Neutral Citation [2016] IEHC 753

THE HIGH COURT

[2013 No. 376COS]

IN THE MATTER OF MB REFRIGERATION AND AIR CONDITIONING LTD

(IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS, 1963–2012

BETWEEN

MB REFRIGERATION AND AIR CONDITIONING LTD

(IN LIQUIDATION)

APPLICANT

– and –

ALLIED IRISH BANKS PLC

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 21st December, 2016.

I. Background and Reliefs Sought

1. Mr Walsh is one of two joint official liquidators of MB Refrigeration and Air Conditioning Ltd (in liquidation). MB Refrigeration was wound up on foot of a petition that was presented on 13th August, 2013. The presentation of the petition was advertised in the *Irish Independent* and the *Irish Daily Mirror* on 22nd August, 2013, and, the following day, in Iris Oifigiúil. Thereafter, Mr Walsh was appointed liquidator pursuant to an order of the High Court (Moriarty J.) on 16th September, 2013. During his investigations as liquidator, Mr Walsh discovered that MB Refrigeration's bankers, including Allied Irish Banks plc, had permitted numerous transactions to be carried out on MB Refrigeration's bank accounts on dates subsequent to the commencement of the winding-up of MB Refrigeration. AIB has declined hitherto to engage with Mr Walsh on the subject of the post-commencement dispositions. Consequently, it has been necessary for Mr Walsh to bring the within application seeking, *inter alia*, the following reliefs: (i) a declaration that certain transactions between 13th August, 2013 and 4th October, 2013, on a particular AIB account constituted dispositions of the property of MB Refrigeration made after the commencement of its winding-up and thus are void pursuant to s. 218 of the Companies Act 1963; and (ii) an order of the court requiring AIB to pay to Mr Walsh (as liquidator) the amount of money involved in those transactions plus interest. By AIB's own account, and the court accepts this as true, the date on which AIB first became aware of the existence of the winding-up application was 18th September, 2013.

II. AIB's Position

2. What has AIB to say about the events at hand? In an affidavit sworn by one of its assistant managers, AIB avers that: (1) following the enactment of the Companies Act 2014, the within application ought more appropriately to proceed pursuant to s. 602 of that Act; (2) as mentioned, the date on which AIB first became aware of the existence of the winding-up application was on 18th September, 2013; (3) as part of the within application, the liquidator has sought to recover certain lodgements that were paid into a credit account. "*This*", the assistant manager avers "*was therefore not a situation where payments were being paid into an overdraft account so as* [to] *reduce an indebtedness of the bank and I am advised that, absent such indebtedness, payments into an account in credit…are not a disposition as they do not involve any disposal of assets at all*"; (4) when it comes to withdrawals made between 14th August, 2013, and 21st August, 2013, Mr Walsh is seeking payment for monies paid out when the fact of the presentation of the petition of winding-up could not have been, and was not, within the knowledge of AIB, prior to the advertisement of the petition on 22nd August, 2013; (5) a number of the payments were payments to preferential creditors who would ultimately have been the beneficiaries of such or like payments in any event; (6) there may be an issue in relation to any payments made to the company directors; and (7) a substantial number of the payments out appear to have been payments to third-party trade creditors done in the ordinary course of business and it is (AIB claims) a matter for the liquidators to provide the necessary information as to the identity of the payees and the ostensible purpose for any particular payments.

III. Section 218 or Section 602?

3. The within application has been brought pursuant to s. 218 of the Act of 1963. However, pursuant to (i) s. 4(1) and Schedule 2, Part 1 of the Act of 2014, and (ii) the Companies Act 2014 (Commencement) Order 2015 (S.I. No. 169/2014), s. 218 of the Act of 1963 was repealed on 1st June, 2015. Section 5 of the Act of 2014 makes various savings and transitional provisions that were perceived to be necessary consequent upon the enactment of that Act. Section 5(7) states that Sch. 6, considered hereafter, "*contains further savings and transitional provisions and shall have effect accordingly*". Section 5(8) adds that s.5 is without prejudice, inter alia, to the generality of the Interpretation Act 2005 and, in particular, s. 27 of same. Section 27(1) of the Act of 2005 provides, *inter alia*, that "*Where an enactment is repealed, the repeal does not…(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment*". Schedule 6, para. 1 of the Companies Act 2014 provides that "*The continuity of the operation of the law relating to companies shall not be affected by the substitution of this Act for the prior Companies Acts*." Schedule 6, para. 8(1) provides that "*Any thing commenced under a provision of the prior Companies Acts, before the repeal, by this Act, of that provision, and not completed before that repeal, may be continued and completed under the corresponding provision of this Act*". Schedule 6, para. 8(3) gives the court a fairly wide-ranging discretion in determining how best to proceed in the context of any one application, stating, *inter alia*, that "[I]*n any such case* [aforesaid], *the court concerned shall, subject to subparagraph (4),* [which is not of relevance to the within application] *have jurisdiction to make whatever order it thinks appropriate for ensuring the smooth transition from the law and procedure under the prior Companies Acts to the law and procedure under this Act*".

4. Some time was spent at the hearing of the within application as to which of s. 218 or s. 602 ought to apply to the within application. Given that s. 602, *inter alia*, appears to seek to resolve certain issues perceived to arise from the decision of the High Court in *Re Industrial Services Company (Dublin) Ltd* [2001] 2 I.R. 118, it seems to the court that when it comes to the within

proceedings it is particularly appropriate to decide them not in accordance with s.218 of the Act of 1963 but with the corresponding provision of the Act of 2014, being s.602.

IV. Section 602

5. Section 602 of the Act of 2014 provides as follows:

> *"(1) This section applies to each of the following acts in any winding up of a company:*
>
> *(a) any disposition of the property of the company;*
>
> *(b) any transfer of shares in the company;or*
>
> *(c) any alteration in the status of the members of the company,*
>
> *made after the commencement of the winding up.*
>
> *(2) Without prejudice to subsection (3), an act to which this section applies that is done without the sanction of –*
>
> *(a) the liquidator of the company, or*
>
> *(b) a director of the company who has, by virtue of section 677(3) retained the power to do such act,*
>
> *shall unless the court otherwise orders, be void.*
>
> *(3) Nothing in this section makes a person who does an act rendered void by this section liable for doing such act, being an act that was done by the person at the request of the company, unless it is proved that, prior to the person's doing the act, the person had actual notice that the company was being wound up.*
>
> *(4) If a company that is being wound up makes a request of a person to do an act referred to in subsection (3) and does not, at or before the time of making the request, inform the person that it is being wound up, the company and any officer of it who is in default shall be guilty of a category 2 offence…"*

6. Given that the payments out of MB Refrigeration's in-credit AIB account following the commencement of the winding-up of MB Refrigeration involved a commensurate diminution of the assets of same, it appears to the court that each such payment constituted a "*disposition of the property*" of MB Refrigeration within the meaning of s.602(1)(a) of the Act of 2014.

7. Section 602(3) appears to seek to resolve certain difficulties that were considered to present, *inter alia*, for banks consequent upon the decision in *Re Industrial Services*. It provides that nothing in s. 602 makes a person who does an act rendered void by s.602 liable for same unless it is proved that prior to the person's so doing, the person had "*actual notice*" that the company was being wound up. Section 602(3) could have been drafted simply to read "*notice*" so the usage of the term "*actual notice*" suggests notice of a more express variety than the mere use of the term "*notice*" by itself would have conveyed. By its own account, AIB was aware, by which the court understands and finds it to have had actual notice, on and from 18th September, 2013, that MB Refrigeration was being wound up.

8. Of course, while s. 602(3) brings a measure of justice for, *inter alia*, banks faced with the liabilities that *Re Industrial Services* was seen to heap upon them, it is justice of a sort. After all, the general body of creditors is still out of pocket, at least to the extent that disposed company property would otherwise have been available for distribution, and may well consider that, from their narrow world-view, justice has not been done. They can, it is true, take comfort that, under s. 602(4), criminal liability attaches where "*a company that is being wound up makes a request of a person to do an act referred to in subsection (3) and does not, at or before the time of making the request, inform the person that it is being wound up*". But the comfort to be derived in this regard may be slight. Criminal sanction of a company and/or any of its officers will not satisfy a disappointed creditor's unpaid bills.

V. Previous Case-Law

9. The court has been referred, *inter alia*, to the decisions of the Court of Appeal in *In re Gray's Inn Construction Co. Ltd.* [1980] 1 W.L.R. 711 and the High Court in *Re Pat Ruth Ltd* [1981] ILRM 51. Given that both *Gray's Inn* and *Pat Ruth* were concerned with payments into overdrawn accounts the court does not consider either case to be of relevance to the within proceedings. The account in issue in the within application is an account that was consistently in credit and which the parties are agreed should be treated as such by the court. That was, of course, the form of account in issue in *Re Industrial Services Company (Dublin) Ltd* [2001] 2 I.R. 118. However, the conclusions reached in Re Industrial Services, as (cautiously) followed in *In the Matter of Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189 appear to have been overtaken by the enactment of s. 602.

VI. Conclusion

10. Having regard to the provisions of s. 602 of the Act of 2014:

> (1) the court finds that any payment made by AIB from MB Refrigeration's in-credit bank account from (a) the date of the commencement of the winding-up, up to and including (b) 17th September, 2013, is valid;
>
> (2) by virtue of s.602(3) of the Act of 2014, AIB is not liable for having made any such payments as are referred to in (1);
>
> (3) any impugned payment made by AIB from MB Refrigeration's in-credit account on and from 18th September, 2013, being the date on and from which the court finds AIB to have had actual notice of the commencement of the winding-up,

is void; and

(4) (a) all such sums as are referred to in (3), as well as, (b) in each case, interest from the date of payment of each individual sum to the date of repayment, shall be repaid by AIB to Mr Walsh (as liquidator), *except* (c) insofar as any sum referred to in (3) was (I) paid by AIB to a preferential creditor of MB Refrigeration and (II) Mr Walsh is satisfied that such preferential creditor would in any event have received such payment as part of the liquidation proceeds.