

THE HIGH COURT**2009 684 COS****IN THE MATTER OF MILLSTREAM RECYCLING LIMITED****AND****IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009****AND****IN THE MATTER OF AN APPLICATION BY MILLSTREAM RECYCLING LIMITED PURSUANT TO SECTION 201 OF THE COMPANIES ACT 1963****Judgment of Miss Justice Laffoy delivered on the 26th day of March, 2010.****The application**

1. Staunton Foods Limited (the applicant) has brought this application in existing proceedings brought by Millstream Recycling Limited (the company) seeking relief under s. 201(1) of the Companies Act 1963 (the Act of 1963). I gave judgment in the proceedings on 23rd December, 2009 that, subject to the company filing a supplemental affidavit as specified, which was done, the following orders would be made:

- (a) an order pursuant to s. 201(1) that meetings of two separate classes of creditors of the company be summoned to consider proposals for a Scheme of Arrangement;
- (b) if the Scheme is approved by the requisite majorities, an order that the petition seeking the sanction of the Court for the Scheme pursuant to s. 201(3) be heard on Monday, 19th July, 2010 at 2pm; and
- (c) an order pursuant to s. 201(2) staying all proceedings and restraining further proceedings against the company for damages in relation to claims against the company arising out of a contamination event, as defined in the Scheme of Arrangement, until further order of the Court.

2. The Scheme as amended and dated 13th January, 2010, which was subsequently advertised, provided, in clause 11.9 that all claims in the prescribed form should be submitted to the Expert (identified in the Scheme), care of the Scheme Manager (as identified in the Scheme), on or before 12th February, 2010 or as directed by the Court. Clause 11.15 of the Scheme, headed "Claim Cut-off Date", provided as follows:

"This will be 12th February, 2010 or such date as may be directed by the Court. Scheme creditors who have not submitted a prescribed Creditor Claim Form by the Claim Cut-off Date will be deemed to have no claim and any claims received after that date, whether on a prescribed Claim Form or not, will be unenforceable."

No alternative Claim Cut-off Date has been directed by the Court.

3. On this application the applicant seeks either –

- (i) an order extending the time for the applicant to submit a claim for compensation/damages against the company to the Scheme Manager, or
- (ii) an order otherwise permitting the late submission by the applicant of a claim for compensation/damages against the company in these proceedings for consideration by the Scheme Manager.

The factual basis for the application

4. In his affidavit sworn on 16th March, 2010 grounding the application, Mr. Peadar Murphy, a director of the applicant, has averred that the applicant, which is engaged in meat, including pork and bacon, processing at its facility in Bandon, County Cork, has suffered substantial losses as a result of the pig feed contamination crisis in 2008 as a result of the supply by the company of contaminated feed to the market. In relation to the losses, Mr. Murphy has averred that they include loss of product, loss of market, loss of profit and the cost of a bridging loan necessitated by the contamination. The applicant has received three government compensation payments totalling almost €1.9m and has a further claim pending. Mr. Murphy averred that the applicant's uncompensated losses stand at in excess of €1.5m, roughly half of which relates to miscellaneous contingency costs and the other half to credits given to customers whose products were recalled.

5. Mr. Murphy has averred that, since December 2009, the applicant has intended taking legal action against the company and would be doing so now, but for the order made by the Court staying proceedings against the company. The company only learned of the Scheme of Arrangement on 23rd February, 2010, at which stage it contacted the Scheme Manager seeking to submit its claim, but the response of the Scheme Manager was that, without the leave of the Court, the company was not in a position to entertain the claim. Mr. Murphy averred that the applicant was not aware of the advertisements which had been placed pursuant to the Court order. However, Mr. Murphy suggested that the company should have been aware of its status as a contingent creditor because of its involvement in the government compensation scheme and that it should have been notified pursuant to the provisions of s. 202 of the Act of 1963.

Factual response of the company/Scheme Manager

6. An affidavit sworn on 23rd March, 2010 by Mr. Robert Hogg, a director of the company, has been filed in response to the application. Mr. Hogg has averred that the company had no dealings with the applicant, either by contract or otherwise, and was not aware of any claim being brought by the applicant. Mr. Hogg averred that he does not accept that the company could know, or should have known, that the applicant was a "contingent creditor" of the company.

7. As a result of what happened at the hearing of the application on 23rd March, 2010, as I understand the position, the applicant has threatened to sue Patrick J. O'Keeffe, who supplied animals to the applicant and Mr. O'Keeffe, who was represented on the hearing of the application under s. 201(1), as recorded in my judgment, proposes seeking leave to bring third party proceedings against the company. That understanding is based on what counsel for Mr. O'Keeffe stated at the hearing of this application.

8. As appears from the affidavit of the Scheme Manager, Mr. Jim Luby, which was also sworn on 23rd March, 2010:

(a) On 5th and 6th November, 2009, in compliance with directions given by this Court (Murphy J.) on 3rd November, 2009, advertisements notifying parties of the application under s. 201(1) were placed in The Irish Independent, The Farmers' Journal, The Financial Times, The Belfast Telegraph and Iris Oifigiúil.

(b) Pursuant to the directions given in the judgment of 23rd December, 2009, advertisements were placed on 21st and 22nd January, 2010 in The Irish Independent, The Farmer's Journal, The Belfast Telegraph, The Financial Times and Iris Oifigiúil. The advertisements were addressed to all creditors of the company and stated:

"All Creditors who wish to make a claim must do so by 5pm on 12th February, 2010 by sending a completed form approved by Order of the High Court dated 23rd December, 2009 ... addressed to: [Mr. Jim Luby] ..."

There followed a warning that all claims received after that date would not be included as qualifying for the purposes of the Scheme of Arrangement. There was a statement in the last paragraph of the advertisement that, in the event that the Scheme is approved by the High Court, any person who fails to make a claim using the prescribed form on or before the time stipulated "will be deemed to have waived any claim" against the company.

(c) All creditors who were known to, or who notified the company prior to 12th February, 2010 were provided with information packs and claim forms.

(d) Claims aggregating €110m have been submitted by 12th February, 2010.

(e) The Scheme Manager first became aware of the claim of the applicant when a letter dated 23rd February, 2010 was received from the applicant's solicitors.

Decision

9. The jurisdiction conferred on the Court by subs. (1) of s. 201 is to order a meeting of the creditors or class of creditors to be summoned in such manner as the Court directs, where a compromise or arrangement is proposed between the company and its creditors or any class of them. In delivering my judgment on 23rd December, 2009 I made it clear that the responsibility for preparing the Scheme and explaining it lay on the company and its advisers and that it was not the function of the Court at the first stage in the s. 201 process to give its *imprimatur* to the content of the Scheme. Therefore, I did not propose to give ancillary directions in relation to the submission and evaluation of claims. I also pointed to the obligations imposed by s. 202 of the Act of 1963.

10. I consider that the Court's function under subs. (1) of s. 201 was exhausted when judgment and order of 23rd December, 2009 was delivered. The Court does not have any jurisdiction to interfere with the implementation of the steps towards the holding of the creditors' meetings on 1st July, 2010. Those matters are governed by the terms of the Scheme itself.

11. Counsel for the applicant invoked Order 122, rule 7 of the Rules of the Superior Courts which provides as follows:

"Subject to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered though the application for the same is not made until after the expiration of the time appointed or allowed."

I am of the view that the time for submitting a claim to the Expert, via the Scheme Manager, is not appointed by order of the Court. It is laid down by the terms of the Scheme itself. Therefore, I am of the view that Order 122, rule 7 does not confer jurisdiction on the Court to extend the time for submitting a claim.

12. Therefore, the applicant's application is refused.

Ramifications

13. Lest there be any issue on this point at a later stage, I think it important to emphasise that nothing in this judgment is to be construed as precluding or limiting the pursuit of any issue which may be raised if the Scheme is approved by the creditors and the petition to sanction the Scheme comes back before the Court after the creditors' meeting. In particular, although I have referred to the last paragraph in the advertisements placed in January 2010, nothing in this judgment is to be taken as an implicit approval of that statement. The ramifications of the implementation of the process leading to the creditors' meetings and the approval of the Scheme by the creditors (if that is achieved) and the relevant considerations on the application to the Court under s. 201(3) are matters for another day.