Neutral Citation Number: [2011] IEHC 424

THE HIGH COURT

2011 505 COS

IN THE MATTER OF JER RYAN ELECTRICAL CONTRACTORS LIMITED

(TRADING AS JRE ENGINEERING GROUP)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

Judgment of Miss Justice Laffoy delivered on 10th day of November, 2011.

1. On 1st September, 2011 Vinci Energies United Kingdom Plc (t/a Twiver Switchgear) (the petitioner) presented a petition to have Jer Ryan Electrical Contractors Limited (the company) wound up by the Court. The petition was grounded on the fact that the company was indebted to the petitioner in the sum of €59,379.31. On 23rd June, 2011 the petitioner had served a demand under s. 214 of the Companies Act 1963 (the Act of 1963) on the company which had not been complied with, so that the company was deemed to be insolvent. Indeed prior to the service of the s. 214 demand, the company had acknowledged that it was indebted to the petitioner in the sum of €57,072. The balance of the sum of €59,379.31 referred to in the petition is described as "late payment interest of €2,307.31 which has accrued since the date of demand". It is clear from the correspondence exhibited in the affidavit of Judith Riordan, the company's solicitor, sworn on 7th November, 2011 that the petitioner made serious efforts after the service of the s. 214 demand, but before the presentation of the petition, to secure payment of its debt by the company but was unsuccessful in that regard.

2. The petition was returnable for 10th October, 2011. Prior to the return date the petitioner had advertised the petition. When the matter came before the Court on 10th October, 2011, counsel for the company informed the Court that the company had been seeking investment, but the directors had reluctantly accepted that there was no realistic alternative to liquidation. However, they felt that proceeding by way of a creditors' voluntary liquidation would be less expensive. On behalf of the company an adjournment was sought to enable it to take steps to convene a creditors' meeting. The application for the adjournment was not objected to by counsel for the petitioner, who realistically accepted that the Court was likely to favour the less expensive route of a voluntary winding up of the company. Counsel who appeared on behalf of three other creditors of the company also consented. On that basis, the petition was adjourned.

3. The creditors' meeting was eventually advertised for 27th October, 2011.

4. When the petition was last before the Court on 7th November, 2011, the Court was informed that the creditors' voluntary winding up had commenced and that Mr. David Carson had been appointed liquidator. Counsel for the petitioner accepted that the liquidation of the company should go ahead as a creditors' voluntary winding up and that the petition should be struck out. However, he applied for orders that:

> (a) the petitioner be awarded its costs of the petition against the company, and
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> (b) the petitioner's costs should rank *pari passu* with costs of the liquidator in the voluntary winding up.

5. Counsel for the company, properly, merely apprised the Court of what had happened on 27th October, 2011 and did not address the argument in relation to costs. On 4th November, 2011, the solicitors for the petitioner had informed the liquidator's solicitors that the petitioner would be seeking an order for its costs of issuing the petition on 7th November, 2011. They sought confirmation that the liquidator would be represented and queried what his attitude would be. In the event, the solicitor for the liquidator informed the Court on 7th November, 2011 that the liquidator did not object to the application. However, it is not clear to me that the liquidator was warned of, and could have given consideration to, the second limb of the petitioner's application, which on the basis of my experience is a novel application.

6. In support of his application, counsel for the petitioner made the point that the process initiated by the petitioner had never been merely a debt collection process, which is undoubtedly the case. He also submitted that the petitioner had been severely prejudiced by having to bring the petition. I have no doubt that the petitioner was prejudiced in relation to the costs and expenses of the presentation of the petition and establishing the proofs on the hearing of the petition, including the cost of advertising.

7. The legal basis on which counsel for the petitioner proceeded was in reliance on s. 280(1) of the Act of 1963, which provides:

> "The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise in relation to the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court."

Counsel for the petitioner submitted that the Court, in dealing with the second limb of the petitioner's application, should approach the matter as if the company were being wound up by the Court and apply the provisions of Order 74 of the Rules of the Superior Courts 1986 (the Rules) dealing with costs and expenses payable out of the assets of the company. Order 74, rule 128(1) provides:

> "The assets of a company in a winding up by the Court remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the assets, including where the company has previously commenced to be wound up voluntarily such remuneration, costs and expenses as the Court may allow to a Liquidator appointed in such voluntary winding up, shall, subject to any order of the Court, be liable to the following payments which shall be made in the following order of the priority, namely:
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> > *First* – The costs of the petition, including the costs of any person appearing on the petition whose costs are allowed by the Court.

Next – The costs and expenses of any person who makes or concurs in making the company's statement of affairs.

Next – The necessary disbursements of the Official Liquidator, other than expenses properly incurred in preserving, realising or getting in the assets herein before provided for.

Next – The costs payable to the solicitor for the Official Liquidator.

Next – The remuneration of the Official Liquidator.

Next – The out-of-pocket expenses necessarily incurred by the committee of inspection (if any)."

8. As I understand the second limb of the petitioner's application it is that the petitioner should not have to prove for its costs as an unsecured creditor but should be allowed its costs, in accordance with the order of priority stipulated in rule 128, by the costs being treated in priority to the remuneration of the official liquidator and the out-of-pocket expenses necessarily incurred by the committee of inspection (if any), and that its costs rank *pari passu* with the costs of the liquidator in the voluntary winding up.

9. I am satisfied that the petitioner should be granted the costs of the petition against the company in voluntary liquidation, the costs to be taxed in default of agreement and I propose making that order at this juncture. Insofar as that decision might appear to be inconsistent with the approach adopted by the Court in relation to costs in *Re Balbradagh* [2009] 1 I.R. 597, where as the reporter's note at the end of the report indicates, no order for costs was made in favour of either the petitioner or the directors, the *Balbradagh* case is distinguishable, because it had evolved into a contest as to whether the creditors' voluntary winding up should continue as a compulsory winding up by the Court, with the petitioner's nominee as liquidator rather than the liquidator chosen at the creditors' meeting. In this case, the petitioner, sensibly in my view, assented to the company's request that it be allowed take the steps to have the company wound up outside the Court. Moreover, it is reasonable to infer that the company's directors' acknowledgement that liquidation was the only way forward was precipitated by the fact that the petitioner's petition was listed for hearing on 10th October, 2011. It is for those reasons that I consider that an order for costs should be made in favour of the petitioner.

10. However, I am not prepared, at this juncture, to go the additional step of ordering that the petitioner's costs should rank *pari passu* with the costs of the solicitor for the official liquidator. On my understanding of the order sought, it would impact on the remuneration of the liquidator and the expenses of the committee of inspection, if there is a committee of inspection, and it must be assumed that it would also impact on the unsecured creditors. The Court has no information on a range of matters relevant to the making of the order sought: the financial state of the company in liquidation; whether the liquidator had advanced knowledge of the import of the second limb of the application made on behalf of the petitioner; whether there is a committee of inspection in place; and what would be the attitude of the unsecured creditors. Finally, in accordance with rule 138 of Order 74 of the Rules, an application under s. 280 is required to be made by way of originating notice of motion, which has not happened.

11. For all the foregoing reasons, I do not think it would be appropriate, at this juncture, to make an order in the terms sought by the applicant at (b) in para. 4 above. However, that does not mean that I have formed any view on the merits of the application. Nor does it preclude the petitioner from bringing an application under s. 280 in accordance with the Rules.