

## THE HIGH COURT

2005 No. 239 COS

**IN THE MATTER OF MARES ASSOCIATES LIMITED  
AND IN THE MATTER OF THE COMPANIES ACTS, 1963 – 2003**

**Judgment of Miss Justice Laffoy delivered on 23rd February, 2006**

1. This is a petition by Haier Electrical Appliances Company Limited (the Petitioner), a company registered in the Peoples' Republic of China, as a creditor, to wind up Mares Associates Limited (the Company), a company which was incorporated in the State in July, 1991.

2. The basis on which the Petitioner claims that the Company is indebted to it is set out in the petition as follows:

"The Company is indebted to your Petitioner in the sum of €1,973,721 pursuant to the terms of an Agreement dated 15th August, 2003 between [the Petitioner], Haier Europe Holdings BV, Haier Europe Trading Srl, the Company and Mr. Frans Jamry, and the terms of a Guarantee Letter dated 29th August, 2003 issued by the Company and Mr. Frans Jamry to [the Petitioner] whereby a pre-payment of €2 million was made by [the Petitioner] to the Company by way of Advance Amount. Under the terms of that Guarantee the Company were to repay the Advance Amount by way of deduction from its commission payments and the entire of the Advance Amount was to be fully discharged by no later than 15th August, 2008. The said Guarantee Letter also sets out the terms on which the Advance Amount would become immediately due and payable by the Company and this included the sale, transfer or disposal of assets by the Company, or any subsidiary of the Company other than in circumstances where [the Petitioner] had given its prior consent. In breach of the terms of this Guarantee Letter, Mares (GB) Limited, a subsidiary of the Company, by Agreement dated 22nd July, 2004 sold its assets to OEM Domestic Appliances Limited and Mr. Brian Johnson. As a result, the sum of €1,973,721 is now due and payable, being the balance of the Advance Amount after all fair and true credits have been allowed."

3. The petition then sets out the text of a demand served by the Petitioner, acting through its solicitors, on the Company on 3rd May, 2005 under s. 214 of the Companies Act, 1963 (the Act of 1963), and asserts that more than three weeks had passed since the demand but that the Company had neglected to pay or satisfy the debt in whole or in part, that the Company was insolvent and unable to pay its debts, and that, in the circumstances, it is just and equitable that the Company should be wound up.

4. The petition was verified by an affidavit of Genyong Qiu, the Secretary of the Petitioner, who merely averred that such statements in the petition as relate to the acts and deeds of the Petitioner are true and such statements as relate to the acts and deeds of any other person or persons he believes to be true.

5. In response to the petition, an affidavit sworn by Frans Jamry (Mr. Jamry) was filed. Mr. Jamry described himself as the attorney of the Company and as the principal and owner of the companies within the Mares Group. Mr. Jamry averred that the petition had been presented in the context of an existing dispute and existing litigation between the Company and the Petitioner and asserted that the petition is an attempt to sidestep or pre-empt a determination of the issues in dispute between the parties under the contracts between them. Mr. Jamry exhibited copies of three agreements in his affidavit: what is called a "Marketing Co-operation Agreement" between the Petitioner and the Company dated 15th August, 2003; a Guarantee Letter from the Company to the Petitioner dated 29th August, 2003, which is referred to in the petition; and the agreement dated 15th August, 2003 which is referred to in the petition. Mr. Jamry admitted that the Petitioner made an advance payment of €2 m. to the Company on foot of the Marketing Co-operation Agreement and that, in that context, the Guarantee Letter was entered into between the parties. However, he averred that it is not correct to say that the Petitioner is owed the amount claimed in the petition for the following reasons:

(a) Having regard to the conduct of the Petitioner, he disputes that the "automatic payback clause" in the Guarantee Letter can be enforced in the manner attempted by the Petitioner.

(b) Neither the amount claimed by the Petitioner, nor any amount, is due to the Petitioner as against the advance payment, taking account of the persistent under-recording and underpayment of commissions on a historic basis, which payments would be set off against the advance payment. If the Company were accorded all just credit and allowances in relation to the commissions payable to it under its agreements with the Petitioner, the Company would be owed a surplus over and above the advance payment of the order of over €1 m.

(c) While an agreement was concluded between one of the Company's subsidiaries and OEM and Brian Johnson to sell aspects of the undertaking of the subsidiary in 2004, the sale was a necessity into which the Company was forced in the light of the Petitioner's conduct.

(d) The Company initiated proceedings against the Petitioner and other parties in the Court of Varese in Italy in December, 2004, claiming, *inter alia*, rescission of agreements between the parties, damages for not less than €15 m. and a declaration that "as a consequence of the separation of the relationship between the parties the petitioner is entitled to a credit for his advance payment minus all adjustments and amounts payable to the Company".

6. A short affidavit in response to Mr. Jamry's affidavit was sworn by Mr. Qiu on 13th September, 2005 in which, having recorded Mr. Jamry's admissions that the Petitioner made the advance payment, that an agreement was concluded to sell aspects of the undertaking of one of the subsidiaries of the Company, and that the Company must account to the Petitioner for the sum of €2 m., albeit in the context of the proceedings pending before the Italian courts, and having stated that under the Guarantee Letter the advance payment of €2 m. was repayable on the sale, transfer or disposal of assets by the Company or any subsidiary of the Company, other than circumstances in which the Petitioner had given its prior consent which it was asserted was not disputed by Mr. Jamry, and having averred that the Petitioner did not at any time give its consent to the Company to dispose of any part of its undertaking, Mr. Qiu averred that the advance payment "is now immediately repayable by the Company". Mr. Qiu also disagreed with Mr. Jamry that the litigation in Italy has any bearing on the application to wind up the Company.

7. The test to be applied by the court on hearing a petition to wind up a company where the company disputes the debt is stated as follows by McCracken J., delivering the judgment of the Supreme Court in *Re WMG (Toughening) Limited* [2003] 1 I.R. 389:

"[The] 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 by this Court in *In re Pageboy Couriers Limited* [1983] I.L.R.M. 510. The passage reads at p. 512:

"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."

8. Although the Company admits that it received the sum of €2 m. from the Petitioner and further admits that it has to give credit for it against sums due to it by the Petitioner, it is unquestionably the case that the Company disputes the debt on which the Petitioner purported to found the s. 214 demand. It is not merely a question of the Company disputing that the debt is due at this time, as was argued on behalf of the Petitioner. The question for determination is whether the Company has established that the dispute is bona fide and on substantial grounds. In my view, it has.

9. Although under clause 2 of the Guarantee Letter the sale of assets of a subsidiary of the Company without the prior written consent of the Petitioner, which I understand the Company accepts occurred, triggered the immediate repayment of the sum of €2 m., or so much of it as was then due, the Guarantee Letter was not a free-standing agreement and, as is clear on its face, and it was interconnected with the agreement of 15th August, 2003 involving three companies in the Haier Group, the Petitioner, a Dutch company and an Italian company, as well as the Company and Mr. Jamry and also interconnected with the Marketing Co-operation Agreement. The case made by Mr. Jamry on affidavit, which is considerably more expansive and detailed than the summary I have outlined earlier, is that, arising from the totality of the dealings between the parties, the Company is owed in excess of €1 m. by the Petitioner, after giving credit for the payment of €2 m. which the Company admittedly received from the Petitioner. What establishes the Company's bona fides, in my view, is the fact that the Company had already initiated proceedings against the Petitioner, as well as the Dutch company, the Italian company and a company incorporated in Hong Kong, in Italy before the s. 214 demand was served.

10. The only basis on which it is alleged that the Company is insolvent is its failure to comply with the s. 214 demand. As I have stated, I consider that the Company has established a bona fide dispute on substantial grounds in relation to the claim embodied in the s. 214 demand, which is being litigated in the Italian courts.

11. On the basis of well-established principles, in my view, the petition must be dismissed.