Neutral Citation Number: [2009] IEHC 264

THE HIGH COURT

2009 169 COS

IN THE MATTER OF LYCATEL (IRELAND) LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 - 2006

Judgment of Miss Justice Laffoy delivered on the 13th day of May, 2009.

Background
On 6th April, 2009, Wavecrest (U.K.) Limited (Wavecrest) presented a petition in this Court to wind up Lycatel (Ireland) Limited (the Company). The basis on which the winding up order was sought was that the company was insolvent and unable to pay its debts, Wavecrest having served a statutory notice under s. 214(a) of the Companies Act 1963 (the Act of 1963) on 11th March, 2009, demanding payment of Stg£255,238.30, which was not complied with. The return date of the petition was 27th April, 2009.

The petition was listed for hearing on 27th April, 2009. On that occasion, counsel for Wavecrest told the court that the petition had not been advertised and that Wavecrest wished to withdraw the petition. When that application was made, a solicitor representing Cronosell Telecom Limited (Cronosell) applied to the court to substitute Cronosell as petitioner on the basis that Cronosell would have a right to present a petition and desired to prosecute this petition. On that occasion, I adjourned the matter until the next motion day, 11th May, 2009, to enable Cronosell to put evidence before the court that it was a person who would have a right to present a petition.

On 11th May, 2009, counsel for Cronosell submitted an affidavit which had been sworn and notarised in the Ukraine on 9th May, 2009, by Ihor V. Bodyak, in which the deponent averred that the Company is indebted to Cronosell in the sum of US$94,161.64 in respect of the provision of telecommunication services from 1st January, 2008, to 28th February, 2009. The deponent further averred that Cronosell's Irish solicitors had, on 3rd April, 2009, served a statutory notice under s. 214(a) of the Act of 1963 on the Company demanding payment of that sum, which notice had not been complied with. Cronosell sought to be substituted as petitioner pursuant to O. 74, r. 18 of the Rules of the Superior Courts 1986 (the Rules).

Opposition to Cronosell's application to be substituted came from counsel for Wavecrest. The court was informed by counsel for Cronosell that the company was not objecting.

The issues
The primary issue for the court, in my view, is whether Cronosell has *locus standi* to apply to be substituted. If it has, an ancillary issue is whether Wavecrest had *locus standi* to oppose the application to be substituted.

The legislation and the Rules
The jurisdiction of this Court to wind up a company is derived from s. 212 of the Act of 1963. The succeeding sections govern the procedure to be followed and the powers of the court. Section 213 sets out the cases in which a company may be wound up. Paragraph (e) thereof is the provision which was originally invoked by Wavecrest and is now being invoked by Cronosell. It stipulates that the company is unable to pay its debts. Section 215 sets out the parties who may petition to wind up, who include creditors. On the basis of the evidence put by Cronosell before the court, I am satisfied that Cronosell is a creditor who would have a right to present a petition and that it would be able to rely on the deemed insolvency provision contained in s. 214. Section 216 deals with the powers of the court on the hearing of a petition to wind up and provides as follows:

> "On hearing a winding-up petition, the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."

I infer that the reason for Wavecrest's opposition to the application of Cronosell is the potential combined effect of s. 220 and s. 218 in the event of the application succeeding. By virtue of s. 220(2), the winding up of a company by the court is deemed to commence at the time of the presentation of the petition for the winding up. Accordingly, if the court has jurisdiction and if it were to accede to the application of Cronosell, the winding up would be deemed to commence on 6th April, 2009, if a winding up order were subsequently made. Section 218 provides that in a winding up by the court, any disposition of the property of the Company made after the commencement of the winding up, shall, unless the court otherwise orders, be void. Although the court was not apprised of this fact formally, the court was left with the understanding that the claim of Wavecrest against the Company had been compromised after the presentation of the petition.

Turning to the relevant rules, O. 74 of the Rules governs the practice and procedure on an application for a compulsory winding up order. Rules 7, 8, and 9 deal with the form of the petition and what happens in the Central Office when the petition is presented. Rule 10 deals with advertisement of the petition and provides that every petition shall be advertised seven clear days before the hearing, once in Iris Oifigiúil and once at least in two Dublin daily morning newspapers. It stipulates the form of the advertisement and the requirement that it shall contain a note at the foot thereof stating that any person who intends to appear at the hearing of the petition, either to oppose or support, shall send notice of his intention to the petitioner within the time and in the manner prescribed by rule 15. Rule 15 deals with the hearing of the petition and the appearances thereon. It requires that a person intending to appear on the hearing of the petition shall serve notice in the prescribed form on the petitioner's solicitor by 5pm on the day prior to the day appointed for the hearing of the petition. The rule further stipulates that a person who fails to comply with it shall not, without special leave of the court, be allowed to appear on the hearing of the petition.

Rule 18, which is the rule relied on by Cronosell, provides as follows:

> "When a petitioner consents to withdraw his petition, or to allow it to be dismissed, or the hearing adjourned or fails to appear in support of his petition when it is called in Court on the day originally fixed for the hearing thereof, or on any day to which the hearing has been adjourned, or if appearing, does not apply for an order in the terms of the prayer of his petition, the Court may, if, and upon such terms as it shall deem just, substitute as petitioner any person who would have a right to present a petition, and who desires to prosecute the petition."

The basis on which Wavecrest opposed an order under O. 74, r. 18 is that the rule is predicated on the petition having been advertised, which was not done in this case.

The authorities relied on by the parties
Counsel for Wavecrest referred the court to two authorities.

The first is a decision dating from 1884 in *Re United Stock Exchange Limited, ex parte Philp & Kidd* (1884) 28 Ch D 183. In that case, a winding up petition had appeared in the court list from time to time over a seven month period, during which it had not been advertised. When counsel on behalf of the petitioner sought leave to withdraw it, the company did not oppose the application. However, a shareholder who wished to oppose it, who had not been cited by service, claimed that he was entitled to have his costs paid. Pearson J., having referred to the relevant section of the Companies Act 1862, then in force and the relevant rule as to advertisements, stated that the course of the proceedings is that the petition is first to be presented, and then the advertisements are issued. In relation to a situation where the petition has not been duly advertised, he asked the rhetorical question whether creditors or contributories had a right to appear. He answered that question as follows:

> "To my mind, until advertisements have appeared no person is a party to the proceedings except the petitioner and the company, and I am at a loss to see how contributories, who are represented by the company until they get a separate existence and locus standi, can have any right to come to court. To my mind it is an entire mistake to suppose that a contributory has a right to appear until after advertisements. I am not referring to cases where there may have been some fraud. It may be that a person who has no *locus standi* otherwise is entitled to come to Court and say that a fraud is being perpetrated. That is an exceptional case. This is not a case of that kind."

The shareholders' application for costs against the petitioner was refused.

> That decision was applied more recently in the second authority cited by counsel for Wavecrest – the decision of the Supreme Court of the Australian Capital Territory in *Re a Company* (1980) 35 ACTR 36, in which judgment was given on 19th September, 1980. In that case, a creditor, having made a statutory demand, presented a petition to wind up the debtor company. The petition was set down for a date to be heard. However, before that date the company settled with the creditor and the creditor sought leave to withdraw the petition in chambers to avoid it appearing in the legal diary published in the *Canberra Times*. Having referred to the decision of Pearson J. in *Re United Stock Exchange Limited*, Kelly J. stated as follows:
>
> "It is clear, therefore, in my opinion, that it is the advertisement which invites other creditors or contributories to become parties and until advertisement of a petition the only parties to it are the petitioner and the company. I am, incidentally, informed by the solicitor for the petitioning creditor that he had received no notice of anybody's intention to support or oppose the petition."

Leave was given to withdraw the petition and a direction was given that the name of the company should not be published.

In my view, neither decision relied on by counsel for Wavecrest is apposite because neither was concerned with a specific power conferred on the court of substitution of a petitioner for a winding up order. The parameters of the jurisdiction in relation to the exercise of such a power must be determined by reference to the rule which creates the power. In other common law jurisdictions the power to substitute is much more elaborate than the rule in this jurisdiction. The important point for present purposes is that in this case the primary issue falls to be determined by reference to the proper construction and application of rule 18.

The Australian case, however, prompts the following observations. The propagation of, and access to, notice of impending compulsory winding up proceedings in 2009 is wholly different to the situation which pertained in 1884 or even 1980. The legal diary for this Court for the following Monday is published on the Courts Service website on the previous Friday. A printed diary is also available. The proceedings are held in open court. The possibility of an interested party becoming aware of such proceedings is no longer dependent on the party or his solicitor being an avid reader of Iris Oifigiúil or the public notices in the national daily newspapers. If a creditor issues a petition but does not advertise it as required by the Rules in the hope of settling with the company, and thus effectively using the process as a debt collection device, he is at risk of interested parties becoming aware of the proceedings and he must endure the consequences which ensue.

The only other authority to which the court was referred is a decision of the Chancery Division of the High Court of England and Wales *in Re Creative Handbook Limited* [1985] BCLC 1. It is not apposite either. It was a case in which a contributory had presented the petition to wind up the company on the ground that it was just and equitable to do so. The petition was advertised. The Inland Revenue supported the petition and sought, with the petitioner's consent, to be substituted as petitioner. The application was opposed by the company and other shareholders on the grounds that the Revenue could launch its own creditors' petition. Mervyn Davies J. acceded to the application, noting that it was the court's usual, if not invariable practice, to ensure that the winding up of a company was the subject of one petition only. However, he directed there should be re-advertisement to make it plain that the petition had become a creditors' petition.

Conclusion
There is a logical procedural scheme to be discerned in Order 74. The petition is presented, formalities are complied with in the Central Office, it is then advertised and, if it is presented by a party other than the company, it is served on the company. Service by a creditor gives the company standing. The invitation in the advertisement gives a person who has

an interest in whether the petition is acceded to or refused standing to make submissions to the court, subject to compliance with the requirements of rule 15, which the court may waive. The scheme provides a structure within which parties who may be affected by the exercise of the court's discretion under s. 216 are put on notice of, and afforded an opportunity to express their views on, the petition. The scheme facilitates the court in the exercise of a discretion which inevitably affects persons other than the petitioner and the company. The purpose of the advertising requirement within the structure is to put parties affected by the proceedings on notice.

The purpose of the power of substitution of a petitioner conferred by r. 18 is succinctly explained in the following passage from French on *Applications to Wind Up Companies* (Oxford University Press, 2nd Ed., 2008) at p. 245:

> "Without provision for substitution, an insolvent company could delay being wound up by paying off petitioning creditors one by one, forcing other creditors to present and advertise new petitions, then waiting until the petition by each creditor was at or near hearing before paying that creditor off too. In order to counter these tactics, several creditors would have to present petitions simultaneously. As Needham J. said in *D.M.K. Building Materials Pty Limited v. C. B. Baker Timbers Pty Limited* [(1985) 10 ACLR 16 at p.19]:
>
> > 'The purpose of substitution, in my opinion, is to ensure that once a *prima facie* right to the winding up of a company has arisen, the company should not escape from that position except upon the basis of fair dealing with all its creditors, not merely by paying off the particular [applicant].'"

I reject the argument advanced by counsel for Wavecrest that r. 18 is predicated on the petition having been advertised. On the contrary, each of the circumstances outlined in r. 18 as giving rise to the discretion to substitute may arise even if the petition has not been advertised. On the basis of my experience of dealing with the Chancery 2 List, each of those circumstances is more likely to arise when the petition has not been advertised than when it has. I find that the power conferred by r. 18 applies even if the petition has not been advertised.

Accordingly, in this case, even though the petition was not advertised, in my view, Cronosell, as a creditor who would have a right to present a petition, has standing to apply to be substituted under Order 74, rule 18. Therefore, the court has jurisdiction to hear Cronosell's application and make an order on foot of it. Although, as I understand the position, notice was not given by Cronosell to Wavecrest in accordance with r. 15, I consider it proper to entertain Cronosell's application and I consider that it should be granted.

In the interests of clarity, I should say that, while I have assessed the arguments advanced, and the authorities to which the court was referred, by counsel for Wavecrest, that is not to be taken as an acknowledgement that I consider that, in a situation where the court has jurisdiction to hear an application under O. 74, r. 18, it is open to a petitioning creditor who had settled his claim with the company and, presumably, is no longer a creditor, to oppose the substitution for fear of the settlement being avoided under section 218. The ancillary issue was not canvassed during the short hearing and is for another day.

Order

There will be an order substituting Cronosell as petitioner and the following terms will be set out in the order:

(a) that the petition be amended to-

(i) identify Cronosell and its solicitors,

(ii) state Cronosell's grounds for petitioning, and

(iii) identify this jurisdiction as the centre of main interest;

(b) that the amended petition is verified;

(c) that the amended petition is served on the Company; and

(d) that the amended petition is advertised in accordance with rule 10 of Order 74 for the adjourned hearing date.