Neutral Citation Number: [2009] IEHC 412

THE HIGH COURT

2009 115 COS

IN THE MATTER OF JIM MURNANE LTD. (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2006

JUDGMENT of Miss Justice Laffoy delivered the 30th day of March, 2009

Background to the application
CNH Financial Services SAS (the applicant) brings this application as a creditor of Jim Murnane Ltd. (the company). The application arises out of events which occurred at a creditors' meeting held on 27th February, 2009.

At an Extraordinary General Meeting of the members of the company held on 27th February, 2009, the following special resolutions were passed:

> (i) that the company, by reason of its liabilities, resolved to go into voluntary liquidation;
>
> (ii) that Mr. Paddy Mehigan of PB Mehigan & Co., Accountants, be appointed liquidator, and
>
> (iii) that Mr. Aidan Murnane be appointed to act as chairman of the meeting, which I assume means the creditors' meeting.

The creditors' meeting was held later on the same day and Mr. Murnane acted as chairman.

In compliance with s. 266 (3)(a) of the Companies Act 1963 (the Act of 1963), a statement of affairs was laid before the creditors' meeting together with a list of the unsecured creditors, setting out the estimated amount of their claims. In accordance with that list, Mr. Murnane was the largest in value of the creditors of the company, the estimated amount of the debt due to him being shown as €527,518, and the applicant (referred to as John Chick CNH UK Ltd.) was the second largest, the debt due to it being stated to be in the sum of €386,677.

James Riordan, solicitor, attended the creditors' meeting on behalf of the applicant and he held a proxy from the applicant. Twenty-three creditors were represented at the meeting.

When questions were invited in relation to the statement of affairs, Mr. Riordan indicated his belief that the amount shown as owing to the applicant was absolutely wrong and strongly disputed. He informed the chairman that the applicant was owed a sum in the region of €1 million. He also told the chairman that, in circumstances where a debt or an amount of a debt was disputed at a creditors' meeting, he believed that it was the normal accepted practice to allow the higher figure in the event of a dispute and that, when it came to voting for the liquidator, the law supported his contention that the higher figure should be allowed. Having consulted his solicitor, the chairman stated that he would not allow the higher figure, but would only allow the figure in the estimated statement of affairs.

When the meeting moved on to the nomination of the liquidator, the chairman told the meeting that Mr. Mehigan was the nominee of the members of the company. When he asked if there were any other nominations, Mr. Riordan nominated Barry Donohoe of KPMG, Accountants. The matter was put to a vote between Mr. Mehigan and Mr. Donohoe. After the vote, Mr. Riordan was invited to scrutinise the proxies and the voting papers. He raised issues in relation to some of the proxies and the issues are dealt with in the affidavits on this application. However, counsel for the applicant acknowledged at the hearing of the application that the issues in relation to the proxies cannot be resolved on the basis of affidavit evidence. The outcome of the vote was that creditors to the value of €654,465 voted in favour of Mr. Mehigan and creditors to the value of €410,812 voted in favour of Mr. Donohoe. On that basis, Mr. Mehigan, the company's nominee, was appointed liquidator.

The reliefs sought on the application
On this application, which was lodged in a timely fashion in the Central Office on 6th March, 2009, the applicant seeks the following reliefs:

> (i) An order pursuant to O. 74, r. 71 of the Rules of the Superior Courts 1986 (the Rules) setting aside by way of appeal the decision of Mr. Murnane, as chairman of the creditors' meeting, to reject the proof of the debt owed by the company to the applicant; and
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> (ii) an order pursuant to s. 267 (2) of the Act of 1963, directing that Mr. Donohoe be appointed as liquidator of the company in place of Mr. Mehigan.

The application was served on Mr. Murnane and on the other director of the company and I will henceforth refer to these parties as the respondents. It was also served on Mr. Mehigan, but he did not appear. It is important to record that, in the applicant's grounding affidavit, it was made clear that the applicant does not suggest that Mr. Mehigan is unqualified or unfit to act as a liquidator and no criticism was made of him.

Statutory framework
Section 267 of the Act of 1963, as originally enacted, contained two sub-sections. Sub-section (1) provides that, subject to subs. (2), the creditors and the company at the 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 the liquidator, and if no person is nominated by the creditors, the person, if any, nominated by the company shall be the liquidator. Sub-section (2), which is invoked by the applicant, provides:

> "Where different persons are nominated as liquidator, any director, member or creditor of the company may, within fourteen days after the date on which the nomination was made by the creditors, apply to the court for 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."

An additional sub-section, subs. (3), was inserted into s. 267 by the Company Law Enforcement Act 2001, section 47. Sub-section (3) provides:

> "If, at a meeting of creditors mentioned in section 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."

As is pointed out in MacCann and Courtney *'Companies Acts 1963-2006',* (2008 ed.) subs. (3) was inserted so as to overcome a problem that often arose in practice where the directors of a company might procure proxies from a large number of creditors with small claims and use those proxies to vote in favour of the members' nominee and thus prevent the majority in value of the creditors appointing their nominee.

Order 74, r. 71 regulates the admission and rejection of proofs for the purpose of voting at a creditors' meeting convened pursuant to s. 266 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 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."

It seems to me to be of some significance that r. 71 pre-dated the amendment to s. 267 in 2001 which introduced sub-section (3).

On this application, the position adopted by the respondents was that the decision taken by Mr. Murnane, as chairman, at the creditors' meeting, was in line with recommended practice and, in particular, in line with the recommendations of the Chartered Accountants Regulatory Body (established by the Institute of Chartered Accountants to regulate its members) guidance document S8B - *'Planning and Administration of Creditors Meetings'.* In particular, the Court was referred to an extract from that document dealing with proof of debt. Paragraph 31 provides:

> "The amount for which the chairman admits the proof for voting purposes should normally be the lower of:
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> (a) The amount stated in the proofs; and
>
> (b) The amount considered by the company to be due to the creditor.
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> The amount for which the proof is admitted for voting purposes should be endorsed on it, and in most instances, it is expected that prior to the meeting, the chairman will do this."

Appeal under Order 74, rule 71: function of the court
Counsel was unable to refer the court to any Irish reported authority on the function of the court on an appeal pursuant to Order 74, rule 71.

There is a note in MacCann and Courtney *op. cit*. (at p. 510) to the following effect:

> "Ord. 74, r. 71 expressly provides that a decision of the chairman to reject a claim is subject to an appeal. However, neither r. 71 itself, nor any other provision of Ord. 74, gives any real guidance as to the nature and extent of such appeal, though some guidance can be obtained from the decision of the High Court *In Re Titan Transport Logistics Ltd. (In Voluntary Liquidation)* (19th February 2003, unreported) HC (Kelly J.). In that case, the court refused the challenge to the vote. Kelly J. expressed the view that the application should have been made within a two-week period, despite the fact the Rules did not lay down a time limit. Clearly, in the event of a contest, the application should be made immediately. In principle, it would seem that, if the court determines that a claim has been wrongly rejected, it ought to make whatever consequential orders as are necessary to give full effect to that determination."

Counsel for the respondents referred the Court to a reference to a decision of McCracken J. in *A & M. Construction Ltd.,* in which an *ex tempore* judgment was delivered on 22nd February, 1995, in an article by John L. O'Donnell, in *'Commercial Law Practitioner'* - April 1995. As the article indicates that the proceedings in that case were initiated by petition, I assume that the matter before the court was a petition for a court winding up, where a voluntary liquidation had commenced. In any event, one of the complaints by the petitioners in relation to the conduct of the creditors' meeting in the voluntary winding up was that several creditors had been either omitted completely or their debts had been vastly understated in the list of creditors provided by the company. The company's answer was that it had vast counter-claims against many of those creditors, which, in effect, cancelled out or substantially reduced the debts due to them. On this aspect of the matter, the article indicates that McCracken J. stated that he "could not adjudicate definitely on the nature and extent of the claims and counterclaims, appearing to accept that the company had acted *bona fide* in giving the answers which it did".

There is one pertinent English authority to which counsel did not refer; that is the decision of the High Court of England and Wales *In Re A Company* [1995] 1 BCLC 459. That decision concerned the application of r. 4.70 of the Insolvency Rules 1986, the material portion of which was as follows:

> "(1) At any creditors' meeting, the chairman has power to admit or reject a creditor's proof for the purpose of his entitlement to vote; and the power is exercisable with respect to the whole or any part of the proof.
>
> (2) The chairman's decision under this Rule . . . is subject to appeal to the court by any creditor or contributory.
>
> (3) If the chairman 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 his vote being subsequently declared invalid if the objection to the proof is sustained.
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> (4) If, on an appeal, the chairman's decision is reversed or varied, or a creditor's vote is declared invalid, the court may order that another meeting be summoned, or make such order as it thinks just."

The only difference of substance between that rule and r. 71, in my view, is that it expressly provides that the chairman's discretion to admit or reject is exercisable in respect of the whole or part of the proof. It also, helpfully, gives guidance to the court as to the consequences of upholding the appeal and the express power conferred on the court to summon another creditors' meeting, in my view, is instructive.

Blackburne J. outlined his understanding of the function of the court on an appeal under r.4.70 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."

Although Blackburne J. was of the view that the function of the court extended to establishing the amount of the debt, in fact, he did not have to perform that task in the case before him. In that case, r. 4.70 (4) was being invoked in the context of an application by creditors for an order reversing the decision of the chairman at a creditors' meeting in a compulsory winding up to allow another creditor (the disputed creditor) to vote on the appointment of a liquidator. Without the disputed creditor's vote, the majority in value of creditors at the meeting would have been in favour of a different liquidator. The disputed creditor's claim was for €6.85 million, representing damages for repudiation of a contract by the company to purchase Stamford Bridge football ground from the disputed creditor for €22.85 million. The nub of the applicant creditors' challenge to that claim was that it had been compromised a year and a half previously as part of an overall settlement of a number of claims between the disputed creditor and the company and that, in consequence of that settlement, nothing was owing. Blackburne J. was satisfied that the claim to damages was compromised, that the disputed creditor was not entitled to vote at the meeting of creditors and that the chairman's decision to admit the proof should be reversed. While it was the existence of the debt, rather than its amount, which was in issue there, it must be acknowledged that the issue was a complex one. It was decided as between the applicant creditors, the chairman and the liquidator. Counsel for the liquidator appears to have acted as *legitimus contradictor* in the absence of the disputed creditor.

Counsel for the respondents submitted that the Court's role on an appeal under r. 71 was not to determine the value of the debt, but rather to determine whether the correct procedure had been followed by the chairman at the creditors' meeting. If the higher figure ought to have been allowed, then it followed that Mr. Donohoe ought to have been appointed liquidator. However, if the proper procedure had in fact been followed and the lower figure was properly allowed, then Mr. Mehigan ought to remain as liquidator.

Before setting out my conclusions on the function of the Court on an appeal under r. 71, I propose outlining the complexities to which the issue of the amount of the applicant's debt, as disclosed in the affidavit evidence before the Court, gives rise. These complexities are reflected in the amount of documentation which has been put before the Court on this application – in excess of 400 pages comprising the following affidavits and the documents exhibited in them:

(a) the grounding affidavit of John Chick, the manager of the applicant, sworn on 6th March, 2009;

(b) the affidavit of Mr. Riordan sworn on 6th March, 2009;

(c) the affidavit of Mr. Murnane sworn on 18th March, 2009;

(d) the affidavit of Mr. Chick sworn on 20th March, 2009;

(e) the affidavit of Mr. Murnane sworn on 23rd March, 2009; and

(f) the affidavit of Mr. Chick sworn on 24th March, 2009.

The factual dispute

The first complexity in this matter is the relationship between the applicant and the company. Suffice it for present purposes to say that the applicant is part of the Fiat family of companies, which also includes two manufacturers of tractors and agricultural machinery, Case IH and New Holland. The company held dealer agreements with both Case IH and New Holland. The applicant is a creditor of the company by assignment of the debts due by the company to Case IH and New Holland.

At the date of the creditors' meeting the applicant's position was that it was owed €1,034,533 by the company, made up of €347,213 owed by the company to Case IH and €687,320 owed by the company to New Holland. In the course of these proceedings the applicant's total claim has been revised downwards to €921,789.

In relation to Case IH, Mr. Riordan told the chairman at the creditors' meeting that there was €347,213 due by the company to the applicant as invoiced. Since the creditors' meeting, that sum has been adjusted downwards to take account of a credit note in the sum of €111,250 which issued to the company on the date of the meeting, 27th February, 2009. That invoice arose out of a settlement between the company and Case IH, the terms of which were set out in a letter dated 23rd December, 2008 from Case IH to the company, which were accepted by the company on 26th January, 2009. That credit note, together with a further credit note in the sum of €244 which is "pending", has dealt with the first three terms set out in that letter. The fourth term was as follows:

> "Subject to … the agreement you have reached with John Chick to a firm payment plan for the outstanding balance €77,677 with CNH Capital – being €17,677 paid by Murnane in December 2008, with twelve subsequent payments in 2009 of €5000 per month – and the return this week of this letter, signed by yourself, we will raise a 'goodwill' payment to you in the form of a credit note for €140,000 to deplete the outstanding balance by this sum in respect of Case IH wholegoods."

It is acknowledged by the respondents that neither the sum of €17,677 due in December, 2008 nor any of the subsequent payments of €5000 due have been paid. Yet the respondents contend that the company is indebted to Case IH only in the sum of €77,677. The respondents justify this stance on the basis that the termination of the New Holland dealer agreement in January, 2009 "effectively deprived the company of the income required to make the payments agreed in the settlement agreement".

The foregoing brief summary of the position of the parties in relation to the Case IH debt reveals a number of difficulties for the Court in dealing with an appeal against the decision of the chairman at the creditors' meeting. First, the amount now represented by the applicant as owing to it on 27th February, 2009 in respect of the Case IH debt is two thirds of the amount which the chairman was informed was owed to Case IH. Secondly, while as a matter of the construction of the agreement constituted by the letter of 23rd December, 2008 and its acceptance, the company's contention that only €77,677 is owed by the company to Case IH in the events which have happened, does not appear to be correct, the matter is complicated by the fact that the company attributes its failure to meet its obligations under the fourth term to the termination of the New Holland agreement. The answer of counsel for the applicant was that the applicant is not responsible for the actions of its related companies. The Court could certainly not take that assertion at face value, given the complex relationship between the Fiat companies and the company.

Turning to the New Holland debt, the company disputes all but €310,000 of the amount of €687,320 which the company acknowledges is the amount invoiced by New Holland. The company claims various credits, which are itemised in paragraph 32 of Mr. Murnane's replying affidavit of 18th March, 2009. The applicant disputes the company's entitlement to any of the credits claimed. The dealer agreement with New Holland was terminated in January 2009.

The nature of the dispute between the parties as to whether the company is entitled to credit or not can be exemplified by the two largest items in respect of which credits are claimed: warranty claims and interest.

In relation to warranty claims, the applicant's position is that no warranty claims were, in fact, received from the company. The respondents' position is that warranty claims were always in arrears and, apart from that, warranty claims were not submitted during the period from June 2008 to February 2009 because the company was unable to submit claims whilst awaiting training. Mr. Chick's response to that was that, not only was no such training sought by the company, but an offer of training was declined.

In relation to the applicant's claim for interest, the respondents' position is that they are entitled to credit in respect of the sum claimed for interest, as that had been the trading practice between the parties. Mr. Chick's response is that, while in the past the applicant issued credit notes for some of the interest it charged under the terms of the agreement with the company, that was entirely discretionary. No credit notes had been sought by the company, none had been issued and the interest is properly due and payable.

In outlining how the divergence between the sum the applicant claimed was due to it by the company and the company's estimation of the debt has been explained, the objective has been to demonstrate the nature of the dispute, not to express a view on the merits of the respective positions of the parties. The nature of the dispute is that it is a dispute which raises questions of law and questions of fact. On the factual component, there are conflicts of evidence on the affidavits, which cannot be resolved on this application.

Conclusion as to the function of the Court

Rule 71 is concerned with the admission or rejection of a proof of debt "for the purpose of voting". In other words, neither the decision of the chairman nor the determination of the Court on an appeal against that decision can be definitive as to the amount of the debt.

Rule 71 as it exists seems to envisage admission or rejection of the proof of the debt in whole. Unlike the U.K. provision considered in Re a Company, it does not appear to address the difficulty which arose in this case – that the company's estimate of the debt represented only part of the amount claimed by the applicant creditor. It may be that there is a *casus omissus* in the legislative scheme constituted by s. 267 and the Rules since the insertion of subs. (3) in s. 267. As it exists, in my view, the rule requires the chairman to give the creditor the benefit of the doubt, subject to the possibility of his decision being set aside on appeal. In the situation which arose in this case, where the amount of the applicant's claimed debt exceeded the company's estimate of the debt, it must be assumed that there was a doubt. On the rule as it exists, the decision of the chairman should have been to allow the applicant to vote on the basis that the value of its claim was the value asserted by Mr. Riordan. As a matter of law, I see no basis for applying para. 31 of guidance document S8B in a situation to which r. 71 applies.

In relation to an appeal to the Court under r. 71 against a decision of a chairman made under that rule, it seems to me that the Court is concerned with much more than whether the chairman acted properly procedurally. Rule 71 treats a doubt of the chairman as to the decision to be made, which, obviously involves a dispute between a creditor and the company as to the debt, as an objection and it envisages the Court making a determination as to whether the objection is sustainable. This means that the Court is required to make some sort of determination on the substance of the dispute.

It is probably easier for a Court to determine whether a person claiming to be a creditor has that status, so as to be

entitled to vote, than to put a value on the creditor's debt. In the *A. & M. Construction Limited* case, McCracken J. found that he was unable to determine the extent of the claims and counter-claims. It is a matter of conjecture whether the claims and counter-claims in that case with which McCracken J. was confronted were of a different order to the competing claims underlying the dispute in this case, as counsel for the applicant suggested. On my analysis of the dispute in relation to the applicant's debt in this case, I think that the probability is that, in many cases on an appeal under r. 71, where the quantum of the debt is in issue, the Court would be unable to determine the amount of the debt so as to determine the substantive issue.

It is quite clear that it is necessary that there should be some rule of thumb whereby the chairman of a creditors' meeting can resolve the type of dispute which arose in this case. It may be open to question whether the rule of thumb provided in r. 71, giving the creditor the benefit of the doubt, subject to an appeal, is the best policy in circumstances where the determinant under subs. (3) of s. 267 since 2001, when there is a contest for the office of liquidator, is the majority in value rather than the numerical majority of the creditors voting. It may be that the policy underlying para. 31 of the guidance document S8B would give rise to a better solution in such a contest. However, that is a matter of policy. It is a matter for a body reviewing the company law code, such as the Company Law Review Group, rather than the Court.

Determination of this application
While I am of the view that, as a matter of construction, the Court's function under r. 71 goes beyond determining whether the chairman of a creditors' meeting acted properly in applying the provisions of that rule, on the facts of this case, I consider that it is not necessary to go further. In this case, under the terms of r.71, in my view, the chairman should have allowed the proof in whole and treated the debt as the amount claimed by the applicant creditor. If he had, then the resolution to appoint Mr. Donohoe as liquidator would have been passed. It would have been open to Mr. Murnane qua creditor and to any other creditor to challenge that vote.

In view of the fact that r. 71 was not properly applied, I propose declaring that the vote in favour of Mr. Mehigan invalid. I have given careful consideration to what consequential order should be made. On the assumption that Mr. Murnane voted in favour of the company's nominee and that the proxy of the applicant was exercised in favour of Mr. Donohoe, if one takes both of those creditors out of the equation, there would still have been a majority in value in favour of Mr. Mehigan. On the basis of the statement of affairs presented at the creditors' meeting there is a deficiency of €907,538 in the company. In the circumstances, the expense of advertising and calling another creditors' meeting is not warranted. Accordingly, I propose making an order under s. 267(2) appointing Mr. Donohue liquidator instead of Mr. Mehigan.

I want to make it clear that that decision is not informed by two matters raised in the grounding affidavit of Mr. Chick. The first is the fact that the company's overdraft facility was personally guaranteed by Mr. Murnane and the current account of the company was in credit before the company went into liquidation. The second is the fact that the company's indebtedness to Mr. Murnane personally was as high as €527,518 at the date of the winding up. Mr. Murnane has given a reasonable explanation as to why the current account went into credit before the winding up. There is nothing from which one could draw any inference that the level of the company's indebtedness to Mr. Murnane was in any way sinister.

Order
In summary, there will be the following orders:

(a) a declaration that the vote in favour of the appointment of Mr. Mehigan as liquidator of the company at the creditors' meeting on 27th February, 2009 is invalid; and

(b) an order under s. 267(2) appointing Mr. Donohoe to be liquidator instead of Mr. Mehigan.