Neutral Citation: [2017] NICh 10

Ref:	**HOR10257**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**28/03/2017**

2016/79310

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between

ULSTER BANK LIMITED

Plaintiff/Respondent

and

DACE PROPERTIES LIMITED

Defendant/Appellant

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HORNER J

Introduction

[1] This is an appeal by DACE Properties Limited ("DACE") from a decision of Master Hardstaff dated 19 January 2017. He ordered in the absence of any representation from DACE or attendance of anyone on its behalf that DACE deliver up possession of four properties, namely 1 Hughenden Avenue, Belfast, 94 Cliftondene Crescent, Belfast, 87 Skegoneill Avenue, Belfast, and 35 Slievecoole Avenue, Belfast ("the Properties").

Background Facts

[2] The uncontested sworn evidence before this court, as before the Master was from Mr Steven Kennedy who was a bank manager of the Bank, but who is now retired. His evidence was to the effect that:

(a) DACE had entered into all monies charges in respect of the four properties.

(b) The sum due in respect of five of DACE's loan accounts, namely numbers 05290440, 05290523, 05290606, 05290879 and 82943218 together with the debit balance due on the current account 82943051 was at the time of the issue proceedings £752,520. At the time he swore the affidavit on 24 November 2016 the sum due was £757,471.89. At today's hearing the sum due was £762,656.84.

[3] The original charges executed by DACE were produced to the court. They were not the subject of any challenge. They are all monies charges.

[4] The evidence before this court is that all four properties are occupied by tenants. Any rent is being paid to DACE and DACE is not accounting to the bank in respect of any of the rent it receives.

[5] DACE is in breach of the terms of the facilities granted to it and the bank called in its indebtedness on 29 September 2014, that is about 2½ years ago.

[6] The decision of Master Hardstaff is dated 19 January 2017 and it was appealed on 24 January 2017. The grounds of the appeal were said to be:

(a) Breach of Article 6 of the right to a fair trial.

(b) Rushed (sic) to Justice.

(c) Mistake.

[7] Ms O'Callaghan who is a Director of DACE appeared. She insisted on being addressed as a woman, Eileen Martina, and claimed to be the "sole beneficiary of Eileen O'Callaghan, Crown Trust and the Constructive Trust, DACE Properties Limited". She asked if she could be assisted by Mr Scullion, who said that he wanted to help her as a friend. I explained that if he wanted to sit beside her in the benches reserved for counsel he would be able to do so only if he acted as a McKenzie Friend. If he was simply her friend, then he would have to sit with the general public. He then asked to act as her McKenzie Friend and confirmed that he had no financial interest in the outcome. In truth, during the course of proceedings whenever Ms O'Callaghan was asked a question, she inevitably sought to be prompted from Mr Scullion before she answered.

Discussion

[8] The first issue which had to be resolved was whether Ms O'Callaghan could represent DACE in these proceedings. The solicitor who represented the bank submitted that there had to be exceptional circumstances before a director could act as a lay advocate for a company.

[9] He referred to Order 5 Rule 6(2) of the Rules of the Supreme Court (NI) 1980 which provides:

> "Except as provided by paragraph (3) or under any other statutory provision, a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor."

[10] He relied on the comments of Scott J in Arbuthnot Leasing International Ltd v Havelet Leasing Ltd and ors [1990] BCC 627 where he says:

> "With the guidance given by those authorities, which collectively are of long standing, are consistent with one another and are, as (counsel) impressed on me, of a character and weight such as to make it impossible for me to contemplate either overruling or ignoring them, the position seems to me to stand as follows. First, 012, r1 is a statutory effect and prohibits a body corporate from taking a step in an action otherwise than through a solicitor. Second, the courts have an inherent power to regulate their own procedure and a judge in an individual case has, as part of that inherent power, the power to permit an advocate to appear for a litigant if the exceptional circumstances of the case so warrant. No limit can be placed on what might constitute sufficient exceptional circumstances. But third, subject to any exceptional circumstances that might require a particular individual in the interests of justice to be allowed to appear as advocate, the general practice of the court is that body's corporate cannot appear by the directors but only by solicitors or counsel."

[11] In Radford v Samuel and Another [1993] BCC 870 Bingam MR quotes Forbes J at first instance as saying:

> "It is quite clear, in my judgment, that the only circumstances in which those sort of exceptional matters might arise are where there are substantial grounds for believing that some application or step in the proceedings could not be brought or put fairly before the court for some reason or other unless somebody on behalf of the company had an opportunity to speak for the company. In very rare circumstances the court might be able to recognise that it was necessary to allow a limited amount of address to the court to be made by, for example, a director of the company and would take steps

> appropriate to the circumstances to allow that to be done."

Bingam MR himself went on to comment:

> "It is worthy of note that provisions which I have cited from the Rules which require corporations to appear through solicitors are not merely rules for the sake of having rules but rest on a basis of fairness and good sense, which indeed, as I understand, Mr Corry understood and accepted. A limited company, by virtue of the limitation of the liabilities of those who own it, is in a very privileged position because those who are owed money by it, or obtain orders against it, must go empty away if the corporate cupboard is bare. The assets of the directors and shareholders are not at risk. That is an enormous benefit to a limited company but it is a benefit bought at a price. Part of the price is that in certain circumstances security for costs can be obtained against a limited company in cases where it could not be obtained against an individual, and another part of the price is a rule that I have already referred to that is that a corporation cannot act without legal advisors. The sense of these rules plainly is that limited companies, which may not be able to compensate parties who litigate with them, should be subject to certain constraints in the interests of their potential creditors."

[12] However, subsequently Lord Woolf MR in the Access to Justice Final Report made the following recommendation:

> "The court should normally exercise its discretion in favour of allowing an employee of a company to take any steps on behalf of the company which a litigant in person could take in High Court or County Court proceedings."

[13] This translated into CPR39.6 which states:

> "A company or other corporation may be represented at trial by an employee if –
>
> (a) the employee has been authorised by the company or corporation to appear at trial on his behalf; and
>
> (b) the court gives permission."

[14] A similar rule was brought into effect in Northern Ireland under Order 5 Rule 6(3). In England and Wales Practice Direction 39 para 5 states that Rule 39.6 "is intended to enable a company or other corporation to represent itself as a litigant in person" and goes on to state that permission should be given "unless there is some particular sufficient reason why it should be withheld". In the Admiralty and Commercial Courts Guide it is said that because of the complexity of most cases in the Commercial Court, permission under r.39.6 is likely to be given only in unusual circumstances.

[15] The issue in the instant case is on what basis should a court give permission to a director or an employee to represent a limited company. In Ulster Weavers Home Fashions v Waterfall NI Limited [2013] NI Master 2, Master Bell addressed this issue. He made it clear, quite rightly, that the old "exceptional circumstances" test had gone with the introduction of Order 5 Rule 6(3). He said that in Oyston v Blaker and others [1996] 2 All ER 106 that:

> "Where the words of a statute imposed no express limit on the exercise of a judicial discretion, simply providing that leave was required, the Court of Appeal for England and Wales held that the judge was correct to apply a test of doing what was just in all the circumstances. In this instance I similarly propose to exercise my discretion in a manner which seems to me to be just in all the circumstances."

[16] It is clear in my view that a court should give permission for an employee, whether a director or otherwise, where that director or employee is authorised to represent the company and where it is in the interests of justice. This accords with the overriding objective set out at Order 1 Rule 1(1)(A) of the Rules of the Supreme Court (NI) 1980 which requires the court to "deal with a case justly".

[17] Accordingly, I am of the view that a court should give permission to allow a director to represent a limited liability company where:

(a) the director has been so authorised by the company; and

(b) it is in the interests of justice.

[18] In this case there was no evidence of any resolution of the company authorising Ms O'Callaghan to appear on its behalf. Accordingly, the application failed at the outset. However, even if authorisation had been given, I would not have given Ms O'Callaghan permission to represent the company because the case she intended to make on behalf the company was such that it did not raise a serious issue to be tried, which is a fairly low hurdle to overcome. In fact the case put forward by Ms O'Callaghan on behalf of DACE was unarguable.

[19] Ms O'Callaghan's case, prompted as it was by Mr Scullion was difficult to follow. I understood it to be as follows:

(i) The Crown Trust of Eileen O'Callaghan is a Director of DACE.

(ii) The Crown Trust is a stakeholder.

(iii) Eileen, a woman, is a beneficiary of the Crown Trust.

[20] Eileen, a woman, was looking to establish a settlement and she had written to the bank seeking the same. The bank had not replied. When (or if) the bank replied she would send them her notarized birth certificate. I was at a loss to know how sending the bank her notarized birth certificate would discharge DACE's liability. Her reply, prompted by Mr Scullion, was that as sole beneficiary she was entitled to all the benefits and none of the liabilities of DACE. When I asked her about DACE repaying the money it had borrowed from the bank she said:

(a) There was no money exchanged.

(b) DACE had not repaid the money.

(c) The remedy is for DACE to send the birth certificate to the Treasury.

[21] Her skeleton argument said:

> "1. I, am woman, Eileen Martina, sole beneficiary of the EILEEN O'CALLAGHAN, CROWN TRUST, and the Constructive Trust, DACE PROPERTIES LIMITED, this Legal Title Deed gives me an absolute right to make presentment(s) in this matter; does it not?
>
> 2. I, am woman, Eileen Martina, sole beneficiary of the EILEEN O'CALLAGHAN, CROWN TRUST and the Constructive Trust, DACE PROPERTIES LIMITED, i am here to settle this matter by discharging this debt by using my Trust Exemption."

[22] Attached to the skeleton argument was her birth certificate which I assume is the "Trust Exemption".

[23] There can be no doubt that DACE's defence to the bank's claim as articulated by Ms O'Callaghan or Eileen, a woman, was legal nonsense. It was devoid of legal or factual merit and unarguable. It did not begin to raise a serious question to be tried. It does appear to bear some resemblance to some of the claims raised by the

"Freemen–on–the-land" and considered at length by the associate Chief Justice J D Rooke in Meades v Meades [2012] ABQB 571. In any event, whatever the origin of the proposed defence, it has no prospect of success.

Conclusion

[24] Accordingly, having considered the papers in detail I am satisfied that:

(a) Substantial sums were lent to DACE secured on four all monies charges in respect of the Properties.

(b) DACE has refused or been unable to repay the indebtedness which is due and owing to the bank and secured by the charges.

(c) DACE continues to receive rent for the Properties and has not accounted for the same to the bank.

[25] I affirm the order of Master Hardstaff without hesitation. The bank has an unanswerable claim to the relief sought. Costs will normally follow the event. In the circumstances I do not consider that it is appropriate to grant a stay.