Neutral Citation: [2013] IEHC 399

THE HIGH COURT

[2013 No. 332 COS]

IN THE MATTER OF HEATSOLVE LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2012

JUDGMENT of Mr. Justice Hogan delivered on the 9th day of September, 2013

1. To what extent is this Court entitled to postpone the making of a winding up order to facilitate a company currently experiencing financial difficulties to trade its way out of these difficulties? This, in essence, is the question which arises on this application for a winding up petition which has been presented by the Revenue Commissioners. It is not in dispute that the company, Heatsolve Ltd. ("Heatsolve") owes the Revenue Commissioners €84,295.75.

2. The Revenue Commissioners had previously caused a statutory demand to be sent to the registered office of Heatsolve in accordance with s. 214 of the Companies Act 1963 ("the 1963 Act"). By that letter, the Revenue Commissioners claimed €149,134.59 by way of arrears of various taxes, including VAT and employee PRSI contributions. It is to the credit of the company that a significant sum was subsequently paid to the Revenue Commissioners, thus reducing the balance outstanding to the present sum of €84,295.75. It is, nevertheless, unarguable but that the Revenue Commissioners are entitled to the sum in question and that Heatsolve has failed to pay it. There can be equally little doubt but that the company, having failed to comply fully with the statutory demand, is insolvent for the purposes of s. 214(a). Section 213(e) of the 1963 Act provides that:

> "A company may be wound up by the Court if . . . the company is unable to pay its debts . . ."

3. For the reason just stated, Heatsolve is plainly unable to pay its debts. Counsel for the company, Mr. Kelly, has nonetheless argued that the Court ought not to make an order pursuant to s. 213(e) of the 1963 Act on the basis that the jurisdiction to order the winding-up of the company is discretionary and the Court should take account of the fact that the company is likely soon to have a new income stream which will enable it over time to pay off its Revenue debt.

4. Before considering this question, it may be convenient at this juncture to say something about the underlying facts of the case. Heatsolve is small manufacturing company which was originally based in Ballina, County Mayo. Like all too many companies - not least small and medium enterprises - the company experienced acutely difficult trading conditions over the last three to four years, as a result of which it was necessary to close the Irish arm of the operation and restructure the company accordingly. The restructuring process necessitated the redundancies of the employees based in Ballina and the moving of the manufacturing to a location in the People's Republic of China. All the requisite plant and machinery associated with the manufacturing process were then sold to the new Chinese company and has been relocated there over the last year. The managing director of Heatsolve, Mr. Peter Brady, has sworn an affidavit that while there has been a short hiatus, the ability of the company to satisfy production as the manufacturing function was being relocated, nonetheless it is anticipated that a new income stream would be generated for the company within the next month or so.

5. To that end, therefore, I was invited to adjourn the Revenue's petition to enable this income stream to be realised. When I enquired in the course of argument how long it would take for the sum of €84,295 to be repaid, Mr. Kelly indicated this is likely to take the best part of some eighteen months.

The estoppel argument

6. The first argument, however, which was actually advanced by counsel for Heatsolve, Mr. Kelly, is that the Revenue Commissioners are estopped by their acceptance of a sum just short of €40,000 by way of payment by the company. This argument can be swiftly dealt with, as I fear that it simply could not succeed on the facts of this case. It is accordingly unnecessary to explore any legal issues which might possibly arise in connection with such a submission were the facts such as might otherwise lend support to any such argument.

7. It is clear from the email correspondence between the parties that, putting the matter at its absolute highest from the company's perspective, the Revenue Commissioners simply promised to consider not proceeding with the winding-up application if the company paid €40,000 towards the arrears and further agreed a deferred payment schedule. Thus, the Revenue Commissioners indicated by email dated 8 May 2013 that:

> "it is only when all promised outstanding tax returns have been submitted and we have received the downpayment of €40,000 that we will be in a position to consider accepting the proposal made. In the absence of any tangible evidence the winding up process will continue."

8. It is clear that the Revenue Commissioners simply promised *to consider* accepting a deferred payment schedule, provided that the sum of €40,000 was paid. The company could really have been in no doubt but that this was the extent of the commitment and, indeed, it may significant that once a figure just short of €40,000 was paid by the company in early June 2013, the company's managing director stated that he looked forward to the "consideration of the proposal" by the Revenue Commissioners.

9. It follows, therefore, that there is simply no basis for the argument that the Revenue Commissioners are estopped in some way from proceeding with a winding-up petition by reason of their acceptance of this figure of €40,000.

The wider jurisdiction to adjourn the petition

10. We may now proceed to consider the issue which was, in truth, more heavily pressed during the course of argument, namely, that this Court enjoys a wider discretion to adjourn such a petition in order to enable the indebted company to trade its way out of difficulties and that I should exercise such a jurisdiction in the present case. While it is true that s. 213 of the 1963 Act says that this Court "may" order the winding-up of an otherwise insolvent company and that s. 216(1) further expressly vests this Court with a discretion to adjourn the hearing of the winding-up petition, I think it most unlikely that the Oireachtas envisaged that the discretion conferred by this section might be exercised in the far-reaching manner now urged by the company. Of course, the fact that s. 213 vests this Court with a discretionary jurisdiction ensures that it retains a power to restrain a petition which is oppressive or which has been tainted by an improper motive: see *Re Genport Ltd.* [1996] IEHC 34. Yet an unpaid creditor is generally regarded as having an entitlement to seek and to obtain a winding-up order as of right, even though the Court also retains an overriding and unfettered discretion to refuse to order to wind up the company, "albeit that it will only exercise the discretion sparingly and where good cause is shown": see *Re La Plagne Ltd.* [2011] IEHC 91, [2012] 1 ILRM 203, per Laffoy J.

11. The facts of *La Plagne* provide an interesting illustration of the application of this principle. Here a 50% shareholder contended that the company should be wound-up on the ground of insolvency. Both the petitioner and the other shareholder had agreed to an arranged whereby La Plagne's debts were to be serviced by another related company, Thomastown. It appears, however, that the petitioning creditor had contrived to have this source of funds unilaterally discontinued, so that La Plagne then could no longer meet bank repayment obligations.

12 In these unusual circumstances Laffoy J. held that the petition should be dismissed:

> "It is unquestionably the case that, without the assistance of Thomastown, the company cannot discharge the only debts which have accrued and which will continue to accrue on a recurring basis, namely, the monthly instalments of the repayment of the loan from AIB which have already accrued and are in arrears, and the future monthly instalments which will continue to accrue until 2022. Even on Mr. Nolan's twenty four month cash flow forecast it would appear that Thomastown, as things stand, does have the capacity to assist the company in discharging the arrears and in making the monthly payments due from the company to AIB. The reason why the monthly instalments due by the company to AIB are in arrears is because, contrary to the agreement between Mr. Fraher and Mr. Ronan which is to be implied from the s. 60 statutory declaration, the payments by Thomastown to the company ceased without any resolution to that effect having been passed by Thomastown or without the agreement of Mr. Ronan as a fifty per cent beneficial owner of Thomastown through the medium of the company. I am not satisfied on the evidence that those payments have ceased because of the inability of Thomastown to meet the totality of its debts as they fall due.
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> As is pointed out in the annotation on s. 214 in MacCann and Courtney, *Law of Private Companies*, although, where a petitioning creditor establishes that a company is unable to pay its debts, he will normally be entitled to a winding-up order *ex debito justitiae*, nevertheless, the Court retains an overriding and unfettered discretion to refuse to order to wind up the company, albeit that it will only exercise the discretion sparingly and where good cause is shown. Even if Mr. Fraher has *locus standi* as a contributory, I think any court should be loathe to wind up the company on his petition as a shareholder given that, by agreement with Mr. Ronan, he was responsible for putting the structure in place whereby Thomastown was to give financial assistance to its parent, the company, to discharge the company's indebtedness to AIB by instalments. By resiling from the agreement to give that assistance in circumstances in which Thomastown appears to have sufficient cash flow to provide it, Mr. Fraher has contrived a situation in which his accountancy adviser, Mr. Nolan, has averred that the company is insolvent on a cash flow basis.
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> Counsel for Mr. Ronan characterised the outcome of a winding up order made by the Court on the petition of Mr. Fraher as "corporate patricide". In my view, that is not an exaggeration. The company's three retail subsidiaries are trading. There is no evidence of any concern on the part of their trade creditors. Their respective financial commitments to their bank, AIB, are being serviced. If the Court were to make an order winding the company up compulsorily, inevitably, the official liquidator would have to consider disposing of the company's shareholdings in the retail subsidiaries, in the context of the winding up. As opposed to that, in the final paragraph of his affidavit, Mr. Ronan has averred that allowing the company to continue and allowing the retail subsidiaries to trade will result in viable businesses surviving, 120 staff members retaining their jobs and AIB having its loans serviced by repayments of capital and interest.
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> Obviously, in the current difficult economic circumstances, it is not possible to predict with any degree of certainty what will happen in the future. However, having regard to the manner in which the company's parenthood of Thomastown came into being and the implied agreement between Mr. Fraher and Mr. Ronan that Thomastown would continue to give financial assistance to the company in connection with the discharge of the company's indebtedness to AIB, in my view, it would be unjust to allow Mr. Fraher to "pull the plug" at this juncture, on the basis of an alleged insolvency of the company which he has contrived contrary to that agreement. Insofar as a deadlock has arisen between Mr. Fraher and Mr. Ronan *qua* shareholders and *qua* directors of the company and its subsidiaries, there is an alternative remedy which Mr. Fraher can pursue which gives the Court a lot more options than making a compulsory winding up order at this juncture, although, of course, one cannot rule out the possibility that it could be necessary to make a winding up order under s. 213(f) at some time in the future. However, that would only be done after an oral hearing and after the Court had an opportunity to explore the respective motivations of the proponents."

13. Viewed thus, *La Plagne* could be viewed as a case where the petitioning creditor was effectively estopped from contending that the company was insolvent. One might likewise classify the case as an example of an abuse of rights, since the alleged insolvency was contrived and the petition was really an endeavour to bring about a situation where the commercial relationship between the shareholders was brought to an end. Irrespective, however, of how the decision in *La Plagne* is characterised, it provides a classic illustration of how the Court's overriding discretion should properly be exercised in a case presenting unusual facts.

14. The present case is a very different one. Both the debt owed to the Revenue Commissioners and the resulting insolvency are all too real and have not been brought about by means of some contrivance on the part of the petitioning creditor. The present case is much closer to another judgment of Laffoy J. on this topic, *Re Burren Springs Ltd.* [2011] IEHC 480, a case where the Revenue Commissioners were also the petitioning creditors. The company did not dispute but that it owed a sum just in excess of €150,000, but it contended that if the Revenue Commissioners were to make a positive determination in respect of the company's claim that it was entitled to tax credits for certain research and development, any then outstanding sums would be cancelled out over the following two years with a small surplus in favour of the company.

15. Laffoy J. noted that in *Re Bula Ltd*. [1990] 1 I.R. 440, 448 McCarthy J. had stated that the discretionary language of s. 213 "gives to the court a true discretion which should be exercised in a principled manner which is fair and just." Laffoy J. considered that were

she to adjourn the petition in the manner urged that this would not be acting in accordance with the "principled manner" envisaged by McCarthy J.. This was particularly so given that:

> "….the outstanding taxes are VAT and PAYE/PRSI which reflect sums paid by customers or deducted from the employees' salaries which should have been remitted to the Revenue Commissioners in accordance with law, I have come to the conclusion that it would not. For that reason, I consider that I have no option but to make a winding-up order."

16. It is perhaps noteworthy that Mr. Kelly properly conceded that the present case was all but indistinguishable from *Re Burren Springs*. Here it may be emphasised that just as in *Re Burren Springs* the taxes which are in arrears involve fiduciary taxes such as VAT and employee PRSI, *i.e.,* tax paid by third parties as customers and employees which the company was obliged to remit to the Revenue Commissioners

17. If anything, the facts of the latter case were stronger because if the creditor took a particular decision (*i.e*., sanctioned the payment of the research and development credit), it would have had the result of off-setting the tax debt, albeit over a two year period. By contrast, in the present case the creditor's prospects of securing payment are contingent on the success of a new manufacturing venture in the People's Republic of China and, thus, on the actions of third parties in a distant country.

18. In expressing this view I have not overlooked the fact that other important creditors such as the Western Development Corporation ("WDC") and United Air Freight Services Ltd. are anxious that the petition should be adjourned so that the company should be given the opportunity to survive as a going concern. Thus, for example, in a letter of support for Heatsolve dated 28th August 2013 and which was furnished to the Court, Mr. Raymond McGreal, the Chief Executive Officer of WDC stated:

> "We are of the view that a period of time to allow the newly restructured entity would be more appropriate to allow the company to concentrate on generating sales and profits for the company in order to discharge its liabilities and we have been supportive of the company's efforts so far in its efforts to survive in changing market conditions."

19. One may readily sympathise with these sentiments. In common with countless other such small and medium enterprises, the company has doubtless experienced huge difficulties in challenging conditions over the last few years. Yet the WDC's letter of support illustrates in its own way the difficulties which are inherent in the approach which those opposing the petition have urged. In essence, both Heatsolve and WDC are asking the Court to adjourn the petition generally for a period of several months to see whether the company can survive following restructuring. But this approach in effect involves the Court converting the winding-up procedure into something akin to that of the examinership process for which the former procedure is rather ill-suited.

20. It must be recalled that the examinership process has its own in-built safeguards and protections designed precisely for this purpose. The Court must accordingly ask whether the company has "a reasonable prospect of survival….as a going concern" before an examiner can be appointed: see s. 2 of the Companies (Amendment) Act 1990 (as amended). The entire process contains a series of checks and balances designed to protect the company and creditors alike. One such safeguard which may be cited by way of representative example is that contained in s. 3(3A) of the 1990 Act, namely, the requirement that the examinership petition be accompanied by a report of an independent accountant to guide the court on the question of the likely prospects of survival of the company. As Fennelly J. pointed out in *Re Gallium Ltd.* [2009] IESC 8, [2009] 2 I.L.R.M. 11 "it is now natural, depending on the standing and expertise of its author, for the court to place particular reliance" on such a report.

21. No similar safeguards exist in the context of the winding-up process. Thus, for example, had Heatsolve applied for examinership I would have had the benefit of the report of an independent accountant to assist me on the question of whether the company was likely to survive as a going concern and the implications for creditors were an examiner to be appointed. In these circumstances the Court could not legitimately superimpose the complex examinership process onto the winding-up process. If any such significant changes are to be effected in respect of the structure of the general law of corporate insolvency, this could only come about as a result of legislative change by the Oireachtas.

22. This is not to suggest that the Court must mechanically accede to every creditor's petition once satisfied that the formal statutory proofs have been satisfied and the liability of the debtor clearly established. It is clear from a long line of cases such as *Bula, Genport* and *Burren Springs* that such an approach would not be appropriate. The Court could clearly, for example, adjourn the petition for a short time – perhaps measured at most in weeks – to facilitate the company to raise funds or to receive an expected payment. But what it cannot do on a winding-up is to grant a form of protection to the company from its creditors akin to the examinership process predicated on an assessment of the company's likely prospects of survival.

23. One may summarise by observing that a company seeking to resist a winding-up petition will not normally be in a position to do so on the ground that, given the opportunity and a breathing space from its creditors, it has a reasonable prospect of survival as a going concern and would thus in time be able to discharge the debt of the petitioning creditor. Such an argument, if it is to be made at all, must normally be advanced by the company by way of an application for examinership rather than by means of a defence to a winding-up petition.

Conclusions

24. It follows, therefore, that for the reasons stated, I am not prepared to adjourn the petition on the grounds urged by Heatsolve and other creditors. The debt is due to the Revenue Commissioners and they have otherwise complied with the requisite statutory formalities. I consider that in these circumstances they are entitled to an order winding-up the company pursuant to s. 213(e) of the 1963 Act *ex debito justitiae* as no special or unusual circumstances which might disentitle them to such an order are present.

25. As I am satisfied that there are no such circumstances I conclude that I have no alternative but to make the winding-up order sought.