SHERRY-BRENNAN

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Henchy J.
Hederman J.
McCarthy J.

THE SUPREME COURT

1980 No. 280

In the Matter of Brendan J. Sherry-Brennan, a Bankrupt

Judgment of Henchy J. delivered the 26 July 1983

New Less.

I am satisfied that, in both law and common sense, the conclusion reached by Hamilton J. in the High Court is sound and should be upheld.

The essential features of the case seem to be as follows. Brendan J. Sherry-Brennan ('The bankrupt') was the registered owner of the small plot of ground at Camolin, Co. Wexford, on which the licensed premises known as The Pike Inn stands. He was at all material times prior to the sale of the premises the holder of the excise licence issued for the sale of intoxicating liquor for those premises.

The bankrupt's adjudication as a bankrupt took place on the 6 December 1976 and on the 10 December 1976 he was given permission by the Bankruptcy Judge to sell the licensed premises as a going concern. This permission to sell and the implementation of that

permission by the bankrupt were assented to by the official assignee and by the interested parties who appeared in the proceedings, without prejudice to any claims they might subsequently make against the purchase money.

The sale duly took place. The premises with the licence attached realized as a going concern £42,000 and the bankrupt endorsed the licence over to the purchaser. The purchaser is now the registered owner and the licensee.

This litigation is concerned with the correct distribution of the £42,000. The difficulty arises because at the time of the sale there were four burdens registered against the property:

(1) an instrument of charge in favour of Equity Securities Ltd.;

(2) an instrument of charge in favour of the Bank of Ireland;

(3) an instrument of charge in favour of Michael B. O'Cleirigh;

and (4) a judgment mortgage in favour of Allied Irish Banks Limited. No dispute has arisen as to the existence of those charges or as to their priority inter se. The sole dispute derives from the contention of the official assignee that the licence was not captured by any of the registered charges. If he is correct in that contention, then the part of the sale price of £42,000

attributable to the licence would be available for the unsecured creditor; otherwise the whole of the £42,000 would go towards the payment of the secured creditors.

The crucial factor, it seem to me, is that the licensed premises, with the benefit of the licence, has been validly sold to the purchaser for £42,000. That is an accomplished and irreversible fact. It is well-established law that the premises could not have been sold for a particular figure to the purchaser and the licence for a further figure to another person. The cases (the most recent of which is the decision of this Court in Macklin v. Greacen 1982 I.L.R.M. 182) show that an intoxicating liquor licence may not be sold as an item of property with a viable existence separate from the premises. But that point is irrelevant and moot in this case. The fact is that the premises and the licence were sold as a single entity, and it would be idle and speculative to attempt at this stage to apportion the purchase price between the amount attributable to the premises and the amount attributable to the licence. All the probability is that the purchaser never approached the purchase in that way. As is well known, the normal consideration in

determining the price in the sale of a licensed premises is the cash turnover of the premises as a licensed premises and as a going concern.

As is to be said about most of the cases to which we have been referred, the case of Irish Industrial Building Society v. O'Brien 1941 I.R. 1 (on which counsel for the official assignee much relied) was, unlike the present case, concerned with a pre-sale situation. The issue was whether the building society as judgment mortgagees of the judgment mortgagor's licensed premises were entitled to sell the premises with the benefit of the publican's licence and to compel the judgment mortgagor to hand over the licence. Reversing Gavan Duffy J., the Supreme Court held that in the absence of any statutory or contractual duty on the debtor to endorse or hand over the licence on a sale by the court, the sale would have to be confined to the premises without the licence.

Since none of the registered instruments of charge or the judgment mortgage expressly professed to affect this licence, it may be that, if the point had been taken in due time, it could be said that it was only the premises without the licence that should have been allowed to be offered for sale by the bankrupt. But that

was not the case. All interested parties, including the official assignee, agreed that the premises and the licence should be sold as an entity. Admittedly this was without prejudice, but it produced a price which cannot now be measured against what the premises would have realized if sold without the licence. For all we knew, the premises without the licence might have realized very little, or even have failed to find a purchaser at all.

In my opinion the official assignee, having agreed to allow the bankrupt to sell the premises on a particular basis, and thereby having permitted a preferential price to be realized, is now estopped from overthrowing the basis of that sale and replacing it with a hypothetical and unreal sale which would assume a purchaser of the premises and a separate purchaser of the licence. An apportionment of the purchase price between the premises and the licence is now both legally and factually impossible.

I would dismiss this appeal.

Approved
S. H.
27-7-83