[2019] IEHC 637

THE HIGH COURT

[2018 No. 279 COS]

IN THE MATTER OF DOMINAR GROUP LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF SECTION 638 OF THE COMPANIES ACT 2014

BETWEEN

PRINT AND DISPLAY LIMITED

APPLICANT

AND

LIAM DOWDALL

RESPONDENT

AND

MICHAEL CURNEEN

NOTICE PARTY

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 26th of July, 2019

1. The background to this application for leave to cross-examine is the applicant's motion to remove the respondent as liquidator ("*the liquidator*") of Dominar Group Ltd ("*the company*"), pursuant to s. 638 of the Companies Act 2014 ("*2014 Act*").

2. The grounding affidavit of Mr. Jim Conway, director of the applicant, for that application to remove was sworn on 16th July, 2018, and the grounding application for this motion seeking leave to cross-examine was sworn by the solicitor for the applicant on 28th January, 2019, with the same solicitor swearing a supplemental affidavit on 18th February, 2019.

3. Mr. Conway offers himself for cross-examination on his affidavits if leave is given to cross-examine the liquidator in this application. Counsel for the parties, at the direction of this Court, prepared outline legal submissions for the substantive hearing so that the Court could acquaint itself with the issues of fact and law that will arise on a full hearing of the application to remove the liquidator.

4. Attached to the typed version of this judgment is the uncontroversial chronology of key events which were appended to the submissions for the liquidator.

5. The Court in passing mentions that the liquidator was appointed voluntarily by the members, being the applicant (in which Mr. Conway is very involved) and the notice party, on 9th April, 2008. A declaration of solvency was sworn on that date also.

6. The applicant and the respondent have confirmed that they are both keen to have the underlying application to remove the liquidator determined soon. The Court heard final submissions yesterday and, in its own way, contributes to advancing matters by delivering this judgment today.

7. The chronology and the legal submissions of the respondent will facilitate the judge trying the issues. The trial judge will be further guided by the principles set out in the Court of Appeal judgment of *Revenue Commissioners v.. Fitzpatrick* [2016] IECA 228 (unreported, Court of Appeal, 26th July, 2016), where the High Court's decision to remove the

liquidator (Revenue Commissioners v. Fitzpatrick [2015] IEHC 477, (unreported, High Court, 21st July, 2015)) was affirmed by the Court of Appeal.

8. This Court is in the unenviable position of having to foresee how relevant facts and arguments will be established and advanced at the hearing of the motion to remove the liquidator.

9. Order 74, rule 35(1) of the Rules of the Superior Courts ("*RSC*") provides:-

> *"Without limiting the power of the Court to make such an order of its own motion in accordance with section 638(1) of the Act, an application to the Court by a member, creditor, liquidator or the Director under that sub-section to appoint a liquidator if from any cause whatever there is no liquidator acting, or on cause shown, to remove a liquidator and appoint another liquidator, shall be by motion on notice to the liquidator (if any)."*

10. After painstaking efforts by counsel and the Court, the issues in respect of which the applicant wishes to cross-examine the liquidator can be distilled down into five categories:-

    (i) whether the company was and is solvent;

    (ii) whether there was a failure to maximise full value from the sale of shares in a Polish subsidiary, Print & Display (Polska) SP. Zoo ("*P&D Polska*");

    (iii) whether the liquidator failed to supply information to the applicant as may be established as having been required by law;

    (iv) whether the liquidator failed to preserve and safeguard the assets of the company; and

    (v) the issue of financing the removal of waste material from the Osmanska 7 site, the sole remaining asset of the company.

The law concerning cross-examination and affidavits

11. In *Lehane v. Dunne* [2016] IEHC 96 (unreported, High Court, 19th February, 2016), Costello J. refused the application for leave to cross-examine in proceedings instituted by the Official Assignee ("the OA") seeking to set aside transfers by the bankrupt defendant.

12. Paragraphs 10-14 of that judgment comments upon excerpts from various authorities. Costello J. expressed a belief that there was not an authority for "*the general proposition that a deponent may be cross-examined to deal with factual matters which were not covered in his or her affidavit to fill 'an information deficit'*" (para. 14).

13. The learned judge concluded at para. 15:-

> *"If there is a conflict on the affidavits in relation to an issue that needs to be determined, can this issue be justly decided in the absence of cross-examination?"*

14. Counsel for the applicant in reply to the above citations referred to the judgment of the Court of Appeal in another application of the OA against the bankrupt, Mr. Dunne, *In the matter of the Bankruptcy Act 1988, as amended* [2017] IECA 304 (unreported, Court of Appeal, 27th November, 2017), where Peart J. allowed the appeal from the refusal of Costello J. to grant leave for cross-examination of the OA.

15. Peart J. concluded that there were primary facts which were largely uncontested:- "*Nevertheless the bankrupt seeks to cross-examine the OA in an effort to test and undermine the basis for such an inference of non-co-operation. The bankrupt considers that the accumulated primary facts do not, when properly examined and scrutinised, lead to a reasonably drawn inference of non-co-operation. He believes that such a cross-examination may well persuade the Court hearing the OA's motion that it ought not to be satisfied on a balance of probabilities that he has failed to co-operate.*" (para. 59).

16. The learned judge of the Court of Appeal applied *Maguire v. Ardagh* [2002] 1 I.R. 385; [2002] IESC 21, in support. The comments from that judgment were uttered in the context of an Oireachtas investigation into the circumstances which resulted in the shooting dead of a member of the public by an elite garda squad where the good names of the members of the Force were at stake and the evidence in question comprised statements of fact.

17. This Court reluctantly describes the difference in the approaches taken by Costello J. and Peart J. as more apparent than real. Suffice to say that those seeking to vindicate their good names whether in applications involving alleged fraudulent transactions or in an Oireachtas inquiry are different from a member of a company applying to remove a liquidator.

18. In the latter circumstance, the member of the company is actively pursuing a claim under a limited company law provision to supervise and control a liquidator. In other words, the underlying application in these proceedings does not directly involve the good name of the applicant. In fact, the applicant is impugning the professional reputation of the liquidator and he has no need to avail of the panoply of constitutional protections for his professional reputation.

19. Does this difference matter in the application for leave to cross-examine? This Court pressed counsel for the applicant about the prospect of the applicant or Mr. Conway pursuing the liquidator for damages in a claim for professional negligence. The reply was that a new liquidator will be able to examine the conduct of the liquidator and pursue the liquidator. At the same time, the applicant reserved its right to take further action.

20. The Court is aware of existing proceedings and counsel apprised the Court of those details. These replies from counsel for the applicant informed the Court to the extent that the Court should be alert to an inappropriate use of the provision for leave to cross-examine. In short, the Court accepts that cross-examination on affidavits should not be used to fill an information deficit, as mentioned by Costello J.

21. The rules of court, and more particularly O. 74, r. 35, quoted above, were implemented to administer justice in an efficient manner. At the same time, the RSC are not there to hinder the establishment of necessary facts in the interests of justice.

22. The Court has already mentioned its unenviable task of anticipating what another judge may desire when applying s. 638 of the 2014 Act in the underlying application to remove the liquidator. There is no dispute that the onus remains on the applicant to establish on the balance of probabilities that an issue of fact or issues of fact are in dispute to such an extent that a judge hearing the underlying application should have the benefit of cross-examination.

23. Before applying all of the above to the five categories, this Court also records that senior counsel for the applicant opined, at the request of the Court, that the application to remove will take three to four days whether cross-examination is conducted or not.

24. A day was the most that would be added if cross-examination was undertaken. Counsel for the liquidator opined that the application to remove may take five days if cross-examination is undertaken.

Applying the law to the five categories

25. The categories are:-

(i) Cross-examination of the liquidator about whether the company was or is solvent will not be necessary. The facts arising from undisputed financial statements and records will allow the judge to apply the legal principles which can be the subject of submissions prior to a final determination. The applicant has not satisfied this Court that cross-examination on this issue is required. Either the company was or was not solvent at relevant times. This Court notes in passing that there are now no creditors of the company and the applicant has actually received a distribution while there is a remaining asset to which I will refer later.

(ii) Whether there was a failure to maximise full value from the sale of the shares in P&D Polska. There is no factual dispute concerning the sale of those shares. The account contained in the four-page letter from A&L Goodbody, then solicitors for the liquidator dated 14th May, 2010, over nine years ago, is not denied in any material respect by the applicant. The Court will not be required to determine whether the liquidator should have sold the shares to the applicant rather than the notice party, as actually occurred. The Court, if pressed by the applicant, will only be asked to take account of whether the liquidator was justified in selling the shares to the notice party. The facts are set out on affidavit and the applicant is not entitled to pursue a personal grievance that has been dealt with in an undisputed account of what transpired over nine years ago. The applicant has not satisfied this Court that cross-examination of the liquidator on his affidavits is required or will assist the judge hearing the application to remove on this aspect.

(iii) Whether the liquidator failed to supply the information to the applicant as required. The adequacy of the communications can be determined by analysing and hearing submissions about the documents and information released to the applicant as deposed to an affidavit. The applicant has not established to this Court's satisfaction that the judge hearing the removal application will require a cross-examination of the liquidator about the dates and contents of communications throughout the years of the liquidation.

(iv) Whether the liquidator failed to preserve and safeguard the assets of the company. This is a difficult question. This Court understands that this area of contention relates to proceedings seeking damages for misrepresentation against the Polish Studios for Conservation of Cultural Property (Polskie Pracownie Konserwacji Zabytków S.A.) in which the company had an interest. The proceedings were dismissed on 5th February, 2015, in Poland and the liquidator accepted legal advice not to appeal. Although the applicant, according to para. 37 of the liquidator's affidavit sworn on 2nd November, 2018, did not respond to a report dated 17th December, 2015, furnished by the liquidator, this Court considers that a judge hearing the removal application may benefit from evidence and clarifications from the liquidator whether by cross-examination or direct questioning from the judge. The Court appreciates that the advice and views have either been deposed to or exhibited. Nevertheless, for the sake of clarity, this Court consider it best to allow the judge hearing the removal application to determine the extent of questions which can be posed by counsel for the applicant at the hearing of the removal of liquidator. Therefore, I will give leave to cross-examine the liquidator on this aspect.

(v) Regarding the financing for the removal of waste from the Osmanska 7 site, the sole remaining asset, this Court has an outline appreciation from the affidavit evidence and submissions and replies to question which it posed about the remaining steps to be taken before the Osmanska 7 site can be sold. It is this Court's view that it is best to leave to the judge hearing the application to remove to decide on whether cross-examination and/or further questions of the liquidator will assist his or her determination of the application.

26. In summary, the Court will grant leave to cross examine the liquidator but confined to those two particular issues and as may be determined by the judge hearing the removal application. The Court will also grant leave for counsel representing the liquidator to cross-examine Mr. Conway on such facts as the judge hearing the application to remove may approve. In other words, both Mr. Dowdall and Mr. Conway should be present at the hearing of the application to remove.