

THE SUPREME COURT

Chief Justice
Henchy J
Griffin J
Hederman J
McCarthy J
(11/86)

IN THE MATTER OF SECTION 280 OF THE

COMPANY'S ACT, 1963 - 1983

AND

IN THE MATTER OF

M.F.V. CONSTRUCTION COMPANY LTD, IN LIQUIDATION

ON THE APPLICATION OF

PARTICK TUFFY, LIQUIDATOR

Judgment of McCarthy J. delivered the 12th day of May, 1988

By special resolution of the 6th July, 1982,
it was resolved that the company be wound up and, on
the same day, the applicant was appointed liquidator.
Section 285 of the Company's Act, 1963 prescribes what
are preferential payments in a winding-up including

(subsection 2(a)(iii) "any amount due at the relevant date (here the 6th July, 1982) in respect of sums which an employer is liable under the Finance (No.2) Act, 1959, and any regulations thereunder to deduct from emoluments to which Part II of that Act applies paid by him during the period of 12 months next before the relevant date reduced by any amount which he was under that act, and any regulations thereunder liable to repay during the set period, with the addition of interest payable under Section 8 of that Act".

As of the relevant date, there was some £34,000 due as the balance of such sums during the period of 12 months next before the relevant date. The liquidator has paid approximately £14,000 and intends to pay the balance of approximately £20,000 as a preferential payment in priority in accordance with Section 285. The remaining assets in the liquidation would then be available for distribution amongst the ordinary creditors. The Collector General, however, claims the much larger sum of £210,250 together with interest up to the 31st March, 1982, being arrears of such statutory sums unpaid between October, 1980 and

the 10th June, 1981.

THE ARRANGEMENT:

In June, 1981, the Company was insolvent but it had two major contracts with Dublin Corporation which had not been completed; the directors Michael McNamara, Patrick Neylon and John Neylon proposed a scheme of arrangement with the creditors including the Bank of Ireland as secured creditor, and the Collector General who would, in the event of a winding up, be a preferential creditor. The scheme was accepted by the required majority of unsecured creditors and was approved by order of the High Court dated the 17th June, 1981. The major proposals in the scheme were: -

- (a) to pay the entire of the amount due to the Bank of Ireland as secured creditor;
- (b) to pay the sum of £210,250 and interest to the Collector General as preferential creditor;
- (c) to pay 40 pence in the pound to unsecured creditors;
- (d) to release the directors of the Company from joint and several guarantees to the Bank of Ireland

and on foot of an insurance bond furnished by the Insurance Corporation of Ireland to Dublin Corporation;

- (e) a provision whereby the directors of the Company personally guaranteed the dividend of 40 pence in the pound to the unsecured creditors.

Subsequent to the resolution for voluntary winding up the majority of the unsecured creditors were paid at a rate of 40 pence in the pound in respect of their several debts the total sum being £254,548. The sums were paid by John McNamara, Shelley McNamara and Bernard McNamara, Barbara Ceillier, none of whom were directors and Michael McNamara and Company Ltd. They are accordingly, entitled to prove in the liquidation as unsecured creditors by virtue of subrogation agreements executed in their favour. The latter parties derived their rights from, and only from, the subrogation agreements and, consequently, are identified with the unsecured creditors who sanctioned the scheme of arrangement.

The Collector General, by letter, accepted the scheme which also made provision for the payment of

current outgoings, including the statutory sums,
of which £146,205 was paid between the 5th July, 1981
and the 5th February, 1982 in respect of persons
employed in the completion of the Dublin Corporation
contracts.

THE ISSUE:

The Collector, in effect, seeks to enforce
the scheme which was approved by order of the High
Court and contains, inter-alia, the following
provisions:-

- 3. "The sum due to the Collector General as the sole preferential creditor as appears in the Statement of Affairs shall be frozen as of the date hereof but shall continue to carry the rate of interest applicable thereto in accordance with law. Future payments of P.A.Y.E. and P.R.S.I. shall be discharged as and when the same fall due and no part of such future payments shall be appropriated in discharge of the said frozen balances due as of the date hereof.

- 10. Subject to the works comprised in the said Building Contracts having been completed by Company and all sums properly payable by Dublin Corporation to the Company having been received, the company shall be wound up as of the 31st day March, 1982 and its assets realised and applied in satisfaction of its debts in accordance with law."

The explanatory statement issued in compliance
with Section 202 of the Company's Act, 1963 contains

the following statements: -

Page 3 "A sum of £210,250 is owed by the Company to the Collector General for arrears of P.A.Y.E. and P.R.S.I. and the entire of that sum would rank as a preferential payment in a winding up of the Company pursuant of Section 285 of the Company's Act, 1963."

Page 5 "The Company is satisfied that monies receiveable during the period up to the 31st March, 1982 will be sufficient to finance the works required to complete each contract and that by the 31st March, 1982 the substantial value of the works in progress will have been released sufficient to enable a dividend of at least 40 pence in the pound to be paid to the unsecured creditors after payment of the secured creditor and the preferential creditor... "

The factual issue is whether or not the frozen claim with interest of the Collector General is to be paid in priority to the subrogated debts and, thereby at the expense of those to whom subrogation was made; if not, the latter will recoup the 40 pence in the pound that they paid.

Those in the shoes of the unsecured creditors say that the Court must disregard the scheme and adhere to Section 285 as the statutory direction to the liquidator on priority of payments. They say that the Collector General benefited from the scheme in that

he continued to collect the statutory sums where, otherwise, these might have not been received. Whether or not that is a benefit to the Collector General and consequently to the Revenue, if the work was going to be carried out to complete the contracts, as, no doubt, it must have been, then those statutory sums would have been paid to the Revenue in any event by somebody. It is also said that a winding up at the time, in June 1981, would have left the Collector General short of payment; be it so, but the present argument would also leave him short of payment, in respect of the debt then, in June, 1981 due. The effect of yielding to the Collector General's claim, it is argued, would mean over-riding the statute.

The Collector General relies upon the enforceability of the scheme of arrangement which involved the Collector General in staying

his hand until at least the 31st March, 1982 and that this scheme is binding on the Company, and consequently, on the liquidator. Reliance was placed upon Section 201 (3) of the Act as support for the view that the liquidator is statutorily bound by such an arrangement; in my view there is no statutory support for such a proposition, since subsection 3, in that regard, is related to an arrangement etc made by a Company in the course of being wound up, whereby the liquidator would be bound. In my view, a more fundamental equitable principle is involved. The unsecured creditors cannot be permitted to approbate and reprobate; they secured the advantage of the Company continuing to trade in the completion of the contracts, thereby greatly increasing the amount available for distribution. But they now seek to deny another part of the self same agreement;

they cannot be permitted to do so. As long as all interested parties are protected, I see no reason why those immediately concerned may not make a valid and enforceable agreement to waive or amend the order of priority of payment. If other parties not involved in the scheme were to be concerned in the winding up, different consideration would apply. Here, however, the Court has before it effectively the two parties to the scheme who have vital interests in the winding up; the liquidator provides the machinery. It is beyond question that the parties intended that the preferential claim of the Collector General should stand in the event of a winding up as of the 31st March, 1982 (which date was unilaterally extended until the 6th July, 1982). To order that the parties adhere to the terms of that scheme of arrangement and to give the Collector General the priority claimed seems to me to be "in accordance with law".

I would accordingly answer the question set out in the Special Indorsement Claim as follows:-

- (a) Yes including interest
- (b) Does not arise
- (c) Does not arise
- (d) Does not arise
- (e) Does not arise

Approved

[Signature]

13.5.88.