February 2014

Recent Developments – Conduct of Creditors' Meetings

Irish Bank Resolution Corporation Limited (In Special Liquidation) v. McCabe's Garage Drogheda Limited (In Receivership and In Voluntary Liquidation) and Martin Kelly (unreported, Charleton J., 2nd December, 2013).

In a judgment delivered on 2nd December, 2013 the High Court made an order replacing a company's nominee as liquidator with the nominee of the company's largest creditor in circumstances where the proxy lodged by that creditor had not been admitted at the creditors' meeting on the basis that it had been lodged late. The judgment examined the issues of (i) notice of creditors' meetings and (ii) lodgement of proxies by email.

Background

On 14th October, 2013 McCabe's Garage Drogheda Limited (In Receivership) (the "Company") summoned a meeting of its creditors pursuant to s. 266 of the Companies Act 1963 for the purposes of, inter-alia, laying a full statement of the affairs of the Company before its creditors and appointing a liquidator to the Company. Irish Bank Resolution Corporation Limited (In Special Liquidation) ("the Applicant") was represented by Dillon Eustace at the meeting and had delivered a general proxy to the Company with a view to proposing and voting for an alternative nominee as liquidator at the meeting. The Applicant was by far the largest creditor of the Company and would have had the casting vote as to the choice of liquidator.

In accordance with the applicable Rules of the Superior Courts, the notice of the creditors' meeting of the Company (the "Notice") had required that proxies be lodged at the registered office of the Company by 4pm the day before the creditors' meeting. The

For further information on any of the issues discussed in this article please contact:

Jamie Ensor
DD: +353 (0)1 673 1722
jamie.ensor@dilloneustace.ie

Lorcan Tiernan
DD:+ 353 (0)1 673 1736
lorcan.tiernan@dilloneustace.ie

Applicant firstly attempted to fax a copy of the proxy however it did not deliver. From the information the Applicant extracted from the transmitting fax machine, it appeared the difficulty was with the receiving fax machine at the Company's registered office. The Court accepted that the Applicant had attempted to send the proxy by fax and, after that attempt had failed, had sent a copy of the proxy by email before 4pm with the original proxy delivered to the registered office of the Company approximately fifteen minutes after the 4pm deadline.

At the creditors' meeting the Chairman of the meeting refused to admit the Applicant's proxy on the basis that it was received after the time prescribed in the Notice. As a result the Company's nominee as liquidator was appointed. It had been disputed on behalf of the Applicant at the meeting that the Courts have determined that delivery of a proxy by fax before the allotted time was sufficient and on that basis the delivery by email before 4pm was also sufficient to comply with the Rules of the Superior Courts. The Chairman did not accept the Applicant's position.

The Application

Dillon Eustace on behalf of the Applicant appealed the decision of the Chairman to refuse to allow the Applicant's proxy to vote in favour of the Applicant's nominee and sought a declaration pursuant to s. 267 of the Companies Act 1963 directing that the Applicant's nominee, Mr Sean McNamara of Smith & Williamson, be appointed as liquidator in place of the incumbent liquidator.

The Applicant argued that the Company failed to comply with s. 266(1) of the Companies Act 1963 in so far as it did not cause the Notice to be sent to the Applicant ten days in advance of the meeting. The Notice had been sent to Applicant's offices in St. Stephens Green, Dublin 2 which was no longer the registered office of the Applicant. Accordingly it was submitted that the provisions of the Rules of the Superior Courts could be invoked which allow the Court to use its discretion to adjudicate upon the conduct of meetings including in circumstances such as this case.

On the issue of lodgement of the proxy by email, it was submitted that there was recent authority which involved similar facts whereby the Courts have held that delivery of a proxy by fax to the registered office within the time prescribed was sufficient in the circumstances of those cases to comply with the applicable Rules of the Superior Courts. It was further submitted that where the Courts have shown a willingness to interpret the relevant Rules of the Superior Courts in a manner which accords with the realities of modern technology that there should not be an arbitrary line drawn by accepting lodgement by fax but rejecting lodgement by email.

Judgment

Mr Justice Charleton delivered judgment (ex tempore, meaning his decision was given straight after the hearing without written judgment) on 2nd December, 2013. On the two principal matters at issue he found as follows:

a) Notice of Creditor's Meeting

The creditors' meeting had been advertised in the newspapers correctly and the Notice had ultimately been brought to the attention of Applicant. However, the Court considered that the Company was also required to send notice to the Applicant's registered office and it was common

knowledge and information easily ascertainable that the address of the Applicant at St. Stephen's Green was no longer its registered office. The Court found therefore that Order 74, Rule 64 of the Rules of the Superior Court was triggered which enabled the Court to apply its discretion to adjudicate upon the validity of the proceedings and resolutions at the creditors' meeting.

Applying this discretion the Court noted the legislation provides that in a creditors' voluntary winding up that in the event of a liquidator being nominated by both the creditors and the members that the creditors' nominee is to prevail.

b) Lodgement of proxies

The Court then turned to the issue of the lodgement of proxies. The Court accepted that the fax was attempted to be sent by the Applicant and that ultimately a copy of the proxy was sent by email before 4pm when it was realised that there appeared to be a problem with the fax transmission at the other end.

The Court held that it was necessary to interpret the law, in so far as practicable, in a manner which kept up with the contingencies of technology. The Court found the requirements of companies awaiting receipt of proxies, which may not always be limited to receipt by post or hand delivery alone, was to keep the relevant means of receipt open until the appointed time. The Court commented that the fax was now a somewhat out dated form of communication which could easily fail for any number of reasons. The Court also took the view that in light of the recent case law cited, that it had no doubt but that a proxy can be validly delivered by email, as it had been in this case.

While expressly noting that the Court was not in any way implying that the incumbent liquidator had not conducted the liquidation with anything other than the utmost professionalism, the Court nonetheless found that the Applicant's proxy should have been admitted for voting purposes at the creditors' meeting of the Company and, had it been so admitted, that it was common case that the Applicant's debt by value was such that it would have had the casting vote. Accordingly the Court made an order directing that the incumbent liquidator be replaced by Mr McNamara.

DILLON EUSTACE

Dublin
33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands
Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

Hong Kong
604 6F Printing House, 6 Duddell Street, Central, Hong Kong. Tel: +852 352 10352.

New York
245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo
12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.