OUTER HOUSE, COURT OF SESSION

[2020] CSOH 6

P345/19

OPINION OF LADY WOLFFE

In the Note

JOSEPH ALEXANDER SWEENEY

Noter

for

orders in terms of section 148(1) and 167(3) of the Insolvency Act 1986 in relation to the winding up of

WEST LARKIN LIMITED

Noter: O'Brien; TLT LLP
Third Respondent: Sandison QC; Currie Gilmour & Co

14 January 2020

Background

Liquidation of the Company, the Property and the parties to this Note

[1] On 12 December 2018 this Court directed that West Larkin Limited ("the Company") be wound up and it appointed Alexander Iain Fraser as *interim* Liquidator ("the Liquidator"). The Liquidator is called as the second respondent to this Note. The Company's only asset is a parcel of agricultural property ("the Property") which has been productive of a large number of disputes and lengthy litigations between members of Sweeney and Urquhart families since about the late 1990s.

[2] This is the second note presented in this liquidation by a member of the Sweeney family. The first note was presented by Theresa Donalda Sweeney ("Mrs Sweeney"), the mother of the Noter in this Note, Joseph Alexander Sweeney ("Mr JA Sweeney" or "the Noter"). I shall refer to the first Note presented by Mrs Sweeney as "Note 1" and the Note presented by Mr JA Sweeney as "Note 2" or "this Note", as the context requires. Defined terms have the same meaning in both Notes. The third respondent in this Note is Amanda Urquhart (who was the creditor in the judgment debt enforced against the Company).

Orders the Noter seeks

[3] Put shortly, by this Note the Noter seeks to have himself recognised as a member of the Company and to have the Liquidator directed to bring a challenge to the registration of a "notice of interest" of the third respondent (and her mother) *qua* tenants of an agricultural tenancy to acquire the Property under section 25 of the Agricultural Holdings (Scotland) Act 2003 ("the Notice" and "the 2003 Act", respectively). (While there are ancillary disputes about the validity of one or all of the three notices the third respondent has registered under the 2003 Act, for ease of reference I shall simply refer to the latest one as "the Notice", without prejudice to any arguments about the validity of it or any earlier notice.) If effective, a notice under section 25 of the 2003 Act creates a statutory right of pre-emption in favour of the tenant or tenants who registered the notice of interest (*per* sections 26 and 28 of the 2003 Act), subject to any challenge by the landlord to the notice (as provided for under section 25(8) of the 2003 Act) and provided that the notice has not lapsed (see section 25(12) of the 2003 Act).

[4] The status in which the Noter ostensibly presents this Note is as a person entitled to be recognised as a member of the Company. (That is greatly to simplify the background:

the Noter has extensive averments in Statements 4 to 16 setting out the basis on which he claims to be entitled to be treated as having remained a member of the Company, notwithstanding the grant of a stock transfer form by him in 2005 (but said to be invalid on a like basis as that relied on by the third respondent in other litigation ("the share register litigation")).

[5] In addition to rectification of the register of members of the Company, the Noter in this Note also seeks an order under section 167(3) of the Insolvency Act 1986 ("the 1986 Act")

> "directing the Liquidator to challenge a purported notice under section 25 of the Agricultural Holdings (Scotland) Act 2003 ("the 2003 Act") which has been registered in respect of the [Property]".

The Noter also sought and was granted *interim* interdict against the liquidator contracting to sell or otherwise disposing of the Property.

Scope of the debate

[6] The matter called before me for debate on a number of the third respondent's pleas. Quite properly, the Liquidator did not instruct any appearance at the debate. At debate, the third respondent advanced two arguments:

1) Whether the Noter has qualified a sufficient interest to present the Note (described by Mr Sandison QC, who appeared for the third respondent), as "the minor issue" (and which was the subject-matter of her fifth plea-in-law); and
2) Whether the Noter's averments criticising the Liquidator's refusal to challenge the Notice are relevant and specific ("the section 167(3) argument", being the subject-matter of the third respondent's sixth plea-in-law).

Mr Sandison described (2) as the principal issue. While the first order the Noter seeks is for rectification of the register of members to this effect, the debate before me sensibly focused on the principal issue. For reasons that will become clear, I propose to deal with the section 167(3) argument first. Other issues referred to in the parties' Notes of Argument (eg of personal bar or the arguments arising from the Noter's sequestration and said to deprive him of sufficient interest to present the Note) were not insisted in.

[7] As will become apparent, there is a very long history of enmity, punctuated by litigation, between the Sweeney and Urquhart families. If the Notice is valid, then certain pre-emption rights will be triggered in favour of the tenants (of which the third respondent is one) of the agricultural tenancy (if it still subsists) to buy the Property valued on a particular basis. If the Notice is invalid, as the Noter contends for a variety of reasons, then, there would be no pre-emption rights and the Liquidator would be free to sell the Property on the open market.

[8] I have had regard to parties' Notes of Argument and the volume of authorities provided in advance of the Debate. This Opinion is a slightly fuller articulation of the *ex tempore* decision and reasons I provided to parties two days after the debate.

Discussion

[9] While parties agreed that a member of the Company has title to present an application under section 167(3) of the 1986 Act, they did not agree that the Noter is either a member or is entitled to be recognised as such; nor were they able to agree as to the proper legal approach to the question of interest to present an application under section 167(3) of the 1986 Act.

The court's approach to an application under section 167(3) of the 1986 Act

[10] In his full and careful submission Mr Sandison traced *dicta* from a well-established tract of authority, from *Leon* v *York-O Matic Ltd* [1966] 1 WLR 450 (at pp 1453B to 1455H) to *Abbey Forwarding Ltd* v *Hone* [2010] EWHC 1644 (Ch), [2010] BIPR 1053 (at paragraphs 6 to 9 and 21), which bracketed the other cases of *Re Greenhaven Motors Ltd* [1997] BCC 547 (at pp 550G to 552H) and in the Court of Appeal [1999] BCC 463 (at pp 466F to 468D, 469G to 470B), *In re Edennote* [1996] BCC 718 (at pp 722C to H and 723B to 724C), and *Buckingham International Plc (No 2)* [1998] BCC 943 (at pp 960C to 961D to E). In short, on this tract of authority the courts adopt a position of deference to certain decisions of liquidators, eg concerning realisation of assets, with the effect that, absent cases of fraud or bad faith, the court will only interfere with the act of the liquidator 'if he has done something so utterly unreasonable and absurd that no reasonable person would have done it' (to paraphrase *Edennote Ltd*) ("the *Edennote* test"). Mr Sandison noted that this remains the proper approach of the court notwithstanding certain changes to the 1986 Act effected by the Small Business Enterprise and Employment Act 2015 (see *Longmeade Ltd* [2016] Bus LR 506 (at paras 1 to 2, 14 to 21, 42 to 47, 50 to 52, 54 to 55, 60 and 66)).

[11] Counsel for the Noter, Mr O'Brien, did not challenge these *dicta* but he sought to draw out two features from the case-law in support of the Noter's application under section 167(3). These two points may be summarised as follows:

1) Mr O'Brien noted that, on its facts, *Edennote* concerned a successful challenge to a proposed assignation of the company's interest in an action on the basis that the liquidator had not offered to assign that interest to any other interested party for a higher sum that might have been obtainable. Here, there were two "special bidders" in the form of the Sweeney and Urquhart

families who both demonstrably wanted the Property and who could be presumed to bid more than a figure based on an agricultural valuation;

2) Mr O'Brien also noted the distinction in *Re Buckingham International plc (No 2)*, *cit supra*, at 960H (albeit taken from counsel's submissions) between

   (i) "practical decisions …. as to valuation and disposal" and

   (ii) other decisions "involving the exercise of judgment as between different creditors' competing claims".

In that case, the question was whether the effect of the grant of execution in the UK of garnishment proceedings in the US would permit one set of creditors to "jump to the head of the queue in priority to the general body of unsecured creditors"- ie a decision that would fall into category (ii) of the distinction drawn. (If the case fell within (ii), then the court could be more readily persuaded to apply its own judgment.) The Court of Appeal accepted the distinction drawn in that case. In doing so, it re-affirmed the general deference of the court to decisions of the liquidators falling within category (i):

> "When liquidators are exercising their administrative powers to realise assets, the court will be very slow to substitute its judgment for the liquidators' on what are essentially a businessman's decision (see *Edennote Ltd* at p 722)." *Per* Robert Walker LJ at 961B-C.
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Mr O'Brien seeks to extend the reasoning in that case to decisions of liquidators that are "adjudication-like" decisions and which would, he suggested, require modification of the accepted approach by the court under section 167(3) of the 1986 Act. (The modified approach would be that the court could consider matters *de novo* and unconstrained by the usual deference to the liquidator.) Mr Sandison resisted this line, arguing that the underlying dispute about the subsistence of an

agricultural tenancy of Property could not be equiperated with a creditor's claim or an adjudication by the liquidator of the parties' competing positions.

Context of the liquidator's decision

The information available to the Liquidator anent valuation of the Property

[12] In assessing parties' submissions I begin by noting the context in which the present application is made. As explained more fully in Note 1, the Company was placed into liquidation following a joint and several decree against it (and against Mrs Sweeney) for the expenses arising out of the share register litigation. The Company's only asset is the Property, and which the liquidator avers in his Answers to this Note was valued at around £27,000 as at May 2018. Mr O'Brien does not challenge that valuation. Mr Sandison observed that the valuation was not "discounted" as a consequence of the agricultural tenancy; the figure was simply the value of the Property valued as agricultural land.

[13] Mr O'Brien accepted that the land was not categorised in the local plan in a way that would permit non-agricultural development (eg for residential development). It should be noted that the Noter has not lodged any alternative valuation. While reference was made in submissions to a valuation of some £1.5 million, Mr O'Brien confirmed that this was the figure mentioned (in 2004) in the case report of one of the prior litigations between the two families (see *Urquhart* v *Sweeney* 2006 SC 591) and, which so far as he was aware, was not supported by any valuation report.

Factors relied on by the Noter for the purpose of the section 167(3) argument

[14] Despite Mr Sandison's challenge in submissions for the Noter to "name his price", as it were, for the Property, on behalf of the Noter Mr O'Brien studiously declined to do so. All

that he could offer was the characterisation of the two families as "special bidders" for the Property. I proceed on the basis that, judged from a practical or commercial perspective, therefore, there is no present development value on which the Liquidator could reasonably rely which might be unlocked by the grant of planning permission for some non-agricultural use or development.

[15] Mr O'Brien argues that the step to challenge the third respondent's Notice is "cheap", simply entailing a letter to the Keeper. Mr Sandison's reply is that any challenge so initiated was bound to end up in the Land Court and that this Court should not speculate as to what that tribunal, which was a specialist tribunal, would decide.

[16] Mr O'Brien also referred to the offer of the Noter's brother, Owen Sweeney, to fund any litigation in relation to that potential dispute. In response, Mr Sandison notes that this is, in effect, a meaningless offer. Mr Sandison noted that it is not clear if this is an offer to the Liquidator. Would Owen Sweeney thereby claim to be a creditor of the Company? Was it an offer to indemnity all costs the Liquidator might incur? Was it open-ended? Would these costs be paid before liquidation expenses? Would it cover the Liquidator's costs if he were unsuccessful? As *dominus litus*, would Owen Sweeney seek to direct that litigation? No detail whatsoever is provided to test the genuineness of this offer. While there is reference in the documentation to Owen Sweeney's prior sequestration, I note that there is no information produced to vouch his means to fund this offer, or even the estimated cost of that litigation (either at first instance in the Land Court or, given the families' appetite for litigation, any appeal therefrom).

[17] Mr O'Brien invited the court to review the various reports and to conclude that there was a strong case to challenge the Notice. Mr Sandison's riposte is that every case is strong if one only looked at one side and that, in any event, this court should not second guess a

specialist tribunal. Somewhat inconsistently with that last submission, and under reference to *Fyffe* v *Esselmont (no 2)* 2016 SCLR 14, Mr Sandison nonetheless invited the court to consider how difficult it is in practice to prove abandonment of an agricultural tenancy.

Issues potentially arising in any challenge to the Notice

[18] Having regard to the pleadings in this Note, there is no doubt that any challenge to the Notice will be robustly resisted.

[19] Among the matters the Noter raises in the pleadings in this Note are the following:

1) The absence of any tenancy disclosed to the Company prior to its acquisition of the Property (Statement 21).

2) The scepticism in respect of a purported offer of let dated October 1990 for 25 years, but coupled with the contention that in any event that lease expired in 2015 (Statement 22).

3) Regardless of the outcome of the litigation resulting in the Inner House decision in 2004, the Sweeneys did not continue to occupy the Property in reliance on the claimed lease; the Property was left derelict and abandoned; in any event, the third respondent did not carry on an agricultural business on the Property (having been a nurse from 2012 until 2015) (Statement 24).

4) Even if there were an agricultural tenancy in respect of the Property, the Property lost its character as an agricultural holding prior to the expiry of the lease in 2015, because the requirements for it to be a 1991 Act tenancy ceased to be met before then (Statement 24A).

5) The tenancy terminated on the expiry of the lease in October 2015 and that, because there was for a period of time no validly appointed director of the Company at the material time, tacit relocation could not operate to extend the lease (Statement 25).

[20] The third respondent's response to these challenges include the following contentions:

1) Abandonment of agricultural use is not lightly inferred. If there has been insufficient agricultural use at the material time, this was because the Noter's family thwarted such activity.

2) In respect of the Notices, the third respondent's position is that each was valid and duly intimated or, in any event, the Company is personally barred from asserting their invalidity (having accepted rent) (Answer 27).

3) In relation to any challenge made to the Keeper, it is averred that if the Keeper did rescind the registration of the Notice, the third respondent "would immediately seek to appeal to the Land Court ... [and] the cost of any challenge is likely to be substantial and may take a significant period of time to conclude" (Answer 27).

4) In relation to the value of the property, the third respondent avers that "the difference between the value of the property with and without the agricultural tenancy is not so significant as to make it economically worthwhile to challenge" (Answer 28).

[21] It is clear from the foregoing that the essential dispute between the Sweeney and Urquhart families is whether the agricultural tenancy of the Property (which was the question resolved in the litigation culminating in the decision of the Inner House in *Urquhart*

v *Sweeney*, *cit supra*) – and of which certain members of the Urquhart family were then the tenants- still subsists. The Noter argues that, by reason of the lack of relevant agricultural use over many years, amounting to abandonment, a tenancy no longer subsists. For that reason, the Noter argues that the Liquidator should challenge the Notice. The third respondent's position is to deny that a tenancy has been abandoned; rather, the tenant's use (or, at least, relevant agricultural use) of the Property has been thwarted by members of the Urquhart family and, in any event abandonment requires positive steps amounting to an inversion of use (ie positive use which by implication excludes agricultural use) and which will not be inferred by reason of the interference of the Urquhart family. Central to this issue is the question of whether the Property is "agricultural land" within the meaning of s 1(2) of the Agricultural Holdings (Scotland) Act 1991 ("the 1991 Act"). On that matter, parties were not agreed as to what had to be shown to establish that the Property was no longer agricultural land in the 1991 Act-relevant sense; nor were they agreed as to the extent or application of any exception to the statutory definition in cases where the tenant was (as is asserted here) prevented from using the land in the required way. An incidental, perhaps jurisdictional, question may arise as to whether the several challenges to the Notice are capable of constituting "inaccuracies" within the Keeper's powers to correct for the purposes of section 25(9) and (10) of the 2003 Act.

The history of enmity between the two families

[22] It must be noted that the pleadings are littered with references to the numerous prior litigations between members of the Sweeney and Urquhart families. The enmity between the two families is evident from the averments. The third respondent avers, for example, that the Noter's family "has a history of dishonesty" and examples are drawn from

litigations in 2010 and 2017 (Answer 9). It is also averred that the Noter and his family "seek to benefit from their own illegal conduct towards the third respondent and her family over many years". There are references to incidents of harassment, intimidation and other activities that "have severely hampered the ability of the third respondent and her family to put the Property to the full range of agricultural uses to which it is suited", and further references to interdicts and complaints to the police and examples of vandalism by the Noter (eg by the discharge of sewage thereby rendering "a large part of the Property unsuitable for agricultural usage" (Answer 24).

[23] Even assuming that there is a strong case that an agricultural tenancy no longer subsists in respect of the Property (and on which I express no view), the submission on behalf of the Noter makes no allowance – as the liquidator must - for the time and cost that will be required to achieve that outcome. Even if the Noter's desiderated outcome were achieved (ie that the Property was not subject to a statutory pre-emption in favour of a member of the Urquhart family, and even if that challenge were funded by the Noter's brother, it is wholly unclear whether any material benefit (in the form of a higher realisation value of the Property) would even be generated.

[24] In applying the *Edennote* test, it is important also to note the liquidator's position, as set out in his answers and in the email of 16 December 2019 provided to the Court on the morning of the debate. In his Answers, the liquidator avers:

> "*Quoad ultra* denied. Explained and averred that the second respondent's refusal to challenge the notice was reasonable, was taken in good faith and was in any event a decision open to him in the lawful exercise of his powers under section 167 of the 1986 Act. The Keeper will generally not make a decision to rescind the registration of a tenant's interest in acquiring land unless there is an obvious material inaccuracy, such as an error on the notice of interest as to who the landlord or tenant is, or if the plan submitted with the notice of interest does not reflect the areas let. None of those elements are here present. In circumstances where the underlying lease is being challenged, the Keeper would not make such a decision without an order from the

> Court that the lease […] does not exist. The outcome of any such challenge is uncertain. The history of litigation between the noter and parties connected with the noter and the third respondent and parties connected with the third respondent is such that it is reasonably anticipated by the second respondent that any such court proceedings would be robustly defended. Significant cost and expense would be incurred which might or might not be recoverable and even then, only in part. The Company has no assets beyond the Property. The Property was valued in May 2018 at £27,000. There is no real prospect of assets being available to yield a substantial return to the noter should such a challenge be made. Such a challenge would not be in the interests of the general body of creditors of the Company."

[25] While the Liquidator did not participate in the debate, he did provide further information (by email dated 16 December 2019) the day before the debate. In particular, the Liquidator confirmed the following:

1) He confirmed that he has not admitted any claims, other than for the purpose of voting. He provided details of three claims (two by members of the Sweeney family and one by a firm of accountants) totalling over £500,000.

2) More importantly he noted, that "there does not seem to be any recognition" of the costs incurred by him as Liquidator. His work in progress stands at £18,714 plus outlays of £5,356. As the Company is not registered for VAT, then VAT would also fall to be applied. On a rough calculation these figures bring out a VAT-inclusive figure between £27,000 or 28,000. However, the Liquidator also noted that the legal fees incurred for the sale of the Property and for this litigation had not yet been rendered, but that these expenses and outlays also required to be included in the expenses of the liquidation.

Determination of principal issue

[26] I begin by noting that the proper approach of the court is as articulated in the *Edennote* test (see paragraph [10], above), namely, absent cases of fraud or bad faith, this Court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable person would have done it.

[27] In relation to Mr O'Brien's argument based on the distinction drawn in *Buckingham* between different types of decisions, I am not persuaded that the circumstances of this case fall within the second category involving "an exercise of judgment as between different creditors' competing claims" (see para [11(2)], above). Consistent with his duty to realise the assets of the Company (in order to pay the claims of creditors he has accepted or adjudicated upon), the Liquidator has indicated his intention to sell the Property. The underlying dispute between the two families is whether, given that intention, the third respondent is entitled to exercise the statutory pre-emption by virtue of the Notice (assuming it is valid) or whether that Notice is invalid, in which case, there may (or may not) be the bidding war the Noter envisages. On no view is that underlying dispute – which can only be resolved conclusively by the Land Court - to be equiparated with an adjudication, or an adjudication-like determination, by the Liquidator. The issues concerning the validity of the Notice do not provide the basis for a claim by the Noter *qua* creditor in the liquidation. In other words, even if the Noter is successful in challenging the Notice, this does not give her status or standing in the liquidation. From the perspective of the Liquidator considering disposal of the Property, the issues forming the basis of the challenge may give rise to an incidental question, namely whether he is free to dispose of the Property on the open market or whether it is subject to a statutory pre-emption. On either hypothesis, this relates to the

exercise of the very kind of power –realisation of an asset of the insolvent company- in which the courts defer to the commercial judgment of the liquidator.

[28] Accordingly, applying the *Edennote* test and having regard to the principal objectives of a liquidation, the Liquidator's decision to decline to challenge the Notice was readily explicable having regard to the valuation of the Company's only asset (the Property) and the costs already incurred in the liquidation. On that unchallenged information, there is bound to be a shortfall in meeting the costs of the liquidation and it is unlikely there will be any, or any significant, return to the Company's creditors (once their claims are adjudicated on for that purpose). The Noter did not engage with this fundamental reality and this omission is not overcome by a funding offer beset by uncertainties made by the Noter's formerly sequestrated brother and in respect of whom no information as to his means (if any) was provided to substantiate any such offer.

[29] Indeed, were the Liquidator to challenge the third respondent's Notice, as the Noter seeks, the Liquidator would be faced with a probable litigation of indeterminate (but not short) duration fought between families with long-held antipathy towards each other. Furthermore, as is apparent from the factors the Noter and third respondent have adverted to in their pleadings concerning the validity of the Notice (see paras [19] and [20], above), and the kinds of arguments to which these give rise (summarised in para [21]), this litigation would be of unknown prospects, but of undoubted complexity of fact and law, and which may or may not be funded on behalf of the Company by the Noter's brother. In light of the enmity between the families, the Liquidator's surmise that any challenge to the Notice would be "robustly defended" is a considerable understatement. More importantly, however, even if a challenge to the Notice were successful, the outcome of this prospective litigation remains entirely speculative as to whether the presumed competition between the

two families (assuming any resources are left to them after any further Land Court litigation) would generate even a minimal increase in the value realised upon a disposal of the Company's only asset. In these circumstances, the Liquidator's refusal to challenge the Notice is in my view eminently explicable. In any event, the Liquidator's decision cannot be said to be unreasonable in an *Edennote* sense. For these reasons, I determine the section 167(3) issue in favour of the third respondent.

The minor issue

[30] My determination of the section 167(3) issue renders the minor issue academic. In any event, the minor issue is superseded by my determination of the issues in Note 1.

Disposal

[31] It follows that the third respondent's challenge to the Note succeeds and the Note falls to be dismissed. I shall put the matter out By Order to discuss the terms of the interlocutor. I reserve all questions of expenses meantime.