must amount to an impropriety before the provisions of the section are engaged.

This point is further demonstrated by the observation of Laffoy J. in ***Devey*** that in some respects, the provisions of s.139 represent a statutory embodiment of the principles enunciated by the Supreme Court in ***Re Fredericks Inns Limited [1994] 1 I.L.R.M. 387***. In that case, an arrangement was entered into by a group of insolvent companies with the Revenue to repay a total of IR£1.2 million in discharge of their respective liabilities to the Revenue Commissioners. However, the only element of the payments that was declared by the Supreme Court to be unlawful and therefore repayable by the Revenue Commissioners was the amount which each of the companies had paid out of their own assets to the Revenue Commissioners in respect of monies owed not by the individual companies concerned, but by other companies in the same group to the Revenue Commissioners.

The distinction made by the Supreme Court between payments made for the benefit of the company and payments made for the benefit of others is entirely consistent with the approach subsequently taken by the High Court in the case law pertaining to s.139. Two basic principles emerge from this collection of authorities. Firstly, the purpose of this section is to address and correct situations where company property has been diverted for improper purposes, to the detriment of the company, its members or creditors. Secondly, the "just and equitable" provision in the section prevents ordinary payments to creditors or suppliers which accrue to the benefit of the company, as opposed to any third party, from being regarded as being tantamount to a fraud on the company, its members or other creditors.

Application of these principles to the facts of this case suggest that the respondent should not be subject to a repayment order under s.139 unless receipt of the payments made to the company current account by third parties should be regarded as a wrongful diversion or misapplication of company funds, with an effect equivalent to fraud, because they had the incidental effect of reducing the applicant's indebtedness to the respondent.

The fact that ordinary payments into an overdrawn bank account may subsequently have the effect of preferring the bank if they happen not to be followed by any withdrawals before the date of liquidation does not necessarily indicate action tantamount to fraud. When the matter is put in this way, it shows clearly that the section ought to have no application to circumstances where a bank operates a company current account in the ordinary course of business and in accordance with applicable contractual obligations prior to the operative date of a voluntary creditors winding up.

In such circumstances, the bank simply operates a current account by receiving or disbursing payments in accordance with the relevant mandate. Ordinary payments in and out of a company current account facilitate and benefit the operation of the company business. Absent proof of other circumstances, such payments cannot be regarded as being equivalent to a fraud upon the company, its members or other creditors.

Neither the company nor the bank had any particular input into the receipt of any of the three third party payments in question. The creditors' voluntary winding up did not become operative until the necessary resolution was passed at the meeting on 4 May 2012. The mere fact that the respondent was on notice of the intention to hold this meeting did not of itself entitle it to amend the ordinary

operation of the company current account. To hold otherwise would be to alter the clear provisions of the 1963 Act as they relate to such situations, and would import uncertainty into banking and business arrangements. Certainty is provided by fixing the date of assessment of the ultimate balance in the current account as the date of the passing of the resolution to wind up.

By acting to rule the account before the necessary resolution was passed at the creditors meeting, the respondent would be anticipating the outcome of that statutory meeting. Until the status of the customer is changed by operation of law, the respondent is obliged to continue to operate the current account in accordance with applicable contractual arrangements. In these circumstances, it is required to process ordinary payments in and out of the account by or for third parties until a liquidator is validly appointed. If it was obliged to refuse to accept payments in these circumstances, as contended by the applicant, presumably it would also be entitled to refuse to honour payments made by the applicant and received in good faith by third parties.

This cannot be the effect of a statutory provision designed solely to either prevent or correct dispositions of company property having an effect equivalent to a fraud, unless the words of the section plainly encompass this scenario. To have this character, the payments must feature something other than receipt or application of funds by the respondent in the ordinary course of a banking relationship. There is no evidence at all to suggest that the payments in issue here are tainted by any quality imparting to them an effect equivalent to fraud. If in some demonstrable way they were not made or received in the ordinary course of business, this could in other circumstances supply the essential additional element required to attract operation of the section in issue.

The balance in the current account as of the effective date of the winding up in this case was simply the product of the ordinary operation of the account, and might have been higher or lower depending on the unplanned or undirected actions of third parties or the company on or before that date. It did not depend in any way on particular dispositions made by either of the parties to the account, nor is there evidence that any of the transactions in question were implemented or managed with either the intention or the effect of improperly diverting or misapplying company property. The respondent may have been indirectly benefited by the reduction of the company overdraft consequent on the receipt of payments, but it might equally have been indirectly prejudiced by payments properly issued by the company to third parties out of the account in the period prior to winding up.

Some further or other ingredient must be present before the receipt or the making of payments on a current account could be regarded as the diversion of company property with an effect equivalent to a fraud on a relevant party. These items were payments *simpliciter* and did not amount in any sense to a "sheer misapplication" of company property. It would not be "just and equitable" or otherwise appropriate to make an order for repayment under s.139 in such circumstances. To hold otherwise would be to potentially invalidate all payments or receipts, on the sole basis that they are made against a background of insolvency. The remedy for improper trading whilst insolvent is to be found elsewhere in the relevant legislation.

It cannot be concluded that the bare fact that a banker has knowledge or information that a company is insolvent is sufficient in itself to outlaw or render fraudulent ordinary payments in or out of the company account pending the legal commencement of a subsequent liquidation. If that was the conclusion or outcome intended by the legislature in enacting s.139, it is not apparent from the plain meaning of the words actually used in enacting the section, and could have been achieved by a simple provision to that effect, without reference to the concept of fraud.

The application herein must be dismissed on the merits, as the applicant has not discharged the burden of proving that the receipt of third party payments by the respondent had an effect amounting to fraud, as well as by reason of lack of the requisite statutory standing on the part of the company. As a consequence, no other order or direction arises under the provisions of s.280 of the 1963 Act.