Neutral Citation No. [2015] NICh 12

Ref: **MOR9679**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered: **11/06/15**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

BANK OF IRELAND MORTGAGE BANK

Applicant;

-and-

BRENDA MARY SHERIDAN AND PATRICK ANDREW EOIN SHERIDAN

Respondents.

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MORGAN LCJ

[1] The applicant seeks an order pursuant to Article 334 of the Insolvency (NI) Order 1989 that the Individual Voluntary Arrangement ("IVA") proposed by the respondent dated 22 October 2014 is ultra vires and of no cause or effect. Alternatively the applicant seeks an order pursuant to Article 236(1) of the Insolvency (NI) Order 1989 ("the 1989 Order") that the creditors' meeting called on 11 November 2014 was unfairly prejudicial to the interests of the applicant or was materially irregular.

Statutory Background

[2] There was no material difference between the parties on the applicable statutory provisions. The 1989 Order provides two procedural routes for an IVA depending upon whether an Interim Order has been made or is sought. In this case

no such Order has been made or sought. Article 230A of the 1989 Order provides for the initiation of the process:

> "230A. - (1) This Article applies where a debtor (being an individual) -
>
> (a) intends to make a proposal under this Part ….
>
> (2) For the purpose of enabling the nominee to prepare a report to the High Court, the debtor shall submit to the nominee-
>
> (a) a document setting out the terms of the voluntary arrangement which the debtor is proposing, and
>
> (b) a statement of his affairs containing-
>
> (i) such particulars of his creditors and of his debts and other liabilities and of his assets as may be prescribed, and
>
> (ii) such other information as may be prescribed.
>
> (3) If the nominee is of the opinion that the debtor is an undischarged bankrupt, or is able to petition for his own bankruptcy, the nominee shall, within 14 days (or such longer period as the High Court may allow) after receiving the document and statement mentioned in paragraph (2), submit a report to the Court stating-
>
> (a) whether, in his opinion, the voluntary arrangement which the debtor is proposing has a reasonable prospect of being approved and implemented,
>
> (b) whether, in his opinion, a meeting of the debtor's creditors should be summoned to consider the debtor's proposal, and
>
> (c) if in his opinion such a meeting should be summoned, the date on which, and time and

> place at which, he proposes the meeting should be held…."

[3] Where the nominee is of the opinion that a meeting should be summoned he is required by Article 231 to summon the meeting for the time, date and place proposed in his report unless the court orders otherwise. Every creditor of the debtor of whose claim and address the nominee is aware must be summoned. Article 232 provides for adjournment. If on the day the requisite majority for the approval of the voluntary arrangement has not been obtained the chairman may adjourn, but must do so if it is so resolved, for not more than 14 days. If the proposal is not agreed to within that time it is deemed rejected by virtue of Article 232 (5). Article 233 provides that the chairman of the meeting must report the result to the High Court.

[4] These provisions are supplemented by the Insolvency Rules (NI) 1991 ("the 1991 Rules"). Rule 5.05 of the 1991 Rules provides that the proposal given by the debtor to the nominee must be endorsed as received on a specified date by the nominee if he intends to act. Rule 5.14 provides that the nominee must deliver two copies of its report to the court within 14 days after receiving the document and statement mentioned in Article 230A(2) from the debtor but the court does not otherwise consider the report unless an application is made under the 1989 Order or the 1991 Rules. The nominee must indicate whether in his opinion the debtor's proposal has a reasonable prospect of being approved and implemented together with reasons and if it is positive a meeting of the debtor's creditors must be summoned under Article 231. Any creditor of the debtor is entitled at all reasonable times on any business day to inspect the file and the filing in court of the report constitutes an insolvency proceeding for certain purposes.

[5] Rule 5.16 sets out the procedure in relation to the holding of the creditors' meeting:

> "5.16. - (1) If in his report the nominee states that, in his opinion, a meeting of creditors should be summoned to consider the debtor's proposal, the date on which the meeting is to be held shall be-
>
> (a) in a case where an interim order has not been obtained, not less than 14 days and not more than 28 days from that on which the nominee's report is filed in court under Rule 5.14….
>
> (2) Notices calling the meeting shall be sent by the nominee, at least 14 days before the day fixed for it to be held, to all the creditors specified in the debtor's statement of affairs, and any other creditors of whom the nominee is otherwise aware.

(3) Each notice sent under this Rule shall state that the nominee's report has been filed in court and shall state the effect of Rule 5.22(1), (3) and (4) (requisite majorities); and with it there shall be sent-

(a) a copy of the proposal,

(b) a copy of the statement of affairs or, if the nominee thinks fit, a summary of it (the summary to include a list of the creditors and the amounts of their debts), and

(c) the nominee's comments on the proposal."

Rule 5.17 requires the nominee to have regard to the convenience of the creditors when fixing the venue for the meeting.

[6] It is apparent, therefore, that the 1989 Order and the 1991 Rules provide a sequential process for the presentation of an IVA by an insolvent debtor. First, the debtor must present the terms of the voluntary arrangement which he is proposing to the nominee. Having considered that information the nominee must, within 14 days of receipt or such longer period as the High Court may allow, submit a report to the Court including his opinion as to whether a meeting of the debtor's creditors should be summoned. The submission of the report to the Court triggers the time period, not less than 14 days or more than 28 days from the filing in court, within which the creditors' meeting must be held. Once the creditors' meeting is held there is then a 14 day period within which the IVA can be approved.

The factual background

[7] Peter O'Hara is an insolvency practitioner based in England and was at all material times the respondents' nominee. On 22 October 2014 he gave notice of the respondents' IVA proposals by sending the proposals to all creditors by special delivery. The first respondent stated in her proposal that she had unsecured liabilities of £3.932 million to the applicant with a further unsecured liability of £1.196 million to IBRC and total unsecured liabilities estimated at £5.133 Million. It followed that apart from IBRC there were debts of only £5000 to other creditors and the applicant was the largest unsecured creditor of the first respondent amounting to about 77% of the debt. The second respondent indicated his estimated unsecured liability to the applicant at £3.182 million. The total unsecured liabilities were £3.187 million so that there was only £5000 owed to other creditors. Mr O'Hara summoned a creditors' meeting for 11am on 7 November 2014 at Huddersfield Road, Birstall, Batley, West Yorkshire.

[8] In each case the proposal was entitled:

> "In the Belfast County Court
> In Bankruptcy
> And In the Matter of Part VII of the Insolvency Act 1986"
> The notice of the meeting of creditors was entitled "The Insolvency Act 1986".

It is common case that the nominee acted in accordance with the Insolvency Act 1986 and that consequently there were various breaches of the 1989 Order and the 1991 Rules. First, the nominee did not endorse the debtor's proposal as received on a specified date in breach of Rule 5.05. Secondly, the nominee did not submit a report to the High Court within 14 days of receiving the proposal as required by Article 230A(3) of the 1989 Order. Thirdly, by virtue of Rule 5.16 the time within which a creditors' meeting must be held is not less than 14 days no more than 28 days from the filing of the report in court in accordance with Rule 5.14. The meeting of which notice was given could not have fulfilled this criterion. In any event it was contended that since service was to be effected outside the jurisdiction, an application to the court was required.

[9] Fourthly, there was a dispute between the parties as to the service of the notice of the creditors' meeting. The respondents relied on copy signature sheets from An Post in Dublin recording delivery to C Robinson and John Farrell at two separate times on the morning of 28 October 2014. The applicant denies any knowledge of such persons and claims that it first became aware of the proposal on 4 November 2014 when an employee of O'Hara & Co contacted an employee of the applicant advising her of the meeting on 7 November 2014. The proposal was forwarded by e-mail on 6 November 2014 and the creditors' meeting was adjourned on 7 November 2014 in order to allow the applicant sufficient time to assess the proposals. On 10 November 2014 the applicant's employee sought a further adjournment but O'Hara & Co indicated that he could not confirm that the meeting would be adjourned beyond 10am on 11 November 2014. The meeting proceeded at that time and the proposal was accepted.

Submissions of the Parties

[10] The applicant seeks relief pursuant to Article 334 of the 1989 Order and also pursuant to the inherent jurisdiction of the court on the basis that the debtor's proposals were not endorsed with the date of receipt as required by the 1991 Rules and were not lodged in court as required by Article 230A(3) of the 1989 Order. In those circumstances there was no valid creditors' meeting and it followed that any purported decision made was of no effect.

[11] Alternatively if there was any valid creditors' meeting it was submitted that there had been a material irregularity at the meeting as a result of which the court should revoke any approval given by the meeting pursuant to Article 236 of the 1989 Order. The applicant complained that the wrong statutory provisions and court were referred to in the proposal, that there was no evidence that the nominee give consideration to the convenience of creditors when fixing the meeting and that the applicant was given insufficient time to consider the proposal having regard to the fact that it only became aware of it on 4 November 2014.

[12] The respondent submitted that the references to the English legislation and to the County Court rather than to the Northern Ireland legislation and High Court were unfortunate errors. They did not, however, affect the substance of the proposal or the ability of the applicant to engage with it. It was accepted that the fact that the nominee's report or the chairman's report were not filed in court meant that the statutory procedure was not followed but it was pointed out that Rule 5.14 provided that the court was not to consider a report unless and until an application was brought in connection with the IVA. An any event Mr O'Hara's staff were told by the court office that there was no need to file such arrangements (it is accepted that if such advice was given it was erroneous). In those circumstances the failure to file could not be material.

[13] The issues in relation to convenience of location for the meeting were irrelevant. Creditors do not physically attend creditors' meetings but instead vote by proxy. Notification of the meeting was sent to creditors on 22 October 2014 and Rule 5.16 refers only to the date of sending of notices. The applicant had the proposal on 6 November 2014 and had from then until 11 November 2014 to consider the proposal. If the applicant had wished to have the meeting of 11 November 2014 adjourned it could have sent a proxy vote for a further adjournment which would have carried the meeting. If it failed to do so it cannot now complain about the outcome of the meeting.

Consideration

[14] The 1989 Order and the 1991 Rules provide a highly prescribed mechanism for the proposal of an IVA and the timescales within which the various steps in relation to the proposal should be taken. The statutory purpose of the endorsement of the date of receipt of the proposal and the lodging in court is to impose a discreet timescale on any nominee who is asked to consider such a report. The remaining timescales are effectively predicated on the date on which the nominee delivers the proposal to the court.

[15] Where the statutory architecture puts in place a highly regulated mechanism to deal with any proposal for an IVA any material departure from the machinery is likely to render anything done after the departure invalid. In England and Wales the procedure is different but this principle applies equally. Vlieland Boddy v Dexter

Ltd [2003] EWHC 2592 Ch is authority for the proposition that non-compliance with the statute renders a purported IVA a nullity and there is no general equity to correct defects arising from non-compliance with the statutory scheme. Mr Gowdy sought to distinguish this case on the basis that the departure in that case affected the supervision by the court of an interim application. Although factually correct in his submissions I do not consider that the principle is affected by the particular circumstances of the case. Here there was a failure to deliver the proposal to the court as a result of which it was impossible to operate the statutory mechanism governing the timescale within which decisions on the IVA were to be determined. That was, therefore, a critical departure which rendered it impossible to hold a creditors' meeting in accordance with the statutory procedures.

Conclusion

[16] In the exercise of the inherent powers of the court I declare that the creditors' meeting of 11 November 2014 was invalid and that any purported decision taken at that meeting was of no effect. I decline to make any order under Article 334 because I consider that provision provides powers solely in relation to bankruptcy matters. Since I have decided that the creditors' meeting was invalid no issue of material irregularity at such a meeting arises.