[2019] IEHC 692

THE HIGH COURT

[2019 No. 101 COS]

IN THE MATTER OF DUIBHNE DILTOIR LOIN TEORANTA
(IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACT, 2014

BETWEEN

REVENUE COMMISSIONERS

APPLICANT

AND

THIRTEEN NAMED CREDITORS

RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 24th day of October, 2019

Introduction

1. This is an application on behalf of the Revenue Commissioners for an order pursuant to s. 588(5) of the Companies Act, 2014 appointing Mr. Aidan Garcia Diaz as liquidator of Duibhne Diltoir Loin Teoranta, instead of Mr. Conor O'Boyle.

2. The notice of motion also seeks orders setting aside two decisions made by the chairman of a creditors' meeting but the issue of the correctness of those decisions, as well as another issue raised in the affidavits, really goes to whether the liquidator should be replaced rather than calling for orders setting them aside.

The first creditors' meeting

3. Duibhne Diltoir Loin Teoranta ("*the Company*") was incorporated on 15th February, 1990 and carried on the business of cake and confectionery sales until it ceased trading on 15th February, 2019.

4. At a creditors' meeting which was convened for 26th February, 2019, the directors presented an estimated statement of affairs which showed estimated realisable assets of €964,431; secured creditors of €540,834; preferential creditors of €460,963; and unsecured creditors of €1,668,562. The estimated deficit was €1,705,928.

5. The secured creditor was said to have a lien over the debtors to the value of €540,834. The preferential creditors comprised wages and redundancy claims of €328,848 and Revenue liabilities in respect of unpaid VAT and PAYE/PRSI of €132,115.

6. The list of unsecured creditors showed the directors, Alan Divney and James Divney, as owed €79,868 and €111,150, respectively. The single largest unsecured creditor was Premier Foods plc, which was shown to be owed €560,950.

7. The creditors' meeting on 26th February, 2019 was chaired, or at least nominally chaired, by Mr. James Divney, who was assisted by an accountant, Mr. Tim Conway, and a solicitor, Mr. Andrew Coonan. Queries were raised by and on behalf of a number of creditors in relation to large differences between the figures shown on the estimated statement of affairs and the most recently filed abridged financial statements. It was suggested that the value of the fixed assets of the Company shown in the statement of affairs was €625,173 less than had been shown in the financial statements as of 31st

December, 2017. Ms. Caroline O'Rourke, an officer in the Insolvency Unit of the Revenue Commissioners, elicited an admission from Mr. Divney that the admitted liability for VAT and PAYE/PRSI arose from the improper use of those monies to pay trade debts, including the directors' salaries.

8. Mr. Coonan, the solicitor assisting the chairman of the meeting, indicated that the Company had nominated Mr. Conor O'Boyle as liquidator and he said that there would be no vote as *"the creditors' proxies in favour of that nomination exceeded the remaining admitted proxies"*. A solicitor from Arthur Cox, acting for two of the creditors (who were shown on the statement of affairs as being owed a total of €78,088) proposed Mr. Shane McCarthy as liquidator, and called for a vote. The chairman refused. Ms. O'Rourke asked to be allowed to inspect the proxies, and that request was refused.

9. There were two representatives of Premier Foods at the meeting, Ms. Alison Healy and Ms. Cath Crompton. Premier Foods had lodged a proxy in favour of the chairman, but Ms. Healy and Ms. Crompton indicated that having heard the questions and answers, they wished to vote in favour of a liquidator other than the Company's nominee. At that stage, Mr. Coonan said that there was a problem with the proxies and that the meeting would be adjourned.

10. Ms. O'Rourke and the solicitor from Arthur Cox argued that the consent of the creditors was required before the meeting could be adjourned, but this was ignored.

11. Ms. O'Rourke renewed her request to examine the proxies, specifically so that she would be able to establish whether at any reconvened meeting the proxies would be the same: but this request was ignored. Ms. O'Rourke asked when the adjourned date would be: but again, there was no answer.

12. The conduct of the meeting was irregular. Ms. O'Rourke's request to inspect the proxies was perfectly reasonable and ought to have been acceded to.

13. The adjournment of the meeting was irregular. By s. 697 of the Companies Act, 2014 the meeting ought to have been adjourned to a specified time and place, which it was not. By the same section, the meeting ought not to have been adjourned without the consent of the meeting.

The second creditors' meeting

14. On 4th March, 2019 a notice was circulated by the Company of a creditors' meeting which was to take place on 12th March, 2019. The notice given did not suggest that the adjourned meeting was being reconvened, but rather gave notice of a new creditors' meeting. The notice was not sent to Revenue, but Ms. O'Rourke learned of the meeting from Mr. McCarthy, who sent her a copy of what had been circulated. If, as was later said, the omission to notify the Revenue of the meeting was an oversight, it was particularly unfortunate.

15. Included with the notice were blank forms of general proxy and special proxy, and a list of the names of the creditors of the Company, but without amounts. The Messrs. Divney

were on that list. The notice called for the proxies to be used at the meeting to be lodged to the registered office of the Company by no later than 4:00pm on Friday 8th March and indicated that "*the Company shall nominate Conor O'Boyle of O'Boyle + Associates as liquidator of the Company*".

16. The time limited for the return of proxies was irregular. By s. 702(3)(c) of the Act of 2014, the time within which proxies might be received was 4:00 pm on the afternoon of the day before the meeting or adjourned meeting at which they were to be used: which would have been Monday 11th March.

17. At the meeting on 12th March, 2019 Mr. James Divney, in the chair, or nominally in the chair, was assisted by a different solicitor, Mr. Anthony Moloney. It was said that the failure to give notice to the Revenue had been an oversight but that a telephone call had been made to the Collector General's Office. Ms. O'Rourke queried whether new proxies were being used, to which the answer was that they were not.

18. A revised estimated statement of affairs was presented to the meeting. The differences between the new and the previous statement of affairs were that Bank of Ireland was shown as a creditor for €101,000; and the combined amounts shown to be owing to the Messrs. Divney, who were on this list of creditors, had been reduced by €101,060 to a total of €89,958.

19. The solicitor from Arthur Cox referred again to the reduction in the value of fixed assets since 31st December, 2017. He elicited an admission that the Company had been insolvent for the previous six months.

20. Ms. Healy and Ms. Crompton were again in attendance to represent Premier Foods and indicated that they would vote in favour of Mr. McCarthy.

21. The solicitor from Arthur Cox nominated Mr. McCarthy as a liquidator and was supported by Ms. O'Rourke, for the Revenue, and Ms. Healy and Ms. Crompton, for Premier Foods. Between them, these four creditors were owed €771,153. The remaining creditors, including the Messrs. Divney, were altogether owed €758,408.

22. There was a discussion about the entitlement of the representatives of Premier Foods to vote. Ms. Alison Healy produced an e-mail which had been sent on 26th February, 2019 at 10:29 from Ms. Jette Andersen to her, and which had been copied to Ms. Crompton and a Mr. Alistair Murray. The e-mail read:

"Subject: DDL

> *Jette R. Andersen (Managing Director International) and Alastair Murray (Acting CEO and CFO) appoint Alison Healy as authorised signature (sic.) on behalf of Premier Foods for the purpose of voting at the meeting of the creditors with DDL on Tuesday 26th February, 2019. All previous votes are withdrawn by Premier Foods.*
>
> *Regards*

Jette R. Anderson.

Jette R. Anderson
Managing Director – International

Office: [UK Telephone No.]

Mobile: [UK Telephone No.]

Premier Foods plc, Premier House, Griffith Way,

St. Albans, Hertfordshire, AL1 2RE

United Kingdom."

23. This e-mail had been forwarded by Ms. Healy to Mr. O'Boyle on 26th February, 2019 at 11:26 and acknowledged by Mr. O'Boyle who had replied at 15:57 on the same day, to say that he had noted it in the minutes of the meeting.

24. Again Mr. Divney refused to allow a vote, indicating that the proxies were conclusively in favour of the Company's nominee.

25. Ms. O'Rourke's evidence is that Mr. O'Boyle said that the Premier Foods proxy had only been received at 8:58 am on 26th February and that Ms. Healy produced *"a copy of the resolution passed for the purpose of section 185 of the Companies Act, 2014 which enjoys the benefit of section 703 of the Act."* Ms. O'Rourke exhibited what was produced by Ms. Healy, which was the e-mail of 26th February, 2019 to which I have referred.

26. What Mr. Divney exhibited as the minutes of the meeting records:-

> *"Premier Foods do not have a vote as they did not produce a proxy on either this occasion or the last. Cath Crompton claims that she has an email from the directors which states that she has been given the power to vote. This is excluded as no proxy was produced on the last occasion. Alison Healy presents an iPad to Anthony [Moloney] to show a number of emails in relation to this, however he states that there has been no resolution has been passed or produced (sic.) and it is up to the chair to decide whether or not to accept their vote. James Divney is not willing to accept their vote. Frances Flynn of Arthur Cox want to elect KPMG as liquidator but as the chair has the vote Conor O'Boyle is elected."*

27. On this occasion Ms. O'Rourke was permitted to inspect the proxies. There were proxies in favour of the chairman, including those of the Messrs. Divney, to the value of €758,408. If a vote had been allowed, and if Premier Foods had been allowed to vote, there would have been votes to the value of €771,153 in favour of Mr. McCarthy.

The application

28. This application was made by originating notice of motion issued on 21st March, 2019 - within fourteen days of the meeting of 12th March, 2019.

29. The first relief sought, as I have said, is an order pursuant to s. 588(5) of the Companies Act, 2014 appointing Mr. Garcia Diaz as liquidator of Duibhne Diltoir Loin Teoranta, instead of Mr. O'Boyle.

30. The two decisions which are specifically challenged are the refusal of Mr. Divney to allow a vote at the second creditors' meeting and the refusal to allow Premier Foods to vote.

31. The further issue, which was raised in the affidavit of Ms. O'Rourke grounding the application, is whether the directors ought to have been allowed to vote without producing a copy of a written loan agreement which, she suggested, was required by s. 237 of the Companies Act.

32. The application was made on notice to the directors, the Company's thirteen largest creditors (including the Messrs. Divney), and the Company. Three of the creditors, with admitted debts amounting in total to €318,434, and who had previously given proxies in favour of the chairman, wrote to the Revenue by e-mail to say that they had no objection to the application to replace Mr. O'Boyle. Apart from the directors, no creditor has given any indication of support for Mr. O'Boyle.

33. Mr. O'Boyle was notified of the making of the application and in correspondence, quite correctly, took the position that the application had nothing to do with him. On the original return date on 8th April, 2019 Mr. O'Boyle gave an undertaking to the court that pending the determination of this motion he would limit his work to dealing with employee claims and collecting the Company's debts.

34. The application was opposed by the Company and the directors. Mr. James Divney swore an affidavit which he said he made on behalf of the Company and his fellow director, Mr. Alan Divney.

35. Mr. Divney suggested, firstly, that if the court accepted the complaints in relation to Mr. O'Boyle's appointment, the inescapable conclusion would be that Mr. McCarthy was duly nominated by the majority in value of the creditors, and so was the liquidator of the Company.

36. Secondly, he said, since s. 588(5) only allows for the removal of a liquidator nominated by the creditors, the premise of the application must be that Mr. O'Boyle had been properly nominated by the creditors.

37. Thirdly, it is said that the representatives of Premier Foods (who Mr. Divney repeatedly describes as such) had failed to lodge a valid proxy "*in advance either of the meeting of 26th February, 2019 or the reconvened meeting of 12th March, 2019*" and had failed to prove that any valid resolution of Premier Foods had been passed. The e-mails which Ms. Healy had produced were said to be *"from persons not purporting or expressly representing the Board of Premier Foods".* Mr. Divney suggested that as chairman he was entitled to enquire into the authority of the "*purported representatives*" and to refuse

to permit Premier Foods to vote in circumstances in which he had not been satisfied they were properly authorised by proxy or resolution.

38. Fourthly, Mr. Divney said that one of the creditors of the Company, shown on the statement of affairs as owed €109,429, claimed to be owed €139,429. This, Mr. Divney suggested, if correct, would have meant that a majority and value of the creditors did approve the appointment of Mr. O'Boyle.

39. Mr. Divney exhibited the minutes of the meetings of 26th February and 12th March and copies of the proxies. The minutes of the meeting of 12th March suggest that the meeting was opened by Mr. Moloney as a reconvened meeting. Ms. O'Rourke is recorded as having asked why new proxy forms had been issued but not what, if any, answer she was given.

40. The copy proxies exhibited are with two exceptions dated for February, 2019. Surprisingly, they are not all in the same form. Some carry the printed words "(*Authorised Officer)*" on the signature line, while others do not. On some of the forms on which the words "*authorised officer*" were not printed, those words were added in manuscript. On others, notwithstanding the instruction in the note that the fact that the officer was so authorised should be stated, the words were not added. Two of the proxies are dated for March and relate to the meeting of 12th March.

Jurisdiction

41. The first and second points made by Mr. Divney in his replying affidavit are dealt with by the decision of the Court of Appeal in *Revenue Commissioners v. Ladaney Limited (In voluntary liquidation)* [2015] IECA 62.

42. That was a case in which the acceptance by the chairman of a creditors' meeting of proxies which the High Court ruled ought not to have been accepted had the result that the person declared elected as liquidator was the Company's nominee rather than Revenue's nominee. Revenue applied pursuant to s. 267(2) of the Companies Act, 1963 - which was in the same terms as s. 588(4) and (5) of the Act of 2014 - for the appointment of its nominee instead of the creditors' nominee. As to the power available to the court under the provision, Finlay-Geoghegan J. (with whom Peart and Hogan JJ. concurred) said:-

> *"Section 267(2) expressly provides a right to apply to the High Court within 14 days where 'different persons are nominated as liquidator'. Whilst there is some lack of clarity as to what is intended by 'nominated' in the sense used in this phrase, it would appear that to make s. 267 as amended workable in practice that it should be construed as including the situation where two different persons were nominated at the creditors' meeting and it is alleged, as here, that the incorrect person was appointed as s. 267(3) was not correctly applied by the chairperson of the creditors' meeting."*

43. Contrary to the suggestion made by Mr. Divney on his affidavit and the argument made on his behalf, *Ladaney Limited* is authority for the proposition that s. 588(3) may be invoked to challenge the validity of the appointment of a liquidator. Further, the consequence of a successful challenge to the correctness of a decision made by the chairman of a creditors' meeting is not necessarily that the other nominee was, or is, the liquidator. Rather the successful challenge engages a power to direct that one or other or both, or some other person, shall be the liquidator.

44. As to the factors to be taken into account by the court in the exercise of its discretion, Mr. Cunningham, for the Revenue, relies on the decision of Humphreys J. in *Star Elm Frames Limited* [2016] IEHC 666, which was affirmed by the Court of Appeal [2018] IECA 103.

45. That was a case in which the resolution of the company to wind up was passed in the interval between the presentation of a winding petition and the return date and the issue was whether the court should make an order for compulsory winding up, but it seems to me that the factors to be taken into consideration on an application pursuant to s. 588(3) of the Act of 2014 are similar.

46. In *Star Elm Frames Limited* Humphreys J., by reference to the judgments of O'Neill J. in Hayes Homes Limited (Unreported, High Court, 8th July, 2004, O'Neill J.), of O'Hanlon J. in Re *Gilt Construction Limited* [1994] 2 I.L.R.M. 456, and of McCracken J. in *In Re Naiad Limited* (Unreported, High Court, 13th February, 1995, McCracken J.) and *Eurochick Ireland Limited* [1998] IEHC 51, noted that the court should be slow to dislodge a voluntary liquidator appointed by the majority of the creditors, particularly where the amount available is small.

47. All of the judgments delivered on applications under the Companies Act, 1963 attached significant weight to the fact that a compulsory winding up under the supervision of the court would have been a great deal slower and more expensive than a voluntary winding up. The regime under the Companies Act, 2014 is significantly different. While time and cost certainly may be matters to which the court will need to have regard, the fact that the court ordered liquidations and creditors' voluntary liquidations are nowadays carried out in substantially the same way means that cost and time are no longer as presumptively important as they were under the old regime. Because any application under s. 588 must be brought within fourteen days of the creditors meeting, the risk in such a case of a duplication of work will be small. In this case there is no suggestion that the replacement of Mr. O'Boyle will add to the cost of the winding up.

48. In *Star Elm Frames Limited* Humphreys J. identified nine factors which in that case militated in favour of making the winding up order which were:-

(i) Whether there are allegations of misconduct which require independent supervision.

(ii) Whether the precipitating event for the creditors' winding up was the presentation of a petition.

(iii) Whether there are allegations in relation to the court having been misled that require independent investigation.
(iv) The conduct of the company since the liquidation.
(v) The complexity of the matter.
(vi) The views of the stakeholders primarily affected.
(vii) The views of stakeholders representing public rather than private interests.
(viii) The views of stakeholders unconnected to the company.
(ix) The extent of objections by other creditors.

49. In this case the court is urged that there is a further significant factor which is the irregularity in the convening and conduct of the creditors meeting.

50. In this case, unlike *Star Elm Frames Limited,* the independence of the company's nominee is not impugned but it is submitted that the application is supported by the stakeholders primarily affected, the stakeholders representing public rather than private interests, and the stakeholders unconnected with the company, and that there is no objection to the application other than from the directors.

51. It seems to me that the discretion of the court to make an order under s. 588(5) is engaged by the making of the application under section 588(4). In the exercise of that discretion, the court will not lightly disregard the wishes of the majority of the creditors. Nor will the court be receptive to applications under s. 588(4) which seek to reopen the resolution of a creditors' meeting without substantial grounds. The authorities are consistent that a resolution of the majority of the creditors may be disregarded where an applicant creditor has a legitimate sense of grievance. I think that the court may also be persuaded to replace a liquidator where it can be shown that the creditors, for good and sufficient reason, have changed their minds. So, as in this case, a creditor might execute and lodge a proxy in favour of the chairman of the meeting but come to regret having done so by reason of information which might emerge at the meeting. In this case Premier Foods had a representative at the first creditors' meeting and heard the questions and answers and the proxy was withdrawn. Two of the other creditors of the Company (with combined admitted debts of €251,725) who, by proxy, voted in favour of the Company's nominee have now indicated that they do not object to the Revenue's application, and no creditor other than the Messrs. Divney opposes it. I think that these are matters which can properly be taken into account.

52. I accept the Revenue's submission that irregularity in the convening and conduct of the creditors' meeting are also matters which may be taken into account. So, for example, a creditor whose proxy in favour of a creditors' nominee had been correctly ruled to be invalid for failing to show that it had been executed by an authorised officer might legitimately complain that similarly infirm proxies in favour of the Company's nominee had been allowed.

Whether Premier Foods ought to have been allowed to vote

53. Section 185 provides for the representation of bodies corporate at meetings of companies. Section 185(2) and (4) provide:-

> *"(2) A body corporate may, if it is a creditor (including a holder of debentures) of a company, by resolution of its directors or other governing body authorise such person (in this section referred to as an 'authorised person') as it thinks fit to act as its representative at any meeting of the creditors of the company held in pursuance of this Act or the provisions contained in any debenture or trust deed, as the case may be.*
>
> *(4) The chairperson of a meeting may require a person claiming to be an authorised person within the meaning of this section to produce such evidence of the person's authority as such as the chairperson may reasonably specify and, if such evidence is not produced, the chairperson may exclude such person from the meeting"*

54. Section 703 provides, for the avoidance of doubt, that s. 185 applies to any meeting of the company held during the course of its being wound up.

55. It was submitted on behalf of Revenue that once the chairperson had been shown the "*resolution*" the Premier Foods representatives were entitled to vote unless, pursuant to sub-s. (4) there was a reasonable request for evidence of the authority and a failure to provide it. In this case, it was said, there had been no request.

56. I find that the decision of the chairman that Premier Foods did not have a vote was wrong.

57. The minutes of the meeting of 12th March, 2019 show that the representatives of Premier Foods were not allowed to vote because they had not produced a proxy. This betrays a fundamental misunderstanding of the Companies Act, 2014. As was spelled out by Laffoy J. in *CED Construction Limited* [2011] IEHC 420 a corporate creditor has a number of means available to it to have its wishes in relation to the appointment of a liquidator taken into account at a creditors' meeting. It may act through an authorised person or it may vote by proxy. These are alternatives. There is no requirement that a proxy should be produced as a precondition to the entitlement of the creditor to act by an authorised person.

58. Section 185(4) of the Act of 2014 is a new provision, in the sense that it significantly changed the rule that theretofore applied. The old rule was that a representative of a creditor was required to produce a sealed copy of the resolution authorising him to act. The new rule is that the chairperson of the creditors' meeting may require a person claiming to be an authorised person to produce such evidence of the person's authority as such as the chairperson may reasonably specify. The minutes of the meeting of 12th March, 2019 show that Ms. Healy was not permitted to vote because Premier Foods had not lodged a proxy, and not because she was not an authorised person. Mr. Divney did not exercise the power he had under s. 185(4) to require Ms. Healy to produce any evidence.

59. Mr. Sean O'Sullivan, for the directors, argues that the characterisation of the e-mail of 26th February, 2019 as a resolution of Premier Foods is a mischaracterisation. I think that he is correct in that. On that basis, says Mr. O'Sullivan, there was no evidence of a resolution of Premier Foods before the second creditor's meeting, nor is there evidence before the court of a resolution of Premier Foods. I think that that is also correct: but the submission fails to engage with the Revenue's argument that the representative of Premier Foods was not obliged to provide a copy of a resolution or, indeed, to provide any evidence of Ms. Healy's authority, unless and until she was required to produce it.

60. While I accept that the e-mail was not a resolution, it seems to me that was not a basis on which Mr. Moloney could have definitively concluded that no resolution of Premier Foods plc had been passed. Moreover, the fact that no resolution had been produced was irrelevant absent a requirement by the chairman that such a resolution or evidence of such a resolution be produced. In his affidavit in response to this application Mr. Divney asserts that he was entitled to enquire into the authority of the "*purported representatives*" of Premier Foods: but he does not say that he did so enquire, and the minutes of the meeting show that he did not.

Whether the directors ought to have been allowed to vote

61. Because the Premier Foods' debt was a multiple of the directors' debt, the outcome of the creditors' vote that should have been allowed would have been the same whether or not the directors had been allowed to vote. That being so, the issue as to whether the Messrs. Divney ought to have been allowed to vote does not strictly speaking arise. The issue having been argued, however, I think that it is useful that I should express my view.

62. Section 237 of the Act of 2014 is headed "*Loans, etc., by directors or connected persons to company or holding company: evidential provisions*". The section provides for a presumption in "*relevant proceedings*" that a transaction or arrangement entered or claimed to have been entered by a director or a person connected with a director with the company constitutes a loan or quasi-loan to the company was not such a loan or quasi-loan unless recorded unambiguously in writing. Section 237(1) provides that "*relevant proceedings*" means civil proceedings in which it is claimed by a director that a transaction or arrangement entered into or alleged to have been entered into with the company was a loan.

63. It is submitted on behalf of Revenue that this section applies to creditors' meetings. I cannot agree. It seems to me that the words civil proceedings in their natural and ordinary meaning contemplate litigation to recover, or perhaps to set off, an alleged loan or quasi-loan.

64. With no disrespect to Mr. Cunningham, the substance of the argument offered on this point was more that the presumption should, rather than does, apply to directors voting at creditors' meetings.

65. Section 237 does not invalidate or make irrecoverable loans the terms of which are not unambiguously recorded in writing but provides for a series of presumptions. In terms, the section contemplates that the presumption may be rebutted. Since the presumption only arises in a case where the alleged transaction or arrangement is not recorded unambiguously in writing, it follows that the rebuttal must be by some evidence other than unambiguous writing.

66. The complaint now made by the Revenue is that the directors voted without producing a copy of a written loan agreement or other written agreement as required by s. 237 of the Act of 2014. It is not suggested that any objection was raised at the creditors' meeting as to their entitlement to vote without doing so. Absent objection at the meeting, it seems to me that *Ladaney Limited* precludes any challenge now to the chairman's decision to allow the directors to vote their admitted debt.

67. I cannot find in the Act any requirement that directors wishing to vote at a creditors' meeting should produce a copy of a written loan agreement. What is contemplated by s. 237 might be produced in the absence of a written loan agreement is not some other written agreement but some other evidence of the nature and terms of the transaction or arrangement relied upon, sufficient to establish that it is a loan or quasi-loan. There is no power conferred on the liquidator, in the case of a meeting summoned in a court winding up, or the chairman of a creditors' meeting in a creditors' voluntary winding up, to decide any issue as to compliance with section 237. Since, by s. 587(7)(b) the chairman of the meeting in the case of a creditors' voluntary winding up is to be one of the directors, it would be very surprising if there was such a power.

68. The court was referred to Mr. Brian Conroy's commentary on s. 237 in the first edition of *The Companies Act 2014 – An Annotation* which suggests that the mischief to which the section was directed was the ranking of directors of insolvent companies with the other creditors. Mr. Conroy recalls that the recommendation of the Company Law Review Group was that in a case where there was not the certainty and transparency of an unambiguous written agreement, there should be a presumption that any loan was interest free, unsecured and subordinated to all other indebtedness of the company. I will not attempt to grapple with the purpose and effect of s. 237(3)(c) but it appears to be directed to subordination rather than validity or recoverability.

69. Mr. Conroy notes that directors' loans to companies are very often not recorded in formal documentation but are in the year-end accounts. The note suggests that if references in accounting records were to be found not to be sufficient evidence to meet the requirement for writing, directors who had advanced money to companies will "*be treated as not ranking at all as creditors in a winding up, meaning that they will not be entitled to a dividend, will not be entitled to vote on the appointment of a liquidator, etc.*" The commentary in the 2018 edition is the same – save that the effect of the section is deescalated from draconian.

70. Apart from what I perceive to be the plain language of s. 237, it seems to me that the construction contended for would be inconsistent with the other provisions of the Act.

Section 698 requires a creditor in a court ordered winding up who wishes to vote at a meeting of creditors convened to consider the appointment of a committee of inspection to lodge with the liquidator a proof of the debt which he or she claims to be due. No special provision is made for directors who claim to be creditors. No power is conferred on the liquidator to decide issues of compliance with section 237. By sub-section 3, s. 698 the requirement for a proof of debt does not apply to a meeting referred to in section 587, which is a creditors' meeting summoned for the day or the day following the day on which a resolution for a creditors' voluntary winding up is to be proposed and at which the value of debts will usually be determined for the purpose of voting by reference to the estimated statement of affairs.

71. In my opinion s. 237 of the Companies Act, 2014 is directed and confined to the right to participate in dividends and does not apply to voting rights.

The proxy forms

72. The objection to the form of proxies is that some of them carry the words "*authorised officer*" which are not on the form prescribed by the Rules of the Superior Courts. The footnotes to the form prescribed in Appendix M, Form No. 18 give directions as to the execution of the form. In principle I do not believe that it is objectionable that the forms issued to firms or corporations, as the case may be, should be customised so as to prompt execution by the person and in the manner provided by the notes.

73. The proxy forms circulated with the notice of 4th March, 2019 were incorrect. Section 702 requires that in the case of a meeting under s. 587, every instrument of proxy must be lodged by no later than four o'clock in the afternoon of the day before the meeting or the adjourned meeting at which it is to be used. The 12th March, 2019 was a Tuesday. By contrast with s. 698, which deals with the entitlement of creditors to vote at a meeting held pursuant to s. 666, for the purpose of which proof of debt must be lodged, s. 587 does not appear to confer a discretion on the company to fix a time for the lodging of proxies which is sooner than 4.00 pm on the previous afternoon.

74. Having taken he view that I have on the issue as to the entitlement of Premier Foods to have voted, it in unnecessary to dwell on the validity of the proxies.

The value of one of the debts

75. It is common case that if Premier Foods had been allowed to vote there would have been €771,153 in favour of Mr. McCarthy, against €758,408 in favour of Mr. O'Boyle: a difference in favour of Mr. McCarthy of €12,745.

76. The fourth point made by Mr. Divney in his affidavit is that one of the creditors of the Company who had lodged a proxy in favour of the chairman, shown on the statement of affairs as owed €109,429, claimed to be owed €139,429. This, Mr. Divney suggested, if correct, would have meant that a majority and value of the creditors did approve the appointment of Mr. O'Boyle.

77. It seems to me that the fourth point which Mr. Divney would raise is not a point at all. The minutes of the meeting of 12th March, 2019, to which he refers, record that a representative of one of the Company's creditors suggested that the figure of €109,429 shown in the statement of affairs was wrong, and that the correct figure was €139,429, to which he, Mr. Divney replied that he was "not qualified" to answer the question. The proposition that the difference of €12,745 in value between the creditors in favour of Mr. O'Boyle and Mr. McCarthy identified by Ms. O'Rourke might have been outweighed by the €30,000 is based purely on hypothesis. Mr. Divney did not say either at the meeting or in his affidavit that the €139,429 was the correct figure, or even that the creditor, if acknowledged to have been correct, would have been allowed to vote a debt other than that admitted in the statement of affairs.

Conclusions

78. While the applicant complains of irregularity in the adjournment of the first creditors' meeting and the convening of the second, there is no challenge to the validity of the second creditors' meeting or (save as to the entitlement of the directors to vote their debts) the validity of the proxies at the second meeting. Rather the focus is on the conduct of the second meeting: specifically, on the refusal of the chairman to allow a vote to be taken and the refusal of the chairman to allow the representative of Premier Foods to vote.

79. I find that s. 237(1) of the Companies Act, 2014 does not apply to a creditors' meeting. The directors, as admitted creditors of the Company, were entitled to vote without showing an unambiguous written record of their loans.

80. Premier Foods plc, an English registered company, was the largest creditor of the Company. It sent two representatives to the meeting of 12th March, 2019 one of whom, Ms. Alison Healy, was the Country Manager Premier Foods Ireland. Premier Foods had previously lodged a form of proxy in favour of the chairman of the creditors' meeting but withdrew it at the meeting of 26th February, 2019. It was known from 26th February, 2019 that Premier Foods intended to vote in favour of Mr. McCarthy.

81. There were two nominations for liquidator: Mr. O'Boyle, who was nominated by the Company, and Mr. McCarthy, who was nominated by the solicitor from Arthur Cox, who was the proxy of two of the creditors. When called upon, the chairman should have allowed a vote.

82. The chairman of the meeting refused to allow Premier Foods to vote because it had not produced a proxy. The chairman was not entitled to refuse to allow Premier Foods to vote on that ground.

83. If - which is by no means clear - the chairman understood that Premier Foods was entitled to authorise Ms. Healy to vote without having produced a proxy, he was entitled to require her to produce such evidence of her authority as he might reasonably have specified. He was not – certainly without having required the production of a resolution,

or evidence of a resolution - entitled to refuse to allow Ms. Healy to vote on the ground that no resolution had been produced.

84. If the chairman had allowed a vote and had allowed Premier Foods to vote, the meeting would have nominated Mr. McCarthy. That by itself is sufficient to persuade me that someone other than the Company's nominee should be appointed.

85. Revenue proposes that Mr. O'Boyle should be replaced by Mr. Garcia Diaz rather than by Mr. McCarthy because Mr. Garcia Diaz is, but Mr. McCarthy is not, on the Revenue's panel of liquidators. As Finlay-Geoghegan J. observed in *Ladaney Limited* there is a lack of clarity in s. 588 as to what is intended by *"nominated"* but I take the view that the proposal of Mr. McCarthy is sufficient to engage the power in section 588(5)(b). The majority of the creditors at the creditors' meeting wished to appoint someone other than Mr. O'Boyle and there is no objection other than by the Messrs. Divney to the appointment of Mr. Garcia Diaz.

86. I am satisfied to make an order pursuant to s. 588(5) of the Companies Act, 2014 appointing Aidan Garcia Diaz of Collins Garcia as liquidator of the Company instead of Mr. Conor O'Boyle of O'Boyle & Associates.