THE HIGH COURT

[2024] IEHC 429

[Record No. H.COS.2023.0000256]

IN THE MATTER OF GREEN LABEL SHORT LETS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 2014

BETWEEN

LIZET PENA-HERRERA

APPLICANT

AND

GREEN LABEL SHORT LETS LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Cregan delivered on 13th May 2024.

Introduction

1. This is an application by the Applicant for

(1) an order pursuant to sections 517, 612, 671, 672, and 684 of the Companies Act 2014 for the examination on oath of the officers of the respondent and/or for an inspection of the respondent's books and records, and/or

(2) an order pursuant to Order 42, rule 36 of the Rules of the Superior Courts that the officers of the respondent appear before the High Court to be examined as to the

financial position of the company and/or its inability to discharge or satisfy a judgment of the District Court in favour of the applicant dated 2 June 2023;

2. The applicant, Ms. Peña-Herrera, is a qualified child psychologist and psychotherapist from Bolivia. She moved to Ireland in 2008 to study and take up employment opportunities in this country.

3. The respondent is a company incorporated in Ireland which has its registered offices at Reuben House, Reuben Street, Dublin 8. The Companies Registration Office (CRO) lists Mr. Marc Godart as a director of the company. In addition, Mrs. Denise Godart was also a director of the company from the date of its incorporation until 28 September 2023.

The background to this application

4. The application is grounded upon the affidavit of Mr. Eoin McMahon, the applicant's solicitor. In it, he exhibits an affidavit of the applicant.

5. The applicant states in her affidavit that on 26 December 2020, she entered into a tenancy agreement with the respondent for premises at 8 Vintage Court, Cork Street, Dublin 8. The rent was €470 per month and the tenancy was for an indefinite duration.

6. She states that on 28 March 2022, after living in the premises for 15 months she made a complaint to Dublin City Council, due to a number of health and safety issues in the dwelling, including overcrowding, and requested that it inspect the building in accordance with its statutory powers and duties in relation to the standards in private rented accommodation.

7. An inspection was subsequently carried out by Dublin City Council on 6 April 2022.

8. Within one week, on 14 April 2022, the respondent served the applicant with a notice of termination of her lease.

9. On 15 April 2022, Ms. Peña-Herrera applied to the Residential Tenancies Board ("RTB") alleging that the notice served on her on 14 April 2022 was invalid.

10. An adjudication was held on this matter on 2 August 2022 and the RTB adjudicator held that the service of the notice of termination was an act of "penalisation" by the landlord. No appeal was made by the company to this adjudication and, as a result, the RTB proceeded to make its first determination order on 9 November 2022. The terms of this order provided that the notice of termination served on 14 April 2022 was invalid and that the respondent should pay an amount of €1,000 to the applicant within 28 days.

11. There was no appeal against this decision and the determination order became binding on the expiry of the 21 day period pursuant to the Act.

12. The respondent failed to comply with the terms of this order and made no payment whatsoever to the applicant.

13. On 3 August 2022, two days after the adjudication of the first complaint, and twelve days before the termination date on the invalid notice, the respondent, its servants or agents unlawfully evicted the applicant from the dwelling by packing up her possessions and taking them to a storage unit while she was away from the house at work. These items included all her personal possessions and private papers, including her personal laptop, her clothing, her jewellery, her passport, her personal legal papers including immigration papers, and her father's death certificate.

14. The first the applicant heard of the eviction was when she received a phone call from an agent of the respondent to tell her that she had been evicted and to collect her belongings from a storage unit on Kylemore Road.

15. In effect, due to the unlawful actions of the respondent, the applicant was made effectively homeless. She said that she suffered severely both professionally, mentally and financially because of this and that she is still moving from short-term let to short-term let.

16. The applicant filed a second complaint with the RTB on 4 August in respect of this unlawful eviction and the retention of the deposit. A second adjudication was held on 19

October 2022 and the adjudicator of the RTB held in favour of the applicant and directed that the respondent should pay a sum of €14,443.93 to the applicant within 21 days.

17. No appeal was made by the respondent to this decision and, in the circumstances, the RTB made a second determination order on 30 November 2022.

18. The applicant then applied for, and obtained, judgment in the Dublin District Court in the sum of €15,433.50 together with costs in the sum of €1,200 (plus VAT) pursuant to s. 124 of the Residential Tenancies Act 2004 (as amended) on 2 June 2023.

19. On 1 August 2023, the Sheriff attempted to execute the said judgment, but the execution order was returned with a letter from the Sheriff marked "*nulla bona*".

20. The applicant has therefore obtained a judgment in the sum of €15,433.50 (plus costs) in the District Court and this judgment is still unsatisfied. No payment whatsoever has been received in satisfaction of this judgment.

21. It is clear from the affidavit evidence filed on behalf of the applicant, none of which is contested, that the respondent, through its controlling director, Mr. Marc Godart, has behaved in a completely unlawful manner towards the applicant. It is clear that the eviction was unlawful and the removal of her personal belongings to a storage unit without her knowledge or consent was also unlawful.

22. As the respondent did not contest any of the proceedings before the Residential Tenancies Board, or indeed before the District Court, it is clear that it has no defence to the allegations made by the applicant.

23. It appears that Mr. Godart, the sole director and controlling party of the respondent, was originally resident in Dublin 8 but appears to have returned to Luxembourg. He appears to be involved in a significant number of residential property companies. He also has, according to the applicant's solicitor, a number of other RTB determinations made against his

companies, and the applicant's solicitor says that he is aware of at least three other awards for compensation arising from other illegal evictions which remain unsatisfied.

24. The appliant's solicitor avers on affidavit that it is necessary for the purposes of enforcing the judgment against the respondent that the officers of the company be examined as to what debts are owing to the debtor and whether the debtor has any property or means of satisfying the judgment.

25. It also appears from the affidavit evidence filed by the applicant that the company paid out dividends of €51,000 to its shareholders during the financial year January to December 2021 rendering the company insolvent and unable to pay its debts.

Replying affidavits of Mr. Godart

26. Mr. Godart swore a number of replying affidavits in this matter seeking to contest the application brought by the applicant.

27. In his first replying affidavit he says that he is the sole company director of the respondent company. He says at para. 7 that: -

> *"The respondent was established in 2018 with a vision to provide budget short term rental accommodation. The company specialises in managing and renting out fully furnished apartments and houses for short stays catering to both leisure and business travellers".*

28. He also says that the company forms part of a Société de Participations Financièrs ('SOPARFI') structure. He says that SOPARFI are unregulated and fully taxable ordinary commercial companies whose corporate purpose consists of holding and related financial activities. He says such companies are incorporated as private limited companies wherein all revenue earned by the respondent company has to be transferred back to the Luxembourg parent company. The parent company is Itzig S.à.r.l., a company having its registered address in Luxembourg.

29. At para. 11 he says: -

"The respondent company does not own any assets and merely acts as a letting agent. The only assets in the company for the year ending 31 December 2022 are the earnings for that year" (emphasis added)

30. He said the accounts have not yet been completed for the year ending 31 December 2023 but as a result of the Covid pandemic, which reduced the demand for accommodation for international travellers, and also as a result of planning regulations introduced by Dublin City Council in respect of short-term letting arrangements, it is likely that there will be no earnings for the year dated 31 December 2023 or indeed for 31 December 2024. He then states: *"On account of this the respondent company's operation has in effect ceased".*

31. At para. 14 he states: -

"I have been open and honest as to the current financial standing of the respondent and as such I am unaware as to what further information I could provide should the court make an order that I appear before this Honourable Court to be examined as to the financial details of the respondent company and/or its ability to discharge/satisfy its outstanding debts".

32. Again, at para. 16, he states that *"I have been open and honest as to the current financial standing of the respondent company".*

33. Again, at para. 20, he says *"Thirdly on the basis that I have been open and honest as to the finances of the respondent company I pray that the court refuses the reliefs sought"*.

Section 567 of the Companies Act, 2014

34. The applicant's application is made under various provisions of the Companies Act 2014 ("the Act"). I will consider section 567 first.

35. *"**Application of certain provisions to companies not in liquidation***

567. *(1) This section applies in relation to a company that is not being wound up where—*

(a) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, or

(b) it is proved to the satisfaction of the court that the company is unable to pay its debts, taking into account the contingent and prospective liabilities of the company,

and, in either case, it appears to the court that the reason or the principal reason for its not being wound up is the insufficiency of its assets.

(2) The sections specified in the Table to this section apply, with the necessary modifications, to a company to which this section applies, notwithstanding that it is not being wound up; accordingly, a person who would have standing otherwise to apply for an order or judgment under a section so specified shall have such standing to make an application under that section as so applied, but this does not affect the Director's power under subsection (3)*."* (emphasis added)

36. It is clear that this section applies certain sections of the Companies Act to companies which are not being wound up. In effect, it enables certain provisions of the Companies Act which would normally apply only in the case of a winding up to be also applied to companies that are not being wound up, provided a number of conditions are fulfilled. These conditions are:-

(a) Where an execution or other process issued on a judgment, decree or order of <u>any court</u>, in favour of a creditor of the company is returned unsatisfied in whole or in part or;

(b) It is proved to the satisfaction of the court that the company is unable to pay its debts;

(c) And, in either case, it appears to the court that the principal reason for its not being wound up is the insufficiency of its assets.

37. It is clear in the present case that all of these conditions are fulfilled. A judgment of the District Court in favour of a creditor of the company has been returned unsatisfied; it has also been proven to the satisfaction of the court that the company is unable to pay its debts; and it appears to the court that the principal reason for its not being wound up is the insufficiency of its assets.

38. Moreover, the respondent has conceded that the conditions for section 567 are fulfilled in this case.

39. It is noteworthy that section 567 applies to a judgment, decree or order <u>of any court</u> (i.e. not just the High Court) and therefore the decree of the District Court is sufficient to enable this provision to be relied on by this applicant in this case.

40. Section 567 contains a table setting out the sections to which this section applies. For the purposes of this application the relevant sections in respect of which the applicant is seeking relief are: -

(1) Section 612 – Power of the court to assess damages against certain persons.

(2) Section 671 – Power of the court to summon persons for examination.

(3) Section 672 – Order for payment or delivery of property against a person examined under s. 671.

(4) Section 684 – Inspection of books by creditors and contributories.

41. I propose to deal with section 684 first.

<u>Section 684 of the Companies Act, 2014</u>

42. Section 684 provides as follows:-

> *"1.* *The court may at any time* [after making a winding up order or the commencement of a voluntary winding up], *make such order for inspection of the accounting records, books and papers of the company by creditors or contributories as the court thinks just.*
>
> *2.* *Where such an order is made, any accounting records, books and papers in the possession of the company may be inspected by creditors or contributories accordingly but not further or otherwise."* (emphasis added)

43. It is clear in the present case that the words "[at any time after making a winding up order or the commencement of a voluntary winding up]" are disapplied by virtue of section 567 of the Act.

44. Therefore, this section provides that the court may make such order for inspection of the accounting records, books and papers of the company by creditors as the courts thinks just.

45. It is also clear that the applicant is a creditor of the company.

46. Indeed, the respondent has, albeit belatedly and only through counsel on his feet during the application, accepted that section 684 applies and that the respondent has no objection to the inspection of its accounting records, books and papers in the present case by the applicant and her solicitor.

47. In the circumstances I will make an order for inspection of:-

(a) The accounting records.

(b) The books and papers of the company by the applicant.

48. I will hear the parties further on the exact terms of this inspection order and in particular:-

a. The time period to which it applies;

b. What documents are to be covered by the order including books of accounts, accounting records, correspondence between the directors and its accountants, correspondence/emails between the company and its parent company;

c. Any emails or correspondence between any officer or servant or agent of the company and any person in connection with the refusal to pay the awards, other debts due and owing to the company, assets of the company, etc.;

d. Whether copies can be made of the said documents; and

e. The time period within which such inspection is to occur.

49. The applicant can then after such inspection, put such further evidence before the court as she wishes to do in respect of any further applications if she wishes to do so.

Section 671 of the Companies Act, 2014

50. The applicant also applied for (a) an order permitting her as a creditor of the company to summon Mr. Godart and/or other officers of the company for examination and/or in the alternative (b) that the Court should summon Mr. Godart for examination before it of its own motion. It is necessary therefore to consider the terms of section 671.

"***Power of court to summon persons for examination***

671.*(1) The court may exercise the following power:*

(a) of its own motion; or

(b) on the application of the Director [or the liquidator or provisional liquidator];

[at any time after the appointment of a provisional liquidator, the making of a winding-up order or the passing of a resolution to wind up a company voluntarily.]

(2) That power of the court is to summon before it—

(a) any officer of the company,

(b) any person known or suspected to have in his or her possession any property of the company or supposed to be indebted to the company, or any person whom the court deems capable of giving information relating to the—

(i) promotion or formation,

(ii) trade or dealings, or

(iii) affairs or property,

of the company.

(3) The court may examine on oath any person so summoned concerning the matters referred to in subsection (2)(c)(i) to (iii), either by word of mouth or on written interrogatories, and may reduce his or her answers to writing and require him or her to sign them.

(4) The court may require any person referred to in subsection (2) to produce any accounting records, deed, instrument, or other document or paper relating to the company that are in his or her custody or power.

(5) The court may, before the examination takes place, require any person referred to in subsection (2) to place before it a statement, in such form as the court may direct, of any transactions between him or her and the company of a type or class which the court may specify.

(6) If, in the opinion of the court, it is just and equitable to do so, it may direct that the costs of the examination be paid by the person examined."

51. Section 671 provides that the court may exercise the powers set out in the section:-

(a) of its own motion or

(b) on the application of the Corporate Enforcement Authority or the Liquidator or provisional liquidator.

52. Section 567 provides that this section also applies to a company which is not being wound up; therefore no liquidator or provisional liquidator are in place. That means that the only persons who can exercise the power to summon officers are (i) the Court of its own motion and (ii) the Corporate Enforcement Authority.

53. I do not believe that section 567 (1) or (2) should be read in a manner which enlarges the category of persons who are entitled to seek an order under section 671. I do not believe that s. 567 grants a creditor (such as the applicant) the ability to apply to court under section 671 to summon officers of the respondent company for examination on these matters.

The court's own motion

54. However, section 671 provides that the court may exercise the power to summon officers of a company for examination of its own motion. Counsel for the applicant submitted that this was precisely the sort of case where the court should exercise that statutory power and, of its own motion, summon the officers of this company before it for examination.

55. Counsel for the respondent submitted that the Court should not make such an order in circumstances where the applicant herself has no *locus standi* to make such an application under section 671.

56. Having considered the matter I am of the view that this is a case in which the court should exercise the power to summon officers of the company of its own motion. I say this for the following reasons:-

1. It is clear that section 671 (1)(a) of the Companies Act, 2014 and section 567 of the Act confer an express power on the court to exercise the power to summon officers of the company, of its own motion;

2. the Legislature has expressly conferred such powers on the court to enable the court to have the jurisdiction to summon officers of the company before it – both in cases where a winding up order has been made, and, as is the case under section 567, where a company has not been wound up;
3. Section 567 (1) expressly provides that this section applies where a company is not being wound up and where a judgment or decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; thus section 567 (1) in conjunction with section 671 (1) (a) expressly provides that the court may, on its own motion, summon directors of a company before it to explain the company's non-compliance with a court order;
4. this application is not a case in which the applicant is suing a respondent and the Court has not yet decided the issue of liability; this case comes before the Court in circumstances where the applicant has obtained judgment against the respondent, the applicant has sought to enforce the District Court judgment, the sheriff has been unable to seize any goods to satisfy the judgment and the respondent is refusing to obey an order of the court and/or to satisfy the judgment of the court;
5. I am not satisfied that Mr. Godart, despite his protestations of honesty in his affidavits, has set out the full truth of the matters on affidavit and it is therefore necessary to question him any further on these matters;
6. In particular I am concerned about who the correct landlord was in this matter. It is clear that \ña-Herrera entered into a tenancy agreement with a person whom she thought was the landlord. This tenancy agreement, she states, was with the respondent. Mr. Godart has however stated in his first affidavit that the respondent was only a letting agent and that it did not own any assets. It follows therefore that it was only acting as agent for and on behalf of the landlord. It is

not clear who exactly the landlord was. It is also not clear how the respondent could have entered into a tenancy agreement if it were not the landlord. It is clear that the landlord would have owned the dwelling in which the applicant was a tenant. As such, it would own an asset (i.e., the building) which could be realised to ensure that the applicant is paid her debt and that the judgment of the court is enforced. I am concerned that the respondent is acting as an agent for an undisclosed principal. That raises a host of questions as to who that principal is. Despite giving the respondent two opportunities to address this question, I am not satisfied that any proper explanation has been provided.

7. In addition, the applicant in her affidavit of 1 May 2024 states that she *"only became aware of the respondent as a legal entity and as the supposed landlord when I was served with the notice of termination and accompanying statutory declaration on 14 April 2022."* and she exhibits the said statutory declaration.
8. In the said statutory declaration, Mr. Godart solemnly and sincerely declared that the *"property is owned by Green Label Short Lets Limited"* and that he intended to enter into an agreement to sell the property nine months after the date of termination of the lease. Likewise in his third affidavit sworn on 2 May 2024, he stated that the respondent company was the landlord. Yet there is no evidence that the company was the owner or that it sold the property or that any proceeds of sale were reflected in the company's accounts.
9. Finally, I am very concerned about the pattern of unlawful behaviour which has been conducted by this company at the direction of Mr. Godart. This company has unlawfully terminated the applicant's tenancy; it has unlawfully evicted the applicant before the expiration of her notice; it has unlawfully removed her personal belongings and put them into storage; it has ignored two directions of the

> RTB to pay compensation to the applicant; it has breached planning regulations; it has breached fire safety regulations; it has refused to comply with a District Court Order. This is an appalling litany of unlawful conduct. It is clear that Mr. Godart, (and the company through which he is operating in this case), believes that he can defy the laws of this country, including orders of the courts.

57. For all the above reasons, I am satisfied that this is an appropriate case in which the Court should, of its own motion, compel Mr. Godart to give evidence under oath of the financial circumstances of the Company and how this debt can be paid.

58. In the circumstances therefore this Court will direct that Mr. Marc Godart appear before the Court at a date and time to be fixed to provide information about the ability of the company to satisfy the court judgment.

59. Under section 671 (4) the court may also require any such person to produce any accounting records, deeds, instruments or other document or paper relating to the company that are in their custody or power.

60. I will also direct Mr. Godart to produce all relevant accounting records and any books and records of the company relating to this matter.

Section 672

61. The applicant also sought an order under section 672 of the Act.

62. It appears that section 672 provides that if in the course of an examination under section 671it appears that any person being examined is indebted to the company, the court may order such person to pay the company the amount of the debt or any part of it.

63. I am satisfied however that it is not necessary to consider section 672 at this time. This can be revisited after the examination of Mr. Godart.

Section 612

64. The applicant also applied for an order under section 612 of the Act. This section sets out the power of the court to assess damages against a certain person.

65. This section is entitled *"Power of court to assess damages against certain persons".* It applies to companies that are in the course of being wound up or companies which have not been wound up.

66. The substance of section 612 is that if it appears that an officer of a company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any misfeasance or other breach of duty or trust in relation to the company that the court may, on the application of a creditors examine into his conduct and compel him either:-

(a) To repay or restore the money or property of any part of it the court thinks just.

(b) Contribute such sum to the assets of the company by way of compensation in respect of the misfeasance or other breach of duty or trust as the court thinks just.

67. The question therefore is whether the Court should, on the facts of this case, examine into the conduct of Mr. Godart on the application of the creditor (i.e. the applicant in this case).

68. Counsel for the respondent has opposed this application. Counsel has indicated that such an examination into the conduct of Mr. Godart would be entirely premature at this point in time. He says that Mr. Godart would have to be put on notice of the exact allegations of misfeasance or other breach of duty or trust in relation to the company or how he has allegedly misapplied or retained or become liable or accountable for any money or property of the company. I agree with this submission.

69. Counsel for the respondent also submitted that the allegations against Mr. Godart would have to relate to any misfeasance or other breach of duty or trust "in relation to the company" i.e., not in relation to the applicant. It is not necessary to deal with this submission at this time.

70. I am of the view that it is premature at this stage to either to accede to, or to refuse, the application brought by the applicant under section 612 and I will hold off making a decision on this section pending further developments in this matter.

Application under Order 42 Rule 36 of the Rules of the Superior Courts

71. The applicant is also seeking an order under Order 42, rule 36 on the basis that she has a judgment of the District Court which remains unsatisfied.

72. Order 42, rule 36 provides as follows:

> *"**II. Discovery in aid of execution and in proceedings under the Debtors Act (Ireland) 1872***
>
> > ***36.** When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the Court for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, or that any other person be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the Court as the Court shall appoint; and the Court may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents."*

73. Her counsel submits that she is entitled to an order under Order 42, rule 36 of the Rules of the Superior Courts because the rule refers to "a judgment or order for the recovery or payment of money" and it does not specifically provide that it should be an order of the High Court which is sought to be enforced.

74. Counsel for the respondent submit that the Court does not have jurisdiction under Order 42, rule 36 to make such an order because the applicant obtained her judgment in the

District Court, and if she wishes to enforce her judgment she should do so using the enforcement machinery of the District Court.

75. Therefore, the question of law which arises on this application is whether Order 42, rule 36 permits a party who has obtained a judgment in the District Court to apply to the High Court under Order 42, rule 36 for an order that officers of a company be orally examined about debts due and owing to the company instead of applying to the District Court.

76. Surprisingly, this simple question of law does not appear to have been addressed in the textbooks, commentaries on the Rules or in any of the reported decisions. It is therefore necessary to consider the matter from first principles. I have considered all of the cases referred to by the parties but none of them seem to have decided this point.

77. Counsel for the respondent submits that even assuming the District Court has enforcement procedures which are less than those of the High Court, that is a problem for the applicant, not for the respondent. It would appear that the District Court rules which are applicable to this are Order 51A, rule 13 and/or 17.

78. Order 51A, rule 13 provides that a court may make an order that an officer of the company produce a document and Order 51A, rule 17 provides:-

> *"The court may make any order that it thinks just in aid of the enforcement of a warrant of execution."*

79. It would appear that there is no express rule in the District Court which explicitly provides that the District Court may make an order that an officer of the company be orally examined about the financial position of the company, although Order 51A, rule 17 (1) would appear to encompass such an order.

80. Although the point is not free from doubt, I am of the view that Order 42, rule 36 should be interpreted to mean that it only applies to judgments or orders of the High Court

(and/or the Superior Courts), not judgments of the District Court and that, in the circumstances of the present case, the applicant is not entitled to rely on Order 42, rule 36.

Conclusion

81. I would therefore conclude as follows:-

(1) I will make an order under section 684 of the Companies Act, 2014 permitting inspection of the books and records and papers by the applicant in this case and I will hear the parties further on the exact terms of this order;

(2) Section 567 is applicable in the present case and therefore sections 612, 671, 672 and 684 are applicable to this company even though it has not been wound up;

(3) I am satisfied that this is an appropriate case in which the Court of its own motion should exercise the power to summon Mr. Godart for examination under sections 567 and 671 of the Act ;

(4) The order sought under section 672 is premature at this time and I will hold this over pending further developments in this case;

(5) The order sought under section 612 is also premature at this time and I will hold this over pending further developments in this case;

(6) Order 42, rule 36 cannot be relied upon by a judgment creditor who has a judgment in the District Court.

82. I will hear the parties further on the forms of the orders and on the issue of costs.

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