

## THE HIGH COURT

2011 96 COS

## IN THE MATTER OF AS FRESH AS IT GETS LTD.

AND

## IN THE MATTER OF THE COMPANIES ACTS 1963 – 2006

**Judgment of Miss Justice Laffoy delivered on 9th day of May, 2011.**

### 1. The proceedings

1.1 As Fresh As It Gets Ltd. (the Company) was incorporated on 23rd April, 2007. On 9th December, 2010 Donegal Creameries Plc (the Petitioner) served a demand pursuant to s. 214 of the Companies Act 1963 (the Act of 1963) requiring repayment of a debt in the sum of €260,728.77 due by the Company to it. As the demand was not met as required by s. 214, on 4th February, 2011 the Petitioner issued a petition pursuant to the Act of 1963 to have the Company wound up on the ground that it is unable to pay its debts. By virtue of non-compliance with the statutory demand under s. 214, the Company is deemed to be unable to pay its debts.

1.2 When the petition came on for hearing the debt was disputed by the Company. Having heard the petition I was not satisfied that the debt was *bona fide* disputed on substantial grounds so that the petition should be dismissed, applying the well established principle which is illustrated by the decision in *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd.* [1996] 1 I.R. 12. Accordingly, I intimated that I propose making a winding up order. However, I was not prepared to appoint the person nominated by the Petitioner as official liquidator because he is a member of the firm of chartered accountants who act as auditors for the Petitioner. A substitute official liquidator was nominated by the Petitioner and an affidavit of fitness was filed in relation to that nominee. Accordingly, on 15th April, 2011 I made an order winding up the Company and I appointed David Walsh of the firm of O'Neill Foley, Chartered Accountants, official liquidator for the purposes of the winding up.

1.3 On the hearing of the petition counsel appeared on behalf of Clona Dairy Products Society Ltd. (Clona), a creditor of the Company. Counsel for Clona intimated that Clona was supporting the Company's opposition to the making of a winding up order. Clona has been a supplier of milk products to the Company since the Petitioner ceased to supply milk products to the Company. On 15th December, 2010 the Company executed a charge in favour of Clona, particulars of which were registered in the Companies Registration Office on 17th December, 2010. Having regard to the view I take of the opposition of the Company to the petition, I consider that it is not appropriate to attach any weight to the support given by Clona to such opposition.

1.4 When the winding up order was made on the last day of the Hilary term, counsel for the Company informed the Court that it intended to appeal the Court's decision to the Supreme Court and sought a stay. I granted a stay until the Easter term and indicated that I would set out the reasons for making the winding up order in writing. Accordingly, the purpose of this judgment is to set out the reasons why I have come to the conclusion that the debt of €260,728.77 which the Petitioner claims is owed to it by the Company to it is not *bona fide* disputed on substantial grounds by the Company.

### 2. Reasons for conclusion that debt not *bona fide* disputed on substantial grounds

2.1 The manner in which the debt arose is outlined in the grounding affidavit of John McDermott, the Financial Director of the Petitioner, which was sworn on 8th February, 2011. The debt arose in respect of milk products supplied by the Petitioner to the Company from around the time of the Company's incorporation in April 2007 to 3rd August, 2010 on foot of a rolling account. Mr. McDermott averred that initially the Petitioner dealt with Dairyland Cuisine South East Ltd. (the Initial Company), which had been incorporated around July 2000, which traded under the name "Dairyland Cuisine". The directors of the Initial Company were Peter Cronin and Noel Barcoe, the current Managing Director of the Company. However, around the beginning of 2006 the Petitioner commenced dealing with Mr. Cronin and Mr. Barcoe separately as sole traders. From the time Mr. Barcoe incorporated the Company in April 2007, the Petitioner dealt with the Company, which also traded under the name "Dairyland Cuisine". The Petitioner ceased trading and supplying milk products to the Company on 3rd August, 2010.

2.2 In the grounding affidavit Mr. McDermott disclosed that, when it commenced dealing with Mr. Barcoe and Mr. Cronin as separate entities, the Initial Company owed over €2m to the Petitioner, representing approximately six months credit. Mr. Barcoe and Mr. Cronin continued to be liable to the Petitioner for that sum. This debt was referred to by the parties as the "historic debt" and it has been so described in these proceedings. The Initial Company was dissolved in 2009. Mr. McDermott disclosed that there was no agreement between Mr. Cronin and Mr. Barcoe as to the division of the historic debt between them, although in 2008 Mr. Barcoe's accountant acknowledged that his share of that debt was €811,383.31 as of 31st December, 2005.

However, Mr. Barcoe denied that liability in these proceedings. Among the documents exhibited by Mr. McDermott is an e-mail of 13th October, 2009 from the Company's accountants setting out the balance owed by the Company to the Petitioner as at 31st August, 2009. Included in the summary attached to the e-mail is a figure of €288,321.54 representing the "old balance", which represented the historic debt.

2.3 By way of general observation, all of the evidence put by the Petitioner before the Court is exceptionally comprehensive and thorough. In the grounding affidavit, Mr. McDermott exhibited invoices sent to the Company in respect of milk supplied during 2010, copies of the statements on the Petitioner's corporate current account with Ulster Bank showing the payments made by the Company against the said invoices and the statement of account of the Petitioner with Mr. Barcoe and the Company from 15th October, 2005 to the closing of the account. A number of observations are necessary in relation to those exhibits. First, the invoices are addressed to "Dairyland Cuisine South East C/o Noel Barcoe T/A Dairyland Cuisine". On the totality of the evidence, there is absolutely no doubt that the goods were delivered to, and accepted on behalf of, the Company. Secondly, it is clear from the statement of account that the old balance as at 31st August, 2009, that is to say, the historic debt, is not included in the sum of €260,728.77 claimed on the s. 214 demand. Mr. McDermott's analysis of that sum was that the vast bulk of it (€248,523.34) represented monies due by the

Company to the Petitioner in respect of the twelve week period prior to the cessation of supply on 3rd August, 2010.

2.4 In the replying affidavit of 7th March, 2011 sworn on behalf of the Company by Mr. Barcoe, the rather specious point that the Company had "never received any invoices claiming that monies were due and owing by it to the Petitioner" was made. There is no merit in that point. The milk products were received by the Company and the Company accepted liability for them. The other point made is that, in fact, the Company did not owe any money to the Petitioner; rather the Company had overpaid the Petitioner to the extent of €306,113.46. A spreadsheet was exhibited covering dealings between the parties from 1st August, 2007 up to and including 8th November, 2010 to illustrate that point. Mr. Barcoe averred that the overpayment arose in circumstances where Mr. McDermott sought to unilaterally impose a price increase on 27th February, 2010. It was stated that it was the intention of the Company to seek a return of the overpayment.

2.5 In a further affidavit sworn on 16th March, 2011, Mr. McDermott reconciled the statement of account exhibited by him in the grounding affidavit and the spreadsheet exhibited by Mr. Barcoe in his replying affidavit. Mr. McDermott demonstrates that the discrepancy between the two documents is that the spreadsheet omitted two invoices which issued to the Company during the relevant period and that the manner in which payments were allocated as against invoices raised in the spreadsheet was incorrect. Mr. McDermott averred that during the trading relationship between the parties, the Company had a twelve week credit period with the Petitioner, which was confirmed in an e-mail from Mr. Barcoe to Mr. McDermott dated 16th July, 2009. In relation to allocation of payments, the error which Mr. McDermott identified in the spreadsheet was that, because the account was being operated on terms of twelve weeks credit, payments made which were allocated to the Company on the spreadsheet between 3rd August, 2007 and 19th October, 2007 should not have been allocated to the Company, but rather should have been allocated to Mr. Barcoe, operating as a sole trader. There is no doubt but that the manner in which the invoices were addressed is confusing. However, what is convincing is that the manner of allocation of payments on the statement which accompanied the Company's accountant's e-mail of 13th October, 2009 referred to earlier reflects that the parties were operating on terms of twelve weeks credit and is also consistent with the Petitioner's statement but inconsistent with the spreadsheet exhibited by Mr. Barcoe, as regards allocation of payments.

2.6 Two invoices which have been omitted from the spreadsheet exhibited by Mr. Barcoe aggregate €78,497. Mr. McDermott has averred that those invoices were issued in respect of milk price adjustments on 5th June, 2010 and 8th September, 2010. At the time they were not disputed by the Company. Mr. McDermott has explained how the price adjustments arose.

2.7 Apart from disputing the Company's contention that the alleged overpayment arose as a result of a price increase, having demonstrated that it was the result of incorrectly allocating payments and omitting invoices, Mr. McDermott averred that there were negotiations between the parties during 2009 and 2010 with a view to the parties entering into what is described as a "Long Term Supply Agreement", under which the Company would receive milk products at a more favourable price than had previously been the case. During the negotiations, as a gesture of good will, the Petitioner supplied milk products to the Company at the lower price. However, when it became apparent that the Company was not going to enter into the Long Term Supply Agreement, the Petitioner informed the Company by letter of 12th February, 2010 that, at the expiry of ten days, the product would only be supplied as per the agreed price list which was in operation at 31st August, 2009. It is clear on the evidence that the Company discharged three invoices issued in May 2010 at the higher price in August 2010, but of the sum of €41,705.51 due on the next invoice, which was dated 29th May, 2010, and was due for payment at the end of August, 2010, following cessation of trade between the parties, only €20,000 was paid. When the shortfall was queried on behalf of the Petitioner, the response on behalf of the Company was that the sum of €20,000 was paid "because of low funds arising due to the price increase that [the Petitioner] implemented on us since February". However, it was stated that the Company would be continuing to make a weekly payment on its account. As the statement of account exhibited in the grounding affidavit reveals, all subsequent payments represented part only of the amount claimed on the invoices.

2.8 In a further affidavit sworn by him on 25th March, 2011, Mr. Barcoe, on behalf of the Petitioner, persisted in his contention that the Petitioner had been overpaid in the amount of €306,113.46 by the Company. In relation to the two invoices which had not been included in the spreadsheet exhibited in his first affidavit, he stated that they had been issued "for absolutely no purpose whatsoever". As I have already pointed out, those invoices aggregated €78,491. Even if that amount was not properly charged by the Petitioner to the Company, the Petitioner would still have been entitled to make a demand under s. 214 for the balance of its debt, which is considerably in excess of the limit specified in s. 214 (€1,269.74). There are other rather spurious contentions made by Mr. Barcoe in his second affidavit, for example, that "the parties hereto were not *ad idem* from the outset", that "the Petitioner is misguided as it is unclear who in fact the Petitioner is dealing with", and that invoices "have been fabricated for the purpose of the proceedings herein". The reality of the situation is that the milk products were supplied by the Petitioner to the Company, the Company accepted them and the Company continued to discharge the invoices issued in respect of them until late August 2010, when the Company only discharged a portion of what was claimed on a relevant invoice.

2.9 Finally, in his third affidavit, which was sworn on 31st March, 2011, Mr. McDermott addressed the various matters raised in Mr. Barcoe's second affidavit. Mr. Barcoe did not adduce any evidence in either of his affidavits to show that the Company is in fact solvent. In his third affidavit, Mr. McDermott exhibited a copy of the Company's Abridged Financial Statements for the year ended 31st July, 2009 which, in my view, are neutral as regards establishing the Petitioner's debt. The Abridged Balance Sheet shows net current liabilities at €214,651 at 31st July, 2009. However, in the notes it is explained that the financial statements were prepared on a going concern basis, which, presumably, the Company's auditors considered appropriate. In short, the Abridged Financial Statements do not throw any light on the current solvency status of the Company.

### **3. Summary of conclusions**

3.1 I am satisfied that a careful analysis of the statement of account exhibited by Mr. McDermott in the grounding affidavit demonstrates that the arguments made on behalf of the Company in support of its contention that there is a *bona fide* dispute in relation to the debt claimed by the Petitioner on substantial grounds do not stand up.