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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE MATTER OF JOHN TAYLOR AND STEPHEN DONNELLY TRADING AS THE TAYLOR GALLERY ("THE PARTNERSHIP")

AND IN THE MATTER OF THE INSOLVENT PARTNERSHIPS ORDER (NORTHERN IRELAND) 1995

Between:

NORTHERN BANK LIMITED TRADING AS DANSKE BANK
Applicant;

and

JOHN TAYLOR AND STEPHEN DONNELLY TRADING AS THE TAYLOR GALLERY
Respondents.

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HORNER J

Introduction

[1] The Northern Bank Ltd ("the applicant"), is the single largest creditor of John Taylor and Stephen Donnelly ("the partners") who have traded at the Taylor Gallery ("the Partnership"). Indeed, the applicant is, on one view, the only creditor of the Partnership. It is asserted that the debt owed to the other creditor, HMRC by the partners is in respect of their personal debts and does not arise out of the trading of the Partnership. I am not in a position to determine this issue. The business of the Partnership involves the purchase and sale of works of fine art. Like many businesses in Northern Ireland, it has been severely hit by the severe economic downturn which has convulsed the province and elsewhere from 2007 onwards. The applicant is currently owed in excess of £2 million. The applicant does hold some securities provided by the partners but they are of a comparatively modest value.

[2] An application was made to appoint an administrator by the applicant following the unsuccessful submission by both the partners of interlocking IVA's. These were the subject of a creditors' meeting on 13 February 2014. Ms Alison Burnside ("AB") of FPM Accountants LLP, Licensed Insolvency Practitioner, acted as the nominee of each of the partners. An application was made by the applicant to place the Partnership into administration on 14 February 2014. The applicant wants James Derek Neill ("JDN") of Horwood Neil Holmes LLP, Licensed Insolvency Practitioner, to be appointed as administrator of the Partnership. In response, the partners have made an application to have AB made administrator. It is this competition between these two candidates which lies at the heart of the present dispute between the applicant and the partners. Both counsel accept that both AB and JDN are eligible and qualified to act as administrator of the partnership, if appointed, and that the choice of who should be the administrator is a decision for the court. Both Mr Dunlop BL for the applicant and Mr Atchison BL for the Partnership claim that the court should select the candidate preferred by their client.

Facts

[3] The following facts do not appear to be in dispute:

(a) The total indebtedness of the Partnership is to £2,046,052.01.

(b) When the properties which the applicant holds as security are taken into account the shortfall is £1,670,000 or thereabouts.

(c) The stock appeared in the accounts up to 31 April 2012 valued at £1.57 million approximately; on the stock list sent to the applicant on 2 September 2013 it had been revalued at £924,000 approximately; it was then valued by Morgan O'Driscoll's on 4 September 2013 at £290,000; it then appeared in the proposals for the IVA's of the partners in January 2014 as £100,000. It is accepted by the partners that this latter figure is a considerable underestimate and it should have been £200,000.

[4] The following facts are disputed:

(i) Whether £100,000 has been raised from the sale of paintings since September 2013 and whether this has been paid into another bank account with the agreement of the applicant.

(ii) How the partners were able to offer an additional £100,000 payable within 2 years to improve the terms of the proposal for the IVA's at the last minute in order to try and sweeten the offer and so obtain the acceptance of the creditor(s). It is not disputed that such an improved proposal was made at the eleventh hour.

(iii) Whether the debts of the HMRC are debts of the Partnership or personal debts of the partners.

It is not possible for the court to resolve these disputed matters on the present application.

Statutory Framework

[5] The Insolvent Partnerships Order (NI) 1995 ("IPO 1995") (as amended by the Insolvent Partnerships (Amendment) (NI) Order 2006) modifies and applies the provisions of the Insolvency (NI) Order 1989 to insolvent partnerships. It permits the winding up of, and the application of other corporate insolvency remedies to, insolvent partnerships, by treating such partnerships as unregistered companies. The insolvency remedy of administration is provided for under Schedule 2 of the IPO 1995 as amended by the 2006 Amendment Order.

[6] Article 6(1) provides:

> "The provisions of Part III of, and Schedule B1 to, the Order shall apply in relation to an insolvent partnership, certain of these provisions being modified in such manner that, after modification, they are as set out in Schedule 2."

[7] Under paragraph 4 of Schedule B1 the administrator of an insolvent partnership must perform his functions to the object of –

> "(a) Rescuing the insolvent partnership as a going concern, or
>
> (b) achieving a better result for the insolvent partnership's creditors as a whole than would be likely if the insolvent partnership were wound up (without first being in administration), or
>
> (c) realising property in order to make a distribution to one or more secured or preferential creditors."

[8] There is no dispute in this case that the objective of the administrator is to achieve a better result for their Partnership's creditors as a whole.

[9] Paragraph 12 provides:

> "The High Court may make an Administration Order in relation to a partnership only if satisfied –

(a) That the partnership is or is likely to become unable to pay its debts, and

(b) That the administration order is reasonably likely to achieve the purpose of administration".

There is no dispute that the Partnership is unable and will be unable to pay its debts. It is hopelessly insolvent.

Legal Discussion

[10] There are a number of cases in which there has been a competition between nominees of different interests as to who should be appointed administrator in the administration of a company or partnership. The principles upon which each of the decisions was made do appear to differ. However the factors that should apply and the weight to be given to each factor will often be fact specific. The approach of the court will differ depending on whether, for example,

(i) the competition is between the nominees of two creditors,

(ii) the competition is between the nominee of a sole creditor and a nominee of the Directors,

(iii) the business if hopelessly insolvent and cannot be saved,

(iv) the business is complex and one of the candidates for administrator knows it intimately.

[11] In Re Maxwell Communication Corporation Plc [1992] BCLC 465 Hoffmann J appointed PWC as the administrator of the troubled firm. It is recorded by Hoffmann J that there was a difference between the two counsel representing respectively the banks and the directors. The banks thought there was no prospect that the company could be saved. The directors claimed that there was a real prospect of the company surviving. There was nothing to choose between the proposed administrators. In those circumstances it is not difficult to understand why Hoffmann J preferred the banks' candidate. They were owed half of the company's debt and representatives of PWC had expended a very considerable amount of time acquiring a detailed knowledge of the company which would have had to be replicated by the other candidate, Touche Ross, the directors' candidate, if it was successful. The judge concluded at page 469:

> "… they (that is the banks' candidate) are able to carry on the administration more cheaply, effectively and quickly on account of their existing knowledge …"

[12] In Re World Class Homes Ltd [2005] 2 BCLC 1 the petitioning creditor was owed £74,000. It sought to have the company wound up. A Director of the company applied for an Administration Order. The creditor then sought to have its own nominee made administrator. It is claimed that the majority of creditors favoured the creditor's nominee. But Lindsay J said that this was impossible to know as:

> "… a head count is unreliable unless one knows what has been said". (Paragraph 12)

He did say that if the weight of the head count was almost wholly one way then:

> "… I would have attached some weight to it."
> (see paragraph [12])

In that case the judge took the following features into account:

(i) BDO had an existing acquaintance with the affairs of the company. The evidence was that the business was likely to be sold.

(ii) BDO had overseas contacts where the company did business.

In Oracle (NW) Ltd v Pinnacle Services (UK) Ltd [2008] EWHC 1920 the company's directors sought the appointment of an administrator. Oracle, a creditor, and the other secured creditors, also sought the appointment of a different administrator. Oracle thought the directors had chosen an appointee who would favour them in respect of their loans to the company. The directors responded by claiming Oracle's debt was disputed and that Oracle was seeking to persuade the company's customers to change over to Oracle as a supplier. Patten J said at paragraph [8]:

> "The court's role on an administration application is to attempt to provide the best solution in terms of setting up an administrative framework for the benefit of the creditors. Disputes of the kind in this case have, in my judgment, to be resolved in whatever way **is likely to produce the best outcome for the creditors as a whole**, and it is on that basis that I approach the two applications which are before me." (emphasis added)

There seems to be much said for this approach.

He then went on to say at paragraph [17]:

> "I have no certain way at this point, any more than I suspect the administrators themselves have, of predicting the precise outcome of the administration, but it seems to me that the issue as to which of the two, so to speak, rival

> administrators ought to be appointed should be determined by the court, having regard to the wishes of the creditors. Even taking into account that Oracle's debt is wholly or in part disputed, they, and the supporting creditor are, on the face of it, significant and the most substantial creditors, and are unwilling to consent to the appointment of Tenon as administrators. Their position is that where the proposals set out in Tenon's outcome statement to be tendered at the meeting they would vote against them."

[13] In Med-Gourmet Restaurants Ltd v Ostuni Investments Ltd [2010] EWHC 2834 there was a dispute between the directors who were backed by the majority of creditors by value of the one part and the majority of creditors by number of the other part as to who should be appointed administrator. Lewison J said at paragraph [7], relying on Oracle, that:

> "… the court will normally be guided by the wishes of the majority of creditors."

He went on to say at paragraph 14:

> "There is a public interest in office-holders charged with the administration of an insolvent estate not only acting but being seen to be acting in the best interests of the creditors generally; and ensuring that all legitimate claims that the company may have are thoroughly investigated. This is a reflection of a more general principle that justice must not only be done but must be seen to be done. The importance of the principle is reflected amongst other ways, in the fact that applications for recusal are almost always made not on the ground of actual bias but on the ground of appearance of bias."

He further stated that there were a number of aspects of the directors' conduct which required serious investigation and that:

> "… there is a public interest in ensuring that liquidation and administration processes are properly conducted and delinquent directors, if such they be, are properly held to account." (see paragraph [25]).

[14] Lewison J in his judgment approved the summary of the principles which applied to the appointment of a liquidator set out by HHJ Maddocks in Fielding v Seery and another [2004] BCC 315. He said that these were the same principles that should guide the appointment of an administrator. In Stanley International Betting

Ltd v Stanley Bet UK Investments Limited and others [2011] EWHC 1732 (Ch) Mr Stuart Isaacs QC sitting as Deputy High Court judge also approved those principles which included:

> "(1) The test in relation to the appointment of a liquidator is whether it will be conducive to both the proper operation of the process of liquidation and to justice as between all those interested in the liquidation.
>
> (2) Although the majority vote of the creditors will in the normal course prevail, creditors holding the majority vote do not have an absolute right to the choice of liquidator.
>
> (3) A liquidator should not be a person nor be the choice of a person who has a duty or purpose which conflicts with the duties of the liquidator. He should in particular not be the nominee of a person against whom the company has hostile or conflicting claims or whose conduct in relation to the affairs of the company is under investigation.
>
> (4) By contrast, it is not an objection to a liquidator that he is allied to or the choice of a person who is concerned to pursue the claims of the company through the liquidator."

In Stanley International Betting Ltd v Stanley Bet UK Investments Ltd and Others [2011] EWHC 1732 (Ch) the Deputy High Court Judge supported the comments of Lewison J in Re Med-Gourmet Restaurants Ltd where he stated that the same broad principles apply in both liquidation and administration.

> "In both cases, the appointment of the office-holder has to achieve justice between all the interested parties; and the office-holder needs to both act and be seen to act in the best interests of creditors and to properly investigate all claims." (See paragraph [36]).

I propose to proceed upon the same basis in this competition.

[15] Finally, apparent bias, arises "where the fair-minded and informed observer, having considered the facts, would conclude that it was a real possibility of bias": see Porter v Magill [2002] 2 AC 357 at paras 102-103. In many cases there will be a potential conflict between the interests of the directors and the interests of the

creditors. In some cases the circumstances may be such where the directors' nominee is in a position where the issue of apparent bias can arise because of his previous dealings with the directors. In such circumstances, even where he has acted blamelessly, he should stand down.

Discussion

[16] Firstly, in this case there is no realistic prospect of saving the business. The central purpose of the administration, is to achieve a better result for the creditors, and in particular the applicant. It is the major, if not the only, creditor. It has a real interest in the success of the administration and ensuring that the maximum return is obtained for the benefit of the creditor(s). I have not been told if the partners have any interest in the administration other than a professional one, namely that the Partnership be wound up in an orderly fashion and that the creditor(s) be paid what is due. But they do not have the same financial interest on the information before me in securing the best result possible in realising the partnership's assets. In these circumstances I consider that the choice of the only (or main) creditor should carry great weight.

[17] Secondly, the business carried on by the Partnership, and the assets of the Partnership appear comparatively straightforward. Obviously AB because of her work in the interlocking IVA's for the partners, has acquired some detailed knowledge of the Partnership and its assets. However there is nothing in the papers that would lead me to conclude that this is going to be an onerous task for JDN, should he be appointed, to acquire the necessary information. This is not going to be an administration in which the cost of JDN acquiring a good working knowledge of the business's assets is going to make a fundamental difference to whether, for example, the business can be saved as a going concern or not. This is an administration which will be seeking the best outcome possible for the creditor(s). Both the proposed appointees have similar expertise, it would appear, in the fine art business.

[18] Thirdly, in this case, there have been different and decreasing valuations of the fine art stock of the Partnership within a relatively short period of time. Such a state of affairs demands a rigorous and independent professional analysis by the administrator. It is better if the administrator in these circumstances is the nominee of the major (and perhaps only) creditor: see G P Noble Trustees Ltd v Directors of Berkeley Berry Birch Plc [2006] EWHC 982 (Ch) at paragraph [12].

For all those reasons I am of the view that JDN should be appointed administrator of the Partnership.

[19] Finally, if the court was left with any doubt, which it has not been, then I consider that there is apparent bias on the part of AB arising from the way the proposals for the interlocking IVA's were presented. It is not suggested, and I want to emphasise this, that there is any actual bias on AB's part or that she would act in

any way other than impartially if she were appointed as administrator of the Partnership. Rather it is a possibility, which I consider would be present in the mind of the fair-minded and independent observer, if she were appointed as administrator. This arises because of two particular issues:

(i) The valuation of the stock in the proposal at £100,000 which was put forward by the partners and supported by her.

(ii) The subsequent proposal made by her to the applicant that the partners would introduce a further £100,000 within an abbreviated timescale in order to secure the approval to the IVA's.

Despite repeated enquiries on both these issues, the court has not been provided with satisfactory explanations for either of them.

Conclusion

[20] The competition for who should be appointed as administrator of this hopelessly insolvent Partnership has been keenly contested. However, there can only be one winner. The view of the major (or on one view the only) creditor must carry great weight as the administrator, who will be appointed, will be trying to realise as much as possible for the benefit of creditor(s). Even if the contest was finely balanced, the problems with the proposed interlocking IVA's, makes AB an unsuitable choice for administrator for the reasons which I have given. This is in no way a reflection of AB's expertise or experience. Instead it arises from the circumstances in which the proposals for the interlocking IVA's on behalf of the partners were put forward.