Neutral Citation Number: [2008] IEHC 329

THE HIGH COURT

2008 250 COS

IN THE MATTER OF BALBRADAGH DEVELOPMENTS LIMITED.
AND
IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2007

Judgment of Ms. Justice Laffoy delivered on the 31st day of July, 2008

1. The petition of Concloda Construction Ltd. (the Petitioner) to wind up Balbradagh Developments Limited (the Company) was presented on 25th June, 2008. It was preceded by a demand within the meaning of s. 214 of the Companies Act 1963 (the Act of 1963), which was served on 26th May, 2008. The demand related to a debt of €264, 655.88, which comprised the balance due by the Company to the Petitioner on foot of an arbitrator's award made on 5th December, 2007 and the Petitioner's costs of the arbitration, which were awarded against the Company and which had been certified by a Taxing Master of the High Court by a Certificate of Taxation dated 21st May, 2008.

2. The petition was returnable in this court for 14th July, 2008. It had been advertised in two national daily newspapers on 4th July, 2008 and in Iris Oifigiúil on 8th July, 2008. In the petition, the Petitioner proposed the appointment of Mr. George Maloney, Chartered Accountant, to act as Official Liquidator. I am satisfied that all the proofs were in order on 14th July, 2008, and, if the petition had proceeded without opposition, a winding up order would have been made and Mr. Maloney would have been appointed Official Liquidator for the purposes of the winding up.

3. However, on 14th July, 2008 counsel for the Petitioner informed the court that the Company was summoning a creditors' meeting with a view to the Company being wound up in a creditors' voluntary winding up and requested that the petition be adjourned for two weeks pending the holding of the creditors' meeting. The creditors' meeting was duly held on 22nd July, 2008. At that meeting, the directors of the Company proposed Mr. Declan McDonald, a Chartered Accountant, as liquidator. The Petitioner nominated Mr. Maloney as liquidator. The matter was put to a vote and the result, which I will examine in detail later, was that the majority in value of the creditors favoured the appointment of Mr. McDonald.

4. The Petitioner was dissatisfied with the conduct of the creditors' meeting and with the appointment of Mr. McDonald as liquidator. When the matter came back before this court on 28th July, 2008, the Petitioner informed the court that it was proceeding with the petition. The petition was heard on 30th July, 2008. The evidence before the court as to what transpired at the creditors' meeting comprised an affidavit sworn by Seamus O'Sullivan, a director of the Petitioner, on 25th July, 2008, and an affidavit of Kenneth Pratt, a director of the Company, who chaired the creditors' meeting, which was sworn on 28th July, 2008.

5. Before considering the evidence, I think it important to emphasize three matters.

6. The first is that what the Petitioner is seeking on this application is to have the Company wound up by the court, rather than by way of a creditors' voluntary winding up, not merely to have an alternative liquidator appointed.

7. Secondly, the Petitioner in his affidavit and through his Counsel at the hearing of the petition has made it clear that, in proceeding with the petition, he is in no way impugning the integrity or independence of Mr. McDonald or his capacity to properly act as liquidator in a creditors' voluntary winding up. Mr. McDonald, in his affidavit sworn on 29th July, 2008, has outlined his qualifications and experience as an insolvency practitioner and the circumstances in which he came to be involved with the Company. Prior to the creditors' meeting he had met the directors of the Company on one occasion only, on 11th July 2008, the occasion on which he was requested to act as liquidator. He had been referred to the directors of the Company by Mazars, the Company's auditors. In his affidavit Mr. McDonald has averred that he does not believe that there exists any conflict of interest, whether actual or apprehended, or any other impediment which would prevent him from duly, fully and efficaciously acting as liquidator of the Company or, as necessary, from taking any action against the directors personally. I am satisfied that that averment reflects the true position.

8. Thirdly, the voting on the resolution at the creditors' meeting to appoint Mr. Maloney as liquidator was governed by subs. (3) of s. 267 of the Act of 1963, as inserted by s. 47 of the Company Law Enforcement Act 2001 (the Act of 2001), which provides as follows:-

> "If at a meeting of creditors mentioned in s. 266(1) a resolution as to
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> creditors' nominee as liquidator is proposed, it shall be deemed to be
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> 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."

9. Essentially, the Petitioner advanced two grounds for a compulsory liquidation, which are interlinked: that the votes of the two directors of the Company, Mr. Pratt, who claims to be a creditor in the sum of €80,000, and Mr. Michael O'Grady, who claims to be a creditor in the sum of €200,000, and of Mrs. Barbara O'Grady, the wife of Mr. O'Grady, who claims to be a creditor in the sum of €300,000, should have been disregarded in the contest for the appointment of liquidator between Mr. McDonald and Mr. Maloney; and, because of concerns raised by the directors' statement of affairs presented at the creditors' meeting and the manner in which the concerns were addressed by Mr. Pratt at the meeting and in the affidavit sworn by him on 28th July, 2008, the affairs of the Company need to be investigated in a winding up under the supervision of the court.

10. There is authority for the proposition that, in exercising its discretion as to whether to make an order to wind up a company, the Court is not obliged to give equal weight to all debts of an equal amount and may have due regard to the interests of non-connected creditors. Counsel for the Petitioner relied in particular on a decision of the English High Court in *Re Falcon R. J. Developments Ltd.* [1987] B.C.L.C. 437 and drew the Courts attention to a footnote in MacCann and Courtney Companies Acts 1963-2006 (at p.498) to the effect that the decision was accepted by Costello J. in an ex-tempore judgment of *Metro Express Ireland Ltd.* (in liquidation). In *Re Falcon,* Vinelott J. stated (at p. 152):

> "… the Court is not bound to give equal weight to all debts of equal amount. It must also have regard to other interests which may influence the views of a particular creditor. And the Court is entitled to take into account 'general principles of fairness and morality which underlie the details of insolvency law'"

11. The Petitioner, through Mr. O'Sullivan's averments in his affidavit, has asserted that the debts of Mr. Pratt, Mr. O'Grady and Mrs. O'Grady, which represent loans to the Company, were "significantly exaggerated if not largely fictitious and were included [in the statement of affairs] at conveniently large round sums specifically to defeat the anticipated motion to propose Mr. Maloney as

liquidator". To corroborate that assertion, in his affidavit Mr. O'Sullivan has referred to a statement of affairs dated 30th June 2006 which had been furnished to him in the course of negotiations he had with the directors in July 2006, which showed directors loans at €304,026. Mr. Pratt in his affidavit made a general denial of the allegations which had been made at the creditors' meeting. In relation to the directors' loans, he averred that the audited accounts for the Company as at 30th June 2006 show loans to the Company made by the directors in the sum of €412,213. He offered no explanation of the sums aggregating €580,000 which had been the subject of questions at the creditors' meeting or the concerns voiced in Mr. O'Sullivan's affidavit. Notwithstanding that silence, on the state of the evidence, in my view, it would not be proper to draw the inference that the debts aggregating €580,000 were "fabricated", as, apparently, was alleged at the creditors' meeting, or inflated for the purpose of procuring the appointment of Mr. McDonald.

12. On the basis of the evidence, it appears that creditors in value of €761,649 voted in favour of the resolution to appoint Mr. McDonald, whereas creditors in the value of €313,346 voted in favour of the resolution to appoint Mr. Maloney as liquidator. According to Mr. Pratt's affidavit the sum of €761,649 included debts of six non-connected creditors, which aggregated in value to €227,649. The non-connected creditors included the Company's solicitors and the Company's auditors, whose debts aggregated approximately €154,000. That suggests that the debts of the connected creditors who voted in favour of Mr. McDonald aggregated €534,000, rather than €580,000, which has not been explained. The Petitioner was supported in the resolution to appoint Mr. Maloney as liquidator by Mr. Pat O'Hare, the Company's former financial advisor, whose firm's debt is shown in the statement of affairs at €43,439, and two other creditors.

13. Having regard to the evidence, I do not think it would be proper to conclude that the votes of the connected creditors in favour of Mr. McDonald should be disregarded. Therefore, I find that the winding up of the Company by way of creditors' voluntary winding up with Mr. McDonald as liquidator represents the wishes of the majority in value of the creditors of the Company. For the avoidance of doubt, that conclusion is not informed in any way by the averment of Mr. Pratt that since the creditors' meeting Mr. O'Hare has intimated that he is pursuing the bulk of his claim against the directors personally, rather than against the Company. Nor does it take account of the fact that a secured creditor, which did not vote at the creditors' meeting, indicated to the Court that it supported the petition.

14. Apart from the fact and quantum of the connected debts, a number of issues were raised at the creditors' meeting, which, if established, could constitute wrongdoing on the part of the directors in some cases and mismanagement of the affairs of the Company in other cases. Mr. McDonald has pointed out in his affidavit that the issue as to the accuracy and reliability of the statement of affairs will have to be addressed by him and will be one of the matters which will be the subject of his report to the Director of Corporate Enforcement under s. 56 of the Act of 2001. The allegations made at the creditors' meeting will have to be investigated and, if there is evidence of wrongdoing, the wrongdoers will have to be pursued by the liquidator. While I find it unnecessary to record the allegations in this judgment, I am satisfied that the matters that gave rise to concern on the part of the Petitioner and Mr. O'Hare at the creditors' meeting can be properly investigated in the creditors' voluntary winding up by Mr. McDonald. In my view, those matters do not involve elements of complexity or conflict which would necessitate an investigation in a winding up by the Court.

15. Moreover, there are sufficient safeguards in place to ensure that the liquidator investigates those matters properly. I have already adverted to the supervisory role of the Director of Corporate Enforcement. At the creditors' meeting a committee of inspection was formed. Both the Petitioner and Mr. O'Hare are members of the committee of inspection. Mr. McDonald in his affidavit has averred that he intends convening regular meetings of the committee of inspection and that he proposes convening the first meeting within two weeks. There is also the statutory entitlement of the liquidator or a creditor to apply to Court to determine any question arising in the winding up which is contained in s. 280 of the Act of 1963.

16. Counsel for the petitioner urged the Court to adopt the approach which has been adopted by Courts in the United Kingdom in ordering a compulsory winding up where otherwise creditors who are not connected to the company would have a genuine sense of grievance. This approach is illustrated by the following passage from the judgment of Judge Roger Cooke in *Re Magnus Consultants Limited* [1995] 1 B.C.L.C. 203:-

> "But it is quite apparent from the authorities I have read that, despite the fact that the liquidator is going to be somebody who is not only licensed but because he is in a way a professional set apart entitled to be regarded as a person of probity, nevertheless the courts have clearly taken the view that justice must not only be done but be seen to be done, and that where the conduct of the principal creditor – a fortiori the principal creditor who is in charge of the company – is under attack he really should not be without more the person who chooses the liquidator, and where the liquidator has been chosen in those circumstances a petitioner can readily feel a real and proper sense of grievance to which the court ought to give effect."

17. There may be cases in which it would be appropriate to adopt the approach advocated in that passage. However, each application to convert a creditors' voluntary liquidation into a compulsory liquidation must be adjudicated on its own facts and circumstances. Given that the conduct of the Petitioner in this case in agreeing to an adjournment of the petition pending the holding of the creditors' meeting is commendable, whereas it is reasonable to assume that the directors' decision to summon that meeting was a reaction to the petition, which does not reflect well on them, it is understandable that the directors of the Petitioner harbour a grievance that their nominee has not been appointed liquidator. Nonetheless, in my view, as the Court must exercise its discretion in the interests of the generality of the creditors and the members of the company, the existence of that grievance alone would not justify the Court in making a winding up order.

18. Taking an overview of what is in the interests of the generality of the creditors and members, the first important factor is that the Company is seriously insolvent. If the only secured creditor is paid in full (but I note that there is an issue as to whether that creditor was fraudulently preferred) and if the only preferential creditor is paid in full, there will be a deficiency of €985,031 as regards the unsecured creditors, which amount in value to €1,247,979, assuming the statement of affairs presented at the creditors' meeting is correct. Moreover, liquidation pursuant to an order of the court is likely to involve greater cost and endure for longer than a creditors' voluntary winding up. That is the second important factor in determining how the court's jurisdiction should be exercised.

19. Accordingly, having regard to all of the relevant factors, I consider that to proceed with the creditor's voluntary liquidation, rather than to make an order to wind up the Company by the Court, is in the interest of the creditors.

20. The petition will be dismissed.