Neutral Citation Number: [2012] IEHC 515

THE HIGH COURT

[2012 No. 408 COS]

IN THE MATTER OF DIORAMA LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

BETWEEN

PATRICK JENNINGS AND MARY JENNINGS

APPLICANTS

AND

BANK OF SCOTLAND PLC., KIERAN WALLACE AND BARRY DONOHUE

RESPONDENTS

JUDGMENT of Mr. Brian J, McGovern delivered on the 5th day of December 2012

1. This is an application brought by the applicants for an order pursuant to the provisions of s. 316 of the Companies Act 1963, declaring that Mr. Kieran Wallace and Mr. Barry Donohue ("the Receivers") do not stand validly appointed as joint receivers and managers over the assets and undertaking of Diorama Limited. The motion was heard on affidavit and a number of deponents were also cross-examined on their affidavits by leave of the court.

2. The applicants claim that the appointment of the Receivers is invalid on two grounds, namely:-

> (a) Diorama Limited ("the Company") was not in arrears at the time of their appointment, or, if it was, it was due to the wrongful actions of Bank of Scotland plc. ("the Bank"); and
>
> (b) the appointment of the Receivers was defective and is therefore invalid.

3. The applicants are directors and shareholders of the Company. They are also directors and shareholders of Harlequin Hotels Limited and Harlequin Developments Limited. As directors or shareholders of the Company, the applicants are entitled to bring this application under section 316. Counsel for the applicants informed the court that the objection to the validity of the Receivers' appointment is a technical one.

4. I am quite satisfied on the evidence that the Company was in arrears at the time of appointment of the Receivers. On 16th December, 2010, the Company's arrears on three loans (101, 106 and 107) amounted to €883,436.47. No instalment was paid by the Company under the terms of the loan agreements between December 2010 and May 2012. A large volume of correspondence from the Bank to the Company between 24th February, 2009, and 10th January, 2012, was exhibited. This correspondence clearly shows that the Company's attention was regularly drawn to the fact that there were arrears on the Loan Accounts 101, 106 and 107, and that they were not being dealt with by the Company. In the circumstances, the Bank was *prima facie* entitled to appoint receivers under the terms of a Debenture dated 15th December, 2005.

5. The court heard evidence as to the manner in which monies were taken from the accounts of Harlequin Developments Ltd. and Harlequin Hotels Ltd. to be set off against the loans of the Company under Loan 107. Although the applicants complain that this was not permissible, I am quite satisfied, on the evidence, that the Bank was entitled to do so on the basis of the Terms and Conditions of the loan facilities and the Bank's General Terms and Conditions which were incorporated into the terms of the loans. While the applicants state that they did not receive the Terms and Conditions in respect of one of the loans, they accept that they acknowledged by their signature that they did receive the Terms and Conditions. I accept the evidence of Mr. Pyers O'Connor Nash who was cross-examined on his affidavit and set out in detail the basis on which the Bank conducted its business with the applicants and the documents and information furnished to them. It is clear that the applicants agreed that funds on deposit in accounts held by Harlequin Hotels Ltd. and Harlequin Developments Ltd. were to form part of the security for loans advanced in respect of the Company and the right of set off existed between the accounts of these companies. For some considerable period of time, Mr. O'Connor Nash had been the relationship manager between the Bank and the applicants and was well placed to give the court a full account of the Bank's dealings with the applicants. Furthermore, the applicants were legally represented at the time when they entered into these agreements with the Bank. In those circumstances, I reject the claim by the applicants that any arrears in the Company's account at the time of the appointment of the Receivers was due to wrongful actions on the part of the Bank.

6. Clause 7.1 of the Debenture provides, *inter alia*:

> *"At any time after the power of sale has become exercisable whether or not the Bank has entered into or taken possession of the Secured Assets or at any time after the Mortgagor so requests, the Bank may, from time to time, appoint under seal or under hand of a duly authorised officer or employee of the Bank any person or persons to be receiver and manager or receivers and managers . . . of the Secured Assets . . ."*

7. Section 64(2)(b)(iv) of the Land and Conveyancing Law Reform Act 2009, provides*, inter alia*, that a deed of appointment executed after the commencement of the Act is a deed if " *. . . made by a foreign body corporate, it is executed in accordance with the legal requirements governing execution of the Instrument in question by such a body corporate in the jurisdiction where it is incorporated"*. The Bank is registered in Scotland and the deed of appointment of the Receivers must be considered in the light of Scottish law.

8. Affidavits of laws were sworn by Scottish lawyers, Mr. Gordon Deane and Ms. Fiona McKerrell. Ms. McKerrell was cross-examined by

counsel for the applicants. However, Mr. Deane was not cross-examined. The evidence of Ms. McKerrell was to the effect that Mr. Alexander Wolfe Murray Bruce was properly authorised under Scottish law to make the appointment of the Receivers. Mr. Deane, in his affidavit, only went so far as to state that if the Bank had documentary evidence to demonstrate Mr. Bruce was duly authorised, then it should be asked to produce the evidence. When the Bank did produce the evidence, Mr. Deane did not put in a further affidavit disputing the nature of the evidence produced by the Bank. I prefer the evidence of Ms. McKerrell on this issue and hold that Mr. Bruce was properly authorised to make the appointment of the Receivers.

9. When the Receivers were appointed by Mr. Bruce on 25th May, 2012, a six-page document was signed in Scotland by Mr. Bruce and he e-mailed a copy of the document to each of the Receivers. Each of the Receivers then copied and signed one page each which they sent back to Scotland. On 28th May, 2012, the original document which was signed by Mr. Bruce was sent to Ireland and signed by each of the Receivers and was backdated to 25th May, 2012. The applicants rely on the case of *R (On the Application of Mercury Tax Group and Another) v. Revenue and Customs Commissioners and Others* [2009] STC 743. In that case, Underhill J. said that if the parties to relevant documents expressed to be deeds intended them to be deeds, then their validity should be judged on that basis. At para. 43, he said:

> *"But I see nothing wrong in applying a strict test of formality to the validity of the agreements with which we are concerned in this case. The entire raison d'être is to create - and demonstrably to create - a series of formal legal relationships: if they do not do that, they do nothing."*

10. In my view, that case can be distinguished from the facts of this application. In *Mercury*, the plaintiff's clients, participating in a tax avoidance scheme, were asked to sign incomplete drafts of key documents and, when fresh documents in final form came to be executed, they were not asked to sign those versions. Instead, the signature pages from the drafts were detached and stapled to the final version. The drafts had a number of blanks that were filled in on the final version. There were also substantial changes in the terms of the documents as between the draft and final versions. In effect, the signature page was taken from one document and was recycled for use in another.

11. In this case, the signature of the Receivers was merely to confirm their acceptance of their appointment. There were no formal requirements necessary. What they did on 25th May, 2012, was sufficient to signify their acceptance of their appointment. This was expressed in a more formal way when they signed the original deed which was sent over from Scotland. But I cannot see how these steps would in any way call into question the validity of their appointment. Support for this view is to be found in the judgment of Lord Evershed M.R. in *Windsor Refrigerator Co. Limited and Another v. Branch Nominees Limited and Others* [1961] 1 ALL E.R. 277, where at p. 281, he said:

> *"The question is not whether these two gentlemen, when they put their names on this document, were purporting to execute a document under their hands as agents for the company, or had any authority to do so. The question, as I conceive it to be, is: Can this document, albeit purporting to operate as a deed, but failing to do so - can it none the less be the instrument of the company in writing? I have come to the conclusion that that question ought to be answered in the affirmative."*

12. In this case, the Bank contends that the document executed by Mr. Bruce was a deed. But even if it was not a deed, it is clear that it had all the requisite qualities to be an instrument in writing under Mr. Bruce's hand and, for the reasons I have outlined above, I accept that Mr. Bruce had authority to create such an instrument.

13. I therefore hold that the Receivers are validly appointed and I refuse the application to discharge them.