Neutral Citation Number: [2012] IEHC 444

THE HIGH COURT

[2012 No. 472 COS.]

IN THE MATTER OF MANAGH INTERNATIONAL TRANSPORT LTD (IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS

267(2), 277(1) AND 280 OF THE COMPANIES 1963-2012 AND ORDER 74, RULE 71 OF THE RULES OF THE SUPERIOR COURTS 1986

AND IN THE MATTER OF AN APPLICATION BY STEPHEN O'KEEFFE

JUDGMENT of Mr Justice Ryan delivered the 30th October 2012

This motion concerns the validity of proceedings at a statutory creditors' meeting of Managh International Transport Ltd, when the creditors nominated a different liquidator to the person chosen by the company at its general meeting held earlier on the same day. A director of the company, who also claims to be a creditor, applies to the court to declare the creditors' appointment invalid and to confirm the status of the company's nominee as the properly installed liquidator. He alleges breaches of O. 74 of the Rules of the Superior Courts and s. 267 of the Companies Acts 1963 to 1990 that render the appointment invalid. He further submits that, if not otherwise invalidated, the creditor's nominee ought to be disqualified on the ground of bias, both perceived and actual.

The company ceased trading in March 2012. Some months later it served and published notices to convene meetings to wind up the company by way of creditors' voluntary liquidation. At the company's general meeting that was held on the morning of the 3rd August, 2012, the sole member and managing director, Seamus O'Keeffe, nominated Patrick Russell, an accountant, as liquidator. He was entitled to do that under s. 266 of the Companies Acts but the nomination could be nullified if the creditors' meeting that was scheduled to follow chose a different liquidator. That is what happened; later on the same date, the creditors nominated another accountant, John O'Connell, as liquidator. If that election was validly conducted, Mr. O'Connell superseded Mr. Russell as nominee and became the liquidator of the company.

The issue in the case is whether Mr. O'Connell or Mr. Russell or neither of them is the properly appointed liquidator of the company.

In this motion Mr. Stephen O'Keeffe, the only other director and the son of Seamus O'Keeffe, seeks to have the nomination of Mr. O'Connell invalidated and Mr. Russell confirmed as the lawfully appointed liquidator and other reliefs as follows. The applicant seeks:

1. Orders pursuant to s. 280 of the Companies Act -

    (a) declaring that Mr. Peter Russell is validly appointed liquidator of the company in accordance with s. 267(1)

    (b) declaring that Mr. John O'Connell is not validly appointed as liquidator of the company.

    (c) annulling the resolution for the voluntary liquidation of the company passed by the member on the 3rd August, 2012 and/or an order annulling the resolution for the appointment of Mr. O'Connell as liquidator that was passed by the creditors.

2. An order under s. 267(2) of the Act directing that Mr. Russell shall be liquidator instead of Mr. O'Connell.

3. If necessary an order under s. 277(1) declaring that no liquidator has been appointed and appointing Mr. Russell.

4. If necessary an order under 0. 74, r. 71 of the Rules of the Superior Courts 1986 (as amended by SI 121 of the 2012) setting aside by way of appeal the decision of the chairman of the meeting of creditors admitting proofs of debt for the purpose of voting.

The grounds for this relief that are advanced by Mr. Stephen O'Keeffe are three:

    (i) The proxies appointing representatives of the major creditors at the meeting that appointed Mr. O'Connell were not properly lodged at the registered office, in breach ofO. 74, r. 82 of the Rules of the Superior Courts which regulate the winding up of companies;

    (ii) Mr. O'Connell had not signified in writing his prior consent to being appointed liquidator as required by s. 276A of the Companies Acts 1963-1990;and

    (iii) Mr. O'Connell is disqualified by reason of bias both actual and perceived.

The respondent is the liquidator nominated by the creditors, Mr O'Connell.

The Facts as set out in the Affidavits

Seamus O'Keeffe 16th August, 2012. Mr. O'Keeffe says that the votes of the persons attending on behalf of Stena Line Ltd, Motis Ireland Ltd, Irish Ferries Ltd and the Revenue Commissioners should not have been allowed in the absence of valid proxies having been received in advance of the meeting. He says that "no written consent by Mr. John O'Connell to act as liquidator was made available at the meeting or presented to me as chairman of the meeting".

John O'Connell 16th August, 2012. Mr. O'Connell says that he signed a letter of consent on the 2nd August, 2012, and he exhibits that letter. Mr. O'Connell goes on to deal with correspondence and other matters that are either irrelevant or covered in other affidavits so it is unnecessary to set them out.

Peter Russell 21st August, 2012. Mr. Peter Russell gives the list of those who attended the creditors meeting. John Russell, his partner, took the attendances. They were: Seamus O'Keeffe, Chairperson; Norma Lane, Solicitor; another solicitor from Fitzgerald Solicitors; John Russell of Russell & Co. Chartered Accountants; D.J. O'Donovan, Sigma Services Ltd; Francis (he writes it as Frances) Buckley, Stena Lime Ltd; Mark McConkey and Adrian Crozier, Motis Ireland Ltd; Les House, Irish Ferries Ltd; John O'Connell and Ciaran

Toomey of John O'Connell & Co. Chartered Accountants; Tom Collins; Gina (he writes it as Jeana) Shanagher and Conor Lupton, Solicitor, on behalf of the Revenue Commissioners, Siobhan McNamara, J.P.G. Freight Ltd.

Mr. Russell says that following the meeting he discussed the conduct and outcome of the meeting with Mr. Seamus O'Keeffe and their solicitor and as result of that he sent a fax to Mr. O'Connell's office querying whether he had complied with s. 276A of the Companies Act, stating that Mr. O'Connell did not "furnish the prior written consent as per the Act". He says and believes and was so informed that no proxies were received by the company at its registered office before 4.00 on the day before the creditors meeting for Stena Line Ltd, Motis Ireland Ltd, Irish Ferries Ltd and the Revenue Commissioners. In those circumstances, he says that their votes should not have been received and the nomination and appointment of Mr. O'Connell were invalid. In the result, he claims that he is the liquidator. He says that he was remunerated for services provided to the company before the winding up resolution in the amount of €8,000, which services he detailed earlier in the affidavit. He exhibits the relevant correspondence.

John O'Connell 22nd August, 2012. Mr O'Connell says that the only issue raised at the creditors' meeting in relation to proxies not being received by the company related to the proxy from Revenue. Neither Mr. O'Keeffe as chairman of the meeting not any other party raised any issue whatsoever in respect of proxies not having been received from any creditor other than Revenue. He says and believe that Revenue sent a completed proxy by registered post to the registered office of the company. It does not appear that the company was collecting its registered post.

The minority vote in favour of Mr. Russell included a sum of€250,000 relating to personal guarantees and he says and believe and is advised that Mr. O'Keeffe is a creditor of the bank in this regard and not to the company. A further amount of €45,000 should be disallowed as this cash injection by Seamus O'Keeffe was treated as Preference Share Capital by the company as set out on Form B5 filed by the company on the 22nct June, 2011 and not as a loan.

He says that had completed the written consent on the 2nd August, 2012 and had it with him at the creditors meeting.

Mr. O'Connell details matters requiring investigation and says that the Revenue Commissioners have written to him setting out a list of matters which arise from the creditors meeting. He refers to the affidavit of Ms. Gina Shanagher of the Revenue in which she records her concerns about the independence of Mr. Russell. These concerns are set out at p. 47 of the Book of Pleadings at the end of a copy letter from Mr. Tom Collins of the Revenue Insolvency Unit.

Minutes of the Creditors Meeting
The minutes are exhibited in affidavits of Mr. John O'Connell and Mr. Seamus O'Keeffe. The part that is relevant to the Revenue proxy question begins at the bottom ofp. 82 and goes into the top of page 83. It is quite a short section and appears to be in fact a transcript of the meeting. The minutes read as follows:-

> "Norma Lane then commented that Peter Russell was the company's nominated liquidator and asked if there was any alternative nomination. Tim Collins nominated John O'Connell as liquidator. Norma Lane said to succeed in their nomination, they would need the majority in value of the creditors. Peter Russell: "There is no proxy in from the Revenue".
>
> Ms. Shanaghan: [*sic*] "We have sent it, it just wasn't collected".
>
> Mr. Collins: "I have a registered post slip showing postage, the postman had called out, there was a note left saying the post had been attempted to be delivered".
>
> Seamus O'Keeffe: "There is nobody at the business and I have told the postman to put everything in the letter box."
>
> Ms. Shanaghan from the Revenue asked Norma Lane what she was holding in proxies.

[I have corrected the quotation marks in the minutes]

Regina Shanagher 21st August, 2012. Ms Shanagher is an official of the Revenue Commissioners. She says that a completed proxy form was sent on behalf of the Collector General to the registered office of the company by registered post on the 25th July, 2012. She exhibits the copy of the proxy and accompanying envelope. She says that she attended the meeting with her colleague Tom Collins- also referred to as Tim Collins.

Ms Shanagher says that she conducted a search with An Post with regard to the proxy sent by her office to the registered office of the company. It appears that there was no answer at the address of the registered office of the company when delivery of the proxy was attempted on the 26th July, 2012. If there is no response at the address a note is left instructing the customer that the post person attempted delivery and their item is available for collection. The item remained in the An Post depot at Cashel, Co. Tipperary for collection by the company from the 26th July, 2012, until the 9th August, 2012 when it was returned to sender in Revenue where it was received on the 10th August, 2012. Revenue became aware that the registered post had not been collected on the 10th August, 2012. She exhibits relevant documents from An Post showing the tracking of the registered letter with the proxy.

The An Post documentation exhibited by Ms. Shangher includes a "Track your Item" document which appears to be a print out of an on-line record. It shows that there was an "attempted delivery" at Cashel Co. Tipperary on the 26th July, 2012, with "no answer at address". Another part of the on-line record shows that the item was at Cashel from the 26th July, until the 9th August, when it began its journey back to the Revenue in Limerick, where it arrived and was delivered on the 10th August, 2012.

Mr. Shanagher draws attention to another matter that arose at the creditors' meeting. She says that it was stated at the creditors' meeting that Mr. Russell carried out a forensic examination of the company, vigorously investigated the auditors' fees and prepared the statement of affairs. During the course of questions from creditors, it transpired that pre-liquidation funds from the disposal of company assets totalling €35,000 were being held by Mr. Russell. Of this sum €27,040.00 was showing on the statement of affairs. When queried on the discrepancy Mr O'Keeffe said that the balance had been paid to Mr. Russell in fees for work already carried out on the company's behalf. She goes on to say that she does not consider that Mr. Russell is sufficiently independent.

Seamus O'Keeffe 5th September, 2012. In this affidavit Mr O'Keeffe says that he leased office premises to the company and an amount of nearly €11,000 was due in arrears and this sum should have been included in the statement of affairs.

He says that the company's office is on the same premises as his family home. He says that all post addressed to the company at its registered office was delivered by hand by An Post, by arrangement, to a member of staff at the companies (sic) registered office. All personal post post addressed to the company were delivered in this manner as a matter of course before the company ceased

trading. After the company ceased trading in March 2012, post addressed to the company and post addressed to him were delivered to the one post box at his family home. This implies that there was a change in the delivery arrangements after the company ceased trading in March 2012, as it seems to me.

Mr. O'Keeffe says that he had no knowledge that a note had been left at the registered office of the company saying that an item sent by registered post had been attempted to be delivered on the 26th July, 2012 and was available for collection. The only reason registered post would not have been delivered and signed for was if no person was at the O'Keeffe home when the postman called. He says that if a note had been left at the family home that an item of registered post was available to be collected, he would have collected it immediately.

Mr. O'Keeffe deals with the decision to wind up the company. He said it was a very difficult one but with the assistance of Mr. Russell and the company's solicitors the directors, who are Mr O'Keeffe and the applicant, took the decision that the company should be wound up as a creditor's voluntary liquidation and Mr. Russell provided assistance in taking the necessary steps to convene a general meeting of the company and a meeting of creditors.

He says that he never received the communication from the Revenue Commissioners before the meeting of creditors. He says that no proxy for the Revenue Commissioners was left at the registered office of the company or at his family home and in those circumstances the vote of the Revenue Commissioners through Ms. Shanagher that the creditors meeting should not have been allowed. Of course the problem for Mr. O'Keeffe is that he is the person who allowed it.

He says that "if an agent of the Revenue Commissioners had attempted to deliver a proxy by hand to the Company's registered office, that proxy would either have been collected by someone at the family home or if it was left at the company's office he would have collected it. This is confirmation that the registered office was separate from the family home.

Mr. O'Keeffe says that no proxies were received from the Revenue Commissioners, Irish Ferries Ltd, Motis Ireland Ltd or Stena Line Ltd. Proxies on behalf of Tipperary Natural Mineral Water (€109); Derry Brothers Shipping Ltd (€7,800); Midland Tyre Services Ltd (€13,500) and Surehaul Ireland Ltd (€11,100) were received -they were delivered by ordinary post addressed to the company at its registered office and left at the post box on his premises.

He says that the copy proxy for Irish Ferries Ltd dated the 27th July, 2012 appoints the chairman of the meeting and that Leslie House, who attended the meeting as representative of Irish Ferries, had no authority to vote for the appointment of a liquidator. In those circumstances the Irish Ferries vote should not have been allowed. As chairman he was entitled to vote on behalf of Tipperary Natural Mineral Waters, Midland Tyre Services Ltd and Derry Brother Brothers Shipping Ltd. The proxy for Surehaul did not nominate any person.

He says that he does not recall any proxy being delivered to the company's registered office or his family home on behalf of Stena Line Ltd and Motis Ireland Ltd and goes on: "I say that my solicitors have written to Stena Line Ltd and Motis Ireland Ltd asking them to confirm if they had sent proxies addressed to the company at its registered office in advance of the meeting of creditors. I say there has been no response to those letters".

Stephen O'Keeffe 10th September, 2012. This is the affidavit of the applicant. He says that he is owed unpaid wages, mileage and expenses by the company. That should be included in the statement of affairs. However, it does not appear that any detail of that claim is available even at this stage. He was unable to attend the meeting on the 3rd August, 2012 as he was out of the country. He says that as a director he is bringing the motion because he formed the view it was desirable to do so. At paragraph 12 he introduces an allegation of bias that had not previously been mentioned.

> "I say that I have been provided with a copy of the minutes of the meeting of creditors held on the 3rd day of August 2012, and taken by Ms. Norma Lane solicitor. I say that upon reading the said minutes I was shocked at the way my father Mr. Seamus O'Keeffe was treated by the representatives of the Revenue Commissioners at the meeting of creditors and the wholly inappropriate nature of some the questions addressed to my father at that meeting. I further say that I was appalled that Mr. John O'Connell joined in the chorus of condemnation directed at my father at the meeting of creditors and I was astonished at the partisanship displayed by Mr. O'Connell at that meeting. I say and believe that as a creditor of the company I have no confidence that Mr. O'Connell can carry out the liquidation of the company in a fair and independent manner in the interests of the creditors of the company as a whole in light of the comments made by Mr. O'Connell at the meeting of creditors and his overt support for the position adapted by the representatives of the Revenue Commissioners at the meeting of creditors."

It is of course noteworthy that Mr. Seamus O'Keeffe chaired the meeting and he was accompanied thereat by two solicitors and Mr. Russell, his nominee as liquidator, in addition to a partner of Mr Russell and none of them made any protest at the comments and statements that were made.

John O'Connell 13th September, 2012. He says that out of the sum of €350,000 voted by Mr. Seamus O'Keeffe at the creditors meeting there should be deducted in the first place €250,000 because that sum was a personal guarantee provided by Mr. O'Keeffe to AIB and he is not a creditor of the company in that regard and he says that it is noteworthy that the sum was not included in the statement of affairs.

Out of the total sum of€100,000 which Mr. Seamus O'Keeffe claims to have lent the company and not been repaid, which he notes was also not included in the statement of affairs, some €45,000 comprised issued share capital and Mr. O'Keeffe is not a creditor of the company in that regard. He says that the new claim in the last affidavit sworn by Mr. Seamus O'Keeffe for €10,915 due for rent was also not included in the statement of affairs. But even allowing for that sum -that is assuming it is properly included- the most Mr. Seamus O'Keeffe can claim as a creditor is €65,915. He says that the total accordingly that could have been voted in favour of Mr. Russell allowing for all the small creditors, five in number, whose total was €48,460 giving a grand total in favour of Mr. Russell of €114,375. He then looks at these smaller creditors and says that that should be reduced because of two proxies that were not properly signed by a duly authorised officer.

He says that the chairman made no objection to the votes cast and did not seek to adjourn the meeting. The only issue that arose was in regard to the Revenue proxy and there was discussion about that as detailed above. At para. 11, he refers to the Stena proxy and the affidavit of Francis Buckley dated the 13th September. Stephen O'Keeffe has not even now furnished any proof of his debt. He says that it is alarming that Mr. Russell was paid money by the company after debts were racked up between November 2011 and March 2012, to Stena, Motis and Irish Ferries. He says that if appointed he will act fairly as liquidator in the interests of all the creditors and of the company and he says that Mr. Russell should not be appointed.

Francis Buckley 13th September, 2012. Mr. Buckley is the Finance Manager of Stena Line. He says that on the 2nd August, 2012 his company had not received notification of the creditors' meeting or proxy forms and he contacted the office of Peter Russell, accountant and spoke to a member of staff, who then sent him a blank proxy form by email. He immediately filled out this proxy form and sent it by fax to the registered office of the company well before 4.00 pm on that day". He exhibits a copy of the proxy. Mr. Buckley also expresses unease about the payment to Mr. Russell of some €8,000 and the handling of the €35,000 proceeds of disposal of company assets.

Tom Collins 13th September, 2012. He is an Executive Officer employed by the Revenue Commissioners who says that the statement of affairs listed the debt due to the Revenue at €120,000 but the declared liability is actually some €172,000, in addition to substantial estimated liability.

Regina Shanagher 13th September, 2012. She says that she heard Mr. O'Connell confirm to the meeting that he was willing to act as liquidator and that he had a letter of consent present.

Conor Lupton, Solicitor, 13th September, 2012. He says that he saw that Mr. O'Connell had a letter of consent to act as liquidator in his possession and he heard Mr. O'Connell confirm to the meeting prior to the vote of creditors that he had a letter of consent.

Seamus O'Keeffe 17th September, 2012. He says that he did not ask Mr. O'Connell if he had a letter of consent and that Mr. O'Connell never produced a letter of consent at the meeting. In this regard there is no dispute. Mr. O'Connell did not actually produce a letter of consent at the creditors meeting. The case is that he actually had it with him and there is no evidence to contradict that.

Mr. O'Keeffe explains the payment to Mr Russell. He says that in February 2012, trailers belonging to the company were sold for €38,000. He retained the cheque for reasons dealt with in his affidavit of the 5th September, 2012. He gave the cheque to Mr. Russell in June 2012, with instructions to deliver it to the company's solicitors Harry McCullough & Co. to be paid into the company's client account. He believes that Mr. Russell did deliver the cheque and it was never lodged into Mr. Russell's own bank account.

What seems to have happened as I understand is that the solicitors negotiated the cheque and paid approximately €8,000 plus VAT to Mr. Peter Russell on the 31st July, 2012. In regard to this payment he says that "it was always intended that the directors would contribute to the cost of the examinership from their own resources by lending money to the company. I say that I am willing to reduce the amount of the debt the company owes to your deponent by the amount of approximately €8,000 plus VAT as it was always the intention of the directors to pay Mr. Russell out of the directors own resources rather than the company's when it was clear that the company could not be put into examinership and would have be put into liquidation".

I am not sure to what extent this issue of the payment to Mr. Russell is relevant, but this undertaking by Mr. O'Keeffe is less than satisfactory. The company was insolvent from the time it ceased operating in March 2012. This cheque for €38,000 represented the receipts of company property. It was therefore property belonging to the company. Mr. O'Keeffe caused some of that money, namely €8,000 to be diverted from the company's account to Mr. Russell. It is not an answer for Mr. O'Keeffe to say that he will deduct €8,000 from debts that the company owe him, in circumstances where he may actually be liable and would in my view prima facie appear to be liable to pay the full amount of€8,000 back to the company. After all, the most that Mr. O'Keeffe can expect to get out of his debts from the company is some proportion, so offering to reduce his claim by €8,000 is not a satisfactory response and of course is does not explain why this mode of dealing with the company's money was undertaken with the approval of Mr. Russell and apparently the company's solicitors.

Francis Buckley 17th September, 2012. In this affidavit Mr. Buckley returns to the question of the proxy form for Stena Line and says that he filled out the proxy form and sent it by fax to the number that was provided to him by the office of Russell Accountants and that he did so before 4.00 pm on the day before the meeting. He was based at the Holyhead office that day and using a fax machine he did not usually operate. On the call-logger sheet there is an outbound call made to [the company's number] which did connect hence the cost being reported against it. Mr. Buckley exhibits this sheet. The log shows six calls of which four are incoming and two outgoing.

Counsel Mr. Gerard Nicholas Murphy for the applicant Mr. Stephen O'Keeffe commented on this sheet that it revealed that the fax message did not actually go through. On examining it again, I do not think that he appreciated that four calls were incoming and two outgoing and thus he may have misunderstood the four entries where "yes" is written. It occurs to me that a transmission of a proxy sheet would be a very rapid event and therefore I do not think that this document is any way inconsistent with that and does indeed appear to show that there was such a call that it took 24 seconds and that it cost 8 pence and it is accepted that it actually went to the company's fax number. Therefore in all the circumstances, this appears to be a helpful document from Stena's point of view. Mr. Murphy also argues that the name on the sheet that was submitted was wrong in any event but I do not take that seriously.

Proxies

The facts

(a) Revenue Commissioners

The Revenue Commissioners sent their proxy by registered post to the registered office of the company. They did so in good time on the 25th July, and an attempt was made by the postman to deliver it on the 26th but that proved to be impossible. It seems that "there was nobody at the business". Mr. Seamus O'Keefe told the creditors' meeting that the postman was to put post into the home post-box. But of course the postman could not do that with a registered letter. Ms. Shanagher in her affidavit exhibits electronic data from An Post indicating that the registered letter was retained at Cashel post office for collection and when that did not happen it was returned to the Revenue sender on the lOth August, 2012. Although there is no direct evidence to establish that it happened in this case, the practice of the post office in case of non-delivery of a registered letter is to leave a printed leaflet saying that the letter may be collected at the post office within a period of days. I think that is sufficiently well known to enable the fact to be inferred in this case as a matter of probability.

(b) Irish Ferries Ltd

No issue on this arose at the meeting. Mr. Seamus O'Keeffe says that he does not recall any proxy for Irish Ferries being delivered or being presented to him at the creditors meeting. He goes on to say that the copy proxy for Irish Ferries Ltd dated the 2ih July, 2012, appoints the chairman of the meeting and that Leslie House who attended the meeting had no authority to vote for the appointment of a liquidator. In those circumstances the Irish Ferries vote should not have been allowed. That appears to be correct.

(c) Stena Line Ltd

The situation with the Stena Line proxy is different. Mr Francis Buckley, the Finance Manager says in his affidavit that he was in Holyhead on the day before the meeting was due to take place. Stena had not received the notices and proxy forms and he contacted the accountants- Russell & Co. He apparently knew that they were the accountants. They sent him the forms by email and gave him the fax number to which the response was to be sent. That was the company's fax number. The records show that Mr Buckley sent a fax to that number. Again, no issue arose.

(d) Motis Ltd

This company's proxy voted without any protest. Mr. Seamus O'Keeffe says that he does not recall any proxy being delivered to the company's registered office or his family home on behalf of Stena Line Ltd and Motis Ireland Ltd and goes on to say that his solicitors had written to Stena Line Ltd and Motis Ireland Ltd asking them to confirm if they had sent proxies addressed to the company at its registered office in advance of the meeting of creditors but there was no response to the letters. This means that Mr O'Keeffe does not know what the position is with this creditor's proxy. There is accordingly no basis for invalidating its vote.

Counsel for the applicant, Mr. Murphy, submits that the attempted service of the Revenue proxy and of the Stena document were in breach ofO. 74, r. 82 of the Rules of the Superior Courts. In each case the proxy was not lodged at the registered office prior to 4.00 pm on the day before the creditors' meeting. Counsel submits that such a breach as he asserts is fatal to the status of the Revenue representatives at the creditors meeting and renders their voting invalid. Not only that, it means that they were not in a position even to nominate Mr. O'Connell for the position of liquidator.

The Law

(a) The Companies Act

This was "*a creditors' voluntary winding up*" as defined by s.256 (7). Section 267 provides that the creditors and the company at their respective meetings may nominate a liquidator; if they nominate different persons, the creditors' nominee is the liquidator. When that happens, any director, member or creditor of the company may apply to the court within 14 days for an order appointing the company nominee as liquidator instead of or jointly with the person nominated by the creditors or appointing some other person.

S. ***276A*** provides that the appointment of a liquidator shall be of no effect unless the person nominated has, prior to his appointment, signified his written consent to the appointment.

S. ***113***.-(1) A company shall, as from the day on which it begins to carry on business or as from the fourteenth day after the date of its incorporation, whichever is the earlier, have a registered office in the State to which all communications and notices may be addressed.

S. ***280***.-(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise in relation to the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.

S.***379***.-(1) A document may be served on a company by leaving it at or sending it by post to the registered office of the company or, if the company has not given notice to the registrar of companies of the situation of its registered office, by registering it at the office for the registration of companies.

(b) The Rules
There are different modes of authorising a representative of a creditor company to attend and vote at a statutory creditors' meeting but the one we are concerned with in this case is 0.74 r.82. (1):

> Every instrument of proxy shall be lodged with the company at its registered office for a meeting under Section 266 not later than four o'clock in the afternoon of the day before the meeting or adjourned meeting at which it is to be used.

(c) The Cases
This Court has held that the formal requirements of Order 74 rule 82 are mandatory. Compliance is a condition precedent to voting on a resolution to appoint a liquidator. In *Re Hayes Homes Ltd* [2004] IEHC 253, O'Neill J held that the Revenue Commissioners had not lodged their proxy in time and the chairman was entitled to disallow their vote. The proxy was sent by ordinary post to the company's registered office. The chairman adjourned the meeting so that he could make inquiries of the landlord of the office of the registered office of the company to ascertain whether or not the proxy form had arrived in the post and, having made those inquiries, he informed the meeting that no such proxy form had arrived at the registered office of the company. However, the court exercised its discretion in favour of the petitioner and acknowledged the creditors statutory right. The judge said:

> "In my view the clear entitlement of the petitioner to have appointed his nominee and the petitioner's undoubted intent to have secured the appointment of its nominee are factors to which considerable weight must be attached."

Although the evidence fell short of demonstrating wrongdoing by the officers of the company before it was wound up, the the affairs of the company in that case created justifiable suspicion that required rigorous investigation.

In Re *CED Construction Ltd (In Voluntary Liquidation)* [2011] IEHC 420, Laffoy J endorsed the view of O'Neill J that compliance was a necessary prerequisite that the creditor had to fulfil. The court concluded that as the company's only creditor was not validly represented at the meeting, it was not quorate and it would have to be resumed. The fact that the applicant would thereby get an opportunity to be properly represented in compliance with the legal technicalities was in line with the rationale underlying s. 267. That section recognises that in a creditors' voluntary winding up of an insolvent company there is an inherent conflict between the members and the creditors and that the nomination of a liquidator by the members, who through the directors were at the helm of the company when it sailed into insolvency, should be overridden by the choice of liquidator by the creditors.

In *Tyner v Lafferty* [2010] 3 IR 821, the chairman allowed two invalid proxies to vote for the liquidator and Laffoy J directed another creditors' meeting to be held.

Hoffmann J said in *In re Palmer Marine Surveys Ltd* [1986] 1 WLR 573 p. 578G-H

> "Besides counting debts, I think I am also entitled to have regard to the general principles of fairness and commercial morality which underlie the details of the insolvency law as applied to companies. A judicial exercise of discretion should not leave substantial independent creditors with a strong and legitimate sense of grievance. In my judgment, the continuation of the voluntary winding up would leave the petitioning creditor with a justifiable feeling of unfair treatment in two respects. First, whatever may have been the technical position under the Companies (Winding-up) Rules 1949, the petitioning creditor was entitled to be aggrieved at its exclusion from the creditors' meeting on 29 January 1985. It is no answer that the result of the vote would have been the same even if all the excluded creditors had been admitted. As a creditor which stood to lose a very large sum of money, McKees were in fairness entitled at least to be heard and to ask questions. Secondly, in a case in which there is evidence to suggest that assets have been transferred for inadequate value to an associated company, the independent trade creditors should ordinarily be entitled to have the company's affairs investigated by a liquidator who is not merely independent but who can be seen to be independent"

On the question whether the technical requirements of 0.74 are absolute free standing conditions precedent to the validity of proceedings at the creditors' meeting, the courts have generally affirmed the procedural rules but exercised discretion in favour of creditors.

Discussion/Analysis of the proxy issue
In s. 266 of the Act, creditors are given the power to appoint a liquidator to replace the nominee of the company. The rules provide for the mode by which that entitlement is exercised. The requirements are very detailed, technical and complex and the courts have interpreted them strictly in a number of cases. The applicant relies on these authorities to show that there was breach of the proxy requirements, such that the attendance and voting by the representatives of the creditors at the second meeting which appointed Mr. O'Connell was entirely invalid and therefore void of any affect. Not only were they disentitled to vote for Mr. O'Connell, counsel submits that the Revenue representatives were not even permitted to nominate him for the position of liquidator. In other words, absent the correct procedural requirements as laid down in 0. 74, r. 82, the representatives or proxies of creditors at the meeting had no status or entitlement whatsoever.

It is clear from the authorities that this Court applies the requirements of 0. 74 and in particular r. 82, quite strictly. Having said that, it does appear that the courts have also reflected and protected the statutory rights of creditors by exercising appropriate discretions. The actual outcome of the cases preserved the creditors' entitlement because the court exercised its discretion to nominate (as it is entitled to do under the legislation) or it ordered a fresh creditors' meeting to be held. In those circumstances, it was possible for the creditor or creditors to qualify themselves by strict and full compliance with the requirements of the Rules.

The Companies Act provides that service on a company is effected at the registered office. If the location of the office changes and has not been notified, service at the address that was notified is good on the company. The purpose of this obligation is to facilitate service on an incorporeal body. It would otherwise be impossible for another person to be sure that he had served his documents on the company. All that is obvious, but the statutory requirement of a registered office also seems to imply that there should be somebody at the company's office to receive the documents. There is no point in having an office which is not occupied. In this case, if Mr. Seamus O'Keeffe had simply abandoned the building in which the registered office was located and never gone there, he would have prevented any document from being served by any means that involved personal delivery, including registered post.

As to service by ordinary post, it was impossible for any sender of a document to be sure that the document had actually reached its destination. There are provisions that enable presumptions to be made about service of documents but the point remains that by abandoning the registered office that is nominated, without actually declaring that to be the case or officially changing it, a person such as Mr. O'Keeffe could make delivery impossible.

It would be patently unjust if the rules were to be exploited in a devious manner for the purpose of frustrating any attempt to assert what is otherwise a clear statutory entitlement. If the creditors of an insolvent company are to be stymied from qualifying themselves to appear at a creditors meeting of the company by means of a simple but effective stratagem, it is scarcely consistent with justice or logic. For my part, I cannot see any justification for the proposition that by staying away from the registered office, the officers of a company can actually prevent a legitimate and admitted creditor from exercising its statutory rights. That would be the case here, if Mr. Murphy's submission is to be accepted.

It must be remembered in regard to the Revenue Commissioners and in regard to the other large creditors that there was no doubt about the indebtedness of the company to them- they were actually listed in the statement of affairs. Neither was there any question about their representatives being genuine proxies and indeed if any doubt had been entertained by the chairman at the meeting or by anybody else, the matter could have been checked without the slightest difficulty in a matter of minutes.

The same factual circumstances that arise here did not feature in any of the authorities that were cited in submissions or in argument.

The word "lodged" in Rule 82 means delivered. The postman tried to deliver it, but could not do so. The reason he could not do so was that the registered office was unoccupied or unattended and I think that state of affairs was general since the company ceased operations. Mr. Seamus O'Keeffe admitted as much at the creditors' meeting. The purpose of a registered office is to be available for service of documents. My conclusion is that the company itself frustrated actual deposit of the Revenue's proxy at the registered office. If the Revenue sent it by ordinary post they would have the difficulty of proving receipt or of disproving non-delivery. If Mr. O'Keeffe missed the particular delivery he could have collected the letter from the Post Office. I think it is likely that the postman left a note in printed form saying that the registered letter was available for collection and Mr. O'Keeffe would have got it if he had gone to the registered office.

Achievement of the lodgment of the proxy required the co-operation of the addressee. The Revenue Commissioners did all that they could to comply with rule 82. I am satisfied that the availability of the proxy notice for collection was, in the circumstances, sufficient to satisfy the rule.

The Stena proxy presents a different problem. This company maintained that it had not got the original notices from the company and the communication with Mr. Russell's office is entirely consistent with that. There was no contradiction of that evidence on affidavit by Mr Buckley from anybody in Mr. Russell's accountancy firm. So here we have a breach by the company, if Mr Buckley is to be believed, of its obligations of notification. I am satisfied that Stena sent it by fax from Holyhead and that that was sufficient to comply with rule 82. I refer to the discussion of the call log that appears above in reference to Mr Buckley's affidavit of2ih September, 2012.

If it is accepted that Stena did not get the relevant documents, then even if the fax failed to go through because of a mistake by

Stena, it would be wrong in those circumstances to exclude the Stena proxy from participating at the creditors meeting.

In regard to Motis Ltd, Mr O'Keeffe's enquiry through his solicitors is not evidence that its proxy was not entitled to participate in the creditors' meeting. The implication of the inquiry is that Mr O'Keeffe simply did not know the position. This creditor's proxy was not disputed at the meeting or subsequently.

I reject the claims under this head in respect of the Revenue Commissioners, Stena Line Ltd and Motis Ltd.

Prior Written Consent, s. 276A
Under s. 276A of the Act, a liquidator must signify willingness to act as liquidator by means of a prior written consent. The purpose of this section is to avoid a situation where somebody is nominated as liquidator who is not willing to act. In this case, Mr. O'Connell deposes that he executed the written consent on the day before the meeting, namely the 2"d August, 2012 and had it with him at the meeting. This is confirmed by Mr. Conor Lupton, solicitor, who attended with Mr. O'Connell and the Revenue officials at the creditors meeting. In those circumstances where there is clear evidence that the consent was executed on the day before and that Mr. O'Connell had it with him and it is confirmed by Mr. Lupton and there is no evidence to contradict that, there can be only one conclusion on this factual question, which is that Mr. O'Connell did indeed have the document which he had executed the day before with him at the meeting. It was suggested on behalf of the applicant that that was not sufficient and that Mr. O'Connell should actually have produced his consent at the meeting and that failure to do so meant there was non compliance with s. 266 but that is not what the Act provides and neither is there any authority to support the proposition. The cases go no further than requiring that the statutory provision be complied with in its own terms and clearly if the issue arises at a meeting, then the consent should be produced.

It may be the case that a person proposed as liquidator at the creditors' meeting is able to comply with the statutory requirement there and then at the meeting by signing a piece of paper expressing his or her consent to act as liquidator if appointed. I am not sure that I can see any impediment to that course being adopted. This would also deal with the situation where somebody had executed the consent, but had not actually got it with him at the meeting. However, the specific point made was that it was not produced and that the authorities required on the interpretation of the section that the actual consent should be produced for inspection. This point I do not accept. The cases simply do not go that far and counsel, Mr. Murphy, was unable to point to a passage saying that.

Bias
The evidence on this is in the minutes of the meeting. These notes are extensive. Indeed they appear to be an actual transcript of everything that was said at the creditors meeting. On the basis of the conduct of the Revenue officials and of Mr. O'Connell himself, the applicant submits that this demonstrates bias both subjective and objective on the part of Mr. O'Connell. Mr. Stephen O'Keeffe and his father Mr. Seamus O'Keeffe are not assured as to the capacity of Mr. O'Connell to deal independently and in a non-prejudiced way with the task of winding up the company.

I do not actually think that the question of bias as understood in the *Orange* case arises in this circumstance. I think that Mr. Maurice Collins S.C. is correct is saying that one of the purposes of a creditors' meeting is to ask questions and even hard questions of the management of the company as to how they got into the financial predicament that led to the voluntary liquidation of the business. If that means the Revenue asking what happened to the VAT and the PRSI then so be it. Similarly, the other creditors are entitled to ask whether the company had conducted its business and run up debts due to them when it was insolvent. The management can be asked whether they knew at the time that that was the financial situation of the company and whether they thought that was responsible or proper behaviour.

It has to be remembered that the company and Mr. O'Keeffe were not short of expertise, legal and accountancy in this regard. Mr. Russell had prepared the statement of affairs and indeed he had examined the books of the company to advise on its prospects, so he was familiar with it. Obviously Mr. Seamus O'Keeffe as the managing director knew about the company and its state of affairs and it was his business to know about its solvency. He had two solicitors with him at the meeting.

My first conclusion on this issue, therefore, is that the questioning was not of such a kind as to disentitle the creditors from nominating a liquidator. This is in effect what is being suggested and I also do not think that any questions asked by Mr. O'Connell amounted to a demonstration of the kind of bias or prejudgment that would exclude him from acting as liquidator and for completeness I should say that I do not think his questions taken either on their own or as seen in the context of the question asked by the Revenue officials can be regarded as such that they would disqualify a person from appointment. In this regard I accept the submissions of Mr. Collins S.C. for the respondent and reject those of Mr. Murphy, Barrister for the applicant.

The law on the issue of bias is set out in the judgment of Keane J. as he then was, in *Orange Communications Ltd v Director of Telecoms* (No.2) [2000] 4 IR 159. The question in this connection is first a factual one as to whether Mr. O'Connell did in fact exhibit some bias either perceived or actual and secondly whether the law as to bias applies to the appointment of a liquidator in the same way as it does to a decision making or arbitrating body or one that is concerned with determining issues relating to rights.

It seems to me to be questionable to say the least whether a liquidator's position can be compared with a decision making body or person. The function of a liquidator is to administer the winding up of the company; he or she must of course make decisions the same as anybody else does in the course of ordinary routine work and a liquidator is no different. But the point is as suggested by Mr. Collins S.C. that the liquidator's work is not in any sense similar to an arbitrator.

I do not exclude the possibility of conduct or predisposition on the part of a liquidator that is so manifestly improper and unfair that a case of bias might arise. But excepting an extreme case, a liquidator is not subject to the same regime as an arbitrator. Nothing remotely resembling such a situation arises here.

It is significant that this issue was raised late in the day by Mr. Stephen O'Keeffe, son of Mr. Seamus O'Keeffe and the applicant in this motion. But Mr. Stephen O'Keeffe was not at the meeting of the creditors and yet he claims that Mr. O'Connell and the other Revenue officials exhibited bias. Mr. Seamus O'Keeffe was chairing the meeting and he raised no objections to the questions that were asked, nor did he suggest any element of bias. Mr. Russell was at the meeting and neither did he raise any question of that kind; in addition, there were two solicitors present of the firm advising Mr. Seamus O'Keeffe. Mr. Russell was accompanied by his professional partner, who is his brother. Not one of these people raised any question of bias. Moreover, in the letter that followed the meeting that was written on Mr. Russell's instructions to the solicitor for the Revenue, Mr. Lupton, there is no mention of that issue.

Conclusions
I therefore reject the challenge to Mr. O'Connell's nomination and appointment made by Mr. Stephen O'Keefe on the grounds that he

advances.

I think that there is some reason to be sceptical or quizzical about the status of Mr. Stephen O'Keeffe as applicant in this motion. In the first place, I do not think that he is a contributory of the company within the meaning of s. 280, but he does have status under s. 267 as a director or creditor. I am somewhat sceptical also of his status as a creditor of the company because he is not included in the statement of affairs, he was not at the meeting, he has furnished no details about his claim and is baldly stating that he is due wages of an unspecified amount for work during a non-defined period. There is simply no way of knowing whether there is anything in this claim. Moreover, it is not at all clear why he is bringing this application.

It appears to be an attempt by Mr. Russell to achieve by litigation what he could not achieve by the votes at the meeting and by Mr. Seamus O'Keeffe to preserve in position a sympathetic person whom he has previously employed to do work for the company. The conduct of the meeting was in the hands of Mr O'Keeffe, the chairman, and the managing director of the company and the sole member of the company. I think that this motion is an attempt by him and by his proposed liquidator to overturn the choice of liquidator made by the creditors and to revisit and invalidate his own conduct of the creditors meeting. I think that the device of getting the co director to bring this application seeking to overturn the creditors' choice of liquidator is wholly unmeritorious.

My conclusions therefore are that Mr. O'Connell was validly nominated by the creditors meeting and that he was therefore appointed liquidator and Mr. Russell was not appointed.

This application fails on all grounds. I should also say that in the alternative, even if I were satisfied that there had been some breach of procedures as laid down in the rules for winding up companies, I would exercise my discretion to appoint Mr O'Connell as being the choice of the overwhelming majority of the creditors. The circumstances of the undisputed debts due to the major creditors, that there was no doubt as to the identity of the representatives, that the registered office was unattended, the conduct of the meeting, the revelations at the meeting, the previous role of Mr Russell and the doubts attaching to Mr Seamus O'Keeffe's own votes all point to the justice of the claim to appoint Mr O'Connell.

Finally, I should say that I think it would be unjustified to direct another creditors' meeting.