Neutral Citation: [2013] IEHC 353

THE HIGH COURT

[2013 No. 241 COS]

IN THE MATTER OF DAVIS JOINERY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

Judgment of Ms. Justice Laffoy delivered on 19th day of July, 2013.

The proceedings

1. These proceedings were initiated by a petition presented by Leon Cosgrave de Buitlear (the Petitioner), who now resides in Perth, Western Australia, seeking that Davis Joinery Limited (the Company) be wound up by the Court pursuant to the provisions of the Companies Act 1963 (the Act of 1963). The petition was presented on 28th May, 2013 and was first returnable for 17th June, 2013. There was no appearance on behalf of the Company on 17th June, 2013 or on any other occasion when the matter has been before the Court, although I am satisfied that the Company and its directors have been put on notice of each listing.

2. The petition highlights a problem in Irish legislation of which the relevant Government Departments have been aware for over twenty years and which has been the subject of much academic discussion. It was also the subject of a briefing paper issued by the Irish Congress of Trade Unions (ICTU) in October 2012. I believe this case is the first case in which the problem has had to be addressed by a court in this jurisdiction, albeit peripherally. On the basis of my recent experience in dealing with winding up petitions, I suspect that it is a problem which is likely to affect many employees in the near future.

3. Before outlining what the problem is and considering how the aspect of it with which this Court is concerned should be addressed, I propose setting out the legal and factual basis on which the Petitioner seeks to have the Company wound up.

Factual and legal basis of the petition

4. The Petitioner is a creditor of the Company in the sum of €53,080. The components of that debt are set out in the petition as follows:

> (a) the sum of €2,240 the subject of a decree made by Judge Connellan at Bray District Court on 2nd November, 2011, which decree also awarded the Petitioner costs and was made in connection with the Petitioner's Minimum Notice and Terms of Employment Acts 1973 – 2001 claim against the Company;
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> (b) the sum of €35,910 the subject of an order of His Honour Judge Fulham made at Wicklow Circuit Court on 14th February, 2012, which order also included an award of costs and was made in connection with the Petitioner's Unfair Dismissals Acts 1977 – 2007 claim against the Company; and
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> (c) the sum of €14,930 the subject of an order of His Honour Judge Fulham made at Wicklow District Court on 19th April, 2012, which order also included costs and was made in connection with the Petitioner's personal injuries action against the Company.

The decree at (a) and the order at (b) above were made in consequence of a determination of the Employment Appeals Tribunal (EAT) on 22nd February, 2011, the final paragraph of which was in the following terms:

> "The Tribunal finds that the claimant was unfairly dismissed and awards him compensation for loss of remuneration in the sum of €35,910. The Tribunal also awards the claimant €2,240 being the equivalent of four weeks' pay under the Minimum Notice and Terms of Employment Acts 1973 – 2005."

The award of €35,910 was made under the Unfair Dismissals Acts 1977 – 2007 and will be the focus of this judgment.

5. Although not material to the issue as to whether a winding up order should be made or how the problem which will be addressed later can be resolved, the documentation before the Court also discloses that the Company owes the Petitioner the sum of €14,903.89 in respect of taxed costs and that interest in the amount of €5,224.59 has accrued on the sums the subject of the decree and the orders referred to above at the Courts Acts rate up to 22nd May, 2013.

6. On 28th February, 2013, the Petitioner's Solicitors, Bernadette Goff & Company, issued a demand under s. 214 of the Act of 1963 demanding payment of the sum of €53,080 and threatening to present a petition to have the Company wound up if the demand was not met within the period of twenty one days stipulated in s. 214. The demand was not met. The effect of that was that the Company is deemed to be unable to pay its debts, so that a circumstance arises pursuant to s. 213(e) of the Act of 1963 in which the Court may make an order winding up the Company.

7. On the evidence before the Court I am satisfied that the s. 214 demand was properly served on the Company and that the petition was properly served on the Company. Moreover, as required by Order 74, rule 10 of the Rules of the Superior Courts (the Rules), the petition was advertised in Iris Oifigiúil and in two Dublin daily morning newspapers.

8. The only element which was missing when the matter first came before the Court on 17th June, 2013 was that no person who had consented to do so was put forward to act as official liquidator for the purposes of the winding up.

9. The petition was adjourned at the request of the Petitioner to enable the Petitioner's solicitors to explore whether the Company would be prepared to wind up the Company by means of a creditors' voluntary winding up.

10. In the course of the Petitioner's solicitors' efforts to procure payment of the debt due to the Petitioner there was only one response by the Company to a stream of correspondence from the Petitioner's solicitors following the determination of the EAT, which correspondence commenced on 29th March, 2011. The single response was from the Company and was signed by John-Paul Davis, as director of the Company, and was dated 19th September, 2011. In the letter, it was stated as follows:

> "On behalf of Davis Joinery Ltd., I would like to inform you that Davis Joinery Ltd. has seized (sic) trading on 31st May, 2011. . . .
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> Due to the economic climate and the construction sectors collapse Davis Joinery Ltd. has not been able to trade out of its creditors' arrears and cannot collect monies owing from debtors, therefore it has no option but to stop trading."

11. Letters dated 14th June, 2013 from the Petitioner's solicitors to each of the directors of the Company requesting that steps be taken to voluntarily wind up the Company elicited one response, an e-mail dated 20th June, 2013 from John-Paul Davis, in which it was stated that the Company was then seeking advice on the matter and looked forward to furnishing a reply shortly. As I understand the position, subsequently there has been no response, or at any rate, no positive response from the Company.

12. The Petitioner's solicitors then explored the possibility of procuring the assistance of an insolvency practitioner who would act as a provisional liquidator of the Company. By letter dated 26th June, 2013, Frank Wallace FCA of James F. Wallace & Co., Chartered Accountants, issued a letter of consent to his appointment as provisional liquidator should this Court appoint him as such. That consent and an affidavit of fitness of Mr. Wallace were before the Court when the matter next came before the Court. The hope was that the Court would appoint a provisional liquidator and that that would solve the problem. However, I did not believe that it would solve the problem.

13. A Companies Registration Office (CRO) search dated 11th June, 2013 has been exhibited in an affidavit in the proceedings. This discloses that the Company still has the status of "normal". The last filing in the CRO appears to have been the filing of the Annual Return (Form B1) for the year ending on 31st December, 2008 in December 2009.

14. Finally, before outlining what the problem is, I think it is appropriate to record that there was no appearance by or on behalf of any other creditors or any contributory of the Company on any occasion on which the matter was before the Court and no notice of intention to appear was given to the Petitioner's solicitors.

The Petitioner's problem

15. In an nutshell, the problem is that, without a winding up order being made, the Petitioner may not be able to have the recourse to what is commonly known as the Employer's Insolvency Fund (the Fund), although it has been merged with the Social Insurance Fund, which he definitely would be if the Company had been or is wound up by the Court or the directors had put the Company into creditors' voluntary liquidation. The source of the problem is outlined with clarity in Lynch-Fannon & Murphy on *Corporate Insolvency and Rescue* (2nd Ed.) at para. 8.93 et seq.

16. As the authors point out (at para. 8.93) the Protection of Employees (Employer's Insolvency) Acts 1984 – 2004 (the Act of 1984, as amended) give effect to Directive 80/987/EEC, which has now been replaced by Directive 2008/94/EC and is commonly referred to as the Employer's Insolvency Directive. As they point out, the Directive is designed to provide a minimum level of protection throughout the EU for employees affected by their employer's insolvency. Certain debts owed to employees by their employer which remain unpaid because of the employer's insolvency may be paid by the Minister for Social Protection in accordance with ss. 6 and 7 of the Act of 1984, as amended.

17. Article 2.1 of the Employer's Insolvency Directive (Codified Version) provides:

> "For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has:
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> (a) either decided to open the proceedings; or
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> (b) established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings."

18. As the law currently stands, the transposition of Article 2.1 is to be found in s. 1(3) of the Act of 1984, as amended, and, insofar as is relevant for present purposes, that provision provides:

> "For the purposes of this Act, an employer shall be taken to be or, as may be appropriate, to have become insolvent if, but only if,
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> (a) . . . ;
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> (b) . . . ;
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> (c) where the employer is a company, a winding up order is made or a resolution for voluntary winding up is passed with respect to it, or a receiver or manager of its undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by any floating charge, of any property of the company comprised in or subject to the charge; . . .".

19. As is pointed out by Lynch-Fannon & Murphy (at para. 8.94) there is an argument that Ireland has improperly implemented the Employer's Insolvency Directive by the adoption of that "*conclusive*" definition of insolvency. Having set out the terms of Article 2(1), they state:

> "What appears to be envisaged by art. 2(1)(b) of the Directive would be the lodging of a petition for the winding-up of a company in the High Court, a hearing of the petition and a decision being taken that the company has ceased trading and is insolvent, but that no winding up order should be made or a liquidator appointed by reason of the insufficiency of assets. In such a situation a 'state of insolvency' within the meaning of art. 2 would arise without the need for the actual appointment of a liquidator. However, there is no provision in Irish law which allows a court to make such a determination, and this can cause difficulties for employees who are not in a position to nominate a liquidator in circumstances where there is likely to be no resources to discharge the costs of the liquidation. In such a situation employees are deprived of access to the employer's insolvency fund. Thus Ireland would appear to have failed to provide the minimum level of protection for employees as required by the Directive."

20. The last sentence in that quotation prompts the following question: how can an inadequately protected employee, such as the Petitioner in this case, get redress? Earlier, the authors had pointed out (in para. 8.93) that the alleged non-implementation of the Employer's Insolvency Directive in Italy had resulted in the seminal decision of the Court of Justice (ECJ) in *Francovich v. Italy* Case C – 9/90 [1991] ECR 1 – 5357, "which established the principle of state liability to individuals for failure to correctly implement EU law". Counsel for the Petitioner relied on the decision of the ECJ in the first *Francovich* case and submitted that the definition of state of insolvency in the Employer's Insolvency Directive has direct effect in Ireland and is binding on the State and, consequently, the Petitioner is entitled to payment of €35,910 from the Fund, as the Company's business has been definitively closed down and the available assets are insufficient to warrant making a winding up order.

The Court's problem

21. However, the fate of Mr. Francovich was actually sealed by the later decision of the ECJ in *Francovich v. Italy* (No. 2) (Case C – 479/93; [1996] I.R.L.R. 355). Mr. Francovich did not succeed in his claim. There is an interesting commentary on the ultimate outcome of the *Francovich* case in an article cited by Lynch-Fannon & Murphy: Sweeney, '*Problems with the Protection of Employees (Employer's Insolvency) Act 1984'* (2009) 6(4) IELJ 98. In that article the author observed as follows:

> "There is clearly a potential for an Irish litigant to bring a claim to the ECJ in the light of Ireland's failure to transpose the Directive into Irish law in a way which would cover an informal insolvency type situation.
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> Had Francovich succeeded in his claim, Ireland's failure to provide protection for employees in informal insolvency situations would be up for legal challenge. However, in light of the Francovich decision, it seems likely that such a claim would fail. The ECJ gives each Member State a broad discretion in relation to the definition of 'insolvent employer'. Thus it would seem the only avenue in which to remedy the current lacuna in our law on the protection of employees in the event of an employer's insolvency is through legislative intervention."

22. A similar conclusion was reached in Barrett '*European Law – Mr. Francovich strikes again or when is an insolvency not an insolvency?*'(1996 DULJ 1 157 – 166) where the author stated:

> "In the event, Francovich failed in his claim, his argument running into what in the event proved to be the insuperable hurdle of the wording of Article 2(1). The conclusions to be drawn for Irish law seem clear. Ireland's failure to provide the same protection for employees in informal insolvency situations as it provides for employees in an identical situation save that their employers have been the subject of formal bankruptcy or insolvency procedures may well continue to be an inequality which begs to be remedied. But the decision of the Court of Justice in *Francovich (No. 2)* constitutes a clear indication that pressure for its resolution will not emanate from any interpretation put upon Directive 80/987 by the Court."

23. The foregoing views of the commentators may or may not be correct. There has been no determination either by a competent court in this jurisdiction or by the Court of Justice of the European Union as to whether the Employer's Insolvency Directive has been properly transposed into Irish law and, if it has not, whether an adversely affected employee of an insolvent employer has a cause of action against the State. It was submitted on behalf of the Petitioner that the Petitioner's situation under Irish law is distinguishable from the situation of Mr. Francovich under Italian law. The Court expresses no view on that submission, because the issue is not before the Court. The Court's problem is how best to apply the provisions of the Act of 1963 for the benefit of the Petitioner.

Other problems

24. The immediate problem which faces the Petitioner is a time limitation problem. By virtue of s. 6(2)(b) of the Act of 1984, as amended, an employee's claim for payment out of the Fund in respect of an award under, *inter alia*, the Unfair Dismissals Acts 1977 – 2007 can only be made where the award was made during or after the period of eighteen months preceding the "relevant date". Where the employer is a company which is being wound up, the term "relevant date" has the same meaning as it has in s. 285 of the Act of 1963, which deals with preferential payments in a winding up. In the case of a compulsory winding up by the Court, the relevant date is the appointment (or first appointment) of a provisional liquidator or, if no appointment was made, the date of the winding up order. Counsel for the Petitioner submitted that the effect of the foregoing provisions is that, in relation to the order enforcing the award under the Unfair Dismissals Acts 1977 – 2007, which was made on 14th February, 2012, the Petitioner has until 14th August, 2013 to make a claim under the Act of 1984, as amended.

25. The impact of the time limits, as summarised by Lynch-Fannon & Murphy at para. 8.97, highlights the Court's dilemma in this case. The authors state:

> "The time limits prescribed in the legislation can cause difficulties in cases where a company ceases trading but is not wound up or a receiver is not appointed for some time. If this state of affairs continues for in excess of 18 months, employees may not be entitled to claim under the Act when the company is eventually wound up or a receiver appointed. If the company is never formally wound up or if a receiver is never appointed, or even if the company is simply struck off the register, the employees are also denied the protection which the Act is designed to provide."

The dilemma for the Court is how to solve the problem before the time limit operates against the Petitioner.

26. The Court's attention has been drawn to one other problem in the Act of 1984, as amended. That is that s. 6(2)(a), in outlining the debts to which the section applies, at sub-para. (v) refers to any amount which an employer is required to pay by virtue of –

> "a determination under s. 8(1) or 9(1) or an order under s. 10(2) of the 1977 Act."

As is pointed out in the annotation by Kerr (Westlaw IE) of the Act of 1984, as amended, s. 10 of the Act of 1976 has been repealed and replaced by s. 11 of the Unfair Dismissals (Amendment) Act 1993. Kerr suggests that the reference to an order under s. 10(2) of the 1977 Act should be read as a reference to an order under s. 11(2) of the amending statute. Given the range of difficulties in this case, I think that is the appropriate course to adopt for present purposes.

The solution to the Court's problem

27. The only manner in which the Court can be of assistance to the Petitioner is by making a winding up order before 14th August, 2013, or, alternatively, appointing a provisional liquidator before that date and ultimately making a winding up order. The appointment of a provisional liquidator alone will not solve the problem. That is because s. 4(1) of the Act of 1984, as amended, stipulates that a company is deemed insolvent if a "winding up order is made". The appointment of a provisional liquidator followed by a winding up order fixes the "relevant date" as the date of the appointment of the provisional liquidator for the purposes of the application of the time limit in the Act of 1984, as amended.

28. Counsel for the Petitioner suggested the appointment of a provisional liquidator for the purposes of confirming to the Court that the Company's business has definitively closed down and that the available assets are sufficient to warrant the making of a winding up order. However, when that suggestion was made, I did not see the sense of going that route, because only the making of a winding up order before 14th August, 2013 would definitely solve the Petitioner's problem. Therefore, I considered that the Court had to determine whether it is appropriate to make a winding up order.

29. It is absolutely clear that the Petitioner, as a creditor of the Company, has standing to seek an order that the Company be wound up (s. 215 of the Act of 1963) and that he has also established a ground for making a winding up order (s. 213(e) of the Act of 1963). Section 216 of the Act of 1963 gives the Court a wide discretion on the hearing of a winding up petition. Of particular relevance for present purposes is that subs. (1) of that section provides that the Court shall not refuse to make a winding up order on the ground, *inter alia*, that the company has no assets.

30. The crucial question for consideration by the Court at the stage when the appointment of a provisional liquidator was suggested was whether the Court should make a winding up order if no appropriate person were to come forward to act as official liquidator for the purposes of the winding up. Section 225 of the Act of 1963 deals with the appointment of a liquidator and provides that, for the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court "may" appoint a liquidator. While that section seems to be open to the inference that a court can make a winding up order without appointing a liquidator, in reality, it is difficult to see how a compulsory winding up could proceed without a liquidator being appointed. It is true, of course, that the office of official liquidator may become vacant. Section 228(e) recognises this fact and provides that a vacancy in the office of a liquidator appointed by the Court shall be filled by the Court. That is reflected in Order 74, rule 36 of the Rules which provides that, in the case of the death, removal or resignation of an Official Liquidator, another shall be appointed in his place in the same manner as in the case of a first appointment and proceedings for that purpose may be taken by such party as may be authorised by the Court. Moreover, s. 229(2) provides that, if and so long as there is no liquidator, all property of the company shall be deemed to be in the custody of the Court.

31. Having given careful consideration to the provisions of the Act of 1963, I came to the conclusion that it would not be appropriate to make a winding up order without ensuring that the office of official liquidator is filled from the time of the making of the winding up order. Accordingly, I adjourned the petition for a very short period to enable the Petitioner's solicitors to ascertain whether Mr. Wallace would be prepared to act as official liquidator, as distinct from provisional liquidator, or, if he was not, whether some other qualified person would be prepared to take on that office. I pointed out that the role of an official liquidator performed under the supervision of the High Court is an onerous role and may involve the official liquidator incurring expenditure which he may not be in a position to recoup. I also made it clear that a qualified person who is prepared to take on the role in this case should carefully consider the implications of so doing and, if necessary, obtain legal advice as to the burden which he will be taking on if he consents to acting as official liquidator.

32. Since the Court expressed the foregoing views on 9th July, 2013, Mr. Wallace, by letter dated 15th July, 2013, has consented to act as official liquidator. Accordingly, an order will be made in the usual form for the winding up of the Company and for the appointment of Mr. Wallace as official liquidator for the purposes of the winding up. The winding up will proceed in the ordinary way under supervision of the Court in the Examiner's Court List.

General observations

33. While the Court has been able to provide assistance to the Petitioner, it has been able to do so by applying the provisions of the Act of 1963 in the ordinary way. However, the problem arising from the transposition of the Employer's Insolvency Directive has been around for a long time and, as stated in Regan on *Employment Law* (2009) (at para. 12.23):

> "The Act's failure to deal with informal insolvency is probably its greatest defect and certainly its most controversial one."

That problem is not cured by this decision.

34. The Petitioner in this case has been fortunate in that his solicitors and counsel have taken the matter this far on his behalf and have been of very considerable assistance to the Court and must be commended for that. However, one has to be concerned for less fortunate employees of corporate employers who have become caught up in what has become known as "informal insolvency" and who are not in a position to petition to have the employer corporation wound up. Unless the issue is successfully litigated by an adversely affected employee in the future in this jurisdiction, or on a reference to the Court of Justice of the European Union, the obvious unfairness inherent in the Act of 1984, as amended, will only be redressed by legislative change. Whether such change should be implemented is a matter of policy for the Government and the Oireachtas.

35. Finally, for the avoidance of doubt, it must be emphasised that nothing in this judgment should be interpreted as expressing any view as to whether the Petitioner can maintain an action against the State for loss incurred as a result of the manner of transposition of the Employer's Insolvency Directive.