Neutral Citation [2008] IEHC 251

THE HIGH COURT

2008 128 COS

IN THE MATTER OF CISTI GUGAN BARRA TEORANTA
(IN EXAMINERSHIP)
AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2006

Judgment of Ms. Justice Finlay Geoghegan delivered the 21st day of July, 2008

1. Cisti Gugan Barra Teoranta ("the Company") presented a petition for the appointment of an Examiner on 1st April, 2008. Mr. Kieran Wallace was appointed as Examiner ("the Examiner") on 10th April, 2008, having been so appointed on an interim basis on 3rd April, 2008. The Examiner presented his report under s. 18 of the Companies (Amendment) Act, 1990 ("the Act"), on 25th June, 2008, with Proposals for a Scheme of Arrangement which had received substantial support at meetings of creditors and shareholders.

2. The Examiner, in his report, recommended that the court confirm the Proposals for the Scheme of Arrangement in accordance with s. 24 of the Act. In his recommendation to the court, he stated, "I am satisfied that the implementation of the Proposals will facilitate the survival of the Company and the whole of its undertaking as a going concern and that such survival is in the best interests of the Creditors and Members as a whole".

3. The Examiner's report was set down for consideration by the court, pursuant to s. 24 of the Act, on 1st July, 2008.

4. At the confirmation hearing on 1st July, 2008, I formed the view that I was then unable to confirm the Proposals by reason of the conditionality of the investment forming part of the Proposals, and adjourned the hearing, with certain directions, until 3rd July, 2008. At the resumed hearing, I was satisfied to confirm the Proposals subject to certain modifications.

5. During the course of the two hearings, I indicated orally in court the reasons for which I formed the view that I could not confirm the Proposals at the first hearing, the directions which I gave, and the changed circumstances which enabled me confirm the Proposals on 3rd July, 2008. As the principal issue which arose in this application is similar to one which had previously arisen in another examinership and in respect of which I did not give any recorded judgment, and as it appears to be one which may arise again, I indicated that I would issue a written judgment setting out the reasons already given orally. This is that judgment.

6. The Proposals presented by the Examiner at para. 5.1 state that, "the Company and the Investor have *conditionally* [emphasis added] agreed to make the sum specified therein available by way of equity or loan at the discretion of the Investor". It was further provided that a minimum amount would be made available within seven days after the date of confirmation of the Proposals by the court. A minimum amount was to be made available by way of subscription for shares to enable the redemption of the Redeemable Preference Shares in the Company in accordance with the Proposals.

7. The conditionality was that the making of the investment by the Investor was subject to certain pre-conditions. As is normal, it was subject to a pre-condition that the court would confirm the Proposals. No difficulty arises from such a pre-condition. However, the Investor's obligation to invest was also made subject to a number of other pre-conditions expressed to continue until the date upon which investment would be made and after confirmation by the court of the Proposals. One such condition was that there be "no material adverse change in the trading position of the company".

8. The pre-conditions in the Proposals were reflective of conditions contained in an agreement entered into by the Company, the Investor, the Examiner and the ordinary shareholders of the Company on 18th June, 2008 ("the Investment Agreement"). The Investment Agreement was produced to the court in the course of the first hearing.

9. At the first hearing, I indicated that I did not consider that I should confirm the Proposals whilst the making of the investment remained subject to pre-conditions, other than the confirmation by the court of the Proposals. The reasons for which I took this view are as follows. Section 24 (3) gives the court jurisdiction "as it thinks proper" subject to the provisions of ss. 24 and 25 to "confirm, confirm subject to modifications, or refuse to confirm the proposals".

10. Section 24 (4) then provides:

> "The court shall not confirm any proposals,
>
> (a) unless at least one class of members and one class of creditors whose interests or claims would be impaired by implementation of the proposals have accepted the proposals, or
>
> (b) if the sole or primary purpose of the proposals is the avoidance of payment of tax due, or
>
> (c) unless the court is satisfied that—
>
> (i) the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and
>
> (ii) the proposals are not unfairly prejudicial to the interests of any interested party.

11. At the initial hearing, I was satisfied of the requirements of paras. (a) and (c) (i) above were met and that para. (b) did not apply. However, the court must also be satisfied that the Proposals are not unfairly prejudicial to the interests of any interested party.

12. In accordance with s. 24 (5) and (6), when the court confirms the Proposals, they become binding on all members affected by the Proposals, on the Company, and also on the creditors and any other person liable for all or any part of the debts of the Company. As is normal, the creditors were each to receive only a percentage of the debts then due by the Company to the creditors. If the court confirms the Proposals, then the debt due by the Company to each creditor is reduced to the amount specified in the Scheme of Arrangement. The Act does not make the Proposals binding on any person such as the Investor whose investment is intended to enable the Company meet its commitments under the Scheme of Arrangement and provide it with working capital so as to facilitate the Company's survival as a going concern.

13. It appeared to me that it was not appropriate that the court should exercise its discretion to confirm Proposals which would have the effect of reducing the liability of the Company to its creditors unless, on such confirmation by the Court, there are binding arrangements in place for the investment or other provision of monies to the Company to enable it meet its obligations under the

Scheme of Arrangement, and have the working capital which the Examiner has considered necessary to facilitate the survival of the Company and the whole of its undertaking as a going concern and enabled him (as he did), recommend to the court the confirmation of the Proposals on that basis. The creditors are an interested party within the meaning of section 24 (4) (c) (ii). It appears "unfairly prejudicial" to their interests to confirm Proposals which have the effect of reducing the Company's liability to them unless there are binding arrangements in place for the Company to have the monies necessary to meet its obligations to pay the reduced debts in accordance with the Scheme of Arrangement. Further, where, as in this case, the intended investment is also to provide working capital which the Examiner has considered necessary to facilitate the survival of the Company as a going concern, it appears that such investment must also be binding. As a matter of common sense, it appears that creditors may vote for Proposals for a Scheme of Arrangement which involves their accepting a significant reduction in existing sums due on the basis that they may benefit, not only from actual payment of the lesser sum, but also from continued trading with the surviving Company.

14. I am particularly conscious of the difficulties which may arise if I were to confirm Proposals with only a conditional agreement (other than in relation to the confirmation of the Proposals by the court) for the making of the relevant investment or loan to the Company by reason of what occurred in Mitek Holdings Ltd (formerly Antigen Holdings Ltd). That was a company in examinership in 2001, in which the High Court (McCracken J., unreported 8th November, 2001), confirmed proposals for a Scheme of Arrangement which was dependant on monies to be provided by third parties. The investment allegedly agreed was not made. The payments due under the Scheme of Arrangement could not be made in full by the Company and it again became insolvent. In 2002, an order was made for the winding up of the company. Subsequently, the Official Liquidator (with the approval of the court) commenced proceedings in the name of the Company, claiming damages against the Investors and the former Examiner, who, in turn, joined professional advisors. The proceedings were ultimately compromised.

15. In several recent examinerships, where a Scheme of Arrangement was dependant on the investment of new monies into the company, the Examiner has sought to avoid the type of difficulty which occurred in Mitek Holdings Ltd., by arranging that the monies to be invested are lodged with a solicitor with instructions to be used in completion of the investment, subject only to the court confirming the proposals for the Scheme of Arrangement. This is one practical way in which an investor may be protected, whilst at same time an Examiner is able to recommend confirmation of the proposals, confident that the investment will be made if the proposals are confirmed. There are, of course, other ways in which such certainty may be achieved.

16. The intended Investor to the Company was not present or represented in court at the confirmation hearing. Counsel for the Examiner indicated that he understood that the Investor was satisfied to complete the investment within a short period of time, subject to confirmation by the court of the Proposals. However, the contractual position remained that the obligation to invest was subject to the continuing pre-conditions set out in the Investment Agreement. Accordingly, I indicated that whilst I was not prepared to confirm the Proposals for so long as the agreement to invest was conditional on matters other than confirmation of the Proposals by the court, I was prepared to indicate that, if the issue of the conditions was resolved, I would confirm the Scheme subject to certain modifications, some of which had been proposed by the Examiner and agreed with the Investor and the others of which would not have affected the Investor.

17. I also indicated that I was considering making an order under s. 24 (8) of the Act, directing the Investor to complete the investment by a particular date, if this appeared necessary, for the purpose of implementing the decision of the court to confirm the Proposals. However, I stated I would not make that order without giving the Investor an opportunity of being heard.

18. I adjourned the matter and directed the solicitor for the Examiner to notify the Investor of the court's views on the conditionality of the Investment Agreement and the possible order under s. 24 (8), and give it an opportunity to appear or be represented in court at the adjourned hearing.

19. At the adjourned hearing, the Examiner, through his counsel, produced a letter from William Fry, solicitors for the Investor, confirming that their client had waived the pre-conditions set out in the Investment Agreement (other than in relation to confirmation of the Proposals by the court) and that it was no longer relying on these pre-conditions as conditions to its completion of the Investment Agreement in accordance with its terms. They also expressly stated that subject to the order of the court, and in accordance with the provisions of the Investment Agreement, their clients would complete the transaction on the Effective Date. They confirmed their understanding that the Effective Date could be as early as Tuesday 8th July, 2008.

20. The Examiner asked the court to fix 8th July, 2008, as the date upon which the Scheme of Arrangement would come into effect pursuant to s. 24 (9) of the Act.

21. I was satisfied, by the letter from William Fry, solicitors, that there now existed an unconditional agreement in place whereby the Investor would make the investment set out in the Investment Agreement on 8th July, 2008.

22. I was therefore satisfied to make an order confirming the Proposals, subject to the modifications specified in the modified Proposals dated 3rd July, 2008, produced to the court and fix 8th July, 2008, as the date upon which the Scheme of Arrangement should come into effect.

23. However, as the monies to be invested had not yet been produced for the purpose of implementing my decision to confirm the Proposals, I made an order under s. 24 (8) of the Act, directing the Investor to complete the investment in accordance with the Investment Agreement on 8th July, 2008, and gave liberty to apply to the Examiner and the Company. The reason for which I made this order was not that I doubted *the bona fide* intention of the Investor, as communicated by the letter from its solicitor, but rather, in the interests of creditors, to give a quick method by which the parties could come back into court if any unforeseen difficulty arose in the completion of the investment on the Effective Date. The implementation of the Scheme of Arrangement confirmed by the court is dependent upon the investment. Therefore, it appeared appropriate that as the monies had not already been made available by the Investor, that the order of confirmation should include an order under s. 24 (8) directing the investment to be made on the agreed date and a mechanism for enforcing that obligation within these proceedings *i.e.* including liberty to apply for the purpose of enforcing the order. This order was only made after the Investor had been notified that the court was contemplating an order under s. 24 (8) and given an opportunity to appear and be heard.

24. The Scheme was confirmed subject to modifications. Certain of the modifications were relevant only to the facts of this Scheme. There were, however, two modifications of more general application.

25. First, the Examiner had sought to address the conditionality of the investment by including in the Proposals at para. 6.3, the following:

> "I will seek an order that, in the event that the First Investment is not made on or before the due date, I will be required

to inform the Court immediately. In such a circumstance, pending the further order of the Court, the Company will remain under Court Protection and the Proposals will not become effective."

At the first hearing, the Examiner, through his counsel, accepted that on a full consideration of the Act, the court has no jurisdiction to make the type of order referred to above and, in particular, no jurisdiction to extend the protection period beyond the date upon which the Scheme of Arrangement comes into effect. This is by reason of s. 26 of the Act which provides:

"(1) Subject to *section 5*, the protection deemed to be granted to a company under that section shall cease-

(a) on the coming into effect of a compromise or scheme of arrangement under this Act, or

(b) on such earlier date as the court may direct.

(2) Where a company ceases to be under the protection of the court, the appointment of the examiner shall terminate on the date of such cessation."

26. Section 24 (9) provides that a Scheme of Arrangement comes into effect from a date fixed by the court not later than twenty-one days from the date of its confirmation. Accordingly, the protection conferred on the Company by s. 5 of the Act, automatically ends at latest on the date fixed by the court for the coming into effect of the Scheme of Arrangement. The court cannot extend it beyond that date. Accordingly, one of the modifications was the deletion of para. 6.3 of the Proposals.

27. The second modification to which I wish to refer, is that made in relation to a recommended amendment to the Articles of Association. The Examiner had recommended that the Articles of Association be amended by providing that the existing redeemable preference shares be redeemed for the sum of twenty euros, but had not specified the actual amendment required to the Articles of Association to so provide. Section 24 (7) of the Act 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."

The above subsection appears to require that the actual text of any amendment to the Articles of Association be specified in the Proposals. The purpose of s. 24 (7) of the Act, in requiring specification of the actual amendment, appears to be certainty. No resolution of the Company is required to effect the amendment which would normally provide the text. A person who needs to know what is the current text of the Memorandum and Articles of the Company should be able, if necessary, to ascertain the wording of any amendment made pursuant to s. 24 (7) of the Act, by consulting the Scheme of Arrangement confirmed by the court. Hence, the actual text of the amendment was included as a modification.

28. For clarity, I also made an order pursuant to s. 24 (8) that the Company file in the Companies Office an amended Articles of Association within twenty-one days. Such filing is required where a company, by resolution, amends its Memorandum or Articles of Association.