NEUTRAL CITATION NUMBER [2009] IEHC 384

THE HIGH COURT

2009 402 COS

IN THE MATTER OF VANTIVE HOLDINGS AND IN THE MATTER OF VILLEER DEVELOPMENTS AND IN THE MATTER OF PEYTOR DEVELOPMENTS AND IN THE MATTER OF CARAGH ENTERPRISES LIMITED AND IN THE MATTER OF PARLEZ INTERNATIONAL LIMITED AND IN THE MATTER OF MORSTON INVESTMENTS LIMITED AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2006

JUDGMENT of Mr. Justice Kelly delivered on the 31st day of July, 2009

Introduction

It is sometimes said that when small or modest borrowers from banks encounter difficulties in repaying their loans, then such borrowers have a problem. For those with large borrowings, it is the banks who have a problem. If ever a case demonstrated the accuracy of that proposition, it is this one.

Apart from the Revenue Commissioners, the companies in suit have no creditors save banks. The amounts advanced by those banks are enormous by any standards. The companies are insolvent and on winding up, it is estimated that the following will be the likely result: Vantive Holdings will have a shortfall of in excess of €396 million; Villeer Developments, a shortfall of in excess of €37 million; Peytor Developments, a shortfall of in excess of €88 million; Caragh Enterprises Ltd., a shortfall of in excess of €72 million; Parlez International Limited, a shortfall of €71 million; and Morston Investments Limited, a shortfall of €361 million. That gives a grand total of well in excess of €1 billion shortfall.

Having lent extraordinary sums of money to companies which form part of a corporate structure of Byzantine complexity, the bank creditors have shown great forbearance in taking any action by way of seeking to recover their money. It is a forbearance remarkably absent when dealing with much smaller borrowers who have defaulted on their obligations, as witnessed by the number of applications for summary judgment that the commercial division of this Court has had to deal with during the legal year just ending today. But in truth the banks can do little else but forebear, because if they take action to recover the monies due to them by the companies in suit, they will bring about a collapse of the house of cards that is the petitioner, its related companies and indeed the wider group associated with them.

So the banks have stood back. They have taken no steps to seek repayment of the monies due to them. Indeed they have done more than that; they have actually advanced further sums to the companies in suit so as to enable them to pay off all of the other creditors with the notable exception of the Revenue Commissioners. It is the intention of some of the banks to advance further monies to these insolvent companies.

But in the recent past one bank has broken ranks with the others and has gone on the offensive, at least to some extent. On 29th June, 2009, ACC Bank PLC made a demand upon Vantive Holdings for the repayment of the sum of €63,960,000 and on the same day made demand on Morston Investment Limited, a Jersey company, for the repayment of €72,111,000. The letters of demand made it clear that in the case of the Irish company it constituted a demand within the meaning of s. 214 of the Companies Act, 1963. Section 214 of that Act obliges a company which is the subject of such demand to discharge the liability within 21 days. In default of so doing, the company is deemed by statute to be insolvent and thus the scene is set for an application to have the company wound up. Indeed the letter from the solicitors acting for ACC made it clear that if the sum was not discharged within the 21 days permitted by the Act, ACC would be at liberty to petition this Court for the winding up of the company. A similar intention was made clear in the letter of the Jersey company indicating that an application would be made to the Royal Court of Jersey to commence désastre proceedings there against Morston Investments Limited.

The 21 days permitted under s. 214 was due to expire on Monday, 20th July, 2009. Late in the afternoon of the preceding Friday, at almost the last possible moment, the petition in the present case was presented and an application was made to Clarke J. for directions concerning it. Thus the protection of the court was afforded to the companies in suit. On Tuesday last I heard the application for the appointment of an Examiner to these companies. This is my ruling on that application.

The Companies

The petitioner is an Irish company, as indeed are all of the other companies named in the title with the exception of Morston Investments Limited. That is a company incorporated in Jersey.

I am satisfied on the basis of the evidence put before me that the companies are related companies as defined under the legislation and that Morston is a company in respect of which this court could make a winding up order. I am also satisfied that a company called Stradbally Investment Company Unlimited together with Vantage Holdings owns the entire shareholding in Villeer. I am also satisfied that the necessary resolutions authorising an application to this Court for the appointment of an examiner were passed by the board of the petitioner and each of the related companies.

The evidence further satisfies me that the business and indeed the prospects of the petitioner and the related companies are interdependent. The petitioner and Morston raise the finance which is required by the related companies registered in Ireland as well as the finance required by other connected companies in the wider group of companies which are not party to these proceedings. When the petitioner and Morston borrow monies, they lend those funds onwards to the related companies registered in Ireland as required. These borrowings then take the form of inter company debt to fund this group in its commercial undertakings. It follows, as is said in the petition, that the related companies registered in Ireland are essential to the purpose and undertaking of the petitioner and Morston since they require the finance which the petitioner and Morston raise through bank borrowings. For their commercial life the related companies registered in Ireland are dependent upon the petitioner and Morston for the provision of finance. The relationship between them has been described as symbiotic.

The principal activity of the related companies is purchasing land with the funds borrowed from the petitioner and Morston. These lands are then developed and sold. Large amounts of land – some developed, some partially developed and some undeveloped – are owned by the companies in suit and the wider group. The petitioner and the related companies form an integral part of a group of related contracting, development and investment companies known as the Zoe Group. That consists of a large number of additional companies which do not form part of the present proceedings but whose undertaking and prospects are nevertheless dependent upon the continued survival of the petitioner and the related companies.

So complex is this corporate structure that in presenting the petition to the court the number of companies involved in the group was misstated as 49 rather than the 51 companies which are in fact in the group. Indeed, the three directors of the companies in suit – Messrs. Liam Carroll, David Torpey and John Pope – are directors of an enormous number of other companies. In the case of Mr. Carroll, he is a director of 203 other companies; in the case of Mr. Pope he is a director of 166 other companies; and in the case of Mr. Torpey, he is a director of 62 other companies. Most of these companies are incorporated in Ireland but some are incorporated in Jersey, Northern Ireland and the Netherlands.

Financial Difficulties

The financial ill health of the companies in suit has been known for some time. In December 2008, a meeting took place with the banker creditors to address the problems. The companies were granted additional funds to settle with creditors and they obtained a two years interest roll up net of rental income from the bankers. A three year business plan was prepared.

This business plan was directed in particular to:-

" *Concentration on more focused new development*
- *Active management of the development portfolio to improve planning status and enhance value*
- *The disposal of much of the company's residential stock through aggressive marketing and competitive pricing*
- *The disposal of a number of equity positions held by the company*
- *The sale of a number of development sites with the benefit of planning which are no longer regarded as key to the companies undertaking*
- *Negotiation of a two year moratorium on certain interest payments, loan capital repayments to the bank, and*
- *Employment of group employees and subcontracting staff over different phases of the business plan estimated at approximately 600 persons in total."*

Much of that is written in what I might call 'management speak' and seems to boil down to this. The banks were asked to place a moratorium on interest payments and not to call in the loans. In the meantime work was going to be done on new developments, planning permissions would be obtained for more properties and a sale of some sites and residential accommodation would take place. Given the collapse in the property market, one could be forgiven for being sceptical about those proposals. But apparently the banks were supportive of them. They probably had little choice. Allied Irish Banks, which holds some 40.8% of the group debt, and Bank of Scotland Ireland Limited which holds 26.8% of the group debt, agreed to provide additional finance to deal with the group's creditors and to provide interest roll up net of rental income. Those additional funds have been used to discharge all of the unsecured creditors with the exception of the Revenue Commissioners. The other banks – Bank of Ireland, which holds 9.3% of the debt, Anglo Irish Bank with 3.1% of the debt; KBC Bank Ireland with 1.9% of the debt; Ulster Bank with 6.7% of the debt; and EBS with 0.7% of the loans – agreed also to provide interest roll up.

ACC Bank, consistent with its subsequent approach, rejected the request for forbearance. It holds 10.7% of the group's debt.

Given the events which I have described concerning ACC, this petition was presented, as I have already indicated. The petition as presented contained numerous inaccuracies as indeed did the independent accountant's report. Subsequent affidavit evidence was adduced before me at the hearing on Tuesday last and I propose to give leave to present a petition in the amended form and to take note of the amendments to the independent accountant's report as sworn to.

The Legal Test

The power to appoint an examiner to a company is contained in s. 2 of the Companies Amendment Act 1990, as amended. The power is discretionary. The court may appoint an examiner for the purpose of examining the state of a company's affairs and performing such duties in relation to the company as may be imposed by or under the Act. The court is prohibited from making an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company as a whole or any part of its undertaking as a going concern.

In *Gallium Limited and the Companies Amendment Act 1990,* a decision of the Supreme Court of the 3rd of February of this year, Fennelly J. in commenting on the decision of McCracken J. in a case called *In Re Tuskar Resources* said:-

> *"Mr. Justice McCracken was undoubtedly correct to say that there is an onus of proof on the petitioner. The statutory requirement is to show that there is a reasonable prospect of the survival of the company. A petitioner does not, by getting over that threshold, acquire a right to have an order made. I still think it fair to say that the section confers a wide discretion on the court, or alternatively, that the court should take account of all the circumstances. The establishment of a reasonable prospect of the survival merely triggers the power, which remains discretionary.*
> *The views of Mr. Justice Lardner as expressed in Re Atlantic Magnetics, could be described as pragmatic. He asked whether it 'seems worthwhile to order an investigation by the Examiner into the company's affairs'. The court has the power to appoint an examiner if satisfied that there is a reasonable prospect of survival of the company."*

Fennelly J. went on to say:-

> *"The entire purpose of Examinership is to make it possible to rescue companies in difficulties. The protection period is there to facilitate examination of the prospects of the rescue. However, the protection may prejudice the interests of some creditors. The court will weigh the existence and degree of any such prejudice in the balance. It will have regard to the report of the independent accountant."*

A quotation from one other case is also relevant. In *In Re Traffic Group Ltd and the Companies Acts,* a decision of Clarke J. of the 20th December, 2007, he had this to say in respect of the legislation under which this petition is brought:-

> *"It is clear that the principal focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal and indeed greater importance, to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important both for the court and, indeed, for Examiners to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs."*

The Independent Accountant's Report

The independent accountant's report was prepared by Mr. Fergal McGrath who is a member of the firm of LHM Casey McGrath, who are the auditors to the companies in suit. I am told that it was prepared over a period of four days. In the original form in which it was presented to Clarke J., it contained a number of errors which have been addressed in an affidavit sworn by Mr. McGrath on 24th July, 2009.

Mr. McGrath expresses the view that the formulation, acceptance and confirmation of proposals by way of a scheme of arrangement would offer a reasonable prospect of the survival of the companies as a whole or a part of their undertaking as a going concern.

Mr. McGrath's view is expressed at s. 6 and s. 7 of his report. The view is based on trading projections which are set forth at appendix 5 to his report. Mr. McGrath is not, of course, responsible for those projections but his opinion is based entirely on them.

The projections predict that if one assumes development of existing sites and an orderly asset disposal over a period of three years, there will be remarkable turnaround in the fortunes of the companies. They will move from their present position of insolvency with debts well in excess of €1 billion to having net assets of just short of €300,000,000, the precise figure being €290,436,290.

That projection is based in part at least upon valuations. The valuations of the properties upon which these projections are made are already seven months old and they were supplied by CBRE and Hook & McDonald, both of whom have carried on work for these companies in the past.

The scheme of arrangement, to which I will turn in a moment, if approved, would, it is said by the independent accountant, allow the companies the opportunity to:-

(a) Enhance site value through planning permissions.
(b) Build out and develop existing sites with planning permission.
(c) Sell completed residential, commercial and retail units.

This will generate what is called *"a significant surplus which would then be used to fund future development"*.

Given current market conditions and with little or no prospect for improvement in the future, on the basis of all of the current

economic indicators, this degree of optimism on the part of the independent accountant borders, if it does not actually trespass, upon the fanciful. What market is there likely to be over the next three years for the sale of sites even with planning permissions, and the sale of residential commercial and retail units? The commercial market, particularly in Dublin where most of properties are located, is grossly over subscribed. The residential sector is hardly moving at all. Indeed, I think it notable that since the business plan of last December was initiated and the ordinary creditors were paid off, courtesy of the banks, and with what is called an *"aggressive marketing and competitive pricing policy"* in existence, only 39 residential units have been sold notwithstanding the enormity of the developments carried out.

It is quite clear that when the independent accountant formed the view which he did based on these projections, not merely did he rely upon the valuations which were provided, but also upon assumptions of development of existing sites and an orderly asset disposal over three years. But the only persons with whom, apparently, he had any discussions concerning these assumptions were their creators, the present management of the companies. There is no evidence of any independent view being formed by him or of him consulting with anybody else.

The independent accountant says that the companies would have a reasonable prospect of survival provided that three conditions are met. The first is a scheme of arrangement involving a rescheduling of the repayment of bank debt and a moratorium on capital payments being accepted by the creditors and approved by this Court. The second is a compromise with inter-group creditors and a third, the retention of the existing management of the companies.

The proposed scheme is most unusual in that it does not require any investment in the companies or a write down of debts. One or both such elements figure in practically every, if not every, scheme relating to companies in Examinership. Here it is clear that no investment is required because the banks will continue to provide funds towards the development of the lands, so that is going to happen in any event. Neither is any write down envisaged because the banks are the only creditors.

As is clear, I have the gravest reservations about the projections on which the independent accountant has relied in forming his opinion. They appear to me to be lacking in reality given the extraordinary collapse that has occurred and the lack of any indication of the revival of fortunes in the property market. The valuations in question are out of date and can hardly be described as truly independent.

I am not satisfied that the petitioners have discharged the onus of proof of showing that there is a reasonable prospect of the survival of the companies.

Even if I were so satisfied, I retain a discretion on the question of the appointment of an Examiner. I would be disinclined to exercise it in favour of the petitioners.

First, it clear that there is something artificial about what is involved here. The only creditors are banks. They will be able to take steps to realise their debts and deal with the property. They will wish to maximise the return on that and thus can be expected to enhance the properties value as they see fit with a view to obtaining a greater realisation. They have already behaved in this way.

Second, the only employment threatened is not that of the 650 people who are mentioned in the documents, but in all about 100 who are directly employed. The figure of 650 mentioned in the documents is largely made up of sub-contractors. They will be required if the partly completed developments are to be finished, as the banks have indicated will be the case. Indeed, I think it is also likely that the employees properly so called will have to be retained in large measure when the development of the lands takes place in any event.

Third, the whole exercise seems designed to help shareholders whose investment has proved to be unsuccessful. As Clarke J. has already said in the case which I have quoted from, that is not the purpose for which the legislation was intended.

Conclusion

In these circumstances, not being satisfied that there has been demonstrated to the court a reasonable prospect of survival, I refuse to appoint an Examiner. I dismiss the petition and I withdraw the protection of the court from the petitioners.