**THE HIGH COURT**

**[2012 No. 281 COS]**

**IN THE MATTER OF BCON COMMUNICATIONS LIMITED trading as**

**BEACON COMMUNICATIONS**

**AND**

**IN THE MATTER OF THE COMPANIES ACTS 1963 - 2009**

**Judgment of Ms. Justice Laffoy delivered on 22nd day of August, 2012.**

**The petition**

1. On 28th May, 2012 Danfoss Ireland Limited (the Petitioner) presented a petition seeking to wind up Bcon Communications Limited (the Company). In the petition it was stated that the Company was indebted to the Petitioner in the sum of €151,475 together with interest thereon at the rate of 8% per annum as and from 20th October, 2011 and that such indebtedness arose on foot of an order of the High Court made on 20th October, 2011. It was further stated that on 2nd December, 2011 the Petitioner's solicitors served on the registered office of the Company a twenty one day letter of demand pursuant to s. 214 of the Companies Act 1963 (the Act of 1963) calling for payment of the debt within twenty one days but more than twenty one days had passed since the demand was made and the Company had failed to discharge the debt. It was then stated that, in the premises, the Company was "insolvent and unable to pay its debts as they fall due" within the meaning of s. 214 of the Act of 1963 and that it was just and equitable that the Company should be wound up.

2. The affidavit verifying the petition was sworn by John Sampson, who described himself as a former director of the Petitioner, on 18th June, 2012. The affidavit disclosed that the debt due by the Company to the Petitioner arose from non payment by the Company of rent on premises known as Unit A1, Nangor Road Business Park, Dublin 12 (the Premises), which had been held by the Company under a lease made on 25th August, 2007 by the Petitioner to the Company. It was also averred that since the High Court had given judgment on 20th October, 2011, the Petitioner had issued proceedings in the Dublin Circuit Court and had obtained an order for recovery of possession of the premises from the Company on 23rd May, 2012. Mr. Sampson further averred that on 2nd December, 2011 the Petitioner's solicitors had served a twenty one day letter of demand on the registered office of the Company in compliance with s. 214(a) of the Act of 1963. In fact, what is exhibited as a copy of the s. 214 demand in the affidavit of Mr. Sampson is a copy of a letter of demand for possession of the Premises. However, while there is some confusion in the verifying affidavit, in that it is averred that the letter of demand was served by Emma Sheehan, a legal executive in the firm of solicitors acting for the Petitioner, the affidavit of service was in fact sworn by Mark Walsh, a solicitor in that firm on 25th June, 2012. He exhibited a letter dated 2nd December, 2011, which I am satisfied complied with s. 214(a), which he averred he had sent by registered pre-paid post to the directors of the Company at the registered office of the Company on 5th December, 2011 and also by e-mail on 2nd December, 2011.

3. The Company has resisted the making of a winding up order on foot of the petition and it has done so on two grounds, namely:

(a) that the s. 214 demand was not properly served in accordance with the requirements of s. 214 of the Act of 1963, so that there is no deemed insolvency; and

(b) that it has not been proved that the Company is unable to pay its debts in accordance with s. 214.

**The relevant statutory provisions**

4. Section 213 of the Act of 1963 sets out the various circumstances in which a company may be wound up by the Court, one such circumstance being that "the company is unable to pay its debts" (para. (e)). Section 214 outlines three circumstances in which a company shall be "deemed unable to pay its debts". These are:

> (a) if a creditor 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 so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
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> (b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
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> (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

**Application of the relevant statutory provisions to the facts**

5. There is no doubt that in this case the Petitioner obtained judgment against the Company in the sum of €151,475 together with €339.63 in respect of costs in this Court in summary proceedings (Record No. 2011/2298S) on 20th October, 2011. That order was not appealed. It is acknowledged, as it has to be, by the Company that a debt in the amount of the judgment is due by the Company to the Petitioner. It appears that, while the Petitioner sued out an order *fieri facias*, the Petitioner is not in a position to establish that it was returned *nulla bona* so as to satisfy paragraph (b) of s. 214. Therefore, the issues which remain are whether the Petitioner can show compliance with s. 214(a) or s. 214 (c).

**Section 214(a)**

6. As I have already recorded, the position of the Petitioner is that the demand under s. 214(a) was served by registered pre-paid post by the Petitioner's solicitors on the Company and also by e-mail. The position of the Company is that that is not sufficient compliance with s. 214(a) because it has not been established that the demand was served on the Company "by leaving it at the registered office of the Company". In his first replying affidavit which was sworn on 9th July, 2012, Walter Batt, a director of the Company, has averred that he did not receive a copy of the letter dated 2nd December, 2011 exhibited by Mr. Walsh and he was not aware of it. In his second replying affidavit sworn on 19th July, 2012, Mr. Watt reiterated the Company's position: that, because the Petitioner did not serve the demand in accordance with s. 214(a), the Petitioner cannot rely on the "deemed insolvency" provision ins. 214(a).

7. Counsel for the Company relied on the decision of the High Court (Murphy J.) in *Re WMG (Toughening) Limited* [2001] 3 I.R. 113 and the decision of the Supreme Court on appeal in *Re WMG (Toughening) Limited* (No. 2) [2003] 1 I.R. 389 as authority for the proposition that the Petitioner could not rely on the service of the s. 214 demand by registered post as giving rise to a "deemed insolvency" under s. 214(a). Counsel for the Petitioner, on the other hand, relied on the observations of this Court in *Re Riviera Leisure* Ltd. [2009] IEHC 183, admittedly *obiter* observations, as authority for the proposition that the s. 214 demand was served on the Company in compliance with s. 214(a). There is a major factual distinction between this case and the *Riviera Leisure* case. In the *Riviera Leisure* case, it was admitted on behalf of the company which it was sought to wind up that, although it had been sent by post, the s. 214 demand had been delivered to the company's registered office, presumably by the postman. Although Mr. Walsh swore a supplemental affidavit in which he stated that the registered letter dispatched to the Company on 5th December, 2011 was not returned to sender, it is not possible on the evidence to make a finding that the letter was served on the Company by leaving it at its registered office. That means that, in order to establish an entitlement to a winding up order, the Petitioner has to prove to the satisfaction of the Court that the Company is unable to pay its debts in accordance with s. 214(c).

8. In his first replying affidavit, Mr. Batt has averred as follows:

> "The company's position in the within petition is generally that it is not insolvent and that it is able to pay its debts (or at least all of its other debts) as they fall due. It is acknowledged that the company is indebted to the petitioner, its former landlord, and the company would hope to be given the opportunity to address that debt over time whilst remaining in business."

Later, Mr. Batt averred that the Company had vacated the Premises on 25th May, 2012 and that the sub-lease from the Petitioner had expired and that the Company had no continuing or future liability for rent accruing to the Petitioner. He averred that the Company was operating out of alternative premises and was continuing to trade actively. He also averred that the Company has nine employees. Mr. Batt acknowledged that there had been a certain element of "burying our head in the sand" in relation to the High Court summary proceedings and the Circuit Court proceedings.

9. In his first replying affidavit, Mr. Batt also exhibited the Company's financial statements for the year ended 30th June, 2011, which I understand have been audited by the Company's auditors. No professional analysis of the accounts was put before the Court. Mr. Batt averred that, while the Company made a trading loss of €49,714 in the year ended 30th June, 2011, it had net assets of €1,061,700. That, indeed, is the figure shown in the balance sheet for net assets. He also averred that it had debtors in the amount of €1,143,729. Indeed, that figure also appears in the balance sheet for debtors. Mr. Batt also exhibited a "Directors Statement of affairs as at the 30th June, 2012" which showed net assets at €924,821.20. Once again no professional analysis of the statement of affairs was put before the Court and, indeed, there is nothing to indicate that it has been audited or has had any professional input whatsoever. Mr. Batt has relied on that documentation as supporting his contention that "the company is solvent and is able to pay all its other debts as they fall due", reiterating the distinction drawn between the Petitioner's debt and the debts due to all other creditors of the Company, for which there can be no valid justification. Mr. Batt has speculated that the Petitioner would be in a significantly worse position if the Company was liquidated than if it were to remain trading as a going concern and is given time to pay the Petitioner's debt. He has averred that the Company is trading well and all expectations and sales indicate that the figures will improve compared to last year. The figure shown in the statement of affairs for cash in bank at 30th June, 2012 is €19,689.23.

10. Mr. Sampson, in his supplemental affidavit sworn on 12th July, 2012, was not impressed by the documentation produced by Mr. Batt and contended that the Company is "manifestly" unable to pay its debts. However, he did not obtain an independent professional analysis of the accounts for the year ended 30th June, 2011 or the statement of affairs as at 30th June, 2012. Mr Sampson made the point, by reference to the balance sheet for year ended 30th June, 2011, that the two major components which gave rise to the surplus of current assets over current liabilities were stock (€820,273) and debtors (€1,143,729), neither of which is immediately realisable by the Company for the purpose of discharging its indebtedness to the Petitioner. It is interesting to note that in the statement of affairs, the value of the stock had decreased to €218,623 by 30th June, 2012. Mr. Sampson pointed out that in the year ended 30th June, 2011 the Company had written off €179,574 worth of bad debt and had only recorded liability for rent for the year in the sum of €33,960, whereas it was liable to the Petitioner for an annual rent of €78,000 in respect of the Premises at that time.

11. Mr. Sampson, in his supplemental affidavit has also averred to the fact that the overall level of indebtedness of the Company to the Petitioner is much higher than the debt identified in the petition (€151,475). He has averred to the High Court costs €339.63), Courts Act interest on the judgment to date (€8,798), additional rent from 1st July, 2011 to 14th November, 2011 (€29,683.33), mesne rates thereafter until 25th May, 2012 and Circuit Court costs which have yet to be taxed. Obviously, mesne rates and untaxed Circuit Court costs cannot be quantified at this juncture. However, this Court has to take cognisance of the fact that the figure of €151,475 is not the limit of the Company's liability to the Petitioner, notwithstanding that in his second affidavit Mr Batt disputed the liability for mesne rates and contended that the Petitioner holds a deposit of €20,000 representing a rent deposit for which the Company is entitled to credit. It was made clear at the hearing of the petition that, if the Company can vouch that the Petitioner holds a rent deposit of €20,000, the Company will be given credit for that.

12. At the hearing on 25th July, 2012 the Company put before the Court a letter dated 23rd July, 2012 from the Company's solicitors to the Petitioner's solicitors offering to pay the sum of €151,475 in the following manner:

> (a) an immediate payment of €10,000;
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> (b) payment of €10,000 on 23rd August, 2012; and

(c) 104 weekly payments of €1,260 until the debt is discharged.

If the Petitioner were agreeable to compromising the claim on that basis, the debt for which the Petitioner has a High Court judgment (exclusive of costs and interest) would not be paid until late August 2014. It is hardly surprising that the Petitioner was not prepared to compromise on that basis. However, the offer does highlight the reality of the situation. That is that, although the Company acknowledges its indebtedness on foot of a High Court judgment in the sum of €151,475 to the Petitioner, and is willing to discharge its indebtedness, it simply cannot do so at this point in time, as is explicitly acknowledged in the affidavits of Mr. Batt.

13. The criterion for determining whether a company is insolvent at a particular time is whether it is able to pay all its debts which have fallen due at that particular time. The sum of €151,475 was due to the Petitioner by the Company when the petition was presented. The only reasonable inference which can be drawn from the evidence before the Court is that the Company was not able to discharge that debt when the petition was presented and it is not now able to discharge it. Therefore, the only conclusion open is that the Company is insolvent.

14. It is well settled that a petitioning creditor who has proved that the company is unable to pay its debts is normally entitled to a winding up order *ex debito justitiae*. Even though the Court has an overriding discretion as to whether to make a winding up order, there is no basis whatsoever for the Court refusing to make a winding up order in this case. The Petitioner, as it is entitled to do, refuses to take on board the philosophy mooted by the Company - that "a bird in the hand is worth two in the bush". Accordingly, even against the appalling background that nine employees of the Company will probably become redundant, the Court has no option but to make a winding up order.

**Order**

15. There will be an order that the Company be wound up. The Petitioner's nominee, Mr. John Foley, will be appointed official liquidator for the purposes of the winding up. The current directors of the Company, Walter Batt, Alan Batt and Philip Connolly, will be directed to swear and file a statement of affairs within twenty one days. The costs of the Petitioner will be reserved and the matter will be listed in the Examiner's Court List in the Michaelmas term.