Neutral Citation: [2014] IEHC 438

THE HIGH COURT

[2014 No. 377 COS]

IN THE MATTER OF LADANEY LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2013 AND IN THE MATTER OF SECTIONS 267 AND 282 OF THE COMPANIES ACTS 1963

BETWEEN

REVENUE COMMISSIONERS

APPLICANT

AND

LADANEY LIMITED (IN VOLUNTARY LIQUIDATION) AND ANTHONY FITZPATRICK

RESPONDENTS

JUDGMENT of Mr. Justice Herbert delivered the 26th day of August 2014

1. This an application for an order pursuant to the provisions of O. 74, r. 71 of the Rules of the Superior Courts 1986, commonly referred to as the "Winding-Up Rules". The order sought is by way of an appeal from a decision of the chairman appointed at the meeting of creditors of Ladaney Limited, the company named in the title of this judgment, held on the 15th July, 2014, to disallow for the purpose of voting the applicants proof of €371,785 and, not to disallow as invalid for the same purpose, the proxies submitted by Roken Construction Limited, O'Hara, Dolan and Company Limited, Devery Farrell and Company, Michael Walsh and Son Limited and Avonlee Soap Company Limited.

2. The applicants further claim an order pursuant to the provisions of s. 276(2) of the Companies Act 1963, appointing Mr. Barry Donohue, Chartered Accountant to be liquidator of the company instead of Mr. Anthony J. Fitzpatrick, Chartered Accountant who was appointed liquidator at the said meeting.

3. The applicants claim in the alternative an order that the company be wound up under the supervision of this Court.

4. It was submitted on behalf of the company and Mr. Anthony J. Fitzpatrick at the hearing of this application that by virtue of the provisions of O. 74, r. 68 of the Winding-Up Rules, the applicant was expressly prohibited from voting in respect of the sum of €371,785 as it was a debt, the value of which had not been ascertained. The Rule provides that:-

> "A creditor shall not vote in respect of any unliquidated or contingent debt or any debt the value of which is not ascertained . . ."

It was submitted on behalf of the applicants that the chairman at the creditors meeting should have marked the applicant's proof for €371,785 as "objected to" and allowed the applicants to vote for the full amount thereof, subject to the vote being declared invalid in the event of the objection being sustained on application to this Court. Order 74, rule 71 of the Winding-Up Rules provides that:-

> "The chairman shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court. If he is in doubt whether a proof should be admitted or rejected he shall mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained."

5. It is provided by s. 267(3) of the Companies Act 1963 as inserted by s. 47 of the Company Law Enforcement Act 2001, that if at a meeting of creditors held pursuant to s. 266(1) of the Act of 1963, a resolution as to the creditors' nominee as liquidator is proposed, it shall be deemed to be 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. It is submitted on behalf of the applicants that they should have been allowed to vote in compliance with the provisions of O. 74, r. 71 of the Winding-Up Rules to the full value of their proof. As they would then have been the majority in value of the creditors present personally or by proxy and voting on the resolution, the appointment of Mr. Anthony J. Fitzpatrick as liquidator was invalid as it was not supported by them.

6. As set out at paras. 3 and 4 of the affidavit of Elizabeth Griffin an executive officer with the Office of the Collector General, sworn on the 23rd July, 2014, the applicants claim that the company is indebted to them in the sum of €371,780. This sum is made up of €39,308.64 for VAT and €151,297.23 for PAYE and PRSI for the years 2000 to 2013 inclusive, together with €7,951.02 interest on VAT and €30,273.95 interest on PAYE/PRSI and penalties of €142,954.40, calculated at 75% of the total tax liability of €190,605.87, for deliberate default. These figures were calculated following an audit of the company carried out by the applicants in the last quarter of 2013.

7. At para. 5 of this affidavit, it is stated by the deponent that a meeting to discuss "the audit liabilities" took place on the 2nd July, 2014, between Ann Carter a director and secretary of the company and her advisers and the Revenue auditors. Elizabeth Griffin goes on to state that:-

> "The meeting was terminated by Anne Carter, who refused to engage in settlement proposals. The company lodged an appeal with the Revenue Commissioners on the morning of the 15th July, 2014. Accordingly, the Company was aware of the Auditor's assessments and the amount the Revenue Commissioners claimed as due and owing."

8. At paras. 8 to 16 of her said affidavit Elizabeth Griffin states that she attended the creditors meeting on the afternoon of the 15th July, 2014. The chair was taken by Ann Carter, but the meeting was in fact conducted by a Mr. Dooley a Financial Adviser. He advised those present that he would be answering any questions posed by them. The chairman refused to provide information to Mr. Mark Homan, solicitor of Bailey Homan Smyth and McVeigh, Solicitors representing the applicants as to how the sum of €75,375 included in the estimated Statement of Affairs as due to the applicants was calculated.

9. At para. 15(xi) of her said affidavit, it is stated by Elizabeth Griffin that:-

> "The chairman through Mr. Dooley refused to include the correct figure due to the Revenue Commissioners of €371,000 in the estimated statement of affairs. The reason given for this by Mr. Dooley was that this amount included a sum for primary liability plus penalty which was under appeal. Mr. Dooley stated that 'we can't admit the claim at this level'."

10. In my judgement, the chairman was correct and was acting within the provisions of O. 74, r. 71 of the Winding-Up Rules, in refusing to admit the applicants proof for the purpose of voting. I find that the sum if any, due to the applicants at the date of the creditors meeting was a debt, the value of which was not then ascertained. It will be recalled that O. 74, r. 68 provides that a creditor shall not vote in respect of any debt, the value of which is not ascertained.

11. In *Sidebottom v. Sidebottom* L.R. 5 P & D 365, it was held that "ascertained" has two meanings "known" and "made certain". In the present case there was and could not be any debt due to the applicants, the value of which is either "known" or "made certain" until the statutory appeal process, invoked within time by the company, has been completed or abandoned or a settlement has been agreed between the company and the applicants. There was not here any doubt as to whether or not the applicant's proof should be admitted or rejected. The chairman through Mr. Dooley stated that the amount claimed by the applicants was not admitted and was under appeal. It was not therefore "ascertained" and the applicants were expressly prohibited by the statutory instrument from voting in respect of this sum of €371,785.

12. The second part of O. 74, r. 71, has no application on the facts of the instant case.

13. In the case of disputed values of a debt, the correct procedure for the chairman of the creditors meeting to follow is to allow the creditor to vote for the full amount claimed by the creditor having marked the proof "objected to". This is what occurred in the case *of In the matter of Jim Murnane Limited (In liquidation) and In the matter of the Companies Act 1963 – 2006* [2009] IEHC 412). In that case the proxy for Mr. Murnane claimed that the amount of €527,518 included, in compliance with s. 266(3)(a) of the Companies Act 1963, in the estimated statement of affairs as due to him was absolutely wrong and he was owed in the region of €1m. The chairman incorrectly, as the court held, ruled that Mr. Murnane could vote only to the value of the debt as included in the estimated statement of affairs. That was clearly a case where there were disputed values of a debt.

14. In marked contrast, in the instant case, the applicants could place no value at all on the amount claimed due to them unless or until the statutory appeal process invoked within the permitted time by the company had been concluded or abandoned or a settlement as to the amount due had been concluded between the applicants and the company. The fact that the estimated statement of affairs included the applicants in the list of creditors and estimated the amount of their claim at €75,375 did not entitle the applicants to vote up to this amount pending the outcome of the appeal process, as up to that point the value of any debt due to them remained unascertained so that the provisions of O. 74, r. 68 of the Winding-Up Rules applied.

15. Order 74, r. 74 of the Winding-Up rules provide that a creditor or a contributory may vote either in person or by proxy. Rule 75 provides, that every instrument of proxy shall be in either Form 21 or Form 22, the former being a general proxy and the latter a special proxy.

16. Rule 2 on Form 21 referring to signature states that:-

> "If a firm, sign the firm's trading name and add 'by AB a partner of the said firm'. If the appointor is a corporation, then the form of proxy must be under its common seal or under the hand of some officer duly authorised in that behalf and the fact that the officer is so authorised must be so stated."

17. In the case of In the matter of *Mountview Foods Limited (In voluntary liquidation)* [2013] IEHC 125, Laffoy J. held, following the decision of the court in *Re. Michael Madden Quality Meats Limited, Ballon Meats Limited v. Leahy and Another* [2012] IEHC 122, that compliance with O. 74, r. 75, read in conjunction with the relevant forms in Appendix M of the Rules of the Superior Courts was mandatory as to the form of the proxy and the manner of its execution in the case of a corporate creditor.

18. In my judgement, it must follow that the same is also true of a firm. Laffoy J. held that where proxy forms are not properly executed, the chairman of a creditors meeting may not accept the appointees of those creditors as proxies for the purpose of voting.

19. I find that the general proxies submitted by Michael Walsh and Son Limited (duly authorised signatory, but failing to identify the signatory as an officer of the company), Roken Construction Limited (signatory not identified as a duly authorised officer of the company), O'Hara Dolan and Company Limited (director not stated to be duly authorised), Avonlee Soap Company Limited (not stated to be a duly authorised officer of the company), were invalid and, the chairman of the creditors meeting should not have accepted the appointees of these creditors as proxies for the purpose of voting.

20. It is admitted by the applicants that the general proxy submitted by Mary Molyneaux, a former employee of the company, was valid. I find that the general proxy submitted by Devery Farrell and Company, a partnership, was also valid. It is signed by "Paul Devery, partner of Devery Farrell and Company". This in my judgement is in no way materially different from "Paul Devery a partner in the said firm", the firm's trading name having been already stated in the form. The "chairperson" as nominated general proxy of Mary Molyneaux and Devery Farrell and Company, the majority in value of the creditors present personally or by valid proxy and entitled to vote, voted for the appointment of Mr. Anthony J. Fitzpatrick as liquidator of the company.

21. In these circumstances, I am satisfied that Mr. Anthony J. Fitzpatrick, Chartered Accountant of Clonmoney House, Newenham Street, Limerick, was validly and lawfully appointed as liquidator of the Ladaney Limited (in voluntary liquidation).

22. At para. 37 of her affidavit, Elizabeth Griffin states as follows:-

> "Lest there be any doubt in making this application, I am of course, casting no aspersions on the character or integrity of the second named respondent, who is an individual of considerable experience. However, as noted earlier, I respectfully say that the manner in which he was appointed was fundamentally defective and as he is a nominee of the Company the more appropriate course to adopt would be to appoint Barry Donohue of O'Connor Pyne and Company, Chartered Accountants, and Registered Auditors as liquidator of the company in place of the second named respondent."

23. The court is satisfied that Anthony J. Fitzpatrick was validly appointed as liquidator of the company. The fact that he was initially nominated by the company is no proper or sufficient basis for considering, in the absence of some credible evidence that Mr. Fitzpatrick would, or could reasonably be perceived as likely to be prejudiced in favour of the company and its members to the

disadvantage of the creditors.

24. I am satisfied on the whole of the affidavit evidence that there is no reason whatsoever to consider that he will not carry out and complete this liquidation in an efficient and proper manner under the supervision of the Creditors Committee of Inspection, of which the applicants are part.

25. I find that it would be altogether inappropriate on the facts of this case, in particular having regard to the paucity of assets, to make an order pursuant to the provisions of s. 282 of the Companies Act 1963, that the company be wound-up under the supervision of the court.

26. The court will therefore dismiss the application.