THE SUPREME COURT

[Record No: 229/2009]

Denham J.
Fennelly J.
Macken J.

In the Matter of Coolfadda Developers Limited

And in the Matter of the Companies Acts, 1963 - 2006

Judgment delivered on the 14th day of July, 2009 by Denham J.

1. This is an appeal by Coolfadda Developers Limited, a construction company, in provisional liquidation, hereinafter referred to as "the Company", from the refusal by the High Court (Laffoy J.) of its application for an adjournment of the winding up petition.

2. Submissions were made by Lyndon MacCann S.C., counsel on behalf of the Company, who sought an adjournment as part of a series of adjournments over a time to enable the Company to complete building contracts.

3. Rossa Fanning B.L. appeared on behalf of the provisional liquidator. He supported the provisional liquidation proceeding, and similarly supported the application for an adjournment. Counsel informed the Court that the provisional liquidator expected, on his understanding of the matter, that the Company would do better in an extended provisional liquidation.

4. This is an appeal against a refusal of the High Court to adjourn the winding up petition and to continue the provisional liquidation to a date in July. Consequently it might appear to be a moot. However, that is not the case. What is in essence being sought is a facility to seek and obtain adjournments, in this provisional liquidation, over a period of time to complete building contracts.

5. The issue to be determined is as follows: whether it is appropriate, in the particular circumstances of this case, to allow a provisional liquidation of the Company to continue so as to maximise returns to the Company's creditors or whether it is appropriate instead for the Court to make a winding up order, which would *inter alia* permit employers on building contracts being carried out by the Company to terminate such contracts, which may have a detrimental effect on the Company's creditors.

6. This is a novel application. In a sense the Company is seeking to have the provisional liquidator act to some extent as if he were an examiner.

7. The facts of the case were set out in the petition and supporting affidavits. The Company is a construction company, based in Bandon, Co. Cork. It was founded to service a market in the construction sector for the delivery of turnkey building projects. Initially the Company traded successfully. However, with the changes in the economy, its fortunes have declined. The Company decided, in light of its cash insolvency, that the most appropriate option was provisional liquidation. On the 22nd April, 2009 the Company presented a petition to the High Court and on the same day the High Court appointed Michael McAteer of Grant Thornton as provisional liquidator of the Company. On the 11th May, 2009 the petition came on for hearing before the High Court and the Company applied for an adjournment of the winding up petition, with the provisional liquidator remaining in place, with a view to seeking subsequent adjournments so that, prior to the making of any winding up order, the Company would

finish out its construction work on eight separate development sites, which are at different stages of completion. The Company submitted that it would maximise returns to the Company, and hence be in the best interests of the creditors, if employers on construction contracts with the Company were not in a position to invoke the termination clauses which they would be able to do if a winding up order were made. Laffoy J. reserved judgment and on the 18th May, 2009 indicated that she was not satisfied to adjourn the winding up petition and keep the provisional liquidator in place on an extended basis. On the 25th May, 2009 the learned trial judge gave a written judgment setting out the reasons for refusing the application, and on the 28th May, 2009 a formal order was made refusing an adjournment of the winding up petition to July. It is against this judgment and order that the appeal has been brought.

The appeal

8. The Company filed fourteen grounds of appeal. In essence it was submitted that:

(i) the learned trial judge erred in finding that an adjournment of the petition with the provisional liquidator remaining in place was not envisaged by the Companies Act, and was contrary to the spirit of the legislation;

(ii) the learned trial judge erred in failing to have regard to the wide jurisdiction and discretion conferred by ss.216 and 226 of the Companies Act;

(iii) that the learned trial judge erred in holding that the appointment of a provisional liquidator was merely a "stop-gap" measure;

(iv) that the learned trial judge erred in failing to hold that the Court's jurisdiction and discretion ought to be exercised in a manner consistent with the best interests of the creditors;

(v) that the learned trial judge erred in her consideration of the circumstances of the case;

(vi) that the learned trial judge erred in distinguishing the circumstances of the Company from insurance companies where orders of the type sought have previously been made.

Decision

9. I would affirm the judgment and order of the High Court, subject to two reservations.

10. First, I am satisfied that the Court does have jurisdiction in an exceptional case to adjourn, from time to time, a winding up petition. Such jurisdiction would arise rarely, and consequently a court would seldom be required to consider exercising such a discretion.

11. An example given to this court by counsel illustrates an appropriate analogy. In **MHMH Ltd. & Others v. Carwood Barker Holdings Ltd** [2006] 1 B.C.L.C. 279 it was held that in the unusual circumstances of the case, for the creditable reason of realising a substantial asset of the companies for the benefit of the creditors, the Court would make an exception to the rule that a winding up petition ought not to be left outstanding for a substantial period of time. The time was to be let run so that payment of outstanding monies would be received. There was no other asset but this claim for monies. The companies were shells. Evans-Lombe J. stated at pp.283 and 284 that:-

> "I was taken by Mr Marks through a series of authorities, both English and Commonwealth. One thing that emerges from all those authorities, of which the most often cited example is *Re Highfield Commodities Ltd* [1984] B.C.L.C. 623, is the flexibility of the remedy for the appointment of provisional liquidators of companies. Sir Robert Megarry V-C, who dealt with that case, said this ([1984] B.C.L.C. 623 at 633-634, [1985] 1 WLR 149 at 159):
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> > 'I would respectfully express my complete agreement with the view taken by [the judge]. I do not think that the old authorities, properly

> read, had the effect of laying down any rule that the power to appoint a provisional liquidator is to be restricted in the way for which Mr Burke-Gaffney contends. No doubt a provisional liquidator can properly be appointed if the company is obviously insolvent or the assets are in jeopardy; but I do not think that the cases show that in no other case can a provisional liquidator be appointed over a company's objection. As the judge said, s.238 ...'
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> [which is the predecessor of the current section]
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> '... is in quite general terms. I can see no hint in it that it is to be restricted to certain categories of cases. The section confers on the court a discretionary power, and that power must obviously be exercised in a proper judicial manner. The exercise of that power may have serious consequences for the company, and so a need for the exercise of the power must overtop those consequences.'

[16] It seems to me that this case is unusual for two reasons. The first is that we are dealing with an unusual insolvency clause which, if the construction placed on it by Mr Marks for the companies is right, can be circumvented so that a substantial asset of these companies can be realised for the benefit of the companies' creditors. It does not seem to me that if Mr Marks is right in his construction of the section and can successfully defend a claim to rectify this particular provision, that there is anything which is abusive of the process of the court by applying for the appointment of a provisional liquidator to achieve that purpose. As I have already said, if other creditors who have established claims, and I pause there to say that Carwood claims to be a current creditor of the companies, but that claim is not accepted, but if there are creditors with established claims they can intervene by application to the court to bring this process to an end. No other creditor has surfaced although of course I do not know whether any of the other creditors are on notice of the application which is being made.

[17] The second question is the principle which, as I understand it, is still applicable to all winding-up petitions, and that is that the winding-up court is most reluctant that petitions be left outstanding for substantial periods of time. It is a basic principle that a winding-up petition, once issued and served, must be brought on and dealt with as quickly as possible. But there are exceptions to that rule. I have had drawn to my attention the case of *Northern Development (Holdings) Ltd v. UDT Securities Ltd.* [1977] 1 All E.R. 747, which is a decision of the Court of Appeal, on appeal from Templeman J, where the decision of the court sanctioned his order, which was to stand over a petition by a creditor for what was realised would be a substantial period of time, though one is bound to say not anything like as substantial as that involved in the present case, in order that certain investigations which might lead to assets could be made.

[18] My attention was also drawn to the use of the provisional liquidator in the BCCI insolvency, in which a provisional liquidator appointed by the

> court administered the United Kingdom affairs of BCCI for a period of rather more than 2 years so that investigations could be made to see whether it was possible to arrive at a worldwide scheme of arrangement for the creditors of that company.
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> [19] In the result therefore it seems to me that this is a case where an exception can be made to the rule that a winding-up petition must not be left outstanding for a substantial period of time. These are not trading companies, they are, as I have said, shell companies now. This is the only asset. Mr Davis has made much of the cost of the provisional liquidation, and with questions as to where those costs are to be found. £100,000 is not that large a sum of money, it will not last particularly long. If there is to be litigation, litigation is expensive. Where is the money to come from to finance that litigation? That seems to me to be a matter for the provisional liquidator. He is prepared to accept appointment. If his funds run out or if he loses litigation and he is ordered to pay the costs and has not got the funds with which to pay then he is personally responsible for finding the money to pay. That is a matter for him. I do not see that this is a case, similar to an administration, where the court need be over-concerned with where the money to back what the provisional liquidator will do is going to come from. I do not see that outside creditors are going to be put at risk. These companies are not going to continue to trade. The expenses will be simply to professionals for advice and to assist with litigation if that, in the end, has to be pursued.
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> [20] For these reasons it seems to me that I should accede to this application for the appointment of a provisional liquidator, which I will."

I am satisfied that similar principles may be applied in an exceptional case under the legislation in this State. Such a jurisdiction exists in rare cases, upon which a judge might then exercise a discretion. Nonetheless, the underlying principle is that the winding up of the company should proceed and that a provisional liquidator should not remain in place for an indefinite period.

12. However, the facts of this case are entirely different from **MHMH Ltd. & Others** and may be distinguished. It is not a situation of realising a single claim. What is sought here is to complete eight developments, where the many houses are in different states of completion, and where contracts would have to be entered into with suppliers etc. to undertake the completion work. It is also based on the assumption that all the houses would be completed and sold. This would be taking place in a situation

where the employers could not terminate the contracts, and where the state of the construction industry presently in the economy is relevant.

13. My second reservation arises out of a matter brought to the attention of the Court by way of an affidavit sworn by Conor Slattery on the 8th day of June, 2009. Conor Slattery is a director of the Company. At paragraphs 11 and 12 he deposed:-

> "… I respectfully note that there appears to have been a misunderstanding by the learned High Court judge in respect of an issue which was not the subject of any oral submissions or comment during the hearing before the High Court but which was referred to in her judgment, which evidences a need for priority in the hearing of any appeal. This arises out of the fact that a significant portion of the Company's contracts are carried out at sites which are either owned by your deponent and Paul Collins or by residential land partnerships of which we are minority partners. However, contrary to what was understood by the learned High Court Judge, your deponent and Paul Collins are not the employers under the vast majority of the relevant building contracts. Specifically, as is commonplace within such types of development:
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> (a) For contracted units within the sites of Sneem, Castleisland and Rathcoole where we are the site owners, the Company's building agreements are with third party individuals who are purchasing the units. These third parties are the employers.
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> (b) For uncontracted units in the sites of Sneem, Castleisland and Rathcoole where we are the site owners, building agreements prices are already determined and agreed, being fixed in value at the outset of the project.
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> (c) For contracted units on development sites where we are minority partners, the employer is the third party purchaser with whom the contract is executed.
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> (d) For uncontracted units on all sites where we are minority partners, the employer is the partnership who owns the site, but as we are minority partners we do not have a controlling influence within the partnership, and contracts with the Company and partnership are dictated by way of contracts/agreements.
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> (e) With regard to the development in Riverstick, Co Cork, which is extremely profitable, we do not have an interest in the site.
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> The net effect of this is that in respect of the vast majority of contracts being undertaken by the Company, contrary to what was understood by the learned High Court judge, Paul Collins and your deponent are not in a position to prevent the exercise by employers of termination clauses if a

> winding up order is made. Such employers have already commenced attempting to terminate contracts, based on the fact that, having regard to the decline in the property market, such contracts are now unprofitable from the employers' perspective."

14. I am satisfied that any misunderstanding by the learned trial judge is not so fundamental as to affect her analysis and application of the law. In the circumstances of this case, it is not an exception so as to give rise to the jurisdiction to adjourn from time to time a petition for provisional liquidation. Thus the issue of the exercise of a judge's discretion does not arise.

15. The Company is concerned that the issue be resolved as quickly as possible so that the provisional liquidator or official liquidator can deal with the employers with clarity. Thus the Court has treated the appeal as a matter of urgency.

Conclusion

16. I am satisfied that there is jurisdiction under the Companies Acts to grant adjournments from time to time on a petition for provisional liquidation of a company. Such jurisdiction is not contrary to the spirit of the legislation. However, it would arise only in exceptional cases where special circumstances exist. An example of such an exceptional case may be seen in **MHMH Ltd. & Others v. Carwood Barker Holdings Ltd.** [2006] I B.C.L.C. 279. In general a provisional liquidation is a "stop-gap" measure, however, in exceptional circumstances the Court has jurisdiction to adjourn the matter from time to time. If such a jurisdiction arises a court has a discretion to exercise to determine whether there should be an adjournment. In this case that exceptional jurisdiction does not arise.

For the reasons given, with the reservations expressed, I would affirm the judgment and order of the High Court that the petition not be adjourned and consequently that the provisional liquidation not be continued indefinitely.