[2019] IEHC 769

THE HIGH COURT

[2018 No. 443 COS]

IN THE MATTER OF SUTTON CASTLE DEVELOPMENTS LIMITED (IN LIQUIDATION) AND IN THE MATTER OF AN APPLICATION BY TERENCE HORGAN AND ANN HORGAN UNDER SECTION 631 OF THE COMPANIES ACT 2014

BETWEEN

TERENCE HORGAN & ANN HORGAN

APPLICANTS

AND

SUTTON CASTLE DEVELOPMENTS LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 13th day of November, 2019

Introduction

1. When this application was opened last Thursday, counsel for the applicant confined it to seeking "*directions as to any further investigation and analysis required to be performed by" James Butler* ("the liquidator") of Sutton Castle Developments Limited ("the company") "*in determining the circumstances of the support given by MKN Investments Limited* ["MKN"] *and Sean McKeon to the company and of the withdrawal of said support leading to the company's winding up*" pursuant to s. 631 of the Companies Act 2014 ("2014 Act").

Background

2. The applicants had purchased an apartment from the company in 2006. The company sold the property immediately above the applicants' apartment in 2007 which "*gave rise to considerable noise pollution and inconvenience*." Those parties proceeded to arbitration leading to an arbitral award on 16th October, 2015, ("the arbitral award").

3. On 25th November, 2015, a statutory demand was served on the company to recover the arbitral award in favour of the applicants in the sum of €100,987.00, plus costs, for the effect of the noise pollution on their home. A petition to wind up the company on behalf of the applicants followed with newspaper notices published on 14th and 15th January, 2016. However, on the evening of 14th January, 2016, a notice of a creditors' meeting for 25th January was served on the solicitors for the applicants. The liquidator was duly appointed at that creditors' meeting which was attended by representatives for MKN.

4. The solicitors for the applicant engaged with the Office of the Director of Corporate Enforcement ("ODCE") and sought unsuccessfully *inter alia* a copy of the report of the liquidator to the ODCE pursuant to s. 682 of the 2014 Act. Counsel for the applicants characterised the background to the late decision to liquidate the company as "suspicious" and correctly anticipated the labelling by the liquidator of this application as a *"grudge*". In brief, the applicants are aggrieved that they had to wait so long for the determination of their claim which arose in 2007 and then endure somewhat exasperating efforts to recover the arbitral award. Costs for the arbitration remain to be discharged by the company.

Facts relied upon

5. The principal facts behind the submission and the request for further investigation identified by the solicitor for the applicants in his three affidavits can be summarised as follows:-

(i) The withdrawal of financial support from MKN, which had common directors with the company, and particularly when the financial statements for the year ending in December 2013 for those companies had each indicated the "*continued financial support*" from MKN to the company. There was indeed an inter-company loan exceeding €9,000,000 disclosed in the financial statements.

(ii) The timing of the decision by the directors to convene a creditors' meeting when the company had long been insolvent.

(iii) The alleged failure of the liquidator to answer some of the questions posed by the applicants' solicitor.

(iv) The assertion by the liquidator that the relieving of the liquidator by the ODCE in June 2017 of the requirement to seek a restriction declaration against the directors of the company was relevant to whether the directors of the company had acted honestly and responsibly. Reference was made to a sentence in a letter from the liquidator to the effect that this had determined that question with which the applicants take issue.

6. The liquidator in his replying affidavit averred that the applicants have *"been paid a dividend of €111,882* [from the total distribution of €6 million] *and there is every likelihood of a further dividend to them from the proceeds of the remaining properties*". He provided the solicitor for the applicants with a schedule of proceeds from other units sold.

The applicant's submissions

7. Counsel for the applicant submitted that:-

(i) The *ex tempore* judgment of McDonald J. in *Re Chambury Investments Company Ltd (in voluntary liquidation)* [2018] IEHC 633 (unreported, High Court, 21st September, 2018) recognised at para. 64 the remedy and protection afforded to creditors by this type of application for directions under s. 631 when those creditors may not have had their preferred liquidator appointed.

(ii) The dictum of Finlay Geoghegan J. in *Re Custom House Capital Ltd (in liquidation)* [2012] IEHC 382; [2012] 3 I.R. 93 which at para. 421 mentioned that the demands on liquidators depends on the nature of the activities of the company prior to liquidation.

8. Counsel urged the Court to have regard to the suspicious circumstances of support and termination of support by MKN for the company which had common members.

The liquidator's position

Standard of review

9. Counsel for the liquidator referred to *Re Edennote Ltd; Tottenham Hotspur plc and others v. Ryman and another* [1996] 2 BCLC 389 where Nourse L.J. stated at p. 394 "*… that the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it"*.

Micromanaging

10. The following excerpt, by way of analogy to directions sought in examinerships from in *Re Eircom Limited* (unreported, High Court, Kelly J., 17th May, 2012), (cited in *Re Ladbrokes (Ireland) Ltd* [2015] IEHC 381 at para. 97; [2015] 1 I.R. 243 at 272), was quoted also:-

> *"It would mean, it is said, that the court would, in effect, be micromanaging the examinership and that the statute does not set up either an appeal mechanism from decisions made by the examiner, nor a form of judicial review of the examiner's decisions, particularly if those decisions involve a commercial judgment being exercised by him … that is … why invariably examiners are drawn from insolvency practitioners, who would have an accountancy qualification and would have considerable business experience involving insolvent entities."*

11. The liquidator in his second affidavit averred that he had attempted to keep the solicitor for the applicants informed of decisions taken in the liquidation and had sought to address the concerns raised by creditors at the meetings of the committee of inspection. He listed the occasions on which the applicants or their solicitor did not attend meetings of that committee with and without excuses and the two annual general meetings in 2017 and 2018. It was submitted that the statutory provision for committees of inspection was the mechanism for supervising the liquidator without having to micromanage by way of seeking directions from the court.

Decision

12. Laffoy J. in *Re Marcon Developments* [2010] IEHC 373 (unreported, High Court, 12th October, 2010) and in *Re Balbradagh Developments* [2008] IEHC 329 (unreported, High Court, 31st July, 2008), was concerned with whether a liquidator appointed at a creditors' meeting should be preferred or ousted by way of a liquidator appointed through a petition to the Court. Laffoy J. mentioned the supervisory role of the ODCE and the committee of inspection in those judgments when determining the balance to be struck. The application now before the Court is not concerned with appointing or replacing the liquidator. The directions nevertheless seek to challenge the professional and commercial decision of the liquidator not to pursue MKN, the parent of the company.

13. The liquidator at paras. 6 and 7 of his second affidavit explained that:-

> *"6.… the liabilities of companies in a group are those of each individual company which incur them and there is no common group liability whereby the debts of one member company become the automatic obligation of the combined companies in the group. In this case the Parent Company did not give any written guarantee to the Company to guarantee its liabilities in the event of a winding up.*

7. The decision by the Parent Company not to indemnify the unsecured debts of the Company is entirely a matter for the directors of the Parent Company, and falls outside my remit as liquidator of the Company. My role was and remains that of overseeing the winding up of the assets and liabilities of the Company and I do not consider that there is any basis to pursue the Parent Company for the debts owed by its subsidiary, the Company."

14. The applicants have not satisfied this Court that the liquidator has acted utterly unreasonably. The only evidence available to the Court regarding the applicants' position is contained in the three affidavits sworn by their solicitor. Impugning the integrity or decision-making of a liquidator by way of seeking directions requires much more than the description of allegedly suspicious circumstances. The applicants did not contest the appointment of the liquidator and have not sought for him to be replaced. Lest there be any doubt there is no evidence or suggestion that the liquidator has acted in any way unprofessionally, without integrity or irresponsibly.

15. Moreover, the applicants through their solicitors availed of the opportunity to convey their concerns to the ODCE and they limited their engagement with the committee of inspection.

16. The applicants, despite their sense of grievance, exasperation and suspicions have not met the threshold required for this Court to direct further investigations and analysis by the liquidator concerning the support given by MKN and Mr. McKeon to the company. This applies equally to the withdrawal of the support.