Neutral Citation Number [2012] IEHC 122

THE HIGH COURT

[2011 No. 590 COS]

IN THE MATTER OF MICHAEL MADDEN QUALITY MEATS LIMITED (IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 to 2006

BETWEEN

BALLON MEATS LIMITED

APPLICANT

AND

EAMON LEAHY AND MICHAEL MADDEN QUALITY MEATS LIMITED (IN VOLUNTARY LIQUIDATION)

RESPONDENTS

Judgment of Miss Justice Laffoy delivered on 12th day of March, 2012.

1. This is yet another application in relation to the representation and entitlement to vote of a corporate creditor at a meeting of creditors of the company sought to be wound up in a creditors' voluntary winding up summoned in accordance with the provisions of s. 266(1) of the Companies Act 1963 (the Act of 1963). In this case, the meeting of the creditors of Michael Madden Quality Meats Limited (the Company) was summoned for 28th September, 2011.

2. The most important matter which arises at such a creditors' meeting is the appointment of a liquidator, which is governed by s. 267 of the Act of 1963. Sub-section (3) of s. 267, inserted by s. 47 of the Company Law Enforcement Act 2001, provides:

> "If at a meeting of creditors mentioned in section 266(1) 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.".

Accordingly, where there is a contest between two or more nominees of the creditors for the office of liquidator, the matter is put to a vote and the resolution may be voted on by creditors present personally or by proxy and the outcome is determined not numerically, but by value.

3. Order 74 of the Rules of the Superior Courts 1986 (the Rules), which deals with winding up of companies, in rules 58 to 83 inclusive, deals with meetings of creditors and contributories not merely in court liquidations but also in voluntary liquidations. As I pointed out recently in *Winthrop Engineering and Contracting Ltd. v. CED Construction Ltd*. [2011] IEHC 420, s. 312 of the Act of 1963 extended the power conferred by s. 68 of the Courts of Justice Act 1936 on the Rules Committee of the Superior Courts to the making of rules in respect of the winding up of companies, whether by the Court or voluntarily. That is the source of the authority of the Rules Committee to make the rules to be found in Order 74, which govern the conduct of, *inter alia,* a meeting convened under s. 266.

4. The issue on this application turns on the application of the rules in Order 74 insofar as they govern the manner in which a corporate creditor, such as the applicant in this case, Ballon Meats Ltd. (Ballon), may exercise its right to vote on the nomination of a liquidator in accordance with s. 267(3). The rules in order 74 which are relevant to the issue are:

(a) Rule 74, which provides that a creditor may vote either in person or by proxy and specifically deals with a corporation, and, insofar as is relevant for present purposes, provides:

> "Where a person is authorised in manner provided by s. 139 to represent a corporation at any meeting of creditors ... , such person shall produce to ... the chairman of the meeting a copy of the resolution so authorising him. Such copy shall either be under the seal of the corporation or be certified to be a true copy by the secretary or a director of the corporation."

The reference to s. 139 is to s. 139 of the Act of 1963 which, *inter alia*, provides that, if a body corporate is a creditor of a company it may-

> "... by resolution of its directors ... authorise such person as it thinks fit to act as its representative at any meeting of any creditors of the company held in pursuance of this Act or of any rules made thereunder ...".

Sub-section (2) of s. 139 provides that a person authorised as aforesaid shall be entitled to exercise the same powers on behalf of the body corporate which he represents as the company could exercise if it were an individual creditor of the company.

(b) Rule 75, which provides that every instrument of proxy shall be in either Form No. 21 or Form No. 22 of Appendix M. In addition to setting out the text of the form of appointment, those forms also contain notes and in each case note to which relates to the signing of the form states:

> "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 stated."

In that context officer means a director or secretary.

(c) Rule 82(3), which provides:

> "Where a company is a creditor, any person who is duly authorised under the seal of such company to act generally on behalf of such company at meetings of creditors ... may fill in and sign the instrument of proxy on such company's behalf and appoint himself to be such company's proxy, and the instrument of proxy so filled in and signed by such person shall be received and dealt with as a proxy of the company."

5. What happened in this case was that, with the notice summoning the creditors' meeting under s. 266, a general and a special form of proxy was sent to Ballon, as required by rule 76. Both forms were completed on behalf of Ballon and returned within the time limited in rule 82(1). Notwithstanding that, it is clear that, in reality, the intention was that Ballon's appointee would act as its general proxy at the meeting. In each case "David Salter of Ballon Meats" appointed "John Salter of Ballon Meats" as proxy. The form was signed by David Salter who was, in fact, an officer of Ballon, being a director. However, the form did not comply with the requirement that the fact that the officer was authorised to make the appointment should be stated on the form. Accordingly, the Company had availed of the option referred to at (b) in paragraph 4 above but had not completed the form in the manner stipulated in Appendix M, which by virtue of rule 75, was mandatory.

6. Mr. John Salter attended the creditors' meeting on 28th September, 2011 on behalf of Ballon, which, having regard to the statement of affairs which was furnished by the Company, was by far the biggest creditor of the Company. While the figure which appears in the statement of affairs (€297,476) is less than the amount which Ballon claims is due to it by the Company (€327,475.72), even the lower figure represents almost 56% of all of the debts listed on the statement of affairs, both preferential and non-preferential. Mr. John Salter was accompanied by his solicitor, Mr. John Goff.

7. The creditors' meeting was chaired by Mrs. Sarah Madden, one of the two directors and one of the two shareholders of the Company. Mrs. Madden and her husband, Michael Madden, the other director and shareholder of the Company, were also shown in the statement of affairs as creditors of the Company in the amount of €18,330. At the creditors' meeting Mrs. Madden was advised by her solicitor, Mr. Maurice Leahy. Mr. Maurice Leahy informed the creditors' meeting that Mr. Eamon Leahy was the members' nominee for liquidator. Mr. John Salter's solicitor, Mr. John Goff, informed the meeting that Ballon wished to propose Mr. David Dore as liquidator. However, Mr. Maurice Leahy stated that the proxy form submitted on behalf of Ballon was invalid. After some interaction between the two solicitors, Mrs. Madden, on the basis of the legal advice she obtained from Mr. Maurice Leahy, rejected Ballon's proxy as invalid on the grounds that it did not state that it was signed by a duly authorised officer of Ballon. The position adopted on this application on behalf of Mrs. Madden was that the proxy was invalid as a matter of law and that she had acted correctly in rejecting it.

8. Mrs. Madden also decided that a further three of the six forms of proxy which had been submitted were not properly completed and she rejected them as invalid. Of those three, one had supported Ballon's position and the other two had been in support of the chairman. One of the two remaining proxies, which was in favour of the appointment of Mr. Dore as liquidator, was from a creditor in the sum of €3,917, whereas the other, in favour of the appointment of Mr. Eamon Leahy, was from a creditor which was owed €11,368 by the Company. Both Mrs. Madden and her husband, as creditors, supported the appointment of Mr. Eamon Leahy as liquidator. The outcome, accordingly, was that the value of the creditors voting in favour of the appointment of Mr. Leahy was €29,698 and the value of the only creditor voting in favour of Mr. Dore was €3,917.

9 On this application the primary relief sought by the applicant, Ballon, is an order pursuant to rule 71 of Order 74 setting aside by way of appeal the decision of Mrs. Madden, as chairperson of the creditors' meeting, to reject the proxy tendered on behalf of Ballon as a valid proof for the purposes of voting at the meeting. Rule 71 provides:

> "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."

10. Before considering the submissions made on behalf of Ballon, I propose considering two recent authorities cited by counsel in their submissions.

11. In *In the matter of Hayes Homes Limited (In Voluntary Liquidation)* [2004] IEHC 124, in which the petitioner, the Collector General, sought to have Hayes Homes Limited compulsorily wound up, while it was already being would up as a creditors' voluntary winding up, one of the issues addressed by O'Neill J. was the propriety of what happened at the creditors' meeting at which the liquidator in the creditors' voluntary winding up was appointed. The Revenue Commissioners were the largest creditor in the sum of €264,456 approximately, which was approximately €100 short of the deficit disclosed on the statement of affairs. O'Neill J. observed in his judgment that a considerable portion of the remaining debt was due to companies connected to Hayes Homes Limited. In any event, the problem which arose at the creditors' meeting was that the proxy form which the Collector General had sent by post to the registered office of the company prior to the creditors' meeting appointing Mr. Philip Maloney as proxy had not arrived. The chairman of the meeting excluded Mr. Maloney from voting at the meeting. The first issue which O'Neill J. had to address was whether the chairman was correct in so doing. In his judgment he stated:

> "In this case the petitioner's debt was admitted and was listed amongst the debt set out in the Statement of Affairs. There was no dispute whatsoever as to the identity or credentials of Mr. Maloney and hence *prima facia* and subject to the provisions of the rules in relation to proxies, he was entitled to participate in the meeting and to vote on a resolution to appoint a liquidator. Having regard to the size of the company's debt to the petitioner, under s. 267 (3) Mr. Maloney's vote would have been decisive in appointing a liquidator."

Having stated that he was satisfied that, for whatever reasons, the proxy form had not arrived at the registered office of Hayes Homes Limited in time, O'Neill J. then addressed the rule in issue there, rule 82(1) of Order 74, which requires the instrument of proxy to arrive "not later than four o'clock in the afternoon on the day before the meeting ... at which it is to be used", stating:

> "Order 74 Rule 82(1) is expressed in mandatory term. Were I to conclude that mere proof of debt ... and proof of identity was sufficient to entitle a proxy to vote that would appear to me, to have the effect of rendering Rule 82 (I) nugatory or superfluous. I am therefore driven to the conclusion that compliance with Order 74 Rule 82(1) is required before a proxy is entitled to participate in a vote on a resolution to appoint a liquidator notwithstanding that the debt was either proven or admitted."

O'Neill J. held that the chairman was correct in excluding Mr. Maloney from voting on the resolution to appoint a liquidator. However, he did accede to the Collector General's petition to have Hayes Homes Limited wound up compulsorily by the Court.

12. The other authority cited was the decision of this Court in *Tyner v. Lafferty* [2010]3 I.R. 821. In that case, at a creditors'

meeting summoned under s. 266 of the Act of 1963 to wind up Stainless Pipeline Supplies (Irl) Ltd., the chairman of the meeting had allowed two proxies to vote on the appointment of the liquidator which the Court held were not valid proxies because they had not been executed in accordance with Order 74, rule 75. As I have pointed out at para. 4 above, that rule gives the company two options: either to affix the seal in the manner prescribed by law, or, alternatively, to have the proxy form signed by an officer authorised in that behalf. If the second option is availed of, then the fact that the officer is so authorised must be stated. Neither option was properly complied with in relation to the proxies in issue in *Tyner v. Lafferty*. In the circumstances, I found that the proxies should not have been admitted for the purposes of voting. I found that I was obliged to set aside the proxies which were technically defective for the purposes of voting at the meeting. While I went on to direct that a further creditors' meeting be held, I did so in the context that the chairman of the meeting had acted improperly in admitting the technically defective proxies.

13. While counsel for Ballon accepted that the proxy form appointing Mr. John Salter was defective and that that was Ballon's responsibility, he urged that the Court look at the reality of the situation and, in particular, the relationship between the parties. The evidence certainly discloses a business relationship between the Company and Ballon and between the Maddens and the Salters, so that Mrs. Madden knew Mr. John Salter and she knew that Mr. David Salter, who signed the proxy form, was a director of Ballon. Counsel also submitted that the form of general proxy which had been sent out to Ballon was not in accordance with the Rules. It is true that Note (2) did depart from the text of Form No. 21 in stating:

> "Where this form of Proxy is executed by a Corporation it must be either under its common seal or under the hand of an officer or Attorney duly authorised in that behalf and the fact that the officer is so authorised must be stated."

In my view, all of the essential elements required by Form No. 21 were in that text: that the proxy should be either under the common seal of Ballon or under the hand of an officer duly authorised, the fact that the officer was so authorised being stated. I consider that the deviation from the strict wording of Form No. 21 could not have given rise to confusion which would justify failure to comply with the requirements of Order 74.

14. Counsel for Ballon also submitted that there must be flexibility in the application of the Rules and that Order 124 envisages flexibility. Rule I of Order 124 provides:

> "Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit."

In my view, Order 124 has no application in relation to what happened at the creditors' meeting. Rather, it applies to the procedural aspects of proceedings in the Superior Courts.

15. Counsel for Mrs. Madden and Mr. Madden, as former directors of the Company, submitted that the function of the Court on an appeal under Order 74, rule 71 is very clear. It is to determine in the first instance whether the chairman acted in error, as was held by this Court in *In the matter of Centrum Products Ltd. (In Voluntary Liquidation)* [2009] IEHC 592, which it was submitted was echoed in *Tyner v. Lafferty*. Further, it was submitted that it is only if the chairman acted in error that the consequences of the mistake have to be addressed, as happened in *Tyner v. Lafferty*. In this case, it was submitted, Mrs. Madden, as chairperson, did not act in error. Further, where there has been non-compliance with the Rules in relation to completing the form of proxy, the chairman of the meeting must reject the proof for the purposes of voting and the Court should uphold that decision. Having such a strict approach is both logical and rational. There must be certainty in relation to the conduct of creditors' meetings. Otherwise those conducting the meetings would be in an impossible situation.

16. Reiterating what I stated in *In the matter of Centrum Products Ltd.*, the Court's function on an appeal under Order 74, rule 71 is to determine whether the decision of the chairman on the admission or rejection, as the case may be, of a proof for the purpose of voting was correct. In this case, Ballon did not comply with the mandatory requirement of rule 75 of Order 74, when read in conjunction with the relevant forms in Appendix M as to the form of proxy and the manner of its execution in the case of a corporate creditor. Consistent with the approach adopted in *Tyner v. Lafferty*, I must find that Ballon's proxy was not properly executed. I must also find that Mrs. Madden, as chairperson, was correct in rejecting Mr. John Salter as a proxy for the purposes of voting.

17. As Mrs. Madden's decision was correct, that is the end of the matter. Unlike the position which arose in *Tyner v. Lafferty*, where the chairman of the creditors' meeting acted incorrectly in admitting the improperly executed proxies, here the chairperson acted correctly in rejecting the improperly executed proxy. In this case, it is not necessary to consider, because it would be inappropriate to grant, any of the ancillary relief sought by Ballon, namely:

> (a) the appointment of Mr. Dore as liquidator in place of Mr. Eamon Leahy; or
>
> (b) the summoning of a further creditors' meeting, as was ordered in *Tyner v. Lafferty*.

No basis has been established for interference by the Court with the decision of the creditors who voted at the creditors' meeting. Therefore, the appointment of Mr. Eamon Leahy stands. However, it is appropriate to record that, on the evidence, I am satisfied that both Mr. Eamon Leahy and Mr. Dore were suitable nominees for the position of liquidator.

18. It is fair to record that the kernel of Ballon's complaint was that, as the largest creditor to a substantial degree, its officers consider that having regard to the provisions of s. 267(3) its nominee for liquidator should have been appointed. While that is understandable, the problem is that Ballon did not comply with the Rules. If the Court were to ignore that fact, to adopt the language of O'Neill J. in the *Hayes Homes Ltd*. case, the effect would be to render Order 74, rule 75 and the requirements of Appendix M "nugatory or superfluous".

19. Finally, at the hearing of the application Mr. Eamon Leahy, who was named as the first respondent and who had sworn an affidavit exhibiting a report of the steps he had taken in the winding up, was excused from the proceedings. On the submission of counsel for Mrs. Madden and Mr. Madden, the Court directed that it was appropriate that Mrs. Madden and Mr. Madden should be treated as the respondents and there was no objection to that course from counsel for Ballon.