THE HIGH COURT

[2012 No. COS 7]

IN THE MATTER OF ALBION ENTERPRISES LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 - 2009

Judgment of Miss Justice Laffoy delivered on 16th day of March, 2012.

1. The petition to wind up Albion Enterprises Limited (the Company), to which this judgment relates, was presented by MCR Personnel Ltd. (the Petitioner) on 6th January, 2012. In the petition, the Petitioner claimed that the Company was indebted to it in the sum of €55,675 plus costs as yet unascertained. The petition was based on a demand dated 17th November, 2011, which complied with s. 214 of the Companies Act 1963 (the Act of 1963), which was served on the registered office of the Company. The Company did not pay or satisfy the sum claimed or make any offer to secure or compound the same. Accordingly, in accordance with the provisions of s. 214, the Company is deemed to be insolvent and unable to pay its debts.

2. When the petition came on for hearing on 12th March, 2012, following the intervention of the National Asset Management Agency (NAMA), the Petitioner had complied with all of the relevant requirements of the Rules of the Superior Courts and practice directions in relation to the presentation of a winding-up petition. The Petitioner had proffered Mr. Kieran Wallace of KPMG as official liquidator and there was a letter from Mr. Wallace consenting to act as official liquidator, if appointed, and an affidavit attesting to Mr. Wallace's suitability and fitness to act as official liquidator before the Court. The petition had been advertised in early February 2012 in the Irish Daily Mirror, the Irish Daily Mail and in Iris Oifigiuil and proof of advertising was contained in an affidavit sworn by the Petitioner's solicitor, Peter Dempsey. In short, all of the relevant proofs on a winding up petition had been established.

3. The factual basis of the intervention of NAMA was set out in an affidavit sworn by Bernard McLoughlin, a portfolio manager with NAMA, which was sworn on 5th March, 2012. That affidavit proved the following facts:

> (a) The Governor and Company of the Bank of Ireland (Bank of Ireland) had been designated by the Minister for Finance as a "participating institution" under the National Asset Management Agency Act 2009 (the Act of 2009).
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> (b) On 24th February, 2012, NAMA appointed Mr. Luke Charleton and Mr. David Hughes of Ernst & Young to be joint statutory receivers of all assets referred to and comprised in and charged by a deed of mortgage and charge dated 14th December, 2007 made between the Company of the one part and Bank of Ireland of the other part, which mortgage had been acquired by NAMA from Bank of Ireland on or about 6th October, 2011.
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> (c) The Minister for Finance had designated Irish Nationwide Building Society (Irish Nationwide) as a "participating institution" for the purposes of the Act of 2009.
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> (d) A guarantee dated 26th July, 2004 given by the Company to Irish Nationwide and a mortgage dated 26th July, 2004 made between the Company of the one part and Irish Nationwide of the other part are "eligible bank assets" pursuant to s. 69 of the Act of 2009 and were subsequently acquired by NAMA from Irish Nationwide on or about 3rd December, 2010.
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> (e) On 2nd March, 2012, NAMA made a demand under the guarantee referred to at (d) above and it was averred by Mr. McLoughlin that, if the demand was not satisfied, NAMA would appoint statutory receivers over all the assets referred to and comprised in the mortgage dated 26th July, 2004 referred to at (d) above.
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> (f) The charge dated 26th July, 2004, in addition to containing a legal mortgage over the lands and premises "situate at Dalymount Part, Phibsborough, County *(sic)* Dublin", also contained a first fix to charge over all other lands hereditaments and premises of the Company and a first floating charge over all its undertaking property and assets, book debts and suchlike.

4. Although this was not on affidavit, the Court was informed on 12th March, 2012 that on the previous Friday, 9th March, 2012, statutory receivers had been appointed over the assets comprised in the mortgage dated 26th July, 2004 given by the Company to Irish Nationwide.

5. Having regard to the facts outlined in paragraph 3, the reality of the situation is that NAMA has security over all of the assets of the Company and it is in the course of enforcing that security via the appointment of statutory receivers under the Act of 2009. On the basis of the evidence before the Court it seems highly unlikely that there are any assets of the Company which have escaped from NAMA's wide net. Notwithstanding that, the Petitioner pursued its application for an order winding up the Company.

6. For more than a quarter of a century before the coming into operation of the Act of 2009, the powers of the court on the hearing of a winding up petition were governed solely by subs. (1) of s. 216 of the Act of 1963 which provided:

> "On hearing a winding-up petition, the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."

However, it is interesting to note that subs. (1), in all material respects, replicates the corresponding provision of the Companies (Consolidation) Act 1908 and, in particular, the element of that provision which provides that the Court shall not refuse to make a winding up order on the grounds only that the assets of the company have been mortgaged or that the company has no assets, is a verbatim replication of the provision in the 1908 Act. There was a subs. (2) in s. 216, which replicated a corresponding provision in the 1908 Act, until it was repealed in 1983, when it ceased to be of relevance because of other legislative changes.

7. What is of relevance for present purposes is that there was inserted a new subs. (2) in s. 216 by virtue of s. 233 of the Act of 2009, which provides:

"The court shall not make an order for the winding up of a company unless –

(a) the court is satisfied that the company has no obligations in relation to a bank asset that has been transferred to [NAMA] or a NAMA group entity, or

(b) if the company has any such obligation -

(i) a copy of the petition has been served on that Agency, and

(ii) the court has heard that Agency in relation to the making of the order."

8. As counsel for NAMA pointed out, subs. (2) of s. 216 is mandatory. Before making an order for the winding up of a company, the Court must ascertain whether the company has an obligation in relation to a bank asset which has been transferred to NAMA. The petition in this case did contain a statement in the following terms:

> "The Company has no obligations in relation to a bank asset that has been transferred to the National Asset Management Agency or a NAMA group entity".

The verifying affidavit of Donall Barrett, sworn on 6th January, 2012 to establish the veracity of the statements contained in the petition, was incorrect in purporting to verify the statement which I have just quoted. Mr. McLoughlin's affidavit has corrected that error. As it is now established that the Company has obligations in relation to bank assets which have been transferred to NAMA, there are two mandatory requirements to be fulfilled. The first, that a copy of the petition has been served on NAMA, has been fulfilled. So also has the second, that NAMA be heard in relation to the making of the winding-up order. I think it is implicit in that requirement, as counsel for NAMA submitted, that not only should NAMA be heard through submissions, but it should also be entitled to put affidavit evidence before the Court, as happened here.

9. As to what the Court has learned from having heard NAMA, it is, as l have indicated at paragraph 5 above, that it seems highly unlikely that there are any assets of the Company which are not secured by securities which have been transferred to NAMA and which are currently being enforced by NAMA. The only other suggestion made on behalf of NAMA was that there was no evidence that substantive funding is available for the liquidation. That, obviously, is a matter which will have to be addressed by the official liquidator, if the Company is wound up. It is premature at this stage, given that Mr. Wallace has consented to act.

10. As regards the law, what is significant, in my view, is that, for more than a century, the statutory discretion conferred on the Court to compulsorily wind-up a company has been subject to a mandatory qualification, that the Court shall not refuse to make a winding-up order merely because the company has no unsecured assets or no assets. Although it would appear that there has been very little judicial or academic comment on that qualification, it seems to me that, when one considers the vast range of statutory powers conferred on liquidators, which facilitate the creation of a pool of assets to meet the liabilities of the company's creditors, the legislative policy behind it and its rationale are readily discernible.

11. Where, as on this petition, NAMA puts evidence before the Court that, by way of transfer from "participating institutions", it has security over all of the assets of the Company, that factor alone, in my view, should not influence the Court in refusing to make a winding-up order. If a winding-up order is made in this case, neither NAMA nor the statutory receivers appointed by it would be prejudiced, because s. 150(2) of the Act of 2009 provides:

> "The appointment of a liquidator to a company whose assets or any part of them are under the control of a statutory receiver does not displace the statutory receiver and does not affect his or her powers, authority and agency."

In a particular case, NAMA may be able to demonstrate that the winding-up order should be refused, by, for example, by being able to demonstrate that the Petitioner has an ulterior motive in bringing the petition. However, in this case, there is no suggestion of an ulterior motive and I am satisfied that none exists. The sole objective of the Petitioner is to have its debt discharged.

12. Accordingly, as a matter of law, as the petitioning creditor has proved that the Company is insolvent and is unable to pay its debts as they fall due, in my view, it is entitled to a winding-up order *ex debito justitiae*. Notwithstanding the evidence put before the Court by NAMA, I consider that the Court must make a winding-up order.

13. If commonsense was the yardstick by which the Court had to determine whether to make a winding-up order in this case, the decision might be different. Although this aspect of the matter was not emphasised by counsel for NAMA, in the letter dated 2nd March, 2012 referred to at para. 3(e) above, NAMA demanded immediate repayment of sums "totalling €59,269,335.79, being the principal and interest due and payable up to 12th February, 2012". As a matter of common sense, it is difficult to see how the liquidation of the Company will achieve the Petitioner's objective of having its debt discharged.