THE HIGH COURT

[2012 No. 355 COS]

IN THE MATTER OF R.E.P. LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

Judgment of Ms. Justice Laffoy delivered on 1st day of October, 2012.

The petition

1. Allied Insulation Limited (the Petitioner) presented a petition to wind up R.E.P. Limited (the Company) on 25th June, 2012. The petition was returnable on 23rd July, 2012. The basis on which the Petitioner contended that the Court should make an order winding up the Company as set out in the petition is as follows:

(a) the Petitioner has supplied goods to the Company in respect of which the Company is indebted to the Petitioner;

(b) there is no *bona fide* defence or dispute in relation to the debt owed by the Company to the Petitioner;

(c) the Company is indebted to the Petitioner in the sum of €61,836 and despite a demand duly served on the Company it has failed or refused or neglected to pay or secure or compound the debt to the satisfaction of the Petitioner; and

(d) in all the circumstances the Company is unable to pay its debts as they fall due.

Although this is not expressly stated in the petition, it is clear that the demand on which the Petitioner is relying is a demand pursuant to s. 214(a) of the Companies Act 1963 (the Act of 1963).

2. In fact, the debt is disputed by the Company and has been since before the petition was presented, as the chronology which can be extracted from the affidavits, and the exhibits therein, filed in support of and in response to the petition reveal. The issue is whether it is *bona fide* disputed.

The chronology

3. According to the verifying affidavit of John Kelly sworn on 21st June, 2012 the sum of €61,836 represents the balance due by the Company to the Petitioner on foot of four invoices in respect of the supply of insulation products by the Petitioner to the Company. The invoices, copies of which are exhibited, being:

(a) invoice 530 dated 20th November, 2009 for €24,392.34;

(b) invoice 531 dated 21st December, 2009 for €20,470.32;

(c) invoice 532 dated 6th January, 2010 for €27,254.62; and

(d) invoice 533 dated 13th January, 2010 for €10,193.04.

All of the foregoing invoices appear on the Company's statement of account with the Petitioner as at 23rd May, 2012 exhibited in the replying affidavit on behalf of the Company sworn by Michael McLoughlin on 18th July, 2012.

4. That statement of account shows the running balance due to the Petitioner as at 14th October, 2010 at €66,835.71. That is consistent with the contents of an e-mail dated 27th October, 2010, which was exhibited in the grounding affidavit, from the Company's account manager, Elaine O'Sullivan, to Mr. Kelly, in which it was stated that the correct balance on a statement which had been furnished by the Petitioner to the Company "should be €66,835.71", and the reason why that figure was the correct balance was set out. It was accepted by the Petitioner that the amount specified by Ms. O'Sullivan was, in fact, the correct balance. There is consensus on the evidence that only one payment was made by the Company to the Petitioner thereafter, that is to say, a payment of €5,000 which was made on 23rd November, 2010. That left a balance of €61,835.71 due by the Company to the Petitioner as per the statement of account, which is the figure, which has been rounded to the nearest euro, which it is claimed by the Petitioner is due and owing by the Company to the Petitioner. In the replying affidavit of Mr. McLoughlin it is averred that, in relation to the debt, there are credits in the sum of €14,449.68 plus VAT, giving a total credit of €17,484.11, due to the Company. These have been itemised on a statement exhibited by Mr. McLoughlin. Eight items appear on that statement which appear to relate to alleged undersupply and overcharging. They range in date from 18th May, 2009 to 13th January, 2010. On the evidence before the Court, the replying affidavit of Mr. McLoughlin mentioned the credits alleged to be due for the first time.

5. Apparently, the first involvement of the Petitioner's solicitors in this matter was on 12th December, 2011, when, by a letter of demand of that date addressed to the Company, payment of the sum of €61,836 was demanded. The letter was stated to constitute a demand within the meaning of s. 214 of the Act of 1963. On 23rd December, 2011 the solicitors on record for the Company responded on behalf of the Company to the Petitioner's solicitors. There were a number of components in the response. The first was that no details of any kind had been furnished indicating how the figure of €61,836 was made up or to what it related. Secondly, it was contended that the demand was not a demand which had been served on the Company "by leaving it at the registered office of the company" as required by s. 214(a) of the Act of 1963, as it had been sent by registered post to the Company's "trading address". Thirdly, it was stated that the sum demanded appeared to relate to the sale price of insulation materials purchased by the Company from the Petitioner, which stock was at the time in the Company's warehouse and unsaleable, because it did not carry the mandatory conformity mark known as the CE mark and, therefore, was unsaleable. It was further asserted that the sum claimed represented the sale value of the stock, not the cost price. The letter also addressed the broader context of the relationship between the Petitioner and the Company, which I do not consider it necessary to address for present purposes.

6. The response of the Petitioner's solicitors by letter dated 20th January, 2012 made the following points:

(a) The "Rules of the Superior Courts and the Companies Act provide that statutory demand under section 214 may be

served by registered post on the registered office of the company". That statement, strictly speaking, is not correct. However, it was further stated that at the time of the sending of the letter the Company's registered office and its trading officer were one and the same according to the records maintained in the Companies Registration Office (CRO).

(b) The full details of the outstanding amount had already been furnished and the e-mail dated 27th October, 2010, copy of which was attached, was pointed to, as was the fact that a further payment had been made on 24th November, 2010. Copies of the statements were attached.

(c) It was stated that there was no requirement for a CE mark in respect of the stock.

This elicited a further letter dated 26th January, 2012 from the Company's solicitors in which they referred to the provisions of s. 214(a), contending that a s. 214 demand could not be served by registered post. They also characterised the Petitioner's assertion that it was unaware of the requirement for a CE mark in respect of the stock as "disingenuous in the extreme". It was stated that any proceedings would be defended in full and costs would be sought.

7. A number of items of correspondence directly from Mr. McLoughlin to Mr. Kelly then intervened, notwithstanding that the Company was being represented by a solicitor. The substance of the communications was that the Petitioner should remove the stock in issue, which had been supplied by the Petitioner and which the Company contended was not saleable, from the Company's premises and issue a credit note for the goods involved in approximately the sum of €71,736, the make –up of which sum was not explained.

8. What happened next was that a further s. 214 demand was issued by the Petitioner's solicitors on 24th February, 2012, which demanded payment of the outstanding amount of €61,836 within twenty one days which was obviously delivered by hand to the Company's registered office, as was implicitly acknowledged in the response dated 9th March, 2012 from the Company's solicitors. In that response the Company's solicitors maintained the position that no details of any kind had been furnished as to how the figure was made up, that the sum demanded appeared to relate to the sale price, and that the stock was unsaleable because it did not have a CE mark. Once again it was asserted that any proceedings would be defended in full. In the interim, however, by letter dated 27th February, 2012 from the Petitioner's solicitors to the plaintiff's solicitors it was denied that the stock in issue, which was then in the possession of the Company, required a CE mark, stating that both the NSAI and the European Commission had separately confirmed that the stock did not require a CE mark, which only became mandatory on 1st August, 2010 and did not have retrospective effect.

9. The last communication before the Court is a letter dated 16th March, 2012 from the Petitioner's solicitors to the respondent's solicitors contending once again that the Company had full details of the outstanding amount, which, on the evidence, I am absolutely satisfied was correct, and stating that the amount outstanding did not represent the retail price of the stock but rather the trade price which was what the Petitioner had always charged the Company. Once again it was denied that the stock (ductwrap) required a CE mark. It was asserted that any failure to sell the ductwrap was not an answer to the Petitioner's demand in circumstances where –

(a) the Company had held the stock for over two years since October 2009,

(b) the Company had never previously sought credit for the stock,

(c) the Company had never previously sought to return the stock to the Petitioner,

(d) the Company had been making regular payments in respect of the debts due to the Petitioner, which stopped, it was alleged, because of the Company's inability to pay, and

(e) the Company had sold some stock which related to the relevant invoices.

It was asserted that the Company's attempt to mount a defence to the Petitioner's claim was without *bona fides* and without merit and completely disingenuous. That was the state of play, on the evidence, when the petition was presented some three months later.

10. However, as regards the contention of the Petitioner's solicitors that the Company ceased making payments to discharge its debt to the Petitioner because of "inability to pay", in the context of the broader picture of the relationship between the Petitioner and the Company, Michael Ryder, the majority shareholder of the Petitioner, who at the time was an employee of the Company, sent an e-mail dated 8th February, 2011 to Mr. Kelly in which he stated, *inter alia*, that the Company had –

". . . in extremely difficult trading difficulties, tried to help [the Petitioner] at all times. They have as you know assumed the [Petitioner's] debt to Owens Corning, paid it in full, and now are carrying the 2 year old un-saleable stock that it represented. To be fair about matters – this has placed a huge burden on [the Company] – which is precisely a major reason why they are finding it difficult to discharge the remaining debt to us."

Owens Corning was the ultimate supplier of the product.

The replying affidavit

11. In addition to the matters to which I have adverted when outlining the chronology, Mr. McLoughlin deposed to the following matters in his replying affidavit:

(a) Mr. McLoughlin alleged that Mr. Kelly did not have the permission of Mr. Ryder, the eighty per cent shareholder of the Petitioner, to bring the petition and Mr. Kelly had no lawful authority to act on behalf of the Petitioner. An affidavit sworn by Mr. Ryder on 20th July, 2012 was filed in response, in which he averred that he attended a board meeting of the Petitioner on 26th October, 2011 with Mr. Kelly, at which a resolution was passed authorising the Petitioner's solicitors to proceed to collect the sums due to the Petitioner. Mr. Ryder denied that the credit of €17,484.11 claimed by Mr. McLoughlin to be due to the Company in the replying affidavit, or any credit, is due to the Company. He averred that neither that sum nor any sum could properly be deducted from the sum of €61,836 due by the Company to the Petitioner.

(b) Mr. McLoughlin averred that ductwrap to the value of €66,590.98, which does not comply with "up to date specifications of the building industry", had been supplied by the Petitioner to the Company and that it is, in effect, unsaleable. Mr. McLoughlin exhibited a number of letters from customers in the insulation business explaining why Owens Corning insulation products were not acceptable to them. The earliest of those letters was 13th September, 2011. Two were from customers in Northern Ireland. The explanation given for unacceptability was the absence of a European CE

mark or a British Standard BBA Certificate. Consistent with what was stated in the final letter from the Petitioner's solicitors to the Company's solicitors referred to above, Mr. Kelly had averred in the verifying affidavit that CE marking of piping insulation only came into place in the European context on 1st August, 2010 and had no retrospective effect. He exhibited an e-mail from an official of the European Commission which corroborated that. He also exhibited an e-mail from an official of NSAI to the effect that there is no mandatory requirement for CE marking in this jurisdiction at present, but that will change in July 2013 as a result of the requirements of the Construction Products Regulations.

(c) Mr. McLoughlin has denied that the Company is indebted to the Petitioner and, in fact, has averred that the Company is due a credit over and above the amount claimed by the Petitioner. That, I assume, is a reference to the sum of €71,736 referred to in the letters which Mr. McLoughlin sent directly to Mr. Kelly in January and February 2012, although no reference is made to that sum in Mr. McLoughlin's replying affidavit.

(d) Finally, Mr. McLoughlin has averred that the Company has acted honourably at all times towards the Petitioner and has purchased materials totalling €1,024,748.59 from the Petitioner and made payments of €962,912.88 to the Petitioner. Coincidentally, *prima facie*, that leaves owing to the Petitioner the outstanding the balance which the Petitioner claims, rounded to the nearest euro (€61,836).

12. As regards what is not to be found in the replying affidavit, there is no refutation of the averment contained in the verifying affidavit of Mr. Kelly, who is a Chartered Certified Accountant, that there is a discernible trend in the accounts filed by the Company in the CRO, copies of which were exhibited, of a decrease of cash, stock, debtors and of an increase in creditors of the Company over the years from 2007 to 2010. Moreover, there is no averment by Mr. McLoughlin that the Company is able to pay its debts as they fall due.

The law
13. The defence advanced by the Company at the hearing of the petition was that the debt is disputed *bona fide* and, accordingly, the petition should be dismissed.

14. The test to be applied by the Court when a company attempts to resist a petition to wind up on the basis that the debt is disputed is well settled and has been reiterated time and again since it was set out as follows by McCracken J. in the Supreme Court in *Re WMG (Toughening) Ltd*. (No. 2) [2003] 1 I.R. 389 (at p. 392):

> "The company is opposing the petition on the basis that the debt referred to therein is the subject matter of a *bona fide* dispute . . ..
>
> 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'."

Application of the law to the facts
15. On the basis of the evidence before the Court, I consider that the characterisation by counsel for the Petitioner of the Company's contention that the debt is *bona fide* disputed as "smoke and mirrors" is justified. I have come to that conclusion because the statement of the Petitioner's account with the Company issued by the Company exhibited by Mr. McLoughlin clearly demonstrates that –

(a) as of 31st January, 2010 the Company had liability for discharge of the balance due on four invoices in issue here,

(b) the Company continued to make payments to the Petitioner until 14th October, 2010, when the balance due, as corroborated by the e-mail of 27th October, 2010 from Ms. O'Sullivan, was €66,835.71, and

(c) a further sum of €5,000 was paid on 23rd November, 2010, reducing the balance to the amount of the Petitioner's demand rounded to the nearest euro (€61,836).

As against that, on the basis of the evidence before the Court, the Company's claim to a VAT inclusive credit of €17,484.11 was first mentioned in the replying affidavit of Mr. McLoughlin. Its claim for a credit of €71,736 mentioned in the letters directly from Mr. McLoughlin to Mr. Kelly is not alluded to at all by the Company's solicitors in the correspondence and the oblique reference to it in the replying affidavit of Mr. McLoughlin does not even set out the amount involved. That leaves the question of the alleged unsaleability of ductwrap to the value of €66,590.98 which is still held by the Company. It is clear on the evidence that that product was supplied to, and accepted by, the Company long before there was any requirement to CE mark such product in this jurisdiction or under European Union law. On the evidence, I am satisfied that the Company cannot resile from payment for the product it accepted, merely because it has not been able to sell it on.

16. While the Court is always astute to ensure that the deployment of a winding up petition by a creditor as a means of recovering the debt due to it is not an abuse of process, contrary to what is contended by the Company in this case, I am satisfied that the presentation of the petition is not an abuse of process. While the Company disputes the debt, in my view, the only conclusion which can be reached on the basis of the evidence is that the debt is not bona fide disputed on substantial grounds, as required by the established law.

Formal proofs
17. I am satisfied that the Petitioner has complied with all the formal proofs in relation to the petition and that this is a proper case to make a winding up order on the basis of a deemed insolvency by reason of non-compliance with the s. 214 demand. Accordingly, there will be an order that the Company be wound up and that Declan Taite and Anne O'Dwyer be appointed joint official liquidators for the purposes of the winding up. Apart from that, the winding up order will be in the usual form.