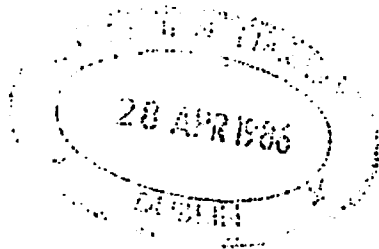


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THE HIGH COURT

1982 No. 8937P



e

REX PET FOODS LTD (In receivership) AND ANOR

v

LAMB BROS (IRELAND) LTD AND ORS

J U D G M E N T

Delivered by The Honourable Mr Justice Declan Costello
on Thursday, 5 December 1985

Mary P. O'Donoghue
Reg.

Approved

DL

9-4-86

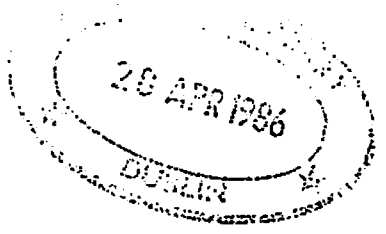
A P P E A R A N C E S

T C Smyth, SC)
Peter Kelly, BL) For the Plaintiffs

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Dublin 2

John Cooke, SC)
D O'Keefe, SC) For the Defendants
Mary Finlay, BL)

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This case arises because of a claim made by the Receiver and Manager of the Plaintiff Company who was appointed on the 15th July 1982. The Receiver submits that the assets of the Defendant Companies and the Plaintiff Company should be aggregated and seeks a declaration that the businesses of the Plaintiff Company and Defendant Companies are one. A separate claim exists in these proceedings arising from certain goods which were in the possession of the Defendant Companies at the time the Receiver was appointed.

The facts of this case, which I find from the evidence adduced by the Plaintiff Company, are as follows:

The Plaintiff Company had an existence independent of the Defendant Companies up to the month of March 1981. In the month of March 1981 the first-named Defendant Company, Lamb Bros. (Dublin) Ltd, was seeking a means of entering into a new line of business and purchased 52 per cent of the shares in the Plaintiff Company. There is no doubt that the Plaintiff Company remained a separate legal entity at that time. Some members of the Board of Directors of the Defendant Group of Companies went onto the Board of Directors of the Plaintiff Company but the minority shareholding in the Plaintiff Company existed and was represented on the Board of Directors of the Plaintiff Company. What is of equal significance is that the management of the Plaintiff Company remained as it had been.

The Plaintiff Company manufactured pet food in a factory premises near Athy. At the time the shares in the Plaintiff Company were purchased two agreements were entered into between the Plaintiff Company and the first-named Defendant Company, one being a distributorship agreement and the other a management agreement. The effect of these agreements was that the Defendant Group of Companies became the sole distributors for the Plaintiff's goods and supplied management services to the Plaintiff Company, arrangements which are by no means unique and which do not in any way affect the separate corporate entities of the companies concerned.

It is clear that the Plaintiff Company started to get into financial difficulties some time later that year and that these difficulties

became aggravated. During this period there were meetings of the Board of Directors of the Plaintiff Company and the Minutes were produced to show that it operated as a separate legal entity from the Defendant Group of Companies.

What is of equal importance is that separate books of account were maintained and I have had the benefit of the evidence of Mr Robert Gentleman, who later became the Secretary of the Plaintiff Company and who was the Accountant of the group of companies formed by the Defendant Companies. His evidence made it clear that at all times separate books of account were kept for the Plaintiff Company and their separate legal entities were at all times recognised by the Defendant Companies.

That situation existed up to March 1982, and the trading arrangement between the parties was governed by the two agreements to which I have referred. The distributorship agreement, it is true, was not carried out to the letter of the agreement in that prices were not fixed in writing but by mutual agreement prices were fixed otherwise than in writing.

In March 1982 the situation changed. Because of the deteriorating financial position of the Plaintiff Company, the Defendant Group of Companies or, to be more precise, the first-named Defendant Company, took up the balance of the shares in the Plaintiff Company as a result of which the Plaintiff Company became a wholly owned subsidiary of Lamb Bros. (Dublin) Ltd. The reason for this change in the shareholding of the Plaintiff Company was the hope that the Plaintiff Company could become financially sound by a change in the management structure in Athy. A change in management was brought about and the existing members were dispensed with. Mr Middlesborough, who was a manager of the Defendant Group, became manager of the Plaintiff Company; Mr Lyons became managing director of the Plaintiff Company and Mr Gentleman became secretary of the Plaintiff Company.

In these circumstances it seems to be clear that the change of management that occurred in March 1982 was one which was a perfectly normal commercial decision and did not affect the separate corporate

entity of the Plaintiff Company although, of course, the relationship between the two became, as I have indicated, one in which the Plaintiff Company was now 100 per cent owned by Lamb Bros (Dublin) Ltd.

The case that is made on the Plaintiff's behalf depends on a number of aspects of the trading of the Defendant Group of Companies and of the Plaintiff Company to which I will now refer.

It is alleged that the Plaintiff Company should be regarded merely as a branch of the Defendant Group as its manufacturing arm because, firstly, the Defendants discharged the creditors of the Plaintiff Company from time to time. The evidence establishes that this in fact occurred, particularly from the month of April 1982 onwards, but this to my mind did not in any way affect the separate legal entity of the Plaintiff Company and was a normal enough arrangement for companies trading in a group such as these companies were trading. Secondly, it is suggested that the claim is supported by the fact that invoices from suppliers of the Plaintiff Company were sent direct to the Defendant Company. Factually that is so. From time to time creditors of the Plaintiff Company, in particular suppliers of goods and raw materials to the Plaintiff Company, sent invoices to one or other of the Defendant Companies but this does not raise any claim or sustain any claim that the two companies should be treated as one legal entity. It does, perhaps, reflect some confusion but not to the extent which would justify the claim now being made on the Plaintiff's behalf. Thirdly, it is suggested that the management of the Plaintiff Company was such that the claim being made is justified. The management changed in the way I have indicated. The explanation for the change is a reasonable one and in my view does not of itself justify the claim that has been made. Fourthly, it was suggested that there were no regular meetings of the Board of Directors of the Plaintiff Company. There were meetings of the Board of Directors and meetings were held up to March 1982. Thereafter it seems that no inference such as is now being sought to be drawn arises from the fact that the Board of Directors comprised members of the Parent Company for this is a situation which is normal and is to be found where a group of companies is controlled by a parent company.

Finally, the point was raised that the Defendant Company was sole distributor for the Plaintiff Company, but this was a situation which was in no way unique or ^{itself} raises the inference which the Plaintiffs seek to raise.

The question arises whether all these factors taken together raise the inference sought to be raised but I cannot agree that this is so. There have been some cases which Counsel have referred me to where the courts have treated companies as being one legal entity but these have been cases in which the facts are very different to those which the evidence establishes in the circumstances of this case.

So in my view the Plaintiffs have failed to make out a case which would justify me in making the declaration which is sought. I should add that even if the situation were different and there were circumstances in which the court should regard these companies as being one for some reason or other, this would not justify the Court making another order which, indeed, is a separate order in relation to the aggregation of assets because it seems to me there has been no evidence to suggest that any funds of the Plaintiff Company were siphoned off into any of the Defendant Companies in such circumstances as would raise an equitable claim to the assets of any of the Defendant Companies.

I now turn to the second part of the Plaintiff's case. In turning to this I should point out that this part of the case was also relied on as evidence of the close relationship between the two companies which would justify the order sought and I think that reliance on this second part of the case does not assist the Plaintiffs on the first part of the case and that the goods in the warehouse which I now come to deal with were treated in circumstances which do not permit the Plaintiff Company validly to claim on either part of the case.



What happened in relation to the goods in the warehouse of the Defendant Group of Companies on the Naas Road was this: Under the distributorship agreement goods manufactured by the Plaintiff Company were consigned to a warehouse on the Naas Road and then sold on by

the Defendant Group to purchasers in this country and elsewhere. The practice developed that at the end of each month an invoice was raised arising from the goods consigned in the previous month and the invoice was based upon the prices which the goods had reached less agreed charges, e.g., a 4 per cent discount and freight and other charges, permitted under the terms of the contract. During the period Lamb Bros (Dublin) Ltd kept a separate account which has been proved in evidence and which is headed 'LIL Account with Rex Pet Foods Ltd', and I accept this account as an accurate record of the dealings. This account is supported by other records produced by Mr Gentleman.

I am satisfied from these records and in particular from the document 'LIL Account with Rex Pet Foods Ltd' that in the relevant period the Defendant Group were paying the Plaintiff Company for the goods which the Plaintiff Company supplied, partly by cheques and partly by means of payments made to creditors of the Plaintiff Company. This was a perfectly permissible way of paying its indebtedness for the goods which the Plaintiff Company supplied to them.

In the course of dealings between the companies the records show that the Defendant Group paid sums in excess of their indebtedness to the Plaintiff Company so that at the end of June the Plaintiff Company owed for goods not yet supplied a considerable sum of money, a sum in excess of £131,000.

I think it is clear from the evidence that at the end of June the Directors of the Plaintiff Company, who were the same persons as the Directors of the Defendant Group, were aware that the Plaintiff Company was insolvent. Goods were supplied and were in the warehouse at the end of June 1982 and at that time the stock was taken and an invoice was raised in respect of those goods on the 2nd July 1982, and it was the intention of the parties that the title of the goods then in the warehouse would be transferred to Lamb Bros (Ireland) Ltd. In my view this was effectively done by the raising of this invoice and the goods then in stock became the property of Lamb Bros (Ireland) Ltd. Thereafter further goods were supplied by the Plaintiff Company and consigned to the warehouse. These consignments occurred on the 5th, 6th and 8th July. The value of these goods was ascertained and an



invoice was raised in respect of these goods on the 8th July for the sum of £19,336.59p. In my view the raising of this invoice transferred the property in these goods to Lamb Bros (Ireland) Ltd.

There were further deliveries on the 9th, 12th, 13th and 14th July and in respect of these goods an invoice was raised on the 14th July for £32,910.20p. In my view this invoice effectively transferred the title of the goods to Lamb Bros (Ireland) Ltd.

The situation, therefore, was that when the debenture which the Agricultural Credit Corporation owned crystallised on the 15th July by the appointment of the Receiver, these goods were no longer the property of the Plaintiff Company but the property of Lamb Bros (Ireland) Ltd.

Had proceedings been instituted as a result of the liquidation of the company under section 286 of The Companies Act, the question might have arisen as to whether or not there was any fraudulent preference within the meaning of that section involved in the transactions to which I have referred, but this did not occur.

The question now arises as to whether or not any claim can be made in respect of these goods in the circumstances which I have outlined. It is perfectly clear that there was money owed by the Plaintiff Company to the Defendant Company at the time these goods were supplied and that the figures set out in the document 'LIL Account with Rex Pet Foods Ltd' are correct. In these circumstances it seems to me that there was no fraud involved in any way by the actions carried out at the time as indicated in the evidence of Mr Gentleman.

It seems to me that the Plaintiff Company have been unable to establish that any tort was involved in what was done. No question of fraudulent preference arises because the provisions of section 286 do not arise; so I must hold that the title to the goods having been passed and there being no invalidity in relation to that having been established, the Plaintiff Company have no entitlement to the goods and no entitlement to the proceeds of the goods which, I understand, are now on deposit.

In these circumstances the Defendants are entitled to a direction and I will dismiss the claim.

First of all, I will make an order dismissing the claim and an order on the counterclaim under the terms of Paragraph A. I can see no reason why the ordinary rule should not apply, the Plaintiffs having failed in this claim, so I will order that the Defendants' costs of defending this claim be paid by the Plaintiffs, such costs to include the costs of any order such as the Order for Discovery and the Order on the Injunction. I give liberty to apply to the Defendants on the undertaking as to damages.

I certify the foregoing to be a true and accurate transcript of the shorthand note taken by me.

AKenny

Official Stenographer

