PYE

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THE HIGH COURT

1452P/1985

IN THE MATTER OF THE COMPANIES ACTS 1963 to 1983

IN THE MATTER OF PYE (IRELAND) LTD.

AND

IN THE MATTER OF THE PETITION OF

THOMAS P. HOGAN, AIDAN P. KELLY,
JOSEPH W. LITTLE AND LIAM DILLON DIGBY

Judgment of Mr. Justice Costello delivered on the 11th day of March 1985.

By order of the 30th July, 1984 it was ordered that Pye (Ireland) Ltd should convene meetings of certain specified classes of creditors and members for the purpose of considering a Scheme of Arrangment and Compromise. The order was made pursuant to the provisions of section 201 of the Companies Act, 1963. The meetings were held on the 19th September but due to the oppostion of the Collector General of Revenue who was both a preferential and unsecured creditor the statutory majorities required for approval were not obtained. A new Scheme of Arrangement and Compromise was devised and a second application was brought to this court under section 201 (1) for an order summoning meetings of different classes of creditors and members for the purpose of considering the new Scheme. The Summons was served on the Collector General. I considered the objections raised on his behalf were valid and I declined to make the order sought. On appeal the Supreme Court on the 22nd November 1984, having been given an undertaking by the applicants to pay a preferential debt of £52,665 due to the Collector General, made an order that meetings of three different classes of shareholders be held and that meetings of three different classes of creditors be held, namely meetings of secured, preferentail and "unsecured trade and sundry creditors" in the manner specified in the order. The preferential debt of the Collector General was paid, the meetings were duly held, and the Scheme obtained the necessary majorities at each of the meetings. The meeting of the unsecured creditors was, however, a close run thing. The total valid poll was, £1,690,266-. The amount or value voting in favour was £1,313,920.40, or 77.73%. The amount or value voting against was £377,345.82, or 22.32%. The number of votes in favour (including proxies)

was 34, whilst there was only one vote against. But this vote was that of the Collector General and his unsecured debt of £377,435.82 was nearly sufficient to defeat the Scheme. The applicants have now petitioned the court under section 201(3) for an order sanctioning it.

Mr. Cooke on behalf of the Collector General has submitted that, apart from any view he would urge that the court in the exercise of its discretion should not sanction the scheme, there are legal objections to the making of the order now being sought. These arise, it is urged, from the failure of the company to hold meetings of different classes of unsecured creditors. Both he and Mr. McCracken (on behalf of the applicants) accepted as a correct statement of the law applicable on section 201 applications the views expressed in Palmer's "Company Law" (23rd Ed. paragraph 79-10). The author points out that:-

> "The Court does not itself consider at his point (i.e. when an application to convene meetings is brought) what classes of creditors or members should be made parties to the scheme. This is for the company to decide ..... If there are different groups within a class the interest of which are different from the rest of the class, or which are to be treated differently under the scheme, such groups must be treated as separate classes for the purpose of the scheme"; and:-
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> "Great care must be taken in considering what for the purpose of the scheme constitutes a class. If meetings of the proper classes have not been held, the court may not sanction the scheme"

Indeed it would seem that a failure to hold proper class meetings will generally speaking be fatal to a section 201(3) petition. This was illustrated recently in England In re Hellenic Trust Ltd (1976) I.W.L.R. 123, where Templeman J (at p. 125) stated:-

> "Although section 206 provides that the court may order meetings, it is the responsiblity of the petitioners to see that the class meetings are properly constituted, and if they fail then the necessary agreement is not

obtained and the court has no jurisdiction to sanction the arrangement. Thus in In re United Provident Assurance Co. Ltd (1910) 2 Ch. 477 the court held that the holders of partly paid shares formed a different class from holders of fully paid shares. The objection was taken that there should have been separate meetings of the two classes, and Swinfen Eady J. upheld the objection, saying, at p. 481: "... the objection that there has not been proper class meetings is fatal, and I cannot sanction the scheme". Similarly Eve, J. issued a practise direction, Practice Note (1934) W.N. 142, in which he reminded the profession, in dealing with the predecessor of section 206, that the responsibility for determining what creditors are to be summoned to any meeting as constituting a class rests with the petitioner, and if the meetings are incorrectly convened or constituted, or an objection is taken to the presence of any particular creditors as having interests competing with the others, the objection must be taken on the hearing of the petition to sanction and the petitioner must take the risk of having the petition dismissed."

Palmer, like other text book writers, quotes Bowen, L.J. in Sovereign Life Assurance Co. v. Dodd (1892) 2 Q.B.573, at 583;

"It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

And the author points out (paragraph 79-11) all unsecured creditors will normally form a single class, "except where some of them are to be treated in a manner different from the rest and have different interests which might conflict. In such cases fre classes will be carved out".

Three points are made about the classifications made by the applicants herein:

(i) Attention is drawn to the fact that the scheme provides that a number of unsecured creditors are to be paid their claims in full. (see paragraph B (iii)). These are creditors with claims under £25,000 and are mainly small trade creditors. The total of their claims is £132,554.00, and it is urged that these form a distinctive class from the other unsecured creditors. I agree. T paragraph B (iii) creditors are getting very special treatment und the scheme. As they are to be paid in full within one month of

its sanction it is impossible to see how they would vote against it and obviously their interests are different to the less favoured general body of unsecured creditors amongst whom is the Collector General. If the scheme is successful the Revenue debt is to be partially paid over a three year period and part of it (the interest component) is not provided for in the scheme at all. But I do not think that this is a justification for refusal of sanction as I am not satisfied that if a separate class for the favoured creditors had been created that this would have meant that the scheme would have been defeated. The report of the meeting of the unsecured creditors shows that only 36 votes (including proxy votes) were cast at the poll and it seems that the paragraph B (iii) unsecured creditors did not tip the balance (admittedly a fine one) to create the requisite majority.

(ii) Secondly, it is pointed out that the Explanatory Memorandum circulated with the scheme on the direction of the Supreme Court reveals that the Chairman of the company (and one of the present applicants) is a director of a firm called "Monkstown Consultants", an unsecured creditor for £12,600 whose debt is to be paid in full. The report of the meeting of unsecured creditors discloses that this firm voted by proxy in favour of the scheme. For reasons just given at (i) I agree that this firm should have been placed in a separate class with other favoured creditors but I do not think the fact the company chairman is also a director of this company is an added reason for creating a further separate class. In my view this company's special relationship to Pye (Ireland) Ltd. is not a reason for refusing sanction.

(iii) Thirdly, attention is drawn to a reference in the Explanatory Memorandum to an unsecured creditor, Philips Electrical (Ireland) Ltd., which is also a substantial

shareholder in the company. This company owns 229,425 ordinary 25p shares in Pye (Ireland) Ltd., a significant and substantial proportion of the entire issued ordinary capital of the company. It is owed as an unsecured creditor a sum of £379,000 (excluding interest) and it voted at the meeting by proxy in support of the scheme. Without its vote the statutory majority would not have been obtained. There is no doubt that if the scheme is successful that the prospect for the ordinary shareholders is very much better than in a liquidation (which is the alternative if the scheme is not adopted) in which it would appear the ordinary shareholders are likely to do very badly. So it seems to me that the interests of a substantial unsecured creditor who is also a substantial shareholder are very different to those of the general body of unsecured non-shareholding creditors and that there is in reality no common interest between them - the creditor/ shareholder is almost certain to support the scheme, whilst the ordinary unsecured shareholder may have (as has happened in the case of the Collector General) what is considered as valid reasons for opposing it. I think therefore that there should have been a separate class created comprising unsecured creditors who are also shareholders in the company.

It was pointed out by Mr. McCracken on behalf of the applicants that the different meetings were held in this case pursuant to order of the Supreme Court. That is true, but it has not been suggested that the point I am now considering was raised at the hearing of the section 201(1) Summons and adjudicated upon. Normally a section 201(1) Summons would not be served on anyone and objectors to the scheme would not have any opportunity to raise a point like this until the hearing of a section 201(3) Petition. this case the Collector General was served with the summons and was represented at the hearings. But it is by no means clear that

that time the information which was contained in the Explanatory Memorandum (and on which the present objection is based) was known to him. And even if it was and the point now taken somehow overlooked, this is not a reason for granting sanction if the objection is a valid one. If the applicants are not in any way mislaid and if nothing in the nature of an estoppel arises it seems to me that on the present petition the court should carefully consider the validity of the procedures which have been adopted. In this case had the proper classes been constituted the views of a major creditor (the Revenue) would not have been defeated. In all the circumstances, then, I think I should exercise my discretion by refusing sanction under the section. Even had I jurisdiction to do so, the summoning of fresh meetings of the correct classes of unsecured creditors would be an otiose exercise.

Approved
DC
14.3.85