Neutral Citation No. [2003] NICh 3 | *Ref:* **GIRF3917**

Judgment: approved by the Court for handing down | *Delivered:* **20/05/2003**
(subject to editorial corrections)

2003 No. 274

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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BETWEEN:

SPANBOARD PRODUCTS LIMITED

Plaintiff;

-and-

ERNEST CHARLES ELIAS, STEPHEN EDWARD ELIAS AND DAVID ANDREW ELIAS TRADING AS ELIAS ALTRINCHAM PROPERTIES

Defendants.

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GIRVAN J

[1] This is an application by the plaintiff company ("the company") for an order that the defendants be restrained from presenting a winding up petition against the company. This follows the service by the defendants on the company of a statutory demand dated 4 April 2002 in which the defendants demands payment of the sum of some £163,000 allegedly due as service rent payable by the company under the terms of a lease dated 20 February 1992. This lease was originally for a term of five years. It was followed by an extension of lease and supplemental lease both dated 2 July 1993 which respectively extended the terms of the 1992 lease to five years from 10 February 1997 and increased the plaintiff's take of the premises.

[2] The affidavit in support of the application exhibited the lease documentation and set out the relevant provisions of the lease. Of particular relevance are the provisions contained in Clause 7. Clause 7.3 provided:

> "The landlord shall as soon as convenient after each computing date prepare an account showing the annual expenditure for that financial year and containing a fair summary of the expenditure referred to therein and upon such account being certified by the accountant the same shall be conclusive evidence for the purposes of this lease of all matters of fact referred to in the said account."

Clause 7.4 provided:

> "The tenants shall pay for the period from the Rent Commencement Date to the next computing date the Initial Provisional Service Charge, the first payment being a proportionate sum in respect of a period from and including the Rent Commencement Date to and including the day before the next quarter day to be paid on the date hereof, the subsequent payments to be made in advance on the usual quarter days in respect of the said quarters."

Clause 7.5 provided:

> "The tenants shall pay for the next subsequent financial year a provisional sum calculated upon a reasonable and proper estimate by the surveyor acting as an expert and not as an arbitrator at what the annual expenditure is likely to be for the financial year before equal quarterly payments on the usual quarter days."

It is common case that the landlords never activated Clause 7.5.

In Clause 7.7 it was provided that:

> "If at any time during the term the total property enjoying or capable of enjoying the benefit of any of the services be increased or decreased on a permanent basis, or the benefit of any of the services be extended on life basis to any adjoining or neighbouring property, the percentage referred to in Clause 1.12 shall be varied with effect from the computing date following such event by agreement between the parties, or in default of agreement within three months of the first proposal for variation made by either party as shall be determined to be a fair and

> reasonable variation reflecting the event in question by a surveyor (acting as an expert and not as an arbitrator) except that nothing herein contained shall imply an obligation on the part of the landlord to provide the services to any adjoining or neighbouring property."

[3] It was not until 22 March 2000 that the defendants sent to the company service rent certificates for the years 1992-1998 together with an invoice dated 21 March 2000 for the amount of £109,385.92 which included VAT. The correspondence passing between the parties indicated that the company raised a number of contentious issues which remain unresolved. The company contends that the defendants failure to observe Clause 7.3 of the lease has prejudiced the company who will be unable to realistically assess service rent claims dating back to 1992. The company asserts a limitation defence to at least part of the claim for service rent. Mr Humphreys on behalf of the company argues that the company is entitled to rely on Article 15(a) and Article 30 of the Limitation (Northern Ireland) Order 1989 to resist any claim for rent going back more than six years prior to the institution of any proceedings (none of which have yet been instituted). The company contends that the defendants have failed to properly apportion the service charge in relation to the area leased to the plaintiff having regard to the take of other tenants of the premises. The company relies in particular on Clause 7.7 and argues that since the parties have not agreed the issue of apportionment for the purposes of that clause it was incumbent upon the defendants to require a surveyor to determine the matter. This they have failed to do. The company contends that the defendants have simplistically apportioned the service rent disregarding changes within the layout of the premises occupied by the company and other tenants and it is argued that the 68% figure appearing in Clause 1.10 and 1.12 needs to be adjusted in accordance with the provisions of Clause 7.7. It is further contended that landlords are wrongfully seeking to recover staff costs in relation to Mr Foot, estate manager and Mr Bond service engineer, which are not recoverable under the relevant provisions of the schedule other than under the provisions of paragraph 11 of the relevant schedule (which deals with "other services") which have an imposed cap of £1,000. It is contended that Mr Foot and Mr Bond were employed subsequent to entering into the 1992 lease without notification to the plaintiff. It is further argued that the defendants have persistently failed to provide supporting documentation in relation to electricity supplies.

[4] In an application to restrain the presentation of a winding up petition such as the present the applicant must demonstrate that it would be an abuse of process for the defendants to proceed with the petition. It is thus necessary for the company to establish that if the defendants presented a winding up petition it would be bound to fail. It is clear from the authorities such as Mann v Goldstein [1968] 2 All ER 769 that if the debt claimed by a petitioner

is disputed on grounds showing a substantial defence requiring investigation the petitioner will be unable to establish that he is a creditor and accordingly does not have locus standi to present the petition. When the company is solvent the proper course is for the petition to bring on an action for the debt (see Sir George Jessel MR in Niger Merchants Limited v Capper (1877) 18 Ch D 557 at 559). "A winding up petition is not to be used as machinery for trying a common law action" (per Sir William James VC in Re Imperial Guardian Life Assurance Society (1869) LR 9 EQ 447 at 450).

[5] Mr Orr QC on behalf of the defendants argues that in the present case there is clearly a debt due which exceeds the sum of £750 (the statutory sum over which a winding up petition may be presented by a creditor). While there may be dispute as to the sum which may finally be shown to be due he contends that even taking account of the various arguments raised by the company there is a substantial sum manifestly due in owing full service rent. The amount currently claimed by the defendants totals £155,868.15 plus VAT together with interest (less some small payments paid on account). Mr Orr contends that even if one accepts without conceding that there is a limitation defence prior to 1996 and accepts (again without conceding) the arguments as to apportionment and in relation to electricity charges and staff charges there is a sum due in excess of tens of thousands of pounds. He was not able to give a detailed final assessment of what he contends would be the minimum indisputable debt.

[6] In Re Tweeds Garages Limited [1967] 1 All ER 121 Plowman J held that where there is no doubt that the petitioner is a creditor for a sum which would otherwise entitle him to a winding up order a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to the petition. That case is often cited as authority for the proposition that a dispute as to the precise amount due is not a sufficient answer to the petition. However it is important to bear in mind that in that case the company in question was demonstrated to be insolvent and there was clearly a debt due to the petitioner by the company which was seeking to reduce the debt claimed by disputed deductions. In Re Brighton Club and Norfolk Hotel Co Ltd (1865) 35 Beav 204 Sir John Romilly MR held that the provisions of the Companies Act 1862 Section 80 for winding up a company in default of its paying a debt three weeks after notice did not apply where there is bona fide dispute as to the amount due though there may be an admitted debt exceeding £50 the then statutory sum that could lay the basis for a winding up petition by a creditor. Plowman J distinguished that case from the case before him on the grounds that unlike in the case before him Sir John Romilly was dealing with a statutory demand case and in that case it was shown that apart from alleged statutory demand the company was not insolvent.

[7] In this case there is no evidence of insolvency in relation to the company apart from the non-payment of the disputed statutory demand and

the indications point to it being solvent. I am satisfied that there is genuine and real dispute on a number of significant factors which if established would significantly reduce the debt claimed by the defendants. In addition the company has raised a genuine and real issue as to the effect of Clause 7.7 which might at trial lead the court to conclude that the defendants (already in breach of their obligations under Clause 7.3) have failed to fulfil the necessary steps to lead to the valid formulation of a claim for service rent.

[8] I am accordingly satisfied that there are triable issues between the parties which render the service of a winding up petition an inappropriate procedure for the defendants to adopt. According the company is entitled to an injunction to restrain the defendants from presenting a winding up petition.