

THE HIGH COURT

COMMERCIAL

[2021 No. 50 SP.]

[2021 No. 33 COM]

BETWEEN

PROCTOR & GAMBLE (MANUFACTURING) IRELAND LIMITED

APPLICANT

AND

MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice David Barniville delivered on the 20th day of May, 2021

Introduction

1. This is an application by Proctor & Gamble (Manufacturing) Ireland Limited for an order under section 26 of the Trustee Act, 1893 (the “1893 Act”) vesting in that company, which is the Applicant in these proceedings, the leasehold interest in part of its manufacturing premises at Newbridge, Co. Kildare.

2. The basis for the application is that the Applicant company claims to be beneficially entitled to the leasehold interest of the relevant property and the trustee of that leasehold interest is said to be a company which has been dissolved. It is contended, therefore, that on the case law, and under section 26 of the 1893 Act, the trustee is a trustee “*which cannot be found*” and that the Court has jurisdiction under section 26 of the 1893 Act to vest the leasehold interest in question in the Applicant company.

The Facts

3. I have been provided with affidavit evidence on behalf of the Applicant company in the form of an affidavit sworn by John Houlihan on 31st March, 2021, and an affidavit sworn by Alan Coyne of Arthur Cox on 14th May, 2021. The facts are not in dispute and, as I explain in a moment, there is no opposition to this application. The Chief State Solicitor's Office on behalf of the Commissioner of Public Works in Ireland does not object to the application. I will come back to the procedural history of the application shortly.

4. It seems to me on the basis of the uncontested evidence before the Court, that the following are the relevant facts and I find them as such:

5. The Applicant company was incorporated under the name Braun Ireland Limited on 18th December 1973. It changed its name to Braun Oral-B Ireland Limited on 27th February 2002. It changed its name further to its current name on 1st July 2012. It is, therefore, now known as Proctor & Gamble (Manufacturing) Ireland Limited. The Applicant operates a manufacturing facility from premises at Newbridge Business Park in Newbridge, Co. Kildare.

6. Title to the premises is held under five leases which are described in the affidavit of Mr. Houlihan. Two of the leases postdate the events which have given rise to this application. It is only one of the leases, referred to in Mr. Houlihan's affidavit as the Lot 3 lease, which is relevant. That lease, the Lot 3 lease, was granted by the IDA on the 31st December 1997 to a company called Oral-B Laboratories Islands Limited, referred to as "Oral-B", for a term of 999 years. The lands the subject of that lease are now comprised in Folio 4954L of the register of leaseholders of Co. Kildare.

7. As I have indicated, the lessee under the Lot 3 lease was Oral-B, a company registered in the Cayman Islands, which carried on business in this jurisdiction through its registered branch in Ireland.

8. On 18th December 2001, Oral-B, as the transferor or seller, entered into a Business Transfer Agreement (the "BTA") with the Applicant company as the purchaser or transferee. It is necessary to refer now to some provisions of the BTA in order to understand what has happened here.

9. In Recital (B) to the BTA, it is stated that the transferor and the transferee were entering into the agreement to provide for the transfer to the transferee of the "*business of the Irish branch*", which is the Irish branch of Oral-B, more particularly described in the First Schedule to the BTA. That business is defined as the "*Business*" and it is described in further detail in the First Schedule to the BTA, as follows:

"The entire business of the Irish branch, which includes design, production, manufacture, sale and distribution of oral care products carried on at Newbridge Business Park, Green Road, Newbridge, Co. Kildare, Ireland, together with all related assets liabilities and employees."

10. Clause 2.1 of the BTA is the provision which provides for the transfer of the business. It says that in consideration of the payment of the consideration, which is the sum of IR£226 million, and on the assumption of various liabilities and the performance of various obligations by the transferee, which is the Applicant company, the transferor, namely Oral-B, as beneficial owner was agreeing to transfer, and the transferee was agreeing to acquire as a going concern on the completion date, which was the 19th December 2001, and with effect from the effective date, which was midnight on the 31st December 2001, "*all the property undertaking and assets of the business.*"

11. Clause 2.1 further provides that the transferor, namely Oral-B, transfers to the transferee, namely the Applicant company, as of midnight on the 31st December 2001, "*all of the transferor's right title and interest in the assets*", save for certain assets that are not relevant for present purposes.

12. The term "*assets*" is defined in Clause 1.1.1 of the BTA as meaning:

"All of the assets of the transferor, including all goodwill, licences, industrial property rights, Properties, fixtures and fittings, plant and equipment, stocks, raw materials, furniture, tools, vehicles, book debts and creditors, and all other assets rights and properties of the transferor whatsoever used in connection with the business of the transferor and existing as at the effective date."

As I have already noted, the "*effective date*" is midnight on the 31st December 2001.

13. The word "*Properties*" first mentioned in that definition is itself defined in the definition section in Clause 1.1.1 as meaning:

"The properties owned by the transferor as listed in the second schedule."

14. The second schedule refers to the properties by reference to a Deed of Transfer relating to the lands and buildings used in the business.

15. Mr. Houlihan has said at paragraph 15 of his affidavit that that Deed of Transfer cannot be located. He explains at paragraph 15 of his affidavit that attempts have been made to locate the Deed of Transfer; a search has been carried out at the premises but it has not been possible to locate a copy of the deed. Mr. Houlihan further says that the files were transferred to the Applicant company's solicitors by its previous Irish solicitors and that those files did not include a copy of the Deed of Transfer. Further enquiries have not turned up a copy.

16. I do not think there is any real problem with the absence of the Deed of Transfer because the definition of "*assets*" in Clause 1.1.1 is, in any event, extremely wide and refers explicitly at the end of the definition to "*all other assets, rights and properties*" of Oral-B whatsoever, which were used in connection with its business. That would clearly include any interest that Oral-B had at that time in the property in Newbridge and would include its interest in the Lot 3 lease.

17. They are the relevant provisions of the BTA for the purpose of this application.

18. I am satisfied on the evidence, which I have just summarised, that at the time of the BTA the Lot 3 lease was an asset of Oral-B. I am also satisfied that at the time of that agreement, the lands, which were the subject of the Lot 3 lease, were being used by Oral-B as part of its Irish business.

19. I am further satisfied on the evidence that the Applicant paid Oral-B for (*inter alia*) its interest in the Lot 3 lease. In that regard my attention was drawn to the relevant directors' report and financial statements showing the payment by the Applicant company to Oral-B of the consideration of just shy of €254 million. Consequently, under the BTA the obligation of Oral-B to transfer its interest in the Lot 3 lease arose with effect from the completion date under the BTA, which was the 19th December 2001, and was to take effect on the effective date, which was midnight on the 31st December 2001.

20. I accept on the evidence that, through inadvertence, Oral-B failed to effect the transfer of its interest in the Lot 3 lease to the Applicant company, although it did effect the transfer of its interests in the two other leases which were in existence at the time. They have been referred to as the Lot 1 lease and the Lot 2 lease. The interests of Oral-B under those leases were transferred to the Applicant company in accordance with its obligations under the BTA. That was not done with respect to the Lot 3 lease and it remains registered in the name of Oral-B.

21. The following then occurred: On the 12th May 2010, Oral-B, which as noted earlier was a company incorporated under the law of the Cayman Islands, was voluntarily dissolved. It has only recently been discovered by the Applicant company, while it was preparing for the sale of its Irish business, which includes its interest, or what it thought was its interest, under the Lot 3 lease, to a third party, that Oral-B had not in fact effected the transfer of its interest in the Lot 3 lease to the Applicant company.

22. In those circumstances, the Applicant's case is that on the basis of the facts which I have just found, Oral-B held its interest at the time of its dissolution in the Lot 3 lease on trust for the Applicant with effect from the effective date, namely, midnight on 31st December 2001. I accept that it did, having regard to the fact that the Applicant company had paid the consideration to Oral-B under the BTA, which included payment for the interest in the Lot 3 lease.

Procedural History

23. The Applicant brought this application by a special summons which was issued on 1st April 2021. The proceedings were entered in the Commercial List on 19th April 2021. The Applicant's solicitors engaged in correspondence with the Chief State Solicitor's Office on behalf of the Commissioner of Public Works in Ireland. In an exchange of correspondence which culminated in a letter from the Chief State Solicitor's Office dated 11th May 2021, the Chief State Solicitor confirmed that the Commissioner of Public Works in Ireland was not objecting to the application. That confirmation was given on the basis of certain confirmations and representations contained in a letter from Arthur Cox, on behalf of the applicant, of 4th May 2021, which it is not necessary for me to detail in this judgment.

Relevant Statutory Provisions

24. I will briefly consider the relevant statutory provisions and then turn to the legal principles before applying them to the facts of this case.

25. I should say that it is clear to me on the facts that the Applicant is entitled to the order which it seeks in the proceedings.

26. The first relevant provision is s. 28(2)(a) of the State Property Act, 1954 (the "1954 Act"). Under s. 28(2)(a) of the 1954 Act, it is provided that where a body corporate is dissolved, certain provisions apply. They include, at paragraph (a), the provision that:

"all land which was vested in or held in trust for such body corporate immediately before its dissolution (other than land held by such body corporate upon trust for another person) shall, immediately upon such dissolution, become and be the property of the State..."

27. The issue here is that the interest which Oral-B had in the Lot 3 lease was vested in it as of the date of its dissolution and, if s. 28(2)(a) applied, then the State could potentially have made a claim to that interest on the basis of *bona vacantia*. However, the Applicant contends that the interest in question was covered by the words in parentheses in paragraph (a); namely, that the interest was held by Oral-B on trust for another person, in this case, the Applicant company. If that is so, then the State would have no claim to that interest under *bona vacantia*. The State has, in effect, confirmed that position in the correspondence from the Chief State Solicitor's Office of 10th May, 2021 to which I have just referred.

28. The next relevant provision, and the most relevant for present purposes, is section 26 of the 1893 Act. It provides that in certain cases, including (at subparagraph (ii)(c)) "*(ii) where a trustee entitled to or possessed of any land... (c) cannot be found... the High Court may make an order...*", known as a vesting order, "*..vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.*"

29. The application is made under s. 26(ii)(c) of the 1893 Act on the basis that it said that Oral-B was a trustee of its interest in the lands and that, having been dissolved, Oral-B is a trustee which "*cannot be found*" and that, therefore, the Court should make a vesting order vesting the interest in the Applicant company, as it was the beneficiary subject to which Oral-B held its interest on trust.

30. They seem to be the relevant statutory provisions for the purposes of this application.

Cayman Islands Issue

31. Before referring to some of the relevant cases, which I will do very briefly, I should note that, as indicated earlier, Oral-B was a company incorporated in the Cayman Islands and was voluntarily dissolved in that jurisdiction. Nonetheless, I am quite satisfied that the 1954 Act would apply and that if s. 28 of that Act did not have the proviso excluding lands held on trust for another person, then the Irish law on *bona vacantia* would apply and not the laws of the Cayman Islands.

32. My attention was drawn to the advice obtained by the Applicant company from Mr. John Harris of Nelsons, Attorneys at Law in Grand Cayman, the Cayman Islands. Mr. Harris sets out the law of the Cayman Islands on this issue and notes that the Cayman Islands courts would, in his opinion, hold that the Lot 3 lease was not *bona vacantia* under Cayman law and that the Cayman Islands authorities would have no claim to it. He goes on to say that he formed that view on the basis of, amongst other things, some English authorities, including the leading text Dicey, Morris & Collins a Conflict of Laws, paragraph 30-058.

33. Mr. Harris further says that, if he is incorrect in that view, and I do not believe that he is, the Cayman Islands authorities would, in any event, have no claim in respect of Oral-B's interest in the Lot 3 lease because Oral-B had sold its interest in that property to the Applicant company prior to dissolution. He further says, and I accept that this is the case, that to the extent that the Cayman authorities obtained any interest in the Lot 3 lease by operation of *bona vacantia* in that jurisdiction (which he believes is not the case), that interest would be held on trust for the Applicant company and would have no value. In those circumstances, Mr. Harris opines that the Cayman authorities would, in all probability, decline to assert any claim or would disclaim such interests.

34. I conclude that Mr. Harris is correct in the first opinion that he has given, namely, that the property of Oral-B consisting of its interest in the Lot 3 lease in Ireland would not be

dealt with under the law of the Cayman Islands, but would fall to be dealt with under the laws of the jurisdiction in which the property interest is situated, namely, Ireland.

Relevant Case Law

35. Mr. Walsh has referred to three authorities in support of this application. The first is the judgment of Costello J. in the case of *Re Kavanagh* (Unreported, High Court, Costello J., 23rd November, 1984) (“*Kavanagh*”). It is unnecessary to recite in any detail the facts of that case. They were considerably more complicated than the facts of the present case, which are relatively straightforward. In *Kavanagh*, Costello J. made a vesting order under s. 26. He followed certain English authorities in holding that a dissolved company is a trustee who “cannot be found” within the meaning of s. 26(ii)(c) of the 1893 Act. He referred in that case with approval to *Re General Accident Assurance Corporation Limited* [1904] 1 Ch. 147 and *Re Bernard Mills & Co. Limited* [1905] W.N. 36. On that basis, he made an order pursuant to section 26 of the 1893 Act directing that the particular interest vested in the company which had been dissolved at the time of its dissolution should vest in the applicants. He laid particular emphasis on the fact that the Attorney General had stated that no claim to the premises was being made by the State. That is also the position here.

36. The judgment of Costello J. in *Kavanagh* was approved by Laffoy J. in the case of *Re Heidelstone Company Limited* [2007] 4 IR 175 (“*Heidelstone*”). Again, the facts of *Heidelstone* were much more complicated than the present case. Laffoy J. cited with approval the judgment of Costello J. in *Kavanagh* and made a vesting order in that case under s. 26 of the 1893 Act vesting the particular interest in question in a new management company which had been incorporated by the applicants. The facts were quite complicated and it is unnecessary to analyse them in any detail here. The critical point is that Laffoy J. in that case followed Costello J. in *Kavanagh*, in finding that a dissolved company is a trustee who “cannot be found” within the meaning of that term in s. 26(ii)(c) of the 1893 Act.

37. I followed those cases and applied them in the third case relied on by the Applicant, which is *Clariant AG and Clariant Plastics & Coatings (Ireland) Limited* [2020] IEHC 211 (“*Clariant*”). That case involved an application by two companies, Clariant AG and Clariant Plastics & Coatings (Ireland) Limited (“Clariant Plastics”), for various orders under ss. 25 and 26 of the 1893 Act in respect of lands in an industrial estate in Naas, Co. Kildare. The registered owner of the land was another Clariant company, Clariant Specialities (Ireland) Limited (“Clariant Specialities”), which had been dissolved. Part of the premises occupied by Clariant Plastics and from which it carried on its business was on that land, of which Clariant Specialities was the registered owner at the time of its dissolution. It had previously agreed to sell the land to Clariant AG and had been paid. The applicants in that case sought, firstly, an order under s. 25 of the 1893 Act appointing Clariant AG as trustee in substitution for Clariant Specialities and, in the alternative, a vesting order under section 26 vesting the land in Clariant Plastics.

38. I referred with approval to *Kavanagh* and *Heidelstone* and concluded that the Court did have the power to make an order appointing a new trustee. That is not something which is an issue in this case; it is not required here. I concluded that I also had the power to make an order directly vesting the land in Clariant Plastics under s. 26 of the Act. I was satisfied that that was a case in which the trustee could not be found and that that situation was provided for in s. 26(ii)(c) of the 1893 Act. Accordingly, I made an order there vesting the lands directly in Clariant Plastics, rather than making an order appointing a new trustee which could in turn vest the lands in Clariant Plastics.

39. The order which the Applicant seeks in the present case is essentially the same as the order that I made in *Clariant*, but without the complication which existed in that case because, in *Clariant*, the beneficiary was Clariant AG and not Clariant Plastics but Clariant Plastics was the entity which had been occupying the land and carrying on the business from

the land since 1995. In the present case, the beneficiary, having paid the money to acquire the interest in the Lot 3 lease is the Applicant company and it is the company that wishes to have the interest in the Lot 3 lease vested in it.

Conclusions: Application of Principles

40. I am quite satisfied on the facts as I found them and on the principles set out in the three cases which I have just mentioned, that this is a case in which I should make the order sought by the Applicant vesting Oral-B's interest in the Lot 3 lease in the Applicant company. It is clear on the evidence that Oral-B held the lessee's interest in the Lot 3 lease on trust for the Applicant company with effect at least from midnight on 31st December 2001 and did so at the time of the dissolution of Oral-B on 12th May 2010.

41. I agree with the Applicant that the BTA did encompass an enforceable contract for the sale of the lands in favour of the Applicant company. I accept that the Applicant company paid the purchase price on 19th December 2001 and that, as of midnight on 31st December 2001, Oral-B was under an obligation under the BTA, which could be enforced by specific performance, to transfer its interest in the Lot 3 lease to the Applicant company. I am also satisfied that due to inadvertence that was not done, and Oral-B was then dissolved in May 2010 without performing its obligation to transfer the Lot 3 lands to the Applicant.

42. I am satisfied on the basis of the case law to which I have referred that, following its dissolution, Oral-B was and is a trustee which "*cannot be found*" for the purpose of s. 26(ii)(c) of the 1893 Act. In those circumstances, the Court has the power under s. 26 to make the vesting order vesting the leasehold interest in the Lot 3 lease in favour of the Applicant.

43. I will, therefore, make an order in the terms sought by the Applicant.