Neutral Citation Number: [2008] IEHC 43

THE HIGH COURT

[2007 No. 484 COS]

IN THE MATTER OF McENANEY CONSTRUCTION LIMITED
(UNDER THE PROTECTION OF THE COURT)
AND IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT, 1990

Judgment of Ms. Justice Finlay Geoghegan delivered the 25th day of February, 2008.

1. On 11th January, 2008, by order of the High Court, Mr. Michael McAteer was appointed Examiner of McEnaney Construction Limited ("the Company") for the purpose of examining the state of the Company's affairs and performing such duties in relation to the Company as are imposed by or under the Companies (Amendment) Act, 1990 ("the Act").

2. The Examiner, as required by s. 18 of the Act, formulated proposals for a scheme of arrangement in relation to the Company, held the necessary meetings of members and creditors and made a report thereon to the Court on 5th February, 2008, recommending confirmation of the proposals.

3. The report of the Examiner, with the proposal for a scheme of arrangement, was set down for consideration by the Court pursuant to s. 24 of the Act on 12th February, 2008.

4. At the hearing before me on 12th February, no person appeared to object to the confirmation of the proposals for the scheme of arrangement and I was not precluded from confirming the proposals by reason of any of the matters specified in s. 24(4) of the Act.

5. However, there were two distinct reasons for which I was unwilling to confirm the proposals for the scheme of arrangement. Having raised the issues with counsel for the Examiner, in the course of the hearing, and considered his submissions thereon, I indicated that I could not confirm the proposals for the scheme of arrangement as proposed and adjourned the hearing to allow the Examiner, with his counsel and solicitor, to consider whether the difficulties could be overcome by modifications to the scheme of arrangement.

6. On 14th February, 2008, at the adjourned hearing, the Examiner presented modified proposals for a scheme of arrangement which addressed the issues raised by the Court and I confirmed the scheme of arrangement. The modified proposals did not alter the substance of the scheme.

7. As the difficulties presented by the original proposals for the scheme of arrangement are matters which have previously occurred and may re-occur, I indicated that I would set out in writing the reasons for which I considered I could not confirm the original proposals. This judgment is for that purpose.

8. The first issue was the proposed cancellation of all 100 issued ordinary shares in the Company at paragraph 3.1.2 of the scheme of arrangement and, in substance, repeated in paragraph 5.1. The Company was a single-member company. Mr. Sean McEnaney held all 100 ordinary shares of €1.26973 each credited as fully paid up. The scheme of arrangement was predicated on "the Investor" making available €67,500,000 to the Company, secured on the Company's assets. The Examiner had entered into an agreement with the Investor, Paragraph 3.1.2 of the scheme of arrangement provided:

> "The Company's Issued Share Capital of 100 ordinary shares will be cancelled and 100 ordinary shares will be issued to the Investor (75 ordinary shares) and Sean McEnaney (25 ordinary shares) at the Effective Date."

9. This provision was, in substance, repeated in Clause 5.1, though with the slight variation that the existing issued share capital of 100 ordinary shares "will be deemed to be cancelled". I propose ignoring this variation as clearly it is not possible to "deem" shares to be cancelled.

10. The proposal, therefore, was that the Company would, as part of the scheme of arrangement, cancel its existing 100 issued ordinary shares. There was no indication, in the proposals, of the steps intended to be taken by the Company to effect the cancellation of its shares. Upon inquiry by the Court, counsel for the Examiner indicated that if the Court confirmed the proposals, he would seek an order from the Court pursuant to s. 24(8) of the Act that the existing 100 issued ordinary shares in the Company be cancelled.

11. Section 24(8) of the Act provides:

> "Where the court confirms proposals under this section it may make such orders for the implementation of its decision as it deems fit."

12. I formed the view that:

> 1. The Court should not confirm proposals which include a provision that the Company cancel issued paid-up shares unless the consequent reduction of capital is expressly authorised by the Companies Acts, 1963 – 2006; and
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> 2. Section 24(8) of the Act does not give the Court jurisdiction to make an order that the issued shares in the capital of the Company be cancelled .

13. My reasons for so concluding are as follows. The effect of the cancellation of issued paid-up shares in the capital of a company limited by shares is to reduce the capital of the company. Section 72(1) of the Companies Act, 1963 (as amended by s. 231(1)(c) of the Companies Act, 1990) provides:

> "Except in so far as this Act expressly permits, it shall not be lawful for a company limited by shares or a company limited by guarantee and having a share capital to reduce its share capital in any way."

14. The Companies (Amendment) Act, 1990 contains no express provision enabling a company to whom an examiner is appointed under that Act to reduce its share capital as part of a scheme of arrangement.

15. The absence of such express provision is to be contrasted with certain other provisions of the Companies (Amendment) Act, 1990 which expressly permit a company to which an examiner is appointed to do matters which it would not otherwise be authorised to do. One such provision is s. 20, which enables a company repudiate a contract under certain conditions with the approval of the Court. Also, s. 24(7) (set out below) expressly provides for the taking effect of alterations in the memorandum and articles of association of a company specified in the proposals "notwithstanding any other provisions of the Companies Acts". No analogous provision exists in

relation to alterations in the share capital of a company proposed as part of a scheme of arrangement. .

16. Accordingly, if a company wishes as part of a scheme of arrangement, to reduce its share capital, then it must do so in accordance with s. 72(1) of the Act of 1963, pursuant to a provision of the Companies Act which expressly so permits. Section 72(2)(b) of the Act of 1963 is one such provision which might apply to a company in a financial situation which required the appointment of an examiner. This was not sought to be operated in the scheme of arrangement herein.

17. On the facts herein, the provision in the scheme of arrangement that the Company cancel its issued shares on the Effective Date, in effect, requires the Company to do something which appears to be unlawful having regard to s. 72(1) of the Act of 1963.

18. Section 24(5) of the Act provides that where the Court confirms proposals for a scheme of arrangement, such proposals are binding *inter alia* on all the members affected by the proposal and also on the company. If the Court were to confirm proposals containing a provision that the Company cancel its issued shares (and thereby reduce its share capital), it would be purporting to impose an obligation on the Company to do something which is unlawful having regard to s. 72(1). The Court cannot make an order which has such an effect. Even if the proposals for the scheme of arrangement were drafted in such a way that the obligation to cancel the shares was not expressly imposed on the Company, it does not appear to me that the Court has jurisdiction under s. 24(8) of the Act to make an order that issued shares credited as fully paid up in the capital of a company limited by shares be cancelled. If it did so, the Court would be assuming a jurisdiction to order that a step be taken, i.e. the shares be cancelled, which the Company itself has no power to do and is expressly prohibited by s. 72(1). Notwithstanding the apparently wide discretion given to the Court under s. 24(8), it does not appear to me to include the doing of an act which, if done by the Company, would be unlawful. Further, any such order of the Court would have to direct that some person or body cancel the shares. The obvious person to do this is the Company, which, again, comes back to the situation of the Court imposing on the Company an obligation to do something which is unlawful pursuant to s. 72(1) of the Act of 1963.

19. Happily, on the facts of this scheme of arrangement, the issued share capital was very small, i.e. €126.9738. The intention of the scheme of arrangement was that, subsequent to the Effective Date, the Investor would hold 75% of the issued share capital and Mr. McEnaney, 25%. It was possible to achieve this by modifying the scheme of arrangement so as to delete all references to cancellation of the existing 100 ordinary shares and to provide for the issue to the Investor of 300 ordinary shares at par, credited and fully paid up, in consideration of €380.92.

20. A similar issue arose in December, 2007, in the matter of *Euro Iompu Teoranta (in examination)* [2007] 372 COS In that instance, the examiner had proposed the cancellation of redeemable preference shares. For the same reasons as expressed herein, I reached a conclusion that I could not confirm the scheme of arrangement as originally proposed. In that instance, the examiner was able to modify the proposals so as to provide for the redemption of the issued redeemable preference shares for a total consideration of €20 out of the proceeds of a fresh issue of shares. The purpose of the cancellation in the scheme of arrangement, in that instance, was to remove the holder of the redeemable preference shares as a member of the company. The redemption provided for in the modified proposals achieved this. The redemption proposed was in accordance with Part XI of the Companies Act, 1990 and the shares could have been cancelled if required, pursuant to s. 208 of the Companies Act, 1990.

21. The confirmation of the scheme of arrangement by the Court does not, of itself, effect any change in the shareholding of the Company. As already stated, confirmation of the scheme of arrangement makes binding, *inter alia*, on the members and the company. The requisite resolutions of the company and/or the board of directors still have to be passed to issue and allot the new shares to the Investor.

22. The second issue which arose related to the amendment of the articles of association of the Company. Paragraph 5.1 of the scheme of arrangement, insofar as relevant, originally provided:

> "The Articles of Association of the company shall be deemed, with effect from the Effective Date, to be amended to the extent necessary to allow these proposals to be implemented. Without prejudice to the generality of the foregoing, the period during which the directors are empowered to allot shares contained in article 2 of the Company's Articles of Association shall be extended to the extent necessary to enable the shares to be allotted to the Investor."

23. The intention was that the articles of association of the Company would then be amended pursuant to s. 24(7) of the Act. This provides:

> "Any alterations in, additions to or deletions from the memorandum and articles of the company which are specified in the proposals shall, after confirmation of the proposals by the court and notwithstanding any other provisions of the Companies Acts, take effect from a date fixed by the court."

24. It is to be noted that, if s. 24(7) is to apply, such alterations must be "specified in the proposals". The original proposals of the Examiner did not specify the intended alterations to the articles of association. The modified proposals confirmed by the Court on 14th February, 2008, expressly specified the amendments to be made in articles 1 and 2 of the articles of association.

25. The requirement in s. 24(7) that the proposed amendments be specified is consistent with the need for certainty at any time as to the relevant provisions of the memorandum and articles of association of a company. If the Company had amended its articles by special resolution, the resolution would have had to be filed in the Companies Registration Office. Hence, on 14th February, I made an order pursuant to s. 24(8) of the Act that the articles of association, amended as specified in the modified proposals, be filed in the Companies Registration Office within 21 days.

26. I wish to add one comment in relation to the order made herein which is of practical importance. In the course of the hearing for the purpose of consideration of the report of the examiner in *Euro Iompu Teoranta (in examination)* [2007] 372 COS in December, 2007, counsel for the examiner therein, as part of his submissions on the question as to whether the Court could confirm proposals for a scheme of arrangement which included provision for the cancellation of shares and/or make an order pursuant to s. 24(8) of the Act that issued shares in the company be cancelled, wished to refer to earlier proposals for schemes of arrangement which, he submitted, had included similar provisions and which had been confirmed by the Court.

27. It then transpired that the relevant proposals for schemes of arrangement confirmed by the Court had not been retained on the Court file. This was so because such proposals were an exhibit to an affidavit sworn by the examiner and, as such, would not normally be retained on the Court file. It appears desirable that proposals for a scheme of arrangement which are confirmed by the Court should form part of the Court order as a schedule thereto and should be retained on the Court file. I so directed, in the proceedings herein, in the order of 14th February, 2008. The proposals as modified are included as a schedule to the order. This was facilitated by

the solicitors for the Examiner making same directly available to the Registrar in electronic format.