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THE HIGH COURT

2009 202 COS

IN THE MATTER OF COOLFADDA DEVELOPERS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 to 2006

Judgment of Miss Justice Laffoy delivered on the 25th day of May, 2009.

The proceedings

This is a petition by Coolfadda Developers Limited (the company) that it be wound up on the grounds of insolvency. Following the passing of a special resolution to wind up the company on 20th April, 2009, the company presented a petition to the Court on 22nd April, 2009, which was verified by the affidavit of Conor Slattery, one of the directors of the company, the other directors being Vera Slattery, Paul Collins and Geraldine Collins. The petition was returnable for 11th May, 2009.

On 22nd April, 2009, on the application of the company, the Court appointed Michael McAteer as provisional liquidator. It was made clear in the verifying affidavit that it was the intention of the company to seek to have the petition adjourned on 11th May, 2009 and thereafter from time to time. The company is a construction company. The objective of seeking the continuation of the provisional liquidation was to finish out existing building contracts, which, it was represented, were at risk of termination by the employer on the making of a winding up order. Finishing out the contracts, it was believed, would maximise funds which would be available for creditors.

When the petition came on for hearing on 11th May, 2009, counsel for the company applied to have the petition adjourned. When the Court queried the likely duration of the provisional liquidation, counsel for the company suggested that the Court might initially adjourn the petition until early July this year, at which point the position could be reviewed by the Court.

The petition had been duly advertised in accordance with the Rules of the Superior Courts. The proofs were in order and a winding up order could have been made. No creditor or contributory appeared on the hearing of the petition. The Court was informed by counsel for the company that there had been one notice of intention to appear on behalf of a creditor, that creditor being Cygnum Timber Frame Limited, which had served a statutory demand under s. 214 of the Companies Act 1963 (the Act of 1963) on 12th March, 2009, the amount of the debt demanded being approximately €550,000. The Court was told by counsel for the company that the position of that creditor was neutral.

The provisional liquidator was represented by counsel at the hearing of the petition and he put a report before the Court. In the report, the provisional liquidator stated that he has been in regular discussions with the secured creditors, from who he had sought, and was confident of reaching agreement on, funding for the completion of the company's projects, or parts thereof. One unsecured creditor, Bank of Ireland, had already indicated that it was willing to fund the company's completion of a project in the event of the continuation of the provisional liquidator in his role. The unsecured creditors had not expressed any objection to the continuation of the provisional liquidation. The Court was informed that the provisional liquidator was taking a neutral stance on whether the provisional liquidation should be continued, but he could see force in adopting that approach. It was suggested that, if the provisional liquidation was continued, the Court might direct the provisional liquidator to furnish updating reports to the Court at regular intervals.

On 11th May, 2009 I adjourned the petition for one week, because I wanted to reflect on whether it was appropriate to accede to the application to adjourn the petition and allow the provisional liquidation to continue. No authority directly in point had been cited by counsel. In the circumstances, I was concerned to ensure that granting an adjournment would constitute a proper exercise of the Court's discretion.

Having considered the relevant legislation, the authorities and also the circumstances of the company, which was the crucial factor, on 18th May, 2009 I gave my decision, outlining the reasons therefore, that the petition would not be adjourned and the provisional liquidation continued indefinitely. I adjourned the petition for one week to enable the company and the provisional liquidator to consider the matter.

I have been asked to give the reasons for my decision in writing. That is the purpose of this judgment.

The issue

The issue is whether it would be a proper exercise of the Court's discretion to adjourn the company's petition to wind up and to continue the appointment of Mr. McAteer as provisional liquidator for an indefinite period to enable the company to build out existing contracts.

The Court's discretion generally

Section 216 of the Act of 1963, dealing with the powers of the Court on the hearing of a petition to wind up a company, provides:

> "On hearing a winding-up petition, the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."

The traditional attitude of the Courts in relation to applications to adjourn winding up petitions is succinctly summarised in the following passage in *Companies Acts 1963 – 2006* (McCann & Courtney 2008 ed.) (at p. 436):

> "The Court is reluctant to grant lengthy adjournments of creditors' petitions. Adjournments are often undesirable because the winding up order (if made) dates back to the presentation of the petition. Furthermore if the matter is not dealt with quickly the books of the company tend to be out of date or lost (quite apart from any question of dishonest behaviour on the part of the Officers). Officers and employees who could provide valuable information sometimes leave and cannot be traced. Dispositions made between the presentation of the petition and the making of the winding up are void and any delay increases the number of these transactions and make their examination more difficult. In certain circumstances the

> Court has granted an adjournment pending litigation between the parties."

As authority for the proposition set out in the last sentence in that quotation, the editors cite the decision of McCracken J. in *Re Genport Limited* [1996] IEHC 34. In that case, the petition was a creditors' petition. McCracken J., having considered s. 213 of the Act of 1963, which provides that a company "may" be wound up in certain circumstances, and having referred to the statement of McCarthy J. in *Re Bula* [1990] 1 I.R. 440, to the effect that s. 213 "gives to the Court a true discretion which should be exercised in a principled manner that is fair and just", went on to consider two matters which were of concern to him in the exercise of his discretion. The first was an allegation that the petitioner was not really bringing the petition to secure her own debt, but was doing so for the benefit of Crofter Properties Limited and/or Mr. Hugh Tunney, who was the effective owner of that company, the real motive being not to recover the petitioner's debt but to prevent further litigation against Crofter Properties Limited and/or Mr. Tunney by Genport Limited. McCracken J. held that such an ulterior motive, which was not necessarily an improper motive, taken by itself was not sufficient to persuade him to exercise his discretion against winding up the company. He outlined the second feature as follows:

> "The principal asset of the Company is its leasehold interest in a very substantial premises in Morehampton Road, and the goodwill of the hotel, restaurant and night-club business carried on therein. If a winding-up Order is made, the lease will be forfeited, which will of course be greatly to the benefit of Crofter Properties Limited, but as I understand it would leave little in the way of assets remaining for the creditors. I think it is highly significant, and it is a matter which I am entitled to take into account under s. 309 of the Companies Act 1963, that the company is trading successfully, and that four trade creditors, being the only trade creditors who have appeared on the Petition, all are opposed to granting the winding-up Order. They clearly believe that it is in their interests as ordinary creditors that the company should continue to trade. I am also influenced by the fact that there is substantial litigation between the Company and Crofter Properties Limited which is part heard. I think it would be difficult for a liquidator to take up such an action at the stage which it has reached. Indeed the liquidator might decide not to continue the action, as he might feel that it was all rather pointless if the principal asset had gone."

McCracken J. decided that "the combination of the ulterior, although not necessarily improper, motive and the fact that a winding-up may not be of any real benefit to the ordinary creditors" was sufficient to persuade him to exercise his discretion in refusing the making of the winding up order. However, he did not dismiss the petition, but merely put a stay on it pending the outcome of the then current litigation, with the liberty to re-enter.

As is clear from French on *Applications to Wind Up Companies* (Oxford University Press, 2nd ed., 2008) at para. 4.4.5.2, there is a strong and well established policy of discouraging long or repeated adjournments of winding up petitions in the United Kingdom. Indeed, the second, third and fourth sentences in the passages from *Companies Act 1963 – 2006* referred to above are based on the Practice Direction of the Chancery Division (Companies Court), which was issued by Brightman J. in 1977 and is to be found at [1977] 3 All ER 64.

Courtney in *The Law of Private Companies* (Butterworths, 2nd ed., 2002) at para. 25.053 cites the decision of the English High Court, Chancery Division in *Re Demaglass Holdings Limited* [2001] 2 B.C.L.C. 633 as an example of the exceptional circumstances in which the Court will accede to a request to have the hearing of a petition adjourned. In that case, receivers who had been appointed to the company by a debenture holder sought to have the winding up petition adjourned so as to enable them to dispose of certain stock more advantageously. While there is an interesting analysis as to the correct approach for the Court to adopt where the Court has to decide whether or not to make a winding up order against the opposition of creditors, receivers and so forth, Neuberger J. characterised the application before him, which was an application for adjournment for ten weeks, as a "temporary refusal" rather than an "outright denial" of the right of a petitioning creditor to a winding up order. He concluded that the Court should be less reluctant to adjourn the hearing of a winding up petition than it would be to dismiss the petition, in each case over the wishes of the petitioner, especially where the adjournment was for a relatively short period. He acceded to the receivers' application.

A more recent example from the United Kingdom of the court being prepared to stay a winding up petition, which is referred to in *Companies Acts 1963 – 2006* at p. 431, is *Re Minrealm Limited* [2008] 2 B.C.L.C. 141. In that case the petition was presented by the persons who represented a majority of the board and there was evidence that monies owed by them to the company would, if repaid, be sufficient to render the company solvent again. The court exercised its discretion to adjourn the petition pending the quantification and payment of interim sums due to the company in separate proceedings.

None of the authorities to which I have referred above involved the adjournment of a winding up petition in the context of the continuation of the appointment of a provisional liquidator. Apart from the special position of insurance company insolvency, particularly where there is a cross-frontier dimension, which I will deal with separately, the only example which is to be found in the textbooks referred to earlier of such a situation arising is the following passage from French (op. cit):

> "There have been exceptional cases in which the court has accepted adjournments for several years so that a company's assets could be protected by a provisional liquidator without the company being wound up."

The authority cited by French is *Re Rafidain Bank* (2000) L.T.L. 23/3/2000. The history of the provisional liquidation and scheme of arrangement in relation to *Rafidain Bank*, as set out on its website, discloses the very unusual circumstances in which the provisional liquidators were appointed on the petition of the Bank of England over *Rafidain Bank* in February 1991. The circumstances which gave rise to the application flowed from the invasion of Kuwait by Iraq in August 1990, the imposition of international sanction on Iraq and the subsequent freezing of the assets of the bank in the United Kingdom at a time when the bank was subject to very substantial claims from creditors. It would appear that almost eighteen years later the provisional liquidators are still in place.

Insurance company insolvency

Counsel for the company helpfully referred the Court to proceedings in this jurisdiction entitled *"In the matter of Novi Reinsurance Company Limited"* (Record No. 2001 317 COS) in which a provisional liquidation was continued for a number of years. I have obtained the relevant file from the Central Office and it discloses the following:

- The petition to wind up Novi Reinsurance Company Limited (Novi) was presented on 10th August, 2001. The petitioner was Independent Insurance Holdings Limited, a United Kingdom company, acting by its joint administrators.
- Novi was a member of the Independent Insurance Group. The parent company, Independent Insurance Group plc., was in provisional liquidation at the time in Scotland, one of the administrators of the petitioning company being one of the provisional liquidators. The petitioning company was a sister company of Novi, as also was Independent Insurance Company Limited, which was in provisional liquidation in England, the joint administrators of the petitioning company being the provisional liquidators.
- On 10th August, 2001 Mr. Tom Grace was appointed provisional liquidator by Johnson J., as he then was. The petition was returnable for 8th October, 2001. Apparently it was adjourned from time to time after that.

• In May 2002 a motion was brought to continue the liquidation. The motion was grounded on the affidavits of Mr. Grace and one of the joint administrators. It was also grounded on an affidavit of Laurence Hugh Elliott, a solicitor in the firm of Herbert Smith, who were acting for the joint administrators in the administration proceedings in England. They were also legal advisers in the winding up in Scotland and England of the parent company and the sister company. Mr. Elliott set out the history of the provisional liquidation procedure which has developed in the United Kingdom in relation to an insurance company, which, under English law, could not be placed in administration as a means of restructuring its business or otherwise reaching an agreement with its creditors on the best way of dealing with its affairs.
• As I have stated, in addition to the affidavit of Mr. Elliott, there was before the Court on the May 2002 motion an affidavit sworn by one of the joint administrators in which the reasons why Novi should remain in provisional liquidation were put forward as follows:

> (a) the solvency of Novi could not be determined "until the resolution of the core programme and other third party contracts";
>
> (b) dividends to creditors were likely to be payable sooner in a provisional liquidation than a liquidation; and
>
> (c) the provisional liquidator would utilise the stay granted in the provisional liquidation to consider the need for and/or viability of entering into agreement or commutations with Novi's creditors, to ascertain its solvency and to implement the best "exit route" for the company and its creditors.

• This Court (Smyth J.) acceded to the application to continue the provisional liquidation in force by an order made on 13th May, 2002, in which he ordered that the provisional liquidator report at six monthly intervals, and by subsequent orders made in 2003, 2004 and 2005.
• The provisional liquidation was terminated on 26th July, 2005 by order of Smyth J., when leave was given to withdraw the petition on the appointment of a liquidator in a creditors' voluntary winding up.
The existence of the procedure which Mr. Elliott outlined was referred to in the decision of the Court of Appeal of England and Wales to which, on this application, the Court was referred by counsel for the company: *New Cap v HIH Casualty & General* [2002] 2 B.C.L.C. 228. There, Jonathan Parker L.J. stated (at para. 11):

> "On 14th September, 2001 the English provisional liquidators of *HIH* were appointed as provisional liquidators under English law pursuant to a petition presented by another company in the *HIH* Group. This enabled *HIH* to remain in provisional liquidation in this jurisdiction, notwithstanding the winding up in Australia. This accords with a now well established practice in this jurisdiction in relation to insolvent insurance companies, whereby a company is enabled to remain in provisional liquidation so that the provisional liquidators can bring forward proposals for a scheme of arrangement to be placed before the creditors for their approval, pursuant to s. 425 of the Companies Act 1985."

The history of the procedure is also set out in Moss on *Cross-Frontier Insolvency of Insurance Companies* (Sweet & Maxwell, 2001)

There are specific features of the insurance industry which, in my view, justify the type of hybrid procedure which has developed in relation to insurance company insolvency in the United Kingdom, which combines provisional liquidation, which has the effect of staying creditor action, with the implementation of a scheme of arrangement. First, both here and in the United Kingdom the insurance industry is regulated at both domestic and European level. In the Novi case, Mr. Elliott deposed to the fact that the procedure whereby the winding up petition is adjourned at six monthly intervals is invariably supported by the U.K. insurance regulator (the Financial Services Authority). Secondly, because of the nature of its business, the assets and liabilities of an insurance company may not be as readily identifiable and quantifiable as the assets and liabilities of companies in other businesses. In Moss (*op. cit.*) (at p. 3) the editors point to a special feature of insurance company insolvency as being that there may well be a large number of contingent liabilities which may or may not crystallise in the future. This was a feature of the Novi case, in which a determination could not be made, when the petition was presented or later when it was sought to have it adjourned, as to whether Novi, which was in the reinsurance business, was solvent or insolvent. Thirdly, as happened in the Novi case, there is frequently a cross-jurisdictional dimension. None of the foregoing features is present in the company's case. I do not regard the decision in the Novi case as a precedent for the order which the company seeks in this case.

In fact, the application by the company would appear to be unprecedented. Therefore, I propose to consider how the Court's discretion should be exercised on the basis of principle by reference to the relevant legislation and then having regard to the circumstances of the company.

Conclusion on the basis of principle
The law provides two methods of dealing with the insolvency of a company under the supervision and protection of the court. One is winding up and the other is examinership.

As is explained in Courtney (*op. cit.*) at para. 23.001, examinership is the process whereby the court places the company under its protection and enables the court to appoint an examiner to investigate the company's affairs and to report to the court on its prospects of survival. Where survival can be achieved, the court may sanction a scheme of arrangement, which often involves part payment of the company's creditors and which enables the company to continue in business. It is clear from the affidavit of Mr. Slattery verifying the petition that the possibility of applying to have an examiner appointed was considered by the company but not pursued. I think it reasonable to infer that the directors concluded that they would not be in the position to satisfy the Court that there was a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern.

Winding up, or liquidation, as both terms suggest, is the process whereby assets of the company are got in, realised and distributed among the persons entitled thereto by law and eventually the company is dissolved. Pending the making of a winding up order, s. 226 empowers the Court to appoint a liquidator provisionally at any time after the presentation of the petition. The primary function of the provisional liquidator is to ensure the preservation of the company's assets until the winding up order is made.

What is proposed in this case by the company, the petitioner, is an extension of the appointment of the provisional liquidator and the continuation of his powers in a manner which is clearly not envisaged by the Act of 1963. Indeed, I would go so far as to say that the proposal goes against the spirit and intendment of the Act of 1963. The appointment of the provisional liquidator is a stopgap measure pending the making of the winding up order and the appointment of the official liquidator, whose function is to liquidate the company in accordance with law. The official liquidator is given powers by virtue of s. 231 of the Act of 1963 to achieve that objective, including, power "to carry on the business of the company so far as may be necessary for the beneficial winding up thereof" (s. 231(1)(b)). As a matter of principle, I do not think it would be a proper exercise of the Court's discretion under s. 216 to postpone the making of a winding up order so as to enable the provisional liquidator, who was appointed after the presentation of the petition, to continue conducting most aspects of the business of the company with a view to maximising the assets of the company. To do so

would be contrary to the scheme of the provisions in the Act of 1963 in relation to compulsory winding up.

There may be exceptional cases in which a court would countenance adopting the approach urged by the company in this case. Having regard to the circumstances of the company, as disclosed in the petition and the verifying affidavit, in my view, this is not an exceptional case and the approach advocated would not be warranted.

The circumstances of the company
The company is hopelessly insolvent and no matter what happens it is never going to return to solvency. What it owes its creditors is in the region of fourfold what its debtors owe it, in that its secured creditors are owed in excess of €31 million, preferential creditors are owed over €100,000 and unsecured creditors are owed in excess of €3.8 million, whereas the provisional liquidator has put a realisable value in the region of €8.4 million on what is owed by debtors. The largest debtor, Glendale Estates Limited, which owes the company in excess of €7 million, has been struck off the Register of Companies. The Collins-Slattery partnership, a partnership of the directors, Mr. Collins and Mr. Slattery, owe the company almost €443,000, according to the provisional liquidator's report. According to the report of the provisional liquidator, the fixed assets of the company are of very little value, including merely office equipment, three motor vehicles and leasehold premises in Bandon, County Cork.

The company's primary asset is the work in progress on eight separate development sites, which are at different levels of completion. The position in relation to work in progress has been set out in the petition and the verifying affidavit and it is also summarised in the report of the provisional liquidator. On the evidence presented to the Court, there would seem to be a good working relationship between the officers of the company and the provisional liquidator. It is only fair to record that none of the undesirable features listed in the passage from the *Companies Acts 1963 – 2006* quoted earlier (books of the company being out of date or lost, dishonest behaviour on the part of officers, officers and employees with valuable information not being available and suchlike) is present here. In fact, it appears that there has been very full disclosure of various interests in the developments which are in hand.

A factor which seems to me to be of some significance is that the Collins/Slattery partnership is the site owner and the employer of the company in the case of three of the developments (Castleisland, Sneem and Castletownbere). The Collins/Slattery partnership has also a majority interest in another development at Rathcoole, County Cork. Mr. Collins and Mr. Slattery are also minority partners in three other developments at Killowen in Kenmare, the Tannery development in Bandon and the Curraclough development in Bandon. The only development in which Mr. Slattery and Mr. Collins do not have an interest as site owners is located at Riverstick in Ovens, County Cork. The company has emphasised the existence of what may be referred to as standard termination clauses in the various building agreements under which the company is developing the sites. Insofar as those clauses are inimical to the company and its creditors, one wonders why in relation to the building agreements in which they are the employers, Mr. Collins and Mr. Slattery could not bring about a situation whereby the termination clause would not be operated in a manner which is inimical to the company in the event of a winding order being made.

In the case of each of the developments, one of the secured creditors has both a floating charge over the assets of the company or a fixed charge on the work in progress from the company coupled with a charge over the site owner's interest in the site. Therefore, it would appear that, if it saw fit to do so, in each case the secured creditor could appoint a receiver and utilise the services of the receiver to finish out the development.

On the evidence before the Court, it would appear that the primary beneficiaries of the provisional liquidator being allowed to finish out the developments would be the site owners and the secured creditors.

It may be that, if a winding up order is made, the Court would sanction the finishing out by the official liquidator of some or all of the developments on the basis that to do so is necessary for the beneficial winding up of the company. I express no view on that. What I am deciding is that, on the basis of the circumstances of the company, I do not think it would be proper for the Court to postpone making a winding up order and to continue the provisional liquidation indefinitely with the objective of giving the provisional liquidator power to finish out the developments.

Order
I will hear further submissions from the company as to the form of order they require to be made.