Neutral Citation Number: [2011] IEHC 420

THE HIGH COURT

2011 376 COS

IN THE MATTER OF CED CONSTRUCTION LIMITED (IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

BETWEEN

WINTHROP ENGINEERING AND CONTRACTING LIMITED

APPLICANT

AND

CED CONSTRUCTION LIMITED (IN VOLUNTARY LIQUIDATION) AND MICHEAL HENEGHAN

RESPONDENTS

Judgment of Miss Justice Laffoy delivered on 15th July, 2011

1. Statutory/Rules framework

1.1 As the outcome of this application will turn on how the Court interprets some very technical provisions of the Companies Act 1963 (the Act of 1963) and the Rules of the Superior Courts 1986 (the Rules), as amended, I consider that, as a prelude to outlining the factual background to the application and the orders which the applicant seeks on the application, it is useful to outline the relevant statutory provisions and rules.

1.2 Section 266 of the Act of 1963, which is one of the provisions applicable to a creditors' voluntary winding up, deals with the summoning of a meeting of the creditors of the company to be held subsequent to the members' meeting at which the resolution for voluntary winding up is proposed, the giving of notice of that meeting to the creditors of the company and the advertising of the meeting. The section provides that the directors of the company shall cause a full statement of the position of the company's affairs to be laid before the meeting of creditors and that they appoint one of their number to preside at the meeting.

1.3 Section 267 deals with the appointment of a liquidator in a creditors' voluntary winding up. Sub-section (1) 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 the liquidator."

Sub-section (2) 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."

Section 276A also deals with the appointment of a liquidator and provides that "the appointment of a liquidator" shall be of no effect unless "the person nominated" has, prior to his appointment, signified his written consent to the appointment. Sub-section (2) of s. 276A envisages the chairman of the meeting notifying the liquidator in writing of his appointment, unless the liquidator or his duly authorised representative is present at the meeting where the appointment is made.

1.4 Section 312 of the Act of 1963 extended the power conferred by s. 68 of the Courts of Justice Act 1936 on the Rules Committee of the Superior Courts to the making of rules in respect of winding up of companies, whether by the Court or voluntarily. That is the source of the authority of the Rules Committee to make the rules to be found in Order 74 of the Rules, which govern the conduct of, *inter alia*, meetings in the course of a voluntary winding up, including a meeting convened under s. 266. The provisions of the Rules by which it is argued the issues in this case are to be determined require to be considered in some detail.

1.5 Rule 56 provides that, except where and so far as the nature of the subject matter or the context may otherwise require, rules 58 to 83 shall apply (inclusive) to, *inter alia*, "a voluntary liquidation meeting".

1.6 Rule 66, sub-rule (1) regulates the quorum for a properly constituted meeting and provides as follows:

> "A meeting may not act for any purpose, except the election of a chairman and the adjournment of the meeting, unless there are present or represented thereat in the case of a creditors' meeting at least three creditors entitled to vote or all the creditors entitled to vote if the number entitled to vote shall not exceed three … ."

Sub-rule (2) addresses the situation where within fifteen minutes from the time appointed for the meeting a quorum of creditors is not present or represented. In that case it is provided that the meeting shall be adjourned to the same day in the following week at the same time and place or to such other day or time or place that the chairman may appoint, subject to the proviso that the day appointed shall not be less than seven nor more that twenty one days from the date from which the meeting was adjourned.

1.7 Rule 67 deals first with a meeting of creditors pursuant to s. 232 of the Act of 1963 (a meeting of creditors in a Court winding up to determine whether a committee of inspection should be appointed), and goes on to provide:

> "In the case of any other Court meeting of creditors or a Liquidator's meeting of creditors, a person shall not be entitled to vote as a creditor unless he has lodged with the Liquidator a proof of the debt which he claims to be due to him from the company and such proof has been admitted wholly or in part before the date on which the meeting is held; … . This rule shall not apply to any creditors or class of creditors who by virtue of the Act or this Order are not required to prove their debts or to any voluntary liquidation meeting."

In *Re Hayes Homes Ltd.* [2004] IEHC 253, O'Neill J. stated as follows:

> "Much attention was focused on Order 74 Rule 67 as quoted above and reliance was placed upon this by counsel for the petitioner to submit, that what was required to be proved was the debt, to be entitled to vote. It was submitted that this rule applied because of the provisions of Rule 56.
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> Reading these rules in a literal way could easily lead to a conclusion particularly having regard to the last sentence of Rule 67 that proof of debt was not a requirement at a meeting convened under s. 266 of the Companies Act 1963 as amended.
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> However such a construction would appear to me to lead to a strange and anomalous result. Clearly at a meeting of creditors by definition, the primary entitlement to be there and to participate, is being a creditor. Hence unless the debt is already admitted, proof of the debt would necessarily be required to entitle the person to participate in the meeting and in particular vote on a resolution to appoint a liquidator. I am satisfied therefore that Order 74 Rule 67 must apply in these circumstances.
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> In this case the petitioner's debt was admitted and was listed amongst the debt[s] set out in the Statement of Affairs."

1.8 Rules 74 to 83 deal with proxies.

1.9 Rule 74, insofar as is relevant for present purposes, provides as follows:

> "A creditor … may vote either in person or by proxy. Where a person is authorised in manner provided by s. 139 to represent a corporation at any meeting of creditors … , such person shall produce to the Liquidator or other 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."

Section 139 of the Act of 1963 referred to in rule 74 deals with the representation of bodies corporate at meetings of companies and of creditors. As regards a creditor company, sub-section (1)(b) provides that it may –

> "by resolution of its directors or other governing body authorise such person as it thinks fit to act as its representative at any meeting of any creditors of the company held in pursuance of this Act or of any rules made thereunder …."

Sub-section (2) provides that a person authorised as aforesaid shall be entitled to exercise the same powers on behalf of the body corporate which he represents as that body corporate could exercise if it were an individual member, creditor or holder of debentures of the company.

1.10 Rule 75 provides that every instrument of proxy shall be in either of the two forms prescribed in the Rules.

1.11 Rule 82(1), insofar as is relevant for present purposes, provides:

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

O'Neill J. dealt with the requirements of rule 82(1) in *Re Hayes Homes Ltd.* where he stated:

> "The question [which] then arises is whether or not the failure to have lodged the instrument of proxy pursuant to Order 74 Rule 82 (1) had the effect of disenfranchising Mr. Maloney.
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> I am satisfied on the evidence that for whatever reasons the instrument of proxy did not arrive at the registered office of the company in time. I am satisfied as a matter of probability that the instrument of proxy was sent by ordinary prepaid post and not by registered post and that as of a (*sic*) time of the holding of the meeting had not arrived in the registered office.
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> Order 74 Rule 82 (1) is expressed in mandatory term[s]. Were I to conclude that mere proof of debt, where that debt is not admitted 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."

1.12 Rule 82(3) provides:

> "Where a company is a creditor, any person who is duly authorised under the seal of such company to act generally on behalf of such company at meetings of creditors … may fill in and sign the instrument of proxy on such company's behalf and appoint himself to be such company's proxy, and the instrument of proxy so filled in and signed by such person shall be received and dealt with as a proxy of such company."

1.13 As is clear from the statutory provisions and rules outlined above, there are a number of means available to a corporate creditor to have its wishes in relation to the appointment of the liquidator taken into account at a s. 266 convened meeting. It may act through a person duly authorised in the manner prescribed in s. 139(1)(b), in which case the corporate creditor is deemed to be at the meeting in person, but, in compliance with rule 74, the authorised person must produce a copy of the relevant resolution either under seal or certified by the secretary or director of the corporation. Alternatively, the corporate creditor may vote by proxy, but, in that event, it must comply with the mandatory requirements of rule 82(1) in relation to lodging the instrument of proxy not later than

4pm on the previous day. Further, the instrument must be in one of the two forms prescribed in rule 75, which means that in the case of a corporation 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 stated (*c.f. Re Stainless Pipeline Supplies (Irl.) Ltd. (In Voluntary Liquidation)* [2010] IEHC 318). Finally, the option provided for in rule 82(3) can be availed of.

2. Factual background

2.1 On 3rd June, 2011 the first respondent (the company) served notice pursuant to s. 266 on the applicant that a meeting of creditors of the company would take place on 15th June, 2011 at 9am for the purposes mentioned in ss. 267 and 268 of the Act of 1963. Two blank forms of proxy were included, which complied with rule 75. The notice was signed on behalf of the board of the company by the second named respondent (Mr. Heneghan).

2.2 The statement of affairs of the company as at 15th June, 2011 produced at the creditors' meeting on 15th June, 2011 was, I venture to suggest, unusual in the current economic climate given the low level of insolvency disclosed. It disclosed that the company had debtors (which I understand to refer to one debtor, First Ireland Ltd. referred to below) with a book value of €47,123 and an estimated realisable value of €1,130 and one creditor, the applicant, being an unsecured creditor in the amount of €37,457. The total deficiency was stated to be €34,603.

2.3 The applicant's debt arose out of a building agreement dated 22nd February, 2008 made, as I understand it, between the company, as main contractor, and the applicant, as sub-contractor, for the carrying out by the applicant sub-contractor of the mechanical and electrical fit out at the offices of First Ireland Ltd. at Parkgate Street, Dublin, 8. The debt appearing in the statement of affairs represents the sum claimed by the applicant as being the balance due on foot of the final invoice submitted to the company on 22nd April, 2009. However, the applicant also has a claim against the company for unliquidated damages for alleged breach of contract on the part of the company, which is the subject of plenary proceedings in this Court (Record No. 2010/10720P), which were initiated by plenary summons which issued on 19th November, 2010. In the statement of claim delivered on 6th April, 2011 the special damages claimed aggregate €175,392.52. The minute of the creditors' meeting held on 15th June, 2011 exhibited by Mr. Heneghan in his replying affidavit sworn on 6th July, 2011 discloses that it is First Ireland Ltd. which is the debtor of the company and that there is "a large counter claim being prepared by First Ireland in respect of faulty supply", as I understand it, arising out of the works carried out by the applicant.

2.4 It also emerges from the affidavits filed on this application that until recently there was a connection at both shareholder level and director level between the company and First Ireland Ltd., which justifies concern on the part of the applicant as to the eagerness of the company to pursue its only debtor.

2.5 At 8.30am on the morning of 15th June, 2011, at an extraordinary general meeting of the company, it was resolved that, it having been proven to the satisfaction of the meeting that the company could not, by reason of its liabilities, continue in business, the company be wound up voluntarily and that Mr. Barry Forrest be appointed liquidator for the purposes of such winding up. It is important to stress that, on this application, the applicant has made it clear that no criticism whatsoever is made of Mr. Forrest in his capacity as the nominee of the members of the company, it being understood that Mr. Forrest is an experienced insolvency practitioner with a very high professional standing.

2.6 The Court has two sources of information in relation to what happened at the creditors' meeting of 15th June, 2011. One is the minute of the meeting exhibited in the replying affidavit of Mr. Heneghan and the other is a note prepared by one of the applicant's representatives at the meeting, which is exhibited in the grounding affidavit. There is a slight degree of conflict between the two sources but I am satisfied it is not material to the issues the Court has to resolve. Mr. Heneghan was the chairman of the meeting. He was attended by Mr. Declan Clancy who, it appears, is an employee of the firm of Forrest & Co. Mr. Barry English, a director of the applicant, who has sworn two affidavits on this application, the grounding affidavit sworn on 28th June, 2011 and a supplemental affidavit sworn on 8th July, 2011, represented the applicant, the only creditor of the company. Mr. English was accompanied by a colleague, who prepared the note referred to above.

2.7 The controversy on this application surrounds the appointment of Mr. Forrest as liquidator. The early part of the meeting was taken up with questions and answers in relation to the statement of affairs and the applicant's claim. It is obvious that Mr. Heneghan, as chairman, accepted Mr. English as the representative of the applicant. The minute of the meeting records what happened when the meeting moved to the appointment of a liquidator as follows:

> "[Mr. Heneghan] advised that Barry Forrest had been duly appointed liquidator of the company, following a meeting of members held this morning. He enquired from the creditors present whether there was any other nominations for liquidator. Barry English advised that he would like to nominate Stephen (*sic*) O'Halloran of Hopkins & O'Halloran to act as liquidator of the company. [Mr.] Heneghan advised that there was no proxy received from [the applicant] in respect of this meeting and as such they had no entitlement to vote at the meeting. Notwithstanding this, he stated that he had no consent to act from Stephen O'Halloran as liquidator of the company and it would be essential that any nomination would be supported not only by consent to act but by the presence of the proposed liquidator. On the basis that none of those had been received, he was not prepared to accept the nomination of Stephen O'Halloran from the floor."

On that basis, the view expressed in the minute was that Mr. Forrest "was confirmed to act as liquidator of the company". The meeting then went on to deal with the question of a committee of inspection. Mr. English was nominated on behalf of the applicant and Mr. Heneghan was nominated to represent the company on the committee of inspection.

2.8 On 20th June, 2011 notice of the appointment of Mr. Forrest as liquidator (Form E2) was filed in the Companies Registration Office.

2.9 Immediately following the meeting, on 15th June, 2011 correspondence commenced from the applicant's solicitors challenging the appointment of Mr. Forrest as liquidator and seeking to have the creditors' meeting adjourned.

2.10 There is before the Court a consent to act as liquidator to the company signed by Steven O'Halloran of Hopkins O'Halloran Group, which is dated 28th June, 2011. It was made clear to the Court that the applicant is prepared to fund, if required, "as a matter of practice", the investigation by Mr. O'Halloran, if he is appointed liquidator, of any claim of the company against First Ireland,

and also the enforcement of any such claim.

2.11 These proceedings were initiated by a notice of motion which issued on 28th June, 2011.

3. The reliefs claimed
3.1 No specific jurisdiction is invoked by the applicant in the notice of motion and, in particular, no specific statutory jurisdiction is invoked. Various reliefs are sought, some being in the nature of alternative relief.

3.2 The reliefs sought, in the order in which they are sought, are as follows:

> (a) a declaration that the applicant was duly present at the creditors' meeting and was entitled to nominate a candidate to the position of liquidator and to vote on the question of such nomination;
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> (b) a declaration that the nomination of Mr. O'Halloran by the representatives of the applicant was duly made;
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> (c) a declaration that Mr. O'Halloran is and was at all material times from the time of the said creditors' meeting the liquidator of the company;
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> (d) in the alternative, to the extent that the nominee of the creditors, Mr. O'Halloran, had not prior to his nomination signified his consent in writing, an order directing the chairman of the creditors' meeting to adjourn the meeting pending the receipt of the consent of Mr. O'Halloran;
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> (e) in the alternative, to the extent that the applicant was not duly present at the creditors' meeting in person or by proxy, a declaration that the meeting was inquorate and that the chairman of the said meeting was obliged to adjourn the meeting as provided in the Rules;
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> (f) an order directing Mr. Heneghan to adjourn the meeting to such date as the Court may direct; and
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> (g) by reason of the failure of the company to recognise the valid presence of the applicant at the creditors' meeting and/or by reason of the failure of the chairman to adjourn the meeting as requested and/or by reason of the breach by the chairman of his duties as such, an order appointing Mr. O'Halloran as liquidator and an order removing Mr. Forrest.

3.3 In relation to the reliefs outlined above, a number of observations are apt. First, if the granting of the relief at (d) was the only issue, as of now, it is moot, because the consent of Mr. O'Halloran has been obtained. Secondly, in relation to the relief at (g), jurisdiction is conferred on the Court by s. 277(2) of the Act of 1963 to remove a liquidator and appoint another liquidator "on cause shown". The Court's discretionary jurisdiction under s. 277 was not addressed at the hearing of the application and a case was not made that cause has been shown that Mr. Forrest should be removed. Indeed, it is clear from the grounding affidavit of Mr. English that Mr. Forrest was not joined as a respondent to this application to save costs and to focus attention on the issues raised, which, it is contended, arise from the conduct of the meeting by the chairman, Mr. Heneghan. Accordingly, I am of the view that, if Mr. Forrest was properly appointed at the meeting of 15th June, 2011, it would not be appropriate for the Court to consider removing him on this application.

4. Conclusions
4.1 Counsel for the applicant referred the Court to one authority: in *Re Duomatic Ltd.* [1969] 2 Ch. 365. I am not satisfied that the *ratio decidendi* of that case has any relevance to the issues to be determined in this case. There, Buckley J. held that, where it could be shown that all shareholders with a right to attend and vote at a general meeting had assented to some matter which a general meeting of the company could carry into effect, the assent was as binding as a resolution in general meeting. That is a well recognised principle in this jurisdiction, but it has no bearing on the conduct of a creditors' meeting convened pursuant to s. 266, which is governed by the strict mandatory provisions of the Act of 1963 and by the Rules.

4.2 I propose addressing the reliefs claimed at paragraphs (a), (b) and (c) first. In essence, the proposition advanced on behalf of the applicant is that Mr. English, as the representative of the creditor, indeed the only creditor, was entitled at the meeting on 15th June, 2011 to nominate Mr. O'Halloran, he did nominate Mr. O'Halloran, and, by operation of law (s. 267(1)), Mr. O'Halloran is the liquidator. In determining whether that proposition is correct, in my view, the following factors are relevant:

> (i) Whether or not rule 67 applied to the meeting, and I consider that it is not necessary to determine that issue, the applicant had the status of a creditor of the company at the time of the meeting. The applicant was notified of the proposed meeting in accordance with s. 266 and it was listed as a creditor in the statement of affairs. It was undoubtedly entitled to be represented, to be heard, and to vote at the meeting, subject to compliance with the statutory and regulatory requirements in relation to representation and voting.
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> (ii) However the applicant did not avail of any of the options open to the applicant to be properly represented at the meeting and to be entitled to vote. First, it was not represented at the meeting by a person authorised in accordance with s. 139 and apparently did not produce, and was not asked for, the evidence of such authority as required by rule 74. Secondly, it was not represented by a person who had been properly appointed as its proxy in accordance with rule 74 and rule 75 and, in any event, it had not complied with the mandatory requirement of rule 82(1) in relation to lodgment of the instrument of proxy with the company the previous day. Thirdly, even if Mr. English could have availed of the means of representation provided for in rule 82(3), and there is no evidence that he could, the failure to comply with rule 82(1) barred him in any event from availing of that option.
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> (iii) The written consent of Mr. O'Halloran to his appointment as liquidator was not available at the meeting. The appointment of a liquidator, where different persons are nominated by the members at their meeting and by the creditors at the creditors' meeting, takes place by operation of law, that is to say, by operation of s. 267(1). As a matter of construction of that provision in conjunction with s. 276A, in my view, the written consent of the proposed liquidator must be available at the meeting at which the nomination is made. Any other interpretation of those provisions, on the basis that there is a distinction between nomination and appointment, would render the achievement of the purpose which underlies s. 276A nugatory. As is pointed out in MacCann and Courtney on the *Companies Acts 1963 – 2009*, the objective of s. 276A is to obviate the position which prevailed before its enactment in 1990 that the appointment could be foisted upon an unwilling nominee. In my view, it is not likely that the Oireachtas, in enacting s. 276A, intended that the written consent of the nominee could be obtained after the creditors' meeting, because the "interregnum" which

would ensue is not regulated. It is implicit in s. 276A, however, that the presence of the nominee of the creditor at the meeting is not necessary.

4.3 For the reasons outlined, I am of the view that the applicant failed to comply with the statutory provisions and the provisions of the Rules governing the manner in which it was entitled to be represented and vote at the creditors' meeting on 15th June, 2011 and that it failed to comply with s. 276A. Therefore, I have come to the conclusion that the applicant is not entitled to any of the reliefs claimed at (a), (b) or (c). Even though Mr. Heneghan obviously recognised Mr. English as being the representative of the applicant at the meeting, that did not act as an estoppel against Mr. Heneghan from insisting on compliance with the relevant provisions of the Act and of the Rules. On the contrary, in my view, even if Mr. Heneghan was disposed to waive those requirements, he could not have lawfully done so, even though, at the time of the meeting, only one creditor of the company was recognised.

4.4 It remains to consider whether the applicant is entitled to the relief at paragraph (e) or paragraph (f). The single issue to which the claim for those reliefs gives rise is whether the meeting was quorate. Rule 66 is clear and unequivocal on this point. On its application to the facts, the meeting was inquorate unless the applicant, who was the only creditor of the company and was an unsecured creditor who was entitled to vote, was "present or represented". In the context of the application of rule 66, in my view, representation of a corporate creditor must mean representation in accordance with s. 139 and compliance with rule 74, or representation by a person appointed proxy in accordance with rules 74 and 75 or representation in accordance with rule 82(3). I have no doubt that the primary obligation of ensuring that it is properly represented by one or other of those means rests on the company. However, there must be a secondary obligation on the chairman of the meeting to inquire whether a corporate creditor is properly represented because the duty of ensuring that the meeting is quorate rests on the chairman.

4.5 The position which prevailed at the meeting on 15th June, 2011 was that the applicant could only have been represented by one or other of those means. At the hearing of the application counsel for the company and Mr. Heneghan contended that the applicant was trying "to have its cake and eat it". In reality, it is Mr. Heneghan on behalf of the company who has adopted inconsistent positions in contending that the manner in which the applicant was represented did not entitle it to nominate a liquidator or vote (the strict approach) but did count in deciding whether the meeting was quorate (the pragmatic approach), although it has to be recognised that the applicant's default went beyond merely its failure to be properly represented. I have come to the conclusion that as the company's only creditor was not properly represented at the meeting, the meeting was not quorate.

4.6 I have reached that conclusion on the basis of the interpretation and application of rule 66 outlined in the previous paragraphs. However, I agree with the view expressed by counsel for the applicant that any other decision would invert the statutory logic. The outcome of that conclusion, that the meeting will have to be resumed and that the applicant will get an opportunity to be properly represented at it in compliance with the requirements of the Act and the Rules, is in line with the rationale underlying s. 267. That section recognises that in a creditors' voluntary winding up of an insolvent company there is an inherent conflict between the members, on the one hand, and the creditors, on the other hand, and that the nomination of a liquidator by the members, who through the directors were at the helm of the company when it sailed into insolvency, should be overridden by the choice of liquidator by the creditors. The factual background of this case, in my view, which clearly signposts actual or potential conflicts surrounding the only matter of substance which will be addressed in the course of the liquidation (the applicant's claim against the company and any claim and counterclaim between the company and First Ireland Ltd.) emphasises the need for a principled approach to the application of s. 267 and the rules governing the convening and conduct of a s. 266 convened meeting. The existence of various remedies which are available to a creditor in a voluntary winding up, which counsel for the company and Mr. Heneghan submitted would protect the applicant, for example, participation by a representative of the company in the committee of inspection or an application to Court under s. 280 of the Act of 1963, is no answer to the failure to conduct the meeting in the manner required by law.

5. Order

5.1 There will be:

(a) a declaration that the meeting of creditors on 15th June, 2011 was inquorate and that the chairman should have adjourned the meeting in accordance with the requirement of rule 66 of Order 74 of the Rules; and

(b) an order directing that the said meeting be resumed not later than 29th July, 2011.

5.2 I will hear the submissions of counsel for the parties on the issue of costs. However, it is indisputable that the primary reason that this application was necessary was because the officers of the applicant did not take the steps necessary to ensure that the applicant would be properly represented and would be entitled to nominate a liquidator and vote at the meeting on 15th June, 2011 before that meeting. Having said that, if Mr. Heneghan had performed his function properly, the meeting would have been adjourned and these proceedings would not have been necessary.