Neutral Citation No. [2013] NIQB 95 | *Ref:* **DEE8995**

Judgment: approved by the Court for handing down | *Delivered:* **17/09/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN

BANK OF IRELAND

and

EDENEAST LIMITED, in liquidation,
THOMAS COSGROVE
And THOMAS MAGUIRE

_____

DEENY J

Application

[1] In this matter of the Governor and Company of the Bank of Ireland, plaintiff and Edeneast Ltd, in liquidation, Thomas Cosgrove and Thomas Maguire, defendants a summons was issued on 11 July 2013 by Arthur Cox, Solicitors, for the plaintiff. That application was for an order continuing and extending the appointment of John Hansen as receiver and manager of the premises and property described in the second schedule to the originating summons, notwithstanding the failure of the said John Hansen to seek permission of the court to act as manager after 1 March 2011. The summons goes on to seek the permission of the court to enter into a lease with Wolf Inns Ltd relating to the premises. The third and fourth paragraphs of the summons are not applicable on this occasion.

[2] The premises in question are those at 163-165 Ligoneil Road, Belfast, and known as the Village Tavern. They are premises licensed for the sale and consumption of intoxicating liquor on and off the premises. The licensee and owner was Edeneast Ltd. It is indebted to the Bank of Ireland in the sum of £385,146. The company got into difficulties and subsequently as I have said went into liquidation. The Bank sought an order appointing Mr Hansen as receiver and manager and that

order was made by the Master on 10 May 2010. It was necessary because the particular form of security held by the Bank did not give the receiver and manager under the security sufficient powers to operate the premises satisfactorily. However, the order of the learned Master as amended gave the receiver authority to act until and not after 1 March 2011. Unhappily this was overlooked by him and those advising him until very recently. The occasion was that he realised that he needed the consent of the court to enter into a lease with the third party, whom I have mentioned, Wolf Hill Inns Ltd, and learned junior counsel pointed out that in fact his power to act as receiver had expired.

[3] The application has come before me rather than the Master because it is a novel one, as Mr William Gowdy of counsel candidly acknowledges. He faces perhaps two difficulties on behalf of Mr Hanson in bringing this application. Firstly, there is a decision of Neville J. in Re Wood Green and Hornsey Steam Laundry Ltd [1918] 1 Chancery 423. That was a case in which a receiver and manager of a laundry had not terminated his activities forthwith following a sale. Nevertheless, when he came to lodge his first and final account, he having been appointed by the Court as the report records, the registrar stated as follows:

> "Notwithstanding the order of July 28 1916 the receiver continued to manage without the leave of the court after 1 September 1916, but I have in my discretion allowed the items of payments in respect thereof."

[4] Counsel for the defendant companies submitted that was unlawful. Counsel for the receiver sought to justify it and Neville J. in a single paragraph recorded as follows at 425:

> "In my opinion it is of the utmost importance that the orders of the Court should be strictly complied with in these matters and that receivers and managers should not act on their own responsibility and afterwards come to the court to ratify what they have done. I do not understand what the registrar means when he says that he has allowed these items in the exercise of his discretion, and I am not satisfied with the certificate as it is at present, and I order it to be sent back to the Registrar with a direction that he is to disallow all items of expenditure by way of management incurred after the Saturday following the date of the order of November 17 1916, and I also disallow any remuneration of the receiver as manager from 1 September 1916, when the leave to continue the management of the business expired."

[5] Mr Gowdy invites me to distinguish that authority. First of all it is clearly not on the express point made here. Secondly, it can be seen that the circumstances were a little unusual. The receiver should have ceased acting on 1 September but after that date the court made an order for sale on November 7 1916 when strictly speaking he was functus officio and presumably the matter was not adverted to. Nevertheless, the learned Judge in his remittal of the matter back to the registrar disallows all items of expenditure by way of management occurring after the Saturday following the date of the order of November 7 1916. It seems to be therefore that his Lordship was allowing some costs to the receiver after that date for the obvious reason that the court had in fact implicitly, perhaps, extended his time by giving him an order for sale of the premises in question.

[6] I say, with less confidence, that I am left uncertain by the report, which is fairly short, even including counsel's submissions, as to whether the judge's disapproving of the registrar doing this by reference to the "Court" means that the matter should have come before a judge of the Chancery Division for extension of time. One notes that the Court made the order for sale of the property and the matter is back before him and he refers to the orders of the Court. His general dictum, of course, is quite right. Receivers and managers should not act in disregard of an order of the Court. The orders of the court are there to be obeyed and will normally and obviously be enforced by the Court. It seems to me that the learned Judge's remarks are not fatal to the application of Mr Gowdy.

[7] The application here is within the general genus of an application to extend time. The leading authority on that issue in this jurisdiction is the decision of the Court of Appeal in Davis and Northern Ireland Carriers [1979] NI 19 and the judgment of Lord Lowry. I myself have commented on this as have other judges but it remains a valuable statement of the principles for the court although there under Order 64 Rule 7 i.e. it was relating to an appeal. So again it is not fully applicable to this situation. Insofar as the principles are of assistance some of them are unhelpful to the applicant here because this is a retrospective application. There is no good reason except oversight for the error and it is only noticed some two years after the expiry. So those factors are against the applicant and cause the second difficulty for the applicant.

[8] On the other hand in favour of the applicant is the third principle enunciated by Lord Lowry i.e.:

> "the effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs."

[9] Now in this instance the only possible opposite parties have been addressed in this matter. The Bank of Ireland is the lender and Mr Hanson is the receiver on its behalf and it joins in the application. Edeneast Ltd is in liquidation and the Official Receiver is the liquidator and by letter of 16 September 2013 he confirms that he has

no objection to the application and asks that that letter be drawn to the judge's attention at this hearing on 17 September. The two men, Mr Cosgrove and Mr Maguire, who are de facto operating the public house and have been for several years, are the directors of Wolf Inns Ltd, the putative lessee but they were represented today by Mr John Coyle of counsel and he expressly consented to the application being brought. If the application is permitted and the court goes on to consent to the lease then a rent of £18,000 per annum is obtained on foot of a lease to be entered into lasting 12 years 6 months with rent reviews annually. That rent is subject to value added tax. Therefore the lender will receive some amount in return and on the strength of its security. The only possible party that might be said to be prejudiced are the two men who are currently operating the public house for free but they are expressly consenting to it.

[10] If the application is refused costs will be incurred, this lease certainly cannot be entered into timeously and the lender will be put to further loss. If it is granted then its losses will be to some degree mitigated and that is a powerful factor in favour of the grant of the application.

[11] I make some further observations. The industry of Mr Gowdy located a reference in Atkins Court Forms, Volume 33(1) Receivers, at paragraph 107. Inter alia the learned authors write as follows:

> "A receiver is usually only appointed as manager for a specific period, other than in partnership cases. Where the appointment of a manager is for a limited period, application for any necessary extension must be made in good time before the expiration of that period. A receiver who purports to act as manager after the authorised period has expired many have its remuneration and liabilities for the excess period disallowed."

and they cite that authority of Wood Green _____

> "If however, the period of management is inadvertently allowed to expire before a receiver's management duties have been completed, an application may be made for a "white washing" order reappointing the receiver as manager and authorising the allowance of all proper acts of management performed by him during the unauthorised period."

[12] The authors refer not to an authority for that proposition but to Form 42 of the text book. So that is authority for the proposition that this has happened before in England and Wales and is dealt with. My own researches would lend further support to Mr Gowdy's submissions. This application seems to me to fall within

Order 3 Rule 5 of the Rules of Court of Judicature. I will read that insofar as it is relevant:

> "Extension etc of time:
>
> 5(1) the court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings;
>
> (2) the court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period."

[13] It is not necessary to deal with paragraphs 3 and 4. The court has express power to do this on such terms as it thinks just and it may do so even if, as here, the application for the extension is not made until after the expiration of that period. Furthermore, I see in Floyd and Grier, Voluntary Liquidation and Receivership - A Practical Guide, 4th Edition, at paragraph 14-05 the following paragraph relating to the equivalent English insolvency provisions:

> "It has been held that the power to apply to the court under Section 35 is sufficiently wide to include an and the court could make a declaration with regard to such remuneration where there is a dispute between the receiver and the debenture holder.(Re Therma-stor Ltd [1997] BCC 301.)"

[14] Now if the power is sufficiently wide for the court to intervene, where it did not appoint the receiver, to determine the remuneration between the two parties, it might be thought that the court had the power to deal with a receiver whom the court had appointed. And likewise and following on from that I think it appropriate to refer to Article 45 of the Insolvency Order (Northern Ireland) 1989. One finds a group of paragraphs in Part 4 of the Order relating to receivership. Articles 40 to Article 42 give the court power to appoint an official receiver. Article 43 and the subsequent articles relate to receivers and managers appointed out of court. I observe that there is no provision relating expressly to an application to the court by a receiver appointed by the court. Mr Gowdy submits that is because it is within the general equitable jurisdiction of the court. Applications to the High Court for directions relate to receivers or managers appointed out of court but they allow the court to give such directions and make such order "as it thinks just". Perhaps again that is not unhelpful by way of analogy although at the moment I do note that there is no express power there in this matter. It would be paradoxical if the court could

make such orders regarding receivers and managers it had not appointed but be unable to do so regarding receivers and managers it had appointed.

[15] Taking these matters together I can see no prejudice to anyone in granting Mr Hanson's application. I will rule on costs in a moment but it may be that that does not give rise to difficulty. I am persuaded that the court has a power to make a retrospective appointment of a receiver, even when, as here, a considerable period has elapsed, on the particular facts that apply to this application. I therefore am ready to make the appointment by way of confirmation and continuance of the order dated 10 May 2010 with effect from 2 March 2011 until the date hereof and until 10 December 2013 but not thereafter without the permission of the court.

[16] The receiver seeks consent to lease the properties to these two men who have been operating it. I have indicated briefly the terms of the lease. I have the affidavits both of Mr John Hansen, Insolvency Practitioner, and Mr John Martin FRICS opining in favour of that leasehold arrangement and I am persuaded that it is a proper one and the court grants its consent to that transaction. The receiver and manager should give security by a date I shall fix or cease to be receiver and manager but otherwise the Order will issue in the way discussed with counsel.