Neutral Citation Number: [2009] IEHC 592

THE HIGH COURT

2009 709 COS

IN THE MATTER OF CENTRUM PRODUCTS LIMITED

(IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF SECTIONS 267(1) AND 267(3) OF THE COMPANIES ACT 1963

AND IN THE MATTER OF SECTION 277(2) OF THE

COMPANIES ACT 1963

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

ON THE APPLICATION OF RATIONEL VINDEUR LIMITED

BETWEEN

RATIONEL VINDEUR LIMITED

APPLICANT

AND

MICHAEL BUTLER

AND CENTRUM PRODUCTS LIMITED (IN VOLUNTARY LIQUIDATION)

RESPONDENTS

Judgment of Miss Justice Laffoy delivered on the 15th day of December, 2009.

The application

As a prelude to setting out the reliefs claimed on this application, there is recited in the originating notice of motion the following matters:

> (a) that by a resolution of 29th October, 2009 at a meeting of the members of Centrum Products Ltd. (the company) it was resolved that the company be wound up voluntarily;
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> (b) that by resolution of 29th October, 2009 the creditors of the company resolved that Michael Butler be appointed to act as liquidator of the company;
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> (c) that it appears that the value attributed to the valid creditors' votes properly cast in favour of the resolution to appoint Mr. Butler to act as liquidator of the company was overstated to the extent of purporting to ascribe a majority of the votes cast in favour of the appointment of Mr. Butler as members' nominee for the position of liquidator; and
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> (d) that it appears that a majority in value of the creditors present and entitled to vote did not support the nomination of Mr. Butler but instead proposed that Ciaran Kirk act as liquidator.

The applicant seeks the following reliefs on the notice of motion:

> (1) a declaration that the resolution of 29th October, 2009 appointing Mr. Butler as liquidator of the company is void pursuant to the provisions of s. 267(1) and s. 267(3) of the Companies Act 1963 (the Act of 1963), as amended;
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> (2) an order removing Mr. Butler pursuant to the provisions of s. 277(2) of the Act of 1963;
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> (3) a declaration that the majority in value of the creditors attending the meeting on 29th October, 2009 voted in favour of the resolution to appoint Mr. Kirk as liquidator of the company in accordance with the provisions of s. 267(1) and s. 267(3); and
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> (4) an order appointing Mr. Kirk as liquidator of the company in place of Mr. Butler pursuant to the provisions of s. 277(2).

At the hearing of the application counsel for the applicant put an alternative proposition to the Court, namely, that Mr. Kirk be appointed liquidator to act jointly with Mr. Butler.

The statutory provisions invoked by the applicant

Section 267 of the Act of 1963, as amended, deals with the appointment of a liquidator in a creditors' voluntary winding up. Sub-section (1) provides that, subject to subs. (2), the creditors and the company at their respective meetings mentioned in s. 266 may nominate a person to be liquidator, and, if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors, the person, if any, nominated by the company shall be liquidator. Sub-section (3) of s. 267, which was inserted by s. 47 of the Company Law Enforcement Act 2001, prescribes how a contest on nominations for the office of liquidator at a creditors' meeting is to be assessed and provides as follows:

> "If at a meeting of creditors mentioned in s. 266(1) a resolution as to the creditors' nominee as liquidator is proposed, it shall be deemed to be passed when a majority, in value only, of the creditors present personally or by proxy and voting on the resolution have voted in favour of the resolution."

What happened on 29th October, 2009 was that at the members' EGM, having resolved that the company, by reason of insolvency, be voluntarily wound up, it was resolved that Mr. Butler be appointed liquidator. Subsequently, at the creditors' meeting the applicant, as creditor, proposed Mr. Kirk as liquidator. The contest between Mr. Butler and Mr. Kirk for the office of liquidator was then voted on by the creditors.

As the declaratory relief sought by the applicant suggests, the basis of the applicant's complaint is that the resolution to appoint Mr. Butler as liquidator was not validly passed.

Order 74 of the Rules of the Superior Courts (the Rules) regulates, *inter alia*, meetings of creditors in a creditors' voluntary winding up. Rule 71 deals with admission and rejection of proofs for the purpose of voting and provides as follows:

> "The chairman shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the court. If he is in doubt whether a proof should be admitted or rejected he shall mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained."

There is also provision in subs. (2) of s. 267 for an application to the Court, but, *ex facie*, it seems to be limited to a situation in which the creditors' nominee has been appointed liquidator, rather than the members' nominee, although it must be acknowledged that the provision is far from clear. In any event, the jurisdiction given to the Court by subs. (2) is to make an order "either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors". The applicant has not invoked that provision, which would appear not to apply to the situation which arises here, where the contest was between two nominees of creditors, albeit that one was also the nominee of the company, and, *ex facie*, does not give jurisdiction to grant the relief it seeks. So the Court's jurisdiction in relation to substitution of, or augmenting the liquidator, having regard to what I say in the next paragraph, must be found in Order 74, rule 71.

The applicant has also invoked s. 277(2) which provides as follows:

> "The court may, on cause shown, remove a liquidator and appoint another liquidator."

It was made clear by counsel for the applicant that no issue arises as to the capacity of Mr. Butler to act as liquidator. The *gravamen* of the applicant's objection to his appointment is merely that he is the nominee of the members, who also claim to be creditors. The position of the applicant is that it harbours a grievance as to the manner in which it has been treated by the company, which may well be justified. As a consequence, it advocates that the affairs of the company leading to the winding up should be investigated by a liquidator other than a nominee of connected parties. The liquidator of the company, it was submitted, must not only act independently of the members, but must also be seen to be acting independently and robustly in investigating the conduct of the directors leading to the resolution to wind up. In view of the position adopted on behalf of the applicant, it seems to me that s. 277(2) has no application. With the leave of the Court, Mr. Butler did not appear on the hearing of the application, although he swore an affidavit exhibiting his report of the steps he has taken to date.

In the light of the foregoing, I am treating this application solely as an appeal under Order 74, rule 71.

The Court's function on such an appeal is dealt with in the judgment of this Court in *Re Jim Murnane (In Liquidation)* [2009] IEHC 412.

The factual basis of the application

The estimated statement of affairs of the company as at 29th October, 2009 disclosed only four unsecured creditors and no secured creditors. The unsecured creditors and the amounts due to them were set out in a note to the statement as follows:

Anthony Reynolds €213,712.00

Swan O'Sullivan €12,206.00

The applicant €115,000.00

Cindy Reynolds €20,000.00

Total: €360,918.00

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At the creditors' meeting, the applicant claimed that the company was indebted to it in the sum of €139,183.73. The chairman admitted the applicant's proof for the purposes of voting at €139,183.73. Accordingly, no issue arises on that point. At the creditors' meeting votes to the value of €245,918 (Mr. Reynolds, Mrs. Reynolds and Swan O'Sullivan) were cast in favour of Mr. Butler and votes to the value of €139,183.73 (the applicant) were cast in favour of Mr. Kirk. Swan O'Sullivan had been the company's auditors. Their debt relates to three outstanding invoices dating from April 2009 in respect of accountancy services provided to the company. There is no issue in relation to their debt. The issue relates primarily to the claim of Mr. Reynolds to be creditor and the claim of Mrs. Reynolds to be creditor. Mr. Reynolds and Mrs. Reynolds were the sole members and the sole directors of the company.

A breakdown of Mr. Reynolds's debt was given in the note to the statement of affairs as follows:

Cash injection into company €40,000.00

Expenses paid on behalf of the company €27,780.00

Undrawn wages €40,932.00

Rent unpaid €60,000.00

Undrawn pension €45,000.00

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Total: €213,712.00

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In the statement of affairs, as regards Mrs. Reynolds, the debt of €20,000 was ascribed to "undrawn wages".

At the creditors' meeting, representatives of the applicant raised issues in relation to the components of Mr. Reynold's debt and in relation to Mrs. Reynold's debt and they were not satisfied with the answers. Those issues were canvassed in the affidavit grounding this application, the affidavit of Gavin Connery, the company secretary and chief financial officer of the applicant, which was sworn on 12th November, 2009. Mr. Connery's affidavit was responded to by an affidavit sworn by Nigel Swan of the firm of Swan O'Sullivan, on 18th November, 2009 and an affidavit sworn by Mr. Reynolds on 19th November, 2009, which exhibited a considerable amount of corroborative material. The explanations given by Mr. Swan and Mr. Reynolds were then scrutinised in an affidavit sworn by Jim Luby of the firm of McStay Luby, Chartered Accountants, on 26th November, 2009 and filed on behalf of the applicant. Finally, Mr. Swan swore a further affidavit on 3rd December, 2009 dealing with some of the points raised by Mr. Luby.

The upshot of the evidence before the Court is as follows:

(a) The cash injection of €40,000 by Mr. Reynolds into the company, which was made on 6th March, 2008, has been vouched.

(b) Of the expenses of €27,780 claimed by Mr. Reynolds as having been paid on behalf of the company, the sum of €25,080.85, representing two payments in respect of insurance made in May 2008 and in April 2009, has been vouched. The balance, €2,699.15, which has not been vouched, is claimed in respect of motor expenses for the period from 1st January, 2009 to 29th October, 2009. A point made by Mr. Luby that the notes to the Abridged Financial Statements of the company for the year ended 31st March, 2008 "at face value" suggested that Mr. Reynolds owed the company €60,463 at 31st March, 2008 has been explained by Mr. Swan. While I am not surprised that Mr. Connery was confused by the accounts and that he thought that the sum of €60,463 should be set off against the company's indebtedness to Mr. Reynolds, on the evidence before the Court I am satisfied that that is not the case.

(c) Mr. Reynolds has averred that he has not drawn any wages from the company since January 2009 and that the sum claimed in respect of undrawn wages represents nine months, that is to say, February 2009 to October 2009 inclusive, gross wages at the rate of €4,548 per month. The applicant contended that, if there were to be a dividend payable to unsecured creditors in the liquidation, and unfortunately this is only notional in the case of the company, Mr. Reynolds would only be able to prove for the undrawn wages less PAYE and PRSI and the income levy, which would reduce his claim by €10,070. A reduction of €10,070 would not have affected the majority in value in favour of Mr. Butler at the creditors' meeting on 29th October, 2009.

(d) The tenancy agreement under which the company held an industrial unit in Bray County Wicklow from Mr. Reynolds and Mrs. Reynolds, as landlords, which reserved a rent of €6,000 per month, has been exhibited. The sum of €60,000 represents ten months arrears of rent from January 2009 to October 2009. Notwithstanding that the applicant has raised questions in relation to the company's liability for rent, for the purpose of the Court's current function, it must be accepted that the company owes the rent, although it would appear that it is owed to Mr. Reynolds and Mrs. Reynolds jointly, rather than to Mr. Reynolds solely.

(e) The propriety of including the unpaid pension contributions in relation to Mr. Reynolds as a debt due by the company to Mr. Reynolds has been questioned by the applicant, on the basis that the unpaid contributions, if proved and admitted in the liquidation, would be paid to the pension scheme trustee. Counsel for the company countered that argument by pointing out that Mr. Reynolds is the beneficiary of the trust and the trust would be obliged to vote at his behest at the creditors' meeting. I consider it is not necessary for present purposes to express a view on the complicated relationship of an employer, an employee beneficiary and the trustee of a pension scheme. That is because the aggregate of the vouched cash injection, the vouched expenses paid on

behalf of the company, the net undrawn wages and the rent in respect of which Mr. Reynolds contends the company is indebted to him exceeds €155,000, which, on its own and aside from the company's indebtedness to Mrs. Reynolds and Swan O'Sullivan, exceeds the applicant's debt.

In the affidavit evidence put before the Court, it has been explained that Mrs. Reynolds' undrawn wages relate to the year 2007. I consider the explanation given must be accepted for present purposes.

Accordingly, on the evidence before the Court, I am satisfied that the majority in value of the creditors voted in favour of Mr. Butler. It is true, as counsel for the applicant pointed out, that the applicant represented 100% of the trading creditors, because there was no other trading creditor disclosed in the statement of affairs, which, of itself, is an unusual circumstance in these recessionary times. It is also true that the applicant represents 93% of the non-connected creditors, because the only other non-connected creditor is Swan O'Sullivan.

The submissions

Counsel for the applicant submitted that the Court should have regard to the special context of the relationship of the applicant and the company and, in particular, that, but for assurances given by Mr. Reynolds in March 2009 that the applicant's debt would be discharged, the company could have relied on the credit insurance which it had in place, which was due to expire at the end of March 2009. The applicant's position is that a robust investigation requires to be carried out as to the manner in which the company operated in the lead up to the winding up and, in particular, whether it traded recklessly and whether some creditors were fraudulently preferred. The basis on which it was submitted that the Court has jurisdiction to take account of those matters is that it was submitted that the Court can give greater weight to the debts of the non-connected creditors than to connected creditors.

Counsel for the applicant submitted that the Court should follow the approach that has been adopted by courts in the United Kingdom on petitions to wind up as outlined in the judgment of this Court in *Re Balbradagh Developments Ltd.* [2009] 1 I.R. 597 in the following passage at p. 602:

> "Counsel for the petitioner urged the Court to adopt the approach which has been adopted by courts in the United Kingdom in ordering a compulsory winding up where otherwise creditors who are not connected to the company would have a genuine sense of grievance. This approach is illustrated in the following passage from the judgment of Judge Roger Cooke in *Re Magnus Consultants Ltd.* [1995] 1 B.C.L.C. 203 at p. 207:-
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> > 'But it is quite apparent from the authorities I have read that, despite the fact that the liquidator is going to be somebody who is not only licensed but because he is in a way a professional set apart entitled to be regarded as a person of probity, nevertheless the courts have clearly taken the view that justice must not only be done but be seen to be done, and that where the conduct of the principal creditor – a *fortiori* the principal creditor who is in charge of the company – is under attack he really should not be without more the person who chooses the liquidator, and where the liquidator has been chosen in those circumstances a petitioner can readily feel a real and proper sense of grievance to which the court ought to give effect.'"

In the succeeding paragraph in the *Balbradagh* judgment, I observed that there may be cases in which it would be appropriate to adopt the approach advocated in that passage. However, on the facts of the case, I refused to convert a creditors' voluntary liquidation into a compulsory liquidation.

It was submitted on behalf of the company that the decision in the *Balbradagh* case is of no relevance and that Order 74, rule 71 is the beginning and the end of the Court's jurisdiction on this application. It was submitted that there is no general jurisdiction in s. 267 to change the identity of the liquidator, which submission I understand to relate to the circumstances which prevail here. Counsel referred to this Court's analysis of the Court's function on an appeal under Order 74, rule 71 in the judgment in the *Jim Murnane* case and the decision of the High Court of England and Wales, referred to in that judgment, in *Re A Company* [1995] 1 B.C.L.C. 459, in which, in considering a rule analogous to rule 71, Blackburne J. outlined his understanding of the function of the court on an appeal as follows:

> "In my view, the task of the court, on an appeal under rule 4.70(4) … is simply to examine the evidence placed before it on the matter and come to a conclusion whether, on balance, the claim against the company is established and, if so, in what amount. I would only add that, in considering the matter, the court is not confined to the evidence that was before the chairman at the time that he made his decision but is entitled to consider whatever admissible evidence on the issue the parties to the appeal choose to place before the court."

Counsel for the company referred the Court to a more recent decision of the High Court of England and Wales in *Re Power Builders (Surrey) Ltd.* [2009] 1 B.C.L.C. 250, in which the court's function under the English rule was considered and the Court came to a view consistent with the view expressed by Blackburne J.

Conclusion

In my view, the jurisdiction of the Court under Order 74, rule 71 is fundamentally different to the jurisdiction of the Court in determining whether to make a winding up order. By virtue of s. 216 of the Act of 1963 the Court has a very broad discretion on the hearing of a winding up petition, in that it is expressly provided that the Court may dismiss it, adjourn the hearing conditionally or unconditionally or make any interim order, or any other order that it thinks fit. In the commentary in *McCann and Courtney* (2008 Ed.) on s. 216 it is stated that the Court has "a complete and unfettered judicial discretion as to whether to make the order or not but will exercise its discretion in accordance with certain guiding principles". By contrast, in my view, the Court's jurisdiction and function under Order 74, rule 71 is limited.

In the context of a creditors' meeting convened pursuant to s. 266 where the issue is the validity of a resolution to appoint a liquidator at such a meeting where there has been a contest between two or more creditors' nominees, which is what is at issue here, the Court's function on an appeal under Order 74, rule 71 is to determine whether the decision of the chairman on the admission or rejection, as the case may be, of a proof for the purpose of voting was correct. Although it is not spelt out in the rule, the Court must have jurisdiction to deal with the consequences of the decision

having been incorrect, if that is the case, where the Court considers that the correct decision would have impacted on the appointment of the liquidator. How the consequences are dealt with will depend on the particular circumstances in the case. In the *Jim Murnane* case, for example, this Court, on the particular facts, substituted the applicant's nominee for the nominee appointed at the creditors' meeting, stating that such order was made under s. 267(2), which was the provision invoked by the applicant. On reflection, it may be that s. 267(2), which is unclear, had no application and the consequential order could only have been, and should have been, made under Order 74, rule 71.

Adopting the approach adumbrated by Blackburne J. in the passage quoted earlier, I consider that the only jurisdiction which the Court has on this application is to determine, by reference to the evidence before the Court, whether Mr. Reynolds, as chairman of the creditors' meeting, was correct in admitting the proofs of the claims of himself and his wife for the purposes of voting the appointment of a liquidator. I do not think it is open to the Court in making such determination, where the question is whether a debt was properly admitted, to have regard to any factors other than whether the evidence shows that, on balance, the debt in issue is due by the company to the creditor in issue. In particular, I do not think that it is open to the Court to take into account the broader issues, such as the conduct of the creditor in issue in another capacity, whether as a director or a member of the company, which may give rise to a claim for reckless trading or fraudulent preference in the winding up. What the appeal is about is whether a particular proof was properly admitted or rejected and no more.

In this case, on the evidence before the Court, on balance, I must conclude that the company is indebted to Mr. Reynolds in a sum in excess of €155,000, which, taken together with its indebtedness to Mrs. Reynolds (€20,000) and Swan O'Sullivan (€12,206) exceeds the debt due to the applicant. Therefore, in accordance with s. 267(3) the majority in value of the creditors voted for Mr. Butler. Accordingly, Mr. Butler was properly appointed liquidator.

As I pointed out in the judgment in the *Balbradagh* case (at p. 602) there are statutory provisions in place now for supervising creditors' voluntary liquidations and there are mechanisms under the Companies Acts in reliance on which an aggrieved creditor can have a matter determined by the Court. Those protections are available to the applicant in the case in the course of the winding up. Furthermore, in this case a committee of inspection was appointed at the creditors' meeting and Mr. Connery is a member of it.

Order
There will be an order dismissing the applicant's application.