Neutral Citation Number: [2013] IEHC 193

THE HIGH COURT

[2013 No. 97 COS]

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

AND

SIMPLY READ LIMITED (IN MEMBERS' VOLUNTARY LIQUIDATION)

BETWEEN

YVONNE R. KIRWAN

APPLICANT

AND

RONAN PARKER (VOLUNTARY LIQUIDATOR)

RESPONDENT

Judgment of Ms. Justice Laffoy delivered on 22nd day of April, 2013.

Factual background

1. There are huge gaps in the affidavit evidence as to the factual background to this application and, in particular, the Court is hampered by the fact that neither a Companies Registration Office (CRO) search, nor crucial documents which were, or should have been, filed in the CRO, for example, the special resolution referred to later, have been exhibited by either party. However, I propose setting out such of the facts as may be extrapolated from the affidavit evidence which are relevant to the issues the Court has to determine.

2. Prior to its winding up, the applicant and her husband, Stephen Kirwan, were directors of, and each held fifty per cent of the shareholding in, Simply Read Limited (the Company). The Company traded as a newsagent, but ceased to trade on 6th February, 2010. The directors then initiated a members' voluntary winding up in April 2010, obviously in the belief that the Company was solvent and that its assets, when realised, would discharge all its debts. They jointly swore a statutory declaration of solvency pursuant to s. 256 of the Companies Act 1963 (the Act of 1963) on 15th April, 2010, which was filed in the CRO, and which stated that the Company was in a position to pay its debts within ten months, and identified a surplus of in excess of €30,000. The statutory declaration embodied a report of an independent person, in accordance with the provisions of s. 256, supporting their contention that the Company was solvent. That report of Brian Morgan & Co. was dated 16th April, 2010.

3. Apparently, the Company resolved by special resolution that it be wound up by a members' voluntary winding up on 29th April, 2010 and that the respondent, an accountant, be appointed liquidator for the purposes of the winding up. The respondent filed notice of his appointment as liquidator (Form E2) in the CRO on 5th May, 2010. The applicant has made various allegations in the grounding affidavit on this application of failure by the respondent to properly exercise his duties as liquidator and to comply with his obligations under the Act of 1963, some of which have been acknowledged by the respondent in his replying affidavit, to which I will refer later. In any event, just short of three years after the commencement of the winding up the sums due to the creditors of the Company have not been discharged and it appears that the Company is probably not in a position to discharge them.

The application

4. This application was initiated by an originating notice of motion issued on 1st March, 2013 which was returnable on 8th April, 2013. On the notice of motion the applicant sought the following reliefs:

> (a) an order pursuant to s. 280 of the Act of 1963 determining three questions posed: whether the respondent is acting properly for the purpose of winding up the affairs, and in the best interests, of the Company; whether the respondent is acting *bona fide* as liquidator; and whether in failing to call a meeting of the Company's creditors where the Company has not met its debts within the time specified in the directors' declaration of solvency pursuant to s. 256 of the Act of 1963, the respondent ought to be removed as liquidator;
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> (b) an order pursuant to, inter alia, s. 277 of the Act of 1963 removing the respondent as voluntary liquidator of the Company;
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> (c) an order pursuant to s. 213 of the Act of 1963 converting the members' voluntary liquidation of the Company into "an Official Liquidation"; and
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> (d) an order appointing Timothy Regan (Mr. Regan) as official liquidator of the Company.

5. The application was grounded on the affidavit of the applicant which was sworn on 1st March, 2013, which contains a considerable degree of detail in relation to what has occurred over approximately four years, both before and after the commencement of the winding up.

6. On 4th April, 2013, an affidavit, which had been sworn on 23rd March, 2013, was filed on behalf of the respondent. Although the name of the firm does not appear on the back sheet of the affidavit, it is stated after the *jurat* that the affidavit was filed for the respondent "by Kenny Boyd & Co. Solicitors".

7. On 5th April, 2013 the respondent e-mailed the applicant's solicitor with confirmation that he consented to the application to appoint Mr. Regan as liquidator. The applicant's solicitors responded stating that they understood that the respondent, or his legal

representative, would be in attendance in court on 8th April, 2013. The response of the respondent on the same day was that, because he was consenting, he felt there was no need for his attendance nor would he be represented.

8. When the matter appeared in the Chancery list on 8th April, 2012, it was adjourned for one week. The motion was heard on the adjourned date, 15th April, 2013. There was no appearance by the respondent or the solicitors who filed the replying affidavit on his behalf.

9. On 15th April, 2013, the Court was informed that what the applicant wanted was that Mr. Regan should be appointed as liquidator and that the liquidation should be converted into a winding up by the Court. That approach was utterly misconceived. An application to the Court for a winding up order must be made by way of petition (s. 215 of the Act of 1963) and one of the circumstances outlined in s. 213 of the Act of 1963 must be proven. In addition, the petition must be advertised in accordance with Order 74 of the Rules of the Superior Courts and compliance with the requirements of those Rules must be established. As things stand, an order for the winding up of the Company by the Court cannot be made.

The issues
10. In the light of what I have said above, it seems to me that the issues which the Court should address are:

> (a) whether Mr. Regan should be appointed liquidator in place of the respondent; and
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> (b) what action the liquidator of the Company should be directed to take and, in particular, whether he should be directed to take steps to formally convert the liquidation into a creditors' voluntary liquidation.

Having regard to the evidential deficit, I am assuming that the winding up is at present proceeding as a members' voluntary winding up.

Appointment of Mr. Regan as liquidator
11. Section 277 of the Act of 1963 confers on the Court power to appoint and remove a liquidator in a voluntary winding up. Sub-section (1) provides that, if from any cause whatever, there is no liquidator acting, the Court may appoint a liquidator. Further, subs. (2) provides that the Court may, on cause shown, remove a liquidator and appoint another liquidator. The fact that the respondent has consented to the order sought being made means that it is not necessary to determine whether cause has been shown.

12. Accordingly, as the respondent has consented to the appointment of Mr. Regan as liquidator of the Company in substitution for him, and as Mr. Regan has consented to act and there is proof in the form of an affidavit of Ben O'Rafferty, solicitor, sworn on 12th April, 2013, as to his experience in insolvency matters and his suitability for the appointment, the Court will appoint Mr. Regan as liquidator in place of the respondent.

Conversion of winding up into a creditors' voluntary winding up
13. The two ways in which a members' voluntary winding up can be converted to a creditors' voluntary winding up are outlined in Courtney on *The Law of Companies* (3rd Ed.) at para. 23.113 *et. seq.*

14. The first, which is enacted in s. 256(5) of the Act of 1963, gives the Court a discretion to apply the provisions of the Act of 1963 relating to a creditors' voluntary winding up where, within twenty eight days after the resolution for voluntary winding up has been advertised, a creditor applies to Court for an order under that subsection and the Court is satisfied that such creditor, together with any creditors supporting him in his application, represents one-fifth at least in number or value of the creditors of the company. While the respondent in his affidavit has acknowledged "his oversight in not posting advertisements announcing his appointment as Liquidator of the Company", which I assume means that the requirement of subs. (1) of s. 252 has not been complied with, so that the time within which the application must be brought has not expired, nonetheless the applicant does not have *locus standi* to bring an application under s. 256(5). That is because, while she contends that she is a creditor of the Company in the sum of €10,000, the evidence does not establish that her debt represents one fifth in number or in value of the creditors.

15. The alternative means of conversion is provided for in s. 261 of the Act of 1963, which deals with the duty of the liquidator to call a creditors' meeting if he of opinion that the company is unable to pay its debts. The liquidator's duties, in such circumstances, are summarised in Courtney at para. 23.115 as follows:

> "Where this happens, a liquidator must:
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> – call a meeting of the creditors within fourteen days from the day he formed his opinion;
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> – mail notices of the meeting to the creditors not less than seven days before the day of the meeting;
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> – advertise in Iris Oifigiúil and in two daily newspapers at least ten days before the meeting;
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> – furnish reasonable information to any interested creditor who requests such information;
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> – state in the notice of the meeting that he is under a duty to call the meeting having formed the opinion that the company was unable to pay its debts on time."

Courtney then explains (at para. 23.116) what happens at the creditors' meeting as follows:

> "At the creditors' meeting the liquidator must present a statement of affairs of the company (including its assets, liabilities, list of outstanding creditors and an estimate of their claims). He must also attend and preside at the meeting of the creditors. From this time onwards, the winding up becomes a creditors' voluntary winding up. The creditors can then replace the liquidator and appoint their own, and where there is a dispute over the costs, charges or expenses of the members' liquidator, application can be made to Court. The validity of any acts which were previously done by the members' liquidator is not affected."

16. The respondent has accepted that he "should have called an appropriate meeting in accordance with the provisions of the Companies Act 1990", obviously referring to s. 261 of the Act of 1963, as amended by s. 129 of the Companies Act 1990. Therefore, it is reasonable to infer that at this point in time the obligations imposed by s. 261, as so amended, fall to be complied with.

17. Accordingly, immediately following the making and perfection of the order of the Court appointing him as liquidator, Mr. Regan

should call a meeting and comply with the obligations of a liquidator in accordance with s. 261 of the Act of 1963, as amended. It will be a matter for creditors as to whether a person other than Mr. Regan should be appointed to continue the winding up, which will become a creditors' voluntary winding up as and from the date on which the meeting is held. It will also be a matter for the creditors whether they will appoint a committee of inspection at that meeting.

18. It is expressly provided in s. 261(6) of the Act of 1963 that nothing in that section shall be deemed to take away any right in the Act of 1963 of any person to present a petition to Court for the winding up of a company. However, as I have made clear from the outset, the Court cannot compulsorily wind up the Company in the absence of a petition which complies with all the necessary statutory and regulatory requirements.

Order

19. While the application gives rise for a considerable cause for concern as to the manner in which the winding up of the Company has been conducted, in my view, the only order which it is appropriate to make on this application is an order appointing Mr. Regan as liquidator in place of the respondent. Following the making of that order, Mr. Regan will have to take the steps which I have outlined earlier, in compliance with s. 261. I consider that it would be otiose to direct him to comply with the law at this juncture.