

## THE HIGH COURT

[2013 No. 48 COS]

## IN THE MATTER OF CHIEFS CAFÉ LIMITED (IN EXAMINERSHIP) AND IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990

BETWEEN

PADRAIC TUFFY LIMITED

APPLICANT

AND

SHANE O'NEILL AND EAMONN COOKE

RESPONDENTS

## JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 31st day of May 2013

1. This application raises a net issue as to the proper construction of s. 25A(1)(c)(i)(II) of the Companies Amendment Act 1990 ("the Act"), as inserted by s. 25 of the Companies (Amendment) (No. 2) Act 1999 ("the Act of 1999").
2. On 31st day of January, 2013, a petition was presented by Chiefs Café Ltd. ("the Company") pursuant to the Companies (Amendment) Act 1990, for the appointment of an examiner. On that day, Mr. Neil Hughes was appointed interim examiner and on 12th February, 2013, as examiner.
3. Mr. Hughes ultimately formulated proposals for a scheme of arrangement and arranged for the holding of the meetings of creditors and members to consider the proposals for 3rd May, 2013.
4. Padraic Tuffy Ltd., the applicant, was an unsecured creditor of the Company. It also held guarantees from the respondents who are directors of the Company.
5. Mr. Massood, an employee in the insolvency department of Hughes Blake, the firm at which Mr. Hughes, the examiner, is a partner, deposed on affidavit that on Tuesday 30th April, 2013, at 12.36pm, he sent an email, inter alia, to the applicant to which he attached the notice of the unsecured creditors' meeting, creditors' proxy, explanatory memorandum and proposals for a scheme of arrangement. The email is exhibited and includes as one of the recipients 'info@tuffys.net'. It is not disputed that this email was received by the applicant. No affidavit has been sworn on behalf of the applicant stating that the email was not received at approximately the time it was sent.
6. Mr. Massood also sent the same documentation to the applicant by prepaid post on Tuesday 30th April, 2013. The solicitor for the applicant, Mr. Ross, in his affidavit, deposes that such posted notice of the unsecured creditors' meeting was received by the applicant by post on Wednesday 1st May, 2013.
7. On Thursday 2nd May, 2013, between 9.00pm and 9.30pm, a notice pursuant to s. 25A(1)(c) of the Act, signed on behalf of the applicant, was served on each of the respondents. That notice was a notice of offer to transfer to each of the respondents as guarantors of the indebtedness of the Company to the applicant any and all rights which the applicant has under s. 23 of the Act to vote in respect of the proposals for the scheme of arrangement in relation to the Company.
8. The net issue is whether, for the purposes of s. 25A(1)(c)(i)(II) of the Act, the applicant "received notice" of the unsecured creditors' meeting upon receipt of the email on Tuesday 30th April, 2013, or whether it received notice upon receipt of the letter on Wednesday 1st May, 2013. The importance of the point is the requirement on the applicant under s. 25A(1)(c)(i)(II) to serve the notice, which was ultimately served on the respondents on the evening of Thursday 2nd May, 2013, within 48 hours after receiving notice of the creditors' meeting.

## Section 25A

9. Section 25A in its entirety appears intended to protect the position of a creditor holding a guarantee of a debt of a company which is to be the subject of a write down in a scheme of arrangement in examinership whilst making subsequent enforcement of the guarantee subject to the giving of a notice with an offer to exercise voting rights to the guarantor within a specified time and also to make provision, in certain circumstances for payment under the scheme of arrangement to the guarantor rather than to the creditor. The requirements of s. 25A(1)(c)(i)(II) must be considered in the context of the entire scheme of the section and the other relevant provisions of the Act. Section 25A of the Act as inserted by s. 25 of the Act of 1999 provides:

"(1) The following provisions shall have effect in relation to the liability of any person ('the third person') whether under a guarantee or otherwise, in respect of a debt ('the debt') of a company to which an examiner has been appointed:

(a) subject to paragraph (b) and save where the contrary is provided in an agreement entered into by the third person and the person to whom he is liable in respect of the debt ('the creditor'), the liability shall, notwithstanding section 24(6), not be affected by the fact that the debt is the subject of a compromise or scheme of arrangement that has taken effect under section 24(9),

(b) neither paragraph (a) nor any of the subsequent provisions of this subsection shall apply if the third person is a company to which an examiner has been appointed,

(c) if the creditor proposes to enforce by legal proceedings or otherwise the obligation of the third person in respect of the liability, then—

(i) he shall—

(I) if 14 days' or more notice is given of such meeting, at least 14 days before the day on which the meeting concerned under section 23 to consider the proposals is held, or

(II) if less than 14 days' notice is given of such meeting, not more than 48 hours after he has received notice of such meeting,

serve a notice on the third person containing an offer in writing by the creditor to transfer to the third person (which the creditor is hereby empowered to do) any rights, so far as they relate to the debt, he may have under section 23 to vote in respect of proposals for a compromise or scheme of arrangement in relation to the company,

(ii) if the said offer is accepted by the third person, that offer shall, if the third person furnishes to the examiner at the meeting concerned a copy of the offer and informs the examiner of his having accepted it, operate, without the necessity for any assignment or the execution of any other instrument, to entitle the third person to exercise the said rights, but neither the said transfer nor any vote cast by the third person on foot of the transfer shall operate to prejudice the right of the creditor to object to the proposals under section 25,

(iii) if the creditor fails to make the said offer in accordance with subparagraph (ii), then, subject to subparagraph (iv), the creditor may not enforce by legal proceedings or otherwise the obligation of the third person in respect of the liability,

(iv) subparagraph (iii) shall not apply if a compromise or scheme of arrangement in relation to the company is not entered into or does not take effect under section 24(9) and the creditor has obtained the leave of the court to enforce the obligation of the third person in respect of the liability,

(d) if the third person makes a payment to the creditor in respect of the liability after the period of protection has expired, then any amount that would, but for that payment, be payable to the creditor in respect of the debt under a compromise or scheme of arrangement that has taken effect under section 24(9) in relation to the company shall become and be payable to the third person upon and subject to the same terms and conditions as the compromise or scheme of arrangement provided that it was to be payable to the creditor.

(2) Nothing in subsection (1) shall affect the operation of—

(a) section 5(2)(f), or

(b) any rule of law where by any act done by the creditor referred to in that subsection results in the third person referred to therein being released from his obligation in respect of the liability concerned."

10. On this application I have to determine what constitutes having "received notice" for the purposes of sub-section (1)(c)(i)(II). This must primarily be done from the words used by the Oireachtas in the sub-section itself in the context of the scheme provided for by s. 25A and the remaining provisions of the Act.

11. The principal submission of counsel for the applicant as to why the receipt of notice for the purposes of the sub-section should be construed as being the receipt of the letter sent by post rather than the email is the requirement of O. 75A, r. 18 of the Rules of the Superior Courts ("the Rules of Court"). Order 75A sets out the procedural rules for applications and other procedures under the Act. Order 75A r. 18, which applies to meetings required to be held under the Act, provides, insofar as relevant:

"18. All meetings of members or classes of members or creditors or classes of creditors convened for the purposes of section 18 or section 23 of the Act shall be governed by the following rules:

1. The Examiner shall summon all meetings of creditors and members by sending by post not less than 3 days before the day appointed for the meeting to every person appearing in the company's books to be a creditor of the company or a member of the company, notice of the meeting of creditors or members as the case may be.

2. The notice to each creditor or member shall be sent to the address given in the report of the Examiner of the company, if any or to such other address as may be known to the Examiner.

..."

12. The submission is that as the examiner is required under r. 18(1) to summon the meeting by sending a notice by post, the commencement of the 48 hour period under s. 25A(1)(c)(i)(II) must be construed as being on the receipt of a valid notice, meaning one sent in accordance with the requirements imposed on the examiner by O. 75A, rule 18(1).

13. There are, in my judgment, two reasons for which this submission is not sound. Firstly, as a general principle it is not permissible to construe a section of an Act by reference to a Statutory Instrument made under the Act: *Proctor & Gamble Company v. Controller of Patents* [2003] 2 I.R. 580, the Supreme Court per McCracken J. at p. 586. This principle follows from the subordination of secondary legislation to primary legislation (see David Dodd, *Statutory Interpretation in Ireland*, 1st Ed., (Dublin, 2008) at p. 340). Whilst O. 75, r. 18 are Rules of Court and not expressly made under a power contained in the 1990 Act, they are rules made for the purposes of proceedings and procedures under the Act and the same principle appears to me to apply. Accordingly, what constitutes receipt of notice for the purpose of s. 25A(1)(c)(i)(II) cannot be construed by reference to the manner in which the Rules of Court require a notice of the meeting to be sent to a creditor.

14. Secondly, as the requirement that a notice be sent by post specified in O. 75A, r. 18(1) is a rule of court, it may be modified in circumstances where it is necessary to do so in the interests of justice pursuant to the Court's inherent jurisdiction and/or pursuant to Order 124 of the Rules of Court. Non-compliance with the Rules does not render a proceeding void unless the Court so directs. Hence, for example, an examiner who had sent notice by email by arrangement with creditors or in circumstances where he was able to demonstrate that the creditor had received the email and did not follow up by sending a letter by post could apply to court to

dispense with the requirement that the notice be sent by post and a court would have jurisdiction to grant the application if it considered it was in the interests of justice to do so. The decision would depend on the facts of the application.

15. Section 25A(1)(c)(i)(II) must be construed as creating, insofar as possible, certainty. This appears to me to follow from the potentially serious consequences for a creditor who does not serve a notice on the guarantor pursuant to s. 25A(1)(c)(iii) within the time specified. The Oireachtas, in commencing the 48 hour period at the time at which a creditor "has received notice of such meeting" intends to create such certainty by commencing the relatively short period of 48 hours from an actual receipt of notice by the creditor. The creditor knows when he or, in the case of a company, it receives notice of the meeting. Undoubtedly, 48 hours is a short period of time but the Oireachtas clearly envisaged that having regard to the overall time constraints in an examinership, that meetings might be held at relatively short notice. The Oireachtas, in the legislation, does not specify how notice of meetings must be given. Accordingly, it appears to me that the words in s. 25A(1)(c)(i)(II) must be construed as meaning that the 48 hours commences from the time at which the creditor actually received notice of the meeting and cannot be construed as meaning that it should only commence when the creditor received a notice which was given in accordance with a rule of court. This is particularly so as for the reasons stated compliance with the rule of court may subsequently be complied with.

16. In reaching this conclusion, I have had regard to the fact that the rights of the applicant under the guarantee which it holds from the respondents are property rights which benefit from constitutional protection, and insofar as s. 25A may limit such rights, its provisions should be strictly construed, see *Byrne v. Grey* [1988] I.R. 31 at p. 38 and *Murphy v. Greene* [1990] 2 I.R. 566. The respondents also have property rights, including their right of indemnity from the Company which are being interfered with by the scheme of arrangement provided for by the Act. A construction of the words used in s. 25A(1)(c)(i)(II) in the context of the entire section and the provisions in relation to schemes of arrangement under the Act, requires that they be construed as providing that the 48 hour period starts from the time of actual receipt of a notice of the meeting by the creditor concerned and is not dependent on the manner in which the notice is sent.

17. It follows from my conclusion that on the undisputed facts herein, the applicant received notice of the meeting for the purposes of s. 25A(1)(c)(i)(II) upon receipt of the email on Tuesday 30th April, 2013. The evidence is that the email was sent at 12:36pm and no evidence has been adduced by the applicant disputing that it was received by it at that time or very shortly thereafter. Accordingly I find that the applicant received notice of the meeting at approximately 12:36pm on Tuesday 30th April, 2013 and hence, the notice served on the evening of Thursday 2nd May, 2013, was not served within 48 hours after it had received notice of the meeting.