

DUBNED

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1986 No. 139P

THE HIGH COURT

IN THE MATTER OF:

DUBNED EXPORTS LIMITED

AND

IN THE MATTER OF:

THE COMPANIES ACTS, 1963 TO 1983

Judgment of Mr. Justice Costello delivered the 9th day of May,

1986.

*Mary P. Donoghue*  
*Recd.*

The Petitioner ("Benburb") is a company registered in Northern Ireland which until it went into liquidation was controlled and largely owned by Mr. Liam Marks, who lives in Blackrock, Co. Louth. Mr. Marks also controls and owns (as principal shareholder) the company ("Dubned") the subject matter of the petition I am now considering. The two companies were closely inter-related; Benburb purchased cattle and slaughtered them, whilst Dubned, carried on business of the manufacturers of meat products in the Republic of Ireland and money was freely transferred between the two companies under Mr. Marks directions.

Benburb is now in liquidation and these proceedings are being maintained by its liquidator who claims that Dubned owed Benburb £364,883.00 sterling on the 10th October, 1985 and has since failed to pay it and that it is insolvent. This debt is disputed by Dubned who alleges that in fact Benburb is indebted to it in the sum of £65,527 and claims that these proceedings are an abuse of the court's process as the dispute between the companies should be settled in the ordinary way by plenary proceedings and not on a petition to wind up the company. The company also denies that it is insolvent. Normally, a denial of liability of a petitioning creditor's debt together with an averment that the company is solvent would at the very least result in the court staying the proceedings on foot of the petition until the dispute had been determined in substantive proceedings. But this is far from a normal case. Lengthy adjournments have been granted so that evidence on affidavit could be filed. On the evidence now before the court it appears (a) that significant and persuasive evidence which tends to establish that the debt claimed is due has not been referred

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to in any replying affidavits or denied; (b) that the controlling director of the two companies has sworn directly contradictory versions of the financial transactions involving the two companies and no reasonable explanation for these contradictions has been forthcoming; (c) that there has been an obvious failure to disclose evidence about the financial situation of the company and the inter-company transactions. In these circumstances I have come to the conclusion (i) that the dispute which has been raised concerning the debt claimed by Benburb is not a bona fide one and (ii) that the Dubned is now insolvent. It would be wrong, in these circumstances, not to grant the petitioner the relief in these proceedings to which it is entitled.

I can briefly summarise the considerations which brought me to these conclusions as follows.

Benburb got into serious financial difficulties in the latter part of 1985. A meeting of its creditors was called at which a scheme of arrangement was proposed and Statement of Affairs prepared based on a report of Messrs Price Waterhouse, the well-known firm of accountants. Price Waterhouse were auditors of both Benburb and Dubned and in the Statement of Affairs they prepared they stated that their conclusions were based on information included in the books and records of both companies "together with such other additional information as we were able to obtain". At the same time, very explicit qualifications were included in a covering letter sent to the creditors. In Paragraph 7 of the Statement of Affairs Dubned is shown as owing Benburb £364,883 sterling as of the 10th October, 1985. Price Waterhouse stated that they had access to the records of Dubned for the purpose of preparing the Statement and expressed

the view that Dubned "had a deficiency of net assets as at the 10th October and is illiquid". From this statement it is reasonable to infer that in the opinion of the Dubned's own auditors the company was insolvent as of that date. The same paragraph went on to state that Mr. Marks had agreed to make available to Dubned £180,000 sterling "which it is proposed will be used to repay part of the balance". Quite clearly, therefore, Price Waterhouse were informing the creditors of Benburb that Dubned owed Benburb £364,883, that Mr. Marks (the principal shareholder in both companies) had discussed this debt with the auditors and that far from controverting it he was prepared to give Dubned financial assistance to enable it to be paid. Nowhere in the many affidavits that Mr. Marks has filed in these and other proceedings (to which I will refer in a moment) has he denied that he had this conversation with Price Waterhouse.

In an affidavit sworn on behalf of Dubned by Mr. Marks of the 25th February, 1986 a completely different position is taken up in relation to its financial dealings with Benburb. It is there stated that Benburb owed Dubned £65,527. The "Summary" showing how this figure is arrived at accepts that there was a balance due to Benburb as of the 31st January, 1985 of £203,437 but claims that there should be debited against this a sum of £160,000 in respect of a Credit Note for the period of 31st January, which was "not approved or issued". In respect of other dealings recorded in the "Summary" it is claimed that there should be what is termed an "offset" for "cash paid by Liam Marks to Benburb on behalf of Dubned of £247,945." Mr. Marks gives no explanation as to why in the Price Waterhouse Statement of Affairs of which he must of course have been aware

(and which in any event was exhibited in the affidavit grounding this petition) he is recorded as having agreed that Dubned owed Benburb £364,883 sterling and volunteered his own personal resources to Dubned to enable it to be paid.

As a result of investigations carried out by Mr. Ross, Benburb's liquidator, further information was obtained and made available to the court relating to the two large sums which according to the "Summary", resulted in Dubned being a creditor, not a debtor, of Benburb. The working papers of Price Waterhouse show that a credit note for £140,000 sterling (which it is accepted refers to the credit note for £160,000 in the "Summary") appears in the journal entries made by them. But more importantly, in the draft accounts which they as auditors of Benburb had prepared for the year ended the 31st January, 1985 some time before the collapse of Benburb this credit in favour of Benburb is reflected. These draft accounts, although not formally adopted, were seen by Benburb's Directors and page 6 of the Accounts states that they had been approved by the Directors on the 30th September, 1985. In view of Mr. Marks position in the two companies the strong presumption is raised that Mr. Marks saw these accounts in September 1985 and approved them, and that he thereby accepted as correct that there was a credit in favour of Benburb of £140,000 sterling properly allowed for in them. He has given no evidence to rebut this inference or to explain why in the year 1985 the company's records indicate that this sum is due by Dubned to Benburb and why the situation should now be reversed. Mr. Ross also expressed his professional opinion that if this credit of £140,000 sterling had not been allowed in the Benburb accounts then Benburb would have been insolvent. Again, this opinion

has not been challenged, even though subsequently evidence by a professional account was filed on behalf of Dubned.

As to the sum of £247,945 claimed as an "offset" because, as claimed in the "Summary", it was paid by Dubned through Mr. Marks into Benburb, it is clear that this figure is reflected in the Statement of Affairs prepared by Price Waterhou. It is however, treated by the auditors in a very different way. Paragraph 14 gives particulars of a balance due by the company to Mr. Marks of £220,174 sterling and contains the statement that "We understand that Mr. Marks has agreed to waive the balance due to him in the event that the Scheme of Arrangement is approved. Mr. Marks has not yet formally agreed that the balance is correct". Paragraph 14 thus raises the strong inference (a) that Benburb's records showed there was a debt due to Mr. Marks by the company in respect of monies advanced to the company by Mr. Marks personally; (b) that the company's indebtedness had been discussed with Mr. Marks; (c) that he did not suggest that he had advanced the money to the company in reduction of Dubned's debt; and that on the contrary (d) he agreed that he was personally owed substantial sums by the company and that he was prepared to waive his claim in certain circumstances. This conduct is inconsistent with the claim now made but, again, it is to be noted that no attempt has been made to deal with this evidence in any replying affidavit, or to explain why, if it was correct, these statements were made to the auditors if, in fact, they were not true.

Further doubt is cast on the bona fides of the dispute now raised by Dubned by reason of contradictions between the evidence filed on the company's behalf and sworn testimony given by Mr. Marks in these proceedings. In an affidavit sworn by

Mr. Marks on the 13th December, 1985 in proceedings instituted by a Mr. Carl O'Neill (a supplier of cattle to Benburb) for damage for fraudulent misrepresentation Mr. Marks referred (in paragraph 18) to the creditors meetings at which the scheme of arrangement was proposed and gave this description of what he said to the meeting:

"At the said creditors meeting I said I would raise, and pay through Dubned Exports Limited, the sum of £100,000 sterling within two weeks and a further sum of £80,000 sterling over a 10 week period. I had also certain proposals whereby I would sell my said premises at Blackrock Co. Louth and would cause the net proceeds of sale to be paid through Dubned Exports Limited into the Scheme, and furthermore that I would waive a sum in excess of £200,000 which was due to me personally by the company, Benburb Meats Limited."

Mr. Marks is stating in this affidavit that he informed the meeting of creditors that Benburb was indebted to him personally for a sum in excess of £200,000 and that he was prepared to waive the debt. He was thus confirming as accurate the Statement of Affairs and making a statement to the creditors which is wholly at variance with the case now being made, namely that the monies were paid by him in reduction of Dubned's debt and did not create a debt in his favour. A further affidavit in those proceedings was sworn on the 14th April (but never filed or delivered to Mr. O'Neill's solicitors and was subsequently re-sworn), in which he stated that for reasons set out in it he was under stress and strain at the time he swore his earlier affidavit on the 13th December and that in fact the

sum of £220,000 was paid to him on behalf of Dubned and that he paid it to Benburb to discharge the debts and liabilities of Dubned. It is to be assumed from this affidavit that Mr. Marks is averring that he did not make the statement at the meeting of creditors deposed to earlier. But the earlier affidavit was a long and detailed one and it is difficult to accept that his recollection as to what he said at the meeting was affected by strain and stress particularly as what he recalls he said is consistent with what he had earlier said to Price Waterhouse. And it is to be noted that he does not deny that he had the discussions with Price Waterhouse about this sum and does not claim that they are wrong in stating that he had accepted that the sum shown in the accounts was due to him personally and that he had agreed to waive its payment in certain circumstances.

There are other aspects of the evidence which has been filed which cast further doubts both on the bona fides of the dispute now raised by Dubned and on its solvency.

In the affidavit sworn by Mr. Marks in these proceedings on the 25th February, 1986 it is averred that "the company is fully solvent". In support of this averment he stated:

"By Order of the High Court dated the 25th November, 1985 in an action entitled Carl O'Neill, Plaintiff and Liam Marks, Defendant Record No. 1985 No. 9872P assets of the company to the value of £100,000 sterling was and remains frozen in a branch of the Bank of Ireland, Balbriggan, County Dublin",

and he referred to the said Order.

There are two points to be made on this averment. Firstly, it is to be inferred that the case is being made that if this sum was unfrozen that the company would be solvent. It is noteworthy that nowhere in any of the affidavits filed on the company's behalf is the court informed of what the company's

assets and liabilities are and no draft statement of affairs has been prepared (even though the services of an accountant were obtained for another purpose in relation to the case) and no evidence of any sort to support the assertion of solvency has been adduced. Nor has it been suggested that Price Waterhouse were incorrect in stating that as of 10th October, 1985 there was a net deficiency of assets in Dubned and that the company was illiquid, and no suggestion has been forthcoming to show how, if that view was correct, the company's situation is now any different. Indeed, Counsel on behalf of the company whilst suggesting that the petition should be dismissed on the grounds that there was a bona fide dispute urged in the alternative that it should be adjourned to see if other Directors might be prepared to advance money to the company, a submission that supports the view that it is indeed insolvent.

Secondly, Mr. Marks quite categorically states that the £100,000 sterling lodged in the Balbriggan Branch of the Bank of Ireland is an asset of Dubned. But this claim is inconsistent with evidence with he gave in the affidavit sworn in the other proceedings to which I have already referred. In Paragraph 18 of that affidavit Mr. Marks stated that he had informed the creditors at the meeting held on 10th October, 1985 that he would raise the sum of £100,000 within two weeks. He went on:

"As a gesture of good faith and at the specific request of Carl O'Neill made through his solicitor Mr. C. B. Turkington the said sum of £100,000 was in fact lodged in Balbriggan in a deposit account in the name of Robert Sinclair, Conn O'Donnell and Noel Gilroy within the said period of two weeks."

And in paragraph 21 of the same affidavit he referred to the fact that horses which he owned were sold in order to inject money into the company and he went on

"I had a 75% interest in the Illiad, but early in October, 1985 I sold 50% interest in the Illiad in order to partly finance the sum of £100,000 hereinbefore referred to."

There is no suggestion in this affidavit that the £180,000 sterling lodged in the Bank of Ireland was obtained from Dubned. On the contrary, it is suggested that part of it has been obtained from the sale of a share in a horse which was Mr. Marks' own property. No attempt has been made to explain the inconsistency between the two affidavits, and although it is claimed that the money in the Bank is owned by Dubned, no explanation has been given as to the source from which it was derived, or who paid it in.

In reaching the conclusion that the dispute which has been raised is not a bona fide one and that the company is insolvent and should be wound up I have not ignored the other affidavits sworn on the company's behalf. But these add nothing to the case advanced on the company's behalf, and do not affect the validity of the conclusions to be drawn from the evidence to which I have just referred.

*Approved*

*JZ*

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