

CROWE v ESB

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THE HIGH COURT

1982 No. 7544P

BETWEEN:

W. AND L. CROWE LTD. AND LAURENCE CROWLEY

Plaintiffs

and

ELECTRICITY SUPPLY BOARD

Defendants

-AND-

1982 No. 7545P

BETWEEN:

IONOS LIMITED AND LAURENCE CROWLEY

Plaintiffs

and

ELECTRICITY SUPPLY BOARD

Defendants

Judgment of Mr. Justice Costello

Delivered the 9th day of May 1984

Appointment of Receiver and Manager. Receiver and Manager prepared to be personally responsible for future electricity charges but unwilling to discharge debts by company on existing supply contract. Existing supply contract terminated by E.S.B. Whether Board under a statutory duty to enter into new supply contract with Receiver.

1.

I tried these two actions together as they involved the determination of the same issue, namely, whether there is a statutory duty on the Electricity Supply Board to enter into a new contract for the supply of electricity with the receiver of a company which, at the date of his appointment, had failed to pay arrears due to the Board under an existing contract. The facts of each case are not identical, but the differences do not affect the point of law which falls to be considered.

The Plaintiff companies in the two actions were companies in the Gallagher group of companies, a group engaged in different aspects of the construction industry whose spectacular collapse attracted a good deal of public attention a couple of years ago.

W. and L. Crowe Ltd. (hereinafter "Crowe") carried on business manufacturing trusses and machining timber at premises at Kilshane Cross, Finglas. The company had entered into a contract with the Board for the supply of electric current to these premises but owed on the 30th April, 1982, the day on which Mr. Laurence Crowley (the second-named Plaintiff) was appointed receiver, and receiver and manager, arrears of charges amounting to £9,459.37. After his appointment Mr. Crowley continued the

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company's business for a number of months, eventually disposing of it and the company's assets to a purchaser. The company's contract with the Board was dated the 21st January, 1972. The contract incorporated the Board's current terms and conditions. Clause 16 of those conditions gave the Board the right to disconnect supply without notice if a consumer failed on demand to make any payment due. The Board's right to determine this contract is not in question.

On the 3rd May Mr. Crowley notified the Board of his appointment and added:

"Please arrange to open a new account in my name as receiver. I shall be responsible for all services used by me from the date of my appointment".

The Board's solicitors replied on the 7th May referring to the fact that Mr. Crowley had been appointed receiver of all the companies in the group, that at that time the companies (including Crowe) owed the Board £29,958.38 and stating that as a condition for the continuance of electricity supplies to the companies at the addresses specified the Board required the immediate payment of that sum and an undertaking

from Mr. Crowley to pay all future bills during the continuance of the receivership. Mr. Crowley was informed that if he did not agree to these requirements by the 14th May supplies would be discontinued without further notice.

Mr. Crowley believed that the Board was not entitled to insist on the requirements in the letter of the 7th May and refused to agree to discharge the debts incurred prior to his appointment, although he was fully prepared to undertake to discharge personally any of the Board's charges arising during the receivership. On the 26th May supply to Crowe's premises was discontinued. On the 28th May these proceedings were instituted and an application for an interlocutory injunction was brought. On the 2nd June 1982 the Board undertook to continue supply until the determination of the proceedings and the Mr. Crowley undertook to set aside out of the company's assets a sum sufficient to meet the amount of arrears owing to the Board at the date of his appointment and to discharge the costs of electricity incurred from the date of his appointment until further Order.

In the case in which Ionos Ltd. are Plaintiffs
 Mr. Crowley was appointed receiver over the company's

assets pursuant to a charge in a deed of mortgage of the 26th February 1980. The principal asset, a property known as Straffan House, Co. Kildare, was the private dwelling house of Mr. Gallagher (the ultimate beneficial owner of the companies' shares) and the contract for the supply of electricity to it was entered into by a company known as Gallagher Group Properties Ltd. There was due to the Board on foot of this contract the sum £5,959.10. The Board's attitude to the receiver's refusal to pay off these arrears was as I have just described, and proceedings were instituted by Ionos Ltd. and Mr. Crowley which took the same course as that/instituted by Crowe. Mr. Crowley as receiver allowed Mr. Gallagher to remain on in Straffan House until the premises were eventually sold.

The Plaintiffs do not now seek any relief by way of injunction and they do not deny the right of the Board to terminate the existing contracts. Their claim is that Mr. Crowley is, as both receiver and as receiver and manager, entitled to obtain a new contract from the Board. This right is not a contractual one but arises, it is said, from the Board's obligations under the Electricity (Supply) Act 1927.

5.

To assist in an understanding of the provisions of the 1927 Act and an appreciation of the authorities to which I have been referred a brief reference should be made to the earlier legislation which the 1927 Act repealed. The Electric Lighting Act, 1882, made provision by which the Board of Trade could by provisional order authorise any local authority, company or person to supply electricity for any public or private purpose within a specified area, the provisional order remaining in force until confirmed by Act of Parliament. The Act contained detailed provisions relating to the powers of local authorities and undertakers empowered to supply electricity under the Act, including a section, section 19, which reads as follows:

"Where a supply of electricity is provided in any part of an area for private purposes, then except insofar as is otherwise provided by the terms of the licence, order, or special Act authorising such supply, every company or person within that part of the area shall, on application be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled under similar circumstances".

The whole of the 1882 Act was repealed by the 1927 Act, but section 19 was re-enacted with minor amendments as section 93. I will refer to this section in greater detail later in this judgment.

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The next Act to which I should refer is the Electric Lighting (Clauses) Act, 1899. This was an Act "to incorporate in one Act certain provisions usually contained in Provisional Orders" made under the 1882 Act by the Board of Trade. It provided that the provisions contained in the Schedule would form part of every Provisional Order unless expressly excepted by the Order; also, that they should be contained in any special Act confirming a Provisional Order unless expressly excepted. Section 27 of the Schedule placed a very explicit and clear statutory duty on undertakers in the following terms:

"The undertakers shall, upon being required to do so by the owner or occupier of any premises situate within fifty yards from any distributing main of the undertakers give and continue to give a supply of energy for those premises"

This obligation was subject to a number of conditions of which one was that the owner or occupier who required a supply should serve a notice on the undertaker specifying, inter alia, the premises to which supply was required and enter into a written contract (if asked by them to do so) with the undertakers in relation to payment for the proposed supply.

A number of points about this section are to be noted.

Firstly, this specific obligation imposed on undertakers by it had not been contained in the 1882 Act. Secondly, the obligation to supply electric current (i.e. an obligation to supply the "owner or occupier" of premises) was expressed in identical terms to the obligation on undertakers who were authorised to supply gas under section 11 of the Gasworks Clauses Act, 1871 (to which I will refer in a moment)

Thirdly, the 1899 Act was repealed by the 1927 Act and the obligation contained in section 27 of the Schedule was not re-enacted or no comparable obligation imposed on the Board.

I was referred to two English authorities on the point that falls for consideration in these actions. Section 11 of Gasworks Clauses Act, 1871 was considered in Paterson .v. Gas Light and Coke Co. (1896) 2 Ch. 476. That was a case in which receivers were appointed over a company which at the time of their appointment owed a gas undertaker £90 for gas supplied. The gas company threatened to cut off the supply unless the debt was paid. The receivers then instituted proceedings to restrain it from so doing, claiming that they were entitled by virtue of section 11 of the 1871 Act to a

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supply of gas. They succeeded in the High Court, Kekewich J. holding that the receivers and managers were in the position of new tenants or new occupiers and so entitled to a new supply. He was reversed in the Court of Appeal, the Court holding that the receivers and managers were not "owners and occupiers" of the premises within the meaning of section 11 and so the gas company owed them no obligation under the section.

A receiver had a more successful outcome in Granger v. South Wales Electrical Power Distribution Co. 1931 I Ch. 551. That was a case in which a colliery company owed a sum of money to an electrical distribution company at the time a receiver was appointed. The distribution company threatened to cut off supplies unless payment of the arrears was guaranteed. The receiver obtained an injunction from the High Court restraining them from doing so. The judgment of Bennett J. makes clear why the receiver in Granger was successful whilst the receiver in Paterson failed: namely, the obligation to supply electricity imposed on the electrical distribution company by

the private Act under which it operated was different to the obligation to supply gas under section 11 of the 1871 Act. The private Act in question was the South Wales Electrical Power Distribution Company Act, 1900. It did not incorporate section 27 of the Electric Lighting (Clauses) Act, 1899 which I have just quoted but instead provided by section 40 that the company "shall give a supply of energy to any person who requires a supply upon that person entering into a binding agreement..." as provided in the section. The court held that the receiver was a "person who requires a supply" within the meaning of the Private Act, and as the words "being an owner or occupier" of the premises were not contained in the section and should not be read into it the case was different to the Paterson case considered earlier by the Court of Appeal

It is obvious that neither of these two cases helps the receiver in the instant cases. The receiver/plaintiff in Paterson failed to get a supply of gas even though there was a statutory duty to supply an "owner or occupier" who was prepared to enter into a contract; the court held that the receiver could not be regarded as either an "owner" or an

"occupier". The receiver/plaintiff in Granger succeeded because there was a specific statutory duty in the Private Act to supply a person who requires a supply - a provision strikingly absent from the 1927 Act.

As I have already pointed out the 1927 Act repealed the 1899 Act and did not re-enact section 27 of the Schedule and no comparable obligation was imposed on the Board to supply "an owner or occupier" of premises prepared to enter into a supply contract with it. In this connection it should be noted that under section 34 of the 1927 Act the Board is empowered to make regulations in lieu of or additional to the provisions of the 1899 Act and the Electric Lighting Act, 1909 and all regulations so made "shall be incorporated into and form part of every special order made by the Board constituting the Board to be an authorised undertaker", save insofar as they may be specifically excepted by the special order. It is common case that the Board has constituted itself an authorised undertaker but its regulations contain no obligations similar to those contained in section 27 of the Schedule to the 1899 Act.

The 1927 Act which established the Board made provision for the handing over to it of the works carried on at Shannon for the production and generation of electricity under the provisions of the Shannon Electricity Act, 1925. Section 19 of the 1927 Act sets out the general duties of the Board. By subsection (a) it was required to produce and generate electricity in the Shannon works and transmit electricity through the transmission system of the Shannon works and extensions thereof. It was required by subsection (b) to maintain the Shannon works in good repair. Subsection (c) (the subsection on which the Plaintiffs rely as justifying the receivers claim for a new contract) placed the following duty on the Board; namely a duty

"to distribute, utilise, and sell the electricity generated by the Board in the Shannon works and to promote and encourage the purchase and use of such electricity".

I cannot see however how this subsection helps the Plaintiffs' case. The subsection places a general duty on the Board to "distribute utilise and sell" the electricity it generates, but it imposes no specific obligation on it to supply electricity to any person who may apply for a supply. The Oireachtas, it seems

to me, has imposed a general public duty on the Board by this subsection, but has not conferred any collateral rights in individual members of the public by it.

The Plaintiffs then rely (and I think I am correct in saying that this is their principal argument) on the provisions of section 93 which as already pointed out virtually re-enacts section 19 of the 1882 Act. Because it is so central to the Plaintiffs' case I should quote it in full.

It reads as follows:

"Where a supply of electricity is provided in any part of an area for private purposes, then, except insofar as is otherwise provided by the terms of the order or special Act authorising such supply, every person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other person in such part of the area is entitled under similar circumstances to a corresponding supply".

The Plaintiffs submit that this gives a double entitlement to members of the public who want a supply for private purposes; (a) a right to a supply and (b) a right to a supply on the same terms on which others in similar circumstances in the same area are entitled to a corresponding supply. Again, I find myself in disagreement with the Plaintiffs construction of the statute. It seems to me that the section certainly contains a prohibition on the Board

against discrimination but it does not contain any obligation on it to supply. It begins by postulating that a supply of electricity exists in a part of an area of supply and then confers an entitlement on every person in that area "to a supply on the same terms on which any other person in such part of the area is entitled under similar circumstances to a corresponding supply". If it was intended to confer a right to a supply to every person who saw fit to apply for one the section, it seems to me, could have easily so provided by putting a full stop after "shall, on application, be entitled to a supply". And if it was intended to give a double entitlement then it would have been simple to add a new sentence to the effect that when a supply is provided it shall be on the same terms as others obtain it.

This view of the section is strengthened by the fact that although a similar section was contained in section 19 of the 1882 Act it was considered necessary to make specific provision in the 1899 Act imposing an obligation on undertakers to grant a supply of electricity to owners and occupiers who were prepared to enter into supply contracts - surely a piece of

supererogation if the obligation existed already in the 1882 Act. It also gets support from the decisions in the Court of Appeal in Husey -v- London Electric Supply Corporation 1902 I Ch. 411. That was a case in which the private Act confirming an earlier provisional order contained a clause which required the undertakers upon being required to do so by the owner or occupier of premises to give and continue to give a supply of energy, subject to the obligation on the owner or occupier to enter into a supply contract with it. A receiver had been appointed over the assets of a company which was indebted to the undertakers, but it was held that the undertakers were entitled to discontinue the supply until the receiver had entered into a new contract with them. The court, however, was not asked to and did not hold that section 19 of the 1882 Act gave any right to a supply contract. As Cozens Hardy, L.J. pointed out (p. 424) this section contemplates that a contract has been entered into between the undertaker and the occupier and it gives an entitlement by arrangements entered into between the parties to a supply on the same terms on which others have been supplied in the same area. The section assumes (as Vaughan Williams L.J.

pointed out at p. 420) that there will be a contract - but it confers no right to such a contract.

An additional argument was advanced in support of the Plaintiffs' claim based not on any specific section of the Act but on the existing situation arising from the fact that the Board now have a monopoly for the supply of electricity throughout the State from which fact it is said a duty to supply the receiver arises under the Act. This submission involves firstly a consideration of the present factual situation On this there is in fact no controversy - no member of the public, subject to some insignificant exceptions, can obtain a supply of electricity unless the Board is prepared to supply it. Secondly, it involves a consideration of the status of a receiver and that of a receiver and manager of a company's assets and business appointed by a debenture holder or mortgagee. (Parenthetically, it can here be mentioned that counsel's submissions have not sought to make any distinction between the duty of the Board vis-a-vis a receiver appointed by the court and a receiver appointed without the aid of the court).

The receiver derives his appointment and authority from the contract entered into between the parties. In each of

these cases the parties have agreed that the receiver is to be treated as the agent of the Plaintiff company, a provision which, of course, protects the debenture holder and the mortgagee from liability as mortgagees in possession. After his appointment a receiver can, of course, enter into contracts and if he does so he is personally liable on foot of them (with a right to be indemnified out of the company's assets, unless the contract otherwise provides (section 316(2) of the Companies Act 1963). But it is important to note that when a receiver and manager is appointed over a company's business the company is still legally in occupation of the premises in which the business is carried on; the receiver is a caretaker of them. This was pointed out in Paterson; "The relation between the mill company" (that is, the mortgagors) "to the plaintiffs" (that is, the receivers) "is not the relation of outgoing and incoming tenant, nor of vendor and purchaser, but that of owner and caretaker" (See 1896 I Ch. at p.483, and see also In re Marriage, Neave, and Co. 1896 I Ch. 663).

Therefore on the appointment of the receiver in these cases the legal position was that the Plaintiff companies remained in

occupation of the premises through their agent and caretaker, the receiver, and no change of occupation occurred after his appointment. The business which he managed in the Crowe case was the company's business, notwithstanding the fact that the receiver may have been personally liable on the contracts he entered into and that the profits may have belonged to the debenture holder as equitable owner. The property over which he was appointed receiver in the Ionos case had been in the physical occupation of Mr. Gallagher with the company's permission prior to the receiver's appointment and so remained with his permission until Straffan House was sold.

The provisions of the Act do not, as I have already pointed out, impose any specific duty to enter into contracts with every person who applies for a supply of current. But it certainly empowers the Board to enter into supply contracts. What has to be considered, therefore, in these cases is the exercise of a discretionary power and the issue is whether the Board has abused its powers by refusing to enter into contracts with the receiver. It is accepted by Mr. Liston on the Board's behalf that the discretion is not

an absolute one and that it must be exercised in accordance with principles established by the common law and in particular that it must be exercised in a reasonable manner.

Mr. Blayney on the Plaintiff's behalf says that the Board has acted wholly unreasonably and urges that just as it would be unreasonable for the Board to refuse to enter into a contract with the purchaser of a dwellinghouse until he discharged the arrears due to the Board by the vendor so too it is unreasonable for the Board to refuse to contract with the receiver in the new situation arising from his appointment by the debenture holders. But the analogy is not an exact one. I would have little difficulty in holding that the Board would abuse its powers if it refused to enter into a contract with a purchaser of premises until a previous occupant's arrears were paid, but here the receiver is agent for the companies and is a caretaker of premises of which legally they remain occupiers: no change of occupation has occurred by his appointment. The Board, it seems to me, is entitled to have regard to the position in law which pertains. If a company appointed a new board of directors

to manage its affairs each of whose members were prepared personally to enter into or guarantee a new supply contract in respect of the premises occupied by the company the Board would, I believe, be entitled to refuse to contract with them until arrears due under the existing contracts with the company had been discharged. If a receiver takes control of a company's assets as a result of a contract which the company had entered into the Board can properly and reasonably adopt the same attitude - in each case the defaulting company remains in occupation of the premises to which the supply is given. Obviously different considerations might arise if the company goes into liquidation or if a mortgagee instead of appointing a receiver goes into possession of mortgaged property. Whilst not deciding either point now I draw attention to them to contrast the different and special position which results from the appointment of a receiver from that resulting from the appointment of a liquidator or from that arising when a mortgagee enters into possession of the company's property

I conclude, therefore, that by exercising its

contractual right to terminate the supply contract because of the company's default, and by refusing to enter into a new supply contract with the receiver as long as the arrears remain unpaid, the Board has not abused its discretionary powers. It was pointed out that by acting in this way the Board is effectively obtaining a preferential payment of its debt ahead of the secured creditors. This is true enough. But this follows from the factual situation which the parties to the debenture and mortgage have themselves created by the appointment of a receiver and there is certainly nothing unlawful and to my mind nothing unreasonable in the Board taking what advantage it can from this situation.

As no breach of statutory duty has been established the Plaintiffs' claims in these two actions fail.

Approved
JL
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