Neutral Citation [2013] IEHC 125

THE HIGH COURT

[2013 No. 39 COS]

IN THE MATTER OF MOUNTVIEW FOODS LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS, 1963 TO 2012

BETWEEN

ANIMEX SPOLKA Z OGRANICZONA ODPOWIEDZIALNOSCIA

APPLICANT

AND

MOUNTVIEW FOODS LIMITED (IN VOLUNTARY LIQUIDATION) AND ANTHONY WELDON

RESPONDENTS

Judgment of Ms. Justice Laffoy delivered on 11th day of March, 2013.

The application

1. This application arises from circumstances in which the second named respondent (Mr. Weldon) was appointed liquidator of Mountview Foods Limited (the Company) at a meeting of creditors summoned pursuant to s. 266 of the Companies Act 1963 (the Act of 1963). By notice dated 3rd January, 2013 creditors of the Company were notified, pursuant to s. 266, that a meeting of the creditors of the Company would be held on 14th January, 2013 "for the purposes mentioned in Sections 267 and 268 of the said Act". A blank General Proxy form and a blank Special Proxy form accompanied the notice and the creditors were informed that all proxy forms to be used at the meeting should be submitted not later than 4pm on the day before the meeting. The creditors' meeting was preceded by a meeting of the Company at which a resolution to wind up the Company voluntarily and for the appointment of Mr. Weldon as liquidator for the purposes of the winding up was passed.

2. The reliefs sought on this application, which was initiated by originating notice of motion which was issued on 28th January, 2013, are:

> (a) orders pursuant to Order 74, rule 71 of the Rules of the Superior Courts (the Rules) setting aside by way of appeal –
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> > (i) the decision of the Chairman of the creditors' meeting to refuse to allow the applicant's proxy to vote in favour of the applicant's nominee for liquidator at the meeting, and
> >
> > (ii) the decision of the Chairman of the creditors' meeting to allow the proxies of Castleknock Meats Limited, Corrib Foods Limited, Jim Franey Limited and Kildare Farm Foods Limited to vote in favour of Company's nominee for liquidator at the meeting; and
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> (b) an order pursuant to s. 267(2) of the Act of 1963 directing that Mr. Eamonn Leahy (Mr. Leahy) be appointed as liquidator in place of Mr. Weldon.

The legislation invoked on the application

3. Section 266, section 267 and section 268 of the Act of 1963 are among the provisions of that Act applicable to a creditors' voluntary winding up. As I stated, the meeting on 14th January, 2013 was summoned in accordance with s. 266.

4. Section 267 deals with appointment of the liquidator. Sub-section (1) provides that the creditors and the company at their respective meetings mentioned in s. 266 may nominate a person to be liquidator. It then addresses the eventuality that different persons may be nominated by the company and the creditors as follows:

> ". . . 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."

Sub-section (2) of s. 267, which has been invoked by the applicant on this application, provides as follows:

> "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."

Sub-section (3) of s. 267, which was inserted by s. 47 of the Company Law Enforcement Act 2001, provides that a resolution as to the creditors' nominee as liquidator 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".

5. Rule 71 of Order 74 of the Rules, which has also been invoked on this application, is to be found in Part X of Order 74 which is entitled "General meetings of creditors and contributories in a winding up by the Court and of creditors in a creditors' voluntary winding up". Rule 71 which is headed "Admission and rejection of proofs for purpose of voting" provides as follows:

> "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."

6. Rules 74 to 83 inclusive of Order 74 deal, in general, with voting by proxy.

The applicant
7. The applicant is a limited liability company incorporated in accordance with the laws of Poland. The abbreviated form of its name is Animex sp. z o.o. It claims that the Company is indebted to it in the sum of €662,546.64 in respect of goods sold and delivered during 2012. In the statement of affairs and list of creditors put before the meeting on 14th January, 2013 in accordance with s. 266(3) of the Act of 1963, the amount of the applicant's debt is given as €652,520. It has been disclosed on this application that the applicant has two securities (a bank guarantee limited to €75,000 and credit insurance limited to €100,000) in respect of the Company's indebtedness to it, which securities aggregate €175,000. For the purposes of this application, as I understand it, the applicant, with a view to avoiding compromising its rights to those securities, has treated its debt as being in the sum of €477,520 and that sum as representing its admitted unsecured debt.

8. The applicant was represented at the creditors' meeting by Krystian Boino, of J.C. Hoban & Co., Solicitors, the applicant's solicitors. Mr. Boino is a Polish lawyer registered with the Law Society under EU Regulation 732/2003 practising in this jurisdiction. He swore the affidavit grounding this application on 28th January, 2013 and he swore a further affidavit on 1st March, 2013 in response to an affidavit sworn on behalf of the respondents by Brendan Doherty, a director of the Company, who was the chairman of the meeting, which was sworn on 27th February, 2013.

9. As is clear from the originating notice of motion, the applicant challenges the appointment of Mr. Weldon as liquidator on two grounds. A third ground is raised in the grounding affidavit of Mr. Boino. I propose considering each ground separately.

First ground
10. The first ground on which the appointment of Mr. Weldon as liquidator is challenged by the applicant is that Mr. Doherty (the Chairman), as Chairman of the meeting, refused to allow the applicant's appointed proxy, Mr. Boino, to vote in favour of the applicant's nominee for liquidator. The applicant's nominee was Mr. Eamonn Leahy of Leahy & Co., Chartered Accountants. He accompanied Mr. Boino to the meeting and he had in his possession a letter of acceptance to his appointment as liquidator.

11. Mr. Boino, in his grounding affidavit, averred the applicant "is extremely concerned by the fact that an extremely significant liability to the applicant was built up by the Company in the months preceding the commencement of the voluntary liquidation" and, for this reason, "is especially anxious to ensure that the manner in which the Company was managed is the subject of a full and independent examination and analysis". The applicant, on the basis of advice from Mr. Boino, decided to seek the appointment of its own nominee as liquidator of the Company. The applicant requested that Mr. Boino act as its proxy at the creditors' meeting. Mr. Boino sent a partially completed General Proxy form to the applicant for completion and submission to the Company.

12. The two forms of proxy, the General Proxy and the Special Proxy, which accompanied the s. 266 notice, had, apparently, gone directly to the applicant in Poland. The applicant, as Mr. Boino put it, "mistakenly understood" that it was necessary to complete the General Proxy and also the Special Proxy and return them to the Company. Counsel for the respondents emphasised that this was an acknowledgment of a mistake on the part of the applicant.

13. The General Proxy form, omitting the provision for a substitute proxy included in it but which option was not availed of, completed by the applicant was in the prescribed form (Form No. 21 of Appendix M of the Rules). It was headed with the name of the Company and it stated as follows:

> "I/we Dariusz Nowakowski of Animex sp. z o.o. a creditor hereby appoint Mr. Krystian Boino of J.C. Hoban & Co. . . . to be our general proxy in the matter of the Companies Acts 1963 to 2012 and in the matter of Mountview Foods Limited to vote at the meeting of creditors to be held in the above matter on 14th January, 2013 at 9.15am, or at any adjournment thereof."

While the words to which emphasis had been added, as set out above, are not to be found in Form 21, in my view, their inclusion does not in any way affect the meaning of the authority thereby given by the applicant to Mr. Boino. The General Proxy was dated 9th January, 2013. It was signed by Mr. Nowakowski, who was described as "officer duly authorised to act on behalf of the applicant".

14. The Special Proxy was also dated 9th January, 2013 and it was also signed by Mr. Nowakowski, who was described as an officer duly authorised to act on behalf of the applicant. The authority given to Mr. Boino in the Special Proxy was stated as follows:

> ". . . to be my/our Proxy at the Meeting of Creditors to be held in the above matter on 14 January, 2013 at 9.15am or at any adjournment thereof to vote for the Resolution in the Notice convening the Meeting."

The corresponding segment of the prescribed form of Special Proxy (Form No. 22 of Appendix M of the Rules) is in the following terms:

> ". . . as my/our proxy at the meeting of creditors to be held on the …… day of …….. or at any adjournment thereof to vote (*a*) …….. the resolution No. (*b*)…… in the notice convening the said Meeting."

In Form 22 it is made clear that at (*a*) the word "for" or the word "against", as the case may require, should be inserted and that at (*b*) the particular resolution should be specified.

15. As a comparison of the two discloses, the blank Special Proxy form sent by the Company to the applicant deviated from the prescribed form in the following material respects:

> (a) It did not make it clear that the special proxy was to have authority to vote "for" or "against" a particular resolution.
>
> (b) It purported to identify the resolution or resolutions in question by reference to the notice convening the meeting, but there was no reference to any resolution in that notice.

In relation to the second point, it is true that the notice stated that the meeting was for the purposes mentioned in s. 267 and s. 268 of the Act of 1963, and that s. 267 is concerned with the appointment of a liquidator and that s. 268 is concerned with the appointment of a committee of inspection. It is also true that the notes to Form 22 were adapted in the Company's blank special proxy form by the inclusion of a note to indicate that a creditor may give a special proxy to any person to vote, inter alia, "[f]or or

against the appointment of a liquidator or as a creditor of the Committee of Inspection." Obviously, the word "member" should have appeared instead of the word "creditor" in that note, but that is a minor point to which no weight should be attached. However, it is of significance that, notwithstanding the guidance given by Form No. 22 and its notes, the form of special proxy sent out by the Company was inevitably going to give rise to confusion and that confusion was compounded by the fact that no resolutions were specified in the notice of the meeting.

16. At the meeting, the Chairman announced through his solicitor, who was in attendance, that he was excluding seven proxies on the ground that each of the creditors had completed and returned both a General Proxy form and a Special Proxy form, one of the persons being excluded being Mr. Boino as proxy for the applicant, because it was not possible to ascertain which form the applicant intended to rely on. Following objection on behalf of the applicant, it was confirmed that the only ground on which Mr. Boino was being precluded from voting on the applicant's behalf was because both forms of proxy had been submitted by the applicant.

17. In his replying affidavit, having acknowledged that proxy forms must conform with Form No. 21 and Form No. 22 in Appendix M, the Chairman averred as follows:

> "8. I say that what was returned by the Applicant to the Company in this regard appeared to indicate that the Applicant was authorising Mr. Boino . . . *'to vote for the Resolution in the Notice convening the Meeting'* (emphasis in original). I say and believe that a reasonable interpretation of same, taken in isolation, was that it was the wish of the Applicant to authorise Mr. Boino to vote on its behalf, in accordance with a specific direction of the Applicant to him on how he must vote as is the case of a person appointed as a proxy under a Special Proxy form, in relation to any resolution put before the meeting as to the appointment of a liquidator and/or a committee of inspection only, since these are the items covered under ss. 267 and 268 of the 1963 Act.
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> 9. I say and believe that the ambiguity in relation to the Applicant was caused by the completion and return to the Company by the Applicant of the General Proxy Form too. In this regard I say and believe that the effect of the General Proxy was to cause confusion as to the intentions of the Applicant.
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> 10. In this regard, if one was to take the General Proxy in isolation, a reasonable interpretation of same would be to conclude that the Applicant was in fact giving Mr. Boino a '*carte blanche*' with respect to any representations and actions made on the Applicant's behalf. This is however completely at odds with the information apparently being communicated in the Applicant's special proxy, i.e. that Mr. Boino was intended to be authorised to vote in accordance with a specific direction of the Applicant as a Special Proxy on matters pertaining to ss. 267 and 268 of the Companies Act 1963. Furthermore at no time did Mr. Boino (who at some point in the meeting indicated he practises with the Applicant's solicitors herein) attempt to clarify matters by indicating whether he had any instructions as to which proxy form was intended by the Applicant as the correct proxy form to be returned.
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> 11. I say and believe that it is crucial from my perspective that it is clear under what authority, if any, a person who attends a creditor's meeting is entitled to act. If I do not satisfy myself in this regard I say and believe that I am doing the Company and the creditors as a whole a disservice, and am further not complying with my duties as chairman of the creditor's meeting. In the circumstances, there was absolutely no clarity as to the capacity in which Mr. Boino was allegedly being authorised to act. Either he was authorised to speak, vote and make representations in whatever way he deemed fit, in the Applicant's interests, or he was being instructed to vote according to specific directions of the Applicant on particular issues only.
>
> 12. I say and believe and am advised that a General Proxy and a Special Proxy are mutually exclusive, both in their intent and in their effect. In this regard I say and believe and am advised further that the Applicant's instruction as to what capacity Mr. Boino was alleged to be acting was not at all clear from the totality of the evidence, and that on that basis alone I was correct in deciding to disallow the proxies in question."

18. The passage quoted above is more in the nature of advocacy than averments of fact. While much of the reasoning in it cannot be gainsaid, it totally ignores the fact that the blank form of Special Proxy sent by the Company to the creditors was so flawed that it could not be interpreted or completed in a meaningful way. In particular, the passage italicised in paragraph 8 in the passage could not be interpreted in any meaningful way, having regard to the purpose for which a creditor would have been considering whether to execute a Special Proxy form in the context of what was to happen at the meeting on 14th January, 2013. It was the Company which was responsible for the fact that the Special Proxy based on the blank form furnished by the Company could not be interpreted and completed in a meaningful way. The Company, which was obliged by rules 75 and 76 of Order 74 to send a proxy form in each of the prescribed forms to each of the creditors, cannot shift that responsibility onto the applicant or onto Mr. Boino, notwithstanding the acknowledgement by Mr. Boino on affidavit that the applicant made a mistake in returning the two forms of proxy. The position, accordingly, was that the Chairman had two proxies: a General Proxy, which the Chairman acknowledges that it was reasonable to interpret as giving Mr. Boino a "*carte blanche*"; and a document headed "Special Proxy", which, as completed, was utterly meaningless because the blank form furnished by the Company to the creditors did not conform with Form No. 22. Having regard to what has been stated at paragraph 15 above, the completed version of the blank form did not make any sense and, in effect, was so obviously defective that it should have been treated by the Chairman as such.

19. It is only fair to acknowledge that the Chairman and his legal adviser were faced with a very difficult situation at the meeting. It is also fair to record that the Chairman acted consistently in excluding the other six proxies from voting where both a General Proxy form and a Special Proxy form had been returned. The Chairman did so, notwithstanding that four of the six creditors were employees of the Company and all of the six had appointed him as proxy. The value of the debts of those six creditors amounted to €71,676. No allegation of bias has been, or could be, made against the Chairman for disallowing the applicant's proxy to vote.

Second ground

20. The second ground on which the applicant has challenged the decision to appoint Mr. Weldon as liquidator has been signposted in the notice of motion. It is that the Chairman was incorrect in allowing the proxies of the four companies which are named in the originating notice of motion to vote. The four General Proxy forms returned by those four companies have been exhibited in the Chairman's affidavit. It was conceded by counsel for the applicant that the proxy put in by Corrib Foods Limited was probably properly executed. As regards the remaining three, the Chairman has averred that each of the parties who signed the proxy forms for those companies had been known to him and he had dealt with each of them for many years in business and that he was satisfied that each owns the relevant company and runs it as "Chief" officer. On that basis, he has averred that he was entirely satisfied that they were officers authorised to sign the proxy forms and it was on that basis that he admitted them for the purposes of voting.

21. Consistent with the decision of this Court in *Re Michael Madden Quality Meats Limited; Ballon Meats Limited v Leahy & Anor*.

[2012] IEHC 122, I must find that the proxy forms given by those three companies were not properly executed, because they did not comply with the mandatory requirement of rule 75 of Order 74, when read in conjunction with the relevant forms in Appendix M, as to the form of proxy and the manner of its execution in the case of a corporate creditor. I must also find that the Chairman was incorrect in accepting the appointees of those creditors as proxies for the purposes of voting.

22. The debts of the three creditors in question, as set out in the list of creditors attached to the statement of affairs, aggregate €110,518.

Third ground

23. The third ground on which it is contended by the applicant that the Chairman of the meeting acted incorrectly and was wrong in law was in excluding two proxies which had been sent to the Company by fax. The proxies in question had been submitted by two other Polish companies, Aviko BV and Sokolow SA. Their debts, according to the list of creditors, aggregate €234,789. The proxy nominated by those two companies was Mr. Ciaran Kirk of KPMG, according to Mr. Boino, although the minutes of the meeting record that it was Joe McVeigh, solicitor, who accompanied Mr. Kirk at the meeting.

24. The Chairman has averred that he disallowed those proxies for non-compliance with the mandatory requirement which is expressed in Note 3 to Form No. 21 and Form No. 22 of Appendix M. That note states:

> "The proxy form when signed must be lodged by the time and at the address named for that purpose in the notice convening the meeting to which it is to be used."

The notice summoning the meeting stated:

> "All proxy forms to be used at the meeting should be submitted to Unit 111, Ashbourne Industrial Estate, Ashbourne, County Meath no later than 4pm on the day before the meeting."

The Chairman has averred that the sending of a proxy by fax "is contrary to what is prescribed by the guidelines laid down under Order 74". He has contended that he was correct in not admitting those proxies.

25. Counsel for the applicant referred the Court to a decision of the Chancery Division of the High Court of England and Wales in *Inland Revenue Commissioners v. Conbeer & Anor*. [1996] B.C.C. 189 and, in particular, to the following passage from the judgment of Laddie J. at page 194:

> ". . . I have come to the conclusion that a proxy form is signed for the purposes of rule 8.2(3) if it bears upon it some distinctive or personal marking which has been placed there by, or with the authority of, the creditor. When a creditor faxes a proxy form to the chairman of a creditors' meeting he transmits two things at the same time, the contents of the form and the signature applied to it. The receiving fax is in effect instructed by the transmitting creditor to reproduce its signature on the proxy form which is itself being created at the receiving station. It follows that, in my view, the received fax is a proxy form signed by the principal or by someone authorised by him. The view which I have reached appears to me to be consistent with the realities of modern technology. If it is legitimate to send by post a proxy form signed with a rubber stamp, why should it not be at least as authentic to send the form by fax?
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> The facts of the present case illustrate the point well. Here the proxy form was sent both by post and by fax. Such being the nature of postal delivery, the creditor could not be certain whether his proxy was received at all or on time. On the other hand, when the fax is transmitted he knows that it has been received because, first, he obtains an answer back code and, secondly, an activity report is normally printed out. From the chairman's point of view, there is nothing about a received fax which puts him in a worse position to detect forgeries than when he receives through the post or by hand delivery a document signed by hand by a person whose signature he has never seen before or one signed by stamping. The reality is that fax transmission is likely to be more reliable and certainly is a more speedy method of communication than post. It would be a pity if rule 8.2(3) required creditors to convey their views to the chairman by the older, slower and less reliable form of communication."

I respectfully agree with those observations, which were subsequently followed by Sir Andrew Morritt V–C in *PNC Telecom Plc v. Thomas & Anor*. [2004] 1 BCLC 88. Notwithstanding that the Rules do not replicate the rules of court under consideration by the UK courts in those authorities, the rationale underlying the approach adopted by the UK courts is equally applicable in this jurisdiction.

26. Finally, on this point, the issue whether service by fax complied with Order 74 was considered by the High Court (Ryan J.) *In the matter of Managh International Transport Ltd. (in voluntary liquidation)* [2012] IEHC 444. In that case, Ryan J. recorded the evidence given by the finance manager of one of the creditors, Stena Line, as that he had filled out the proxy form and sent it by fax to the registered office of the company well before the relevant time. Apropos of that evidence, Ryan J. noted that there was no contradiction of that evidence on affidavit. He was satisfied that the creditor, Stena Line, had sent the notification by fax from Holyhead and that that was sufficient to comply with rule 82 of Order 74. Again, I respectfully agree with that conclusion.

27. Accordingly, I am satisfied that the Chairman acted incorrectly in disallowing voting by the named proxy (whether Mr. Kirk or Mr. McVeigh) on the proxy forms which, as I understand it, had been received in time by the Company at its registered office by fax.

28. The Chairman has, however, taken issue in his replying affidavit with the premise which underlies the third ground, namely, that the proxy for the two Polish companies, Mr. Kirk, would have voted for the applicant's nominee for appointment as liquidator. It is undoubtedly the case that there is no evidence before the Court from Mr. Kirk or the Polish companies on the basis of which one could conclude that the Polish companies, as a matter of certainty, through Mr. Kirk, as proxy, would have voted for the applicant's nominee. However, Mr. Boino averred in the grounding affidavit that it was Mr. Kirk who seconded his proposal that Mr. Leahy be appointed liquidator, although the minutes of the meeting record that it was Mr. Kirk who nominated Mr. Leahy "to act as liquidator on behalf of [the applicant]". By way of general observation, there is a considerable difference between the facts averred to in the affidavits before the Court and what is recorded in the minutes, which cannot be resolved, which is a very unsatisfactory situation.

Outcome of vote

29. Before outlining the voting process on the appointment of a liquidator at the creditors' meeting, its actual outcome, and the probable outcome if Mr. Boino had been permitted to vote as proxy for the applicant, it is pertinent to take an overview of the financial state of the Company at the commencement of the winding up, as reflected in the statement of affairs as at 14th January, 2013 furnished at the meeting and the list of unsecured creditors appended to it. The statement of affairs shows a total deficiency of €2,136,139. The total value of the debts of unsecured creditors listed in the appendix was €2,141,320. The applicant was the largest

creditor and the figure recorded in the list (€652,520) represented almost thirty three per cent of the total value of the unsecured creditors as listed. The aggregate value of the unsecured debts of the two Polish companies which appointed Mr. Kirk as proxy (€234,789) represented a further nine per cent of the total value of the listed debts.

30. As to the voting process, according to the minutes of the meeting, at the commencement of the meeting the creditors present were informed that Mr. Weldon had been nominated as liquidator at the earlier EGM of the Company. As regards Mr. Leahy, the minutes record that it was "proposed that the resolution to be voted on should be that [Mr. Leahy] be appointed Liquidator of the Company as this was the creditors' nomination". The result of the vote was recorded as follows:

> "€391,350 was admitted as votes against the Creditors resolution. €112,294 was admitted as votes in favour of the resolution."

It was then recorded that Mr. Kirk, which I assume should have been a reference to Mr. Leahy or Mr. Boino, advised that he did not accept the reason given for not admitting the proxies of the applicant.

31. If the Chairman had made a different decision on each of the issues raised by the applicant, the implications of the outcome may be partially tabulated as follows:

Vote per value	**Against** **€**	**For** **€**
Outcome of vote per decisions made	391,350	112,294
Adjusted if dual proxy forms had not been disallowed	71,676	477,520
Total	**463,026**	**589,814**
Adjusted if improperly executed corporate proxies disallowed	(110,518)	
Total	**352,508**	**589,814**

The outcome reflected in that table is based on evidence which must be regarded as uncontradicted. The figure included for the applicant's debt is the unsecured value of its debt.

32. That table reflects the outcome only if different decisions had been made on the issues raised in the first ground and the second ground. As regards the third ground, although the evidence strongly suggests that Mr. Kirk, as the proxy of the Polish companies whose proxy forms were sent by fax, would have voted for the appointment of Mr. Leahy as liquidator, on the state of the evidence, as they have not participated in these proceedings, either as parties or by offering affidavit evidence, it cannot be assumed that that would have been the case. However, while it is not possible to conclude with certainty that the majority in value of the votes would have been for the appointment of Mr. Leahy as liquidator, if the faxed proxies were admitted, even in the unlikely event that the proxy voted against the appointment of Mr. Leahy, the total vote against (€587,297) would have been slightly less than the vote for Mr. Leahy, as shown in the bottom line of the table.

Applicant entitled to relief?
33. The position of the Company is that, if Mr. Weldon were to be replaced as liquidator, duplication of work and wastage of costs would inevitably follow and that would be detrimental to the Company's creditor base as a whole. Mr. Weldon has sworn an affidavit to which he has attached a schedule outlining the tasks he has undertaken since his appointment as liquidator on 14th January, 2013. The position of the applicant is that that is no answer to the failure to comply with the statutory and regulatory requirements in the appointment of the liquidator. Further, even if a replacement liquidator is appointed, the benefit of the work carried out by Mr. Weldon will have enured for the benefit of the creditors.

34. The Company also advanced the argument that the applicant is not suffering any prejudice in the light of Mr. Weldon's appointment, nor will it suffer any prejudice if he continues to act as liquidator. Counsel for the applicant submitted that prejudice is not a factor which the Court should have regard to in determining whether the applicant should be granted relief. He submitted that, in any event, if the Court was to have regard to the prejudice argument, it should be borne in mind that it is not disputed that the majority in value of the creditors did not want Mr. Weldon to be the liquidator of the Company.

35. It is only fair to record that from the outset, the applicant has not suggested that Mr. Weldon, who is an experienced insolvency practitioner, is not an appropriate person to be the liquidator of the Company. In his grounding affidavit, Mr. Boino averred that the applicant does not seek to cast any aspersions on the professionalism or independence of Mr. Weldon. Mr. Weldon, in his own affidavit, has averred that he is independent and that he has never acted for or advised the Company in any capacity prior to his appointment as liquidator. He also pointed out that he is obliged to fully investigate the conduct of the directors of the Company and to prepare and submit a s. 56 report to the Office of the Director of Corporate Enforcement.

36. The application of s. 267 of the Act of 1963 and Part X of Order 74 of the Rules has been addressed on quite a few occasions by the High Court in recent years, commencing with the judgment of O'Neill J*. In the matter of Hayes Homes Limited (in Voluntary Liquidation)* [2004] IEHC 124, where O'Neill J. observed, apropos of the rule under consideration by him in that case as follows:

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

Similarly, rule 75, which stipulates that every instrument of proxy shall be in either the Form No. 21 or the Form No. 22, and, *inter alia*, regulates the manner of execution on behalf of a company, and rule 76, which imposes a requirement on the company to furnish a general and a special form of proxy to each creditor with the notice summoning the meeting under s. 266, are expressed in mandatory terms. In the last decade, the High Court, in line with the observations of O'Neill J., has applied the mandatory requirements of Order 74 strictly.

37. The clear intention of the Oireachtas in enacting s. 267, as amended, is that the majority in value of the creditors, rather than the members of the company, should have the prerogative of choosing the person who is to act as liquidator in the winding up. Although subs. (3) of s. 267 was introduced since the coming into force of Order 74, as regards the issues which have arisen in this case, and, in particular, what I have referred to as the first ground and the second ground, the requirements of the relevant rules in Order 74 are appropriate to, and compliance with them should have the effect of, implementing the intention of the Oireachtas.

38. Accordingly, I am satisfied that the applicant is entitled to an order setting aside the decision of the Chairman not to allow Mr. Boino, as the applicant's general proxy, to vote for the appointment of Mr. Leahy as liquidator at the meeting on 14th January, 2013. I am also satisfied that the applicant is entitled to an order setting aside the decision of the Chairman to allow proxies of the three companies, other than Corrib Foods Limited, mentioned in the notice of motion to vote in favour of the Company's nominee for liquidator at the meeting.

Form of redress

39. As to the form of redress which the Court should provide to reverse the misconduct of the voting process in relation to the appointment of a liquidator at the meeting, I have given careful consideration to whether the proper course is the course adopted by this Court in *Re Stainless Pipeline Supplies (Irl.) Limited, Tyner v. Lafferty* [2010] 3 I.R. 821, where the Court directed that a further creditors' meeting be summoned, or, alternatively, the approach adopted by this Court in *Re Jim Murnane Limited (in liquidation)* [2010] 3 I.R. 468, where the applicant creditors' nominee was substituted as liquidator, in place of the person purported to be appointed at the creditors' meeting.

40. I have come to the conclusion that in this case the proper course is to make an order by way of declaration substituting Mr. Leahy as liquidator in the place of Mr. Weldon pursuant to s. 267 for three reasons. First, as the table in paragraph 31 clearly illustrates, if Mr. Boino had been allowed to vote, the value of the votes for Mr. Leahy would have been €589,814, which was considerably in excess of the value of the votes against the appointment of Mr. Leahy, when adjusted upwards to take into account the value of the debts of the six other creditors who submitted dual proxy forms, which comes to €463,026. However, the gap between the votes for and against the appointment of Mr. Leahy is considerably widened when the value of the debts of the three corporate creditors whose proxies in favour of the Chairman were not properly executed, which amount to €110,518, are deducted, as the table illustrates. The gap then is €237,306. Secondly, the imponderable outcome arising from the Chairman's failure to admit the faxed proxies is attributable to the Chairman's incorrect decision. Thirdly, as the statement of affairs as at 14th January, 2013 disclosed, the Company is wholly insolvent. It would not be in the interests of the general body of creditors if further costs and expense were to be incurred in giving notice of, advertising, and holding a further creditors' meeting, particularly when, unusually, the outcome is reasonably predictable.

41. I am satisfied that to declare Mr. Leahy to be liquidator in place of Mr. Weldon is wholly consistent with the intention of the Oireachtas in enacting s. 267 as a whole, notwithstanding that, having regard to what transpired at the creditors' meeting, the effect of the Court intervention at the behest of the applicant is not precisely in the terms of subs. (2) of s. 267. If the Chairman had not misconducted the meeting, Mr. Leahy would have been the liquidator of the Company ab initio by virtue of s. 267(1).

Orders

42. There will be orders in the terms of the reliefs sought in paragraphs 1 and 2 of the notice of motion and there will be a declaration pursuant to s. 267 that Mr. Leahy is appointed as liquidator of the Company in place of Mr. Weldon.

43. The Court will hear any further submissions the parties want to make in relation to how Mr. Weldon is to be remunerated for the work he has carried out to date, which I have no doubt was for the benefit of the Company in liquidation.

Comment

44. Having given a lot of consideration in recent years to the practical application of s. 267, in conjunction with Order 74 of the Rules, I am of the view that consideration should be given by the appropriate arm of the State to whether the law needs to be clarified so that all of the eventualities which may happen at creditors' meetings are addressed. In this case, what occurred was that, by reason of the misconduct of the vote on the resolution to appoint Mr. Leahy as liquidator, he was not nominated by the creditors, as he should have been. It seems to me that this eventuality should be expressly addressed in the legislation.