Neutral Citation Number: [2009] IEHC 312

THE HIGH COURT

2009 3484 P

BETWEEN

COTTON BOX DESIGN GROUP LIMITED

PLAINTIFF

AND

EARLS CONSTRUCTION COMPANY LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 25th day of May, 2009

These proceedings arise out of a petition presented by the defendant (the petitioner) for an order that the plaintiff (the company) be wound up by the Court, the proceedings on the petition being entitled "In the matter of Cotton Box Design Group Limited and In the matter of the Companies Acts 1963 to 2006" (Record No. 2009 No. 159 COS). The chronology on the petition and the plenary proceedings to date has been as follows:

- The petition was dated 1st April, 2009 and presented on that day. It was given a return date of 27th April, 2009. The basis on which the petitioner sought to have the company wound up was that, by reason of non-compliance with a statutory demand under s. 214 of the Companies Act 1963 (the Act of 1963), the company was insolvent. The statutory notice relied on was a letter dated 2nd March, 2009. The petition was grounded on the verifying affidavit of Stephanie Earls sworn on 6th April, 2009 and filed on that day.

- There had been correspondence between the petitioner's solicitors, Matheson Ormsby Prentice, and the company's solicitors, Bell & Carroll, in relation to the debt which the petitioner alleged was due to it by the company prior to the presentation of the petition and between its presentation and the filing of the verifying affidavit.

- On Thursday 9th April, 2009 an application was made to this Court *ex parte* by the company in the petition proceedings seeking an order restraining the petitioner from advertising the petition and proceeding with it. On that day, Edwards J. made an order that the petitioner be restrained until after 21st April, 2009, or until a further order in the meantime, from advertising the petition or proceeding with it. The company was given liberty to issue a notice of motion for an interlocutory injunction returnable for 21st April, 2009. That order was made during the Easter vacation, Thursday 9th April, 2009 being the Thursday before Easter Sunday. An issue which has consumed what I consider to be an unwarranted amount of paper and time in these proceedings is the fact that neither the petitioner nor its solicitors became aware of the making of the interim order until 14th April, 2009. The debate between the parties has gone so far as to extend to consideration as to whether Good Friday is a public holiday. In the overall context of the application which is now before the Court, I consider that the fact that a fax transmission informing the petitioner's solicitors of the making of the order was not actually received until after 5pm on 9th April, 2009 by the petitioner's solicitors to be wholly inconsequential, because no prejudice was caused to the petitioner. The affidavit which grounded the *ex parte* application was sworn by Laura McNern, a director and shareholder of the company, on 8th April, 2009.

- On 17th April, 2009 the plaintiff initiated these proceedings by a plenary summons in which the company sought various reliefs.

- When the petition proceedings came before the Court on 21st April, 2009, the company was given leave to bring a motion in the plenary summons in terms similar to the motion in the petition proceedings returnable for 27th April, 2009. The company's understandable concern was that the listing of the petition proceedings in the legal diary might be damaging to its reputation and create difficulty for it.

- The interim injunction has been continued from time to time. Numerous affidavits have been filed on the interlocutory application, which eventually came on for hearing on 18th May, 2009.

- A statement of claim was delivered by the plaintiff in these plenary proceedings on 23rd April, 2009.

This application

On this application the plaintiff seeks injunctions restraining the defendant from advertising or proceeding with the petition to wind up the company. It also seeks an order dismissing or striking out the petition as being an abuse of the winding up procedure of the Court. This application has to be considered in the light of the totality of the documents filed and delivered and the affidavits filed in both the petition proceedings and in the plenary proceedings.

The law

To find a clear and comprehensive summary of the law relevant to an application to restrain the presentation, advertising or prosecution of a winding up petition, in my view, one has to look no further than the decision of this Court (Keane J., as he then was) in *Truck and Machinery Sales Limited v. Marubeni Komatsu Limited* [1996] 1 I.R. 12. Keane J. referred to the provisions of the Act of 1963 which were relevant in that case and which are relevant in this case, namely:

(1) Section 213, which provides that a company may be wound up if, *inter alia*, the company is unable to pay its debts (para.(e));

(2) Section 214, as amended, which provides that a company shall be deemed to be unable to pay its debts, if a creditor, whose indebtedness is a sum exceeding €1,269.74, has served a demand for payment on the company and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; and

(3) Section 215, which provides that a winding up petition may be presented by, *inter alia*, a creditor.

Keane J. then set out the principle which, in my view, is crucial in this case, stating (at p. 24) as follows:

> "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. That was the effect of the decision of Ungoed-Thomas J. in *Mann v. Goldstein* [1968] 1 W.L.R. 1091, which was subsequently approved of by the Court of Appeal in *Stonegate Securities v. Gregory* [1980] Ch. 576, both of which decisions were expressly adopted by O'Hanlon J. in *In re Pageboy Couriers Ltd.* [1983] I.L.R.M. 510.
>
> The words "any liability" are, however, important: where a company admits its indebtedness to the creditor in a sum exceeding [€1,269.74] but disputes the balance, even on substantial grounds, the creditor should not normally be restrained from presenting a petition."

The issue
In this case, the company contends that it is not indebted to the petitioner in any sum and it alleges that it has an action for damages against the petitioner for breach of the contract which the petitioner asserts has given rise to its debt. In the circumstances, in my view, the core issue is whether the company has shown that the debt claimed by the petitioner is *bona fide* disputed on substantial grounds.

In addressing that issue the Court has had to wade through a Lever Arch file containing 522 pages, mostly comprising affidavits and exhibits, which are replete with factual conflicts, which cannot be resolved. I propose only referring to such of the evidence as I feel throws light on the issue.

The evidence
As I have stated, the petition is based on a s. 214 demand which was dated 2nd March, 2009. It claimed that the company was indebted to the petitioner "in the sum of €173,567, inclusive of VAT at the rate of 21%, plus interest". How this liability is alleged to have arisen is set out as follows in paragraph 7 of the verifying affidavit of Stephanie Earls sworn on 6th April, 2009:

> "I say that on the 8th October, 2007 the petitioner entered into a contract with the Company for the fit out of 46 apartments at a rate of €8,531.48 per apartment (plus VAT) giving a total Contract price of €392,448.08 (hereinafter called "the Contract"). To date, 19 apartments have been completed to the value of €177,905.00 plus VAT. The petitioner has to date paid a total of €316,651.38 plus VAT giving a total figure paid of €400,824.54, inclusive of VAT. This figure includes a deposit and an element of overpayment as against the contractual schedule of payments."

In the next paragraph the deponent averred that the total amount due "in respect of these unpaid invoices is €173,567.00".

Those averments reflect what was represented in the statutory demand dated 2nd March, 2009. However, in my view, they give no inkling as to the real basis of the petitioner's claim. Subsequent to the service of the statutory demand, there had been telephone communication between the company's solicitors and the petitioner's solicitors prior to 27th March, 2009 but whatever transpired in the course of the communication was on a "without prejudice" basis. In any event, by letter dated 27th March, 2009 the petitioner's solicitors set out to explain how the debt arose. Having stated what was subsequently averred to in paragraph 7 of the verifying affidavit of Stephanie Earls, it was stated:

> "Despite these payments, your client persists in its refusal, in breach of contract, to fulfil its contractual obligations without further payment of monies from our client, as demanded by your client during a recent meeting. This further payment is not a requirement of any provision of the Contract. Your client's demand for this payment constitutes illegitimate pressure and economic duress on our client whereby your client is refusing to fulfil its contractual obligations unless further overpayments are made."

There followed a table which was headed "statement of account", which purported to show that the petitioner had overpaid the company the sum of €179,170.48. It is not immediately obvious where that figure comes from, although it is obviously the difference between the figure of €400,824.54 in one column in the statement and the figure of €221,654.06 in the other column in the statement. The evidence indicates, and I am accepting as a fact, that the sum of €400,824.54 was actually paid by the petitioner to the company (inclusive of VAT) in respect of the relevant contract, although, as far as I can see, the company has not acknowledged that fact plainly anywhere in the vast amount of documents which the company has put before the Court. What I found to be really puzzling was where the figure of €221,654.06 came from. It seems to be the petitioner's assessment of the fit out of 19 apartments, with 3 additional items and a certain element of VAT. Apparently, certain documentation accompanied that letter, which is not before the Court. There was reference to a schedule of works prepared by the petitioner "arising from a forensic measurement of the fit out of each of the 19 apartments". The crucial factor is that the case made by the petitioner's solicitors in the letter of 27th March, 2009 was that the alleged overpayment of €179, 170.48 was fully recoverable from the company on the basis that the company was "in breach of contract by refusing to fulfil its obligations" to the petitioner.

The next paragraph of the letter indicates that, notwithstanding that it was suggested later in the letter that the company had not produced any evidence or even a basis that there was a legitimate dispute with regard to the amount claimed, suggests that the petitioner's solicitors were aware of the position the company was adopting, in that it was stated:

> "Your client seems to be relying on a document prepared by it dated 3rd December, 2007 and sent to our client. This document contains figures which do not reflect the Contract. This appears to be the sole basis upon which your client claims a right to additional monies. Our client has informed us that the payment of monies on foot of this document were made in good faith and based on the honest and reasonable belief that your client had not unilaterally amended the figures contained in the Contract and that matters would be adjusted in final accounting."

That letter from the petitioner's solicitors to the company's solicitors obviously crossed a letter of the same date, 27th March, 2009, from the company's solicitors to the petitioner's solicitors, which also referred to telephone communications, which were "without prejudice". In this letter, the company's solicitors expressed surprise that the petitioner was proceeding with the petition notwithstanding the fact that the company's solicitors had forwarded copies of the agreements and invoices which it was asserted clearly sustained the company's case. A warning was given that publication of a petition would be treated as an effort by the petitioner to defame the company and as an undue use of court procedure. A further letter of 31st March, 2009 from the company's solicitors was sent by fax transmission at 17.45pm on that day to the petitioner's solicitors stating that it was obvious that the petitioner's solicitors had been misinstructed. The letter further stated that the company was ready, willing and able to complete the contract and asserted that the petition was an abuse of court procedure.

The response of the petitioner's solicitors in a letter of 1st April, 2009 contained the following paragraph:

> "The central point is that you have not provided any evidence of your client's solvency and ability to pay its debts. Our client has very legitimate concerns about your client's solvency that have not been addressed and is not willing to allow on site an insolvent contractor who has been overpaid and has not provided goods and services to the value of the overpayment. This would jeopardise the success of the project further. Your contention that your client is ready, willing and able to complete the Contract between our respective clients is not supported, and is not accepted."

Later in the letter, it was stated that no basis had been given or particularised in relation to the allegation of breach of contract against the petitioner. That letter was misconceived. The central point was not the question of the solvency of the company or its ability to pay its debts. The central point was whether the petitioner was a creditor of the company in the sense of the company being indebted to it in respect of a debt which was not disputed in good faith and on substantial grounds. The petitioner's solicitors also alleged that the company had not produced any evidence or basis that there was a legitimate dispute with regard to the sum which it was alleged was due and owing to the petitioner.

The foregoing outlines the interaction which had taken place between the parties at legal adviser level before the petition was presented on 1st April, 2009. As I understand the position, no "unpaid invoices" amounting to €173,567.00 had been furnished by the petitioner to the company. All that had happened was that the s. 214 demand had been served and the explanation contained in the letter of 27th March, 2009 was given.

As regards the contractual relationship of the petitioner and the company, the following facts emerged from the affidavit of Laura McNern sworn on 8th April, 2009, which grounded the *ex parte* application for the interim injunction and a supplemental affidavit sworn after the interim order was made:

- On 8th October, 2007 the company entered into a contract (the October 2007 contract) in writing and executed on behalf of the parties with the petitioner to fit out 46 apartments in the petitioner's apartment development at Ballinasloe, County Galway. There was a separate contract between the parties in relation to the fitting out of a nursing home development, which it is common case has nothing to do with these proceedings, although its existence is conducive to confusion because the petitioner occasionally made composite payments under that contract and the October 2007 contract. The October 2007 contract was exhibited. It discloses that the fit out was to be "as per inventory agreed" and that the total cost, €392,448.08 represented the VAT exclusive costs for 46 apartments, averaging €8,531.48 per apartment. It provided that the contract total was based on a sample apartment and was subject to a full site survey. It also provided that any "further selections or additions" made after the signing of the contract would be treated as a separate order and charged for accordingly. The payment terms were set out as follows:
    (i) A deposit payment of 40% of the contract value was payable on the signing of the contract;

    (ii) An interim payment of 30% of contract value was payable prior to the commencement of fit out on site;

    (iii) Final payment of 30% of contract value was payable within 7 days of sign off.

- Additional amendments and upgrades were requested by the petitioner throughout the fit out of the 4 show apartments throughout October and November 2007, which the company acceded to at a revised figure. On 3rd December, 2007 the company issued two invoices in respect of the fit out of the 4 show apartments, which aggregated €63,315.96 and which were discharged in full.

- The company issued post-survey costings in relation to the remaining 42 apartments in December 2007, which showed a revised total fit out cost, exclusive of VAT, for the fit out of the remaining 42 apartments at €472,449.26. On 3rd December 2007 the company issued another invoice claiming a sum of €228,665.44 in respect of the 40% "initial payment on the remaining apartments and communal areas", i.e. the deposit on the 42 apartments, plus VAT. The 40% was based on the revised total cost in relation to the 42 apartments of €472,449.26.

- On 27th March, 2008 the company issued an invoice for €171,449.07 in respect of the 30% interim payment on

the 42 apartments plus VAT. Again, the 30% was based on the revised total cost of €472,449.26.

• On 9th September, 2008 the company issued an invoice claiming €31,392.49 (inclusive of VAT) in respect of the final balance due on 8 apartments which had been fitted out and signed off on. That invoice was exhibited in a supplemental affidavit sworn by Ms. McNern on 20th April, 2009.

• On 4th December, 2008 the company issued an invoice in the sum of €30,207.70 (inclusive of VAT) in respect of "the final 30% due" on another 7 apartments which had been completed.

In summary, as I understand the company's position, it is that under the October 2007 contract, as varied by the revised December 2007 costings, its entitlement to have all of the foregoing invoices discharged in their entirety had accrued by December 2008, when the fit out of 19 apartments had been completed. The invoices, including the invoices in relation to the 4 show apartments, aggregate in amount €525,030.66 inclusive of VAT. As I have stated, I am accepting that the petitioner paid a total of €400,824.66 to the company. The "bottom line", as it were, in the grounding affidavit of Ms. McNern was that the petitioner owed the company a further €129,224.10 inclusive of VAT on foot of the invoices, which figure is slightly more than the difference between the aggregate value of the invoices and what the petitioner appears to have paid. No explanation of the difference, about €5,000.00, is obvious to me.

In broad terms, the invoices sent by the company to the petitioner represented 100% of what the company claims to be due in respect of the 19 apartments which it is common case have been fitted out and 70% (the initial deposit and the interim payment) of the costs in relation to the 27 apartments which remain to be fitted out, in all cases on the basis of the revised costings from December 2007.

In response to Ms. McNern's affidavit, in an affidavit sworn on 20th April, 2009, Ms. Earls has tabulated all of the payments made to the company by reference to dates and cheque numbers and has exhibited bank statements and cheque stubs. Some of the cheques included payments due under the nursing home contract. It is not possible to definitively marry the cheque payments to the invoices exhibited by Ms. McNern, save in the case of the invoice dated 9th September, 2008. In relation to the two invoices dated 3rd December, 2007 in relation to the show apartments, as I understand it, the petitioner acknowledges that it paid those invoices in full. It seems also to be the case that the petitioner accepts that the proper inference to be drawn from the payment made by the petitioner on 2nd July, 2008 by a cheque for €177,000.00, when considered against a statement of account as of 25th June, 2008 exhibited in a further affidavit sworn by Ms. McNern on 23rd April, 2008, is that the petitioner was acknowledging that a balance of €103,644.44 was due in July 2008 in respect of the initial deposit. That sum was based on the revised costings presented by the company in December 2007, as was submitted by counsel for the company. By way of general observation, I feel constrained to point out that I find it preposterous that the Court is asked to perform an exercise such as is reflected in the preceding paragraph and in the succeeding paragraph on an interlocutory application.

The response of Ms. Earls on behalf of the petitioner to the company's contentions in two affidavits sworn by her on 20th April, 2009 and 23rd April, 2009 may be summarised as follows:

• While the petitioner received from the company a single sheet purporting to set out revised costings in December 2007, it did not receive the additional documentation backing up those costings.

• The petitioner never agreed to vary the terms and conditions of the October 2007 contract. While many of the costings figures have been varied from those provided for in the contract, some items were omitted altogether. That vague assertion underlines the lack of clarity as to the facts which require to be established to enable a determination to be made as to whether the company is indebted to the petitioner or vice versa.

• The petitioner has overpaid the sum of €172,438.28 (inclusive of VAT), which is a slight revision of the figure set out in the s. 214 demand and the petition. The document exhibited to support this revision echoes an assertion made elsewhere, that the very first invoices, which related to the show apartments, showed a VAT inclusive figure which was approximately €3,300.00 too high. It also includes a statement which highlights the absurdity of the task which the parties have imposed on the Court on an interlocutory application, in that it states that there was no request to re-survey the property by the petitioner and "it was deemed by [the petitioner] that all necessary surveys, site visits, etc., had been included in the tenders". Maybe that is correct, but the company relies on the wording of the contract, which I have quoted, and which was expressly stated to be subject to full site survey.

• Ms. Earls is perplexed by the increase in the company's claim against the petitioner from €129,224.00 (inclusive of VAT) in her grounding affidavit to €188,354.04 (exclusive of VAT) in her supplemental affidavit. Whether the increase is justified or not, the explanation for it is obvious. The increase is to cover what Ms. McNern describes as the "remaining value of the contract" in relation to the 27 apartments which the petitioner has refused to allow the company to complete despite the company asserting that it is ready, willing and able to do so. The abandonment of VAT inclusive figures in relation to its claim against the petitioner by the company was subsequently carried through to the statement of claim. I mention this merely to emphasise again the complexity of the task with which the Court has been burdened, even if the move from VAT inclusive figures to VAT exclusive figures may be justified, having regard to the claim the plaintiff is making in the plenary proceedings.

• The petitioner asserts that the €177,000.00 payment made in July 2008 was made with great reluctance and in circumstances where the company was not prepared to carry out any works on the site without it being made. While there is an implicit acknowledgement that the sum included €103,665.44 representing the balance of the initial deposit based on the revised costings, the petitioner contends that it was made without any concession as to the revised costings.

• The petitioner asserts that serious overcharging by the company was discovered and notified to the company on 22nd December, 2008 and that reductions conceded by the company reflect this. Even if this assertion is true, by its vagueness it underlines again the futility of the exercise which the Court is performing.

What the evidence, as summarised above, discloses is a total lack of consensus between the petitioner and the company

as to the terms and effect of the October 2007 contract and as to whether revised costings were agreed in December 2007, as the company contends but the petitioner denies. The conflict on those issues cannot be resolved on this application. Nor can the Court determine whether –

(a) there was an overpayment on the part of the petitioner, or

(b) if there was, whether it is recoverable on demand, or

(c) the current status of the contract, and in particular, whether the circumstances have given rise to breach of contract on the part of the petitioner, as pleaded in the statement of claim, on the basis that the petitioner has purported to rescind and is preventing the company from completing the contract, so as to give rise to the company's claim, which has escalated further and is now particularised at €204,825.29 in the statement of claim.

Conclusion
To reiterate the petitioner's position, it is that the company is indebted to it in the sum of €172,438.28 (including VAT) representing an overpayment which it is alleged was made by the petitioner to the company. The company's position is that not only was it not overpaid, but the petitioner has further liability to it on foot of invoices already issued and a claim for damages arising from an alleged breach by the petitioner of the underlying contract.

The most recent item of correspondence between the parties prior to legal adviser involvement and the service of the statutory demand dated 2nd March, 2009 exhibited is an e-mail dated 23rd January, 2009 from Alan Morris, the financial controller of the company, to Ms. Earls suggesting a way forward with the fit out project, which had followed discussions between the parties. On the basis of the documentation as presented to the Court, the statutory demand made some five or six weeks later would appear to be the genesis of the petitioner's claim predicated on the basis of the petitioner being entitled to a repayment of an alleged overpayment. For the reasons set out at the end of the analysis of the evidence before the Court, it is impossible to conclude, on the basis of the evidence, other than that the company is acting in good faith and on substantial grounds in disputing the petitioner's claim to be entitled to the sum in question. Adopting the terminology used by Keane J. in the *Truck and Machinery* case, I am satisfied that the company has established at least a *prima facie* case that the prosecution of the petition "would constitute an abuse of process". That is sufficient for the Court to restrain the advertising and the further prosecution of the petition.

This judgment is intended to demonstrate the extent of the factual conflict between the parties. That conflict is of an order that had the petitioner sought to pursue the claim and recover the sum which grounds the petition by way of summary summons in this Court, the conclusion would inevitably be that the matter would have to go to plenary hearing. Apart from factual disputes, the issues between the parties raise questions of contract law. I find it unnecessary to express any view on the submissions made by the parties on the law, because of the absence of an agreed or undisputed factual matrix within which the law could be applied.

Allegations of failure to make full and accurate disclosure on the part of the company
In the petitioner's defence of the company's application for an interlocutory injunction, the petitioner from the outset has made the argument that, in the exercise of its discretion, the Court should have regard to the fact that on the *ex parte* application for the interim injunction the company failed to put before the Court any of the correspondence from the petitioner's solicitors to the company's solicitors in the period leading up to the presentation of the petition. In particular, it was submitted that the Court should have been apprised of the petitioner's solicitors' contention in correspondence that the company's solicitors had not produced evidence for, or even set out the basis of, their contention that there was a legitimate dispute in relation to the amount which the petitioner claimed was owing to it by the company. Further, the Court should have been apprised of the petitioner's solicitors' request for evidence of the company's solvency and ability to pay its debts and that no such evidence had been provided.

On the basis of what I have stated at the outset as to the core issue, and my finding that there is a *bona fide* and substantial dispute as regards the company's alleged indebtedness to the petitioner, it will be clear that I do not consider that the petitioner had any right to seek evidence of solvency or ability to pay debts from the company. As to the issue of the alleged indebtedness of the company to the petitioner and the status of the petitioner to present the petition, which arose on the interim application, undoubtedly it would have been preferable if Ms. McNern in her affidavit had exhibited all of the correspondence from the petitioner's solicitors to the company's solicitors, starting with the s. 214 demand, which was in letter form. However, the petition was exhibited in Ms. McNern's grounding affidavit and it set out the text of the s. 214 demand. I do not think that there was a failure on the part of the company to make sufficient and candid disclosure of the type referred to by Kelly J. in *Adams v. Director of Public Prosecutions* [2001] 2 I.L.R.M. 401, which would prompt a Court to exercise its discretion to set aside an order obtained *ex parte* or would carry weight in relation to the exercise of its discretion to grant or refuse an interlocutory injunction.

Order
There will be an order dismissing the petition.