COURT OF APPEAL

Neutral Citation Number: [2015] IECA 62

Finlay Geoghegan J.
Peart J.
Hogan J.

Appeal No. 2014/1382

[Article 64 Transfer Case]

In the matter of Ladaney Limited (In voluntary liquidation) and

In the matter of the Companies Acts 1963 to 2013 and

In the matter of sections 267 and 282 of the Companies Act 1963

Between

Revenue Commissioners

Appellant

And

Ladaney Limited (In voluntary liquidation) and Anthony Fitzpatrick

Respondents

Judgment delivered on the 26th day of March 2015, by Ms. Justice Finlay Geoghegan

1. On the 15th July, 2014, the members of Ladaney Limited ("the Company") passed a resolution that it be wound up voluntarily. The Company was satisfied that by reason of its liabilities it could not continue in business. The members also resolved that Anthony Fitzpatrick be appointed liquidator for the purposes of the winding up.

2. A creditors meeting had been called pursuant to s. 266 of the Companies Act 1963 for 4.30 pm on the 15th July, 2014. At the meeting, chaired by Mrs. Ann Carter, a director of the Company. The Revenue Commissioners (the "Revenue") proposed that Mr. Barry Donohue be appointed liquidator.

3. Mrs. Carter, as chairman of the meeting, held a number of proxies from creditors. The Revenue objected to the validity of certain of those proxies. The chairman ultimately ruled that all of the proxies, including the Revenue's proxy, were valid.

4. The Revenue also sought to have the value attributed to their vote based on their claim that the debt due to them was €371,785. The statement of affairs prepared by the directors for the purposes of the meeting had included a Revenue debt of €75,375.

5. Following exchanges at the meeting, inspection of the proxies by the Revenue and objection made to most, the minutes of the meeting state "The chair ruled that all of the proxies including the Revenue's proxy were valid". There was then a vote taken on the two proposals for liquidator, i.e., Mr. Fitzpatrick nominated by the Company or Directors and Mr. Donohue proposed by the Revenue Commissioners. The result of the vote in terms of the value of the creditors voting by proxy as recorded in the minutes was:

> Anthony J. Fitzpatrick €81,324
>
> Barry Donohue €75,375

6. Mr. Fitzpatrick was declared elected as liquidator and thereafter commenced the winding up of the Company. It is of relevance to the issues on this appeal to note that Mr. Fitzpatrick, whilst originally nominated as liquidator by the members, was the liquidator elected on a vote by value of the creditors at the meeting of creditors.

7. By an originating notice of motion dated the 23rd July, 2014, the Revenue sought the following reliefs:

"1. An order pursuant to Order 74 of the Rules of the Superior Courts setting aside by way of appeal the following decisions reached by the Chairperson of the Creditors' meeting held on the 15th July, 2014, at The Central Hotel, Tullamore, Co. Offaly:

> a. The decision not to exclude invalid proxies of Roken Construction Limited, O'Hara Dolan, Devery Farrelly & Co., Michael Walsh & Son Limited, Avonlee Soap Co. Limited and O'Hara Donal; and
>
> b. The decision not to allow proof of the full value of the debt due by the Company to the Revenue Commissioners namely, €371,785.00.

2. An order pursuant to s. 267(2) of the Companies Act 1963, directing that Barry Donohue of O'Connor Payne & Co. Chartered Accountants and Registered Auditors be appointed as liquidator of the company in place of the second named respondent."

They also sought other consequential reliefs.

8. No other appeal or application was made to the High Court arising out of the meeting of creditors or the nomination of Mr Fitzpatrick as liquidator.

9. In the High Court, affidavits of Ms Griffin were filed on behalf of the Revenue, and by Mr. Fitzpatrick as liquidator of the Company and Mrs. Carter.

10. The application was heard on the 15th August during the vacation and on the 26th August Herbert J. delivered a written judgment in which in summary he held:

> (a) The proxies submitted by Michael Walsh and Son Limited, Roken Construction Limited, O'Hara, Dolan and Company Limited, Avonlee Soap Company Limited were invalid and the chairperson of the creditors meeting should not have accepted the appointees of those creditors as proxies for the purpose of voting. The remaining proxies challenged were valid.
>
> (b) The chairperson of the meeting was correct and acting within the provisions of Ord. 74, r. 71 of the Rules of the Superior Courts in refusing to admit the Revenue Commissioner's proof of €371,785 for the purpose of voting. The reason of the trial judge for this decision was that the value of the Revenue debt was not "ascertained" within the meaning of Ord. 74, r. 68 of the Rules of the Superior Courts 1986 and hence the Revenue Commissioners were not entitled to vote in respect thereof. That finding related to the entire value of the Revenue debt including the sum of €75,375 specified as the Revenue debt in the statement of affairs and in respect of which the chairperson of the meeting had admitted the Revenue to vote by proxy.

11. The trial judge further concluded by reason of those two decisions that Mr. Fitzpatrick was validly appointed as liquidator of the Company at the creditors meeting. In consequence he made an order that the Revenue's application be refused and also made a consequential costs order.

12. The Revenue appealed against that order and judgment. The grounds of appeal in summary are:

> (i) The trial judge exceeded his jurisdiction in determining that the Revenue were not entitled to vote at the creditors meeting with a value attributable to their debt at minimum in the sum of €75,375 as included in the statement of affairs.
>
> (ii) The trial judge was incorrect in determining that any part of the claimed Revenue debt of €371,785.25 was unascertained within the meaning of Ord. 74, r. 68 of the Rules of the Superior Courts.
>
> (iii) The trial judge erred in law in determining that the chairman of the creditors meeting was acting in accordance with Ord. 74, r. 71 of the Rules of the Superior Courts in refusing to admit the Revenue's proof in the value of €371,785.25 for the purpose of voting.

13. There is no cross appeal against the determination of the trial judge of the invalidity of the proxies from the four named creditors whose debts aggregated €34,229 in value.

14. The grounds of appeal were opposed on behalf of the respondents who were represented by solicitor and counsel. Objection was taken on behalf of the Revenue to the extent to which Mr. Fitzpatrick as liquidator participated, both personally and as liquidator on behalf of the Company before the High Court and on the appeal. It is unusual for a liquidator whose initial appointment is challenged to so participate. However, the Revenue in bringing this application named the Company (In voluntary liquidation) and Mr. Fitzpatrick as respondents to the application. Whilst in their application they were appealing the determination of Mrs. Carter as chairperson of the meeting they did not join her as a respondent. She was only made a notice party to the proceedings notwithstanding that the principal appeal was against her rulings. There was no challenge to the resolution to wind up as such and as Mr. Fitzpatrick had been appointed liquidator, he was then the appropriate person to give instructions on behalf of the Company which Revenue named as respondent. Further he was personally named as a respondent. An order was sought pursuant to s. 267(2) of the 1963 Act, that he be replaced as liquidator.

15. In such circumstances, it does not appear to me that it was inappropriate for him to have participated in the application. If the Company had not been named as a respondent and Mr Fitzpatrick only made a notice party, the position might have been different. In expressing this view, I am not suggesting his participation as liquidator on behalf of the Company was necessary or that he is entitled to be reimbursed out of the assets of the company for costs or expenses incurred. That is a separate issue.

Statutory Scheme

16. The issues on appeal must be considered in the context of the statutory scheme which gave rise to the High Court's jurisdiction.

17. The creditors meeting at which the disputes arose was called pursuant to s. 266 of the Companies Act 1963 ("the 1963 Act"). Section 266(1) obliges a company, which is not solvent, proposing to resolve that it be wound up voluntarily to hold a meeting of creditors on the same day or the day following the proposed general meeting of the company. There are notice provisions and whilst the Revenue stated that they did not receive the relevant notice, it was not a matter which grounded their application to the court. Section 266 (3) and s. 266(4) are relevant and provide:

> "266(3) The directors of the company shall –
>
> (a) cause a full statement of the position of the company's affairs, together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of the creditors to be held as aforesaid; and
>
> (b) appoint one of their number to preside at the said meeting.
>
> (4) It shall be the duty of the director appointed to preside at the meeting of creditors to attend the meeting and preside thereat. "

18. Section 267 of the 1963 Act then provides:

> "267(1) 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.
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> (2) 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.
>
> (3) 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."

19. Subsection (3) of s. 267 was inserted by s. 47 of the Company Law Enforcement Act 2001. Prior to that O. 74, r. 62 of the Rules of the Superior Courts 1986 applied to meetings held pursuant to s. 266 and pursuant thereto a resolution to be passed required a majority both in number and value of the creditors. This provision no longer applies to a meeting held pursuant to s.266. Now pursuant to 267(3) a single creditor to which a company is indebted for a large amount may procure the appointment of a liquidator of its choice. As Laffoy J. noted in *Re Jim Murnane Ltd.*, [2010] 3 I.R 468 at 472 this provision was inserted to overcome a problem that arose in practice where directors procured proxies from a large number of creditors with small claims and used those proxies to vote in favour of the members' nominee and thus prevent the majority in value of the creditors appointing their nominee.

20. Order 74 of the Rules of the Superior Courts 1986, applies to both a winding up by the court and to a voluntary winding up. It inter alia regulates the conduct of a creditors meeting held pursuant to s. 266 of the1963 Act. Pursuant to rule 56, rules 58 to 83 (inclusive), with certain exceptions, apply to such a meeting of creditors. Of relevance to this appeal are rules 68 and 71 which apply and provide respectively:-

> "68. A creditor shall not vote in respect of any unliquidated or contingent debt or any debt the value of which is not ascertained, nor shall a creditor vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the company and against whom an adjudication order in bankruptcy has not been made, as a security in his hands and to estimate the value thereof, and for purposes of voting but not for the purposes of dividend, to deduct it from his proof.

71. 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.

21. Order 74, rules 74 – 83, contain detailed rules as to proxies which are no longer relevant as there is no appeal against the trial judge's decisions on the validity and invalidity of certain proxies.

Issues on appeal

22. The first issue to be considered is whether the trial judge had jurisdiction to effectively overrule or set aside by way of appeal the decision made by the chairperson of the meeting that the Revenue be permitted to vote by proxy in respect of a debt with a value of €75,375. In my view he did not. The High Court has a limited jurisdiction conferred by statute in relation to a creditors' voluntary winding up. Unlike in the case of a winding up by the court, there is no general supervisory jurisdiction vested in the High Court. The jurisdiction of the court is therefore determined by the 1963 Act as amended and the application is brought pursuant to that particular jurisdiction

23. The Revenue brought the application firstly, by way of an appeal pursuant to Ord. 74, r. 71 and, secondly, pursuant to s. 267 (2) of the 1963 Act. As already stated, there was no appeal or challenge by any person against the decision by the chairperson of the meeting to permit the Revenue to vote by proxy in respect of a debt with the value of €75,375 as included in the Statement of Affairs. In those circumstances, the trial judge when considering the appeal by the Revenue against the refusal of the chairman to admit the Revenue's proof for voting purposes in the larger sum of €371,785, had no jurisdiction to decide that the chairperson had incorrectly permitted the Revenue to vote by proxy in respect of its debt with the value as stated in the Statement of Affairs.

24. It follows, therefore, that on this ground alone I would allow the appeal against the decision of the trial judge insofar as he determined that no part of the Revenue debt was ascertained within the meaning of Ord.74, r.68 and, accordingly, that the Revenue were not entitled to vote in respect of any value of debt.

25. It follows from this conclusion and the trial judge's decision on the invalidity of proxies aggregating € 34,229 (which is not subject to appeal) that, prior to any consideration of the refusal to admit proof of the Revenue debt with a value of €371,785 for voting purposes, the value of the creditors' votes validly cast in person or by proxy at the creditors meeting ought to have been recorded by the chairperson as:

> In favour of Mr Fitzpatrick €47,095 (€81,324 - €34,229)
>
> In favour of Mr Donohue €75,375

Accordingly Mr Donohue is the person who in accordance with s.267(3) of the 1963 Act ought to have been deemed to have been nominated or appointed as liquidator by the creditors at the creditors' meeting and in accordance with s. 267(1) his nomination prevails over the nomination of Mr Fitzpatrick by the Company.

Other Issues

26. Prior to considering what order this Court should make arising from the above conclusion it appears necessary that I should express a view on the issue which was argued in full before this Court relating to the correctness of the approach of the trial judge to the meaning of a "debt the value of which is not ascertained" for the purposes of O. 74, r. 68 of the Rules of the Superior Courts. The trial judge adopted the meaning of "ascertained" used by the court in *Sidebottom v Sidebottom* (1872) L.R. 2 P. & D. 365. That was a judgment given on an application for a grant of administration with will annexed. The entitlement of the plaintiff to the grant (which was not opposed) depended upon the date upon which the court determined that the failure of a trust created in favour of the testator's children was "ascertained". The court was therefore construing the meaning of "ascertained" as used by the testator in his will. In his short judgment, Lord Penzance explained his decision and approach as follows [(1872) L.R. 2 P. & D. 365, 366]:-

> "I think the reasons given are strong enough to induce me to grant this motion. The question is whether the failure of this trust in favour of the children was 'ascertained' on the 14th February, 1871, within the meaning of the bequest. If a child had been born in the testator's lifetime, and had survived the testator, but had died under the age of twenty one, when would the failure of the trust be ascertained? Would it be 'ascertained' when the death became known, or when the death happened? If known, known to whom? The child might die abroad, and his death not be known to his relations for years

> after it had happened, but surely the trust would have failed upon the occurrence of his death, not at the moment that intelligence of his death reached anybody. The word 'ascertained' therefore must, I think, be read as 'made certain', and this certainty may be arrived at by the light of after events. From these events, it appears in this case that the possibility of the testator leaving a child was in fact at an end when he died. I am therefore of opinion that the failure of the trust was then 'ascertained' and that it is reasonable I should make the grant."

27. With respect to the trial judge, it appears to me that in the above judgment Lord Penzance was deciding what was meant by the failure of trust being "ascertained" in the context in which it was used by the testator in his will. It does not appear to me that the same meaning in the sense of "made certain" can be ascribed to its use in O. 74, rule 68 of the Rules of the Superior Courts.

28. The meaning of the word "ascertained" used in the phrase "any debt the value of which is not ascertained" in O. 74, r. 68 must be determined in its particular context. As previously noted, O. 74 applies to both voluntary windings up and to windings up by the court. Rule 68 furthermore applies to many different meetings of creditors in both types of liquidations. The Rules of the Superior Courts (including Order74) are made by the Superior Court Rules Committee by statutory instrument pursuant to powers conferred by various Courts Acts. Order 74 at the time of this application in the High Court was that as substituted by Rules of the Superior Courts (Winding- up of Companies and Examinership) 2012 (S.I. 121 of 2012).

29. Order 74 primarily contains rules of court for applications to the High Court pursuant to the Companies Acts. It also contains a limited number of provisions which apply to other procedures in a voluntary winding up. It therefore must be construed, where possible, in a manner consistent with the Companies Acts and terms used will normally be construed as intended to have the same meaning as in the Companies Acts.

30. Order 74, rr. 68 and 71 applied on the facts giving rise to these proceedings to the creditors' meeting of the Company called pursuant to s. 266 of the 1963 Act to which s. 267 also applies. In construing their meaning, regard must be had to those sections and other relevant provisions of the 1963 Act. The 1963 Act does not expressly address the question as to which creditors are entitled to vote at a meeting called pursuant to s. 266. However, s. 266(1) requires "a meeting of the creditors of the company" to be held. In the absence of any contrary indication it must mean a meeting of all creditors of the company. Section 267(3) deems a resolution as to the creditor's nominee as liquidator 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". This also indicates an intention that all creditors so present may vote but also appears to require that there be a means of determining for voting purposes the value of their debt. However the legislation does not indicate how such value should be determined for voting purposes. There is no provision enabling "a just estimate" of the value of a debt to be made for the purposes of voting at a creditors meeting similar to that in s.283 of the 1963 Act which expressly applies only to proof of debts.

31. No challenge was made herein to the validity or vires of Ord.74, r. 68 (which purports to exclude certain creditors from voting) in this proceeding and hence I am not expressing any view on that issue. Also in considering the decision of the trial judge that the Revenue were excluded from voting even in respect of their debt of €75,375 included in the directors' Statement of Affairs it is not necessary to consider the purported exclusion of all creditors with unliquidated debts by O.74, r 68. I express no view on such exclusion. I am satisfied that, as was not in dispute, the Revenue were a creditor of the Company. It was admitted that there were taxes owing. Further the Revenue debt in question estimated at €75,375 is of its nature a liquidated debt. The directors of the Company had estimated this as the amount due for PAYE and VAT taxes. Such a debt is capable of ascertainment by either the Revenue or Company by reference to the underlying transactions to which the taxes relate. There was a dispute as to the amount or value of the debt due for further taxes in part by reference to the appropriate tax treatment of certain transactions and a further dispute as to whether additional amounts claimed by the Revenue in particular for interest and penalties were a debt, in the absence of an assessment. However, the directors of the Company, in the Statement of Affairs had estimated the amount of the Revenue liquidated debt for taxes at €75,375. It was not submitted that the Company liability for such taxes (PAYE and VAT) was dependant on the Revenue raising as assessment. Hence the purported appeal the effect of which was in dispute is not relevant to this part of the Revenue debt.

32. Construing Ord. 74, rr 68 and 71(as substituted in 2012) in a manner consistent with the Companies Acts they can only be considered to include practical provisions to enable the chairman of a creditors meeting determine whether a resolution in favour of a liquidator has been passed by a majority in value of the creditors for the purposes of section 267(3). In saying this I am aware that the Ord.74 as substituted in 2012 included rules 68 and 71 in its prior form which predated the enactment of s.267(3). Nevertheless the Rules Committee must be considered in 2012 to have been aware of the relevant provisions in the 1963 Act. Given the apparent entitlement of all creditors to vote at a meeting held pursuant to s.266(1) any restriction on the right to vote by reason of the necessity to attribute a value to the vote must be narrowly construed and only insofar as is necessary to make workable the voting provision in s. 267(3).

33. In that context it appears that O. 74, rr. 68 and 71 must be construed as intended to enable the chairman of a creditors meeting to attribute a value to the debts of all creditors voting on a resolution to appoint a liquidator in two ways. Firstly, r. 68 (as the more drastic provision) excludes from an entitlement to vote, those creditors whose debt is of such a nature that it is not possible to objectively attribute or ascertain a value for voting purposes at the date of the meeting. Secondly, provision is made in r. 71 for the voting by those creditors whose debt is ascertained by either the debtor or creditor but the existence or amount or value of the debt is disputed.

34. It must be recalled that O. 74, r. 68 only applies to persons who are creditors of the company, i.e. that there is a debt owing by the company. There are a limited number of situations in which a debt will be considered to exist the amount of which is not yet ascertained in the sense of it not being possible to objectively attribute or ascertain a value for voting purposes. Examples may include where judgement on a claim for damages is obtained in default of appearance or pleading together with an order that the amount of the judgment be determined by a judge at a future date. Also where an order for costs is made by a court with a provision that the costs are to be taxed and taxation has not taken place. It may also include those with certain unliquidated claims against a company. In each instance the debt exists, but the amount of the debt is not capable of ascertainment without proceeding before a third party. In my judgment, applying a restrictive construction for the reasons stated to Ord.74 r. 68, this is the limited type of debt intended by the phrase "any debt the value of which is not ascertained". It could not be construed in a manner consistent with the Companies Acts as intended to exclude from voting a creditor who has a liquidated debt the amount of which is capable of ascertainment by either debtor or creditor but where the amount or value of the debt is in dispute. The value for voting purposes of such creditors is governed by rule 71.

35. Applying that construction to the facts of this application The Revenue were not precluded from voting pursuant to Ord.74, r.68 on the basis of the debt estimated by the directors of the Company as €75,375 by reason of the disputed appeal or a dispute as to the additional amount alleged to be due as a debt to the Revenue for unpaid taxes, interest and penalties.

36. It is unnecessary for the purposes of this appeal to consider the submissions made in relation to the entitlement of the Revenue to vote pursuant to Ord.74, r.71 on the basis of a proof with a value of €371,785. This gives rise to further complicated issues on the facts herein and it is preferable that they are resolved in a case where it is necessary to do so in order to determine the appeal.

Relief

37. The final question is the order which should now be made by this Court in the light of the decision reached. For the reasons set out above, having regard to the trial judge's decision on the invalidity of certain proxies and this Court's decision on the entitlement of the Revenue to vote, at minimum, on the basis of a value of €75,375, it appears that the creditors validly voting in person or by proxy should have been deemed pursuant to s. 267(3) to have voted in favour of Mr Donohue as liquidator.

38. The Revenue sought in the High Court and in this Court an order pursuant to s. 267(2) that Mr. Donohue be appointed as liquidator instead of Mr. Fitzpatrick. The decisions in the High Court and of this Court on appeal mean that Mr. Fitzpatrick was not validly elected by the creditors as liquidator. As Mr Donohue was the person who ought to have been deemed to have been elected by the creditors, he was the person who ought to have been appointed pursuant to s.267 (1). The Revenue has made clear in submission that they are not making any complaint against Mr Fitzpatrick in relation to the conduct of the liquidation. They nevertheless submit that in accordance with subs. 267(1) and (3) of the 1963 Act, they are entitled to have their nominee act as liquidator for the remainder of the winding up.

39. Section 267(2) expressly provides a right to apply to the High Court within 14 days where "different persons are nominated as liquidator". Whilst there is some lack of clarity as to what is intended by "nominated" in the sense used in this phrase, it would appear that to make s. 267 as amended workable in practice that it should be construed as including the situation where two different persons were nominated at the creditors' meeting and it is alleged, as here, that the incorrect person was appointed as s. 267(3) was not correctly applied by the chairperson of the creditor's meeting.

40. Accordingly, I consider that this Court should allow the appeal and make an order that Mr Donohue be appointed liquidator in place of Mr Fitzpatrick. So that there be an orderly transfer between Mr Fitzpatrick and Mr Donohue I would further direct that such order take effect on the 1st day of April 2015.

Note: Mr Justice Peart and Mr Justice Hogan concurred with this judgment.