

THE HIGH COURT

2011 6608 P

BETWEEN

D. AND F. PARTNERSHIP LIMITED

PLAINTIFF

AND

HORAN KEOGAN RYAN LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Ryan delivered the 10th August 2011

The plaintiff is seeking an interlocutory injunction to restrain the defendant from presenting a petition to wind it up. The defendant is a firm of architects and claims to be owed fees and interest by the plaintiff in the amount of €935,294.62. It served a 21- day notice under section 214 (a) of the Companies Act 1963 warning of a winding up petition if the debt was not paid. The plaintiff seeks an order to restrain the petition on the ground that it disputes the debt in good faith on substantial grounds.

The plaintiff's case is that there are no grounds entitling the architects to present a s. 214 petition and the threat to wind up the company is an abuse of process. The plaintiff claims that it is "manifestly clear" that any money due and owing to the defendant Architects is owed not by the plaintiff but by another company for whom the plaintiff was acting as an agent on behalf of a disclosed principal. The plaintiff claims that the defendant knew at all material times what the true situation was and that there is no basis for contending that the plaintiff company is the debtor. It is argued that on any reasonable view of the circumstances, the plaintiff has demonstrated that there is substantial dispute about the debt and thus it is not appropriate to proceed by way of this swingeing provision of the Companies legislation. The plaintiff also argues in the alternative that even if it could be suggested that the plaintiff is the correct debtor, the amounts alleged to be due are the subject of a bona fide dispute. This point is very much a subsidiary contention and the main issue concerns the identity of the debtor.

The defendant's case is that there was a written agreement for the provision of their services to the plaintiff. There was no question of agency. The plaintiff has repeatedly acknowledged its liability to the defendant and the admissions are recorded in e-mails and letters from the defendant to the plaintiff whose contents are not disputed on affidavit or otherwise.

The relevant law was stated by Mr Justice Keane, as he then was, in his High Court judgment in the case of *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd* [1996] 1 I.R. 12, in the following extracts from pp 23-27:

"It is clear that where 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 the court before the petition is issued, its presentation will in normal circumstances be restrained. This is on the ground that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed."

"The words 'any liability' are, however, important: parent company admits its indebtedness to the creditor ... but disputes the balance, even on substantial grounds, the creditor should not normally be restrained from presenting a petition."

"The undoubted power of the courts to restrain proceedings which are an abuse of process is one which should not be lightly exercised. In context of winding-up petitions, I have no doubt that it should be exercised only when the plaintiff company has established at least a prima facie case that its presentation would constitute an abuse of process."

It is accepted by both sides that s. 214 is not a debt collection mechanism that may be employed in a case where there is a bona fide substantial dispute. On the other hand, if there is a clear entitlement to payment of a debt then it is legitimate to issue a s. 214 notice and to proceed with a petition.

Background

By letter of the 23rd April, 2007, the defendant architects submitted a fee proposal to the plaintiff company for its consideration. This was in connection with a planned development of a private hospital at Letterkenny, Co. Donegal. The letter set out a basis of payment and a scale of fees based on an estimated construction value of €32 million, subject to final tender documentation. The letter sought confirmation of the architects' appointment by way of signature to the letter and it concluded:

"We understand that a letter or deed for appointment of the Architect may be issued at a later date on behalf of Health Partnership, and we confirm that we are prepared to enter into such an agreement subject to review by our solicitors and provided that the above terms are incorporated in the deed."

The letter was addressed to Ms. Deidre Foley-Woods, Executive Director, the Health Partnership, 19 Fitzwilliam Square, Dublin 2. The Health Partnership is a business name that was registered by the plaintiff, D. & F. Health Partnership Limited, on the 4th January, 2005. Ms. Foley returned the letter with the following endorsement:

"I confirm the appointment of Horan Keogan Ryan Limited as Architects on the above terms."

She signed that "For an on behalf of The Health Partnership" and that endorsement is dated the 24th April, 2007.

The Architects did work and submitted invoices that were addressed to "North West Health Services, c/o The Health Partnership, 19 Fitzwilliam Square, Dublin 2, Attn: Deirdre Foley-Woods". Six invoices were paid, for sums of €180,000, €180,000, €72,000, €9,700, €72,000 and €82,645. Four of the payments were made out of an account in the name of North West Healthcare Development Co.

Limited. Two invoices were paid by the plaintiff.

The claim is in respect of a further six invoices comprising in total €664,722.27 and the balance of €262,903.35 is interest. Five of the invoices were issued between the 31st July, 2007 and the 31st December, 2007 and they comprise all but a small amount of the total. The final invoice is dated the 27th April, 2010 and is in the amount of €4,840.

By an e-mail which, according to the replying affidavit of Mr Jerry Ryan, was sent on the 9th October, 2007, Peter Buckley of the defendant company wrote to Deirdre Foley with "an up-to-date of the situation in relation to the fees due to HKR. for the Letterkenny Hospital Project." Paragraph 4 of the message recorded payments received to date and paragraph 5 stated the current balance outstanding to be €871,200 (including VAT). On the 22nd December, 2008, Mr. Ryan, Managing Director of the defendant company, wrote a letter addressed to Ms. Deirdre Foley-Woods, Managing Director, Healthcare Partnership, 19 Fitzwilliam Square, Dublin 2 that began:

"I refer to our meeting of last Friday morning and your request that we instruct our solicitors to refrain from further action in relation to the debt of €747,000 that you have acknowledged as outstanding to HKR."

On the 11th December, 2009, Mr. Buckley wrote to Ms. Foley addressed as above referring to "the current fees outstanding of €659,882.27". An e-mail of the 26th April, 2010 to Ms. Foley attached feasibility drawings for an alteration of the design. Finally a letter of the 26th November, 2010, from Mr. Buckley to Mr. Noel Daly began:

"I refer to the above project and the amount of €659,882.27 which has been acknowledged as due and payable by yourselves under the terms of the attached letter of appointment."

That letter was addressed to Mr. Daly of the Health Partnership at the same address.

The defendant served a 21 day letter dated the 24th June, 2011, pursuant to s. 214(a) of the Companies Act 2011. The statutory period expired on the 13th July, 2011. The plaintiff issued a plenary summons on the 20th July, 2011, seeking an order restraining the defendant from employing s. 214(a).

Plaintiff's Case

The grounding affidavit for this application was sworn by Mr Noel Daly, a director of the plaintiff company. The case he makes in this affidavit is as follows: -

- I. The defendant issued its invoices to North West Health Services and not to the plaintiff.
2. Mr Daly details six invoices from the defendant that were paid. These were paid out of a bank account in the name of NWHC, with the exception of two invoices which were met by a single payment in the name of the plaintiff which he says was an exceptional situation.
3. Referring to the agreement made in April 2007, Mr Daly says (a) that there is currently no final net contract value agreed; (b) the net contract value will be substantially less; and (c) he says that payment of fees at each stage was contingent on third-party investor funding. This leads him to the conclusion that even if it could be argued that the plaintiff is in fact the contracting party, the amounts are alleged to be due are the subject of a bona fide dispute.
4. Different versions of a deed of appointment of the architects were circulated and Mr Daly exhibits one of them; in each draft the client was named as Northwest Health Care Ltd. In the draft North West Health Care Ltd was the employer and the defendant was the architect: it is to be inferred from this that North West Health Care Ltd was in fact the contracting party. Mr Daly says at paragraph 13.4: -

"Having regard to the said deed, I say and believe there are that it is abundantly clear that the fee proposal letter of the defendant was signed by Deirdre Foley Woods on behalf of the plaintiff in its capacity as consultant to, and effectively agent for, North West Health Care Ltd. It was at all times clear that the plaintiff was acting on behalf of a disclosed principal. The reason why the deed was not in fact executed was because the defendant I understand made various changes/amendments to its fee structure and was not in anyway due to a change or a variation of the parties to the deed."

Mr Daly argues that it is "manifestly clear" that any monies due and owing to the defendant are due and owing by NWHC and not the plaintiff. The threat to wind up the company under section 214 (a) is a clear abuse of process. The debt is bona fide disputed on fundamental grounds. There exists a bona fide dispute as to whether the defendant is entitled to be paid any other fees. Mr Daly further claims that insofar as the defendant has a claim for fees against NWHC, that company also has a bona fide dispute in respect of the alleged debt.

In his second affidavit, which was filed in reply to that of Mr Ryan on behalf of the defendant, Mr Daly makes the following additional points: -

5. At all material times Mr Ryan knew and understood that the plaintiff was acting as consultant on the project and that the defendant's services were being provided to North West Health Care Ltd.
6. The planning application for the project was made in the name of NWHC and the decision was granted to NWHC.
7. The plaintiff could not have been the client for the project because it is "solely a consultancy firm with a small number of employees, some five in all and simply neither has the resources nor expertise to embark upon the development and construction of a hospital project such as the one involved herein."
8. There were previous projects in which the plaintiff provided consultancy services and the defendant was the project architect but in none of the previous dealings was the plaintiff liable to discharge fees and so there was never a course of dealings between the parties that gave rise to a creditor/debtor relationship.
9. The defendant is targeting the plaintiff simply because it is a mark.

10. The defendant has an alternative remedy, in that it can sue either by way of summary proceedings or plenary proceedings.

Defendant's Case

The affidavit of Mr Ryan, for the defendant, relies on the agreement that was effected by the proposal of the 23rd April 2007 that was endorsed and signed on the 24th "For and on behalf of The Health Partnership", which is a registered business name of the plaintiff. He exhibits the correspondence referring to the fees due and to the acceptance by the plaintiff of the position.

Mr Ryan refers to the points raised by Mr Daly in the grounding affidavit as enumerated above.

1. Mr Ryan says that the defendant addressed invoices to North West Health Services c/o The Health Partnership on the instructions of Ms Foley of the plaintiff company. This is not contradicted by Mr Daly in his second affidavit.
2. He agrees that four invoices were discharged by North West Health Care and two by the plaintiff.
3. He says that the invoices that have been paid were raised within the same time period as those the subject of the claim. They were based on the same estimated construction value, which was valid at the time. The draft deed that the plaintiff seeks to rely on would have excluded "back-end recalculation of fees"-Note 3 Third Schedule. The plaintiff has accepted the fees as being due and owing. There is no term in the April 2007 agreement making fees contingent on third-party investor funding as claimed.
4. The draft deed was not executed. The actual agreement did envisage that a deed might be executed but it had to incorporate the terms agreed in April, 2007. There was no agreement to substitute one of the contracting parties. There is no reference anywhere in the agreement to the plaintiff acting as consultant or agent. The defendant never agreed to accept North West Health Care Ltd as the client.

Points 5 - 10 in Mr Daly's second affidavit were obviously not specifically addressed in this deposition.

Discussion

It seems to me to be undeniable that the defendant was engaged by The Health Partnership, a business name of D. and F. Health Partnership Limited, the plaintiff company, on the terms contained in the letter of 23rd April, 2007. The architects carried out design work in connection with the Letterkenny Hospital Project. They invoiced North West Health Services c/o The Health Partnership. Four invoices were paid out of an account in the name of North West Healthcare Development Co. Limited. A further two invoices were paid out of a corporate current account in the name of the Directors of the plaintiff company. Correspondence between the 9th October, 2007 and the 26th November, 2010 refers to very substantial arrears corresponding with the amount of the plaintiff's claim in which the plaintiff company's directors are recorded to have acknowledged the amounts of the debt due to the defendant company as then standing due. In the replying affidavit, Mr. Ryan swears that the invoices were directed to North West Health Services, because Ms. Foley-Woods told them to do so, a statement that is not rebutted by Mr. Daly's second affidavit which was filed in response. Neither does the plaintiff make any reference to the correspondence or offer any explanation or rebuttal. In these circumstances it is clear in my view that the claiming creditor, the defendant in these proceedings, has made out a case that the debt is indeed due and owing by the plaintiff.

The question then arises whether the defendant has either refuted that allegation of debt or has in rebuttal established if not a convincing case at least a bona fide substantial dispute. The fundamental point that Mr. Noel Daly makes in his two affidavits and that is set out in the correspondence in reply to the letters of claim is that Ms. Foley was acting as agent in behalf of a disclosed principal. It must first be noted - crucially in my view - that nowhere is this stated. The affidavits filed on behalf of the plaintiff simply make the assertion but do not fortify it with any reference to a document that could in any respect be described as contractual or even that contain a clear statement as to this asserted status of the plaintiff or Ms Foley-Woods.

Mr. Daly says that the original April 2007 fee proposal note that was endorsed by Ms. Foley envisaged that a further deed of appointment might be executed. He exhibits a draft deed in which the employers described as North West Healthcare Limited, but that obviously is not a contractual document since it was not executed. It is impossible in the circumstances to infer that the Architects were now to understand that they were to deal with an entirely separate legal entity because a draft deed was circulated.

As I mentioned above, Mr. Ryan, in his replying affidavit, states without subsequent contradiction that the invoices were sent as directed by Ms. Foley. Mr. Daly says that several versions of the proposed deed of appointment were circulated, but in fact none was executed, and since that is the case, it obviously does not mean that the Architects were aware that Ms. Foley was acting merely as agent.

The plaintiff company has established no basis for considering the April 2007 agreement as anything other than what it says. The invoices do not help the plaintiff. Neither does the fact of payment of most of the invoices out of an account in the name of another company. Even there, some inconsistency is evident from the payment of two of the invoices by funds out of the plaintiff company's account. It seems to me that just as Mr. Daly is correct in saying that the mere payment of two invoices by the plaintiff company does not of itself create a contractual relationship, similarly the payment of other invoices by cheques drawn on the account of North West Healthcare Development Co. Limited cannot of itself alter the pre-existing contractual relationships without notice expressly providing for a change.

The letters and e-mail messages which are unaddressed in Mr. Daly's second affidavit provide supporting evidence of the acceptance of the amounts due in the invoices.

In respect of Mr Daly's points as above enumerated, I will deal with them in turn in summary form.

1. Mr Ryan's explanation furnishes a complete answer to this.
2. The payment of the invoices by the plaintiff does not as Mr Daly argues make it liable; neither does the payment by NWHC absolve the plaintiff if it is otherwise liable.
3. (a) I think that the height of this contention is that there is a dispute as to some of the debt but that is not a reason for restraining the petition, according to the second of the quotations from Keane J set out above.

(b) The replying affidavit is an effective rebuttal of these arguments. (c) The conduct of the plaintiff is inconsistent with the existence of a genuine issue.

4. An unexecuted draft cannot furnish a basis for overturning a written agreement, one of whose terms is that a superseding deed must conform to its own provisions. Still less could it by implication replace one of the only two parties.

5. There is simply no evidence beyond mere repeated assertion which is in conflict with the documentary evidence and the behaviour of the parties that the defendant was aware that the actual contracting party was other than stated.

6. The planning application did not effect a change in contractual relationships.

7. This again is not a matter that would necessarily effect an implied alteration of contracting parties. And it appears to be actually contradicted by the deponent himself when in paragraph 3 of the grounding affidavit he says that the "plaintiff ... is a private limited liability company . . . provides hospital planning services to hospitals and to service providers such as engineering companies or architects providing a turnkey service to entities seeking to develop private hospitals."

8. No material basis in this reference to previous dealings is provided from which it could be inferred that the express written terms of the agreement were overridden. The point made is actually a negative one.

9. This is not a legitimate objection. If the debt is owing by the plaintiff to the defendant the point does not arise.

10. A creditor is entitled to invoke the section if there is a debt due which is not the subject of bona fide dispute on substantial grounds.

Summary & Conclusion

In summary, it seems of me that there was a clear written agreement contained in the letter and endorsement in April, 2007. The contracting parties were the defendant and the plaintiff. There was nothing to suggest that Ms. Foley and/or the plaintiff company was or were acting as agents for any other body or person. The existence of the debt, its amount and the fact that it continued to be owed is stated repeatedly in the letters and e-mail messages to have been acknowledged as being due by the plaintiff company. There is accordingly no basis for concluding that there is a substantial bona fide dispute as to the debt in this case.

It follows that the s. 214 procedure has not been adopted by the defendant company in respect of a legitimately disputed claim and it is not an abuse of process.

The application for an interlocutory injunction must accordingly be refused.