THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 129

[2018 No. 56]

Irvine J.

IN THE MATTER OF LOBAR LIMITED AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

LOBAR LIMITED

APPELLANT

- AND -

MICHAEL GLADNEY

RESPONDENT/PETITIONER

JUDGMENT of Ms. Justice Irvine delivered on the 10th day of May 2018

Background facts

1. This judgment concerns an application on behalf of the appellant, Lobar Ltd., ("the company") for a continuation of a stay on an order of the High Court which was made on the 29th January 2018 and later amended on the 5th February 2018. The order provided that the company be wound up by the court under the provisions of the Companies Act 2014, and further provided that Mr. Myles Kirby, chartered accountant, be appointed liquidator. The stay granted by the High Court was conditional upon the company serving a notice of appeal within 10 days of the perfection of the High Court order in which case the stay would continue until the date of the first directions hearing in the Court of Appeal. That hearing took place on the 20th April 2018 on which date no application was made for an extension of the stay earlier granted. That being so, on the date upon which this Court heard the present application, the stay had expired and the liquidator had been appointed.

2. A notice of expedited appeal was filed on behalf of the company on the 14th February 2018. The grounds of appeal may be summarised as follows:

> (i) the petitioner, Michael Gladney, does not fall within the category of persons/parties entitled to present a petition to wind up the company under s. 571(1) of the Companies Act 2014. He was not a creditor within the meaning of that section;
>
> (ii) the High Court judge erred in law and in fact in concluding that the Revenue Commissioners were a creditor of the company within the meaning of s. 571 of the Companies Act 2014;
>
> (iii) the trial judge erred in law and in fact in determining that Michael Gladney, as agent of the Revenue Commissioners, was a creditor within the meaning of s. 571 of the 2014 Act;
>
> (iv) the trial judge erred in law and in fact in determining that the petitioner was the Revenue Commissioners and not Michael Gladney;
>
> (v) the High Court judge erred in law and in fact in concluding that the Revenue Commissioners were a creditor of the company within the meaning of the section and that Michael Gladney, as their agent, could be considered a creditor within the meaning of the section.

3. The respondent's notice was filed on the 22nd February 2018. In that notice, Mr. Gladney, the petitioner, as Collector General and an officer of the Revenue Commissioners, is stated to be a creditor of the company and a person entitled to present a petition to wind it up under s. 571(1). In the alternative, it is asserted that the Revenue Commissioners are creditors of the company and that Mr. Gladney, as Collector General and an officer of the Revenue Commissioners, is authorised to present a petition to wind up the company under the aforementioned section.

4. It is not necessary to set out the entire basis upon which the respondent opposes the appeal. The respondent's notice does, however, seek to rely upon the fact that the company is clearly insolvent and that the debt, the subject matter of the petition, remains due and unpaid. In addition, the respondent reserved the right to expand on the grounds of opposition on the hearing of the appeal.

The stay application

5. The company's application to extend the stay granted in the High Court was brought on foot of a notice of motion dated the 20th April 2018 and was supported by an affidavit sworn by Mr. John Quinn, solicitor, on the 20th April 2018. Noteworthy is the fact that no affidavit was filed by Mr. Patrick Maguire, a director of the company, whom, it would appear was, at the time the notice of appeal was filed, instructing Mr. Quinn on behalf of the company.

6. The affidavit of Mr. Quinn is somewhat unusual insofar as it has been used as a vehicle to advance legal submissions which should not be included in an affidavit, for reasons which are obvious. Then, he gives hearsay evidence concerning the company's finances, its ongoing building activities and its potential prospects. Based upon information relayed to him by Mr. Maguire, he advises that the company expects to be able to trade out of its difficulties and reduce its tax liabilities further but that if the court were to decline the stay the company will not be in a position to complete the works on the contracts in which it is presently involved.

7. In the concluding section of his affidavit, Mr. Quinn expresses concern that unless this appeal is determined, the respondent will

continue to seek orders from the High Court on the basis of Article 2 of Council Regulation No.2015/848, in circumstances where it is not entitled to do so. Finally he states that if the stay is not granted, the liquidator will be appointed and the appeal will be moot. As we now know the liquidator was appointed prior to the hearing of the stay application

8. In a letter dated the 27th April 2018, Mr. Quinn advised the Revenue's solicitors that he would seek their consent to a stay on the court order until 31st May 2018, that being the date upon which the Court of Appeal had indicated it might fix a date for the hearing of the appeal. In the meantime, he advised that his client would agree to:

(i) discharge all tax liabilities as they fell due;

(ii) furnish a list of assets and undertake not to dispose of them; and

(iii) provide, every two weeks, a copy of "his" bank account statements.

9. In a replying affidavit sworn on the 27th April 2018, Ms. Catherine Shivnan, on behalf of the Collector General, advised that the stay on the High Court order expired on the 20th April 2017. That being so, the company had no *locus standi* to maintain a stay application. The liquidator was in place and all powers to instruct solicitor and counsel on behalf of the company had passed to the liquidator.

10. In her affidavit, Ms. Shivnan referred to the fact that by letter dated the 13th March 2018, she had written to the appellant company and its directors advising that should it be their intention to seek to extend the stay beyond the 20th April 2018, a motion would have to be filed forthwith. Ms. Shivnan makes the point that no application to extend the stay was made prior to its expiry.

11. Concerning the balance of justice, Ms. Shivnan emphasises the fact that as of the date of the swearing of her affidavit, €178,441.90 remained owing to Revenue and she asks the court to note that it is not disputed that the company is insolvent. That being so, even if the appeal proved successful, as matters stand, the Directors would be obliged to wind up the company.

12. Ms. Shivnan also outlines the failure of Mr. Quinn's affidavit to faithfully record the company's liability to Revenue. She places emphasis upon the fact that the first tax repayment made by the company since the 29th August 2016 was made on the 10th April 2018 in the sum of €13,592.85. Furthermore, she expresses concern that if the stay was granted the interests of the petitioner and all other *bona fide* creditors would likely be prejudiced as the company clearly intends to continue trading whilst insolvent and in the absence of any checks, balances or supervision. Ms. Shivnan points to the risk of the company incurring further debt and reducing its assets to the detriment of its creditors.

13. Ms. Shivnan concludes her affidavit by expressing doubt as to the *bona fides* of the appeal, which she believes is motivated by delay in the hope that by the time the appeal is heard, the company may have traded out of its difficulties. She also expresses concern that no assurance has been given to the court that in circumstances where the company is insolvent, that company funds would not be used to fund the appeal.

Principles

14. The principles to be applied by a court on an application for a stay pending appeal are not in dispute. Some of the better known authorities are the decisions of Clarke J. (as he then was) in *Danske Bank t/a National Irish Bank v. McFadden* [2010] IEHC 119; *Irish Press plc. v. Ingersoll Irish Publications Ltd.* [1995] 1 ILRM 117, and most recently, the decision of Clarke J. in *Charles v. The Minister for Justice, Equality & Law Reform* [2016] IESC 48.

15. The aforementioned authorities make clear that the court is bound to engage in what is often described as a two-stage test. First, the applicant must demonstrate that they have an arguable ground of appeal and is one which is *bona fide* rather than tactical.

16. If the court is not satisfied that the appellant has demonstrated an arguable ground of appeal, that is the end of the stay application. Assuming, however, the appellant demonstrates a *bona fide* and arguable ground of appeal, then the court must consider where the balance of justice is to be found. As is stated in many of the more recent authorities, a stay brings with it potential detriment to both sides. Thus, it is necessary for the court to consider where the greatest risk of injustice may arise. It must consider the likely effect that granting a stay would have on the respondent should the appeal fail, and must also consider the effect that refusing a stay may have on the appellant should it succeed on its appeal. In this context, the court may impose a stay in terms which can ameliorate the potential detriment of granting or refusing a stay.

Submissions

17. It is not necessary to set out in detail the submissions of the parties. Counsel for the company relies on the legal arguments set out in Mr. Quinn's affidavit for which some traction is found in the notice of appeal. Having submitted that arguable grounds of appeal have been established, which are *bona fide*, counsel submits the court must look for the "middle ground" when it comes to establishing where the balance of justice is to be found. In particular, he emphasises the prejudice to the company if a stay is to be refused. If the winding up order is allowed to remain in place, there is no basis upon which he can pursue his appeal. He seeks to rely upon what he claims are the ameliorating effects for the petitioner of the terms and conditions offered in Mr. Quinn's letter of the 27th April 2018.

18. Counsel on behalf of the respondent makes a preliminary legal point. She submits that in circumstances where the stay on the High Court order expired on the 20th April 2018, the company has no *locus standi* to maintain the present application. She relies upon the provisions of s. 677(3)(a) of the 2014 Act. The present application has not been sanctioned by the company's creditors and does not have the approval of the liquidator.

19. Without prejudice to the aforementioned submission, counsel for the respondent submits that the company has no *bona fide* ground of appeal and that the present application offends the requirement that the appeal be one which is *bona fide* rather than tactical. She submits that the company is clearly insolvent. The company has not denied its liability to the petitioner and its inability to pay. That being so, the appeal is purely a tactical effort on the part of the company to continue trading whilst insolvent.

20. Finally, counsel submits that the balance of justice would clearly favour the refusal of the stay for all of the reasons identified in Ms. Shivnan's affidavit.

Decision

21. Having considered the submissions of the parties, I am satisfied that the preliminary objection voiced by the respondent, by way of objection to the company's application for a stay, is well founded. *De facto* this was acknowledged by Mr Quinn in his affidavit

which was sworn at a time when he anticipated his client would be seeking to extend the stay before it expired. He stated that once the liquidator was appointed the appeal would be moot.

22. It is a matter of some import that the High Court order stayed the appointment of the liquidator until the first directions hearing of any appeal brought by the company against the winding up order. That stay expired on the 20th April. On that occasion, the company did not apply for a continuation of the stay pending the hearing of the application on the 27th April 2018.

23. Section 677(3) of the 2014 Act provides as follows concerning the effect of winding up on the business and status of a company, namely:

> "On the appointment of a liquidator, other than a provisional liquidator, all the powers of the directors of the company shall cease, except so far as:
>
> > (a) in the case of a winding up by the court or a creditors' voluntary winding up, the committee of inspection or, if there is no such committee, the creditors, sanction (in either case, with the approval of the liquidator) the continuance of those powers…"

24. From the affidavit filed by Mr. Quinn in the present case, it would appear that he is instructed by Mr. Patrick Maguire in his capacity as a director of the company, but in circumstances where the liquidation has now commenced and where the present application has not received any sanction from the company's creditors nor the approval of the liquidator.

25. Lest I am incorrect as a matter of law in relation to the applicant's *locus standi* to maintain the present application, I intend in any event considering the present stay application on its merits having regard to the legal principles earlier outlined.

26. In my view the first matter material to the court's consideration is the fact that Mr. Maguire seeks to maintain this application in the name of the company for the purpose of permitting what is clearly an insolvent company to trade for an additional period of time. It is clear that if the stay is not granted, not only will the company continue to carry out the two building projects identified in Mr. Quinn's affidavit, but it will seek to enter into contractual arrangements concerning five other projects for which it has been asked to tender.

27. Secondly, it is important to recognise just what the court is being asked to do on the present application. It is being asked to set aside the appointment of the liquidator, because the stay application was not brought prior to the expiration of the stay granted by the High Court, and to do so at a time when, by reason of its financial circumstances, the directors are themselves under a duty to wind up the company. It is clear that the company is not in a position to pay its debts as they fall due, yet it is proposed that the court should permit it to continue to trade and grant a stay on the liquidation on the terms set out in Mr Quinn's letter to the Revenue's solicitors. For the court to take such an approach would be to ignore the statutory regime that applies when companies are insolvent.

28. As to whether or not the company has an arguable ground of appeal, I have to say that I consider the points raised in the notice of appeal no more than barely sufficient to pass the arguability threshold. However, I would not go so far as to conclude on this interlocutory application that as a matter of law, all of the grounds of appeal are unstateable. What can be said of them is that they would appear to be pursued for tactical advantage in the sense described in *Danske Bank v. McFadden*, and on legal analysis to be somewhat novel. However, given that they are at least *prima facie* capable of being argued, I intend to move directly to consider where the balance of justice is to be found in this case.

29. In my view, the balance of justice clearly warrants the refusal of the stay application. The first significant factor that weighs in that balance is the fact that the company is clearly insolvent and as matters stand, the company cannot pay its debts as they fall due. It is not in a position to discharge the petitioner's liabilities. That fact is not disputed.

30. Another factor that weighs in the balance is that if the court refuses the stay, it is permitting a company which it knows to be insolvent to continue to trade in an unsupervised fashion, and in so doing risks a grave injustice being perpetrated upon the general body of creditors. I do not think it would be appropriate for this Court to allow a company to trade when it is insolvent on the basis that they will continue, *inter alia*, to discharge all tax liabilities as they fall due. The court has to be mindful of the risk of allowing this company engage with those projects referred to in Mr. Quinn's affidavit when it cannot meet its agreed liabilities to the Revenue Commissioners. It is also material that the stay which the company seeks is one which would likely last for a period of a year during which irreparable damage might be caused.

31. Finally, the court is also satisfied that the liquidation would be gravely prejudiced if the stay were to be granted and the appellant were to lose its appeal, insofar as the liquidation would date back to the date of the presentation of the petition, thus significantly increasing the complexity and costs of the liquidation to the potential prejudice of creditors.

32. For all of the aforementioned reasons, I would refuse the stay.