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THE HIGH COURT

2010 332 COS

IN THE MATTER OF BIRCHWELL DEVELOPMENTS LIMITED (IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF S. 131 OF THE COMPANIES ACT 1990

Judgment of Miss Justice Laffoy delivered on the 23rd day of July, 2010.

1. The problem

1.1 This is the second occasion during this term on which I have been faced with an application which is designed to redress the failure to comply with the provisions of s. 256 of the Companies Act 1963 (the Act of 1963) in relation to a members' voluntary winding up, in particular, the failure to deliver the required statutory declaration of solvency to the Registrar of Companies not later than the date of the delivery to the Registrar of a copy of the resolution for the winding up of the company, which, in accordance with s. 143 of the Act of 1963, requires to be delivered within fifteen days of the passing of the resolution.

1.2 Before dealing with the facts underlying this application and how the problem should be redressed, I propose outlining what I consider to be the relevant provisions of the Companies Acts and the relevant authorities.

2. The relevant statutory provisions and the relevant authorities

2.1 Section 256 of the Act of 1963 in its current form was substituted by s. 128 of the Companies Act 1990 (the Act of 1990). A pre-condition to a members' voluntary winding up of the company is the making of a statutory declaration to the effect that the directors have made a full inquiry into the affairs of the company, and that, having done so, they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding twelve months from the commencement of the winding up (sub. (1)). Sub-section (2) deals with when the statutory declaration of solvency should be made and delivered to the Registrar of Companies and what it should contain. It provides that it should be accompanied by a report made by an independent person in accordance with the provisions contained in subs. (3) and (4). Sub-section (11), insofar as is relevant for present purposes, provides:

> "A winding up in the case of which a declaration has been made and delivered in accordance with this section is in this Act referred to as a 'members' voluntary winding up' and a voluntary winding up in the case of which a declaration has not been made and delivered as aforesaid … is in this Act referred to as 'a creditors' voluntary winding up'".

2.2 Section 266 of the Act of 1963 is one of the provisions therein applicable to a creditors' voluntary winding up by virtue of s. 265. Sub-section (1) requires the company to cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for the voluntary winding up of the company is to be proposed, and that the creditors be notified of the meeting by post at least ten days before the date of the creditors' meeting. Sub-section (2) requires that the company advertise the creditors' meeting at least ten days before the date of the meeting once at least in two daily newspapers circulating in the district where the registered office or principal place of business of the company is situated. Sub-section (3) requires that the directors of the company lay a statement of affairs and a list of creditors before the creditors' meeting and appoint one of their number to preside at the said meeting.

2.3 Section 131 of the Act of 1990 applies where, in the case of a creditors' voluntary winding up, a liquidator has been nominated by the company. As is pointed out in the annotations in McCann and Courtney on *Companies Acts 1963 – 2006:2008 Edition* (at p. 1267), the purpose of s. 131 was to reverse the effect of the decision in *Re Centrebind Limited* [1967] 1 WLR 377, where it had been held that the person appointed as a liquidator by the members had been validly appointed and had power to act in the liquidation and to realise and deal with the assets despite the fact that no creditors' meeting had ever been held. As the editors point out, a practice had thus developed of holding a members' meeting and appointing a "friendly" liquidator who would not investigate or pursue the directors and who would be in a position to transfer the company's assets on advantageous terms to a new entity established by the directors. Sub-section (2) of s. 131 provides that the powers conferred on the liquidator by s. 276 of the Act of 1963 shall not be exercised, except with the sanction of the court, during the period before the holding of the creditors' meeting under s. 266 of that Act, subject to certain exceptions designed to preserve the assets of the company which are set out in subs. (3). Sub-section (4) requires that the liquidator shall attend the creditors' meeting and shall report to the meeting on any exercise by him of his powers. Sub-section (5) provides as follows:

> "If default is made –
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> (a) by the company in complying with subsection (1) or (2) of section 266 of the [Act of 1963], or
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> (b) by the directors in complying with subsection (3) of the said section,
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> the liquidator shall, within 7 days of the relevant day, apply to the court for directions as to the manner in which that default is to be remedied."

In subs. (6) the "relevant day" is defined as meaning the day on which the liquidator was nominated by the company or the day on which he first became aware of the default, whichever is the later.

2.4 For present purposes I am assuming that s. 131 has application to a deemed creditors' voluntary winding up by virtue of s. 256(11) of the Act of 1963, although in such a winding up the company has purported to *appoint* a liquidator under the power contained in s. 258, rather than merely *nominate* a liquidator.

2.5 Section 280 of the Act of 1963 confers on the liquidator, or any contributory, or any creditor of a company in liquidation power to apply to court to determine any question arising in the winding up. Sub-section (2) of s. 280 gives the court a very broad discretion on such an application. The only condition is that the outcome should be "just and beneficial". Sub-section (3) provides:

> "An office copy of an order made by virtue of this section annulling the resolution to wind up or staying the proceedings in

the winding up shall forthwith be forwarded by the company to the registrar of companies for registration."

2.6 In *In Re Oakthorpe Holdings (In Voluntary Liquidation)* [1987] I.R. 632, an application under s. 280 to annul a resolution that Oakthorpe Holdings, an unlimited company which had never traded and had no creditors, be voluntarily wound up and appointing the applicant as liquidator was considered by the High Court. The context was the failure of the company to make and deliver to the Registrar of Companies the statutory declaration of solvency in accordance with s. 256, so that the winding up was deemed to be a creditors' voluntary winding up, and the failure of the company to summon a creditors' meeting in accordance with s. 266. It was held by the High Court (Carroll J.) that the Court did have the power under s. 280 to annul the resolution to wind up the company voluntarily and that, given that the company was not trading and had no creditors, it was appropriate for the Court to make such an order. However, it was held that, as no liquidator had been appointed in accordance with the provisions of s. 267 of the Act of 1963, the appropriate person to make the application under s. 280 of that Act was a contributory. It is recorded in the report that the matter was adjourned until later in the day of the hearing, whereupon a contributory of the company was substituted as applicant by consent of the parties. That case pre-dated the enactment of s. 131 of the Act of 1990.

2.7 The decision of the High Court (Costello J.) *In Re Favon Investment Co. Ltd. (In liquidation)* [1993] 1 I.R. 87 post-dated the enactment of the Act of 1990. In his judgment in that case, Costello J. described the changes introduced in s. 128 of the Act of 1990 as significant (at p. 89). The factual problem in that case was that the statutory declaration of solvency had not embodied the required statement of an independent person and it had not been delivered to the Registrar of Companies as required by s. 256, in the absence of the report of an independent person being annexed to the copy which had been sent to the Registrar. Apropos of the application of s. 131 of the Act of 1990 Costello J. stated (at p. 90):

> "The Act of 1990 makes provision for the steps to be taken by a liquidator in the type of situation which I have just described. When a liquidator has been nominated by the members of a company in what is intended to be a members' voluntary winding-up but where by operation of law the winding-up has become a creditors' voluntary winding-up and there has been a failure to hold the meeting of creditors which should have been held in such a winding-up, then the liquidator is required to apply to the court for directions as [to] the manner in which the default can be remedied. But he must make the application within seven days of his nomination as liquidator by the members or within seven days after he has become aware of the default (s. 131 of the Act of 1990). There is no power conferred on the court to extend the seven-day period."

In the case before Costello J., there had been no application brought under s. 131. The application had been brought under s. 280 of the Act of 1963 seeking orders giving liberty to attach the report of the independent person to the directors' statutory declaration of solvency and seeking an order directing the winding up to proceed as a members' voluntary winding up. Costello J. was of the view that he did not have jurisdiction to make such an order because the requirements of s. 256 are perfectly clear and are mandatory. However, he held that the Court had power under s. 280 to annul the resolution to wind up. He made such an order because "no one would be prejudiced thereby". Costello J. also made an order that the company be bound by any act of the liquidator, and that the liquidator be paid his costs of the application and his fees (if any) out of the assets of the company. He required a copy of the order to be served forthwith on the Registrar and notice of it to be inserted in Iris Oifigiúil. He stated that, if required, steps could be taken to wind up the company as a members' voluntary winding up in accordance with the Act of 1963, as amended by the Act of 1990.

3. The factual context

3.1 The applicant on this application is an insolvency practitioner who has sworn the grounding affidavit. The company was incorporated on 18th November, 1999 as a private company limited by shares. Its object was the development of lands and property. The applicant has averred that, as the company had ceased to trade, it was decided by the members of the company to pass a special resolution that the company be wound up voluntarily as a members' voluntary winding up, so that the assets of the company could be distributed *in specie* amongst its members.

3.2 The following documents are exhibited in the grounding affidavit:

> (a) The minute of a meeting of directors held on 16th December, 2009. While the minute is correctly headed in the name of Birchwell Developments Limited, the company the subject of this application, which will be referred to hereafter as "Birchwell", the minute is described as a minute of "Directors' Meeting of Cladewell Consultants Limited". In any event, at the meeting there was obviously agreement to wind up Birchwell, the declaration of solvency produced was approved by the Board and the directors were authorised to sign it. It was resolved that an independent accountants' report be obtained and that the declaration of solvency be filed in the Companies Registration Office (CRO). The directors then approved a notice to the members of the company that the company be voluntarily wound up, that the applicant be appointed as liquidator for the winding up, and that the applicant be authorised, in accordance with the memorandum and articles of association, to distribute the whole or any part of the assets of Birchwell amongst the members *in specie.*
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> (b) The declaration of solvency in the statutory form (Form No. 12) which disclosed an estimated surplus after payment of debts in full (including a sum for the estimated cost of the liquidation) of €146,264.
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> There was embodied in the declaration a report by FGS, Chartered Accountants, as "an independent person" within the meaning of s. 256.
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> (c) A Form G1
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> It recorded that a special resolution of Birchwell had been passed on 16th December, 2009 that the company be wound up, that the applicant be appointed liquidator and that the liquidator be permitted to distribute *in specie* the assets of the company. The form was signed by a director of the company.
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> (d) A copy of a letter dated 16th December, 2009 from the applicant's firm to the CRO.
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> It referred to Birchwell, stating that on 16th December, 2009 the applicant was appointed liquidator of the company and attaching Form G1 and Form E1, which presumably was intended to refer to the statutory declaration of solvency.

3.3 In the grounding affidavit the applicant has averred that he understood that the declaration of solvency had been lodged in the CRO and in that regard he exhibited the letter of 16th December, 2009. He further averred that, however, on 26th May, 2010 he "discovered that there is no record of the said letter dated 16th December, 2009 having been received by" the CRO.

4. The application

4.1 This application was initiated by an originating notice of motion which issued on 2nd June, 2010, wherein Birchwell seeks the following orders:

> (1) an order pursuant to s. 131(5) of the Act of 1990 giving directions to the liquidator as to the manner in which a default in the procedures required for a creditors' voluntary winding up pursuant to s. 266 of the Act of 1963 is to be remedied; or
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> (2) in the alternative, an order directing that the procedures adopted by the applicant during the course of the voluntary winding up of the company are valid notwithstanding the failure to comply with the provisions of s. 266 of the Act of 1963.

4.2 In his grounding affidavit the applicant has suggested "that the most appropriate order that this Court could make would be for an order deeming the procedures used in the creditors' voluntary winding up valid notwithstanding the failure to comply with the provisions of s. 266".

4.3 The application was served on the Director of Corporate Enforcement and the Registrar of Companies. By letter dated 10th June, 2010 the solicitor for the Director, while pointing out that there was no statutory requirement under the Companies Acts requiring notice of the matter to his Office and that he had no role in relation to the matter, intimated that he had no objection to the application and did not intend to be represented before the Court.

5. Conclusions

5.1 In my view, to accede to the suggested preferred relief indicated by the applicant would be, as the saying goes, to "drive a coach-and-four" through the companies legislation, which is designed to protect creditors and contributories of companies. Assuming that s. 131 applies to a creditors' voluntary winding up which is deemed to exist by virtue of s. 256(11), if the Court were to make an order at this juncture deeming the procedures adopted to date to be valid notwithstanding the failure to comply with s. 256, the outcome would be to wholly defeat the purpose of s. 131, which is to ensure that, until the members' nominee as liquidator is validly appointed at a creditors' meeting in accordance with the requirements of s. 267, the liquidator, subject to the exceptions stipulated in subs. (3) of s. 131, may only exercise powers with the sanction of the Court. Taking a broader view of the provisions of the Companies Acts in relation to winding up, and, in particular, the requirement that s. 256 be complied with, if the Court were to ignore the failure to give notice to the public at large of a members' voluntary winding up and, in particular, the solvency of the company, the protection which s. 256 is designed to give to creditors of a company would be set at nought.

5.2 As regards the first relief sought on the notice of motion, that directions be given to the liquidator as to the manner in which the liquidation proceed as a creditors' voluntary winding up having regard to non-compliance with s. 256 and s. 266, it was contended on behalf of the applicant that this application was brought within the time limited in subs. (5) of s. 131, on the basis that the "relevant day" was 26th May, 2010, being the day on which he discovered that no record of his letter of 16th December, 2009 had been received in the CRO. It is not clear why no record of the letter was received in the CRO. Was it posted? Did it go astray in the post? Almost six months had elapsed from the passing of the resolution to wind up Birchwell, when this application was initiated. Assuming s. 131 applies to a creditors' voluntary winding up which is deemed to exist by virtue of s. 256(11), in my view, the Court would require a better explanation as to the circumstances in which s. 256 was not complied with than has been given in this case before being satisfied that this application has been brought in time and before giving directions under s. 131(5).

5.3 If the Court was giving directions under s. 131(5), in my view, the Court could not wholly absolve Birchwell from the requirements of s. 266. What s. 131(5) empowers the Court to do is to give directions "as to the manner in which that default is to be remedied". It seems to me that the appropriate course would be for the Court to set out a timetable in which the defaulting company would comply with the requirements of s. 266. On the facts of this case, that might impose an unnecessarily onerous burden on Birchwell.

5.4 Having considered the matter carefully, given that the Court has jurisdiction to annul the winding up order, in my view, that would be the appropriate course to adopt at this juncture. The consequences of annulling the winding up order would be that the members would have to start the members' voluntary winding up process *de novo* and properly comply with the provisions of s. 256 of the Act of 1963 and bring the process to conclusion in accordance with the Companies Acts.

5.5 If that approach were to be adopted, it may be that actions have been taken by the applicant on the assumption that the winding up was being conducted in accordance with the law as a members' voluntary winding up which it would be futile to unwind and re-implement. For instance, it may be that the applicant, on the assumption that he was a properly appointed liquidator, has got in monies owed to the company or discharged debts. He may also have purported to effect a distribution *in specie* of the remaining assets. If the matter were to be put fully before the Court, the Court might consider it appropriate to make an order of the type made by Costello J. in the *Favon* case to the effect that Birchwell is bound by those actions of the applicant. However, in my view, it would be entirely inappropriate for the Court to give a carte blanche to the actions of the applicant without knowing what those actions were and without having an overview of the position of Birchwell in liquidation.

6. Order

6.1 I propose at this juncture making an order adjourning the matter for a sufficient length of time to allow the parties to consider the observations I have made above and amend the application, if necessary. Having regard to the observations of Carroll J. in the *Oakthorpe* case, it would probably be more appropriate if the application were amended to name a contributory of Birchwell as applicant.

6.2 It would be my intention to direct that a copy of any order made is filed in the CRO forthwith and that notice of the making of the order is advertised in Iris Oifigiúil within 21 days.