THE HIGH COURT

[2013 No. 4 COS]

IN THE MATTER OF MI-ZONE TECHNOLOGY IRELAND LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

Judgment of Ms. Justice Laffoy delivered on 4th day of March, 2013.

The proceedings

1. These proceedings were initiated by a petition presented by Lucid Group Limited (the Petitioner), a company based in the United Kingdom, to wind up Mi-Zone Technology Ireland Limited (the Company), which was presented on 8th January, 2013 and which was first returnable before the Court on 4th February, 2013. The petition was eventually heard by the Court on 25th February, 2013, when the Company was represented by counsel who opposed the making of a winding up order on the ground that the Petitioner's debt is disputed.

2. Apart from its relevance to the determination of the core question which the Court has to determine, namely, whether, by reason of the existence of a cross-claim by the Company against the Petitioner, the Petitioner's debt is being disputed in good faith and on substantial grounds, I consider it appropriate to consider the grounding documentation before the Court in some detail for the purpose of demonstrating its unsatisfactory nature.

The grounding documentation

3. As I have stated, the petition was presented on 8th January, 2013. In paragraph 8 it contained a statement that the Company is indebted to the Petitioner in the sum of €30,991.25 in respect of services supplied. Obviously, in the next paragraph, it was intended to set out the text of a demand under s. 214 of the Companies Act 1963 (the Act of 1963). What was stated in paragraph 9 was that the Petitioner, acting by its solicitors, on 15th November, 2012, which was not the correct date, served on the Company –

> ". . . by delivering same to the registered office of the Company a demand calling on the Company to pay the sum known to be due and which demand was in the following terms: –"

There followed a blank half page. There then followed a statement that more than twenty one days had passed since the demand was made but that the Company had neglected to pay or satisfy the sum of €30,991.25 in whole or to make any offer to the Petitioner to secure or compound the same. It was then asserted that the Company is insolvent and unable to pay its debts and that it is just and equitable that the Company be wound up. There was a note at the foot of the petition to the effect that it was intended to serve it on the Company "at its registered office at Second Floor, Block 10, Unit 3, Blanchardstown Corporate Park, Dublin, 15", which was also incorrect. It appears from the Companies Registration Office (CRO) search as of 15th February, 2013 put before the Court that the registered office of the Company at all material times was 39/40, Upper Mount Street, Dublin, 2, which is the offices of L.K. Shields, Solicitors.

4. The verifying affidavit was sworn by Alastair Williamson, a director of the Petitioner, on 15th January, 2013. Mr. Williamson exhibited the s. 214 demand, which was dated 26th November, 2012, not 15th November, 2012 as stated in the petition. He averred that it was served on 26th November, 2012. As will appear later, that is not correct. However, he did verify the debt of €30,991.25 and that it had not been discharged.

5. The affidavit vouching the advertisement of the petition in accordance with Order 74 of the Rules of the Superior Courts (the Rules) was sworn by Matthew Wales, the Petitioner's solicitor, on 28th January, 2013. He averred that Iris Oifigiúil of 25th January, 2013, The Daily Mirror newspaper of 24th January, 2013 and The Daily Mail newspaper of 23rd January, 2013 each contained an advertisement of the petition filed on 9th January, 2012. The first point I would make about that is that the petition was filed on 8th January, 2012. Mr. Wales did not exhibit copies of the advertisements, as should have been done in the affidavit. Loose pages of the newspaper advertisements were handed into Court, but not of the notice in Iris Oifigiúil. In my view, that affidavit does not properly comply with the recent Practice Direction, which substituted proof by affidavit of the advertising of the petition for vouching in the Central Office.

6. Proof of service of the petition on the registered office of the Company at 39/40, Upper Mount Street, Dublin, 2 (and not the Blanchardstown address) was contained in a further affidavit sworn by Mr. Wales on 23rd January, 2013.

7. After service of the petition, an issue arose in relation to service of the s. 214 demand. After it had arisen, an affidavit sworn by Conor Donnelly, described as summons server, on 30th January, 2013 proved that Mr. Donnelly had called to the registered offices of the Company at 39/40, Upper Mount Street, Dublin, 2 on Wednesday, 28th November, 2012, where he personally served an employee of L.K. Shields, Solicitors, who was named, with "the Statutory Demand letter from Wales & Company, Solicitors, dated 26th November, 2012" on behalf of the Company.

8. The first response to the petition on behalf of the Company was an affidavit sworn on 30th January, 2013 by Jeffrey Selwyn Williams, with an address in England, who described himself as a director of the Company. That affidavit confirms that L. K. Shields did receive the s. 214 demand "and sent it by post to the Company offices in Blanchardstown on or around 26th November, 2012". However, it goes on to state that the demand was never received or known of by the Company and its directors as they had moved out of that office in October 2012. Mr. Williams then went on to dispute the debt. He explained that the Company is "a start-up technology business that markets Bluetooth Security Tag's to the market". The Petitioner is an industrial design company which designed the Company's product and the Company relied on it, because the Company had "no such expertise in house". The product was manufactured by Flextronics, which was described as a well established manufacturer of technology products based in Cork. Mr. Williams has averred that production commenced in June 2012, but the Petitioner had been informed that there were issues with the design of the product and that there would be an additional cost due to "the product tolerances being inaccurate". Mr. Williams averred that Flextronics had confirmed that the additional cost would be c. €24,000. The only document exhibited in support of that contention was an e-mail dated 13th November, 2012 from Flextronics to the Company, one line of which stated:

> "Additional manufacturing cost over RFQ £1.95* 6K = £11.7K"

As I understand Mr. Williams' averment and the reliance on that exhibit, it is that each item would cost £1.95 extra to manufacture and, on the basis of what Mr. Williams described as "10,000 sets of components", the additional cost to the Company was going to be about €24,000.

9. More significantly, in his affidavit, Mr. Williams exhibited communications with the Petitioner in October/November 2012, which dealt with the financial position as between the Petitioner and the Company. Mr. Williams sent an e-mail to Mr. Williamson on 14th October, 2012 in which he stated as follows:

> "I understand that your accounts department have been asking Gary about outstanding invoices last week, unfortunately we will not be able to pay these at the moment. As you know we have continually had to increase our working capital to meet the cash burn of the Mi-Zone product and we continue to do so. The current round of funding has not yet been agreed and as such we cannot currently discharge our indebtedness to Lucid, we are working on the next round and I hope we will be able to resolve the situation within the next 3/4 weeks. I will update you at the end of the month but in the meanwhile the accounts department has been moved across to the U.K. and I would appreciate an up to date statement being sent to Phil. I will update you as soon as I have further news."

Mr. Williamson's response was to thank Mr. Williams for his frankness and to say that he would get the statement sorted out. Mr. Williamson sent an e-mail to Mr. Williams on 7th November, 2012 requesting that he arrange payment of outstanding invoices. Mr. Williams has made certain averments in relation to the last e-mail between the parties, which was dated 28th November, 2012, which is supposed to be exhibit E to his affidavit, but which is not before the Court. In any event, apparently, it was an e-mail from Mr. Williamson. Mr. Williams has complained that Mr. Williamson made "no mention of the fact that only 48 hours beforehand he had personally instructed Wales & Co. to issue a Statutory Demand upon the Defendant". Mr. Williamson then reiterated that the Company had not been aware of any proceedings or of a threat of such, nor that the demand had issued.

10. In the penultimate paragraph of his affidavit Mr. Williams averred that there is "a genuine and substantial dispute" that the Company "had not had the right of a fair hearing", because, apart from not receiving the Statutory Demand, the Petitioner hid the fact from the Company in the e-mail of 28th November, 2012.

11. A further affidavit was sworn on behalf of the Company by Gary Murphy, who was described therein as a director of the Company, on 12th February, 2013. The thrust of Mr. Murphy's averments was that the Company "contests the statutory demand *bona fides* on substantial grounds", on the basis that the Company has a cross-claim against the Petitioner, which, if the Petitioner had acted appropriately and issued proceedings against the Company in the Circuit Court, would have been the subject of a counterclaim which would have exceeded the Petitioner's debt and would have offset and extinguished it. The alleged basis of the cross-claim is the extra cost of Stg £19,500 for manufacturing 10,000 units for rectifying the "design flaw", which the Company attributes to the Petitioner, and, in addition, the "resultant delays and decreased profit margins on each item as a result of the increased costs" which have caused the Company damage and loss for which, it is alleged, the Petitioner is responsible, although this additional loss is not quantified. In Mr. Murphy's affidavit the result of the design flaws was averred to be "the devices having their 'reset' buttons pressed in constantly rendering them defective".

12. A number of e-mails have been exhibited by Mr. Murphy. The first was dated 2nd March, 2012 and was from Carl Stone of the Petitioner to Sebastian Coope of the Company, which Mr. Murphy averred acknowledged "the issue". Indeed, Mr. Stone's e-mail does point to a problem. The response from Mr. Coope to Mr. Stone was whether Mr. Stone had "any thoughts on a solution". Nowhere in those e-mails is there an allegation or an acknowledgement of wrongdoing on the part of the Petitioner. The only other document exhibited is a hard copy of the e-mail dated 13th November, 2012, which had been exhibited in Mr. Williams' affidavit, and an e-mail which preceded it and an e-mail which appears to have post-dated it. The three e-mails appear to be part of a stream of e-mails, which on their own do not make a lot of sense, and, in my view, do not substantiate the Company's assertion that it has a cross-claim against the Petitioner.

13. Finally, Mr. Murphy has averred that the Company "is minded to issue proceedings against the Petitioner in Ireland or England and Wales seeking damages for breach of contract in the defective design" of the Security Tags. He has also averred that the petition has caused harm to the Company's financial reputation.

14. When the matter was before the Court on 18th February, 2013, the Court was informed that the Petitioner's solicitors had received e-mails from a person purporting to represent the Company, who, in some e-mails, described himself as U.K. counsel acting for the Company, some of which e-mails were stated to be "without prejudice save as to costs". The Court directed that the e-mails should be exhibited on affidavit, and that the Company should have leave to respond on affidavit. That led to an affidavit sworn by Mr. Wales on 19th February, 2013 exhibiting the e-mails.

15. A further affidavit was sworn by Mr. Murphy on 19th February, 2013, in which he objected "in the strongest terms" to admission of the e-mails "given that they appear to have been made *bona fides* in an attempt to settle the dispute" and were "entitled clearly 'Without Prejudice'". In his affidavit Mr. Murphy has clarified that John Botros, who sent the e-mails, is a legal adviser to Mr. Williams. However, he is not a director, employee or agent of the Company and he had no authority to bind the Company or represent the Company in his e-mails. His actions, if on behalf of anyone, were on behalf of Mr. Williams. Mr. Murphy averred that accounts of the Company which had been furnished by Mr. Botros to Mr. Wales are not evidence that the Company was insolvent. He reiterated that the debt claimed by the Petitioner and relied on in the s. 214 demand is disputed and he commented on the fact that there had been no response by the Petitioner to his first affidavit.

Service of s. 214 demand

16. Section 214 of the Act of 1963 provides that a company shall be deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding €1,269.74 then due –

> ". . . has served on the company, by leaving it at the registered office of the company, a demand in writing requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor . . .."

17. As I have stated earlier, the registered office of the Company, as recorded in the CRO, at all material times was 39/40, Upper Mount Street, Dublin, 2. The affidavit of Conor Donnelly referred to at para. 7 above satisfactorily proves that the s. 214 demand was delivered to the registered office of the Company on 28th November, 2012. In any event, at the hearing of the petition, counsel for the Company conceded that the s. 214 had been properly served. That concession was properly made, because it was the duty of the Company to ensure that it would get timely notice of communications delivered to or posted to its registered office as recorded in

the CRO. It clearly fell down on that duty and was responsible for the confusion caused by its departure from its address in Blanchardstown, which is the subject of the note in the petition.

18. There remains the question whether the Company is entitled to have the petition dismissed on the basis of the alleged claim against the Petitioner for €24,000 together with damages for loss of profits.

The law
19. The jurisprudence on the position to be adopted by a court on the hearing of a petition to wind up a company at the suit of a creditor where the company disputes the petitioning creditor's debt or maintains it has a cross-claim against the petitioning creditor in excess of that debt is well settled. As McCracken J. stated, delivering judgment in the Supreme Court in *Re WMG Toughening Limited* (No. 2) [2003] 1 I.R. 389 (at p. 392) relied on by counsel for the Petitioner:

> "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.'
>
> 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."

Application of the law
20. In applying the law to the facts, the question for the Court is whether the Company's alleged claim for €24,000 together with unquantified damages of a sum in excess of €6,000, against the Petitioner is a claim made in good faith and on substantial grounds. In my view, it is not for the following reasons.

21. First, the design "issue" was apparent as long ago as March 2012, yet there was no suggestion that the Company had a claim against the Petitioner until after the Company became aware that the petition had been served. On any reading of the e-mail dated 14th October, 2012 it acknowledged that the Company was then indebted to the Petitioner but was not in a position to discharge its liability to the Petitioner at that juncture.

22. Secondly, not only the existence of the e-mail of 14th October, 2012, but also what transpired between Mr. Botros and Mr. Wales, after the Company became aware of the existence of the petition, raises serious doubts as to whether in raising the design "issue" the Company is acting in good faith. The first three e-mails from Mr. Botros to Mr. Wales on 28th and 29th January, 2013 were not expressed to be "Without Prejudice" and Mr. Botros did not represent that he was a legal adviser to the Company. The first two e-mails were primarily concerned with the Company's complaint that it was not aware of the s. 214 demand. The third, which was dated 29th January, 2013, having referred to the earlier e-mails, stated:

> "I am advised that other correspondence exists concerning the problems and costs arising from your clients defective work eg a humming sound on the device making it unusable with the IPhone and therefore useless.
>
> There is clearly an arguable defence and a triable issue."

The design "issue" subsequently deposed to by Mr. Williams and Mr. Murphy was different, as is clear from what I have recorded earlier. In the light of the foregoing it is difficult to conclude that the Company has a genuine cross-claim against the Petitioner.

23. Thirdly, in any event, there is nothing before the Court to point to the Company as having any cause of action, whether for breach of contract or otherwise, against the Petitioner arising from the "issue" in relation to the design of the Security Tags, let alone a cause of action on substantial grounds. The e-mails exhibited in the affidavits filed on behalf of the Company indicate that the design process was an ongoing process even up to mid-November 2013. The evidence does not establish that there are substantial grounds for concluding that the Company has a cross-claim in excess of €31,000 against the Petitioner.

24. Finally, even if the Company has a cause of action against the Petitioner, and that has not been established, the Company has not adduced any satisfactory evidence in relation to the quantum of its claims and, in particular, whether it would eliminate the Petitioner's debt against the Company.

25. As the Company has not established that its alleged claim against the Company is made in good faith and on substantial grounds, I am satisfied that a deemed insolvency exists by reason of the proper service of the s. 214 demand on the Company. Accordingly, for that reason, I propose making an order winding up the Company on the terms set out below. However, I want to make it clear that the sole basis of making the order is that there is a deemed insolvency by reason of failure to comply with the s. 214 demand.

Order
26. Subject to the Petitioner filing –

> (a) an amended petition correcting the errors in the original petition, and
>
> (b) an affidavit properly proving the advertising of the petition in accordance with Order 74 of the Rules,

there will be an order that the Company be wound up. Mr. Kieran Wallace, who has consented to act, and whose suitability has been established by an affidavit of Mark Homan, solicitor, will be appointed Official Liquidator for the purposes of the winding up. Apart from that, the order will be in the usual form.