

Case report

Creditors meetings

Re Power Builders (Surrey) Ltd (2008) EWHC 2607 (Ch)

Background:

Rule 4.70 Insolvency Rules 1986 (“IR”) governs the entitlement of creditors to vote at creditors’ meetings in relation to a creditors’ voluntary liquidation (“CVL”) and provides as follows:-

At any creditors’ meeting, the chairman has power to admit or reject a creditors’ proof for the purpose of his entitlement to vote; and the power is exercisable with respect to the whole or any part of the proof.

The chairman’s decision under this Rule or in respect of any matter arising under Rule 4.67 IR, is subject to appeal to the Court by any creditor or contributory

If the chairman is in doubt whether a proof should be admitted or rejected, he shall mark it as objected to and allow the creditor to vote, subject to his vote being subsequently declared invalid if the objection to the proof is sustained

If, on an appeal, the chairman’s decision is reversed or varied, or a creditor’s vote is declared invalid, the Court may order that another meeting be summoned, or make such other order as it thinks just.

Substantially similar provisions apply in respect of voting at creditors’ meetings in relation to company voluntary arrangements (Rule 1.17 IR), administrations (Rule 2.39 IR), individual voluntary arrangements (“IVAs”) (Rule 5.22 IR) and bankruptcy (Rule 6.94 IR).

As noted by the Court in its judgment in this case, the purpose of allowing the chairman of a creditors’ meeting to mark a claim as “objected to” but nevertheless allowing the creditor to vote, is so as to allow a quick decision by the chairman with the possibility of a more leisurely examination of the objection to the proof by the Court at a later date. In other words, a creditors’ meeting is not the place to go into lengthy debates as to the exact status of a debt and so a mechanism is provided by which the objection to the proof can be tested.

Facts:

Mr Power was the sole director of Power Builders (Surrey) Ltd (“the Company”), which carried on business as a building contractor. Its main client was Petrus Estates Ltd (“Petrus”).

The Company ran into financial difficulties and it was decided that the Company should be put into CVL. A creditors’ meeting was held, which was chaired by Mr Power. The only vote taken at the meeting was on the appointment of the liquidators of the Company. Mr Power proposed that a Mr Bhardwaj be appointed as liquidator but nominations were also received at the meeting for the appointment of a Mr Latos and Mr Holgate as joint liquidators.

Mr Power admitted the proofs of all creditors for voting purposes with the exception of the proof of Petrus. Petrus’ claim arose under a building contract and because the claim was disputed and not suitable for summary determination, Mr Bhardwaj advised Mr Power to allow Petrus to vote for the full extent of its claim but mark the proof as “objected to”.

Apart from one other creditor, all creditors, including Petrus, voted in favour of the appointment of Messrs Latos and Holgate as joint liquidators.

Following the creditors' meeting, a dispute arose between Mr Power and the joint liquidators. The joint liquidators were asserting that Mr Power was personally liable for the Company's debts and owed the Company more than £620K in respect of unlawful dividends and drawings and an unlawful overdrawn director's loan account. Mr Power rejected the joint liquidators' claims and alleged that their impartiality in investigating the claim against him was being compromised because they were being funded by Petrus.

Mr Power made an application to the Court pursuant to Rule 4.70(2) IR asserting that Petrus was not a creditor of the company and so had not been entitled to vote at the meeting and seeking the convening of a new meeting to decide who should be appointed as liquidator, without any reference to Petrus' claim.

The Registrar struck out the application on the grounds that:-

- Even if Petrus' vote had been rejected, the outcome of the creditors' meeting would not have been any different
- Mr Power could not, as chairman of the meeting, appeal against his own decision.

Mr Power appealed.

Decision:

Dismissing the appeal, the High Court Judge held as follows:-

- For the purposes of the appeal, it had been conceded that Petrus had not been a creditor of the Company at the date of creditors' meeting nor had been entitled to vote. Therefore, the issue for the Court was whether it was appropriate for the Court to summon another creditors' meeting.
- The Court had to bear in mind that the summoning of a new meeting was likely to involve expense both for creditors and also for the office holder whose fees had to be paid in priority to any dividend for creditors.
- Whether it was appropriate to summon another meeting would to some extent depend on the question on which the vote had been taken.
- In the present case, there had only been one question for decision at the meeting, namely who was to be appointed as liquidator. There had only been two candidates, so the position had been clear-cut. In other cases, however, the matters for decision might be more complex – for example, a proposed IVA might be the subject of amendments proposed by creditors and different creditors might vote in different ways.
- There might also be a difference in approach in a case in which the chairman had refused to allow a creditor to vote for his full entitlement (either because he had rejected the proof or because he had only admitted it in part) and a case in which a creditor had been allowed to vote, but his vote was subsequently declared invalid. In the former case, the default position would be that a new meeting should be summoned. In the latter case, the default position would be that no new meeting should be summoned.

- In the former case, it followed from the principle of creditor democracy that all those who had been entitled to vote should have that opportunity. If the Court were to decline to order a new meeting, it would mean that the Court would be exercising a decision-making power that had been given to the creditors. In other words, a creditors' meeting would be treated as having made a decision, which it had not made at all. This contrasted with the latter case, where all those entitled to vote had cast their votes, as well as some who had not. In these circumstances, the outcome of the meeting could readily be deduced by eliminating any vote that had subsequently been declared invalid without the need to summon a new meeting.
- In the present case, even if Petrus' vote had been eliminated entirely, the outcome of the meeting would not have been affected. That was a strong reason for not summoning a new meeting.
- A further consideration that militated strongly against summoning a new meeting was that Mr Power's purpose, in seeking to summon a new meeting, was to seek to persuade creditors to appoint a liquidator of his own choice. A liquidator should not be a person, nor be the choice of a person, who had a duty or purpose that conflicted with the duties of the liquidator. More specifically, the liquidator should not be the nominee of a person against whom the company had hostile or conflicting claims or whose conduct in relation to the affairs of the company was under investigation. Mr Power had a purpose that conflicted with the duties of the liquidator, namely to defend his own conduct in relation to the company. In addition, he was a person whose conduct in relation to the affairs of the company was under investigation. It would therefore be wrong if the liquidator were to be a person chosen by Mr Power.
- Mr Power was not legally precluded from appealing against the chairman's decision in his capacity as a creditor or contributory of the Company, merely because he himself had been the chairman. Rule 4.70(2) IR gave a right of appeal to "any" creditor or contributory. Further, in acting under Rule 4.70(3) IR, the chairman had not really been deciding anything at all. He had merely been recording doubt whether a proof should be admitted or rejected. Therefore, the position was not analogous, as claimed, to a case of a person appealing against his own decision.