THE HIGH COURT

[2012 No. 578 COS]

IN THE MATTER OF KASAM INVESTMENTS IRELAND LIMITED AND IN THE MATTER OF THE COMPANIES ACTS

Judgment of Ms. Justice Laffoy delivered on 18th day of December, 2012.

The petition

1. On 18th October, 2012 Mark Foran (the Petitioner) presented a petition seeking an order that Kasam Investments Ireland Limited (the Company) be wound up by the Court under the provisions of the Companies Act 1963 (the Act of 1963). The basis of the petition was that the Company owed €499,500 to the Petitioner in respect of a loan made by the Petitioner to the Company by way of investment on 13th August, 2008, that the Petitioner had served a demand for payment pursuant to s. 214(a) of the Act of 1963 on 24th July, 2012, that the demand had not been complied with and that, accordingly there was a deemed insolvency and the Petitioner, as a creditor, was entitled to petition to have the Company wound up.

2. All the formal proofs have been complied with. The petition has been advertised in accordance with the requirements of the Rules of the Superior Courts and proof of that has been put before the Court. Randal N. Gray, a Fellow of Accounting Technicians Ireland, has consented to act as liquidator if appointed by the Court. An affidavit of suitability of Mr. Gray sworn by Mark Edmund Doyle, solicitor, has been filed.

3. The petition has been resisted by the Company on the ground that the debt alleged to be due and owing by the Company to the Petitioner is not owing. Indeed, the Company's deponent, Martin McDonnell (Mr. McDonnell), who is a director of the Company, goes so far as to say that the petition represents a very serious abuse of process.

The law

4. The law is well settled on the test to be applied by the Court when adjudicating on a petition to wind up a company where the petitioning creditor is relying on an unpaid debt alleged to be due to him by the company and the company is disputing that the debt is due and owing. In *Re WMG (Toughening) Ltd. (No. 2)* [2003] 1 I.R. 389, McCracken J., with whom the other Judges of the Supreme Court agreed, stated (at p. 392):

> "The company is opposing the petition on the basis that the debt referred to therein is the subject matter of a *bona fide* dispute and that the company has a cross-claim against the petitioner for monies in excess of the amount claimed by him . . ..
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> There is no real dispute between the parties as to the proper test to be applied by the court in the circumstances. That test is set out in the judgment of Buckley L.J. in *Stonegate Securities v. Gregory* [1980] Ch. 576 at p. 579, and has already been approved . . . in *In re Pageboy Couriers Ltd*. [1983] I.L.R.M. 510. The passage reads at p. 512:-
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> 'If the Company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed, or if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed.'
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> It is also accepted by the parties that the subject matter of the bona fide dispute may in fact not be the debt itself but rather a cross-claim by the company against the petitioner. The issue, therefore, is whether the company's claim in the present case is a claim made in good faith and on substantial grounds. It is clear that the issue is not whether the company will succeed in its claim, but whether it is a *bona fide* dispute which should be determined by the courts in the normal way without putting the company's existence at risk."

Translating those principles to the situation on this petition, where the Petitioner's debt is disputed by the Company, the issue for the Court is whether, in so disputing that the debt is now due and owing, the Company is doing so in good faith and on substantial grounds, not whether the Company can successfully defend the claim.

5. That issue is a question of fact to be determined on the basis of the affidavit evidence before the Court, which, as almost invariably happens in these cases, is not an easy task, and, as frequently happens, is an impossible task.

The Company and the Petitioner's relationship to it

6. The Company was incorporated on 11th March, 2008 as a limited liability company. The annual return (Form B1) filed in the Companies Registration Office (CRO) on 13th April, 2012 for the period up to 11th March, 2012 discloses that the issued share capital of the Company comprises:

> (a) €100 comprising 100 Ordinary-A shares at a nominal value of €1 each fully paid up; and
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> (b) €4,300 comprising 4,300 Ordinary-B shares at a nominal value of €1 each fully paid up.

The Ordinary-A shares are registered in the name of the promoters of the Company, namely, Kevin Dawe (now deceased), Alan Farrelly, Sean Hession and Mr. McDonnell in equal shares. As regards the Ordinary-B shares, twenty nine distinct shareholdings are registered. The registered owners of seventeen of the said shareholdings, which have a total nominal value of €2,400 representing 55.81% of the nominal value of the issued Ordinary-B shares, have furnished letters to the Company, which have been exhibited in affidavits sworn by Mr. McDonnell, in which they oppose the making of the winding up order. The Petitioner is the owner of 500 Ordinary-B shares. His late brother, John Foran, who died on 9th April, 2011, is registered as owner of 500 Ordinary-B shares. The personal representatives of John Foran, deceased, under a grant of administration intestate which issued to them on 3rd September, 2012 pursuant to an order of the Court dated 23rd July, 2012, have supported the Petitioner's application to have the Company wound up. The Petitioner and the estate of John Foran, deceased, are the owners of 1,000 Ordinary-B shares at a nominal value of €1,000, which represents 23.26% of the nominal value of the Ordinary-B shares. The directors of the Company, as shown on the Annual Return, are Kevin Dawe (since deceased) and Mr. Donnell.

7. Under the Articles of Association of the Company, holders of Ordinary-B shares have no voting rights. What the evidence discloses is that the owners of the Ordinary-B shares are "investors" in the Company, who between them have invested approximately

€4,300,000 in the Company.

8. The most recent abridged financial statements of the Company put before the Court are for the year ended 31st December, 2011. They were audited by Frank Lynch & Co. The balance sheet as at 31st December, 2011 discloses debtors in the sum of €4,300,724 and creditors (amounts falling due within one year) in the sum of €4,314,932. As I understand the evidence put forward by the Company, there is one debtor, a company incorporated in Poland, Kasam Investments Sp. zo.o (Kasam Poland), which is a wholly owned subsidiary of the Company. The creditors are the Ordinary-B shareholders, who "invested" €4,300,000 in the Company.

9. In broad terms, the picture which emerges from the affidavits of Mr. McDonnell is that four individuals, namely, Kevin Dawe, Alan Farrelly, Sean Hession and Mr. McDonnell formed a company, MASK Investments Limited (MASK) "to promote syndicated property investments". The Company was a "special purpose vehicle company" incorporated solely to hold shares in Kasam Poland, as part of a syndicated property development in Poland. Kasam Poland was incorporated in Poland to buy a site in Warsaw, which the syndicate proposed developing as a residential development. Kasam Poland agreed to purchase the site in June 2007 and the purchase was completed in August 2007 with the funds invested by the investors, who are now the Ordinary-B shareholders in the Company, including the Petitioner, from whom approximately €4,300,000 was raised to discharge the purchase price and the associated costs.

10. As regards the investment of the Petitioner, what emerges from Mr. McDonnell's affidavit evidence is that, when the Company was incorporated in March 2008, the "investment" of €500,000 which the Petitioner had made in or around July 2007, was, with a view to creating a tax efficient investment, treated, as to €500, as a payment in cash for 500 Ordinary-B shares and, as to the balance amounting to €499,500, as a loan from the Petitioner to the Company and has been so treated in the books and records of the Company. Accordingly, the sum of €499,500 is within the figure of €4,314,932 which appears in the balance sheet as at 31st December, 2011 as representing creditors "amounts falling due within one year".

11. The overall picture presented by Mr. McDonnell in his affidavit evidence seems to me to make sense. I have no difficulty in inferring that the figure of €4,314,932 in the balance sheet as at 31st December, 2011 representing creditors is the amount due by the Company to the Ordinary-B shareholder investors as regards so much of their investments as were treated as loans.

12. The nub of the issue between the Petitioner and the Company as to the Petitioner's contention that, when the s. 214(a) demand was served, the Company was indebted to him in the sum of €499,500 is that, while acknowledging that the Company is indebted to the Petitioner in the sum of €499,500, it is the Company's contention that the debt has not yet become due and payable by the Company to the Petitioner.

13. Each side's point of view was argued so vociferously at the hearing that it is necessary to consider in some detail the evidence, such as it is, before the Court. I propose addressing the evidence in the following order:

(a) what the *inter partes* correspondence engaged in after the dispute emerged illustrates;

(b) the position of the Petitioner on affidavit;

(c) the position of Mr. McDonnell on behalf of the Company on affidavit; and

(d) whether the evidential chasm between the two sides can be rationalised.

Inter partes correspondence

14. The Petitioner has averred that he only learned about "the existence of a loan" in or about mid-2012. The first item of *inter partes* correspondence exhibited is a letter of 12th July, 2012 from the Petitioner's Solicitors, Oisin Murphy, to the Company. In that letter it was stated that the Petitioner had lent the sum of €499,500 to the Company on the basis of advices and assurance given to him by Mr. Dawe and that he was assured of the repayment of the loan "with a substantial return in the short term". The repayment of the amount outstanding was demanded within seven days, failing which the Petitioner would seek to have the Company wound up.

15. The response from the Company in a letter dated 17th July, 2012 signed by Mr. McDonnell as director acknowledged that the Petitioner had made an investment of €500,000 in the Company, the structure of which was a loan of €499,500 and his shareholding in the Company. While other matters were dealt with in the letter, including a reference to the fact that the Petitioner had received "a prospectus" and regular updates in relation to the ongoing position of his investment, the response to his request for repayment was as follows:

> "As your client's investment/loan is an illiquid investment, we are not in a position to repay either your clients or indeed any other clients investment at this stage. Any action by your client would result in a forced sale and a much lower value being returned both for your client and all other investors in the project."

The Company asked for the Petitioner's forbearance in the matter.

16. That letter resulted in the s. 214(a) demand, which issued on 24th July, 2012, to which the solicitors for the Company, Galligan Johnston, responded by letter dated 8th August, 2012. In that letter it was stated that the terms on which the Petitioner invested in the Company were clearly set out in an Investment Memorandum issued to him prior to his placing any funds in the Company. A copy of the Investment Memorandum was enclosed. This would appear to correspond to the document which was referred to as a "prospectus" in the letter of 17th July, 2012. The Company's solicitors drew attention to the terms and conditions set out in pages 9 and 10 of the Investment Memorandum "that the monies invested were not repayable to the investors other than out of the net profit arising from the disposal of the developed property". Reference was also made to the segment headed "Exit Strategy" on page 10, where it was stated –

> "It will not be possible for investors to exit the fund before the units are sold and the fund is liquidated."

It was stated that the development intended for the Polish property had not commenced due to "the current worldwide economic climate". On that basis, it was stated that it was clear that the monies invested by the Petitioner are not due and owing to him.

The Petitioner's position

17. When the Petitioner came to swear the affidavit verifying the petition on 13th October, 2012, he was in possession of the so-called Investment Memorandum. He had also received via Mr. Peter Houlihan, one of the administrators of the estate of John Foran, a

letter dated 13th August, 2008 from the Company addressed to the Petitioner, which was signed by Mr. Dawe and Mr. McDonnell, and which confirmed that the Company had received a loan of €499,500 from him and that that amount was recorded as a loan from him to the Company in the books and records of the Company. His evidence was that he had no recollection of the letter having been shown to him, despite the fact that it had been addressed to him. His evidence was that until 2012 the letter was in the possession of Messrs. Farrelly Dawe White (FDW), Chartered Accountants, who until recently had been his accountants. The Petitioner also averred that he had never been previously provided with the Investment Memorandum furnished by the Company's solicitors with their letter of 8th August, 2012.

18. In the grounding affidavit the Petitioner averred that there is no written loan agreement. There is consensus on that point. He also averred that prior to making the loan to the Company he had appointed FDW as his agent for the purposes of making investments and that he had been advised by Mr. Dawe "in general terms during 2007 that an investment would be made and that it would provide a return of 30 percent within 18 months". On that basis, he had allowed FDW to organise a loan on his behalf from Ulster Bank to fund the investment. As I have already recorded, his position is that he was not aware that he had provided a "loan" to the Company until mid-2012.

19. The Petitioner has averred that in 2008 he was advised by Mr. Dawe that the Company did not have enough money to begin construction on the site in Warsaw and that he was frequently advised orally by Mr. Dawe of problems being encountered and that the Company was not in a position to commence the development.

20. The position of the Petitioner is summarised in the following averment:

> "The loan was made by me on foot of an agreement that it would be repaid within eighteen months from the date it was made. The accounts of the company and two separate letters from it confirm and acknowledge the debt."

It is now common case that the monies were advanced by the Petitioner to the Company in July 2007 not in August 2008.

The position of Mr. McDonnell on behalf of the Company

21. I think it is not an exaggeration to comment that the replying affidavit of Mr. McDonnell is more argumentative than factual. Having referred at length to the Investment Memorandum, he pointed to a disclaimer therein stating that it was not a prospectus nor any substitute for the detailed legal documents which would be formalised as the transaction progressed towards conclusion. As I have recorded, it is common case that there was no written agreement in relation to the "investments" of the "investors". Nonetheless, Mr. McDonnell averred that the Investment Memorandum "provides evidence of what was agreed between the parties to the investment and the basis upon which they invested". He further averred that this was the manner in which "the syndicate being promoted was intended to operate" and that the Petitioner was at all times on notice of that, which is fundamentally at variance with the evidence of the Petitioner.

22. Later Mr. McDonnell commented that the Petitioner's evidence appears to suggest that he invested the sum of €500,000 without considering a single document relevant to the transaction, which Mr. McDonnell did not accept. He further commented that, even if it were so, it did not alter "the terms of the contract between the parties and the fact that the loan upon which he seeks to rely is not repayable until the maturity/liquidation of the project". Mr. McDonnell has quoted most of the segment of the Investment Memorandum headed "Exit Strategy", pointing out that the first sentence indicated that the investment period of eighteen months to two years was a "target". He then quoted the sentence which stated that it would not be a "liquid investment" and that it would not be possible for investors to exit the fund before the units were sold and the fund was liquidated. That seems to be the basis of the Company's contention that the Petitioner's loan is not repayable "until the maturity/liquidation of the project". Mr. McDonnell has had to acknowledge that there is a disclaimer in the Investment Memorandum and he has endeavoured to get around that by the following averment:

> "In particular I say that the said document evidences the fact that the Company never agreed with the Petitioner that it would repay any loan within eighteen months from the date it was made. The term is not in the loan agreement which the Petitioner now seeks to rely upon."

There is an element of "having one's cake and eating it" about that proposition.

23. As regards the Investment Memorandum itself, which has been exhibited by Mr. McDonnell, it names MASK as the "promoters". However, the other parties and professionals named in it (for example, development, property, taxation and legal advisers) are not involved in these proceedings. The document does not bear a date, although it must have been produced after 30th January, 2007, because it refers to the fact that planning permission was obtained for the Polish development on that date. It is reasonable to infer that it pre-dated the incorporation of the Company because under the heading "Taxation" it was stated that the promoters were then reviewing various international tax structures in order to offer investors a tax efficient investment.

Evidential chasm rationalised?

24. It is undoubtedly the case that Mr. McDonnell has identified inaccuracies in the Petitioner's grounding affidavit. However, the evidence does suggest that, as he has averred, the Petitioner made the loan investment through FDW and on the advice of Mr. Dawe and that he did not deal with Mr. McDonnell or any officer of the Company, other than Mr. Dawe, directly. It is possible that documentation from the Company addressed to the Petitioner was sent to Mr. Dawe on his behalf and that Mr. Dawe conveyed the contents of the documentation to the Petitioner orally. As I have stated, Mr. Dawe is deceased. The other member of the firm of FDW, who was one of the promoters of MASK, Alan Farrelly, has not sworn an affidavit in response to the petition.

25. In responding to Mr. McDonnell's affidavit in his supplemental affidavit sworn on 19th November, 2012, the Petitioner reiterated the position adopted in his grounding affidavit, stating:

> "I do aver that I was told by Mr. Dawe that I would receive a return of 30% within 18 months. The fact that this may not sit with Mr. McDonnell's view of property finance is utterly immaterial. I was not told the investment/ *(sic)* would be repayable on demand, but neither was I told that it was a loan or that it would be repayable at the convenience of the company."

26. As regards the fact that the debt due by the Company to the Petitioner appears in the Company's balance sheet as at 31st December, 2011 as an amount falling due within one year, in his final affidavit sworn on 23rd November, 2012, Mr. McDonnell has exhibited a letter from Frank Lynch & Co., who, as I have recorded, audited the Company's financial statements for the year ended 31st December, 2011. The letter, which is dated 23rd November, 2012, actually refers to financial statements for the periods ended 31st December, 2009 and the year ended 31st December, 2010. In relation to "the disclosure of the investors' loans as amounts

falling due within one year", it is stated in the letter:

> "The accounting treatment of same as falling due within one year is consistent with the fact that there is no pre-defined term attributable to these loans save that they are due and repayable on maturity of the investment, which we understand based on the information available to us, has no pre-determined maturity date."

As explained by counsel for the Company, what that letter was intending to convey was that maturity could happen in any year. He also pointed out that the accountancy evidence is unchallenged.

27. The Petitioner and Mr. McDonnell, on behalf of the Company, have presented two diametrically opposed versions of what was agreed between the Company and the investors, or, at any rate, the Petitioner as one of the investors, as to when the element of the investors' investment which was to be treated as a loan would be repaid, which cannot be reconciled in any way. However, it has to be acknowledged that there is nothing implausible about the Company's version.

Conclusion

28. I have no doubt that the Company has met the test laid down by the Supreme Court in *Re WMG (Toughening) Ltd.* I am satisfied that the Company, while acknowledging the loan of €499,500 is repayable by the Company to the Petitioner at some future time, is disputing the fact that the debt became due before the s. 214(a) demand was issued or that it has become due in the interim and, in my view, is doing so in good faith and on substantial grounds. While there is consensus that there was an oral agreement between the Petitioner, as an investor in the Company, with the promoters of the Company, the terms on which that loan was repayable by the Company cannot be determined on the evidence before the Court. Therefore, the petition must be dismissed.

29. For the avoidance of doubt, in reaching that conclusion I have attached no weight to any factor other than the conclusion that there is an issue to be resolved as to when, as a matter of contract, the loan made by the Petitioner to the Company is repayable. On the one hand, I have attached no weight to the fact that the Petitioner is in the unfortunate position that the loan made to the Company was financed by borrowing from Ulster Bank and that he continues to be indebted to Ulster Bank and is paying interest on that indebtedness. Likewise, I have attached no weight to the submission made by counsel for the personal representatives of John Foran, deceased, that their support of the petition is on the ground that they cannot complete the administration of the estate of John Foran, deceased, while the debt due by the Company to the estate is outstanding. On the other hand, I have attached no weight to the fact that letters opposing the petition were exhibited by Mr. McDonnell from the owners of 55.81% of the Ordinary-B shares in the Company, who represent 55.81% of the creditor investors of the Company.

Order

30. There will be an order dismissing the petition.