

THE HIGH COURT

[2012 No. 696 COS]

IN THE MATTER OF:

AMANTISS ENTERPRISES LIMITED (IN VOLUNTARY LIQUIDATION) AND WILBURY LIMITED (IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF:

THE COMPANIES ACTS 1963 - 2012

Judgment of Ms. Justice Laffoy delivered on 15th day of July, 2013.

The applications

1. This matter is back before this Court on foot of a motion issued on 11th June, 2013 on behalf of Seamus Maye (Mr. Maye), a creditor of Amantiss Enterprises Limited (Amantiss) and Wilbury Limited (Wilbury), each of which companies is in voluntary liquidation. The reliefs sought on the notice of motion are:

- (a) an order re-entering these proceedings in the Chancery List; and
- (b) directions as to the hearing and determination of issues concerning the authorisation of appeals issued on behalf of Amantiss and Wilbury in proceedings between Framus Limited, Amantiss and Wilbury, as plaintiffs, against CRH Pic, Irish Cement Limited, Roadstone Provinces Limited, Roadstone Dublin Limited, Tradbun Limited, Ready-Mix Pic, Kilsaran Concrete Products Limited and CPI Limited (the High Court, Record No. 1996/10658P) (the Competition Proceedings).

2. On 20th June, 2013 the Court, without opposition from any of the parties who appeared before the Court, re-entered the proceedings and listed the application for hearing on 8th July, 2013. The parties who were represented on 20th June, 2013 were:

- (a) Mr. Maye;
- (b) Mr. Des Donnegan (the Liquidator), the Liquidator of Amantiss and Wilbury;
- (c) the first five defendants in the Competition Proceedings (the CRH Respondents);
- (d) the sixth defendant in the Competition Proceedings (Ready-Mix); and
- (e) the seventh defendant in the Competition Proceedings (Kilsaran).

What was before the Court for determination on 8th July, 2013, accordingly, was:

- (i) Mr. Maye's entitlement to the relief outlined at para. 1(b) above; and
- (ii) Mr. Maye's entitlement to the reliefs which remained to be determined on the originating notice of motion which issued on 18th December, 2012 and which initiated the proceedings.

The history of the proceedings

3. Essentially, the proceedings concerned the conduct on behalf of Amantiss and Wilbury of appeals to the Supreme Court against the judgment and order of the High Court (Cooke J.) made on 26th July, 2012 dismissing the Competition Proceedings (Supreme Court Appeal No. 445/2012). When the proceedings were initiated by originating notice of motion on 18th December, 2012 applications were pending before the Supreme Court by the CRH Respondents, Ready-Mix and the eighth defendant in the Competition Proceedings (CPI) seeking to strike out appeals brought in the name of Amantiss and Wilbury against the judgment and order of the High Court on foot of notices of appeal dated 26th September, 2012. The basis on which it was sought to have the appeals struck out was that they had been brought without the consent or authority of the Liquidator.

4. In a judgment delivered on 22nd January, 2013 ([2013] IEHC 21), I dealt with the first two reliefs sought on the originating notice of motion, which invoked s. 309 of the Companies Act 1963 (the Act of 1963) insofar as was necessary, the Liquidator having already convened meetings of the creditors of both companies for 24th January, 2013. I adjourned the balance of the application, including the issue of costs, generally with liberty to re-enter. That judgment and the order of 22nd January, 2013 are the subject of an appeal to the Supreme Court, which I understand has not yet been heard.

5. However, the applications by the CRH Respondents, Ready-Mix and CPI to strike out the appeals by Amantiss and Wilbury against the order of the High Court dismissing the Competition Proceedings have been heard and determined by the Supreme Court. Judgments were delivered on 14th May, 2013 by Denham C.J., Clarke J. and MacMenamin J. ([2013] IESC 23). The relief sought by Mr. Maye referred to at para. 1(b) above has arisen from the fact that the Supreme Court, while having struck out the appeals of Amantiss and Wilbury, gave a stay of three months on the order. The purpose of the stay was explained as follows in the judgment of Denham C.J. (at para. 39):

"The period of three months is designed to afford a realistic timeframe within which the jurisdiction of the High Court may be invoked, and any order which the High Court may be persuaded to make, be implemented."

6. In order to ascertain what the Supreme Court envisaged the function of the High Court would be on the re-entry of these proceedings it is necessary to consider the judgments of the Supreme Court in some detail. Before doing so, it is convenient to outline what remains of the reliefs sought on the originating notice of motion.

Remainder of reliefs sought on originating notice of motion

7. The balance of the reliefs sought on the originating notice of motion which were adjourned by the order of 22nd January, 2013 were:

(a) an order pursuant to s. 280 of the Act of 1963 determining questions arising as to the conduct of the Supreme Court Appeal No. 445/2012 by or on behalf of Amantiss and Wilbury;

(b) if necessary, and in the alternative, an order pursuant to s. 277 of the Act of 1963 removing the Liquidator on cause shown and appointing another liquidator to Amantiss and Wilbury;

(c) if necessary, an order pursuant to s. 280 of the Act of 1963 and/or the inherent jurisdiction of the Court directing the Liquidator to exercise the power afforded to him by s. 231(1)(a) and s. 276(1)(b) of the Act of 1963 to bring, maintain and prosecute, or cause to be brought, maintained and prosecuted, on behalf of Amantiss and Wilbury Supreme Court Appeal No. 445/2012.

The judgments of the Supreme Court

Denham C.J.

8. As is recorded in the judgment of Denham C.J. at para. 5, there was no representation by or on behalf of the Liquidator on the hearing of the applications to the Supreme Court. Denham C.J. identified an issue which arose on the applications before the Supreme Court as being whether the Liquidator had given consent to the filing of the notice of appeal in the Supreme Court and to proceeding with the appeal, there being no dispute that such consent was necessary (para. 28). She also recorded that there was "a degree of conflict of fact" before the Supreme Court as to the consent or decision of the Liquidator.

Clarke J

9. The arguments advanced on each side before the Supreme Court give context to the decision of the Supreme Court. Clarke J. outlined the arguments made by the moving parties seeking the dismissal of the appeal as follows (at para. 3.2):

"(a) It is argued that the appeal is a nullity on the basis of a contention that the evidence is said to disclose that the liquidator did not authorise the filing of a notice of appeal on behalf of Amantiss and Wilbury.

(b) It is said that, even if the court is not satisfied that the liquidator did not authorise the filing of a notice of appeal on behalf of Amantiss and Wilbury, it is at least clear now that the liquidator does not authorise the continuance of the appeal on behalf of those companies.

(c) As a specific consequence of (b) it is said that there is no one before the court who has standing to oppose the applications"

From the outline of the submissions made by counsel for Mr. Maye (at para. 3.5) it is clear that the Supreme Court was invited to conclude that there was sufficient authorisation from the Liquidator for the filing of a notice of appeal on behalf of Amantiss and Wilbury. However, counsel for Mr. Maye advanced an alternative position (as outlined by Clarke J. at para. 3.6) as follows:

"Second, it was acknowledged that there might be some difficulty in this Court, as a court of appeal and on a motion heard on affidavit with, perhaps, limited evidence and in the absence of the liquidator, coming to a definitive conclusion on the question of whether it could be said that the filing of the notice of appeal on behalf of Amantiss and Wilbury was authorised. On that basis, as a fallback position, it was argued that this Court should, in those circumstances, put in place appropriate measures to facilitate a proper determination of that question in the High Court."

10. In addressing the issues before the Supreme Court, Clarke J. stated (at para. 4.6) that, while he was satisfied that "Mr. Maye and/or Framus" had standing to be heard on the question of whether either had authority to instruct that a notice of appeal on behalf of Amantiss and Wilbury be filed, he was not satisfied that it was possible to resolve the question on the applications before the Supreme Court. In relation to the reference there to Framus Limited, counsel who appeared for Mr. Maye also appeared for Framus Limited on the applications before the Supreme Court to dismiss the appeals of Amantiss and Wilbury. However, Framus Limited is not before this Court, although counsel for Mr. Maye made it clear that whatever happens in relation to Amantiss and Wilbury, the appeal of Framus Limited against the decision of the High Court in the Competition Proceedings will proceed.

11. Later, (at para. 4.12) Clarke J. stated:

"However, the fact remains that the creditors of Amantiss and Wilbury do have standing, as creditors, to seek to invoke the supervisory jurisdiction of the High Court in relation to the liquidation of those companies. The High Court would have jurisdiction to make orders or give directions which could have the effect of bringing about a situation where the prosecution of the appeals of those companies was permitted. I should emphasise that nothing which I say should be taken as giving any indication as to how the High Court should, on the facts of this case, exercise any such jurisdiction. The fact that the court has a jurisdiction, however, cannot be doubted."

12. Clarke J. concluded (at para. 4.13) that Mr. Maye and the creditors of Amantiss and Wilbury had "a very limited standing" to address the Supreme Court on what would happen in the light of the fact that the Liquidator did not wish to prosecute the appeal and he continued:

"Their standing is confined to one which allows them to urge on the court that they be given an opportunity to invoke the supervisory jurisdiction of the High Court in a manner which would allow the appeals to go ahead."

Having addressed the relevant principles governing the jurisdiction of the Supreme Court, Clarke J. went on to consider whether, on the facts of the case before the Supreme Court, "some leeway should be given to allow that the supervisory jurisdiction of the High Court in respect of liquidations be invoked ...". (Para. 4.17).

13. In paragraph 5.1 of his judgment, Clarke J. addressed the function of the High Court on "any potential application" as follows:

"It seems to me that it is appropriate to characterise any potential application which might be made by the creditors in

this case as one where there is a realistic possibility that orders might be made, directions given or measures put in place which would allow this appeal to go ahead. I have come to that view because it is clear that the creditors support the appeal going ahead. That is, of course, far from conclusive. The High Court will have to consider all the circumstances of the case including the relevant law and, doubtless, any financial consequences for all parties. It will be a matter for the High Court to hear whatever is offered by any party entitled to be heard and to come to its own conclusion. Nothing in this judgment should be taken as giving any indication as to what the result of any such application should be."

The reference to the creditors supporting the appeal going ahead is a reference to the outcome of the creditors' meeting held on 24th January, 2013 at which the respondents on the appeal to the Supreme Court had been precluded from voting by the order of this Court of 22nd January, 2013.

14. Having gone on to consider the conduct of the parties, Clarke J. concluded as follows (at para. 5.6):

"... the balance of justice requires that the creditors be given an opportunity to seek from the High Court such orders or directions as might allow this appeal to go ahead in a lawful fashion."

MacMenamin J.

15. MacMenamin J. in his judgment indicated that he agreed with the judgment and the order proposed by the Chief Justice and also with the judgment delivered by Clarke J. Having stated that it was for the High Court to determine the sequence of issues, he stated (at para. 5):

"But one thing is clear. Whether or not the liquidator remains in situ, it will be necessary for the High Court to determine whether the appeals were brought with the consent of the liquidator, whether that consent is said to be either express or implied. Even from the correspondence exhibited in this application, one can infer that the resolution of that issue will be by no means free from complexity and cost."

Process since motion to re-enter filed

16. The motion to re-enter was grounded on an affidavit sworn by Mr. Maye on 11th June, 2013.

17. Following the Court giving leave to Mr. Maye to re-enter the proceeding on 20th June, 2013, the following affidavits were filed:

(a) an affidavit sworn by Mr. Maye on 27th June, 2013;

(b) an affidavit sworn by the Liquidator on 9th July, 2013;

(c) an affidavit sworn by James Andrew Lenney, a solicitor and partner in Arthur Cox, Solicitors, who are on record for the CRH Respondents also sworn on 9th July, 2013; and

(d) an affidavit sworn by Mr. Maye on 9th July, 2013, in which he exhibited a letter dated 9th July, 2013 from Michael Butler of Butler & Co., Insolvency Practitioners, in which Mr. Butler confirmed that he was willing to accept appointments as liquidator of Amantiss and Wilbury.

18. In his affidavit, the Liquidator outlined his personal position as follows:

"... I have no difficulty in resigning but given the controversy between different groups of creditors, I do not believe it is appropriate for me to resign without the sanction of this Honourable Court and without an appropriate replacement liquidator being either agreed or appointed by this Honourable Court."

Hearing on 8th July, 2013

19. While the Court had not had an opportunity to read the papers beforehand, at the hearing on 8th July, 2013 the Court heard submissions as to the issues which the Court will have to address from counsel for the following parties:

(a) Mr. Maye;

(b) the Liquidator;

(c) the CRH Respondents;

(d) Ready-Mix; and

(e) Kilsaran.

There was some divergence of views as to the issues this Court needs to determine and the order in which they should be determined and whether there should be a staged process. As there is a transcript available of the hearing, I do not consider it necessary to outline the divergences.

Conclusion on issues

20. Having had an opportunity to consider the papers, I am in a position to identify the issues which I consider the Court should determine having regard to the judgments of the Supreme Court. I consider that all of the issues should be dealt with at the one hearing, because that approach probably will result in the most efficient use of court time.

21. The issues and the order in which they will be addressed are as follows:

(1) Did Mr. Maye have the necessary authority or consent to authorise the issue and service of notice of appeal in Supreme Court Appeal No. 445/2012 on behalf of Amantiss and Wilbury, and, if so, the extent of that authority?

(2)(a) Does the Court have jurisdiction to sanction the resignation of the Liquidator as liquidator of Amantiss and Wilbury and, if so, should the Court exercise that jurisdiction?

(2)(b) If the Court sanctions the resignation of the Liquidator, or if the Liquidator resigns without the benefit of such sanction, what steps should be taken to appoint a replacement liquidator to Amantiss and Wilbury?

(3) If the Court determines that Mr. Maye did not have authority to initiate and prosecute the said Supreme Court appeal, does the Court at this point in time have jurisdiction to make orders and give directions to allow the said appeal to proceed in a lawful manner?

(4) If the Court determines that Mr. Maye did have authority to initiate the said Supreme Court appeal, will a person who replaces the Liquidator as liquidator of Amantiss and Wilbury have authority to prosecute the said appeal and, if so, does the Court have jurisdiction to make orders and give directions to allow the said appeal to proceed in a lawful manner?

(5) If the Court has the jurisdiction referred to in either issue (3) or issue (4), what orders should the Court make and/or what directions should the Court give in relation to the prosecution of the said Supreme Court appeal?

(6) If the Court determines that it does not have jurisdiction to make orders or give directions in relation to the prosecution of the said Supreme Court appeal, as a matter of law, does a replacement liquidator have power to initiate an appeal against the order of the High Court dismissing the Competition Proceedings and to seek an enlargement of time for so doing from the Supreme Court and, if so, how is that power to be exercised?

22. Issue (1) is primarily an issue of fact, as the Supreme Court pointed out. I consider that it should be determined on oral evidence, the principal witnesses being Mr. Maye and the Liquidator, although I am not ruling out the possibility of there being other relevant witnesses. As Clarke J. recognised, the dispute underlying issue (1) is a dispute between Mr. Maye and the Liquidator. However, I consider it would not be appropriate at this juncture to rule that the notice parties (the CRH Respondents, Ready-Mix and Kilsaran) will not be entitled to adduce evidence, cross examine or make submissions on issue (1). In reserving the Court's position, in particular, I have had regard to a submission made on behalf of the CRH Respondents to the effect that they do not accept that the Liquidator's stance adopted in correspondence to Arthur Cox, which was referred to by Denham C.J. (at para. 30), has been impelled by a letter of 4th October, 2012 from Arthur Cox to the Liquidator in which it was stated that CRH Respondents would seek to hold the Liquidator personally liable for any shortfall in any costs in relation to the said Supreme Court appeal "that are not recovered from the plaintiff companies", which I understand to mean Framus Limited, Amantiss and Wilbury.

23. In relation to the issues as to the Court's jurisdiction to make orders or give directions, I would expect the parties in their submissions to the Court to address the source of the jurisdiction. I mention this because I understood counsel for Mr. Maye to resile from reliance on the sections of the Act of 1963 referred to in the originating notice of motion at the hearing on 8th July, 2013.

Hearing of the issues

24. I propose that the hearing in relation to the issues should commence on Tuesday, 23rd July, 2013. I would propose delivering judgment before the end of August. Therefore, I would suggest that it would be appropriate for the parties to apply to the Supreme Court for an extension of the stay on the Supreme Court Order of 14th May, 2013.