Neutral Citation Number: [2007] IEHC 268

THE HIGH COURT

2007 No. 161 COS

IN THE MATTER OF PERMANENT FORMWORK SYSTEMS LIMITED
AND IN THE MATTER OF THE COMPANIES ACTS, 1963 TO 2006

Judgment delivered by Miss Justice Laffoy on 23rd May, 2007.

1. The history of this petition of Vincent Callan for an order that Permanent Formwork Systems Limited (the Company) be wound up is as follows:

> On 17th April, 2007 the petition was presented and it was made returnable for 30th April, 2007. The petition was preceded by a statutory notice pursuant to s. 214 of the Companies Act, 1963, as amended, which was served on 1st March, 2007. The notice was not complied with.
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> The petition was duly advertised in two national daily newspapers on 21st April, 2007 and subsequently in Iris Oifiguil.
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> On the first return date, 30th April, 2007, the petition was adjourned. On the same day an affidavit in response to the petition on behalf of the Company was sworn by Michael Tracey, a director of the Company. Mr. Tracey disputed that the debt alleged to be due by the Company to the petitioner was due. However, his affidavit contained no averment whatsoever as to whether the Company was solvent or otherwise.
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> On 9th May, 2007 a notice pursuant to s. 266 of the Act of 1963, as amended, giving notice of a meeting of creditors on 22nd May, 2007 was published by the Company in a national daily newspaper.
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> When this petition came on for hearing on 21st May, 2007, the court was informed that on that morning the members of the Company had passed a resolution to wind up the Company as a creditors' voluntary winding up and had nominated Mr. Hughes to be liquidator.

2. On the hearing of the petition, counsel for the Company submitted that the petition should be dismissed on two grounds: first, that the debt was disputed and that the Company's position was that, in fact, there was no debt due by the Company to the petitioner; and, secondly, that in accordance with the jurisprudence of the court, the voluntary liquidation, which it was submitted is cheaper and more expeditious than a court winding up, should be allowed to proceed. The views of four creditors, who were represented by the same firm of solicitors and the same counsel, were heard. Two of the creditors, an Austrian company and an Austrian resident individual, who claim to be owed €4,205,000 between them by the Company, are admittedly connected with the Company. The two other creditors are Irish-based companies who claim to be owed €178,319 between them. Counsel for the petitioner submitted that the Austrian-based creditors are not independent and he implied that the Irish-based creditors are not independent either, suggesting some form of contrivance in the manner that they came to be represented by the same firm of solicitors. I have formed no view on that suggestion.

3. It is well settled that, if a company in good faith and on substantial grounds disputes liability in respect of the alleged debt on which a petition to wind up a company is founded, the petition will be dismissed.

4. In this case the petitioner, who was a former director, managing director, company secretary, and shareholder in the Company claims that he is owed €157,000 by the Company. He also claims interest, although the basis, if any, on which he is entitled to interest is not clear. The Company's position as to its indebtedness to the petitioner was set out in the letter of 12th January, 2007 from Mr. Tracey, the current Managing Director of the Company. From that letter it is clear that it is admitted that at that date the Company owed the petitioner €157,000. However, in that letter the Company adopted the position that it was entitled to deduct two sums from that sum, leaving a balance due of €7,098.59. A cheque for that amount in favour of the petitioner was enclosed. It is not clear whether that cheque was negotiated, but I assume it was not.

5. The first sum which the Company contends it is entitled to deduct from the amount due to the petitioner is the sum of €98,240.67, details of which were given in a letter of 5th October, 2006 from Mr. Tracey, on behalf of the Company, to the petitioner. The sum in question is Mr. Tracey's assessment of the balance due by Offsite Construction and Design Limited (OSCD), a company which I understand is controlled by the petitioner and which was retained on a contract basis to do work for the Company both before and after the petitioner's involvement with the Company was severed in mid-2006. The figure of €98,240.67 was apparently arrived at as a result of a review or audit of invoices presented, prices charged and work done by OSCD pursuant to its contractual arrangement with the Company and payments made to OSCD by the Company.

6. The second sum, €51,660.74, according to the letter dated 12th January, 2007, represents withdrawals made by a third party, who was the General Manager of the Company during the petitioner's incumbency, which, it was asserted in the letter, were authorised by the petitioner. Mr. Tracey has exhibited an email from the third party to him dated 17th July, 2006 in which the third party stated that he got permission from the petitioner, the then managing director, to withdraw the monies. However, in that email the third party stated that, as he had previously stated, the repayment of the monies in question, which I understand to mean by him, was not in dispute.

7. So the position is that the Company purports to set off against the sum of €157,000 admittedly due by the Company to the petitioner two amounts which the Company claims are due to it by third parties, OSCD and the former General Manager. Mr. Tracey in his affidavit, which to a considerable extent is hearsay, transmogrifies those amounts into an amount allegedly due by the petitioner to the Company on foot of a claim (which would be a claim for unliquidated damages) for alleged breach of the fiduciary duties owed by the petitioner, as a director, to the Company. No proceedings for damages for breach of fiduciary duty have been initiated by the Company against the petitioner, nor, as far as I can ascertain, were any such proceedings threatened. On the basis of the evidence before the court, it is impossible to conclude that the Company has substantial grounds for asserting that, in an action for breach of fiduciary duty, the petitioner would be found liable for the sums due by the third parties to the Company or any sums. On that basis alone the court would be justified in rejecting the Company's attempt to resist the making of a winding up order on the basis that the debt is disputed.

8. However, that conclusion is entirely academic. The winding up of the Company is inevitable. In fact, as counsel for the Company pointed out, by virtue of s. 233 of the Act of 1963, the winding up is deemed to have commenced on the passing of the resolution to wind up on 21st May, 2007. Accordingly, the only real issue which arises at this juncture is whether the court should make an order for the winding up of the Company or whether the creditors' voluntary liquidation should be allowed to proceed.

9. It was submitted on behalf of the petitioner that the court should make a winding up order for the following reasons:

(a) The timing of the convening of the creditors' meeting gives the petitioner cause for concern, because the Company appears to be seeking to supplant the process of a court liquidation, which was initiated first in time.

(b) The petition is based on an undisputed debt of €157,000, which contention is premised on the Company's set off argument being spurious.

(c) The fact that the Company has resolved to wind itself up as a creditors' voluntary winding up is in effect an admission of the Company's own insolvency, thereby entitling the petitioner to a winding up order *ex debito justitiae*.

(d) Serious allegations have been made by Mr. Tracey against the petitioner in his affidavit, which are denied, and, in the circumstances, it would be particularly appropriate that an independent liquidator be appointed, and supervised, by the court to review the conduct of all parties in relation to the affairs of the Company.

(e) It is almost inevitable that the creditors will affirm the Company's choice of liquidator at the creditors' meeting. This is a cause of concern to the petitioner, given the connection of the Austrian-based creditors to the Company.

(f) The petitioner will be deprived of the special priority to costs which would otherwise be available under O. 74, r. 128 of the Rules of the Superior Courts if this petition is adjourned or dismissed.

10. The only authority to which the court has been referred in which there was a contest on the hearing of a petition between a creditor who had presented a petition for compulsory winding up first, on the one hand, and creditors who were in support of a voluntary liquidation, which had commenced on foot of a resolution of the Company following the presentation of the petition, continuing, on the other hand, is a decision of the Court of Appeal of England and Wales in In *re J.D. Swain Limited* [1965] 1 W.L.R. 909. The trial judge, having regard to the wishes of the majority of the creditors, dismissed the petition. The Court of Appeal held that the decision was one that lay within the discretion of the judge. Having reviewed the authorities, Diplock L.J. gave the following guidance at p. 914 *et seq*:

> "It seems to me from those two cases, that the guide-line has been laid down in this way: In the case of a petition for compulsory winding up, if the only circumstances which are available are that the petitioner seeks compulsory winding up and the majority of the creditors seek that there should be no winding up at all, then prima facie the petitioning creditor is entitled to a winding up unless there are some additional reasons for deciding to the contrary. If, on the other hand, the petitioner seeks a compulsory winding up and the majority of the creditors seek a voluntary winding up, then for the wishes of the petitioner to overrule those of the majority of the creditors there must be some special reason why the wishes of the majority should be over-ridden. The difference or the distinction seems to me to be an obvious one, namely, in the former case, what is being resisted is any winding up at all, so that the petitioning creditor, if he fails, will be denied the class remedy which he would otherwise have if the winding up took place; whereas, in the latter case, he will obtain the class remedy anyway under the voluntary winding up, and the matter then turns upon his being able to show some reason why the remedy under the voluntary winding up is not an adequate remedy for him."

11. The factors to be taken into account by the court in determining whether to make a winding up order in a situation in which a creditor's voluntary liquidation has already commenced and the petition is presented after such commencement were considered by this Court (O'Hanlon J.) in *In the Matter of Gilt Construction Limited* [1994] 2 I.L.R.M. 456. The decision of O'Hanlon J., which was subsequently followed by McCracken J. in *Re Naiad Ltd.* (13th February, 1995, unreported), is succinctly summarised in the headnote as follows:

> "(1) The court must be slow to dislodge a voluntary liquidator appointed to wind up a company with the concurrence of a majority, both numerically and in value, of its creditors.
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> (2) [The Liquidator's] credentials in terms of his professional qualifications and competence were not impugned in any manner which would justify conversion from a voluntary liquidation into a liquidation under the direction of the court.
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> (3) The court must have regard to a number of factors before dislodging a voluntary liquidator, in particular, the costs involved in a winding up by the court, the delay which would be incurred, the overall value of the assets to be administered, the level of complexity of the winding up and other factors such as the question of *mala fides* on the part of any person involved in the dispute.
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> (4) The present case involved assets of a relatively small value and so the winding up should be relatively straightforward and simple. In the event that unexpected problems should arise, an application could be brought pursuant to s. 280 of the Companies Act, 1963."

12. In Courtney on The Law of Private Companies at para. 25.104, it is pointed out that, in a number of English cases, a compulsory winding up has been ordered where it has been held that the creditors would otherwise have a "genuine sense of grievance" and it is commented that, generally, it would seem that the English courts are more inclined to accede to a creditor's petition than are the courts in this jurisdiction, citing *Re Zirceram Limited* [2000] 1 BCLC 751, which was relied on by counsel for the petitioner here. In that case, Lawrence Collins Q.C., sitting as a Deputy Judge of the High Court, set out the relevant principles applicable in determining whether to accede to a petition for compulsory liquidation, in a case in which the Company had been voluntarily wound up about a year prior to the presentation of the petition. Having reviewed the authorities, including *Re J.D. Swain Limited*, he set out the relevant principles as follows at para. 25:

> "(1) One of the reasons, if not the principal reason, for giving weight to the views of the majority of creditors who wish the voluntary liquidation to continue is that they have the largest stake in the assets of the company and their motives (especially if they are connected with the company) for resisting compulsory liquidation may be questionable if there are no assets or no realistic prospects of recovery for the unsecured creditors.
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> (2) The court may have regard to the general principles of fairness and commercial morality, and the exercise of discretion should not leave substantial independent creditors with a strong legitimate sense of grievance. Fairness and commercial morality may require that an independent creditor should be able to insist on the company's affairs being scrutinised by the process which follows a compulsory order.
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> (3) Inter-group transactions may require a special scrutiny if they operate to the prejudice of creditors and the court may take account of the fact that an opposing creditor is not an independent creditor, but an associated company.

(4) A compulsory liquidation may be ordered so that there can be an investigation which is not only independent, but seen to be independent. Even if there is no criticism of the liquidator appointed in the voluntary winding up: (a) the fact that associated supporting creditors have gone to great lengths to install, and maintain, him in office, may disqualify him in the eyes of the creditors; (b) the petitioning creditors may view with cynicism any investigation undertaken by a liquidator chosen by the very person whose conduct is under investigation.

(5) A liquidator appointed in the voluntary winding up must be seen not to be taking sides, but even if there is no attack on the probity or competence of the liquidator, or any other criticism, it may nevertheless be right to protect the creditors by a full investigation into the affairs of the company by a fully independent liquidator appointed in the context of a compulsory winding up."

13. On the facts of that case, the court decided that the appropriate course was to make a compulsory winding up order to enable an independent investigation to be carried out into inter-company transactions which gave rise to serious questions.

14. The principle on which counsel for the petitioner relied here is the principle set out at (4) in that quotation. Counsel made it clear that no criticism of the proposed liquidator, Mr. Hughes, was implied in the pursuit of a winding up order. His argument was that, given the history of this matter, a perception on the part of the petitioner of lack of independence in a creditors' voluntary winding up if the liquidator was the Company's choice in this case would be justified. That, he submitted, is a special reason for making a winding up order.

15. There are aspects of the Company's response to the s. 214 demand and to the petition which give rise to concern. In a letter dated 1st March, 2007, in response to the s. 214 demand, the Company's solicitor stated that the Company was solvent and able to pay its lawful debts as they fell due. A "deemed insolvency" arose on the failure to comply with the s. 214 notice. The petition was grounded on the Company being, accordingly, insolvent. In Mr. Tracey's affidavit of 30th April, 2007 he did not, as I have already stated, address the issue of solvency at all. This was explained at the hearing on the basis that the views of the creditors had to be ascertained. While I can understand that the advertising of the petition would affect the basis on which, say, trade creditors were prepared to deal with the Company, I think the Company should have fully apprised the court of the situation in relation to solvency when it was setting out on affidavit the factual basis for resisting the petition.

16. As the authorities indicate, it is appropriate in a case like this that the court should have regard to the views of the majority of the creditors who wish the voluntary liquidation to continue, unless the petitioner establishes a special reason for making the winding up order. In this case, unfortunately, no evidence has been put before the court as to the number and classes of creditors, the amounts due to them and so forth. The court has had to take it on faith from counsel for the creditors who appeared that they represent 86% in value of the creditors. That is not a satisfactory state of affairs.

17. Notwithstanding the reservations I have expressed, I have come to the conclusion that the proper course is to dismiss the petition. The primary consideration which informed that decision is that it is in the interests of the general body of creditors that the liquidation of the Company be effected as cheaply and as expeditiously as possible. In all probability, a winding up under the supervision of the court would be more costly and would be of longer duration than a creditors' voluntary winding up. No question has arisen as to the independence of the professional insolvency practitioner whose appointment is likely to be confirmed at the creditors' meeting. Further, since O'Hanlon J. gave judgment in the *Gilt* case the law has changed and the Director of Corporate Enforcement now exercises a supervisory jurisdiction in relation to voluntary liquidators. Finally, the facts here do not give rise to the necessity for an independent investigation of the type which the court in *Re Zirceram* considered necessary, having regard to the pre- and post-liquidation activity there in relation to an associated company, which was either a creditor of the company or its only debtor, to safeguard the interests of the independent creditors.

18. For all the foregoing reasons, I consider that the appropriate order is to dismiss the petition.