Neutral Citation Number: [2009] IEHC 455

THE HIGH COURT

2009 364 COS

IN THE MATTER OF MARBLE AND GRANITE TILES LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1963

BETWEEN

DUBLIN CITY COUNCIL

PETITIONER

AND

MARBLE AND GRANITE TILES LIMITED

RESPONDENT

JUDGMENT of Miss Justice Laffoy delivered on the 16th day of October, 2009.

The proceedings

On 6th July, 2009, Dublin City Council (the petitioner) presented a petition in this Court seeking an order that Marble and Granite Tiles Limited (the company) be wound up. The petition was returnable on 27th July, 2009. On that day, counsel on behalf of the petitioner opened the petition and the evidence to support it. She also opened a replying affidavit which had been sworn on 19th July, 2009, by Noel O'Gara (Mr. O'Gara), who is a director of the company. Mr. O'Gara appeared in person on that occasion, and he complained that the replying affidavit had been produced in haste and he sought an opportunity for the company to respond more fully to the petition. On that occasion, I adjourned the matter to the vacation sitting on 23rd September, 2009, directing that any further affidavit on which the company wished to rely should be filed within three weeks. That direction was not complied with. The petitioner filed a further affidavit sworn on 11th September, 2009, in response to Mr. O'Gara's affidavit of 19th July, 2009. When the matter came on for hearing on 23rd September, 2009, Mr. O'Gara had filed a further affidavit sworn on 21st September, 2009, to which the petitioner, its officers and legal representatives took objection. On 23rd September, 2009, the matter was adjourned to 12th October, 2009, to give the petitioner an opportunity to deal with that affidavit.

The petitioner issued a notice of motion returnable for 12th October, 2009, in these proceedings, seeking an order under O. 40, r. 12 of the Rules of the Superior Courts 1986 (the Rules), either striking out the entirety of the affidavit sworn by Mr. O'Gara on 21st September, 2009, on the grounds that it is scandalous, vexatious, unnecessary and an abuse of process of the Court or, alternatively, so much thereof as should be struck out on those grounds.

The petition and the motion were heard together on 12th October, 2009. Mr. O'Gara appeared in person and purported to represent the company.

Three principal issues arise for determination by the Court in the proceedings, namely:

(a) whether a winding up order should be made on foot of the petition;

(b) whether the entirety or any part of the affidavit sworn by Mr. O'Gara on 21st September, 2009 should be struck out; and

(c) whether Mr. O'Gara is entitled to represent the company on the hearing of the petition.

Whether a winding up order should be made

The petitioner brings the petition claiming to be a creditor of the company in the sum of €43,115.30, which sum represents:

(a) sums due by the company and Mr. O'Gara to the petitioner on foot of an order dated 9th October, 2006, made by Hanna J. in proceedings in this Court (the High Court proceedings) under s. 160 of the Planning and Development Act 2000 (the Act of 2000), between the petitioner, as applicant, and the company and Mr. O'Gara, as respondents, (Record No. 2006 No. 114 MCA), being the sum of €1,000 in respect of measured costs and expenses incurred by the petitioner and the sum of €28,985.21 being legal costs certified by the Taxing Master on a certificate of taxation dated 16th August, 2008; and

(b) sums due by Mr. O'Gara and the company to the petitioner on foot of an order made on 30th March, 2007, in Circuit Court proceedings under the Act of 2000, between the petitioner, as plaintiff, and Mr. O'Gara and the company, as defendants, (Record No. 2007 No. 02366), being the sum of €1,825 in respect of non-legal costs and the sum of €8,737.61 being legal costs as certified by the County Registrar in a certificate of taxation dated 30th

May, 2008.

On 14th May, 2009, the petitioner, in accordance with s. 214(a) of the Companies Act 1963 (the Act of 1963), served on the company a demand in writing requiring payment of the said debt of €43,115.30. The company failed to comply with the said demand within three weeks, or at all. In the circumstances, by virtue of the operation of s. 214, the company is deemed to be unable to pay its debts and to be insolvent.

The grounds on which Mr. O'Gara contended that the company should not be wound up, as set out in his original affidavit of 19th July, 2009, were as follows:

> (1) The order of Hanna J. is the subject of an appeal to the Supreme Court. It appears that Mr. O'Gara did lodge notice of appeal in the Supreme Court in November 2006. The position of the petitioner is that Mr. O'Gara has done nothing to prosecute the appeal and that, in any event, there is no stay on the order of Hanna J. In the absence of a stay, I find that the sums due on foot of the order in the High Court proceedings are payable by the company to the petitioner. In any event, the sums due on foot of the order of the Circuit Court exceed the limit of €1, 269.74 stipulated in s. 214(a), so that a deemed insolvency exists on account of the non-payment of the costs due on foot of the Circuit Court order. This ground fails.
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> (2) Mr. O'Gara alleges that the petitioner owes the company sums aggregating €43,301.10 in respect of costs incurred by him in connection with the Dartmouth Square Area Compulsory Purchase (Amenity) Order, 2006, made by the petitioner and confirmed by An Bord Pleanála on 21st September, 2006. Subsequently, the petitioner decided not to proceed with the acquisition of Dartmouth Square and did not serve notice to treat on any party pursuant to that Order, which I assume has lapsed. While Mr. O'Gara appeared in person at the oral hearing held by An Bord Pleanála pursuant to s. 218 of the Act of 2000, costs were not awarded to the company. Mr. O'Gara has not established that the petitioner has any liability to the company in respect of the costs he alleges are due, which are itemised by reference to a letter of 28th July, 2008 from a firm of solicitors and a letter dated 29th July, 2008 from a firm of auctioneers. This ground also fails.
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> (3) Mr. O'Gara also alleges that money is due and owing by the petitioner on foot of a vesting in the petitioner of premises known as 4, Hewardine Terrace, Dublin, 1, pursuant to the Derelict Sites Act 1990, in the year 2002. It is clear on the evidence that those premises were vested in Mr. O'Gara personally, not in the company. Therefore, it is to Mr. O'Gara personally that the petitioner is indebted in respect of whatever sums are due on foot of that acquisition. This ground also fails.
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> (4) Mr. O'Gara also alleges that money is due and owing by the petitioner on foot of a Compulsory Purchase Order made in respect of the premises No. 34, Dolphin's Barn Street, Dublin, 8 in 2003. It is clear on the evidence that the premises in issue were vested in a company known as Ballinahowen Developments Limited of which Mr. O'Gara claims to be the beneficial owner. Such monies as are due by the petitioner on foot of that compulsory purchase order are due to Ballinahowen Developments Limited, not to the company. Therefore, this ground also fails.

The evidence suggests that there is unfinished business between Mr. O'Gara and his company, Ballinahowen Developments Limited, and the petitioner in relation to the acquisitions referred to at (3) and (4) above, but it is not possible to form a view on who is to blame for the delay in finalising those matters on the affidavit evidence. Irrespective of who is to blame, the important point for present purposes is that, as the company is a separate and distinct legal entity from Mr. O'Gara and Ballinahowen Developments Limited, those matters have no bearing on whether a winding up order should be made in these proceedings. It is open to Mr. O'Gara, who clearly harbours grievances against the petitioner in respect of those acquisitions and the manner in which they have been conducted, to pursue his claims in respect of those matters separately against the petitioner.

In his second affidavit sworn on 21st September, 2009 Mr. O'Gara expressed a willingness to make available the sum of €50,000 to the company and attached to the affidavit a document which he has designated "Promissory Note", which bears the date 10th September, 2009, and in which he undertook and promised to pay €50,000 to the company as additional capital "immediately upon receiving payment" from the petitioner of compensation in respect of 4, Hewardine Terrace. As counsel for the petitioner pointed out, that promise is qualified. In reality, it is indefinitely qualified so that, apart from any other issues in relation to enforceability, it does not affect the status of the company as an insolvent company at this point in time.

Finally, Mr. O'Gara submitted that there should be a full plenary hearing of the petition "before another independent Judge and a jury". On the hearing of a petition to wind up, the Court determines whether any of the grounds on which a company may be wound up, as set out in s. 213 of the Act of 1963, has been established and on the basis of that determination, as empowered by s. 216 of the Act of 1963, either makes a winding up order or dismisses the petition. While the Court has a broad discretion under s. 216, there is no process whereby a petition to wind up can be referred to plenary hearing.

In this case, I am satisfied that the plaintiff has established that the company is unable to pay its debts and should be wound up (para. (e) of s. 213). Accordingly, there will be an order winding up the company. Mr. Jim Hamilton will be appointed liquidator for the purposes of the winding up. The winding up order will be in the usual form. The directors of the company, Mr. O'Gara and Naramon O'Gara, will be directed to swear and file a statement of affairs within twenty-one days. The costs of the petitioner will be reserved to the Examiner's Court List.

The petitioner's motion to strike out

Order 40, rule 12 of the Rules provides as follows:

> "The Court may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client."

In moving the application to strike out, counsel for the petitioner relied on the decision of McGovern J. in *Doherty v. The Minister for Justice, Equality and Law Reform and Ors.* [2009] IEHC 246. That judgment was concerned with an application to strike out a statement of claim under O. 19, r. 27 or O. 19, r. 28 of the Rules or under the Court's inherent jurisdiction. It seems to me that the Court has a broader scope for striking out pleadings under that jurisdiction than is provided for in O. 40, r. 12, which limits the Court's jurisdiction to "any matter which is scandalous".

There is helpful guidance on the application of Order 40, rule 12 in Delany & McGrath on *'Civil Procedure in the Superior Courts'* 2nd Ed., at para. 18-61, where it is stated:

> "The contents of an affidavit will be considered to be scandalous where it attempts to introduce into the proceedings extraneous matters for purposes and motives unconnected with the subject matter of the dispute between the parties. This will particularly be the case where the material is calculated to and has the effect of embarrassing or causing distress or offence to the opposing party."

I have no doubt that most of the material which is in Mr. O'Gara's second affidavit sworn on 21st September, 2009, was deliberately calculated to embarrass and cause offence to the petitioner, to Mr. Declan Wallace, who is the Executive Manager of the petitioner's Development Department, and who has sworn all of the affidavits on behalf of the petitioner filed in these proceedings, and to the Court.

I am striking out two paragraphs of the affidavit: the penultimate paragraph, which refers to Mr. Wallace, and the third preceding paragraph to that, which also refers to Mr. Wallace. I am allowing the remainder of the affidavit to stand for two reasons. First, as I have stated, there is undoubtedly unfinished business in relation to the acquisition of 4, Hewardine Terrace and No. 34, Dolphin's Barn Street between the petitioner and Mr. O'Gara and another company owned by Mr. O'Gara. I think it appropriate to give Mr. O'Gara the benefit of the doubt that he does not fully understand the significance of the company the subject of these proceedings being a separate and distinct legal entity. Secondly, I am desisting from expressing any view on the many offensive references in the affidavit to this Court with a view to avoiding a charge of breach of constitutional justice for infringing the rule *nemo iudex in causa sua* – that nobody should be a judge in his or her own cause.

Mr. O'Gara's representation of the company

Counsel for the petitioner submitted that Mr. O'Gara was not entitled to represent the company on the hearing of the petition, in reliance on the decision of the Supreme Court in *Battle v. Irish Art Promotion Centre Limited* [1968] I.R. 252. In that case, Ó Dálaigh C.J., having reviewed the authorities, stated:

> "This survey of the cases indicates clearly that the law is, as we apprehended it to be when the application was first made to us, *viz*. that, in the absence of statutory exception, a limited company cannot be represented in Court proceedings by its managing director or other officer or servant."

The legal position, accordingly, is that Mr. O'Gara is not, as a matter of law, entitled to represent the company in these proceedings. However, as frequently happens on the hearing of a winding up petition when a director or a member of the company appears in Court without legal representation, he was listened to to ensure that no injustice would be perpetrated.

There is no evidence before the Court that Mr. O'Gara is a contributory of the company and is entitled to be heard in that capacity.

Title of the proceedings

The title of the proceedings does not conform with the Form No. 1 of appendix M. of the Rules and will be amended to conform.