Case No: 20370/2009

Neutral Citation Number: [2009] EWHC 3551 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 11 December 2009

BEFORE:

HIS HONOUR JUDGE PURLE QC

IN THE MATTER OF:
THE CONSTRUCTION CONFEDERATION

AND IN THE MATTER OF:
THE INSOLVENCY ACT 1986

MR P ARDEN QC (instructed by Denton Wilde Sapte LLP) appeared on behalf of the Construction Confederation Staff Pension Scheme

---

Approved Judgment

Digital Transcript of Wordwave International, a Merrill Communications Company
101 Finsbury Pavement London EC2A 1ER
Tel No: 020 7422 6131 Fax No: 020 7422 6134
Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com
(Official Shorthand Writers to the Court)

No of words: 1,806
No of folios: 26

1. HIS HONOUR JUDGE PURLE QC: This is a winding up petition brought by the Trustees of the Construction Confederation Staff Pension Scheme. They seek to wind up a company known as the Construction Confederation (CC), which is an unincorporated association.

2. As Hughes LJ pointed out in R v L and another [2009] 1 All ER 786 at 790:

> "There are probably almost as many different types of unincorporated associations as there are forms of human activity."

The present association is a substantial commercial organisation, which has conducted business on a large scale, and unhappily is now heavily insolvent. I have been taken to its constitutional objectives and its attributes in detail by Mr Arden QC who has scrupulously drawn my attention to the relevant authorities, including those that are against him. I am most grateful to him for his industry and thoroughness.

3. The petition is brought under the provisions of the Insolvency Act 1986 ("the 1986 Act"). Part V. Section 221 provides that any unregistered company may be wound up under the 1986 Act. An unregistered company is defined as meaning, or more accurately as including, in section 220(1): "…any association and any company" with a following immaterial exception. The word "association" could hardly be wider and is on the face of it apt to apply to the present institution.

4. However Mr Arden QC drew my attention to a number of authorities which might suggest otherwise. The first, to which Mr Arden QC referred for a general overview of the relevant approach, was Re International Tin Council reported both at first instance at [1987] Ch 419, a decision of Millett J as he then was, and at [1989] 1 Ch 309 in the Court of Appeal, where the relevant judgment was given by Nourse LJ. It is clear from that case that not every unincorporated association is an association within the meaning of what is now section 220 of the 1986 Act. The particular example of the Tin Council (a body which was set up under international treaty consisting of a membership of sovereign states) was, perhaps unsurprisingly, held not to be subject to the winding-up jurisdiction. The approach of Millett J, endorsed by the Court of Appeal, was to ask the question, "Could Parliament reasonably have intended that the International Tin Council should be subject to the winding-up process of the UK insolvency legislation?" That was, for compelling reasons, having in the main no real bearing on the present case, readily answered "no". In the course of so deciding Nourse LJ in the Court of Appeal made specific reference to the mid-19th century decision of In the Matter of The St James's Club and of the Joint Stock Companies Winding-up Acts, 1848 and 1849 (1852) 2 De G M & G 383 where Lord St Leonards, the Lord-Chancellor, sitting as the Court of Appeal in Chancery, held that a members' social club was not an association for the purposes of the then Joint Stock Companies Winding-up Act 1848. The Lord-Chancellor was clearly troubled that the winding-up jurisdiction could be contemplated as applying to a gentlemen's club, and other similar organisations, commenting that every club would in that event be included. He seemed to envisage that the position might be different if the members were liable as such for the debts of the club.

5. More recently the same approach was adopted by Morritt J in Re Witney Town Football and Social Club [1993] BCC 874. Upon a consideration of the constitution and rules of that club Morritt J held that it was an ordinary members' club, and

therefore excluded from the jurisdiction in part V of the 1986 Act. The fact that it carried on professional football activities and permitted temporary membership was not a material distinction. He noted also that members were not liable beyond their subscriptions.

6. Each case must turn upon its own facts. Here the rules of CC set out a series of objectives, which read like a trading company's objects clause. In very broad terms, CC has carried on the business on a non-profit-making basis of providing lobbying services for the construction industry generally and other defined services to its membership. In carrying out those functions it has over the years entered into liabilities, in particular towards its own staff and the petitioners in relation to its pension arrangements. The members from time to time have consisted of other trade organisations within the construction industry, all having as their objectives the promotion of their particular sectors of the trade. Detailed provisions are contained in CC's constitution for, amongst other things, the payment of liabilities. The members undertake to abide by the provisions of the rules of the constitution and, most importantly, acknowledge an obligation to pay such sums towards the liabilities that might be determined in accordance with a particular rule and appendix, though the appendix itself is curiously silent on the point.

7. Thus, this is not, as in the case of an ordinary members' club, an organisation that one joins simply for the purpose of recreation and pleasure in return for an annual subscription. The rules clearly envisage that the members may become liable as such to contribute to the liabilities. The intent that members should, in given circumstances, contribute to the liabilities seems clear, though nothing I say today must be taken as binding individual members who wish to argue that they are not liable to contribute in the particular circumstances affecting them.

8. CC does seem to me to be the sort of organisation which one would expect, in the event of insolvency, to be within the contemplation of Parliament in 1986 when re-enacting provisions going back into the 19th century extending the winding-up jurisdiction to unregistered companies by reference to the concept of an association. It is a trade association, not a place where people meet to eat, dine, formerly smoke and now merely drink, or for other recreational or social purposes, but an organisation that is meant to promote the trade interests of its exclusively commercial underlying membership. By "underlying membership" I refer to the members of the other associations which themselves form the membership of CC.

9. There are substantial pension liabilities within CC, in consequence of which CC is now a debtor of the petitioner in a sum exceeding £300,000 and a contingent debtor in a much larger amount, running into many millions of pounds. It is perhaps noteworthy that one of the member organisations, that is to say an organisation which is a member of CC, the National Federation of Builders, was on 9 December 2008 made subject to a scheme of arrangement under the Companies Act 1985 section 425. Though I have not seen the reasoning of the Judge in that case, Mr Arden QC submits, by reference to paragraphs 18 and 19 of the judgment of Lawrence Collins J (as he then was) in Re Drax Holdings Limited [2004] 1 WLR 1049, that the only basis upon which the Judge could have exercised jurisdiction was that the National Federation of Builders was an unregistered company within section 221 of the 1986 Act. That is, on the face of it, a pointer towards the approach I should adopt in the present case. It is the approach that

I propose to adopt also. I am not concerned with a social club or anything like it, I am concerned with a commercial organisation which although not run for gain has been run on commercial lines incurring substantial liabilities which the members could be called upon to contribute towards. It is in my judgment properly to be regarded as the sort of organisation within the contemplation of Parliament in re-enacting Part V in its current form, there being no special features such as in the International Tin Council case to take the matter outside Parliament's contemplation.

10. It is clear from the list set out in Halsbury's Laws of England to which I have been referred by Mr Arden QC in paragraph 1149 of volume 7(4) (2004 reissue) that a wide range of different organisations may be wound up under Part V including, for example, loan societies, and friendly societies whether registered or not. In one case, Re Irish Mercantile Loan Society [1907] 1 IR 98, it was held that the fact that a society is in the course of dissolution does not prevent a creditor from obtaining a winding-up order. That is pertinent to the present case. There are provisions for dissolution in CC's constitution. As it has been held that the invocation of those provisions would not be a bar to a winding-up order at the suit of a creditor, the mere existence of those provisions (which have not in fact been invoked) cannot be a bar to a winding-up order either. Whether or not it is appropriate to wind up is a matter for the court's discretion. Here of course there is a substantial debt which is unpaid and an even greater contingent liability and undoubted insolvency, having regard to the pension obligations which have been incurred over the years towards the petitioners. On the face of it, therefore, the petitioners are entitled to a winding-up order.

11. There is a real prospect, though I am not ruling finally on the point, that if CC is placed into liquidation by the court under the 1986 Act, the liquidation will operate as a triggering event enabling access to the Pension Protection Fund ("PPF"). The position is not wholly clear but the prospect is a real one. In Re Compania Merabello San Nicholas SA [1973] Ch 75 the prospect of relying upon the Third Parties (Rights Against Insurers) Act 1930 was held to be a sufficient reason for winding up a foreign company. The subsequent decision of Re Allobrogia SS Corpn [1979] 1 Lloyd's Rep 190 established that a cause of action relied upon to found jurisdiction to wind up a foreign company need only be shown to have a reasonable prospect of success. In my judgment, the potential advantage of eligibility for the PPF is itself a reason for exercising the jurisdiction at the suit of the pension fund trustees, who are substantial creditors, and who have established the prospect of such eligibility to the requisite standard. Moreover, CC is not a foreign company but a domestic association established and operating within the jurisdiction. I am not to be taken as saying that inhibitions similar to those affecting the exercise of the Court's jurisdiction in the case of a foreign company arise in the case of a domestic association but, even if they do, the inhibitions are overcome on the facts of this case.

12. I should mention that Mr Arden QC also referred me to Re National Union of Flint Glassworkers [2006] BCC 828, a decision of HHJ Norris QC, as he then was, who accepted without detailed argument on the point the submission of counsel that section 221 did not apply to that particular body. His reasoning made reference to what were then the Companies (Unregistered Companies) Regulations 1985 (now replaced by the Unregistered Companies Regulations 2009). The 2009 Regulations apply (as did the 1985 Regulations) only to corporate bodies. As it is clear on any footing that an "association", as that expression is used in section 220 of the 1986 Act, includes at

least some unincorporated associations, the Regulations can hardly be relevant to the present case, and I am not clear how they were relevant in the case before HHJ Norris QC. In any event he did what he was asked to do through a different route, under the court's inherent jurisdiction.

13. In the circumstances I am satisfied that I have jurisdiction and that I should exercise it. I therefore order that Construction Confederation, an unincorporated association, be wound up under the provisions of the Insolvency Act 1986. Mr Arden QC will presumably ask for costs in the winding-up, which will be the usual compulsory order.