

THE HIGH COURT

[2021] IEHC 680
[2019 No. 415 COS]

**IN THE MATTER OF ETHAFIL LIMITED (IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 631 OF THE
COMPANIES ACT 2014**

BETWEEN

MYLES KIRBY

APPLICANT

AND

EXPRESS BUS LIMITED

RESPONDENT

[2020 No. 228 COS]

**IN THE MATTER OF ETHAFIL LIMITED (IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 678 OF THE
COMPANIES ACT 2014**

BETWEEN

EXPRESS BUS LIMITED

APPLICANT

AND

MYLES KIRBY

RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 29th day of October, 2021

Introduction

1. This judgment is supplemental to a judgment I delivered on 14th May, 2021 [2021] IEHC 334 and should be read in conjunction with that earlier judgment.
2. The parties having been afforded time to consider my judgment, the matter was listed for argument as to how the questions posed by the liquidator in his application for directions should be answered, and what order should be made as to the costs of the motion.
3. This judgment also deals with an application by EBL for leave to issue proceedings against the Company. EBL's motion was issued before the liquidator's motion was heard but was stood over to await the outcome of the motion for directions and following delivery of my judgment was recast. I will come to it in due course.

Answers to the questions posed by the liquidator

4. It will be recalled that by his notice of motion issued on 7th November, 2019 Mr. Kirby asked the court to determine four questions, namely:-
 1. Whether EBL is in lawful occupation of the property in Folio 51988F (or any part thereof);
 2. Whether EBL holds a valid and subsisting option to purchase the property (or any part thereof) pursuant to the agreement of 11th November, 2015;
 3. If the answer to question 2 is in the affirmative, whether EBL has validly exercised an option under the 2015 agreement;

4. If the answer to question 2 is in the affirmative, whether the liquidator is entitled to disclaim the 2015 agreement pursuant to s. 615 of the Companies Act, 2014.
5. As noted in my earlier judgment the questions as so formulated did not precisely identify the issues between the parties.
6. There was no issue as to the fact that EBL was in occupation of that part of the lands in Folio 51988F identified as Lot 2, and no issue as to whether it was in occupation of any other part of the lands. The question, then, is whether the occupation by EBL of Lot 2 is lawful.
7. As explained in my earlier judgment, at the time the motion issued there was no question that EBL held a valid and subsisting option. Rather the true issue to which the second question was directed was whether the agreement of 11th November, 2015 created a valid option by which EBL was entitled, in the first instance, to acquire Lot 2. The agreement contemplated an option which might be exercised within the first twelve months of the term of a five year lease. If, correctly construed, the 2015 agreement created an option, that option if not exercised in time would have lapsed, and if validly exercised would have given rise to a contract for the sale and purchase of Lot 2.
8. Mr. Crean, for EBL, argued, correctly, that question 2 was not really the right question but that the answer to the question as formulated should be "No". While strictly speaking Mr. Crean is correct, I prefer the narrative answer suggested by Mr. McCarthy that the agreement of 11th November, 2015 created a valid option but that the option was conditional on the rent not being three months in arrears and lapsed because the rent was not paid.
9. It was effectively agreed that the findings in my earlier judgement that the option was conditional upon payment of the new rent and that that rent had not been paid meant that the purported exercise by EBL of the option was invalid, and so the answer to question 3 should be "No".
10. As I observed in my earlier judgment, the proposition that the liquidator might be entitled to disclaim the 2015 agreement was not argued. A valid exercise of the option created by the 2015 agreement would have given rise to a contract for the sale and purchase of Lot 2 and it was not suggested that any such contract might have been disclaimed. I think that the formal answer should be that the question was not argued.
11. As to whether the occupation by EBL of Lot 2 is lawful, Mr. McCarthy argued that the answer was simply "No". The effect of the findings of the court were that EBL was not, as was its primary submission, a purchaser in possession on foot of a contract for sale. Neither, as had been EBL's fall-back position, could it be entitled to a new lease at a rent of €35,000 per annum. EBL did not pay the rent contemplated by the 2015 agreement, bar the €25,000 paid on 14th June, 2016.

12. Mr. Crean submits that the answer to question 1, or at least the answer to the question when it was asked, must be "Yes". EBL has flagged its intention to appeal – which, of course, it is perfectly entitled to do – but counsel correctly acknowledges that the question must be answered according to the findings of the High Court. On the findings of the court, it is acknowledged that EBL is not a purchaser in possession, nor can it be entitled to a new lease from the expiration of the term of the lease of 15th May, 2012, nor can it be entitled to remain in possession pending the determination of any claim to such a lease. Since the agreement of 11th November, 2015 provided for a renunciation of any rights that might otherwise have arisen on the expiration of the five year lease provided for, EBL does not contend for any right by reference to that lease.
13. Citing para. 4.34 of Wylie *"Irish Landlord and Tenant Law"* (3rd Edition) Mr. Crean submits that EBL is a tenant at sufferance. The passage relied upon is:-

"D. *Tenancy at Sufferance*

1. *Nature*

[4.34]

A tenancy at, or on, sufferance is a peculiar type of 'tenancy' which arises where a tenant holds over, after expiry of his existing valid tenancy, without the assent or dissent of the landlord and without statutory right. The nature of such a tenancy was considered by the old Court of Appeal in Holland v Chambers (No 1), [1894] 2 I.R. 442 where the question at issue was whether former weekly tenants were entitled to the franchise. They had been served with notices to quit, but continued in possession after expiry of the period of notice and were later served with summonses for possession. FitzGibbon L.J. stated:

'The lowest form of tenancy is tenancy on sufferance; and I take it as the minimum requisite for the franchise. Tenancy on sufferance is thus defined by Woodfall (p 230): 'A tenant on sufferance is one who has entered by lawful demise or title, and after that has ceased, wrongfully continues in possession, without assent or dissent of the person next entitled.' This definition excludes a person who wrongfully continues in possession notwithstanding the dissent of the person entitled. The summons for possession served on each of these claimants was at least a formal declaration of such dissent; it made their possession thenceforth wrongful, and turned them from tenants into trespassers.'

Such a tenancy must, therefore, be distinguished from a tenancy at will, which may also arise as a result of a contractual tenant overholding, because a tenant at sufferance does not occupy by the 'will' or with the 'agreement' of the landlord. A fortiori it must be distinguished from a periodic tenancy which may arise by presumption in favour of an overholding tenant. Thus a tenant at sufferance has neither tenure nor any estate in the land capable of disposition. There is no

relation of landlord and tenant between him and the landlord. This view of his position was confirmed by the Land and Conveyancing Law Reform Act 2009, which excludes such a tenancy from the definition 265 in s 3 of that Act. He is only called a 'tenant' because his original occupation of the land was under a contract of tenancy and in order, as the Holland case illustrates, to distinguish him from a trespasser in the strict sense. Since such a tenancy is confined to cases of contractual tenants overholding its incidence may have been reduced in modern times by statutory protection conferred on such tenants."

14. Wylie, at para. 4.39, suggests that the concept of tenancy at sufferance appears to have been devised to protect the landlord from the old doctrine of adverse possession which has long since been abolished. I am bound to say that I struggle with the notion that a person who "*wrongfully continues in possession*" might somehow be entitled to a declaration of dissent, or how such a declaration of dissent, whether by a summons for possession or otherwise, might make thenceforth wrongful what is already wrongful. In any event, taking EBL's argument at its height, a tenancy at sufferance may be determined by a formal declaration of dissent. Whatever may have been the position prior to the appointment of Mr. Kirby as liquidator, it was made absolutely clear thereafter that the Company took issue with the fact that EBL continued in possession of the property without paying anything and without having paid anything for the previous three years. If, at the time of Mr. Kirby's appointment, there was some doubt as to the basis on which EBL came to be and was continuing in occupation, it was clear that the Company, by the liquidator, wanted EBL out. While the notice of motion identified an issue as to whether EBL's occupation was lawful, the liquidator's unambiguous position was that on any analysis of what he could see from the Company's records and correspondence it was unlawful, and he went on to ask for such ancillary orders or directions as might be necessary to secure vacant possession.
15. With all due respect to Mr. Crean's indefatigable ingenuity, it would be wholly artificial to contemplate answering the liquidator's question by reference to the time at which the question was asked rather than the date of the answer: but whether as of the date of the notice of motion or the date of the judgment the answer is the same. EBL is not in lawful occupation of Lot 2. The answer to question 1 must be "*No*".
16. The questions posed by the applicant will therefore be answered:-
 1. No.
 2. The agreement of 11th November, 2015 created a valid option but that the option was conditional on the rent not being three months in arrears and lapsed because the rent was not paid.
 3. No.
 4. This question was not argued.

Costs of section 631 motion

17. As to the costs of the proceedings, Mr. McCarthy S.C. submits that they must follow the event, which is, he submits, that the applicant has been successful. EBL, he submits, was asked by letter prior to the issue of the motion to clarify the basis on which it was in occupation and had failed to do so.
18. Mr. Crean argues that EBL should have its costs. The event, he suggests, did not go the Company's way. Of the four questions posed one was not pursued and one was clearly answered in EBL's favour. If the court accepted that EBL was a tenant at sufferance, it was submitted, Mr. Kirby would have failed – and so EBL would have prevailed on three of the four questions: so that it would have been 75% successful.
19. Undaunted by the fact that EBL had lost the substance of the dispute, Mr. Crean argued that the costs of the motion – EBL's as well as Mr. Kirby's – should be costs in the liquidation. Section 631 of the Companies Act, 2014 allows the liquidator of any company to apply to the court to determine any question arising in the winding up, and the court, if satisfied that the determination of the question will be just and beneficial, may accede wholly or partly to the application. Section 617 provides that all costs, charges and expenses properly incurred in a winding up shall be payable out of the property of the company. The questions having been properly asked and the court having determined that it would be just and beneficial to answer them – so the argument goes – it follows that the costs should be costs in the winding up. Mr. Crean also pointed to s. 678, the scheme of which was that leave to issue proceedings against a company in liquidation would only be granted where the issue could not be dealt with in the liquidation.
20. Yet again, with all due respect to Mr. Crean's ingenuity, I cannot agree. The issues which arose in the course of the winding up arose because EBL raised them. The questions posed might have been more carefully refined but the substance of the dispute was whether EBL was entitled to purchase Lot 2 in accordance with the agreement of 11th November, 2015 and in any event, at a minimum, was entitled to a new tenancy. It is true, as Mr. Crean submitted, that the questions were framed neutrally – or at least relatively neutrally – but I do not believe that the liability for costs can properly turn on that. It could fairly be said also – as was submitted – that EBL found itself caught up in a difficult question of law. But that argument fails to recognise that the web in which EBL became entangled was a web of its own making. In my firm view, the justice of where responsibility for costs should lie does not depend on the vehicle by which a dispute between parties is brought before the court. Section 617 of the Act of 2014 is directed to the priority for payment of costs and expenses as opposed to the award of costs.
21. In my view, EBL's reliance on *Re: National Building & Land Investment Co.; Ex parte Clitheroe* (1884) 15 L.R. Ir. 47 is misplaced. In the first place that was an issue as to the priority an award of costs made to the applicant, as opposed to its entitlement to an award of costs. Perhaps more to the point, that was a case in which the applicant had succeeded in a claim against the company in liquidation. If this motion was – as it was – necessary litigation as far as the liquidator is concerned, it does not follow that it could properly be seen in the same way as far as EBL is concerned.

22. The motion was argued in one day and in substance was decided against EBL. While it is true that EBL prevailed on the question as to whether it ever had a valid option, it does not appear to me that this ultimately achieved anything for EBL or that this issue significantly added to the costs. The position might very well have been different if the application had gone into a second day.
23. I am satisfied that the appropriate order for costs is that the applicant's costs should be costs in the winding up and that as between the applicant and the respondent the applicant is entitled to a order for the costs of the motion, to be adjudicated in default of agreement.

Section 678 application

24. On 12th July, 2020, at a time when the applicant's motion for directions was well advanced, EBL filed a motion for leave to issue proceedings against the Company claiming an order for specific performance of the then claimed contract for sale of Lot 2, alternatively for a new tenancy of Lot 2. Such proceedings would have inevitably given rise to the same issues which were already before the court on the liquidator's application. In the event, it was ultimately accepted on behalf of EBL that the questions which the liquidator had asked were questions which had arisen in the course of the liquidation, the determination of which would be just and beneficial and the s. 678 application was not moved.
25. Following the judgment delivered on 14th May, 2021 it was accepted that EBL could not pursue either of those claims but on 15th June, 2021 an affidavit of Mr. Alan Martin was sworn and filed in support of an application for leave to issue Circuit Court proceedings against the Company by which EBL would make a new claim.
26. It will be recalled that on 19th February, 2015 EBL signed a contract to buy the entire property comprised in Folio 51988F from Pierse Contracting Limited for €1,005,990. That contract provided for the payment of a deposit of €100,559. The money for the deposit was already in the hands of Pierse's solicitors, to whom EBL's solicitors had paid €10,000 on 2nd October, 2014, €40,599 on 13th February, 2015, and €50,000 on 16th February, 2015.
27. It appears that the deposit monies had come as to €50,599 from EBL and as to €50,000 from the investor. It will be recalled that the option provided for a credit against the option price of €50,599.00 rather than the full amount of the deposit so that there may be a question as to the basis on which the investor made the €50,000 available to EBL – whether as a loan to EBL or a part payment of the purchase price – but it is not immediately necessary for present purposes to resolve any such issue.
28. Similarly, the peculiarity that although the contract provided for a consideration of €1,005,990, the assurance of the property to the Company showed a consideration of €845,900 is not something that immediately needs to be addressed at this stage.

29. EBL now seeks leave to issue Circuit Court proceedings claiming a declaration that EBL is entitled to a beneficial interest in the property – that is the entire property comprised in Folio 51988 F, County Dublin – commensurate with the proportion of the purchase price of the property that the plaintiff paid: 10% if the consideration was €1,005,990, a greater percentage if the price paid was less than that. Alternatively, EBL would claim an equitable lien over the property for repayment of the contribution it made to the purchase price.
30. In response to Mr. Martin’s affidavit, Mr. Kirby swore an affidavit on 2nd July, 2021. The first point Mr. Kirby made was that the new claim was, in his view, clearly one that was capable of being decided in the course of the winding up. He suggested that it raised a question of law which was suitable for determination by an application for directions under section 631.
31. The second point made by Mr. Kirby is that the proposed new claim arose out of facts known to EBL from the start of the directions application and he argues that it should have been brought forward earlier. To permit EBL to do so now, it is said, would further deplete the assets of the Company available for distribution.
32. As to the substance of the proposed new claim, Mr. Kirby argues that any presumption in law or equity that EBL’s contribution to the purchase price gave rise to any beneficial interest was rebutted by the terms of the contract for the sale and purchase of the property dated 19th February, 2015 and the later agreement of 11th November, 2015. The proposed new claim, it is said, is inconsistent with the positions – themselves inconsistent – previously taken by EBL. Mr. Kirby suggests that the proposed new claim is an attempt to stymie his ability to deal with the property.
33. As to the principles to be applied in deciding an application for leave to issue proceedings against a company in liquidation, Mr. Crean referred the court to the judgment of Laffoy J. in *Wright-Morris v. IBRC (In special liquidation)* [2014] 3 I.R. 468 and in particular to the conclusion at para. 22 that:
- "Accordingly, the criterion which the court should apply is whether it is right and fair in the circumstances for the court to give consent to the proposed proceedings."*
34. As appears from the immediately preceding paragraph of the judgment of Laffoy J. in *Wright-Morris*, where she quoted extensively from the judgment of the English High Court in *Re Exchange Securities Ltd.* [1983] B.C.L.C. 186, leave to issue proceedings should ordinarily be refused if the proposed action raises issues that can be conveniently decided in the course of the winding up.
35. While in his affidavit sworn on 15th June, 2021 Mr. Martin deposed that he had been advised that this new claim was not an issue that could be conveniently decided in the course of the winding up, the position taken by EBL when moving the application was that it could: but that it was a matter for the liquidator to bring the question before the court.

36. Mr. Crean did not really attempt to explain why the new claim was not agitated long ago, but he did point to the fact that it was the liquidator who had formulated the questions posed by the directions motion. He argued that there was no authority for the proposition that the rule in *Henderson v. Henderson* (1843) 3 Hare 100 applied to a directions application in a winding up and argued that it would not be fair to put the onus on EBL to do so.
37. On the eve of the adjourned hearing of the s. 678 application, the liquidator's solicitors wrote to EBL's solicitors making a number of points. The liquidator's solicitors first declared themselves to be at a loss to understand how EBL could claim an interest in the property over and above that provided for by the 2015 agreement. Secondly, it was said, any claim to a beneficial interest in the property did not give EBL an entitlement to occupy the property. Thirdly, it was said, any equitable interest that EBL might have would rank after the legal charge in favour of Independent Trustee Company Limited. Fourthly, it was said, EBL was indebted to the Company for €282,500 for rent in respect of the period 18th December, 2015 to 17th December, 2020, in respect of which EBL had made no proposal. The liquidator's solicitors went on to demand vacant possession within eight weeks and (without prejudice to the Company's claimed entitlement to a set off for the rent) to offer to hold 5.8% of the proceeds of sale (that is the percentage which €50,599 represented to the purchase price of €845,900) pending the determination of any claim for a beneficial interest in the property. Attached to that letter was an exercise in the estimated outcome of the liquidation which showed that a sale of the property for €2 million would leave Independent Trustee Company Limited short by €383,386.87.
38. In *Crumb Rubber Ireland Limited (In liquidation)* [2020] IEHC 348 O'Moore J. refused an application for permission to bring proceedings against the Company on the grounds inter alia that, absent any assets or insurance that would allow the Company to comply with any order than might be made, the proposed action would serve no useful purpose as far as the applicant was concerned but would be prejudicial to the interests of the preferential creditors who would effectively have to fund it. In this case, as Mr. McCarthy fairly conceded, the ground has not been laid for the liquidator to suggest that the proposed action would be futile. There is simply no evidential basis for the hypothesis which is the basis of the "*Estimated Outcome*", namely that the value of the property is €2 million.
39. As to the liquidator's argument that EBL is indebted to the Company in the sum of €282,500 for rent and liable for mesne rates after 17th December, 2020, I am not immediately convinced that the fact that there is no identity in the claims is a relevant consideration. However, without some evidence of the value of the land, it is impossible to put a value on the claim EBL would make, and so it is impossible to say that it would be extinguished by a set-off.
40. As to whether an order permitting the commencement and prosecution of the proposed proceedings would stymie the sale of the lands (or as to the suggestion that EBL's motive

in bringing the application was to do that), it is accepted by Mr. Crean that EBL's claim ranks after the charge in favour of Independent Trustee Company Limited; it is accepted that the liquidator is entitled to sell the property; and it is effectively accepted that the pursuit of the proposed claim will not allow EBL to remain in possession of Lot 2.

41. The test to be applied to EBL's application is whether it is right and fair in all the circumstances for the court to give consent to the proposed proceedings.
42. I accept the liquidator's argument that the now proposed claim ought to have been brought at the time of the directions motion. It arises out of facts then known to EBL. I am bound to say that I am not altogether sure why the now proposed claim was not previously articulated, and I am satisfied that it was not unfair to EBL that the liquidator did not previously identify an issue by reference to a claim which had not been made. I accept that the now proposed claim is inconsistent with the claims already made but it seems to me that alternative claims may often be inconsistent with one another. Such inconsistency does not necessarily mean that all of the claims are bad or, as in this case, that the last alternative is bad.
43. That said, it is clear that EBL provided at least €40,599 part of the purchase price of the land and was to have had credit for that sum if it exercised the option created by the 2015 agreement. What, if any, credit or allowance EBL should have in respect of that contribution (or the €100,599 contribution which it claims to have made) in circumstances in which the option was not validly exercised is something that remains to be decided.
44. The liquidator's solicitors, as I have said, declared themselves at a loss to understand how, in light of the claims previously made, EBL could seek to advance the claim which it now would. In his affidavit sworn in response to the affidavit of Mr. Martin, Mr. Kirby appeared to come close to inviting the court – on a leave application – to decide that the claim was manifestly bound to fail, but the focus of Mr. McCarthy's submission was that the claim was one which was perfectly suitable to be dealt with in the liquidation.
45. While the liquidator argues strongly that EBL ought not to be permitted to advance the claim which it wishes to advance, his grounds are principally that it should have been made earlier, and that to permit it now would delay the sale of the land and increase the costs of the liquidation. Mr. Kirby's apprehension that the EBL's object or intention might have been to delay the sale is disposed of by the concession made on its behalf that it would not. The fact that the costs of the liquidation have been increased – as I am satisfied that they have been – by the fact that the claim is advanced later rather than sooner is something that I believe can be dealt with by an appropriate costs order.
46. In *Wright-Morris v. IBRC (in special liquidation)* [2014] 3 I.R. 468, Laffoy J. cited with approval a passage from the judgment of Mervyn Davies J. in the English High Court in which it was said that leave to issue proceedings against a company in liquidation should be refused if the proposed action raises issues which can conveniently be decided in the course of the winding up. Part of the liquidator's answer to this application was that the claim was one which could conveniently be dealt with in the course of the winding up, but

he fell short of expressly saying that if the court was of the view that the claim was one which EBL should be allowed to make, he would bring it forward on a motion for directions. While the position taken by EBL in the affidavit of Mr. Martin was that the claim was not one which could conveniently be decided in the course of the winding up, EBL now agrees with the liquidator that it is such a claim.

47. With some misgivings, I am persuaded on balance that EBL should not be shut out from making the claim it wishes to make that it is entitled to an equitable interest in the property commensurate with the proportion of the purchase price which it paid, or an equitable lien over the property for payment of its contribution to the purchase price. Whether EBL needs an order under s. 678 permitting it to issue proceedings will depend in the first instance on whether the claim is contested, and if so whether the liquidator will undertake to apply for directions.
48. I will adjourn EBL's application under s. 678 to allow the parties to consider this judgment.
49. I remind the parties of the two issues identified earlier in this judgment which I said it was not immediately necessary to decide but which may be material to the question of the appropriate procedure. The first of these is whether EBL's contribution to the deposit was, as it contends, €100,499, or, as the liquidator contends, €40,999. The answer to that is presumably to be found in the books and records of the company and the proofs of debt. The second issue is whether the purchase price of the land was €1,005,499, as provided by the contract between the Company and Pierse Contracting Limited, or €845,990, as shown by the assurance of the property. The liquidator's solicitors' letter of 6th July, 2021 suggests that the liquidator agrees that it is the lesser sum.
50. On the adjourned date the court will invite counsel to make submissions as to how any contested issues of fact, if any, may be resolved.