Neutral Citation [2012] IEHC 460

THE HIGH COURT

[2012 No. 496 COS]

IN THE MATTER OF MAPLEWOOD DEVELOPMENTS (IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

BETWEEN

AKEN LIMITED

APPLICANT

AND

MAPLEWOOD DEVELOPMENTS (IN VOLUNTARY LIQUIDATION)

RESPONDENT

Judgment of Ms. Justice Laffoy delivered on 12th day of November, 2012.

The application

1. On this application the applicant seeks the following orders:

> (a) an order pursuant to s. 267(2) of the Companies Act 1963 (the Act of 1963) appointing Mr. Derek Earl (Mr. Earl) as Liquidator of Maplewood Developments (the Company) in place of Mr. Simon Coyle (Mr. Coyle);
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> (b) if necessary, an order pursuant to Order 74, rule 71 of the Rules of the Superior Courts (the Rules) declaring the vote of National Asset Loan Management Ltd. (NALM) passed at the meeting of the creditors of the Company held on 28th August, 2012 invalid for the purposes of voting at the creditors' meeting; and
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> (c) in the alternative, a declaration pursuant to s. 280 of the Act of 1963 that the value of the security in respect of the Company's assets held by NALM is €22,300,000 for the purposes of the liquidation.

2. The notice parties on the application were Mr. Coyle and NALM. The real proponents were the applicant and NALM. While Mr. Coyle filed an affidavit in reply to the plaintiff's application and submissions were made on his behalf by counsel at the hearing of the application, as to the issues between the applicant and NALM, he adopted a neutral stance, that is to say, it was made clear by his counsel that he was not supporting the stance adopted by either of those parties.

The factual background

3. The primary source of the issues which arise on this application was the conduct of the meeting of the creditors of the Company, which was held pursuant to s. 266(1) of the Act of 1963 on 28th August, 2012, following the general meeting of the Company at which it was resolved that it could not by reason of its liabilities continue its business and that it be wound up voluntarily. At the Company meeting, it was resolved that Mr. Earl be appointed as Liquidator for the purposes of the winding up.

4. The Company is an unlimited company which has been involved in residential property development. It is part of a group of companies known as the Moritz Group. The applicant has been described in the grounding affidavit of Michael Whelan Senior (Mr. Whelan) as a "connected company to the Company, in that both the Company and the applicant are part of the Moritz Group".

5. It has been averred to by Mr. Whelan that the decision of the directors to wind up the Company was made after a protracted period of engagement by the Moritz Group as a whole with the National Asset Management Agency (NAMA).

6. The statement of affairs of the Company as at 28th August, 2012 prepared by the directors pursuant to their obligations under s. 266(3) of the Act of 1963 estimated the total assets of the Company at €80,650,000 and the total creditors at €378,234,349, resulting in a total deficiency of €297,584,349. The breakdown of the creditors as set out in the statement of affairs was as follows:

> (a) secured creditors' claims were estimated at €334,843,948, which included NAMA as a secured creditor in the sum of €52m, a note indicating that NAMA had judgments "of €70 million (including the debt)";
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> (b) the claims of preferential creditors (Collector General and redundancy) were estimated in the sum of €507,316; and
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> (c) the claims of unsecured creditors were estimated in the sum of €42,883,085.

The unsecured creditors were itemised in Appendix 2 to the statement of affairs which disclosed that the applicant, one of a number of connected companies which appeared in Appendix 2, was a creditor of the Company in the sum of €24,790,000.

7. Although NAMA was named as a secured creditor in the statement of affairs, the true position was that it was NALM which had obtained an unopposed judgment in the sum of €70,201,729.18 against the Company in proceedings in the High Court (Record No. 2012/506S) on 31st March, 2012. The Company's debt to NAMA is secured on four properties situate at Rathfarnham, Old Court, Celbridge and Brownestown. On 17th January, 2012, NALM appointed fixed asset receivers (the Receivers) over those properties on foot of the powers contained in the various deeds of mortgage and charge by virtue of which NALM has security over those properties.

8. At the creditors' meeting, those present were informed that at the Company meeting it had been resolved to appoint Mr. Earl as liquidator. NALM, through its proxy, Mr. Neil O'Mahony (Mr. O'Mahony) of Eversheds, Solicitors, nominated Mr. Coyle as liquidator. As the minutes of the creditors' meeting, which have been exhibited, disclose, before the appointment of the liquidator was put to a vote, Mr. O'Mahony addressed the chairperson of the meeting, Helen Gibbons of Noel Smyth & Partners, Solicitors for the Company, in relation to what is referred to in the minutes as NAMA's debt. The minutes should obviously refer to the debt of NALM. In any event, the minute records that Mr. O'Mahony asked that the following be noted, and, in quoting from the minutes, I am substituting NALM for NAMA:

> ". . . that NALM had received a judgment of €70,200,000 against the Company leaving a difference of €47,900,000 unsecured as against NALM's secured debt as valued in the statement of affairs produced by the directors. He asked that, for voting purposes, the chairperson would acknowledge that this was the amount of the unsecured debt that could be used for the purposes of the meeting. The chairperson noted the directors would come back on this point before any vote was taken.
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> [Mr. O'Mahony] further said that on the value of NALM's secured debt they would take same as the value the directors had put on it in the statement of affairs being €22,300,000. [The chairperson] asked [Mr. O'Mahony] to confirm that the unsecured portion of NALM's debt was €47,900,000."

By way of explanation of that assertion, in the statement of affairs the assets listed included "Development Land mortgaged to Banks", which were itemised, and opposite NAMA the figure of €22,300,000 appeared. Accordingly, the figure of €52m referred to at para. 6(b) above was not utilised by NALM to estimate the value of its unsecured debt. Instead, the value of its unsecured debt was arrived at by deducting from the amount of the judgment debt of NALM (approximately €70,200,000) the Company's estimate of the value of the property secured in favour of NALM (€22,300,000).

9. The minutes go on to record that, after questions and comments from the floor, the chairperson dealt with Mr. O'Mahony's request as follows:

> "The [chairperson's adviser] confirmed that they would accept, as per the Statement of Affairs, that the value of NALM's security was €22.3 million. He stated that this is the open market value, albeit it may not be the best. He stated that it is an uncertain market."

The minutes then record that Mr. O'Mahony stated that it was the view of NALM that the land may not realise that much but "for the purpose of this meeting" NALM would accept that valuation. The minutes record his further observations as follows:

> "He outlined the quantum of unsecured debt was at €47.9 million and the secured was €22.3 million. He stated that this was subject to his caveat that these valuations were only for the purpose of this meeting."

10. When the matter was put to a vote all of the unsecured creditors present and voting supported the Company's nominee, Mr. Earl. Those votes aggregated in value €42,378,600. The creditors who voted for Mr. Coyle were NALM, as an unsecured creditor in the sum of €47,900,000, and the Collector General (€400,616), so that the votes of those two creditors aggregated in value €48,300,616. On the basis of the value of the claims of the creditors who had cast their vote in his favour, Mr. Coyle was appointed as liquidator by the majority in value of the creditors. Before the meeting concluded, a committee of inspection was appointed and a number of unsecured creditors who voted for Mr. Earl intimated that they wished to be part of the committee of inspection.

11. The foregoing are the only facts which are relevant to the issues the Court has to determine. The affidavits filed on behalf of the Company and on behalf of NALM contain a considerable amount of factual material which, in my view, has no bearing on those issues and to which I have not had regard.

12. The core issue on this application is whether under either s. 267(2) of the Act of 1963 or Order 74, rule 71 of the Rules there is any basis on which the Court can interfere with the appointment of Mr. Coyle as sole liquidator of the Company in voluntary liquidation. I propose addressing that core issue first by identifying the relevant provisions of the Act of 1963 and the Rules and then applying them to the factual scenario which I have outlined. I will then address some ancillary issues raised on the application.

13. Certain issues have been raised by Mr. Coyle in relation to whether the application is in the proper form, namely: he is not named as a respondent to the notice of motion, although it was directed to him and served on him; where named as respondent, the Company is not described as being in voluntary liquidation; and it is queried how the Company is supposed to respond to the core issue. As will be clear from paragraph 2 above, I have treated the applicant and NALM as the real proponents on the application. The absence of the words "in voluntary liquidation" after the name of the Company appears as respondent was described as a typographical error, which I accept, because the Company is described as being in voluntary liquidation in the first line of the title. In any event, I have corrected that in the title to this judgment and will make an order amending the title. That is the only order I consider necessary in consequence of Mr. Coyle's concerns.

The relevant statutory provisions and rules on the core issue

14. The provision of the Act of 1963 which the applicant invokes as the basis of the first relief it claims is s. 267(2) of the Act of 1963, which provides:

> "Where different persons are nominated as liquidator, any director, member or creditor of the company may, within 14 days after the date on which the nomination was made by the creditors, apply to the court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors."

The applicant is a creditor of the Company and clearly has *locus standi* to bring an application under s. 267(2). Further, this application was clearly brought within the time limit prescribed in s. 267(2). In order to understand the application of subs. (2) of s. 267, in my view, it must be considered in the context of s. 266 and the other sub-sections of s. 267.

15. Sub-section (1) of s. 266 mandates that a company which proposes to go into creditors' voluntary liquidation shall cause a meeting of creditors of the company to be summoned within the time limits specified and the subsequent sub-sections deal with the advertising of notice of the meeting and other procedural matters. Of importance for present purposes is subs. (3) which provides that the directors of the company shall "cause a full statement of the position of the company's affairs, together with a list of creditors of the company and the estimated amount of their claims be laid before the meeting of the creditors". What it is important to emphasise about that provision is that what the company is required to do is to estimate the amount of the creditors' claims.

16. Sub-section (1) of s. 267 provides as follows:

> "Subject to subsection (2), the creditors and the company at their respective meetings mentioned in section 266 may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors, the person, if any, nominated by the company shall be liquidator."

In practice, what usually happens is that a proposal to appoint the company's nominee and a proposal to appoint the creditors' nominee is put to a vote at the creditors' meeting. That is what happened at the creditors' meeting on 28th August, 2012.

17. Sub-section (3) of s. 267, which was inserted by 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."

The objective of the insertion of that provision, which was laudable, was that the value of the claims of the voting creditors, rather than the number of the voting creditors, should be determinative in appointing the liquidator.

18. Returning to subs. (2) of s. 267, on a plain reading of it, where it is invoked and the Court determines that the appointment of the creditors' nominee as sole liquidator should not stand, the remedy available to the Court is either to replace the creditors' nominee by the company's nominee, or appoint the company's nominee as joint liquidator with the creditors' nominee, or appoint some other person as liquidator. Section 267(2) does not envisage a contest between two different nominees of creditors. Previously, in *Re Centrum Products Ltd*. [2009] IEHC 592, I questioned whether the solution provided for in s. 267(2) could be applied in the type of situation which arises here, but on further reflection perhaps the way to view what happened on 28th August, 2012 is that the purpose of what could be perceived as a contest between two creditors' nominees was to evaluate whether the creditors' nominee, that is to say, Mr. Coyle, had the majority in value of the votes.

19. Part X of Order 74 of the Rules which deals, *inter alia*, with general meetings of creditors in a creditors' voluntary winding up, contains a number of rules which have been canvassed by the parties on this application. I propose setting out what I consider to be the relevant rules in what I consider to be logical order.

20. Rule 69, which is headed "Votes of secured creditors" provides as follows:

> "For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof or in a voluntary liquidation in such a statement as is hereinafter mentioned the particulars of his security, the date when it was given and the value at which he assesses it and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to surrender his security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence."

21. Rule 72, which is headed "Statement of security" is the rule which outlines the nature of the "statement as is hereinafter mentioned" referred to in rule 69. Rule 72 provides:

> "For the purpose of voting at any voluntary liquidation meetings, a secured creditor shall, unless he surrender his security, lodge with the Liquidator before the meeting a statement giving the particulars of his security, the date when it was given and the value at which he assesses it. This rule shall not apply to a meeting of creditors held pursuant to section 266."

The last sentence of rule 72 clearly recognises the reality of the situation which will prevail when a creditors' meeting takes place in accordance with s. 266. No liquidator will be in place and, accordingly, no process will exist for complying with rule 72. However, assuming that the directors have complied with their obligation under s. 266(3), a statement of affairs of the type stipulated in that sub-section will be before the meeting.

22. The provision of the Rules which the applicant invokes as the basis of the second relief it claims is rule 71, which is headed "Admission and rejection of proofs for purpose of voting". 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."

The function of the Court on an appeal under rule 71 in relation to the admission or rejection of a proof for the purposes of voting at a creditors' meeting pursuant to s. 266 was considered in *Re Jim Murnane Ltd.: CNH Financial Services S.A.S. v. Murnane* [2010] 3 I.R. 468 in a context in which the appellant creditor had contended at the meeting that its debt was much larger than was set out in the statement of affairs, but the chairman rejected the higher figure and only admitted the figure which appeared in the statement of affairs. In that case, I stated (at p. 479):

> "In relation to an appeal to the court under r. 71 against a decision of a chairman made under that rule, it seems to me that the court is concerned with much more than whether the chairman acted properly procedurally. Rule 71 treats a doubt of the chairman as to the decision to be made, which, obviously involves a dispute between a creditor and the company as to the debt, as an objection and it envisages the court making a determination as to whether the objection is sustainable. This means that the court is required to make some sort of determination on the substance of the dispute."

I am of the view that the analysis in the *Murnane* case and the conclusion set out in that passage is of little assistance in addressing the applicant's complaint on this application for two reasons. First, rule 69 specifically addresses the position of a secured creditor and specifically mandates that a secured creditor shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security and it expressly stipulates that such entitlement is for the purposes of voting. Secondly, it is expressly stated in rule 71 that the chairman's power conferred by that rule is "for the purpose of voting".

23. Counsel for the applicant referred the Court to s. 284 of the Act of 1963 which applies the bankruptcy rules in the winding up of insolvent companies. In particular, the Court was referred to the annotation on s. 284 in MacCann & Courtney *Companies Acts 1963 – 2009* (at p. 550), and, in particular, the following commentary on secured creditors:

"If a secured creditor realises his security, he may prove for the balance due to him after deducting the net amount realised and receive dividends thereon but not so as to disturb any dividend then already declared. If he surrenders his security for the general benefit of the creditors, he may prove the whole of his debt. He may at any time amend the valuation on proof upon showing that the valuation and proof were made *bona fide* on a mistaken estimate, but every such amendment shall be made at the cost of the creditor and upon such terms as the court shall order...."

The point emphasised by counsel for the applicant is that, in order to be entitled to amend, the secured creditor must establish a mistake in the original valuation.

24. In my view, s. 284 is of absolutely no relevance to the core issue which arises on this application, because s. 284 concerns what happens after the liquidator is appointed, whereas this application is concerned with the procedural aspects of the appointment of the liquidator. There is a fundamental difference between what happens at a creditors' meeting convened under s. 266 and what happens subsequently when the liquidator is adjudicating on the claims of the creditors in the context of distributing the assets of the company.

The basis of the applicant's appeal
25. By letter dated 30th August, 2012, Noel Smyth & Partners, on behalf of an "unnamed shareholder" of the Company wrote to Mr. Coyle alleging that –

> (a) the secured debt of NALM was set as €22,300,000 for the purposes of the liquidation;
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> (b) any security over and above that sum had been surrendered; and
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> (c) once the Receivers appointed by NALM recover the sum of €22,300,000 from the sale of the assets secured in favour of NALM, any sums over and above would be for the benefit of the general unsecured creditors of the Company.

It was asserted that those propositions were based on the position taken by NALM at the meeting, the value of the unsecured debt used and relied on by Mr. O'Mahony for the purposes of the vote on an alternative liquidator, Order 74, rule 69 and the fact that all other unsecured creditors, other than the Collector General, voted in favour of Mr. Earl. It was asserted that, such being the case, Mr. Coyle's appointment was procured through, and rests strictly on, the value allocated by NALM to the unsecured portion of its debt. On the basis of those assertions –

> (i) confirmation was sought from Mr. Coyle that he accepted that the value of the security of NALM was then €22,300,000, and
>
> (ii) in the absence of such confirmation, an application to court to seek Mr. Coyle's removal as liquidator on the basis of the vote having been improper and/or to determine the value of the NALM security was threatened.

26. The response to that letter came from Eversheds. The fact that Eversheds, who had previously acted for NALM, were now acting for Mr. Coyle gave rise to one of the ancillary issues which will be addressed later. In that response, which was dated 31st August, 2012, it was stated that Mr. Coyle did not accept that he was bound by the valuation of €22,300,000 and it was pointed out that it was made clear to the chairperson of the creditors' meeting on numerous occasions the valuation of €22,300,000 was being used for the purposes of voting only. It was suggested that Noel Smyth & Partners had mistakenly conflated the voting procedure at the creditors' meeting with the manner in which a debt is proved in a winding up. It was stated that Order 74, rule 69 is very clear in its terms and that it applies to voting at creditors' meetings only and does not speak in any way to the manner in which security is to be valued in the course of the winding up itself. It was asserted that NALM was entitled to realise its security outside the liquidation process and could prove for the balance due to it having deducted the amount realised, and that the value used for the purpose of voting at the creditors' meeting did not bind NAMA to the valuation of €22,300,000 in any way. It was suggested that the claims made in the letter of 30th August, 2012 were entirely misconceived.

27. The legal basis for seeking the reliefs sought in the notice of motion was asserted in the grounding affidavit by Mr. Whelan as follows:

> "I believe and am advised that NALM, the secured creditor, has no entitlement to declare itself unsecured in the amount of €47,900,000 for the purposes of voting only and also has no entitlement to subsequently claim that NALM is in no way bound by such a valuation. However, that has since been re-iterated by the liquidator's solicitors in correspondence of 31st August, 2012 .... It is abundantly clear that it was not a mistake or any inadvertence that caused the secured creditor to value its security at €22.3m, but it deliberately did so and without good faith so that it could procure the appointment of its own liquidator and have enough votes to do so. I believe and am advised that the secured creditor is entitled to value its security but that having done so, it is then limited to the value of the security declared for the purpose of the vote and any excess value over and above that valuation achieved out of the realisation of the properties must thereafter be for the benefit of the unsecured creditors in the liquidation."

Conclusion on core issue
28. Rule 69 is primarily concerned with identifying the entitlement of a secured creditor to vote in a liquidation after the liquidator has been appointed. It envisages the secured creditor having lodged with the liquidator a statement, as provided for in rule 72, setting out the value at which the secured creditor assesses his security. On the basis of the value of his security as set out in the statement certain consequences ensue for the creditor.

29. One such consequence is set out in rule 70, to which I have not alluded before because it has no direct relevance to the issue with which I am concerned. However, it is instructive in understanding what happens after the liquidator is appointed. Rule 70 provides that the liquidator may, within twenty eight days after the statement has been used in voting at a meeting require the creditor to give up the security for the benefit of the creditors generally on the payment of the value so estimated. However, there is a proviso in rule 70 to the effect that where a creditor has valued his security he may, at any time before being required to give it up, correct the valuation by a new proof and deduct the new value from his debt. So the position is that, even after the liquidator has been appointed, there is provision for the amendment of the valuation of the security in the formal statement. However, as expressly provided in rule 72, that rule has no application to a creditors' meeting pursuant to s. 266.

30. There was no requirement before or at the meeting on 28th August, 2012 that NALM should submit a formal assessment of the value of its security to the Company. What NALM did, through its proxy, at the meeting was that it relied on the valuation of its

security contained in the statement of affairs prepared by the directors in accordance with their obligations under s. 266(3). The totality of the Company's indebtedness to NALM had been determined by the judgment obtained by NALM against the Company. The directors of the Company had valued the lands the subject of the security of NALM at €22.3m in the statement of affairs and, by so doing, they had valued the security of NALM at €22.3m. In my view, the directors of the Company cannot quibble that, for the purposes of voting at the creditors' meeting, NALM put the same value on its security. Nor can the applicant, which is a connected company, quibble with the value put by NALM on the secured element of the Company's debt to NALM. In my view, it is not open to any creditor of the Company to challenge that valuation, which NALM adopted on a reasonable and pragmatic basis.

31. As regards the position of the chairperson of the meeting, in my view, the chairperson acted in accordance with the powers conferred on her by rule 71 in admitting the balance of the debt due to NALM, after deducting the estimated value of the security, that is to say, €47,900,000 as the unsecured claim of NALM for the purpose of voting. Indeed, as was pointed out by counsel for NALM, there had been no assertion by the applicant at the meeting or, indeed, subsequently that the chairperson was wrong in admitting the unsecured claim in the sum of €47,900,000, although that is probably implicit in the applicant's case, even if not articulated.

32. Accordingly, the applicant is not entitled to –

> (a) an order pursuant to rule 71 or otherwise declaring the vote cast by NALM at the meeting of 28th August, 2012 invalid; or
>
> (b) an order pursuant to s. 267(2) of the Act of 1963 replacing Mr. Coyle by Mr. Earl, because I am satisfied that Mr. Coyle was properly appointed liquidator.

33. The Court has no jurisdiction, whether under s. 280 of the Act of 1963 or otherwise, to put a value on the secured element of the claim of NALM against the Company and the Court has no jurisdiction to make a finding that the value of the secured element for all purposes is €22,300,000. The value of the security of NALM, insofar as it is pertinent to assessing the value of NALM's unsecured claim in the liquidation and is an issue in that context, falls to be adjudicated on by the Liquidator when he is assessing NALM's unsecured claim in accordance with s. 284 of the Act of 1963 and the relevant provisions of Order 74.

Ancillary matters

34. Having learned that Eversheds, who had acted as solicitors for NALM and NAMA in all previous negotiations and litigation with the Company had been retained by Mr. Coyle to act for him in the liquidation, through receipt of the letter of 31st August, 2012, Mr. Whelan has averred that it was put to Mr. Coyle that Mr. Coyle could not be acting independently when taking advice from Eversheds and that Eversheds could not and should not be advising Mr. Coyle, given that Eversheds and, in particular, Mr. O'Mahony were already acting on behalf of NALM and NALM's Receivers. By letter dated 5th September, 2012, Eversheds informed Noel Smyth & Partners that Mr. Coyle had instructed O'Gradys, Solicitors, to act for him. O'Gradys have continued to act for the Liquidator and no specific relief was sought on the application in relation to the retainer of Eversheds for a short period after the Liquidator was appointed. If the Company had any legitimate grounds of complaint because of the retainer of Eversheds, the matter has been rectified by the appointment of O'Gradys. Having said that, it is not to be implied that I am of the view that it was appropriate for Mr. Coyle to retain the services of the solicitors who had acted for one of the secured creditors and the Receivers appointed by that secured creditor. In short, I express no view whatsoever on that issue.

35. The applicant also raised the issue of the validity of the proxy on behalf of NALM which was a general proxy granted by NALM to Mr. O'Mahony of Eversheds, on the ground of Eversheds' previous involvement. In my view, NALM were perfectly entitled to appoint as a general proxy a member of the firm of solicitors which had acted for them in the litigation with the Company and on behalf of the Receivers.

36. It is appropriate to record that Mr. Whelan recognised that Mr. Coyle is a respected insolvency practitioner and that there was no criticism of him either personally or professionally. However, it was suggested that he was "significantly conflicted". In my view there is no evidence that Mr. Coyle was significantly conflicted.

Order

37. For the reasons outlined earlier, the applicant is not entitled to any of the reliefs sought on the notice of motion. Accordingly, the application will be dismissed after amending the title as indicated in paragraph 13 earlier.