

*Approved*  
*No redactions required*



**THE COURT OF APPEAL**

**CIVIL**

**Record No 2020/316 COS**

**Appeal No 2021/159**

**Neutral Citation [2022] IECA 34**

**Noonan J.**

**Faherty J.**

**Collins J.**

**IN THE MATTER OF THE COMPANIES ACT 2014**

**AND IN THE MATTER OF LANSKEY LIMITED**

**BETWEEN**

**JOSEPH BYRNE**

*Petitioner/Respondent*

**AND**

**CATRÍONA BYRNE AND SEAN BYRNE**

*Respondents/Appellants*

**Judgment of Mr Justice Maurice Collins delivered on 8 February 2022**

## **Background**

1. The Appellants appeal from an Order of the High Court (Allen J) made on 17 December 2020 directing the winding-up of Lanskey Limited (hereafter “*the Company*”) and appointing John Healy of Kirby Healy as liquidator of the Company.
2. The winding-up order was made on the petition of Joseph Byrne, a 40% shareholder in the Company. The Appellants are, respectively, the wife and son of the Petitioner, who between them hold the remaining 60% shareholding in the Company. Sean Byrne was a director of the Company prior to the making of the winding-up order. The Petitioner, who is in his 70s, had also been a director though as of the hearing of the winding-up petition before the High Court, there was some dispute as to whether he remained as a director or whether he had resigned. Catriona Byrne had been secretary of the Company as well as a director but had resigned as a director in August 2020.
3. The Company was incorporated in 2012 for the purpose of acquiring a flower-growing business which, it seems, had initially been established by Catriona Byrne and which the Petitioner later became involved in. The business was based on lands in Ballyboughal, North County Dublin. The business operated as “*Blooming Baskets*” and, in addition to growing flowers and plants, it involved the sale of flower baskets both at wholesale and retail level. It seems that it developed a very successful watering system for its baskets and was generally a very successful and profitable business. When the Company was incorporated, it incurred significant debt (€950,000) in order to acquire the business (including some 19 acres of land using for growing) from the Petitioner

and Catriona Byrne and the evidence suggests that this debt was paid off within 6/7 years.

4. Unfortunately, significant conflict appears to have arisen as between the Petitioner and the Appellants as to the management of affairs of the Company. In June 2019, the Petitioner issued proceedings pursuant to section 212 of the Companies Act 2014 (*“the 2014 Act”*) asserting that the Company’s affairs were being conducted and/or the powers of the directors were being exercised in a manner oppressive to him and in disregard of his interests as a member and seeking a declaration to that effect. Various other reliefs were sought in those proceedings, including *“if necessary”* directions with regard to the presentation of a petition for the winding up of the Company under section 212 or section 569 of the 2014 Act, an order providing access to the books and records of the Company and orders directed to the possible mediation of the issues in dispute. I shall refer to these proceedings as *“the section 212 proceedings”*.

5. In the affidavit grounding those proceedings, the Petitioner alleged that corporate governance within the Company was *“virtually non-existent”*, that there were no regular directors’ meetings and that he had been excluded from management and from access to the Company’s bank accounts. He also expressed concern about certain transactions involving the Company, including the approval by it of a share transfer from Catriona Byrne to her son (the effect of which was to increase his shareholding to 51%) and the withdrawal of €30,000 by Catriona Byrne from the Company, apparently for the purpose of discharging a tax liability arising on that transfer. While expressing a willingness and a desire to resolve the issues by mediation, Mr Byrne also expressed

the view that, in the absence of any such resolution, it would be necessary to wind-up the Company so that an independent liquidator could investigate its affairs and realise its value by selling it as a going concern under the supervision of the High Court.

6. The Appellants both swore affidavits in the section 212 proceedings which took issue with the Petitioner's characterisation of their conduct within the Company and suggested that any difficulties were the responsibility of the Petitioner himself. In her affidavit, Catherine Byrne accused the Petitioner of being aggressive and abusive and said that it was virtually impossible to deal with him. In her view, the winding up of the Company was to be avoided at all costs but any resolution of the position would require the resignation of the Petitioner as director and the acquisition of his shares over a period of time. She also explained that the parties had had numerous mediation sessions with different mediators without reaching any resolution. In his affidavit, Sean Byrne also took issue with what his father had stated. He accused the Petitioner of being largely responsible for the breakdown in trust and confidence between him and his fellow directors. The Petitioner responded in kind repeating his assertions of being excluded from the Company's management and making it clear that he was not prepared to resign as a director or to allow his shares to be acquired in the manner suggested by his wife.

7. On 13 (or 14) October 2020, while the section 212 proceedings were pending in the High Court, the Petitioner issued a winding-up petition. It sought the winding up of the Company on the basis of its failure to pay a sum in excess of €300,000 which was the subject of a statutory demand issued on 7 October 2020. The sum demanded comprised

some €275,000 said to be due to the Petitioner by way of loans advanced by him to the Company, as well as an amount of €11,000 in respect of outstanding salary and expenses and a sum of €30,000 in respect of monies said to have been taken from the Company by Mrs Byrne. However, the Petitioner also sought the winding-up of the Company on the grounds that it was just and equitable.

8. The Petition was grounded on a short confirmatory affidavit of the Petitioner and he also swore a more detailed affidavit on 17 November 2020 referring to what he characterised as the illegal delivery of a false return to the CRO on 4 November 2020 purporting to record his resignation as a director with effect from 14 October 2020. He suggested that this had been prompted by the presentation of the winding-up petition. He explained that in February 2020 he had tendered his resignation but that his solicitor had shortly afterwards communicated his withdrawal of that resignation. The Petitioner also referred to the incorporation of a new company, Baskets in Bloom Ltd by the Appellants which, he suggested, was waiting in the wings to carry on business in competition with the Company.
9. One final point to mention in this context is that a mediation between the parties took place on 1 March 2020, without success.

### **The Hearing in the High Court**

10. The Petition was returnable to 16 November 2020. On that date both it and the section 212 proceedings were transferred – apparently by consent – to the list to fix dates on

19 November 2020. On that date, a hearing date of 3 December 2020 was assigned. There appears to have been no objection to a hearing date being fixed.

11. On 2 December 2020 counsel for the Appellants sought leave from the Judge in charge of the Chancery list to deliver affidavits but the Judge declined to give such leave, indicating that the application should be made to the Judge assigned to hear the Petition and the section 212 proceedings.
12. The application was indeed renewed before Allen J on the following day. Having heard what was said by counsel, Allen J concluded that no adequate explanation or excuse had been offered for the failure to deliver the affidavits in a timely way and he was of the view that the Petitioner was entitled to have the Petition heard. Accordingly he excluded the affidavits sought to be relied on and the hearing proceeded on that basis.
13. Having heard further submissions, the Judge ruled that on any view the relationship between the parties had irretrievably broken down and he was satisfied on the evidence that the shareholders could not legally or practically administer the Company without the co-operation of one another, which would not be forthcoming. While there had been allegations and counter-allegations of oppression, the Court noted that the application as ultimately presented had not been argued on the basis of oppression but on the basis that a winding up order was just and equitable. The Judge was persuaded that an order should be made on that basis. However, he postponed the making of the order for a period of two weeks to allow an opportunity for a further mediation to be convened and/or to allow the Appellants to make an offer for the Petitioner's shareholding.

14. During the hearing Counsel for the Petitioner did not press the Petition insofar as it was based on the insolvency of the Company, conceding that his client was not in a position to give an accurate picture of its financial affairs. In the course of argument on this appeal, Counsel accepted that a winding-up order could not properly have been made on the grounds of insolvency.
15. In the event, there appears to have been no engagement between the parties (though we were told by Sean Byrne that he had sent a settlement proposal directly to the Petitioner and his solicitors after the hearing on 3 December 2020) and nothing had been resolved by the 17 December 2020 and on that date Allen J made the order winding up the Company and appointing Mr Healy as official liquidator.
16. No stay on that order was sought and the order duly took effect (though there appears to have been some delay in its finalisation) and Mr Healy has been in position as liquidator for a considerable period.

### **The Appeal**

17. The Appellants' notice of appeal sets out a number of grounds but they may, I think, be reduced to two main grounds:
  - It is said that the Judge erred in excluding the affidavits they wished to file and/or in failing to adjourn the hearing for that purpose (Grounds 1, 2 & 3). It is also said

that the Judge erred in not directing that the Petition be heard by way of oral hearing given that there were facts in dispute (Ground 4)

- It is said that the Judge erred in making an order for the winding up of the Company (Grounds 7 and 8)

Grounds 5 (a complaint that the Judge wrongly refused to review the settlement proposal made by the Appellants after the initial hearing on 3 December 2020) and 10 (a complaint that the High Court Judge had erred in failing to consider that Catriona Byrne had already instituted family law proceedings and that both Appellants were residing on Company lands) do not, I am satisfied, disclose any arguable basis for impugning the order of the High Court and accordingly I shall not refer to them further.

18. Shortly before the hearing of this appeal, the solicitors acting for the Appellants sought to come off record. That application was not opposed and the solicitors were permitted to do so. That left the Appellants without representation. However, the Appellants made it clear at the start of the hearing today that they were not seeking an adjournment of the appeal and were happy to proceed. They each addressed the Court and I have had careful regard to what they said.

### **Discussion and Disposition**

19. An explanation was advanced in the notice of appeal as to why the affidavits which the Appellants wished to rely on had not been filed earlier but that explanation was not

given to the Judge and in any event does not plausibly explain the delay on the Appellants' part.

20. Nevertheless, I am a little surprised by the High Court's refusal to allow the affidavits to be delivered in the circumstances here, particularly having regard to the nature of the order being sought by the Petitioner and the consequences of it for the Company and its shareholders. No pressing urgency was identified on behalf of the Petitioner and the High Court was content to postpone the making of its order for two weeks in any event. It does not appear that an adjournment of the Petition to allow the Appellants to file the affidavits prepared on their behalf would have caused any significant prejudice to the Petitioner, albeit that he was no doubt anxious to bring the proceedings to finality. There is no doubt that the Appellants were in default but that could have been addressed by way of an order for costs against them in respect of the costs thrown away by any adjournment.
21. However, the issue is not an abstract or theoretical one. That the Judge may arguably have erred in the exercise of his discretion is not a sufficient basis for setting aside the winding-up order here. To succeed on their appeal, the Appellants must be able to demonstrate that the Judge's refusal to adjourn the proceedings and permit them to file their affidavits caused or may have caused them some real prejudice. That is particularly so given that events have moved on significantly since December 2020 and the liquidator has been *in situ* for some considerable time. In those circumstances, the order made by the High Court should not be lightly upended.

22. At its request, the Court was provided with the (draft) affidavits on which the Appellants had sought to rely in the High Court and it has carefully considered the contents of those affidavits.
  
23. In my view – and I understand that the other members of the Court share this view – those affidavits could not have advanced the Appellants’ position or provided any basis for resisting the order ultimately made by the High Court.
  
24. In this context, it is important to appreciate that the basis on which that order was made was *not* that the Company was insolvent (an issue addressed in both draft affidavits) *or* that the oppression had been established such as to warrant the making of a winding-up order (also addressed in those affidavits). Ultimately, the order was sought, and made, on the basis that the circumstances were such that it was just and equitable to wind up the Company. Nothing in the draft affidavits the Court has reviewed was capable of weighing against that conclusion.
  
25. In truth, the evidence on that issue was (and is) all one way. It is painfully evident from all of the affidavit evidence that all trust and confidence between the Petitioner and the Appellants had irretrievably broken down as of December 2020. The parties had endeavoured, unfortunately without any success, to arrive at some form of resolution. As Mrs Byrne told the Court earlier, hundreds of hours had been spent in mediation, including a mediation on 1 March 2020. Even when the High Court allowed a further opportunity for engagement, under the shadow of an imminent winding-up order, no progress could be made. That demonstrates in a very concrete way how intractable

were the difficulties within the Company. Its management was deadlocked and the Company effectively had ceased to function. The recent report from the liquidator makes it clear that these difficulties persist. There was no evidential conflict on these issues and permitting the late delivery of the draft affidavits sought to be relied on by the Appellants would not have given rise to any conflict. The complaints at grounds 1, 2 and 3 fall away on that basis, as does the complaint at ground 4. No cross-examination or oral hearing was indicated or necessary in the circumstances here. In any event, it does not appear that the Appellants ever served a notice to cross-examine the Petitioner on any of his affidavits or sought a direction that he attend for cross-examination.

26. As for the order made by the High Court, it has not been suggested that, as a matter of principle, such an order was not open to the Judge here. Section 569(1)(e) is cast in broad terms and it has been said that the court should not trammel the jurisdiction thus conferred by reference to authorities that merely exemplify it. In any event, and subject to that caveat, Courtney, *The Law of Companies* (4<sup>th</sup> ed; 2016) (“*Courtney*”) identifies a number of circumstances in which such orders have been made, including (i) quasi-partnership cases and (ii) cases where there is deadlock in corporate management (at para [24.120]). Given the undisputed background to the incorporation of the Company here, it certainly appears to be a quasi-partnership in the sense used in the authorities in this context. *Re Murph’s Restaurant Ltd* [1979] ILRM 141 establishes that where there is a fundamental breakdown in relations between quasi-partners, the power of the High Court to wind-up the company on just and equitable grounds may be engaged. The deadlock in corporate management ground also clearly applies on the evidence here. The leading Irish case is *Re Vehicle Buildings and Insulations Ltd* [1986] ILRM

239 which is discussed in detail in *Courtney*. While *Re Vehicle Buildings and Insulations Ltd* involved two 50% shareholders - whereas the split here is 40:60 - it has not been suggested that that of itself takes the case outside the scope of section 569(1)(e) and it would be most surprising if that were to be the case, having regard to the terms of that sub-section. A notable feature of *Re Vehicle Buildings and Insulations Ltd* is that – as here – the order was made on foot of a hearing on affidavit only. Both *Re Murph's Restaurant Ltd* [1979] ILRM 141 and *Re Vehicle Buildings and Insulations Ltd* were opened to the High Court.

27. What is said by the Appellants is that winding up should be the “*option of last resort*”, relying on the observations of the High Court (Charleton J) in *In re Fuerta Limited* [2014] IEHC. 12. The circumstances in *In re Fuerta* were rather different to the circumstances here, involving allegations of non-compliance with the Companies Acts. However, accepting for the purpose of this appeal that there is such a general principle, it appears to me that the High Court was entitled to take the view that there was no adequate or satisfactory alternative remedy here and that, therefore, it was appropriate to reach for the “*option of last resort*”. What is suggested is that the Court should have directed the Appellants to buy out the Petitioner’s shareholding. However, the process of valuing that shareholding would be fraught with difficulty and delay given the nature and range of conflict between the parties. Furthermore, the Court had no evidence of the Appellants’ willingness and/or financial capacity to buy out the Petitioner (and no such evidence was contained in the draft affidavits sought to be relied on in the High Court either). A buy-out of the Petitioner was not, on the evidence, a realistic or effective alternative. The High Court was, in my view, entitled to take the view that the

appropriate remedy was to wind up the Company, thus enabling the sale of the Company's assets on the open market by an independent liquidator who would be answerable to the court.

28. It is very regrettable that an apparently successful family company should be wound up but the parties have had years – literally – to resolve their difficulties in a manner that could have saved or revived it. It may not be too late to do so even now. In any event, it will of course be open to the Appellants to seek to purchase the business and/or assets of the Company from the liquidator in the ordinary way. However, the Appellants have not identified any error in the order made by the Judge. It follows, in my view, that the appeal must be dismissed.

*Noonan and Faherty JJ agree with this judgment*