

## THE HIGH COURT

2010 185 COS

## IN THE MATTER OF DR DEVELOPMENTS (YOUGHAL) LIMITED

## (IN LIQUIDATION)

## AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

## Ex-Parte Application

of

Gerard Murphy Official Liquidator

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 25th day of July, 2011**

1. On 17th May, 2010, an order was made for the winding up of DR Developments (Youghal) Ltd. ("the Company") and the appointment of Mr. Gerard Murphy as Official Liquidator thereof.

2. In this application, brought by motion *ex parte*, the Official Liquidator sought the sanction of the court for approval to act as "agent for AIB Bank plc." in respect of the sale of certain charged assets of the Company. The application changed in the course of the hearing for which the Official Liquidator was present in person. I understand that the proposal now is that the charged assets be sold by the Official Liquidator and that he obtain the sanction of the court for certain arrangements (which have not been finalised) with AIB in relation to such sales.

3. The factual background to the application is that the Company was a development and construction company. Whilst the Official Liquidator does not appear to have obtained a statement of affairs from the directors of the Company, nor any cooperation from them, he is of the view that all the assets of the Company are subject to a fixed and floating charge in favour of AIB plc. The Official Liquidator, in his grounding affidavit and earlier reports to the court, has not made clear whether he has been advised by his solicitor on the validity of the charges in favour of AIB to which he refers. The remainder of this judgment is upon an assumption that the Official Liquidator, upon advice, is satisfied that there exist valid charges in favour of AIB.

4. The assets of the Company principally comprise a semi-completed development known as Radharc Na Mara, Ballyvergan East, Imokilly, Youghal, County Cork, and a small site at Porter's Lane, Youghal, County Cork. The realisation of the partly completed development site presents particular difficulties. There is a bond given by AIB in favour of Cork County Council. There appear to be certain planning conditions which require to be fulfilled, including an obligation to construct a number of units on the site to be provided to the Council as social and affordable housing. The transfer of the common areas also appears to remain outstanding.

5. AIB has not appointed a receiver and has not gone into possession of the charged property. Accordingly, it would appear that pursuant to s. 229 of the Companies Act 1963, the property is now in the custody of the Official Liquidator.

6. The Official Liquidator has informed the court that on the indebtedness figures provided to him by AIB and his understanding of the current value of the properties, that the amounts due to AIB far exceed the potential realisations from the properties. Accordingly, in the Official Liquidator's view, there are no potential assets available to discharge his costs and expenses as Official Liquidator in the winding up or for unsecured creditors. It is also assumed that the Official Liquidator has satisfied himself that the sums claimed by AIB are owed by the Company.

7. Notwithstanding the apparent absence of any potential discharge of his remuneration and expenses, the Official Liquidator and his solicitor have properly taken steps to investigate the precise position in relation to the partly completed development, which includes a contract for sale in respect of one unit. He has also engaged an engineer to correct mapping errors and a valuer to value the assets of the Company. He also has engaged in negotiations with Cork County Council. He and his solicitor have thus acquired a significant knowledge and understanding of the development site in question.

8. The Official Liquidator also states that he has met with an official of AIB branch in Fermoy, County Cork, who has suggested that he would act "as an agent for the Bank in respect of the sale of the development site" by reason of the knowledge he has gained of the site. Whilst it may make good sense for the liquidator to attempt to sell the charged assets he is now correctly of the view that it would not be appropriate for him, as Official Liquidator, to do so by acting as an agent for AIB. It appears that this was simply loose terminology by non-lawyers. As part of the proposed arrangements, AIB had also indicated that they would provide the Official Liquidator with an indemnity in relation to his actions in respect of the sale of the development site. There are also tentative, though not fully formulated or agreed arrangements in relation to the discharge of his legal costs in connection with the sales and certain other expenses, and possibly (depending on realisations) some remuneration to be paid the Official Liquidator.

9. Insofar as the charged property is to be sold by the Official Liquidator then as the property is an asset of the Company albeit subject to a charge he can do so pursuant to the powers conferred on him by s. 231(2)(a) of the Companies Act 1963 provided of course he has reached agreement with AIB that it will release the charges on completion of the sale.

10. As the Official Liquidator has not yet reached agreement with AIB, there is no arrangement in being which is capable of now being sanctioned by the court. However, I propose setting out for the assistance of the Official Liquidator the applicable principles which need be taken into account in finalising the proposed arrangements with AIB and which should apply in any future application to the court for sanction of the terms agreed.

11. The Official Liquidator is an agent of the company with fiduciary obligations arising from his office and with statutory obligations imposed on him by the Companies Acts 1963 to 2009 (see, *inter alia*, Keane 'Company Law' 4th Ed. par. 36.107 and *Re Belfast Empire Theatre of Varieties* [1963] I.R. 41 and 49).

12. The primary duty of a liquidator is to take possession of the company's assets and protect them; realise those assets and apply those proceeds in distribution to those entitled in accordance with the statutory schemes. He also has additional duties imposed on him by statute, including regulatory obligations of reporting to the Director of Corporate Enforcement and the Registrar of Companies,

and unless relieved, bring applications pursuant to s. 150 of the Act of 1990.

13. An official liquidator may sell property of the company pursuant to s. 231(2)(a) of the Act of 1963, without sanction of the court. However, in practice, by reason of the fact that the exercise of such powers are made expressly subject "to the control of the court" and the right of application given to creditors and contributories in s. 231(3) and the general obligations in relation to achieving the best price court approval is often sought for significant sales.

14. Where an official liquidator sells property of the company, then, in accordance with O. 74, rules 44 and 117, the gross proceeds of sale must be paid into the liquidation account and it will follow that court duty will be payable on the gross proceeds of sale. Nevertheless, as these are obligations pursuant to the Superior Court Rules, the court may pursuant to its inherent jurisdiction make orders modifying the requirements or such rules.

15. In particular, it appears that the court may authorise an official liquidator who is selling property of the company subject to charges to enter into agreements with the charge holder which include the payment directly to the charge holder of the proceeds of sale (subject to deduction if agreed of costs and expenses) in consideration of the release of charges, thereby avoiding the necessity of paying the money into the liquidation account and the charging of any duty thereon. See *Re McCairns (PMPA) plc (In Liquidation)* [1992] ILRM 19 at 22. Such arrangements however require to be sanctioned by the court in advance of the completion of sale. Whether the precise arrangements are appropriate for sanction will depend upon the facts of each liquidation.

16. The Bankruptcy rules apply to the rights of a secured creditor in a winding-up (s.284 of the Act of 1963). This includes the right of a secured creditor, such as AIB in this liquidation, to rely on its security and not prove in the liquidation (Bankruptcy Act 1988, the First Schedule, rule 24). It appears to be exercising this right insofar as it enters into an agreement with the Official Liquidator as to the terms upon which it will release its charge to enable a sale by the Official Liquidator be completed.

17. Section 285(7) of the Companies Act 1963 (priority to preferential creditors over holders of floating charges) requires the Official Liquidator to distinguish in any arrangements reached with the charge holder between proceeds from assets subject to fixed charges and those only subject to floating charges. It is not clear whether this issue arises on the facts in this liquidation.

18. Upon an assumption that the Official Liquidator will by agreement with AIB, be seeking to sell assets subject to a fixed charge with a realisable value significantly less than the Company's debt to AIB, he will be doing so for the exclusive financial benefit of AIB and not for the financial benefit of the company in liquidation. There may be a general benefit to the orderly winding up in enabling the liquidation to be completed.

19. In such circumstances where an official liquidator is doing significant work for the exclusive financial benefit of a charge holder such as AIB, it would not appear appropriate that he be remunerated for such work out of any assets coming into the liquidation which might otherwise be available for distribution to the preferential and general unsecured creditors. Hence, it would appear to follow that where an official liquidator agrees to do work exclusively for the benefit of a secured creditor (including selling for the benefit of the holder of a fixed charge) that he should not include the work done as work for which he would claim remuneration in the winding-up. Insofar as he reaches agreement with the secured creditor for the discharge of remuneration to him, this requires sanction of the court for the reasons next set out. The position becomes more complex where an official liquidator does work which is in part for the benefit of a secured creditor and in part for the winding-up but similar principles apply. This is unlikely to arise on the facts herein.

20. An Official Liquidator is entitled to receive such remuneration "as the court may direct" (s. 228(d) of the Act of 1963 and O. 74 of the Superior Court Rules). *Prima facie* it is payable only out of assets realised in the course of the winding up in accordance with the specified priority (O. 74, r. 47 and r. 128). Further O. 74, r. 38 expressly prohibits an official liquidator from, *inter alia*, accepting remuneration from any solicitor, auctioneer or any other person connected with the company. This prohibition is consistent with official liquidator's fiduciary obligations to the company. The court may, modify the prohibition of O. 74, r. 38 and it has been the practice of the court to sanction arrangements whereby an official liquidator may be remunerated by a petitioning creditor or other person either in general or for a specific purpose. It is often foreseeable at the time of presentation of a petition, that there is no likelihood of realisation of any assets in the winding up which may be available to discharge the costs, expenses and remuneration of the official liquidator. Unless the court is prepared to sanction such arrangements, it would not in practice be possible to get persons to act as official liquidators in such windings-up. However regard must be had to the potential conflict of interest for an official liquidator who is to be remunerated by a particular creditor.

21. The fiduciary obligations of the liquidator and the general rules applicable to his remuneration must be borne in mind in making any such arrangements. It appears to follow that insofar as a petitioning creditor or any other person connected with the company, including a creditor, secured or unsecured, proposes entering into arrangements which would include the payment of remuneration either on an absolute or contingent basis to the official liquidator that having regard to s. 228(d) of the Act of 1963 and O. 74, r. 38 and the obvious potential conflict of interest for the official liquidator that disclosure to and the sanction of the court is required for such arrangements. The Revenue Commissioners frequently underwrite liquidation costs and remuneration and disclosure is made to the court. A practice has developed whereby sanction is not expressly obtained. This may not be correct having regard in particular to s. 228(d) of the Act of 1963 and O. 74, r. 38. There are also other windings up by the court in which sanction has been obtained for a particular creditor or specified creditors to enter into indemnity or payment arrangements, either in relation to the general costs and remuneration of the official liquidator in the winding-up, or for a particular purpose such as the pursuit of litigation. In principle, there appears no objection to the court sanctioning such arrangements provided care is taken to identify and manage any potential conflict of interest situation. In practice such arrangements are necessary to obtain agreement of persons to act as liquidators where there is little likelihood of realisations or where the interests of the winding up requires certain work including litigation to be pursued and there are no assets available to fund same. Whether or not sanction should be given will depend upon the facts of each situation.

22. If and when the Official Liquidator herein reaches agreement with AIB as to the terms upon which it will agree to release its charge to enable the Official Liquidator sell the charged property pursuant to s. 231(2)(a) of the Act of 1963, then an application should be brought by the Official Liquidator for sanction by the court of the proposed arrangement. Unless such application is made and a court order obtained in advance of the sales, the Official Liquidator is obliged to lodge to the official liquidation account the gross proceeds of any sale with the consequential obligation of the payment of court duty. Further, he is not entitled to receive remuneration from AIB for work done in the winding up without sanction of the court.