THE HIGH COURT

2009 22 COS

IN THE MATTER OF RIVIERA LEISURE LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 - 2006

Judgment of Miss Justice Laffoy delivered on the 30th day of March, 2009.

The Petition

On 19th January, 2009, SCS Industries Pty Limited (the petitioner), an Australian company, presented a petition, as creditor, seeking an order that Riviera Leisure Limited (the company) be wound up. It was claimed in the petition that the company was indebted to the petitioner in the sum of AUD$291,912.45, being the equivalent of €153,935.29. The petition was returnable for 2nd February, 2009. On 2nd February, 2009 the petition had not been advertised and a new return date of 23rd February, 2009 was fixed. Subsequently, the petition was adjourned from 23rd February, 2009 to 9th March, 2009 and then to 23rd March, 2009. By that stage the book of documentation with which the Court was confronted, which was not paginated, was over an inch in depth. The petition was adjourned for hearing until 24th March, 2009 to give the Court an opportunity to read the documentation.

The basis on which the petitioner claims entitlement to seek a winding up order as set out in the petition is that:

> (1) on 3rd December, 2007 a member of an Australian firm of lawyers acting for the petitioner "wrote a letter of demand to the registered offices of [the company]" in which there was demanded payment of AUD$291,912.45 plus interest of AUD$84,156.81,
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> (2) subsequently, on 9th July, 2008, the petitioner's agent in this jurisdiction, that is to say, the solicitors acting in these proceedings, demanded AUD$291,912.45, being the amount due, the text of that letter being quoted,
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> (3) more than three weeks had passed "since the demand was made", and
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> (4) the company had neglected to pay or satisfy the demand in whole or in part.

The petition was grounded on the affidavit of Graham Franklin Ritchie, a director of the petitioner, which was sworn on 23rd December, 2008. In that affidavit the deponent averred that the sum of €153,935.29 was due in relation to goods sold and supplied by the petitioner to the company. In fact the goods in question were "Signature" spas. Twenty nine invoices raised on dates between 5th September, 2006 and 24th April, 2007 were exhibited. There was no reference to the letter of 3rd December, 2007. However, it was averred that the letter of 9th July, 2008, which it was asserted complied with s. 214 of the Companies Act 1963 (the Act of 1963), had been served on the company. That letter was exhibited. The affidavit also exhibited a letter of 14th July, 2008 from the company's then solicitors to the petitioner's solicitors, but no further correspondence which had passed between the parties.

Statutory demand: effective?

It would appear, therefore, that the petitioner was relying on the letter of 9th July, 2008, rather than the letter of 3rd December, 2007, as a demand for the purposes of paragraph (a) of s. 214 of the Act of 1963. The letter of 3rd December, 2007 which was exhibited in the replying affidavit of Roy Galsworthy, a director of the company, which was sworn on 20th February, 2009, actually demanded a sum of AUD$376,569.26, which included, in addition to the alleged trade debt of AUD$291,912.45, interest in the sum of AUD€84,156.81 and a sum of AUD$500 in respect of legal fees. The text of the letter of 9th July, 2008 which, as I have stated, was quoted in the petition was as follows:

> "We are instructed by SCS Industries that you are indebted to that Company in the sum of AUS$291,912.45. We note that despite a letter of demand on 3rd December '07 you have failed to discharge any part of this amount.
>
> Kindly note that we now have instructions to issue a petition before the High Court to have Riviera Leisure Limited wound up with immediate effect."

The letter was headed "SCS Industries v. Riviera Leisure Limited". There were no proceedings in being between the parties.

Section 214 of the Act of 1963 provides that a company shall be deemed to be unable to pay its debts, *inter alia*:-

> "if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding €1,269. 74 then due, has served on the company, by leaving it at the registered office of the company, a demand in writing requiring the company to pay the sum due and the company has for 3 weeks thereafter neglected to pay the sum due or to secure or compound for it to the reasonable satisfaction of the creditor."

It is well settled that, in order to be effective, the demand should be unequivocal, of a peremptory character and unconditional (MacCann and Courtney, *Companies Act 1963 – 2006*, 2008 ed. at p. 428). In my view, the letter of 9th July, 2008 does not have those characteristics. While it referred to the letter of 3rd December, 2007, that letter

demanded a much larger amount than the amount of the alleged debt which grounds the petition. Apart from that, neither the terms nor the tenor of the letter of 9th July, 2008 were such that it conveyed to the company the essential message which a letter which complies with s. 214(a) must convey – you owe the petitioner €x, pay up. Furthermore, it occluded the implication that s. 214(a) would apply – that if you do not do so within three weeks, you will be deemed to be unable to pay your debts. The terms and tenor were such that the message conveyed was that the company had not paid up on foot of the demand made on 3rd December, 2007 and a petition to wind up was going to be issued immediately.

Statutory demand: served?

The principal argument advanced on behalf of the company that no effective demand had been made under s. 214(a) was that the letter of 9th July, 2008, being the letter which was treated by the company as the demand, was served on the company by being sent by ordinary pre-paid post to the registered office, which did not constitute service "by leaving it at the registered office" in accordance with s. 214(a). It was acknowledged by Mr. Galsworthy in his affidavit that the letter was delivered by post and what subsequently transpired bears this out. By the letter dated the 14th July, 2008 exhibited in Mr. Ritchie's grounding affidavit from the company's then solicitors to which I have referred, receipt of the letter of 9th July, 2008 by the company was clearly acknowledged.

Digressing from the issue of service, the letter of 14th July, 2008 made it clear that the sum claimed by the petitioner was the subject of a long running dispute between the parties, aspects of which were set out. However, it was stated that the company was prepared to deal with the matter on a "quantum meruit basis" and a settlement proposal equating to fifty per cent of the sum indicated in the petitioner's correspondence was put forward. The letter was an open letter but it was made clear that, if the proposal was not accepted, the company would rigorously contest any proceedings which the petitioner might issue. It was disclosed in the replying affidavit of Mr. Galsworthy that in an open letter of 22nd July, 2008 the petitioner made a counter-proposal on the basis that, in order to resolve the dispute on an expedited basis and avoid legal costs being incurred by both parties, it was prepared to settle for sixty five per cent of the amount claimed and the proposal was open for acceptance for ten days. It is only fair to say that it was made clear in that letter that the petitioner's position was that there was no genuine dispute between the parties in respect of the amount claimed. Apparently, the letter of 22nd July, 2008 was not received by the defendant's former solicitors and the fact that it had been dispatched but not received only came to light on 9th December, 2008. The important point, for present purposes, is that the company received the letter of 9th July, 2008. I have referred to subsequent correspondence because I am of the view that once the letter of 14th July, 2008 was disclosed, in order to make full and frank disclosure to the Court, the subsequent correspondence should have been referred to in the petitioner's grounding affidavit.

In relation to the issue whether actual delivery by post to the registered office of a company fulfils the requirement of "leaving it" at the registered office of the company within the meaning of s. 214(a), there are two conflicting authorities of the High Court of England and Wales on the corresponding provisions of the U.K. company law code. The earlier of the two, the decision of Nourse J. in *Re a Company* [1985] BCLC 37, was followed in this jurisdiction by Murphy J. in *Re WMG (Toughening) Limited* [2001] 3 I.R. 113. It would appear that Murphy J. had not been apprised of the existence of the later conflicting authority – the decision of Morritt J. in *Re a Company* [1991] BCLC 561.

In *Re WMG (Toughening) Limited*, Murphy J. recorded (at p. 120) that an objection had been made that para. 6 of the petition stated that the petitioner served the statutory demand on the company by faxing the same to the registered office. Later (at p. 124) he stated:

> "While there may be a dispute as to whether the notice under s. 214 was both faxed and posted to the company, or merely faxed, there is no question in the company's submission that it was not delivered to the company's registered office by leaving the notice at the registered office."

Murphy J. then went on to quote the following passage from the judgment in *Re a Company* in which Nourse J. stated at p. 42:

> 'Although I understand that it is sometimes the practice of the Companies Court to act on the basis of a statutory demand which has been sent through the post, it seems to me that once the point taken by counsel for the company has been taken, it is seen to be a good one. Section 437(1) … shows clearly that sending it by post is not leaving it at the registered office within s. 223(a). It may be that the provisions of the Companies Act have not yet fully caught up with modern conditions and that there would be a case for allowing a statutory demand be sent through the post, or indeed to be sent by telex. On the other hand the statutory demand is a solemn document with potentially serious consequences. I can well understand that the legislature might have consciously intended that the service of a document of that character would be carried out in much the same way as the service of a winding up petition, which cannot be sent through the post and certainly cannot be sent on the telex machine'".

In relation to that quotation from the judgment of Nourse J., a number of points require to be clarified. First, s. 223(a) was a provision of the Companies Act 1948 and, as regards the material portion for present purposes, it was in the same terms as s. 214(a) of the Act of 1963. Secondly, s. 437(1) was also a provision of the Act of 1948 and it was in the same terms as s. 379(1) of the Act of 1963, which provides that a document may be served on a company by leaving it at or sending it by post to the registered office of the company. Thirdly, the issue in the case before Nourse J. was the efficacy of a demand which had been sent by telex.

In giving his decision (at p. 124), Murphy J. stated that the issue in relation to service of statutory demand was a technical one and he continued:

> "It does appear to be the case that the service of a formal document is required to be done with exactitude. I would adopt the reasons given by Nourse J. in *Re a Company* … in this regard".

Morritt J. identified the issue in relation to service which arose in the later English authority as that "because the statutory demand was served by registered post, for that reason alone the petition based on it would inevitably be demurrable". In deciding that issue Morritt J. consciously disagreed with the view expressed by Nourse J.

Morritt J. was dealing with provisions which had replaced the relevant provisions of the Act of 1948. The analogue of s. 214(a) with which he was dealing was s. 123(1)(a) of the Insolvency Act 1986 and at the time the analogue of s. 379 was s.725 of the Companies Act 1985.

Having quoted the passage from the judgment of Nourse J. which I have quoted earlier, Morritt J. stated (at p. 561):

> "The object of service is to bring a document to the attention of the company. The two alternatives set out in s.725 of the 1985 Act provide alternative acts by which service is to be proved. The first, leaving it at the office, indicates that the person who has to prove service has to prove that it arrived. The second, sending it by post, only requires him to prove postage …".

Later (at p. 563) he stated:

> "… I cannot see any sense in a distinction which says that if it is proved that the document was left at the registered office that it should not be deemed or treated as adequate service because it was left by the postman rather than by a creditor, his employee, or some perhaps independent third party. It seems to me that the alternatives posed by s. 725 are alternative facts which have to be established to prove service. The draftsman of s. 123, for the reasons indicated by Nourse J., namely the potentially serious consequences of service of a statutory demand, has required the creditor seeking to rely on it to prove that it was left at the office, not merely that he put it in the post box. But, once it is accepted as having been left at the office, although transmitted by means of the Royal Mail, it seems to me that it is served within s. 123 perfectly properly."

As that passage highlights, the issue is whether service was effected by leaving the demand at the registered office of the company. I share the view expressed by Morritt J. that the distinction as to the manner of such service by reference to the person who physically left the demand at the registered office makes no sense. Of course, there is a potential problem for the petitioner if he serves the demand by post, in that he may not be able to prove that the postman left the demand at the registered office. Therefore, it seems to me that prudence dictates that a demand under s. 214(a) should be delivered by a person from whom the petitioner will be able to obtain an affidavit of service. However, if, as in this case, it is acknowledged on affidavit on behalf of the company that the demand sent by post addressed to the registered office was received, there is proof that it was served by leaving it at the company's registered office.

Accordingly, I am satisfied that the letter of 9th July, 2008 was served by leaving it at the registered office of the company. However, as I have stated, I do not consider that the content of that letter had the necessary characteristics to constitute a demand under s. 214(a).

Debt disputed?

What emerges from the vast range of documentation put before the Court is that the agreement upon which the petitioner is relying is an agreement dated 12th July, 2006, which was based on an Application for Credit Account form. The party contracting with the petitioner was named as R. & B. Hottubs 4 U Limited, a company incorporated in Northern Ireland. In September 2006 the petitioner was notified by e-mail that the business R. & B. Hottubs would be re-locating to this jurisdiction as from 1st October, 2006 and trading as the company. I do not understand Mr. Galsworthy's supplemental affidavit of 3rd March, 2009 as contending that the company does not have a contractual relationship with the petitioner. I take that affidavit as being by way of explanation only.

As is disclosed in the grounding affidavit of Mr. Ritchie, the invoices raised which formed the basis of the petitioner's claim were raised between September 2006 and April 2007. The position adopted by Mr. Galsworthy in his replying affidavit was that "negotiations in relation to the sum claimed by the petitioner were ongoing" when the petition was presented. Due to ongoing difficulties and further expense incurred by the company in relation to the spas since the company's offer to pay fifty per cent of the amount claimed in the letter of 14th July, 2008, by the time Mr. Galsworthy swore the replying affidavit, the company was no longer prepared to offer an amount in settlement of the petitioner's claim and now fully disputes the debt.

Mr. Galsworthy's replying affidavit and his supplemental affidavit have been responded to in the following affidavits sworn on behalf of the petitioner:

> (a) an affidavit sworn on 4th March, 2009 by Robert Kruber, the operations manager of the petitioner;
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> (b) an affidavit sworn by Mr. Ritchie sworn on 4th March, 2009; and
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> (c) a further affidavit sworn by Mr. Ritchie sworn on 17th March, 2009.

Before considering the factual matters averred to in the affidavits, I propose considering what the Court's function is where the company disputes the debt which forms the basis of the petition to wind up. This matter was dealt with in the Supreme Court in *Re WMG (Toughening) Limited (No. 2)* [2003] 1 I.R. 389. In that case, McCracken J., with whom the other members of the Court agreed, stated 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 and that the company has a cross-claim against the petitioner for monies in excess of the amount claimed by him. …
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> 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 of by this Court in *Re Pageboy Couriers Limited* [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.'

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."

The question whether a cross-claim can afford an answer to a winding up petition was considered more recently by this Court (Clarke J.) in a judgment in *Re Emerald Portable Buildings Systems Limited*, [2005] I.E.H.C. 301, a case in which the company both disputed the debt and raised a cross-claim. Having referred to the decision of the Court of Appeal in England and Wales in *Re Bayoil S.A.* [1999] 1 All E.R. 374, which was a case in which the debt was not disputed but the company asserted that it had a *bona fide* cross-claim for a greater sum, Clarke J. stated:

"It is clear, therefore, that a cross-claim can afford a company an answer to a winding up petition even in circumstances where that cross-claim would not amount to a set off in equity so as to afford a defence to a claim for a liquidated sum. It follows that there may be cases where a plaintiff creditor might be able to obtain judgment against a company but where the same debt might, by virtue of a substantial cross-claim, be insufficient to lead to a winding up."

Clarke J. adopted the reasoning of Nourse L.J. in the *Bayoil* case and also his characterisation of the nature of the cross-claim which would be an answer to a winding up petition. Nourse L.J. stated (at p. 155) in a passage quoted by Clarke J.:

"I emphasise that the cross-claim must be genuine and serious or if you prefer one of substance, that it must be one which the company has been unable to litigate and it must be in an amount exceeding the amount of the petitioner's debt."

In the case before him Clarke J. considered whether, as a matter of fact, the cross-claim was one on which the company had been unable to litigate and he held on the facts that it was.

Returning to the facts of this case, factual issues have been raised in relation to the many matters on the affidavits. It was with a view to emphasising the level of contention that I mentioned the volume of documentation before the Court at the outset. The following is a summary of the issues arising from the company's allegations and the petitioner's responses, which is indicative only and not intended to be comprehensive:

(1) Whether the petitioner, not the company, is liable for the cost of shipping the goods from England to Ireland (STG£5,287.50), as the company contends. This liability is disputed by the petitioner.

(2) Whether all of the 47 spas, which it is common case were sold on a sale or return basis to the company, were new or from bankrupt stock, as was contracted for. It is alleged by the company that the spas supplied were used spas. This is denied by the petitioner.

(3) Whether, as alleged by the company, the spas supplied were defective. Mr. Galsworthy, on behalf of the company, has made a number of allegations, including the following:

(a) Eight of the 47 spas delivered had to be retained by the company in an unassembled state for use as spare parts. As I understand it, the company was not invoiced for 3 spas, which were intended to be used as spare parts.

(b) All of the 39 spas which have been sold by the company have required repairs and, in the case of some, on more than one occasion. On several occasions the company has been required to re-order and fit new electrical motherboards to the spas. It was alleged that the motherboards supplied were suitable for the United States market and were not suitable for the European market. It was also alleged on behalf of the company that as recently as December 2008 the company first ascertained that this represented a "danger and risk" to the customers and users of the spas and the company is currently in the process of visiting and servicing each of the spas sold to ensure that it contains the correct motherboard type. The petitioner's deponents have generally denied that the spas were defective but they have not specifically responded to the allegation in relation to the motherboards.

(c) The cost to the company of carrying out repairs, staining, painting, cleaning and testing of the spas to date was put at €16,001. The petitioner's response was that the ten per cent discount on all spas sold, which it is common case the company was allowed, was in order to enable the company to test the spas before purchasing them. The petitioner's position is that it has not received any notification that the company actually undertook tests. The point was made that although the transaction was on a sale or return basis, no spas were remitted to the petitioner. The petitioner has also adopted the position that each spa came with a warranty card but no signed warranty cards were returned to it, so as "to access warranty rights". Further, Mr. Ritchie in his affidavit of 4th March, 2009 has alleged that the charges in relation to alleged repairs which the plaintiff has claimed are "fabricated". He gave an example of an item in a schedule exhibited in Mr. Galsworthy's affidavit on which the figure of €16,001 is based.

(d) Mr. Ritchie also averred in his affidavit of 4th March, 2009 that at no stage was the petitioner on notice of any alleged faults or complaints in relation to the spas sold to the company. No correspondence, verbal or in writing, was received regarding the alleged defects. That is at variance with an averment in Mr. Galsworthy's replying affidavit to which Mr. Ritchie was responding. Mr.

Galsworthy exhibited an e-mail of 1st June, 2007 from the company to Lyal Marshall of the respondent, to which there was attached a database of details of all faults to the tubs which the company had installed. It was stated that, of the 27 tubs installed at that stage, the company had to rectify faults in the case of 17 as shown on the database. It was also stated that 2 tubs had been returned by the customers and that the author, Mr. Galsworthy, had informed Mr. Marshall two days previously that they were not new when they arrived. Mr. Galsworthy stated that the company was not prepared to make any type of payment until the matter was resolved. Mr. Galsworthy also stated that the company's good name and reputation had "taken a huge hit" as a result of the second rate spas. Mr. Galsworthy also exhibited the replying e-mail from Mr. Marshall of 7th August, 2007, which, on a plain reading, did not address the issue of the condition of the spas. Mr. Galsworthy averred that, apart from a subsequent telephone call informing him that Mr. Marshall had left the petitioner, no further contact had been made by the petitioner until the letter of 3rd December, 2007 from the Australian solicitors.

(4) Whether the company has a claim against the petitioner for damage to its business. Mr. Galsworthy has averred that, although it is not possible to precisely quantify the full effect which the difficulties in relation to the petitioner's product have had on the company's business and goodwill generally, and will have into the future, the effect is and will be significant and has been and will be extremely damaging to the company.

In broad terms, the company's allegations against the petitioner encompass both a dispute as to the debt and a cross-claim for damage to the company's business.

Applying the legal principles outlined earlier, the first question which the Court has to determine is whether those allegations are made *bona fide*. Apart from the answers contained in the affidavits filed on behalf of the petitioner to the company's specific complaints, in essence, the position of the petitioner is that the company accepted the goods, sold them on and has made no payment whatsoever in respect of them. Against that, the company raised issues as to the condition of the goods more than six months before the demand issued from the Australian firm of lawyers and their complaints were ignored. Further, on the basis of the evidence contained in Mr. Galsworthy's affidavit, defects have been coming to light on an ongoing basis. On balance, I find that, in adopting the position it has adopted in answer to the petition, the company is acting *bona fide*.

The second question is whether the company is disputing the debt and advancing the cross-claim on substantial grounds. The company has adduced no independent evidence, other than an e-mail from Balboa Engineering of California, in relation to the motherboards. As with most of the factual issues raised in this matter, I do not think it would be appropriate to form any view on the significance of that e-mail. Generally, taking an overview of the matter, I find that the grounds on which the company is resisting the petitioner's claim are substantial grounds. However, the crucial question on the facts of this case is whether the company has demonstrated that there are substantial grounds for the company's contention that the issues in dispute in relation to the debt and the company's cross-claim will wipe out the petitioner's claim or, at any rate, reduce it to €1,269.74 or less. It is simply not possible to resolve the conflicts of fact or to form a view on that question. As was pointed out in the passage from the judgment of Buckley L.J. in *Stonegate Securities v. Gregory*, which is quoted earlier, a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed. On the evidence of the e-mail of 1st June, 2007, I consider that the debt alleged to be due by the company to the petitioner was *bona fide* disputed long before the petitioner embarked on the winding up process. Accordingly, I consider that the proper course in this case is to dismiss the petition on the ground that the debt on which it is founded is disputed *bona fide* and on substantial grounds.

Company insolvent?

In his replying affidavit, Mr. Galsworthy has averred that the company is solvent and able to pay its debts. In his final affidavit sworn on 17th March, 2009, Mr. Ritchie has exhibited the most recent financial statements of the company which were filed in the Companies Registration Office, the abridged financial statements as at 31st August, 2007. As Mr. Ritchie averred, the balance sheet as at 31st August, 2007 does show a deficiency of assets in the amount of €146,318. On that basis and on the basis that the balance sheet also shows that the company had creditors, as at that date, in the amount of €398,391, Mr. Ritchie averred that the company is extremely heavily indebted and insolvent.

The penultimate affidavit put before the Court was an affidavit sworn on 22nd March, 2009 by Ephraim Bradley, chartered certified accountant, who is the company's accountant. Mr. Bradley exhibited an unaudited statement of affairs of the company as at 28th February, 2009 which was compiled on the basis of information and documentation supplied to him. On the basis of the representations made by his client, he averred that the statement of affairs related to the period from 1st September, 2007 to 28th February, 2009. The statement of affairs shows a deficiency of assets in the amount of €68,166, but that is on the basis that there is included in the current liabilities of the company the entire sum of €153,935 in respect of the contested claim of the petitioner.

On the question of whether the company is solvent, that is to say, able to pay its debts as they fall due at this point in time, very little comfort is to be derived from Mr. Bradley's affidavit and the statement of affairs exhibited, given that it contains the following disclaimer:

> "To the fullest extent permitted by law, we do not accept or assume responsibility to anyone other than the company and the company's shareholders as a body for this statement. It has been prepared for discussion purposes only, due to the level of the directors' representations."

There is no evidence on the basis of which the Court can assess the veracity of Mr. Galsworthy's averment that the company is solvent. I am taking that averment at face value for present purposes. Serious consequences may ensue, if it is not true.

Official Liquidator

Finally, I want to comment on what was put before the Court in relation to the appointment of an official liquidator on 23rd March, 2009. At that stage there was a faxed letter of 20th March, 2009 from Seamus Farren of the firm of Farren Roarty, Chartered Certified Accountants and Registered Auditors, practising in Letterkenny, County Donegal. In the letter Mr. Farren indicated his willingness to accept the position as liquidator, if the Court should make the appointment.

However, he went on to state what his costs and fees would be on an hourly basis in respect of the assignment. There was no affidavit of the suitability of Mr. Farren to take on the position. I commented on that on 23rd March, 2009, when the matter was before the Court on 24th March, 2009, the Court was furnished with an affidavit sworn on that day by Mr. Tim Shanahan, a solicitor of the firm of solicitors representing the petitioner on this petition. I pointed out, as I frequently have to, that it is inappropriate for a member of the firm of solicitors acting for the petitioner to swear the affidavit of suitability as to the proposed official liquidator. When I queried the position, it was also indicated that Mr. Farren was aware that the remuneration of an official liquidator is subject to the direction of the Court. It was indicated that a further affidavit of suitability would be filed. However, both points are academic now.

Summary of findings

In summary, on this petition I find as follows:

(1) The letter of 9th July, 2008 does not have the necessary characteristics to constitute it a demand within the meaning of s. 214(a) of the Act of 1963,

(2) If the letter of 9th July, 2008 did constitute a proper demand, I am satisfied that it would have been properly served in accordance with the requirements of s. 214.

(3) The company in good faith and on substantial grounds disputes the petitioner's claim and, on that ground, the debt cannot support the petition to wind up.

(4) There is no evidence to contradict the averment on behalf of the company that it is solvent now.

Order

There will be an order dismissing the petition.

It is open to the petitioner to pursue its claim by bringing *inter partes* proceedings.