Neutral Citation: [2014] IEHC 225

THE HIGH COURT

[2014 No. 185 COS]

IN THE MATTER OF THE COMPANIES ACTS 1963-2012 AND IN THE MATTER OF BUZREEL LIMITED

JUDGMENT of Mr. Justice Hogan delivered on 1st May 2014

1. On 2nd April 2014 Mr. Neil Hughes was appointed as provisional liquidator of Buzreel Ltd. ("Buzreel") by order of McGovern J. on foot of a petition presented by Midland Web Printing Ltd. ("Midland Web"). Buzreel is the owner of the only classified advertising business in Ireland, namely, the magazine known as "Buy and Sell". There were five weekly titles which were distributed widely among retailers throughout the island of Ireland. The company also has a strong online and social media presence. Publication ceased, however, once a liquidator was appointed.

2. Section 231(2) of the Companies Act 1963 ("the 1963 Act") provides that the liquidator in a winding up by the court shall have power to sell the assets of the company by public auction or private contract. Section 213(3) provides that that the exercise by the liquidator in a winding up by the High Court of the powers conferred on him by the section shall be subject to the control of this Court.

3. To this end the liquidator advertised the sale of the company's assets by an advertisement published in *The Irish Times* on April 4th, 2014. He was naturally anxious to do this as quickly as possible so as, as Mr. Hughes put it in his affidavit of 15th April 2014, "to mitigate the risk of brand value decreasing whilst the publications remained out of circulation." Interested parties were then given an information memorandum which detailed the assets for sale and which also laid down a timetable for what was effectively a tender process.

4. In this regard the liquidator required prospective bidders to make final offers to acquire the assets and undertaking of the business by 12 noon on Thursday 10th April. The information memorandum required that "all offers must be supported by documentary evidence of funding to the satisfaction of the Provisional Liquidator." The information memorandum then continued:

> "Acceptance of the preferred offer will be communicated by close of business on 10th April 2014. Please note that there will be a requirement for the preferred purchaser to enter into an asset sale agreement on 11th April 2014. The asset sale agreement will be conditional on approval of the sale by the High Court.
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> The Provisional Liquidator intends making an application on 11th April 2014 (or the earlier possible time thereafter) for the approval by the High Court of the sale of the assets to the preferred purchaser.
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> The Provisional Liquidator reserves his right to change the timetable set out above."

5. As it happens, the deadline was extended to 5.30 p.m. on Thursday, April 10th. The liquidator received four offers in total, ranging from €26,000 to €303,000 (exclusive of VAT). The highest offer of €303,000 came from Midland Web and it was informed that evening that it was the preferred bidder. Midland Web was also informed that the liquidator intended to complete the sale of the relevant assets on the following day, subject only to approval from this Court.

6. At this point a difficulty arose. It became clear from the letter provided from Ulster Bank that Midland Web's funding was contingent on the early encashment of various investments held by the directors with that Bank, so that it would take somewhere between three to four weeks for the necessary funds to clear. In the light of these difficulties and having spoken with James Fanning of Midland Web, Mr. Hughes decided to withdraw Midland Web's status as the preferred bidder. Mr. Hughes maintained that the information memorandum had made clear at all times that time would be of the essence given the nature of the assets and the real possibility that the brand value would deteriorate. He suggested that it was clear that all bidders were – or, at least, ought to have been – aware from that memorandum that any proposed sale would have to be completed more or less immediately after this Court had approved the terms of the sale.

7. At that point Mr. Hughes turned to the second highest bidder, Demirca Ltd. ("Demirca"). While its bid was lower, it was nonetheless at that juncture the highest bid in respect of which the liquidator had satisfactory proof of immediate funding. This was the background against which Mr. Hughes applied by motion dated 15th April 2014 to this Court for an order pursuant to s. 213(3) in respect of that sale to Demirca.

8. The matter originally came into the vacation list before Barr J. This matter was then adjourned to enable Midland Web to put in a replying affidavit. In that affidavit, the principal of Midland Web, Mr. Fanning, stated that at all material times the Provisional Liquidator was made aware that it would take three to four weeks for the necessary funds to clear. He specifically stated that an employee of Messrs. Hughes Blake had expressly confirmed to him that the Provisional Liquidator would accept the investment portfolio as proof of funding. Mr. Hughes responded by affidavit on 22nd April stating that he had never known or realised that the funding would take this length of time to clear.

9. A further complication was that Midland Web's original bid price - €313,000 – was disclosed by the Provisional Liquidator to Demirca in an effort to ensure that the original winning price was matched. At the hearing before me on 24th April 2014 Midland Web strongly resisted the liquidator's application for confirmation of the sale on the basis that it would be unfair for the liquidator to go back on what it said had been the assurances given to it, although the liquidator had also put in a further replying affidavit denying any such assurances or understanding. Midland Web also indicated to the Court that it was now prepared to raise its bid to €312,000.

10. Given that all parties had stressed the urgency of the matter and that an immediate decision was necessary, I took the view that the fairest thing in the circumstances was to make a *Van Hool* order (*Van Hool McArdle Ltd. v. Rohan Industrial Estates Ltd.* [1980] I.R. 237) and to give the two parties one final opportunity to make unconditional sealed bids. I reached this conclusion because it would have been impossible to determine the factual dispute in respect of the alleged assurance given to Midland Web without at least some form of oral hearing which the exigencies of time simply did not permit. It would have been equally unfair to Demirca to accept the slightly enhanced bid from Midland Web without having given it the same opportunity to increase its bid.

11. The liquidator was understandably anxious to ensure that the existing Demirca bid with its cleared funds should not be lost if there was a re-tender. I sought to guard against the possibility that the sale might be jeopardised and, as a condition of the making of the *Van Hool* order, I required Midland Web to give an undertaking (which was forthcoming) that it would make an unconditional bid of at

least €312,000 on the re-tender.

The Van Hool order of 24th April 2014
12. It was in that vein that I accordingly made the *Van Hool* order in the expectation that the parties would have one final opportunity to make an unconditional offer, with sealed bids to be with the liquidator by 5 p.m. on Monday, April 28th. The offer was to be on the basis of the draft asset sale agreement which had been sent to both parties, subject only to non-material amendments or amendments to that agreement analogous to those which had been agreed in principle by the liquidator with Demirca. With a view to avoiding the difficulty which had attended the first tender I directed for the avoidance of doubt that the liquidator was entitled to reject any offer which was not accompanied by either a bank draft or a letter from a bank of standing confirming that funds were available for immediate transfer.

13. The curial part of the order of 24th April 2014 accordingly provided in relevant part that:

> "1. Demirca and Midland Web Printing be each at liberty to provide sealed unconditional bids together with signed contracts to the Provisional Liquidator, Mr. Neil Hughes, by 5.00p.m. on Monday 28th April 2014.
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> 2. The Provisional Liquidator is entitled to accept the highest bid tendered which is cash backed and for the avoidance of doubt the Provisional Liquidator is entitled to reject a bid not accompanied by a bank draft or its equivalent or a letter from a senior official from a bank of standing confirming that the funds are available for immediate transfer to the Provisional Liquidator on completion of the contract for sale.
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> 3. That the matter stands adjourned to this Court for final approval
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> 4. The motion herein stands adjourned to this Court on Tuesday 29th day of April 2014 at 10.45 a.m.
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> Liberty to apply to the duty judge."

The events of Monday, April 28th
14. Mr. Hughes was confirmed as official liquidator by order of Charleton J. on the morning of Monday, April 28th.On that afternoon the liquidator received the bids/

15. At 4.45 p.m. a representative of Demirca, Mr. Claffey, attended at the office of Hughes Blake and submitted a bid for [y] euros which was higher than its second revised bid of €311,000. This bid was unconditional.

16. On behalf of Midland Web Mr. Fanning arrived at approximately 4.59 p.m. He informed Mr. Hughes that he was making an offer of in the sum of [z] euros. This was made up of a bank draft for [x] euros, plus a cash figure amount to 1% of the x euro figure. The x euro figure was higher than the y euro revised bid of Demirca. The 1% figure in cash was handed to Mr. Hughes's solicitor, Mr. O'Grady (who was also present) at about 5.20 p.m.

17. There was to be yet a further complication when Mr. Hughes opened the bids at approximately 5.05 p.m. in that the bid submitted by Midland Web contained the following sentence:

> "The offer is also subject to the purchaser acquiring clean title and all computers and software that that is required for running the business as per your information memorandum."

18. Mr. O'Grady immediately queried whether this clause complied with the Court's direction that the bid be unconditional. Midland Web's solicitor, Mr. Clinch, stated that he had not previously seen the letter and took instructions. Having done so, Mr. Clinch confirmed that the clause should be deleted and the letter was returned with the sentence in question deleted.

19. Mr. Hughes than met Mr. Claffey to indicate that Demirca had not made the highest offer. For his part Mr. Claffey expressed the view that the Midland Web bid ought not to have been accepted in view of the issues which arisen. Mr. Hughes stated that he not consider these departures from the terms of my order (such as they were) were not material, although he accepted that this would ultimately be a matter for this Court.

The events of April 29th
20. On the morning of April 29th, counsel for the liquidator, Mr. Murphy, applied to me to make an order under s. 213(3) in respect of the revised Midland Web bid. Demirca were not present on that morning and I took the view that in order to protect their procedural rights that they should be given a formal opportunity to object. I accordingly indicated that I would approve the revised Midland Web bid at 11 am on Thursday May 1st. unless Demirca applied by motion to restrain this step.

The events of May 1st
21. On May 1st Demirca applied to restrain the sale to Midland Web. Demirca also sought leave to make a fresh bid for [w] euros. This liquidator confirmed that this latter sum was higher than any previous offer made by either of the parties. There then followed legal argument which lasted much of the day. Given the urgency of the situation, I found myself obliged to give an *ex tempore* judgment, although I stated that given the acute difficulty of the questions raised, I would have preferred some little time to reflect and to deliver a reserved judgment.

22. In giving that *ex tempore* judgment I ultimately concluded that, as the *Van Hool* order made by me was intended to be the final step of the process, I should direct the liquidator to accept the Midland Web bid, provided that it was a valid bid. I further concluded that the deviations from the terms of my order (such as they were) on the part of Midland Web were not material and that it was accordingly a valid bid.

23. I put the matter in for 2 p.m. on the following day, Friday, May 2nd.,in order to give Demirca an opportunity to consider its position. On that occasion counsel for Demirca, Mr. Lehane, indicated that it was his client's intention to appeal. Following further argument I agreed to extend that stay on my order to 5 p.m. on Wednesday, May 7th. in order to give Demirca an opportunity to appeal to the Supreme Court. It was in that context that, with the concurrence of the parties, it was agreed that I would furnish the parties with a more elaborate version of my reasons in writing.

The task of the court under s. 213(3)

24. It is merely statement of the obvious to say that one of the tasks of the liquidator in this process is to achieve the best possible price for the assets of the company. That, however, must be balanced against considerations of fairness, honour and integrity in respect of any tender process the outcome of which requires judicial sanction. It is, accordingly, not *simply* a question of the best possible price – although that, of course, must be a key consideration – but where (as here) an open bidding process has been held by the liquidator (either in his or her own right or at the court's direction) it is rather a question of the best possible price obtained in a regular and fair fashion.

25. If it were otherwise, then, for example, it would be open, for example, to the liquidator having announced the winning bid at the end of the tender process then to accept a higher offer from the losing party. The unfairness inherent in that example, would be manifest.

26. These are, I believe, the principles which emerge from the two key Supreme Court decisions which we may now examine. In the first case, *Re Hibernian Transport Companies Ltd.* [1972] I.R. 190, the official liquidator applied to the High Court and obtained leave to sell by public auction certain leasehold property by auction subject to a reserve of £70,000. There were in fact no bids received at the auction, but subsequently an offer of £65,000 was made by a company, United Dominion Trust, which was expressed to be "subject to contract". That offer was approved by a judge of the High Court (Kenny J.) in chambers and acceptance of the offer was then duly communicated to the prospective purchaser. In the wake of this communication the liquidator then applied to the judge for approval of the sale of the contract, but in the course of that application it became clear that another party, Irish Permanent, was willing to make an offer for £101,000. Kenny J. concluded that the Court was bound to confirm the sale to United Dominion Trust given that court sanction for the sale had already been given.

27. The Supreme Court dismissed an appeal by Irish Permanent against this decision of Kenny J. As Walsh J. explained ([1972] I.R. 190, 202):

> "It is the purpose of liquidation proceedings to realise the assets for as much as it is possible to obtain as this inures for the benefit of creditors, and all other parties who are interested in the assets. In the present case the offer of £101,000 was a very considerable increase on the price offered by United Dominions, and if all other things were equal then there should be no doubt but that the larger sum should be accepted. However, all other things were not equal, and if one assumes that the documents and letters which passed between United Dominions and the liquidators would not constitute a sufficient memorandum or note in writing to comply with the provisions of the Statute of Frauds, 1695, the fact remains that it had been communicated to United Dominions (with the approval of the judge) that their offer would be accepted…..
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> Much stress has been laid on the fact that initially the offer of United Dominions was 'subject to contract'; in the ordinary course of events an agreement for the sale or purchase of the land subject to contract means nothing more than an agreement to enter into a contract for the sale of land and, as such, it is not enforceable as if it were a contract. In the present case whether or not, as the matter stood on 11th October, the agreement between the parties could have been enforced, there can be no doubt about the fact that the High Court had agreed to the sale and United Dominions had committed themselves to purchasing….In my view, it was quite right for the learned trial judge to regard himself as being bound, if not in law, certainly in honour, to permit the liquidator to complete the contract already executed by United Dominions."

28. The decision in *Hibernian Transport* can be contrasted with the subsequent decision of the Supreme Court in *Van Hool McArdle Ltd. v. Rohan Industrial Estates Ltd.* [1980] I.R. 237. In that case the liquidator agreed to sell the company's lands for the sum of £730,000, "subject to and conditional upon the consent of the High Court thereto" being obtained. The liquidator subsequently obtained a higher offer from another bidder. When the liquidator applied to the High Court he informed the Court of the higher offer, but McWilliam J. approved the original contract of sale.

29. The Supreme Court allowed the appeal and it is striking that both O'Higgins C.J. and Kenny J. stressed that the present case was quite different from the facts disclosed in *Hibernian Transport* and other similar cases. As Kenny J. explained ([1980] I.R. 237 at 242-243):

> "Each of [these cases] relates to an application to discharge a court order, which had approved a sale, because a higher bid was received *after* the court's sanction had been given. In all three of them the court, having approved the sale, had to keep faith with the purchaser. In the instant case the High Court had not given its consent to the sale when Van Hool's offer of £850,000 was received.
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> The primary duty of the court and of the liquidator in a court winding up is to get the maximum price for the assets. A system under which a bid of £730,00 is accepted when one of £850,000 has been made would bring the courts into well-deserved ridicule."

30. The Court then directed that the two parties submitted sealed tenders within one week: see [1980] I.R. 237, 243.

31. It was, perhaps, significant that in *Van Hool* there had not been a competitive tender process prior to that point. It was also clear that there had been no question of court sanction of the first bid prior to the making of the second bid. By contrast, in *Hibernian Transport* the first bid had received judicial approval *before* the second (and higher) bid. This was the essential difference between the two cases and why Walsh J. held in *Hibernian Transport* that the court was entitled to regard itself "as being bound, if not in law, certainly in honour" in respect of the first bid in that case.

The application of the principles in Hibernian Transport and Van Hool

32. It is clear from the terms of the *Van Hool* order that the two parties were each to be given one further opportunity to make a final bid. It was necessarily implicit in that process that the contract would be awarded to be highest bidder who made a valid bid and, indeed, I said as much in open court. It is true that the matter had to come before the Court again on the following morning, but this was no more than the exercise of the Court's general supervisory powers in relation to the process.

33. Assuming, therefore, that there were two otherwise valid bids, the Court must, in line with the principles in *Hibernian Transport*, keep faith with the process and award the contract to the highest bidder. Subject only to the question of whether Midland Web complied with the terms of the order and that it made a valid bid, then it is clear that the z euros bid which it made that afternoon was the highest bid. Accordingly, therefore, the outcome of the present application is contingent on whether Midland Web made a valid bid in accordance with the terms of the *Van Hool* order.

Whether Midland Web complied with the terms of the Van Hool order
34. Two issues in relation to the compliance with the terms of the *Van Hool* order now arise. First, although the bid consisted of z euros, made up of a bank draft for x euros, plus a cash payment equal to 1% of the x euros figure, the 1% cash element was presented about 20 minutes after the 5 p.m. deadline. Second, an issue arises as to whether the bid was unconditional.

35. In my view, while the terms of the order should be construed relatively strictly, this should not be done in some unyielding or unforgiving fashion. All of this means that some flexibility must be built into the process, provided that there is a high degree of compliance with the terms of the order and no particular unfairness is caused thereby to the other bidder.

36. So far as the late arrival of the cash payment is concerned, it should be noted that the liquidator was given the bank draft for x euros in advance of the 5 p.m. deadline and that he was told that another cash payment was about to be immediately delivered. One would be hard pressed to say that in this respect there was not a high degree of compliance with the order. After all, the order contemplated that it was sufficient if there was a letter from a bank of standing confirming that the funds were to hand, so that immediate payment on or before 5 p.m. was not absolutely necessary. Nor could it be said that this lack of perfect compliance with the order prejudiced Demirca, in that the sum which was actually available to the liquidator before 5 p.m. in the form of the bank draft for x euros was higher than that which had been tendered by Demirca at that stage.

37. The second question was whether the bid was unconditional. It is true that the letter of 28th April had stated that it was subject "to the purchasers acquiring clean title and all computers and software that it required for running the business as per your information memorandum", so that it was in, perhaps, a strictly literal sense a bid subject to certain conditions. This, however, was not the sense in which the bid was required by the *Van Hool* order to be unconditional, as this requirement rather commits the bidder to make an unequivocal offer. It was in that sense that the bid was was nonetheless, to all intents and purposes, an unconditional bid.

38. The first qualifying condition required "proof of clean title." But this means no more than that the vendor would be required to produce a good, marketable title and this is but a standard requirement of very commercial transaction of this kind. In this respect, the bid was no different from the first bid accepted by this Court in *Hibernian Transport* which was expressed to be "subject to contract". In the Supreme Court Walsh J. did not think that this condition took from the otherwise unequivocal nature of the offer to purchase.

39. The second stipulation was that the purchaser would acquire the "all computers and software that is required for running the business". Again, this stipulation does not really take from the unconditional nature of the bid, because the information memorandum had contemplated that, subject to some minor variations and adjustments for individual cases, these computers and software would be, in any event, included in the sale. This stipulation was, accordingly, no more than a statement of the obvious.

40. Counsel for Midland Web, Mr. Whelan, candidly and fairly admitted that the inclusion of the clause was unfortunate. Yet, for the reasons I have just ventured to state, I do not think that these words truly conveyed some equivocation on the part of Midland Web and the bid was, accordingly, unconditional in the sense envisaged by the *Van Hool* order. In any event, the words were deleted within a matter of minutes of the opening of the bid by the liquidator, so that no real prejudice was caused to Demirca.

Conclusions
41. It follows, therefore, that for the reasons stated I am of the view that the *Van Hool* order of 24th April 2014 contemplated that there would be finality to the bidding process. As I have concluded that Midland Web's bid on 28th April 2014 was a valid bid and that it was the highest bid made pursuant to that order, it follows that I will direct the liquidator to complete the sale of the assets of the company to Midland Web for the sum set out in its letter of offer dated 28th April 2014.