Neutral Citation Number: [2010] IEHC 318

**THE HIGH COURT**

**2010 395 COS**

**IN THE MATTER OF STAINLESS PIPELINE SUPPLIES (IRL.) LIMITED**

**(IN VOLUNTARY LIQUIDATION)**

**AND IN THE MATTER OF SECTIONS 267(1), 267(2) AND 267(3)**

**OF THE COMPANIES ACT 1963**

**AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2010**

**ON THE APPLICATION OF CLIVE TYNER**

**BETWEEN**

**CLIVE TYNER**

**APPLICANT**

**AND**

**FRANK LAFFERTY**

**AND STAINLESS PIPELINE SUPPLIES (IRL.) LIMITED**

**(IN VOLUNTARY LIQUIDATION)**

**RESPONDENTS**

**Judgment of Miss Justice Laffoy delivered on the 29th day of July, 2010.**

**1. The application**

1.1 This application arises out of a meeting of creditors (the meeting) summoned by the second respondent (the company) under s. 266 of the Companies Act 1963 (the Act of 1963) and held on 25th June, 2010. The application was initiated by an originating notice of motion dated 17th July, 2010 in which the applicant, who is a creditor of the company, seeks the following reliefs:

> (a) a declaration that the resolution passed at the meeting appointing the first respondent (Mr. Lafferty) as liquidator of the company in the creditors' voluntary winding is void;
>
> (b) an order under Order 74, rule 71 of the Rules of the Superior Courts 1986 (the Rules) setting aside by way of appeal the decision of the chairman of the meeting to accept the proxies of Outokumpu Limited and Watercut Limited as valid proofs for the purposes of voting at the meeting;
>
> (c) a declaration that the majority in value of the creditors attending the meeting voted in favour of the resolution to appoint Paul McCann (Mr. McCann) as liquidator; and
>
> (d) an order appointing Mr. McCann as liquidator of the company in place of Mr. Lafferty.

1.2 No issue arises as to the qualifications and the experience of Mr. Lafferty to perform the functions of liquidator of the company. The only issue is the outcome of the voting on the resolutions as to the appointment of a liquidator proposed at the meeting. As I understand it, two resolutions were put to the meeting: a resolution proposed on behalf of the applicant that Mr. McCann be appointed liquidator; and a resolution proposing that the members' nominee for liquidator, Mr. Lafferty, be appointed liquidator. Accordingly, as I understand it, the two candidates for liquidator were put to the vote of the creditors.

**2. The relevant statutory provisions and rules**

2.1 Sub-section (3) of s. 267 of the Act of 1963, inserted by the Company Law Enforcement Act 2001, provides:

> "If at a meeting of creditors mentioned in s. 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."

2.2 Counsel for the applicant also relied on s. 177 of the Act of 1963 which provides that a provision requiring or authorising a thing to be done by or to a director and the secretary shall not be satisfied by its being done by or to the same person acting as director and as, or in place of, the secretary.

2.3 Part X of Order 74 of the Rules deals with, *inter alia*, general meetings of creditors in a creditors' voluntary winding up. Rule 71 deals with admission and rejection of proofs for the purpose of voting and 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."

It is that rule which the applicant invokes to set aside the decision of the chairman of the meeting on the admission of the proxies of Outokumpu Limited and Watercut Limited.

2.4 Rule 74 deals with proxies and provides that a creditor may vote either in person or by proxy. It further provides:

> "Where a person is authorised in manner provided by section 139 to represent a corporation at a 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."

That provision relates to representation in person. The corresponding formalities in relation to proxies are set out in the notes on the forms of proxy.

2.5 Rule 75 provides that every instrument of proxy shall be in either Form No. 21 or Form No. 22 of Appendix M. Form No. 21 is a general proxy and Form No. 22 is a special proxy.

2.6 As counsel for the applicant acknowledged, the objections raised to the decisions of the chairman of the meeting which are the subject of the appeal under Order 74, rule 71 are technical. I propose to consider first whether the Court should set aside the decisions of the chairman and the result of the voting on the basis of those technicalities and, if it should, the consequence of doing so.

**3. The voting**

3.1 The meeting was chaired by Eddie St. Ledger, a director of the company. There was before the meeting a statement of affairs, the "bottom line" of which was that the company has a net deficit of in excess of €1.6m on the basis of the realisable value of its assets. The amount for unsecured creditors, who numbered about seventy, shown in the statement of affairs was in excess of €1.453m. A list of unsecured creditors was attached to the statement of affairs. For present purposes it is sufficient to record that the list included the following creditors and the amounts owed:

*The applicant €54,519*
*Liam Duffy €76,470*
*Outokumpu Limited (formally (sic) Sogepar) €105,684*
*Outokumpu Stainless AB €56,853*
*Outokumpu Stainless Oy €43,130*
*Watercut Limited €71,943*

Mr. Duffy is an accountant. He is a director of Watercut Limited and he was a former director of the company having resigned with effect from 20th August, 2009.

3.2 The status of the applicant as creditor arises from the fact that he is the lessor of premises known as Unit R, Kells Business Park, Kells, County Meath, which at the date of the meeting constituted the registered office of the company, which were held by the company under a lease dated 19th August, 2002 made between Royaldrive Developments Limited of the one part and the company of the other part for a term of 21 years from 1st August, 2002. Prior to the meeting, the applicant had obtained judgment for €54,519 in proceedings in the High Court (Record No. 2009/3733S) in respect of arrears of rent. He claimed that there were further sums due to him in respect of arrears of rent or mesne rates which brought the amount due to him as creditor up to €131,000. The affidavits filed on this application are riddled with controversy as to the company's liability for rent under the lease over and above €54,519. What happened at the meeting, according to the applicant, was that Mr. St. Ledger agreed to minute the applicant's debt as what the applicant contends is the correct liability of the company to the applicant, that is to say, as €131,000. Mr. St. Ledger, in his replying affidavit, has confirmed that this account of what happened is correct. In any event, Mr. St. Ledger, as chairman, did not mark the applicant's proof of debt as "objected to" in accordance with Order 74, rule 71.

3.3 The outcome of the voting on the resolutions to appoint the liquidator was announced by Mr. St. Ledger as follows:

> • Total votes in value in favour of the nominee of the company, Mr. Lafferty being €354,080, which was made up of the following creditors and amounts as per the list of unsecured creditors:
>
> Liam Duffy €76,470
>
> Outokumpu Limited €105,684
>
> Outokumpu Stainless AB €56,853
>
> Outokumpu Stainless Oy €43,130
>
> Watercut Limited €71,943
>
> _____
>
> TOTAL: €354,080
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> _____
>
> • Total votes in value in favour of Mr. McCann as liquidator being €280,636, which included the applicant's debt in the amount of €131,000 and the debts of four other creditors, including the Revenue Commissioners.

3.4 The basis of the applicant's case is that Mr. St. Ledger, as chairman, should not have admitted the debts of the three Outokumpu companies or the debt of Watercut Limited and, if he had rejected them, the votes in favour of Mr. McCann would have met the requirement of s. 267(3) of the Act of 1963. The grounds on which the applicant appeals the admission of those debts are unquestionably technical. I will consider each separately.

**4. Outokumpu**

4.1 Essentially, the applicant's objections to the admission of the three Outokumpu debts are based on the fact that there was only one proxy presented to the chairman, which was in the name of Outokumpu Limited, and the proxy form was not executed in accordance with the articles of association of Outokumpu Limited and was not properly completed. At the core of the objection is the proposition that the proxy did not cover the debts of Outokumpu Stainless AB, a Swedish company, and Outokumpu Stainless OY, a Finnish company. In response, an affidavit has been filed on behalf of the company which was sworn by Sylvia Webb, a director and secretary of Outokumpu Limited, on 15th July, 2010. The proxy form relied on by the chairman of the meeting is exhibited in that affidavit. The special proxy form (Form No. 22) was utilised. The proxy form was signed by Ms. Webb and dated 23rd June, 2010. The creditor was named as "Sylvia Webb of Outokumpu Limited". The creditor appointed Mr. St. Ledger "or chairman" to be its special proxy at the meeting. The instruction given was to "vote for/against the resolution in the notice convening the meeting". In other words, in essence, no special instruction was given.

4.2 It is not disputed that the articles of association of Outokumpu Limited require that every instrument to which the seal shall be affixed shall be signed by a director and shall be countersigned by the secretary or a second director or some other person appointed by the directors for that purpose. The notes to Form No. 21 and Form No. 22 in Appendix M (Note 2) state:

> "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 he is so authorised must be so stated."

In her affidavit Ms. Webb has averred that she affixed the common seal of Outokumpu Limited to the special proxy. While that is not obvious from the photocopy of the special proxy exhibited in her affidavit, I am assuming it to be the case. She has also averred that, at the time she signed the special proxy and affixed the common seal to it, she was a director of Outokumpu Limited and she was duly authorised by its board to affix the seal in the manner described. At the time there was only one other director of Outokumpu Limited, who was based in Denmark, and, she averred, "it simply was not expedient for the other to sign the proxy".

4.3 In relation to the debts of Outokumpu Stainless AB, a company incorporated in Sweden, and Outokumpu Stainless OY, a company incorporated in Finland, Ms. Webb has averred that Outokumpu Limited acts as agents for those two companies in Ireland and collects monies due and owing to those companies for and on their behalf. She specifically averred that she believes that the sums shown in the list of unsecured creditors to be due to the Swedish company and the Finnish company are, in fact, due and owing to Outokumpu Limited as agent for the Swedish company and the Finnish company. She has further averred that she believes that the special proxy she signed authorised Mr. St. Ledger not only in respect of the debt due by the company to Outokumpu Limited in its own right, but also in respect of the debts due by it to Outokumpu Limited "as agent for" the Swedish company and the Finnish company.

4.4 In support of his argument that the special proxy was not properly executed, because the seal of Outokumpu Limited was not affixed in the manner prescribed in its articles of association, counsel for the applicant referred the Court to the decision of Morris J. in *Zafeera Limited v. Wallis & Anor.* (Unreported, High Court, 12th July, 1994). That case concerned the title to premises in the City of Dublin which were the subject of a contract for sale by the plaintiff to the defendants. The conveying party in a deed of 1987 under which the plaintiff had acquired title to the premises had been a company incorporated under the Companies Act 1908, and the provisions of Table A of that Act, which required that the seal should be countersigned by two directors and the secretary of the company, were applicable to it. However, the deed of 1987 originally was only countersigned by one director and the secretary. Morris J. held that the deed was not executed in accordance with the articles of association and was not effective to convey the company's interest in the property to the plaintiff.

4.5 On the other hand, counsel for the company has referred the Court to a decision dating from 1905: *Re David Wright & Co. Ltd.* (1905) 39 ILTR 204. The issue in that case was the validity of debentures issued by the company. The articles of association of the company provided that the seal of the company should not be used, except by the general or special authority of the Board, and in the presence of two directors and the secretary, or a person acting as secretary. The debentures and the trust deed securing them were executed by the affixing of the seal of the company and by countersigning by the two directors and one of the directors as secretary. It was held by the Master of the Rolls that the debentures were "legal and right; that is, they are legal and valid so far as the circumstances permitted". The Master of the Rolls pointed out that there was no clause in the articles that the person acting as secretary should be different from the directors. Of course that decision pre-dated the Act of 1908 and s. 177 of the Act of 1963.

4.6 I must conclude that the special proxy given by Outokumpu Limited was not executed as required by Order 74, rule 75. That rule gives a 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 latter option is availed of, then the fact that the officer is so authorised must be stated. Neither option was properly complied with in this case.

4.7 The form of proxy given by Outokumpu Limited was also defective in that, being a special proxy, it did not internally direct the person to whom it was given as to what he was to do, as it should have. That being the case, it could have been open to being construed as giving the person to whom it was given a carte blanche to vote either for or against the resolution and, indeed, that is the way it was treated by Mr. St. Ledger. It is not necessary to decide, and I am not deciding, however, that the internal defect in the proxy form on its own rendered the proxy invalid.

4.8 Outokumpu Stainless AB and Outokumpu Stainless OY were listed as creditors in the list of creditors attached to the statement of affairs separately and distinct from Outokumpu Limited. Presumably, each of those companies was given notice of the summoning the meeting and each was furnished with a general and a special form of proxy with that notice as required by Order 74, rule 76. In my view, if either company wished to vote by proxy at the meeting, it should have submitted a proxy form completed in accordance with the Rules. In my view, the Rules were not complied with in the case of either company and it is no answer that Outokumpu Limited acts as collecting agent for both companies. That does not excuse a failure to comply with the Rules.

4.9 I will consider the implications of the findings in paragraphs 4.6 and 4.8 later.

**5. Watercut Limited**
5.1 The proxy furnished on behalf of Watercut Limited was a general proxy. It was given by "Liam Duffy of Watercut Limited". It was dated 23rd June, 2010. According to an affidavit filed on behalf of the company and sworn by Mr. Duffy on 16th July, 2010 he affixed the common seal to the general proxy. While the common seal is not discernible on the photocopy exhibited, I assume that it is there on the original. It was countersigned by Mr. Duffy solely. It is not in issue that under the articles of association of Watercut Limited the affixing of the seal of Watercut Limited to a document must be attested by two directors of the company. Mr. Duffy has averred that he was a director and that he was "simply unaware that there was any requirement" that the affixing of the common seal should be witnessed by the signatures of two directors or officers of Watercut Limited.

5.2 In my view, Watercut Limited did not properly avail of either of the two options provided for in the Rules for execution of a proxy form. There is nothing on the face of the proxy form to state that Mr. Duffy, as an officer, was authorised to sign on behalf of Watercut Limited. Accordingly, the general proxy was not properly executed.

**6. The implications of the findings in paragraphs 4.6, 4.8 and 5.2**
6.1 It is important to stress that what is at issue on the appeal under Order 74, rule 71 is whether the proxies of Outokumpu and Watercut should have been admitted as valid proofs for the purposes of voting at the meeting. In the applicant's grounding affidavit sworn on 7th July, 2010, the applicant opened up the question of the validity of all of the returned creditors' proxies on the basis of an inspection which had been permitted by Mr. St. Ledger and which had been carried out by the applicant's solicitor, Mr. Damien Hand, at the meeting. In Mr. St. Ledger's replying affidavit of 16th July, 2010, he has responded to the matters averred to in the applicant's affidavits. Between the two affidavits issues arise as to the validity or otherwise of other proxies, apart from the Outokumpu and Watercut proxies. Notwithstanding that the validity of those other proxies is not in issue on this application, I consider that, in determining what action should be taken on the basis of the findings I have made in relation to the Outokumpu and the Watercut proxies, I should have regard to the totality of the evidence.

6.2 The applicant has averred that, at the meeting, Mr. Hand concluded that, of the eighteen proxies submitted, eight proxies were invalid, six were valid and two, the Outokumpu and Watercut proxies, were disputed on the basis that their execution was questioned. Mr. Hand requested that Mr. St. Ledger adjourn the meeting to take advice and satisfy himself that the proxies of Outokumpu and Watercut were valid, but Mr. St. Ledger refused to accede to that request.

6.3 In response, Mr. St. Ledger has averred that six of the proxies which the applicant contends were invalid were not invalid. Those six aggregate in value €46,305. Among the six, the creditor with the largest debt is Macro Stainless Limited (Macro) with a debt of €20,658. An affidavit sworn on 14th July, 2010 by Anthony McNamara, a director of Macro, has been filed on behalf of the company, in which Mr. McNamara exhibited the general proxy dated 23rd June, 2010 which he had given to the chairman of the meeting. On the basis of the evidence contained in the affidavit and the exhibits, in the absence of the articles of association of Macro, it is not clear that the proxy, given by Macro and apparently sealed by Macro in the presence of Mr. McNamara only, is a valid proxy.

6.4 However, what is significant, in my view, is that the creditors on whose behalf affidavits have been sworn to apprise the Court that they favoured the appointment of Mr. Lafferty as liquidator (Outokumpu, Watercut and Macro) between them have debts aggregating €298,268. Mr. Duffy's personal proxy in favour of the chairman related to a debt of €76, 470. Therefore, technicalities aside, it is unquestionably the case that the majority in value of the creditors who gave valid proxies and technically defective proxies to the chairman favoured the appointment of Mr. Lafferty as liquidator. If the Court makes an order under Order 74, rule 71 setting aside the proxies of Outokumpu and Watercut as valid proofs for the purposes of voting at the meeting, as it must do on the basis of the findings made in paragraphs 4.6, 4.8 and 5.2 above, on the basis of the result of the voting as announced by Mr. St. Ledger, as chairman of the meeting, the outcome will be that one creditor was in favour of the appointment of Mr. Lafferty (Mr. Duffy whose debt is €71,943), as against creditors to the value of €280,636 in favour of Mr. McCann. If the Court were to give effect to that outcome, it would certainly not reflect the wishes of the majority in value of creditors who took the trouble to give proxies at the meeting, albeit that most of them did so in a defective manner.

6.5 It seems to me that the options open to the Court are as follows:

(a) to make an order, as sought by the applicant, appointing Mr. McCann as liquidator in place of Mr. Lafferty;

(b) to make an order appointing Mr. McCann as liquidator jointly with Mr. Lafferty, thus reflecting the type of order the Court can make under s. 267(2) where it is applicable, which would not be justified in this case;

(c) to leave Mr. Lafferty in place as liquidator; or

(d) to direct that a further creditors' meeting be held.

6.6 I consider that on the facts of this case, which have been put comprehensively before the Court by all of the parties, the appropriate course to adopt is to direct that a further meeting of creditors be ordered for the purposes of voting on the appointment of a liquidator. Adopting that course, it seems to me, will give effect to the intention of the Oireachtas in amending s. 267 by the addition of subs. (3). Having regard to what has happened to date, I think the additional costs involved in convening the meeting would be justified. The Court has had the benefit of an affidavit from Mr. Lafferty sworn on 15th July, 2010, exhibiting a report in which he sets out the steps he has taken since the meeting. I am satisfied that there is nothing in the report which contra-indicates the approach I propose adopting.

6.7 The order which I intend to make, which is specified in the next paragraph, is not intended to impinge on the appointment of the committee of inspection at the meeting, of which the applicant is a member.

**7. Order**
7.1 The order of the Court will have the following elements:

(a) an order under Order 74, rule 71 of the Rules setting aside by way of appeal the decision of the chairman of the meeting to accept the proxies of Outokumpu and Watercut as valid proofs for the purposes of voting at the meeting;

(b) an order directing the company to summon a further creditors' meeting for the purpose of voting on nominations for the office of liquidator of the company in the creditors' voluntary winding up on 17th August, 2010 and to comply with the requirements of s. 266 of the Act of 1963 in relation to summoning, giving notice to the creditors of, advertising and conducting the said meeting;

(c) an order suspending the exercise by Mr. Lafferty of the powers of liquidator pending the outcome of the meeting on 17th August, 2010; and

(d) an order that the appointment of the liquidator of the company for the purposes of the creditors' voluntary winding up shall be made at the said meeting in accordance with the provisions of s. 267 of the Act of 1963.